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Editors' Note

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A fundamental concern of public interest law is the representation of the underrepresented, a concern that was reflected in the earliest definitions of the term in the 1970s.[1] Since then public interest law organisations have disagreed about which groups in society are, indeed, underrepresented, and this has led them to adopt and apply the term in vastly different ways, for numerous different purposes.[2] The result is that those acting under the auspices of *public interest law* have taken "opposing sides of nearly every divisive social and economic issue of our time".[3]

Acknowledging this ambiguity, our Public Interest Law Journal continues to adopt a broad conception of the term. While the Journal is inclined to feature articles on "civil liberties, environmental protection, consumer protection, employment, education, media reform, healthcare, welfare benefits, housing, voting, and occupational health and safety"[4]—subject areas that are commonly associated with public interest law[5]—it remains committed to advocating for those with less influence in society and, as a result, open to publishing any article that provides a compelling case for the use of law as "a tool for social change".[6]

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1 For example, see Charles R Halpern and John M Cunningham "Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy" (1971) 59 Geo LJ 1095; Gordon Harrison and Sanford M Jaffe "Public Interest Law Firms: New Voices for New Constituencies" (1972) 58 ABAJ 459 at 459; Council for Public Interest Law *Balancing the Scales of Justice: Financing Public Interest Law in America* (Washington, DC, 1976) at 6; and Burton A Weisbrod "Conceptual Perspective on the Public Interest: An Economic Analysis" in Burton A Weisbrod (ed) *Public Interest Law: An Economic and Institutional Analysis* (University of California Press, California, 1978) 4 at 22.

2 Ann Southworth "What Is Public Interest Law: Empirical Perspectives on an Old Question" (2013) 62 DePaul L Rev 493 at 497. See generally Ann Southworth "Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law'" (2005) 52 UCLA L Rev 1223.

3 Southworth "What Is Public Interest Law", above n 2, at 515.

4 At 497. See Weisbrod "Conceptual Perspective", above n 1, at 57.

5 Southworth "What Is Public Interest Law", above n 2, at 497.

6 "Introduction" in Edwin Rekosh, Kyra A Buchko and Vessela Terzieva (eds) *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (Public Interest Law Initiative in Transitional Societies, Columbia Law School, New York, 2001) 1 at 2.

In this issue we are proud to present nine articles by some of the brightest law students and graduates across the country. The authors examine legal issues facing numerous groups, including indigenous women, gender diverse individuals, terminally ill individuals, owners of customary land, and offenders with neurodisabilities, as well as legal issues affecting the population generally, such as the availability of class actions, political engagement with terrorist threats, and the destruction of culture and heritage.

Camille Wrightson argues that the legal community needs to respond actively to the unique problems facing indigenous women in seeking justice for the violence inflicted against them. Māori women are twice as likely—and Aboriginal women are 45 times as likely—as non-indigenous women to experience violence by a partner. However, the voices of indigenous women victims are struggling to be heard. Not only do indigenous women struggle with the adversarial system, but they are often faced with arguments by the abuser that customary law condones the abuse.

Wrightson proposes ways that the justice systems of Australia and Aotearoa can better serve indigenous women victims, and urges indigenous communities themselves to condemn violence against women and rebuild structures to address these crimes. She concludes that indigenous women victims must be heard if the mainstream legal system is serious and sincere about serving justice.

The Human Rights Act 1993 provides a list of prohibited grounds of discrimination. The list expressly prohibits discrimination on the basis of a person's *sex*, but it does not prohibit discrimination on the basis of a person's *gender*. **Samuel Campbell** argues that Parliament should amend the Human Rights Act 1993 so that *gender* is expressly included as a prohibited ground of discrimination. He argues that this approach would ensure broad and guaranteed protection for gender diverse (including trans, genderqueer and agender) individuals from discrimination and provide a strong symbolic message that New Zealand recognises and respects the human rights of all gender diverse people.

