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EDITOR'S NOTE

The Public Interest Law Paper

JAYDEN HOUGHTON*

Equal Justice Project (EJP) is a non-partisan pro bono charity that applies law students' legal knowledge and training to promote social equality, inclusivity, and access to justice in our local and wider communities.[1] EJP is comprised of five teams: Access, Advocacy, Community, Communications and Pro Bono. The Pro Bono Team provides legal research support to practitioners, academics and community groups that share EJP's values and goals. In doing so, the Team provides students with the opportunity to gain practical legal experience, and actively contribute to cases and submissions.

In February, I invited the Team to research and write a paper on the state of public interest law in New Zealand for this Journal. The Team's managers, Rosa Gavey and Iutita Evans, accepted that invitation and led their team of about 20 students to research and produce the paper.

The project brief included five research streams: a history of public interest law initiatives in New Zealand; pro bono work in law firms; pro bono work in governmental and community organisations; pro bono activities at law schools; and future directions. By mid-year, the Team had produced a draft paper. It was at this point that we discussed securing ethics approval to interview law firms and community law centres (CLCs) for their opinions on the state of public interest law in New Zealand. We agreed that this would contribute significant new insights. Shortly after, we secured ethics approval from the University of Auckland Human Participants Ethics Committee, and the Team formed a subgroup to conduct the interviews. Invitations to participate were sent to most of the large and mid-sized law firms throughout the country, as well as most of the CLCs. 10 law firms and three CLCs participated.[2]

The interviewers designed a list of questions to take into each interview. The questions for each law firm sought to understand: how the firm decided what pro bono and public

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* Rereahu Maniapoto. Lecturer, Faculty of Law, University of Auckland. Jayden has written the Editor's Note for this issue on behalf of all members of the editorial team.

1 Equal Justice Project "Our Mission" <www.equaljusticeproject.co.nz>.

2 AJ Park, Bell Gully, Dentons Kensington Swan, DLA Piper, Duncan Cotterill, Kahui Legal, Lane Neave, Meredith Connell, MinterEllisonRuddWatts and Simpson Grierson; and Auckland Community Law Centre, Rotorua District Community Law Centre, and Porirua and Kapiti Community Law Centre.

interest law projects to take on; whether the firm had a formal committee to manage the pro bono work conducted by the firm; whether lawyers at the firm had the opportunity to carry out pro bono work in their individual capacities separate from firm initiatives; whether the firm had expectations for the type and amount of pro bono work that lawyers at the firm took on; how pro bono work at the firm was funded; and challenges faced by the firm in carrying out pro bono work. The questions for each CLC sought to understand: the CLC's experience working with law firms which engaged with it in a pro bono capacity; the type of work it typically undertook; who decided what work to take on; whether the CLC referred pro bono clients to law firms (and, if so, how it decided which clients to refer); the CLC's limitations; and how law firms could better support the CLC's needs. Firms and CLCs were also asked what they considered to be the key challenges facing pro bono work in New Zealand. The interviewers took these questions as a starting point, whilst being open to exploring other ideas arising in the course of the interview.

Following the interviews, the Team analysed the interview transcripts and incorporated their findings into the paper. Once the paper was accepted for publication in this Journal, the Team worked with the Editors-in-Chief to further refine the paper. The resultant article, titled "The State of Public Interest Law in New Zealand"—a subtle nod to a prior article on related issues[3]—is the first of nine articles in this year's volume. The other articles explore a range of other important public interest issues.

Katherine Werry argues that the government has failed to provide adequate support to address Pacific language loss within its communities. When looking at the statistics, the proportion of New Zealand-born Pasifika who can speak Pacific languages is decreasing in spite of increasing population numbers.[4] Werry argues that such loss can be attributed to the relegation of minority languages to the private sphere, which absolves the state from any responsibility to preserve its use. She also contends that when viewed through a Critical Race Theory lens, the current legislative and rights frameworks are ineffective at protecting minority languages in any meaningful way. Werry urges the government to take affirmative action in partnership with Pasifika communities.

Driverless vehicles are becoming increasingly common as a form of transportation, yet the current approach to criminal liability in situations involving driverless vehicles is outdated. Keeha Oh argues that the Land Transport Act 1988 must be amended to reflect this new reality. Oh sets out the current legislative framework for criminal vehicular liability, which she argues has the potential for misapplication to driverless vehicle passengers. Oh considers whether, and in what circumstances, driverless vehicle manufacturers should be held criminally liable. Finally, Oh makes recommendations for the new criminal liability framework, favouring an emphasis on censure augmented by publicity orders and increased fines.

Transability is the overwhelming lifelong desire of healthy people to become disabled, often through the amputation of one or more limbs.[5] Persons with transability elect to live

3 Sam Bookman "Providing Oxygen for the Flames? The State of Public Interest Litigation in New Zealand" (2013) 25 NZULR 442.

4 Galumalemana Hunkin-Tuiletufuga "Pasefika Languages and Pasefika Identities: Contemporary and Future Challenges" in Cluny Macpherson, Paul Spoonley and Melani Anae (eds) *Tangata O Te Moana Nui: The Evolving Identities of Pacific Peoples in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 2001) 196 at 197.

5 Michael B First "Desire for amputation of a limb: paraphilia, psychosis, or a new type of identity disorder" (2004) 34 Psychological Medicine 1 at 1.

a life of disability, rather than having that life imposed on them by happenstance.[6] **Liam Dalton** examines transability and the challenges that it poses for our current understanding of and approaches to disability. Dalton notes that transability is being increasingly conceptualised by the medical profession as a form of identity disorder. Dalton argues that, whilst New Zealand law is currently capable of accommodating disabling surgeries for the alleviation of psychological suffering, it does not provide any legally enforceable access rights to healthcare. Dalton concludes by acknowledging the role of disorders such as transability in reframing our understanding of disability and re-evaluating the efficacy of health policies.

