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EDITOR'S NOTE

Conceptions of Public Interest Law

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The Chief Justice's Foreword speaks to two conceptions of public interest law.[1] The narrower conception is that public interest law represents the unrepresented or underrepresented.[2] The broader conception is that public interest law is concerned with legal issues of interest to the public. But there are many other takes on the meaning of the term.[3] In this journal, we hope to give a home to scholarship that fits within the established parameters of public interest law, whilst also stimulating thinking about what public interest law does, could and should mean in modern day Aotearoa New Zealand.

The 12 articles in this inaugural issue prompt us to confront these ideas, and more. In the first article, **Andrew Pullar** takes issue with the treatment of resources, such as fisheries and forests, as common property. When a resource is treated as common property—and its exploitation is unregulated—the profits of exploiting the resource are internalised, while the costs are socialised. Pullar advocates for a different approach according to which resources are designated as the *Common Heritage of Mankind* and regulated internationally. On this approach, the costs of exploiting the resource would be internalised, whereas the benefits would be socialised.

In the second article, **Joy Twemlow** examines international environmental law—a subset of international public law—which places obligations on private actors.

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1 See generally Sian Elias "Foreword" (2014) 1 PILJNZ 1.

2 See, for example, "The New Public Interest Lawyers" (1970) 79 Yale LJ 1069. Other early examples include: James R Whitaker "Interdisciplinary Collaboration in Public Interest Law" (1971) 13 Arizona Law Review 909 at 909; John J Osborn Jr "Federal Funds for Public Interest Law: Plausibility, Politics and Past History" (1971) 13 Arizona Law Review 932 at 932 and 941; Thurgood Marshall "The bar must pay for public-interest law" (1975) 1 Bar Leader 2 at 2–3; Howard Lesnick "What next for public interest law" (1977) 60 Judicature 466 at 466–467; and Sanford M Jaffe "Public Interest Law—Five Years Later" (1978) 62 American Bar Association Journal 982 at 982. More recent examples include Derric Reid "Public interest law: What is it?" (1993) 1 Juta's Bus L 35 at 35.

3 Christine M Forster and Vedna Jivan, for example, suggest that public interest law concerns specifically "the conduct and content of *government* action or policy in relation to constitutional, statutory or general law rights of a particular segment of society". Christine M Forster and Vedna Jivan "Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience" (2008) 3(1)(6) Asian Journal of Comparative Law 0 at 3 (emphasis added).

International environmental law is curious because, unlike states, private actors do not possess the requisite legal personality to give consent and operate within international public law. Twemlow addresses an argument that non-governmental organisations (NGOs) could help to bridge that divide. Twemlow argues that whilst NGOs increase the perception that international environmental law is legitimate, they do not impact its substantive legitimacy.

Max Harris examines the concept of a "minimum core" of rights in both domestic and international human rights law. The minimum core refers to some essential level of protection of economic, social and cultural rights. Harris addresses common criticisms of the minimum core concept and concludes that the concept can survive all but one criticism: that it can undermine full rights protection by entrenching a hierarchy between different generations of rights. Harris argues that it is only by abandoning the minimum core concept that governments—including New Zealand's government—can more effectively protect economic, social and cultural rights.

Another set of rights that New Zealand has failed to adequately protect, argues Philippa Moran, is the particular education-related rights of persons with disabilities. Article 24 of the United Nations Convention on the Rights of Persons with Disabilities recognises a right for persons with disabilities to enjoy education on an equal basis with others.[4] Whilst New Zealand has ratified the Convention, it has imposed statutory limitations on the right, and the courts have also denied a substantive and enforceable right. Moran assesses New Zealand's current regime for protecting the right to education of persons with disabilities against Katarina Tomasevski's *Four As Framework*.[5] Moran concludes that New Zealand is not meeting its obligations under art 24.

Still in the realm of international human rights, the focus turns to Indigenous peoples. Laura MacKay considers the value of the United Nations Declaration on the Rights of Indigenous Peoples 2007 for Māori in New Zealand and Aboriginal peoples in Australia.[6] Whilst the Declaration has been criticised as an aspirational document with no binding force, MacKay argues that it provides Indigenous peoples with a framework of rights upon which to leverage our claims. The Declaration also has the potential to crystallise into international customary law, providing the courts with a powerful tool to enable the promotion of Indigenous rights in the future. Ultimately, MacKay concludes that the Declaration should not be dismissed, reminding us that great things often take time.

