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EDITOR'S NOTE

The Public Interest Flame

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Why do you do law? When you started your legal education, you might have responded with some bright-eyed, idealistic declaration about wanting to advance social justice and make a difference in the world. But after a few years at law school, your answer might have changed, perhaps to reflect a more personal and pragmatic desire to secure a stable job and earn a good salary.[1] Whilst such goals are no less valid, the question remains: what is it about law schools that makes students less idealistic about using their legal education to serve the public interest?

Robert V Stover suggests that law students' idealism is affected by changes in two factors: the values that shape students' future career preferences; and students' expectations about what careers would satisfy those values.[2] Law schools shape those values and expectations, such as by signalling (explicitly or implicitly) the importance of a career path in commercial law.[3] But law schools are not the only influencers. Recent data confirms that private law firms tend to offer graduates a higher salary than,

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1 If you experienced similar attitude changes during your legal education, you are certainly in good company and quite possibly the norm rather than the exception. See generally Lawrence S Krieger "What We're Not Telling Law Students—and Lawyers—that They Really Need to Know: Some Thoughts-in-action toward Revitalizing the Profession from Its Roots" (1998) 13 JL & Health 1; Kennon M Sheldon and Lawrence S Krieger "Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being" (2004) 22 Behav Sci Law 261; and Lawrence S Krieger *The Hidden Sources of Law School Stress: Avoiding The Mistakes That Create Unhappy and Unprofessional Lawyers* (Krieger, 2006).

2 Robert V Stover *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (University of Illinois Press, Urbana (IL), 1989) at 18–35.

3 See, for example, Auckland Law School *Handbook 2018* (University of Auckland, Auckland, 2018). With one exception, the Handbook advertises career opportunities in commercial law firms only. The exception is a law firm with a dual focus on commercial law and criminal law. Although this is probably because commercial law firms tend to be better placed to afford to advertise in such a publication, this is not always the case, and the reader may nonetheless get the impression that a career path in commercial law is more prestigious, challenging and worthwhile than the many other options available to law students.

for example, public defence or community law centre roles[4]—and money is important to many law students.[5]

But there are reasons to be optimistic. As recently as 2015, a study of first year law students in New Zealand found that the majority of participants had strong idealistic convictions about using law for the public good.[6] When asked why they were pursuing law, the students' most frequent responses had clear public interest undertones: "I am passionate about justice and the law" (56.8 per cent), "I want to make a difference" (55.0 per cent) and "I want to help people" (53.0 per cent). Encouragingly, these responses outranked even career aspirations and financial concerns, including "It is a good, steady profession" (44.6 per cent) and "It is a well-paid career" (42.9 per cent).[7] So, all is not lost: many New Zealand law students want to keep the public interest flame burning, at least in their first year.

As they progress, many students who cannot find adequate or appropriate avenues within the law school to channel their passion for public interest law take it upon themselves to launch their own initiatives. Indeed, most public interest law initatives at New Zealand universities are essentially student-run, with the universities tending to play supporting roles only. The Equal Justice Project, for example, is a pro bono charity based at the University of Auckland for which students provide research support, produce research articles and organise community events to promote access to justice, and social equality.[8] Similarly, the Wellington Community Justice Project was founded by law students at Victoria University of Wellington to provide law students with opportunities to gain practical legal experience by volunteering in advocacy, education, human rights and law reform projects.[9] Law For Change, an initiative responsible for *The Public Interest Law Handbook*,[10] is also driven by law students and young lawyers, and has branches across the major university centres in New Zealand.[11] Whilst this list of examples is by no means exhaustive, it demonstrates that law students are often the originators and drivers of public interest law projects to plug the public interest law-shaped holes at their institutions.

So, I lay down a challenge for the law schools in Aotearoa New Zealand: nurture the bright-eyed idealism that your first year students carry through your

4 See State Services Commission *Our People: Public Service Workforce Data 2018* (December 2018); and New Zealand Law Society and Niche Consulting Group *Legal Salary Survey 2018*.

5 Consider the world they are entering upon graduating—Millennials look to be the first generation in a long time to be worse off than their parents. Larry Light "Here's Why Millennials Are Trailing Behind Financially" *Forbes* (online ed, 19 November 2018). Most law students who wish to build a career and start a family will need to overcome student loan debt, mounting house prices and rising living costs. See Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017) at 232.

6 Lynne Taylor and others *The making of lawyers: Expectations and experiences of first year New Zealand law students* (Ako Aotearoa: National Centre for Tertiary Teaching Excellence, RHPF Southern Regional Hub Project Fund, May 2015).

7 At 15.

8 See Equal Justice Project <www.equaljusticeproject.co.nz>. See also Craig Stephen "Equal Justice Project helps practical skills development" New Zealand Law Society <www.lawsociety.org.nz>.

9 See "About Us" Wellington Community Justice Project <www.wellingtoncjp.com>.

10 See Alice Eager and Hugo Van Dyke *The Public Interest Law Handbook: A Law For Change Publication* (Law For Change, Dunedin, 2013). The University of Otago Faculty of Law supported this particular publication. At 24.

11 See Law For Change <www.lawforchange.co.nz>.

doors.[12] Idealism gives students a sense of greater purpose—a sense that they can use what they are learning to make a difference in the world. Do what you can to keep their public interest flame burning.

It is our hope that this journal will facilitate law students and graduates to make a difference. In this issue, I am proud to present articles by nine authors who do in their own ways.