Holding costs are costs such as mortgage interest, rates, insurance, repairs, maintenance and other non-capital expenditure that are incurred as part of land ownership.[7] The Inland Revenue Department (IRD) currently denies deductions for holding costs on the basis that they are private in nature. **Jillin Yan** challenges the IRD's approach and considers the extent to which holding costs are deductible where they relate to land that is privately used but taxable on sale. Yan argues that the Income Tax Act 2007 offers three possible interpretations: that holding costs are fully deductible during periods of private use; that holding costs are not deductible for periods of private use; and that holding costs are partly deductible for periods of private use based on an apportionment between the gain on sale and the value of the private benefit. Yan concludes that, in the absence of a workable and accurate method of apportionment, holding costs should be fully deductible. In any case, Yan encourages landowners to challenge IRD's approach and seek judicial clarification on the matter.

In 2018, the Customs and Excise Act 2018 (CEA) was enacted to provide additional guidance on search and investigatory powers in relation to technological devices. One of the new provisions, s 228, confers a statutory power on customs officers to search electronic devices without a warrant. **Winnie Chau** argues that s 228 fails to strike an appropriate balance between the competing values of privacy and law enforcement. She argues that inconsistencies between the CEA and statutes protecting privacy, such as the Privacy Act 2020 and the New Zealand Bill of Rights Act 1990, reveal a lack of privacy safeguards in the CEA. To address privacy concerns, Chau recommends the insertion of a proportionality principle and restricting the permissible scope of electronic searches.

Katherine Werry, in her second article in this issue, argues that New Zealand should adopt stronger regulations against hate speech. Werry reviews feminist thinking on the silencing effect of pornography on women. Applying that thinking to a new context, Werry then explores the silencing effect of hate speech on minorities. Werry contends that: hate speech can silence; hate speech does silence; and the silencing argument provides a strong justification for greater legislative regulation of hate speech in New Zealand. Werry suggests that the imminent review of the Human Rights Act 1993 provides a timely opportunity to reform New Zealand's hate speech laws.

In *The State of Western Australia v Liyange*, the Western Australia Supreme Court and the Court of Appeal found that the results from two intimate partner violence risk assessment tools—the Danger Assessment Scale and Abusive Behaviour Inventory—

6 Robin MacKenzie and Stephen Cox "Transableism, disability and paternalism in public health ethics: taxonomies, identity disorders and persistent unexplained physical symptoms" (2007) 2 International Journal of Law in Context 363 at 368.

7 Inland Revenue *Holding costs for privately used land that is taxable on sale: A tax policy consultation document* (October 2019) at [1.3].

were inadmissible as expert opinion evidence.[8] Despite compelling evidence to support Ms Liyange's claim of self-defence, the Supreme Court of Western Australia found that the tools were not scientifically reliable as expert evidence, while the Court of Appeal, though acknowledging their reliability, found other factors that rendered the tools inadmissible. In her article, **Rebecca Scoggins** argues that the tools used were scientifically reliable and valid and, hence, the evidence should have been admissible. Scoggins contends that the reasons outlined by the Australian courts were inadequate and addresses each court's concerns. Scoggins suggests that an alternative approach to the admissibility of such tools as evidence should be adopted if a similar case emerges in New Zealand. Finally, Scoggins emphasises the significance of these tools in assisting the courts to achieve a better understanding of intimate partner violence and facilitating informed decision-making in the criminal justice system.

In our final article, **Jessica Macdonald** and **Madeleine Story** argue that the Adoption Act 1955 must be reformed to protect tamariki, whakapapa and tikanga in the adoption regime, and to better reflect the bicultural identity of Aotearoa New Zealand. A recent study on the effects of the adoption regime reveals that many adopted persons feel a strong sense of disconnect from their cultural identities.[9] Macdonald and Story argue that this severance of whakapapa is the product of the Act's flawed adoption process. The authors present proposals to better align the Act with other family law legislation and the Māori view of parenting, and to remove secrecy in the adoption process. Importantly, the article puts the Adoption Act 1955 and its shortcomings into focus at a time when the legislature is contemplating its reform.

It remains for me to thank the team responsible for this issue. The Editors-in-Chief, Althea Domenica Tarrosa and Ana Kathrin (Kyra) Maquiso, have been exceptional leaders of the editorial team. Althea and Kyra are two of the most detail-oriented, passionate and committed editors I have worked with. In particular, I would like to acknowledge their commitment to refining EJP's article. It has been a true pleasure to work with them on this issue.

I would also like to thank the editors on the Editorial Board, who have worked tremendously hard to get the little details right, as well as the academics on the Academic Review Board, who have generously contributed their time and expertise to our research enterprise. The Public Interest Law Journal of New Zealand as a peer reviewed journal would not be able to maintain its high standards without the support of leading law academics across the country. The Journal routinely receives between 50 and 100 submissions for each issue, on a broad range of topics. No editor has expertise across so many areas. Peer review by subject area specialists ensures that only scholarship that makes an original and important contribution to the literature goes to print. Thank you for your continued support.

8 *The State of Western Australia v Liyanage* [2016] WASC 12 at [80]; and *Liyanage v Western Australia* [2017] WASCA 112, (2017) 51 WAR 359 at [159].

9 Te Aniwa Hurihanganui "How closed adoption robbed Māori children of their identity" (14 July 2019) Radio New Zealand <www.rnz.co.nz>.