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EDITOR'S NOTE

Defining Public Interest Law

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What is public interest law? This is not an easy question to answer. Many scholars have grappled with the question since the late-1960s,[1] and I am not sure we are closer to a commonly accepted definition today.

Public interest law is generally defined by *who* it represents.[2] Strictly speaking, it represents the underprivileged. But, more broadly, it might be said to represent the underrepresented or unrepresented: persons neglected or excluded from the decision-making process on issues of importance to them.

Another way to define public interest law is to focus on *what* is at issue. Rick Bigwood, for example, defines public interest litigation as litigation in which the litigants:[3]

> ... seek to use the ordinary Courts to vindicate particular, and often highly contestable, social or political causes that they believe are not receiving the traction they deserve in the political arena.

But this still returns us to the *who*. When social and political causes are pursued through the court system, they always directly or indirectly concern persons and groups that are not the parties legally represented in the court. But when are these unrepresented "the unrepresented"?

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1 In 1978, Burton A Weisbrod suggested that there is "no consensus as to what [the term] means, even in an approximate sense". Burton A Weisbrod "Conceptual Perspective on the Public Interest: An Economic Interest" in Burton A Weisbrod, Joel F Handler and Neil K Komesar *Public Interest Law: An Economic and Institutional Analysis* (University of California Press, Berkeley, 1978) 4 at 4. In 1985, Jeremy Rabkin wrote that "no single definition is commonly accepted". Jeremy Rabkin "Public Interest Law: Is It Law in the Public Interest?" (1985) 8 Harvard Journal of Law & Public Policy 341 at 341.

2 "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, 2001) 1 at 1.

3 Rick Bigwood "Introduction and Overview" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) at 1.

It might be said that public interest law prioritises public interests over private interests.[4] Alan K Chen and Scott L Cummings, for example, define public interest lawyering as "lawyering that advances the public's interest as well as (or perhaps instead of) the client's private interests".[5] It might also be said that public interest lawyering accrues more public benefits than private benefits. Burton A Weisbrod, for example, has suggested that organisations doing public interest work accrue more benefits to members of the public than to the members of the organisation doing the work.[6]

For any definition to hold water in New Zealand, it must account for the existence of competing groups with conflicting normative views about what is best for society at large.[7] In a pluralist society, like New Zealand, "the notion of the 'public interest' becomes an ideological battlefield" in which different groups each advocate on behalf of the public interest and assert that their conception of the public good is the conception that should be adopted by society as a whole.[8] Heterogeneity makes it more difficult to ascertain the public interest. And when there are competing conceptions, who ought to decide which conception it to be favoured?[9]

Such questions have been broached in New Zealand. Some judges have expressed concern that the judicial process is neither a competent nor appropriate forum to litigate public interest issues, which are often highly controversial social, economic and political issues.[10] Some scholars have alternatively argued that public interest litigation "fits comfortably with the judicial function as critic of government compliance with legality and rights".[11] The conversations continue.

In this second issue, I am proud to present nine articles on a range of public interest issues written by current students and recent graduates. Students often bring unique and valuable perspectives to the "ideological battlefield" and this journal continues to offer a platform for informed student participation in these important conversations.

In the first article, Jack Alexander examines the impact of the Taxation (Bright-line Test for Residential Land) Act 2015 which inserts s CB 6A into the Income Tax Act 2007. The amendment, which introduces a new rule requiring income tax to be paid on gains from the sale of residential property that is bought and sold within two years, was passed in the context of rising house prices across New Zealand and intended to allay foreign buyers driving up house prices further. Alexander offers three incisive critiques of the rule. First, the rule adds considerable complexity to an already-complex set of rules. Secondly, the rule is unlikely to affect the intended group (property speculators) and will adversely affect another class of taxpayers that it did not target (people who have to sell their property due to circumstances outside of their control). Finally, the rule has failed in its objective of minimising compliance costs for taxpayers.

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4 This public-private dichotomy harkens back to cases in the late-1960s which flouted "the traditional pattern of a single plaintiff asserting … rights as an individual". Rabkin, above n 1, at 342.

5 Alan K Chen and Scott L Cummings *Public Interest Lawyering: a contemporary perspective* (Wolters Kluwer, New York, 2013) at 11.

6 See Weisbrod, above n 1, at 21.

7 See Chen and Cummings, above n 5, at 11. The authors regard this as the "definitional dilemma" inherent in defining public interest law.

8 At 11–12.

9 See, for example, Rabkin, above n 1, at 343–344.

10 See generally Sam Bookman "Providing Oxygen for the Flames? The State of Public Interest Litigation in New Zealand" (2013) 25 NZULR 442 at 450–463.

11 At 466.

Actuarial tools are used in criminal justice—particularly at sentencing and parole—to quickly assess the likely risk presented by an offender. **Anna Chalton** argues that the statistical tools currently used to predict risk in convicted sex offenders are based on a biased sample that renders them unreliable. Chalton argues that, so long as actuarial tools are being used, they should be made as robust as possible in a way that is supported by data. Chalton argues that the current sample—which seems to be comprised of offenders with a high *perceived* risk regardless of their *actual* risk—should no longer be used. Rather, Chalton suggests that the population at large presents a more reliable statistical profile, based on verifiable data rather than assumptions about criminality, and would serve as a more useful predictive tool.

