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Victoria University of Wellington Student and Alumni Subseries Issue X: Seeking Justice in the Criminal Law

The Student and Alumni subseries forms part of the Victoria University of Wellington Legal Research Paper Series (VUWLRPS). For more information about both VUWLRPS and the Student and Alumni subseries, see "About this eJournal" near the end of this issue.

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES **VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS**

"Fighting a Problem with the Problematic: Section 98a and its use against Organised Crime in New Zealand"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 6/2016

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Since its conception in 1998, an average of just 21% of offenders charged under s 98A have been convicted. This is much lower than the average for all criminal charges (78%). This paper firstly

focuses on the difficulties of defining 'organised crime' before examining the context in which s 98A was created in 1998 and later amended. This examination highlights that s 98A has mixed conceptual origins.

The paper then identifies two factors which may be contributing to s 98A's low conviction rate. 1) the burden on the prosecution to establish the criminal group's common prohibited objective is difficult to satisfy, and often requires the prosecution to establish another substantive offence; and 2) s 98A is regarded as a subsidiary offence which is often withdrawn. A number of factors which increase the likelihood of the charges being withdrawn are submitted. The paper concludes that any benefits stemming from s 98A in an evidence gathering and efficiency enhancing capacity do not quell the perception that s 98A is a problematic provision.

"Fitness to Plead in New Zealand: An Analysis of *Balemi v R*"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 7/2016

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This paper explores the reasoning in *Balemi v R*, a recent case in New Zealand on whether a finding of unfitness can be revisited prior to disposition. The Court of Appeal held that such a decision cannot be revisited. In both principle and policy, however, a finding of unfitness should be capable of revision. The doctrine of unfitness to stand trial seeks to identify and exclude from standing trial defendants who are not capable of understanding proceedings. Given that findings of unfitness are by virtue of their nature not 'once-only' diagnoses, and given the consequences that arise if a defendant is released into the community only to be subsequently re-arrested, a judge should be able to revisit a finding of unfitness if evidence arises prior to disposition indicating that a defendant is in fact fit to plead. Moreover, it was open to the Court of Appeal to hold that a finding of unfitness is capable of revision. The Court of Appeal erred in applying a black-letter analysis to relevant statutory provisions. This paper ultimately suggests reform as a means to clarify a point of law which is as stands unsatisfactory.

"A Discussion Regarding a Partial Shift in the Burden of Proof in Sexual Violence Offending in New Zealand: the Search for Justice on Behalf of Complainants"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 8/2016

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A reversal in the burden of proof in regards to sexual violence cases is an issue that has been discussed and debated both publically and politically. The focus of this paper involves a reversal in the burden of proof in regards to the mens rea element. A defendant in a sexual violence trial would be compelled to testify as to why they reasonably believed consent to have existed. The standard this element would need to be proved to would be on the balance of probabilities. In this paper I offer a critique of the current criminal justice process and outline how a partial reversal in the burden of proof could directly address the most pressing concerns for complainants of sexual violence. I argue that this proposal is certainly worth informed discussion and public debate. My overarching argument consists of the recognition that sexual violence is a prevalent and detrimental issue in New Zealand society and requires immediate address. It is therefore important that useful discussions such as the reversal of the burden of proof receive attention.

"Forgotten Victims? Male and Child Rape Victims and the Admissibility of Sexual History Evidence During Trial"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 9/2016

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This paper examines male and child victims of sexual offending within the context of New Zealand's rape shield provision, s 44 of the 2006 Evidence Act. By assessing the application of this provision to victims other than those the provision was drafted for (adult women), this paper firstly inspects the impact of rape myths on the concerning under-reporting of male victimisation. Secondly, in regard to child complainants, this paper argues that age-based assumptions attributed to children has resulted in a departure from the usual standard of s 44, the consequences of which has been a consistent failure to protect child victims from the harms of cross-examination during trial. This paper concludes that the inconsistency in the application of s 44 between child and adult complainants exemplifies the need for reform of the section and in particular, the impact on the victim when assessing sexual history evidence should be a compulsory judicial consideration.

"The Implicit Legitimation of Violence against Women in New Zealand Homicide Cases: Did Abolishing Provocation Address Public Concerns?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 10/2016

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The partial defence of provocation was inappropriately used by abusive men that killed their partners for challenging them. This led to concerns that provocation was implicitly legitimising violent reactions toward women who were perceived to have challenged their male partner's sexuality. Despite the abolition of provocation, this paper finds a continuation of the concerns that arose from the use of provocation in post-abolition homicide sentencing decisions. Specifically, the recognition of perceived lower culpability of men that had killed their female partners in the form of manslaughter verdicts, or through inappropriate mitigating features, continues to be an issue. For this reason, I argue that establishing the Sentencing Council, as recommended by the Law Commission, is the best way to address these concerns.

"Denigration of the Criminal Justice System: A Reflection of the 1970s New Zealand Courts Through an Analysis of the Arthur Allan Thomas Trials"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 11/2016

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This paper is a critique of New Zealand's criminal justice system as it existed in the 1970s. Through an analysis of the Arthur Allan Thomas trials, in which the courts failed to produce a just result, it will demonstrate how the system was crippled by three of its major components; the prosecution, the judiciary and the jury. While acknowledging the prominent roles played by the defence and the police in the Thomas case, they will not be the focus of this paper. After setting out the chronology of appeals and proceedings that lead up to Thomas' royal pardon, this paper will go on to explain why the criminal justice system was ineffective. It will do so by unravelling the systematic bias and unethical practice that occurred within the prosecution and the judiciary. Lastly, it will illustrate the adverse effect such practices had on the impartiality of jurors.

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About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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