

# *New Zealand Journal of Public and International Law*



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THIS ISSUE INCLUDES CONTRIBUTIONS BY

Jonathan Boston

Sarah Kerkin

Timothy Endicott

Dawn Oliver

Mark Hickford

Sir Geoffrey Palmer

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



**VICTORIA**  
UNIVERSITY OF WELLINGTON

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# FOREWORD: ADVANCING BETTER GOVERNMENT THROUGH LEGISLATIVE STEWARDSHIP

*Dean Knight,\* Alberto Costi<sup>†</sup> and Edward Clark<sup>‡</sup>*

This issue draws together a number of contributions originally presented at Victoria's conference on legislative stewardship, as well as two annual lectures delivered at Victoria's Faculty of Law.

The issue opens with the Robin Cooke Lecture, delivered by Professor Timothy Endicott from Oxford University in December 2016. He looks at the Brexit litigation in the United Kingdom and reflects on the nature of the royal prerogative and public power generally. Professor Endicott interrogates the first instance decision of the High Court, *R (Miller) v Secretary of State for Exiting the European Union*, in an address delivered after the appeal to the Supreme Court was heard but before the decision was delivered. He suggests the High Court's decision reflects a negative conception of public power, that is, government institutions have no lawful power except that power conferred on them by statute. He argues for the reverse: government institutions should be able to lawfully do anything that serves the purposes for which they exist, unless prohibited by law. He concludes with a short epilogue on the United Kingdom Supreme Court's decision and its implications.

The Borrin Lecture follows, delivered by Professor Dawn Oliver from University College London in November 2016. Professor Oliver's address explores the nature of the stewardship obligations in the United Kingdom and New Zealand and stands as a sequel to the legislative stewardship conference from the month earlier. She reflects on the principles of stewardship – especially the idea of constitutional guardianship – and their ability to promote the legitimacy of government and public confidence in liberal democracy.

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‡ Lecturer, Faculty of Law; Associate, New Zealand Centre for Public Law; Victoria University of Wellington; conference committee member, Advancing Better Government Through Legislative Stewardship conference.



The remaining articles arise from a conference on legislative stewardship hosted by Victoria's New Zealand Centre for Public Law and Institute of Governance and Policy Studies, with the support from the University's Advancing Better Government strategic theme steering group. The State Sector Act 1988 seeks to foster a culture of stewardship; s 32 charges chief executives – and, through them, the public service – with stewardship of, amongst other things, legislation. The conference brought together scholars, ministers, officials and practitioners to explore this nascent concept and its implications for the legislative endeavour. What is stewardship? How can or should it be delivered? What does it mean in practice, especially when legislating or regulating? How do we design legislative and regulatory systems so that we can protect the interests of the future, including those of our future selves and future generations? In other words, how do we govern for the future? The articles presented here confront some of those issues.

Professor Mark Hickford seeks to locate "stewardship" within a much broader setting of legal and non-legal phenomena. He unpicks the notion of stewardship, identifying five different characteristics: organisational capability; pro-active attentiveness; dynamic systemic awareness; historical and future mindfulness; and self-aware consciousness.

Dr Sarah Kerkin explores the issue of legitimacy in the exercise of public power. She promotes the idea of a "legitimacy triangle" – bringing together ideas of transparency, accountability and participation – and argues this should be used to assist in policy and legislative design. She then looks at the response to the Canterbury earthquakes through this lens of legitimacy, concluding that the application of legitimacy-fostering policies could have improved the response and recovery from the public's point of view.

Professor Jonathan Boston tackles the bias of democratic policy-making institutions towards preferring short-term interests over long-term interests. He explores the causes and consequences of this short-term obsession and suggests a variety of reforms which might shift the focus of policy-makers towards the long-term impacts of their policies.

Finally, Sir Geoffrey Palmer turns to Parliament's function of scrutinising legislative proposals, from both historical and contemporary perspectives. He looks at the abolition of the upper house, the Legislative Council, in 1950 and subsequent attempts to revive it, including recent proposals. However, he argues against its reinstatement, suggesting that its legislative scrutiny role could and should be delivered by an improved select committee process.

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