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EDITOR'S NOTE

The Public Interest Law Firm

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What is a public interest law firm? A public interest law firm, like a private law firm, is a "private, for-profit association of lawyers".[1] However, unlike a private law firm, its primary objective is to "assist underrepresented people or causes, rather than to make money".[2] This objective is generally reflected in the types of cases the firm takes on and the fees it charges for its legal services.

In the late-1960s, F Raymond Marks, Kirk Leswing and Barbara Fortinsky deemed the public interest law firm a "totally new form".[3] However, in the late-1970s, a decade after the term was coined, the public interest law firm was still regarded as a "fledgling, institutional innovation".[4] Today, whilst it appears to be going strong in North America,[5] the public interest law firm is a rarity in New Zealand. Over here, it is not mandatory for lawyers to do a certain amount of pro bono work each year. Many lawyers do it nonetheless. But without any nationwide standard or institutional regulation, the amount of pro bono work undertaken tends to vary widely from firm to firm.[6]

In the United States, the American Bar Association makes it a lawyer's "professional responsibility" to undertake pro bono work, and sets an aspirational goal of 50 hours of

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1 "Public Interest Law Firms" Yale Law School <www.law.yale.edu>.

2 "Public Interest Law Firms". Public interest law firms are not alone in having this objective: public defence services and not-for-profit legal organisations are similar in this regard.

3 F Raymond Marks, Kirk Leswing and Barbara Fortinsky *The Lawyer, the Public, and Professional Responsibility* (1972) at 251; Barlow F Christensen *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services* (1972); and Robert W Meserve "Our Forgotten Client: The Average American" (1971) 57 ABAJ 1092. See also Charles R Halpern "Public Interest Law: Its Past and Future" (1974) 58 Judicature 119 at 119: "[f]ive years ago, the term 'public interest law' had not been coined".

4 Burton A Weisbrod "Introduction" 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) 1 at 1.

5 See generally "Private Public Interest Law and Plaintiff's Firm Guide" Harvard Law School <www.hls.harvard.edu>.

6 Rod Vaughan "Lawyers dig deep for public good" (9 December 2016) Auckland District Law Society <adls.org.nz>. Indeed, it may vary widely within firms.

pro bono work per lawyer per year.[7] Similarly, in neighbouring Australia, the Australian Pro Bono Centre has set a National Pro Bono Target of at least 35 hours per lawyer per year.[8] Although the Target is voluntary, over 12,000 lawyers had signed up to meet it, either as individuals or in a collective practice, by July 2017.[9] Whilst there is no equivalent nationwide target in New Zealand, some law firms set targets for themselves as part of an internal policy. DLA Piper, for example, aims for 35 hours per lawyer per year across all of its branches globally, although its New Zealand offices are currently averaging 30 hours only.[10]

Nicolas Patrick, Pro Bono Partner at DLA Piper, believes that the problem is not a lack of commitment to pro bono work at the individual level, but rather a lack of institutional support:[11]

> There are certainly some very good examples of New Zealand firms with an institutional commitment to pro bono, but I doubt whether you will find many firms that have actively provided pro bono opportunities to every employed lawyer over the past year. So a greater level of institutional commitment is what is needed.

Similarly, Darryn Aitchison of the Auckland Community Law Centre believes that an overarching institutional structure is required to match lawyers with suitable clients (and vice versa), taking into account factors such as their availability and expertise.[12] Aitchison is currently working on a pilot project that aims to help bridge the gap between community law centres and the broader profession, to ensure that litigants receive the support they need, and lawyers are able to provide "targeted pro bono services at a level that they can manage along with their regular commitments".[13]

But why does New Zealand not already have legal institutions specifically dedicated to pro bono work? Max Harris, an alumnus of the Public Interest Law Journal of New Zealand, suggests three reasons: the "lack of resourcing by governments and law firms"; pro bono work being culturally dissociated from the role of a lawyer; and the limits placed on pro bono work by law firms.[14] Section 9 of the Lawyers and Conveyancers Act 2006, for example, provides that, under certain circumstances, it is misconduct for an employed lawyer to provide unpaid legal services to a person or organisation other than their employer. The government and the profession must address these barriers if they are serious about recognising the important role that pro bono work plays in ensuring access to justice.

The government ought to consider supporting profession-driven initiatives to facilitate access to justice. The New Zealand Bar Association, for example, is currently looking to establish a pro bono Clearing House to coordinate pro bono activities across the profession.[15] Clearing houses aim to make the provision of pro bono legal services

7 American Bar Association *Model Rules of Professional Conduct*, Rule 6.1.
8 "National Pro Bono Target" Australian Pro Bono Centre <www.probonocentre.org.au>.
9 "National Pro Bono Target".
10 Craig Stephen "Global links aid firm's local work" (3 November 2017) New Zealand Law Society <www.lawsociety.org.nz>.
11 Vaughan, above n 6.
12 Lynda Hagen "Turning pro bono willingness into action" (2 June 2017) New Zealand Law Society <www.lawsociety.org.nz>.
13 Hagen, above n 12.
14 Vaughan, above n 6.
15 Cameron Madgwick "Annual Conference Address: Access to Justice: the Clearing House Model" *At The Bar* (New Zealand, December 2016) at 17–18.

more efficient and effective, such as by pre-assessing clients and matching cases to lawyers with relevant expertise. Until now, the Clearing House project has been hindered by a lack of financial support. It would seem that the government provision of financial and other resources would help considerably to make the Clearing House a reality. Perhaps the profession—the larger firms, in particular—should take more initiative to support the project too.