Lecretia Seales passed away from terminal brain cancer in 2015. Earlier that year, Ms Seales sought two sets of declarations from the High Court.[7] First, she sought a declaration that her doctor would not be acting unlawfully in assisting her death. Secondly, in the alternative, she sought a declaration that the provisions in the Crimes Act 1961 governing murder and assisted suicide are inconsistent with the New Zealand Bill of Rights Act 1990. If successful, these declarations would have meant Ms Seales' doctor could have assisted her in dying on her own terms, rather than waiting for the illness to eventually claim her life. On 5 June 2015, soon after being told that her challenge was unsuccessful, Ms Seales passed away.

Louise Grey argues that a declaration of inconsistency—between Parliament's meaning of suicide in the Crimes Act 1961 and the right to life in the New Zealand Bill of Rights Act 1990—was feasible and should have been granted. To reach this conclusion, she applies the *R v Hansen* majority test for interpreting legislation that appears inconsistent with the New Zealand Bill of Rights Act 1990.[8] While she expresses disappointment at the result in *Seales v Attorney-General*, Grey gauges a renewed interest in the euthanasia debate as a result of Ms Seales' high-profile challenge and calls upon the legislature now to clarify the law relating to euthanasia.

The next article is on class actions. There are two types of class action: class litigation and class arbitration. Class litigation is a lawsuit where the plaintiff is a group of people

7 See *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

8 See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J.

who are represented collectively by a member of that group. Class arbitration is an alternative to class litigation, where the dispute between the group of people and the defendant is resolved, not by a court, but by an arbitrator. Both types of class actions are underutilised in New Zealand—there have only been a handful of class action lawsuits, and there have been no class arbitrations to date. It should be no surprise then that very little has been written about these actions in the New Zealand context.

Rachel Dunning argues that New Zealand must develop and introduce a formal procedural framework for class actions. To begin, Dunning provides an overview of the existing legal framework for representative actions in New Zealand and compares this framework with the Australian federal class action regime. Next, she discusses United States-style class arbitration and considers whether any such procedures could be implemented in New Zealand. Finally, Dunning analyses the relevant advantages and disadvantages of class litigation and class arbitration for parties choosing how to resolve their class action disputes. In concluding that the benefits are relative to the parties and the particulars of the dispute, Dunning recognises the great potential for both actions in New Zealand in the future.

The Waitangi Tribunal has confirmed that te Tiriti o Waitangi, as signed and understood in 1840, was not a cession of sovereignty. And yet **Emily Blincoe** argues that the three leading public law textbooks in New Zealand portray the treaty as a cession of sovereignty.[9] She argues that the textbooks do this by overlooking Māori law, history and the motivations for signing, and by portraying the meaning of the English text as *the* treaty. In her conclusion, Blincoe encourages Pākehā, in particular, to reject the myth of cession, and challenges the textbook authors to revisit their portrayal(s) of the treaty.

In *Proprietors of Wakatū v Attorney-General* the New Zealand Court of Appeal found that the Crown did not breach a fiduciary duty to reserve settlement land for Māori owners.[10] The case has since been appealed to the New Zealand Supreme Court and a judgment will be released in 2017. Throughout this litigation the appellants relied heavily on the doctrine of trust responsibility as developed in North America.

In her article, **Emma Hensman** argues that it is appropriate for the doctrine of trust responsibility to be developed in New Zealand. While most—if not all—New Zealand-based scholarship in this area applies the Canadian jurisprudence on state-owed fiduciary duties, Hensman's article makes a unique contribution by focusing on the United States jurisprudence and comparing the United States context with the Crown-Māori relationship in New Zealand.

In the next article, **Charlotte Best** uses a Therapeutic Jurisprudence approach to examine how contact with the criminal justice system affects the overall wellbeing of an offender with neurodisability.[11] She then proposes a raft of reforms designed to increase the likelihood that offenders with neurodisability experience *therapeutic* (and not *antitherapeutic*) consequences within the criminal justice system. Of the reforms, it is the development of a mental health court, equipped to deal therapeutically with offenders who have neurodisability, which we feel is most deserving of elaboration.

