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*Reconstituting the Constitution Conference*

## Welcome to the second issue of Public Voices for 2010

It has been an eventful and productive second half of the year for the Centre for Public Law. There have been some changes regarding our people: **GEOFF MCLAY** was appointed Professor and will be a Law Commissioner for the next five years. We are also delighted that **SIR GEOFFREY PALMER** will be working at the Faculty next year and contributing to the Centre for Public Law.

**DEAN KNIGHT** will be spending 2011 completing a doctorate on “Vigilance and Restraint: Standards of Review in Administrative Law” at the London School of Economics and

Political Science. Dean has just concluded a successful conference for which he was a key organiser, **Critic & Conscience?**, which explored the role of those who act as the critics and conscience of society.

Speakers included Rt Hon Sir Edmund Thomas and Professor Kendall Thomas, Nash Professor of Law, Director of the Center for the Study of Law and Culture, Columbia University, who delivered a paper entitled “Democracy and Disgust: Political Criticism and Critical Politics in the Age of Political Moralism.”



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# ACTIVITIES UPDATE



Alberto Costi



Joanna Mossop

In our first issue we introduced you to new staff members. They have settled in well and their current projects follow:

**MARK BENNETT** has a number of research projects on public law topics in progress. He is finishing his doctorate on the concept of the rule of law, through the University of Toronto. With Joel Colon-Rios, he is beginning a research project on conceptions of democracy in New Zealand constitutional theory, and is working on a project on democracy, participation, and the rule of law in regulation as part of the Regulatory Reform Project funded by the NZ Law Foundation.

**JOEL COLON-RIOS'** research explores the relationship about law and democracy. He is currently working with Mark Bennett on a project that analyses conceptions of democracy present in New Zealand's constitutional scholarship and public discourse. In addition of his ongoing research on the theory of constituent power, Joel is also working on a book manuscript that examines the conditions that must be met for a constitutional regime to be considered legitimate from a democratic perspective.

**CAROLINE SAWYER'S** recent work has focused on issues of citizenship and statelessness. She is editor, with Brad K. Blitz, of *Statelessness in the European Union*, a comparative study of the lives of non-nationals living without status in four jurisdictions within the framework of the European Union (in press, CUP). Caroline is giving a paper on "The Loss of Birthright Citizenship in New Zealand" to the Law and Society Association of Australia and New Zealand in December 2010 and has been invited to speak in the Netherlands on deprivation of citizenship in the UK in January 2011.

Other Faculty are also busy working on other public law projects and research. These include:

**ALBERTO COSTI** has edited an issue of the *VUWLR* dedicated to international humanitarian law, which has been well received overseas. He is in the process of completing the second edition of *The Laws of New Zealand – International Law: Principles* (LexisNexis, Wellington, forthcoming

2011) and he acts as editor-in-chief jointly with Professor Scott Davidson for *International Law – A New Zealand Perspective* (LexisNexis, Wellington, forthcoming 2011).

Hoping to complete both projects early in the new year, Alberto then intends to embark on a comprehensive study of the work of hybrid tribunals (including the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia), reviewing the contribution of these mixed international-domestic tribunals to transitional justice. Alberto is also very much involved in contributing to the research environment at the Law School. As Vice-President of the New Zealand Association for Comparative Law and Secretary-General of the International Law Association New Zealand Branch, he organises every year a number of public lectures, many of them in conjunction with the Centre for Public Law. He is currently on the organising committee of the 2011 Annual Meeting of ANZSIL in Canberra.

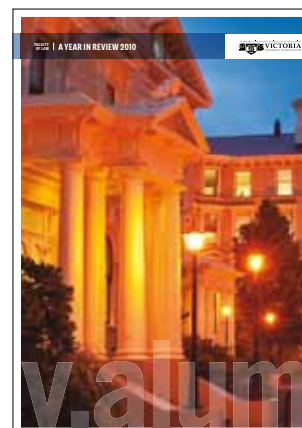
**JOANNA MOSSOP** is a senior lecturer specialising in public international law, with a focus on the law of the sea, international environmental law, and Antarctica. Since joining the faculty in 2003, Joanna has taught in these areas, including developing a new course in Law of the Sea which is now a permanent offering in the LLB programme.