Negligence liability for public authorities is often hamstrung by public policy concerns negating a duty of care. One policy concern is that monetary liability will have a chilling effect, and public officials are sometimes presumed to become detrimentally defensive in performing their duties for fear of incurring liability. In the first article, **Louis Norton** surveys the current body of case law in New Zealand concerning defensive practice and outlines a reasoned framework for assessing negligence liability in a given public authority context.

Intersex infants account for approximately 1.7 per cent of live births.[13] Whilst there is overwhelming anecdotal evidence of the long-term trauma caused by surgical intervention on infants,[14] genital-normalising surgery remains standard medical practice.[15] **Emily McGeorge** argues that genital-normalising surgery raises various legal issues which have yet to be litigated in New Zealand. McGeorge then makes several recommendations for intersex treatment in the future, including that clear guidelines be drafted for the medical profession, and that the courts, and not the infant's parents, make the decision to intervene surgically.

The legislature has a limited involvement in New Zealand's treaty-making process. **Thomas Riley** examines its current mechanisms of treaty examination. Riley finds that the current process does not function as it was envisioned when it was instituted 20 years ago: parliamentary input into the process serves as little more than rubber stamping of executive decision-making.[16] Riley argues that significant changes may be necessary in the future to ensure an appropriate constitutional balance is struck and the current democratic deficit in treaty-making is remedied.

The Islamic State of Iraq and Syria (ISIS) has dominated public consciousness and political discourse for much of this decade. **Lourenzo Fernandez** acknowledges that ISIS and its members have committed, and continue to commit, heinous international crimes in Iraq and Syria. Fernandez then evaluates the grounds for prosecuting these crimes and the potential forums for such prosecutions. Fernandez concludes that the establishment of an ad hoc tribunal would be the most effective means to hold ISIS accountable.

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12 The University of Canterbury, for example, has launched the New Zealand Public Interest Project, which enables its students, operating under the supervision of a board, to investigate issues "[they] think are in the public good, whatever they may be", such as test cases, class actions and cases involving miscarriages of justice. See The New Zealand Public Interest Project <www.nzpip.nz>. See also Myles Hume and Ashleigh Stewart "Panel to investigate suspected miscarriages of justice" (18 May 2015) Stuff <www.stuff.co.nz>.

13 Organisation Intersex International Australia "On the number of intersex people" (28 September 2013); and Anne Fausto-Sterling *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books, New York, 2000) at 53.

14 See generally Anne Tamar-Mattis "Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants" (2006) 21 Berkeley J Gender L & Just 59.

15 See Julie A Greenberg *Intersexuality and the Law: Why Sex Matters* (New York University Press, New York, 2012) at 128.

16 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 348.

Housing affordability in Auckland is an issue that disproportionately affects Pacific people. **Lola Gorrell** considers whether the Housing Accords and Special Housing Areas Act 2013 is an effective way of improving housing affordability for Pacific people in Auckland. Gorrell argues that Auckland Council's interpretation and application of the affordable housing provisions in the Act has been significantly flawed.[17] She then makes three suggestions to improve housing affordability for Pacific people in Auckland: social housing reform; extending the capital gains tax; and incorporating a social right to housing in the Bill of Rights Act 1990.

The current laws related to end-of-life choice in New Zealand and the United Kingdom are such that one may refuse life-saving treatment, have life-sustaining treatment withdrawn and/or have painkillers administered with the effect of hastening death. However, it is not legal to provide assisted dying. **Hannah Yang** explores the two philosophical doctrines that underpin this position: the act/omission distinction; and the doctrine of double effect. Yang suggests that, on closer examination, neither doctrine is ethically sound and the current state of the law on end-of-life choices is not adequately justified from a moral standpoint.

In 2014, the legislature inserted a new section into the Sentencing Act 2002. Section 24A requires that cases before the District Court be adjourned for restorative justice assessment where appropriate. **Ling Ye** argues that the assessment is inappropriate in domestic violence cases. Ye argues that the restorative justice framework, as it currently stands, fails to effectively address domestic violence-related policy issues. Ye concludes that, unless the current model is improved, the legislature should add a proviso to s 24A excluding the use of restorative justice for domestic violence cases.

Regina (Miller) v Secretary of State for Exiting the European Union was a seminal case in Brexit litigation ruling that constitutional conventions are non-justiciable.[18] **Aaron Kirkpatrick** argues that the courts' inability to remedy breaches of a convention presents a flaw in the constitutional frameworks of both the United Kingdom and New Zealand. With regards to New Zealand, Kirkpatrick advocates for the adoption of a supreme constitution, which would codify specific conventions and make them enforceable in the courts.

Child relocation is widely seen as one of the most controversial and challenging dilemmas in family law. In the final article, **Elizabeth Murray** proposes that courts should consider as a solution that the non-applicant parent relocates alongside the child and the applicant parent. Murray evaluates both theoretical and legal grounds for this solution. She concludes that a failure to consider the solution is a failure to take into account the best interests of the child, which the law considers to be of paramount importance.

It remains for me to thank the team behind this issue. I would first like to thank the Editors-in-Chief, Dilshen Dahanayake and Lewis Hebden, for their expert management of the editorial team. Being an effective Editor-in-Chief takes courageous leadership, fine technical skill and a commitment to advancing the purposes of the Journal, and you have demonstrated each of these qualities many times over. As always, I would also like to thank the Editorial Board and the Academic Review Board for demonstrating such generosity with their time and expertise, and enthusiasm for social justice. The Journal continues to gather "bright-eyed idealists" to keep the public interest flame burning. Together, we strive not only to provide a platform for quality scholarship, but also to give a higher profile to public interest issues that might otherwise fall under the radar.

17 See Housing Accords and Special Housing Areas Act 2013, ss 14–15. See also s 4.

18 *Regina (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.