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9 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014); Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004); and Grant Morris *Law Alive: The New Zealand Legal System in Context* (3rd ed, Oxford University Press, Melbourne, 2015).

10 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298.

11 Therapeutic Jurisprudence views the law as a social force that can produce either therapeutic or antitherapeutic behaviours and consequences for those involved.

In late 2014 the New Zealand legislature drafted the emotively-titled Countering Terrorist Fighters Legislation Bill. This omnibus Bill was later divided into three Acts, each with an innocuous title: the Passports Amendment Act 2014, the Customs and Excise Amendment Act 2014 and the New Zealand Security Intelligence Service Amendment Act 2014. Together, these rights-intrusive statutes restrict and disrupt travel outside of New Zealand. They also provide for enhanced monitoring and investigative state power.

Selwyn Fraser argues that supporters of this legislation—including then Prime Minister, the Rt Hon John Key, and the Minister in charge of the New Zealand Security Intelligence Service, the Hon Christopher Finlayson MP—routinely misrepresented the actual provisions of the legislation. He also argues that their communications about the purpose and effect of the legislation *exaggerated* the risks posed by foreign terrorist fighters and terrorist returnees. Perhaps best read as a case study, the article serves to highlight the dangers of uncertain communications about counterterrorist legislation.

The Convention Concerning the Protection of the World Cultural and Natural Heritage provides three categories of cultural heritage: monuments, groups of buildings and sites. In our final article, **Emily McGeorge** examines *Prosecutor v Al Mahdi*, a groundbreaking case in which the International Criminal Court prosecuted the destruction of cultural heritage for the first time.[12] McGeorge argues that the *Al Mahdi* case and other precedents show that the international criminal framework of protection is comprehensive and highly developed to prosecute these criminal activities. While she identifies many shortcomings, McGeorge concludes that the *Al Mahdi* case sends a strong message to states that wanton destruction of this kind will not be tolerated. Be that as it may, we feel the international community should work towards some framework where heritage does not need to be destroyed before the would-be perpetrator is prosecuted. Until then, there is at least some level of deterrence.

We must also acknowledge the academics and editors who work behind the scenes to ensure the quality of our articles. The Journal would not be possible without the academics who serve on the Academic Review Board. As a refereed publication, the Journal's articles are subject to anonymous review by a team of academics from New Zealand's law schools. As Academic Directors, we continue to be humbled by the calibre of our Academic Review Board, which boasts leading thinkers in a great many areas of law, and we thank the academics for lending their expertise to the Journal. We receive a wagonload of submissions to the Journal each year and our academics' collective care and attention ensures we publish only the very best. Thank you for all that you do.

Finally, we are fortunate that the Journal continues to attract high-achieving law students and graduates to serve on its Editorial Board. It is only with a team of sharp, detail-oriented editors working painstakingly over multiple rounds of editing that we are able to ensure the Journal continues to meet its high editorial standards. We sincerely thank our editors for serving on the Editorial Board this year. It goes without saying that your pride in this important scholarship shines through.

12 See *Prosecutor v Al Mahdi (Confirmation of Charges)* ICC Pre-Trial Chamber I ICC-01/12-01/15, 24 March 2016; *Prosecutor v Al Mahdi (Trial Hearing)* ICC Courtroom I ICC-01/12-01/15, 22 August 2016; *Prosecutor v Al Mahdi (Judgment and Sentence)* ICC Trial Chamber VIII ICC-01/12-01/15, 27 September 2016; and *Prosecutor v Ahmad Al Faqi Al Mahdi (Prosecution Charges)* ICC Pre-Trial Chamber I ICC-01/12-01/12, 17 December 2015.