From 1967 to 2021: The Importance of Student Legal Research

SAMANTHA NOAKES AND HUGO WAGNER-HILIAU

I INTRODUCTION

This year, the Auckland University Law Review (AULR) will produce its 27th annual volume. The AULR published its inaugural volume in 1967. It featured, amongst others, articles authored by Sir Grant Hammond on privacy and the press,[1] and the Hon John Priestley, who analysed the law on the legal personality of an unborn child.[2]

That maiden volume also contained an article by Sir David AR Williams.[3] Contrary to what his successful arbitration career would suggest, this article concerned the criminal law. Specifically, Williams wrote about a then-recent reform of the "no-comment" rule, which allowed a judge to comment on an accused's failure to give evidence. Calls for reform of the law concerning that area of the law have come to light in the present day. Such appeals were the concern of one of the author's (Samantha's) LLB(Hons) dissertation, which she wrote in 2021.

In that same year, Dame Margaret Wilson addressed the annual AULR Alumni Dinner on the importance of the AULR. The 2021 volume of the AULR published a written version of her speech.[4] Wilson argues that since the AULR sits outside the University's institutional framework (and thus its student authors are not subject to neoliberal performative measures), the journal is an important gatekeeper "for preserving the critical approach to legal research and education."[5]

This short article revisits Sir David Williams' contribution to the inaugural volume of the AULR. In doing so, and by comparing the content of that article with the more modern calls for reform discussed

1 RG Hammond "Privacy and the Press" (1967) 1 Auckland U L Rev 20.

2 JM Priestley "Personality and Status in the Womb" (1967) 1 Auckland U L Rev 33.

3 David AR Williams "Judicial Comment on the Failure of an Accused to Give Evidence" (1967) 1 Auckland U L Rev 69.

4 Margaret Wilson "The Role of the Law Review in a Performance-Based Research Environment" (2020) 26 Auckland U L Rev 54.

5 At 59.

in Samantha's dissertation, this article substantiates Dame Margaret Wilson's argument about the importance of the AULR.

This article first examines Wilson's 2021 address in more detail. It then moves to revisit Williams' 1967 article, exploring themes raised within and drawing parallels with Samantha's LLB(Hons) dissertation. In doing so, this article substantiates Dame Margaret Wilson's argument about the importance of the AULR.

II DAME MARGARET WILSON'S ARTICLE

Wilson explains that the integration of law schools into a tertiary regulatory regime has undermined faculty control over academic decisions. Historically, law faculties retained predominant influence over the content and scope of legal education and research. However, over time, Universities have moved to a corporate managerial governance structure, resulting in a loss of independence within law schools. The move to a corporate managerial structure has been attributed to the rise of neoliberal policy in New Zealand in the 1980s.

The neoliberal agenda, as shown through corporate managerial governance and the increasing use of performative measures for academic research, advocates that the University is a business. Under it, legal academics face a demand to publish with regard to these performance-based metrics, while also delivering high quality education to the upcoming legal profession.

Wilson acknowledges the work of Michael Taggart,[6] who has written on the impact of the Performance-Based Research Fund (PBRF) on law schools. Taggart writes that the PBRF conflicts with the fundamental goals of the University. Students should be nurtured and taught to think critically. The PBRF, on the other hand, is designed to force academics to dedicate time to producing "valuable" research — "valuable" meaning that research will produce a vocational workforce, not a critical one.

Law Reviews are "one avenue for resistance" to this corporate managerialism.[7] Where governments attempt to co-opt universities through neoliberal agendas, "editors of law reviews become important gatekeepers for preserving the critical approach to legal research and

6 At 55–56, citing Michael Taggart "Some Impacts of the PBRF on Legal Education" in Claudia Geiringer and Dean R Knight (eds) Seeing the World Whole: Essays in Honour of Sir Kenneth Keith (Victoria University Press, Wellington, 2008) 250.

7 At 59.

education".[8] Because students, unlike academics, are not subject to the performative measures of the neoliberal university. The AULR can publish critical legal thinking that may otherwise not be considered valuable. That, in essence, is the argument Wilson makes in her 2021 piece.

III SIR DAVID WILLIAMS' 1967 ARTICLE

Sir David Williams' 1967 article is one such example of important critical legal research published by the AULR. The article considers a then-recent reform to the "no-comment" rule. On its face, the article discusses abolition of a criminal procedure safeguard. More broadly — and arguably more importantly — the article also critically analyses how the reform occurred, raising issues about the removal of procedural safeguards in the law.

Reform of the No-Comment Rule

Prior to amendment, the no-comment rule prevented Judges commenting on an accused's failure to give evidence in their defence at trial.[9] The rule intended that a defendant not be prejudiced by their decision not to give evidence.[10] The no-comment rule gave meaningful effect to the right to silence and presumption of innocence.

In 1966, Parliament chose to remove this procedural safeguard.[11] It amended the no-comment rule to allow Judges to comment on an accused's failure to give evidence in their defence.[12] The commonsense implication of this rule was that juries could come to the conclusion that because a defendant didn't give an alternative explanation to their charge, they were likely guilty.

Reaction to the reform was mixed. The New Zealand Law Society and members of the legal profession opposed the reform.[13] On the other hand, parliamentary debate in favour of the reform condemned the protections the law afforded criminals:[14]

8 At 59.

9 Criminal Evidence Act 1887, s 4.

10 Section 4.

11 Section 4(1) of the Crimes Amendment Act repealed s 366(1) of the Crimes Act, substituting it for the new provision.

12 Section 4(1).

13 Williams, above n 3, at 69.

14 At 70.

> Why on earth should we help so much these people that are criminals? Everybody knows they are, and they are able to get away with crime because of some silly provision in the law.