At the intersection of Indigenous issues and family law, Hannah Cobb identifies a lacuna of legislation on the division of relationship property on Indian reserve land in Canada, and Māori land in New Zealand. Such legislative gaps have the potential to exacerbate existing problems, such as homelessness and domestic violence. Cobb is optimistic that a new statute in Canada will plug the legislative gap by protecting the rights of those living on Indigenous lands and providing for Indigenous self-determination. Ultimately, Cobb recommends that New Zealand adopts the Canadian example as a template for future, much-needed legislation.

Annaliese Johnston also engages with the impact of separations, specifically of mothers from their dependent children when the mothers are imprisoned. Given the negative effects of maternal imprisonment, Johnston argues that the child's rights and

4 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 24.

5 See K Tomaševski *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Swedish International Development Cooperation Agency, Right to Education Primers No 3, 18 January 2001) at 12.

6 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

welfare should be given greater priority in the sentencing regime. The discretion that judges currently possess to construct more nuanced sentences makes this possible. More broadly, Johnston argues that there needs to be a change of mindset in the criminal justice system so that imprisonment is regarded as a last resort rather than a first response.

From adult female offenders we turn to violent female offenders aged 14 to 16 years. In her article, **Charlotte Best** argues that more positive gender-specific initiatives are needed to effectively cater for violent girls in the New Zealand youth justice system, as well as international law. Approaching the issue from a feminist perspective, Best examines how violent girls are a threat to the safety of society, and also in need of special care and protection. Best assesses the benefits and drawbacks of addressing the needs of violent girls in both a welfare-based system and a justice-focused system, and concludes that violent girls would benefit from elements of both.

Another issue that affects young women is the ability of minors to consent to sexual health services. This issue is discussed by **Chantelle Murley**, who argues that New Zealand should adopt the mature minor doctrine established in *Gillick v West Norfolk and Wisbech Area Health Authority* to allow persons under 16 years of age to consent to their medical treatment without parental knowledge or permission.[7] To give effect to the doctrine, Murley rejects blanket age restrictions in favour of a competency-based consent test.

Of all the sexual health services, perhaps none is as morally controversial as abortion. In his article, **Hugo Farmer** discusses whether New Zealand's abortion law system—where, in practice, abortion is available on request—should be reformed. Farmer addresses this question from three moral perspectives: pro-life, pro-choice and a middle ground view. Farmer concludes that subscribers to all three moral perspectives have reason to favour reform, although the reasons differ. In any case, reform should be pursued with caution.

Another controversial topic at the intersection of law and religion is elective male circumcision. **Phoebe Harrop** examines the place of male circumcision in New Zealand criminal, health and human rights law in the aftermath of a German court finding that infant male circumcision may constitute child abuse.[8] Given the finely balanced rights and competing interests, Harrop concludes that, at least in the near future, New Zealand is unlikely to outlaw male circumcision.

In the final article, **Philip Arnold** considers whether it is unlawful to fail to provide available and effective pain relief options to a person who suffers severe pain. Whilst domestic legislation does not currently explicitly recognise a right to pain relief, Arnold argues that such a right can be found in case law, and international and professional instruments. Arnold concludes that a legal right to effective pain relief is not only practically workable, but highly desirable.

As the managing editor for the Journal, with oversight of the final publication, I would like to thank everyone who contributed to this issue. I must praise the considerable time and effort invested in this issue by Anjori Mitra, who served as the Editor-in-Chief, as well as the significant contributions by Tariqa Satherley and Lydia Sharpe, who helped to finalise the issue for publication. I must also acknowledge all of the editors who have served on the Editorial Board, as well as the academics who have served on the Academic Review Board. I would finally like to thank the New Zealand Law Foundation, which provided funding to help establish the Journal. It has been inspiring to see all contributors work together to produce this wonderful issue. I look forward to introducing many future issues in due course.

7 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL).

8 Landgericht Köln 151 Ns 169/11, 7 May 2012.