For now, our "public interest law firm" pales in comparison to its North American counterpart. In any case, a few projects are underway to support pro bono work here which will hopefully receive further support so that New Zealand can begin to realise its potential in this space. In the meantime, I will be following the projects with great interest.

Turning to the present issue, I am excited to present eight new articles on public interest legal issues. **Rebecca McMenamin** explores the concept of reasonable accommodation[16] and how it has worked in practice for learners with disabilities in their pursuit of the right to equal education. McMenamin presents the findings of an empirical study in which she interviewed numerous experts and persons with personal experience in this intersection of disability rights law and education. McMenamin's findings shed light on the extent to which discrimination still exists in New Zealand schools for students with disabilities. Next, McMenamin uses *A v Hutchinson* as a case study on how a court might apply reasonable accommodation to a discrimination claim in the education context.[17] McMenamin sets out a legal framework for assessing how reasonable accommodation might justify discrimination in education, and applies the framework to the facts of *A v Hutchinson*, concluding that the discrimination in *A v Hutchinson* was unjustified. McMenamin ends by evaluating potential legal and non-legal methods for achieving non-discriminatory education in practice. If New Zealand is to enable traditionally-marginalised students to achieve their full potential, the government must provide further guidance, training and resources to equip our educators to realise the law's promise of equal education for all.

Shontelle Grimberg argues that the repeal of the partial defence of provocation was a rash response to the moral panic following the *R v Weatherston* trial.[18] A moral panic is an exaggerated fear or public concern over "a perceived threat to the social order".[19] During the *R v Weatherston* trial, extensive media coverage fuelled a fervent discussion amongst the New Zealand public about whether or not the partial defence of provocation had an appropriate place in the criminal law. The partial defence reduces a murder charge to manslaughter in circumstances where the defendant may be said to have reasonably lost self-control. Following intense public scrutiny, the legislature passed the Crimes (Provocation Repeal) Amendment Act 2009, which removed the partial defence from both the Crimes Act 1961 and the common law as it applies in New Zealand. However, the reform left a significant gap in the criminal law system to the detriment of vulnerable

16 Reasonable accommodation is defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2, definition of "reasonable accommodation".

17 *A v Hutchinson* [2014] NZHC 253, [2014] NZAR 387; and *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273.

18 *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009.

19 Charles Krinsky "Introduction: The Moral Panic Concept" in Charles Krinsky (ed) *The Ashgate Research Companion to Moral Panics* (Ashgate, Surrey, 2013) 1 at 1.

members of society, particularly battered women. Grimberg analyses the public response to *R v Weatherston* according to various theories of moral panic, and critically evaluates approaches that other jurisdictions have taken in respect of the partial defence. Ultimately, Grimberg calls on the legislature to reintroduce a more limited partial defence of provocation that addresses the shortcomings of the previous iteration.

How should the international legal system respond to massive influxes of refugees across state borders? The dilemma is topical, though certainly not new. **Michael Greenop** argues for a framework that obliges the state of origin to pay compensation to the host state for the burden incurred by hosting refugees. This is a proactive solution that aims to disincentivise refugee creation and also ameliorate the burden of hosting refugees. Whilst Greenop acknowledges that his proposal would currently face significant obstacles, he suggests that necessity might well prompt changes in the international law framework that would allow for more effective protection of refugees and the states that host them.

The discharge without conviction model in New Zealand law acknowledges that the defendant has committed an unlawful wrong, yet imposes no punishment nor any obligation to disclose the fact of the offending in the future. **Dennis Dow** argues that the Sentencing Act 2002 should be amended to allow judges to grant conditional discharges, such that the discharge only becomes absolute if the offender completes a good behaviour period without committing further offending. Dow concludes that conditional discharges would better serve the aims of sentencing and make the law more substantively equal.

The New Zealand Supreme Court in *Dixon v R* held that digital files are "property" under s 249 of the Crimes Act 1961.[20] The decision signalled a departure from the orthodox approach, which excluded information from the ambit of "property". **Katherine Hu** explores the implications of this new definition. Hu concludes that, rather than altering existing definitions under the Crimes Act, legislators should consider new digital-specific solutions to deal with legal issues arising from the digital world.

Excessive sugar consumption is a leading cause of obesity. As governments struggle to address the financial and social burdens of obesity, sugar taxes have emerged as a favourable solution. **Kate Roberts-Gray** discusses the efficacy of a sugar tax on improving public health and considers the best method for implementation. Roberts-Gray concludes that a specific excise tax is the best method for reducing consumption of sweet drinks.

A shortage of organs for transplantation leads **Christopher Smol** to consider whether there can be private property rights in cadaveric organs. Smol examines the jurisprudential underpinnings of the traditional rule that there is no property in the body. He then advocates for a tightly-regulated government-run futures scheme to overcome the organ shortage whilst mitigating serious ethical concerns.

Globalisation has allowed corporations to spread their production processes around the world, particularly into third world countries. The corporations' activities have human rights implications for the communities they enter. In our final article, **Sally Wu** critically examines the practical limitations of relying on individual states to protect rights within their territories. Wu argues that domestic human rights laws should be given extraterritorial effect to police the activities of transnational corporations, which would widen the net of extraterritorial laws to catch corporate human rights abuses abroad.

It remains for me to thank the rest of the team behind this brilliant issue. My thanks to the Editors-in-Chief, Michelle Chen and Jae Kim, for their commitment to bringing the issue to life. Thank you also to the editors on the Editorial Board and the academics on our Academic Review Board for their thoughtfulness, care and attention.

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20 *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678.