Erin Gough considers whether New Zealand has adequately implemented the United Nations Convention on the Rights of Persons with Disabilities in the context of the Canterbury earthquake rebuild.[12] She answers in the negative. Gough contends that whilst some of the failures are legal, significant challenges are also posed by a social perception that making buildings accessible is costly and only benefits people with disabilities. Gough disagrees, arguing that making buildings accessible benefits a wider group, including parents with young children, and the elderly, and creates opportunities for economic growth. Ultimately, Gough contends that we are missing a golden opportunity to make Christchurch more accessible and inclusive, and concludes that a significant shift in New Zealand's human rights culture is necessary if the Convention is to be implemented satisfactorily in the future.

In his article, **Blake Carey** engages with another issue that has resurfaced in the context of the Christchurch earthquakes: whether judges should have discretion to alter parties' obligations if their contractual obligations become onerous. Under the doctrine of frustration, a contract will be discharged if an unforeseen event significantly affects the parties' obligations under that contract. The threshold for frustration is high, and one party is often forced to bear the full loss for a contract when it is onerous but does not reach the threshold. Whilst a more equitable approach that distributes the loss between the parties would soften the *all or nothing* nature of the doctrine, Carey concludes that the benefits of discretion are overridden by a greater need to preserve commercial certainty. Carey ends by offering two adjustments to the doctrine that would soften the current approach, while also preserving commercial certainty.

Oliver Sutton discusses the Copyright (Infringing File Sharing) Amendment Act 2011: New Zealand's latest legislative regime aimed at tackling online copyright infringement. Sutton argues that whilst remedies for infringement are needed, the Act does not provide adequate protection for end users, and otherwise has serious implications for freedom of speech and due process.

In 2007, the United Kingdom enacted the Corporate Manslaughter and Corporate Homicide Act.[13] More recently, there have been calls in New Zealand for the legislature to introduce an offence of corporate manslaughter. Notably, *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (2013) assessed the efficacy and suitability of New Zealand's current legal mechanisms in this area, and recommended a strengthening of occupation health and safety laws and an extension of

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

13 Corporate Manslaughter and Corporate Homicide Act 2007 (UK).

the existing law of manslaughter to corporations.[14] In his article, **Mitchell Spence** endorses some of the Taskforce's recommendations, but urges Parliament to look at New Zealand's criminal law holistically and make a principled response.

In her article, **Sarah Alawi** argues that the law on abortion is out of touch with reality. First, lawful abortions exist as an *exception* in the criminal law. Secondly, the availability of abortions depends on the beliefs of medical practitioners whose decisions are non-reviewable. Finally, the decision to abort is categorised as a medical problem, when most women who choose to abort do so because of decisional autonomy, not issues with mental health. Alawi argues that a woman's decision to abort is more honestly categorised as a private decision rather than a medical one, and suggests that privacy law presents a more workable framework than existing measures of protection.

In 2012, tougher legislative protections for animals were introduced in Queensland, Australia following high-profile public outrage at Indigenous hunting methods.[15] Growing support for legal protections for animals in Canada suggests that the debate will be re-canvassed there in the future. After examining the existing statutory regimes in each jurisdiction, **Alice Sowry** offers three possible resolutions to the conflict between Indigenous hunting rights and animal welfare standards. First, Indigenous hunting methods could be modified to minimise cruelty and allow hunting to continue. Secondly, Indigenous hunting rights could be extinguished altogether by animal welfare standards. Thirdly, animal welfare standards could include exemptions for the continued exercise of Indigenous hunting. Sowry contends that Indigenous perspectives are sorely lacking in the secondary literature and calls for governments to prioritise consultation with Indigenous communities to ascertain how they would be affected by any future animal welfare laws.

In the final article, **Aishwarya S Bagchi** considers what makes a constitution legitimate. In New Zealand, the High Court has held that the constitution is legitimate because it has legal continuity from the original British constitution.[16] However, legal continuity cannot be the only source of constitutional legitimacy. First, legal continuity does not explain how constitutions of new legal systems gain legitimacy, as in the case of a nation which emerged from a revolution. Secondly, a constitution does not necessarily lose legitimacy when it loses continuity, as in the case of social uprisings and coups d'état. Bagchi argues instead that legal continuity is, in fact, a mask for *social consensus* and *judicial recognition*, which are the true determinants of constitutional legitimacy. Bagchi concludes that liberal democracy should be a prerequisite for legitimacy and suggests that recognition by other nations should contribute towards constitutional legitimacy.

It remains for me to acknowledge the work of those who made this issue possible. First, I thank the Editor-in-Chief, Adam Holden, for his leadership in the editing process. Secondly, I thank the Supervising Editors, Madeleine Hay and Michael Brennan, for helping to prepare this issue for publication. Thirdly, I thank the editors on the Editorial Board for taking on the painstaking tasks of citation checking, style editing and proofreading the articles. Finally, I thank the academics on the Academic Review Board for their valuable insights in the article selection process.

14 Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (April 2013).

15 See Animal Care and Protection and Other Legislation Amendment Act 2012 (Qld), pt 3.

16 *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC) at 212.