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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Shireen Daft
EmpowerNZ
Carwyn Jones
Dean Knight and Julia Whaipooti
Cheryl Saunders
Anna-Marie Skellern
Pádraig McAuliffe
Rt Hon Jim McLay

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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FOREWORD

Claudia Geiringer and Rayner Thwaites

This issue of the New Zealand Journal of Public and International Law is in three parts.

Part one consists of four peer-reviewed articles. The first two are on domestic law themes – administrative law and MMP inter-party negotiations respectively.

Professor Cheryl Saunders' article began life in late 2011 as Victoria University of Wellington Law School's premiere annual public lecture, the Robin Cooke lecture. Professor Saunders' theme is the growing divergence between the administrative law doctrine of Australia and New Zealand. With an emphasis on Australian differentiation from the common law family of the Commonwealth, she argues against any characterisation of that departure as an "aberration". She explains how, to the contrary, contemporary Australian administrative law doctrine constitutes a plausible response to Australian conditions – including, but not limited to, the Australian Constitution. Evaluating the resultant position, her assessment is that the highly legalistic style of analysis that prevails in Australia has served supporters of judicial checks and balances reasonably well, but that it needs considerable development to address contemporary pathologies of government adequately. She closes with reflections on the implications of her study for "easy reference" to foreign jurisdictions within the common law family of the Commonwealth.

Judge Anna Skellern's article presents an in-depth case study of inter-party negotiations over legislative reform under the Mixed Member Proportional electoral system. The article shows how pressure on the National Party to achieve legislative reform on climate change in advance of the 2009 Copenhagen conference created a window of opportunity for one of National's junior support partners, the Māori party, to achieve extensive policy gains in exchange for its support for the Bill. Those gains included the insertion of a specific Treaty of Waitangi clause in the legislation but, additionally, agreement to a broad range of policy initiatives going well beyond the content of the particular legislation. The article is of special relevance to those interested in the workings of coalition and minority government under a proportionality-based electoral system. It also contains interesting insights on the subject of legislative "Treaty clauses" more generally, as well as of course on the climate change debate.

The second pair of articles relates to aspects of international criminal justice. Shireen Daft examines the issue of corporate involvement in large scale atrocities. She argues that such action by corporates is best addressed through what she calls a "complementary" approach, whereby corporations are tried in the same forum as the primary perpetrators, by way of doctrines of

complicity. In her view this approach (which she contrasts with attempts to address such behaviour within a distinct corporate accountability framework) simultaneously enables both a more consistent and a more contextually sensitive approach to human rights violations. The article also addresses the role the United Nations Security Council could play in addressing corporate complicity in human rights atrocities.

Padraig McAuliffe's article takes as its starting point a growing scholarly literature that casts doubt on the credibility of deterrence as a rationale for international criminal trials. In the face of this sceptical literature, the author addresses the question of what might explain the continued invocation of the deterrence rationale by international criminal law advocates, practitioners and, in some cases, scholars. He suggests that the "heroic" agenda of the human rights and transitional justice movements, and the understandable desire of participants to see human rights abuses punished, serve to privilege rhetoric over reasoned appraisal and to exaggerate the capabilities of law to effect societal change. He also suggests that this human rights "messianism" has sometimes resulted in sloppy methodological approaches to the study of the impact of international criminal trials.

Part two is short, and consists of a book review by Carwyn Jones – of Kirsty Gover *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, Oxford, 2010).

Part three is something of a departure for the journal. It consists of three outputs associated with the EmpowerNZ youth workshop, which was run in August 2012 by the McGuinness Institute.

The EmpowerNZ workshop unfolded against the backdrop of the Government's on-going constitutional review, which is supposed to involve a "conversation" with the public about New Zealand's constitutional arrangements, led by a Government-appointed Constitutional Advisory Panel. Against that background, the McGuinness Institute decided to organise a workshop of 50 youth participants who would come together over two days to discuss New Zealand's constitutional arrangements and to draft their own constitution. The event is, as far as we are aware, the first of its kind in New Zealand. From the perspective of this journal, it is of interest not so much for the potential of the final output to provide a model for constitutional drafting in the future, but as an innovative experiment in civics education and constitutional engagement. For readers who are interested to learn more about the event, detailed information is available at: http://empowernz.co.nz/.

The first output from the workshop that is published here is the keynote address given to the youth participants by New Zealand's Ambassador and Permanent Representative to the United Nations, Hon Jim McLay. From a constitutional perspective, perhaps the particular interest of this lecture is in the middle sections. There, McLay recounts "what really happened" during the constitutional impasse that unfolded in the wake of the 1984 election, when outgoing Prime Minister Rt Hon Robert Muldoon initially refused to follow the advice of the incoming Government and

devalue the dollar. McLay – then outgoing Deputy Prime Minister, Attorney-General and Minister of Justice – played a critical role in forcing the hand of Muldoon and thereby averting a constitutional crisis. McLay's speech to the EmpowerNZ workshop details the manner in which the events unfolded. In doing so, he provides insights into an important "moment" in New Zealand's constitutional history – one that is taught in every law school in New Zealand and that stimulated both the crystallisation of an important constitutional convention (relating to the responsibilities of "caretaker governments") and legislative reform to provide for a smoother transition between regimes.

The next two outputs consist, in reverse order, of the Draft Constitution itself and of a commentary on it co-written for the journal by the workshop's Lead Facilitator, Dean Knight, and by one of the youth participants, Julia Whaipooti. The commentary explains how the workshop unfolded and reflects on a number of aspects of the process and outcome. The Draft Constitution itself is, unsurprisingly, an imperfect document – it was, after all, drafted over only two days. But it is of interest for a number of innovations that it contains,[1] as well as for what it says more generally about the preoccupations and concerns of young New Zealanders.

The decision to publish the documents contained in Part three expresses the view of the editorial committee that among its functions, the journal should serve as a forum of public record for developments and events in New Zealand public law that might otherwise be overlooked. And it speaks to the particular interest of the journal, housed as it is within a university faculty, in the engagement of young New Zealanders with public law.

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1 These include the list of constitutional principles in the Preamble, and the use of graphic devices to make the constitution accessible to a broader public.