Issues with Removal of Procedural Safeguards

Williams' article critically analyses the reform of the "no-comment" rule, but also legal reform more generally.

In terms of the specific 1966 reform, Williams argues that the amendment did not receive sufficient attention.[15] The arguments for and against the reform were ill-considered.[16]

More broadly, Williams makes several vital points on legal reform generally. He claims that in situations where society is disturbed by crimes of cruelty and violence, legislators turn too readily to restricting the rights of the accused.[17] Procedural safeguards are in place to protect societies' most vulnerable. Williams contends further that the reform in this case reflected political pressure, and that such reforms may lead governments to act unwisely. The article concluded with a plea, that:

> It is hoped, that on the next occasion when the government considers a change of this nature the issues involved will be examined and appraised in a more satisfactory manner.

Despite Williams' plea, over 50 years later, these concerns persist.

Contemporary Issues

In my (Samantha's) LLB(Hons) dissertation, I critically examine arguments to abolish pre-trial right to silence.[18] My dissertation encounters direct themes discussed by Williams' analysis of the no-comment rule. This pre-trial right to silence, although not identical to Williams' "no-comment" rule, plays a similar role in the criminal justice system: pre-trial silence is a procedural safeguard afforded to defendants to protect their presumption of innocence and fair trial rights.

The key links between Williams' article and my dissertation are: first, the idea that legislative reform is sparked in situations where

15 At 70.

16 At 70.

17 At 79.

18 Samantha Noakes "Moral Panics and Penal Populism in New Zealand: A critical analysis of proposals to abolish the right to silence in cases of child abuse" (LLB(Hons) Dissertation, University of Auckland, 2021).

society condemn certain crimes as being "violent"; and secondly, that political climates can also influence legislative reform.

My dissertation considers the phenomena of "Moral Panics" and "Penal Populism" and their influence on law reform. Moral panic theory was coined by Stanley Cohen in 1975. It refers to a phenomenon whereby a social condition or episode emerges, and is framed as a danger to society, causing widespread panic.[19] Moral panic theory has been utilised by social scientists to explain the phenomenon of panic resulting in law reform.[20] Williams used the concept of moral panics in his article, despite not referring to the term explicitly. He argued that "when we are disturbed by crimes of cruelty and violence we turn too quickly to proposals for changes in rules of law favouring the accused."[21] Williams implied that it was this disturbance of "crimes and cruelty and violence" that led to the 1966 reform of the no-comment rule. Similarly, in my dissertation I claim that a moral panic concerning child abuse contributes to proposals to abolish the right to silence.

Williams' article also touches on a "war on crime" causing the government to "act unwisely". This is akin to the concept of "penal populism". Penal populism, as theorized by John Pratt, is the tendency for governments to spread messages of zero-tolerance on crime, which in turn often leads to conservative legislative reform.[22] Williams' article contended that one reason for the 1966 reform was the government's desire to appear as taking part in a war on crime. Similarly, I claim in my dissertation that penal populism is at play in pleas to abolish the right to silence in child abuse cases. Legislative reform can often be parceled as correcting an issue that does not need to be fixed. The reform may be unnecessary. It may not actually target the problem it is stipulated to fix. Rather, the reform plays into a "tough on crime" rhetoric.

The strong links between Williams' article and my dissertation demonstrate the fundamental nature of the principles. The right to silence, "moral panics", and "penal populism" are vitally important to the development of law. The concepts of moral panics and penal

19 Stanley Cohen *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed, Routledge, New York, 2011) at 1.

20 See generally Jill Jones "Barking up the wrong tree" (2003) 4 NZLJ 98; Tony Carton "The War on P (Pure, Methamphetamine) in New Zealand, a Moral-Panic?" (2016) 6 Sociology-Mind 92; and Jane Kelsey and Warren Young *The Gangs: Moral Panic as Social Control* (Institute of Criminology, Victoria University of Wellington, Wellington, 1982).

21 Williams, above n 3, at 79.

22 John Pratt "When Penal Populism Stops: Legitimacy, Scandal and the Power to Punish in New Zealand" (2008) 41 The Australian and New Zealand Journal of Criminology 364.

populism particularly, are tools that encourage critically analysis of the law. In the case of my dissertation, and Williams' articles, the tools enable the author to critique reform, or possible reform, in order to demonstrate whether or not such proposals are actually beneficial for society.

IV CONCLUDING REMARKS

This piece, first and foremost, has provided a valuable opportunity to revisit Sir David Williams' contribution to the inaugural volume of the AULR, and in doing so to acknowledge his journey. However, the authors also wish to use this opportunity to demonstrate the importance of Dame Margaret Wilson's argument in her own 2021 contribution.

There are strong links between Sir David's 1967 article and Samantha's 2021 dissertation concerning law reform of defendants' rights pre-trial and trial rights. On one level those links merely suggest a connection between the "no-comment" rule and a defendant's pre-trial right to silence. However, the calls for concern echoed in both articles demonstrate the value student-driven legal research can have. Sir David felt, in 1967, the need to draw attention to the process of the "no-comment" rule reform. The similarity of the arguments in Samantha's 2021 dissertation deems his earlier examination prescient. Just as Sir David's analysis was a vital and relevant contribution to legal research on societal issues in 1967, so too is Samantha's 2021 dissertation. Not only that, but, as Dame Margaret reminds us, so too is *all* student legal research. The AULR thus plays a vital role in making that invaluable student work — which otherwise would go unnoticed — available.