Joanna's research interests cover a range of issues including maritime security. She recently co-edited *Maritime Security: Law and Policy Perspectives from Australia and New Zealand* (Routledge, 2010) which was the result of a research group consisting of 12 scholars from Australia and New Zealand. In addition, Joanna has been a member of a maritime security study group of the Council for Security Cooperation in Asia Pacific, and appeared as an invited expert at two recent ASEAN Intersessional Meetings on maritime security. Other areas of interest include whaling in the Southern Ocean, on which she has spoken and written in several fora. Currently she is working on several projects, including a paper on how to achieve integration in international oceans governance, adaptive management as a

concept in international fisheries organisations, the implementation of international maritime security treaties into NZ law, and how whaling affects maritime security in Antarctica. With Alberto Costi, she is also currently coaching a team that will participate in the 9th Red Cross International Humanitarian Law Moot in Hong Kong in March 2011.

**PETRA BUTLER'S** research for next year will be mainly on broader Bill of Rights issues. One project will concern disability discrimination in light of the Convention on the Rights of Persons with Disabilities and the other will be on the cross-fertilisation between the UK Human Rights Act and the New Zealand Bill of Rights Act.

A number of Faculty members are involved in an exciting project funded by the NZ Law Foundation, the Regulatory Reform Project – see [www.victoria.ac.nz/law/PROJECTS/Regulatory\\_Reform.aspx](http://www.victoria.ac.nz/law/PROJECTS/Regulatory_Reform.aspx).



Each year Victoria's Faculty of Law produces *V.Alum*, its annual report. The Centre for Public Law's events featured within it are:

- ☐ Geoff McLay
- ☐ The Urgency Project
- ☐ Reconstituting the Constitution Conference
- ☐ Celebrating 20 years of the Bill of Rights

The relevant pages from *V.Alum* follow.

**Merry Christmas and a Happy New Year.**

**Dr Petra Butler**  
Editor

# Geoff McLay - commissioned, accomplished

Professor Geoff McLay

Within one week in 2010, Geoff McLay was appointed Professor and then, a Law Commissioner.

The University has given Professor McLay a leave of absence for five years. Dean of Law, Professor Tony Smith says: "It is a mark of the esteem in which Geoff is held. He has made an outstanding contribution to the Faculty. We are sure the Law Commission will enjoy the same energy and commitment."

His specialist areas include torts, crown liability, intellectual property, and legal history. He was a major contributor to the recently published New Zealand *Law Style Guide* and has been a contributor to the Lost Cases Project, both funded by the New Zealand Law Foundation. His recent research on Government liability has also been supported by the New Zealand Law Foundation, as its 2006 International Research Fellow.

Professor McLay began his legal career as a student at Victoria in 1987. He became a staff member in 1995, after completing a LLM at Michigan. He was awarded a doctorate from Michigan in 2008 and was promoted to Professor in October this year.

At the Law Commission, he will be working for an independent Crown entity. It is funded by government and reviews areas of law that need updating, reforming or developing.

The Law Commission's outgoing President, Sir Geoffrey Palmer (also a Victoria law alumnus and former Professor), says: "Professor McLay is assured of a warm welcome when he arrives at the Law Commission.

Academic lawyers do well here. There is a lot of work to do."

Shortly after his appointment to the Law Commission was made public, Professor McLay sent an eloquent email to the Faculty:

"I have always been extremely proud of the extraordinary job that our Law School does. I have been privileged to study, teach and visit some of the "best" law schools in the world – and I admire them greatly. But I have always told



the people there that we have students to rival their very best, and faculty and support staff that are extraordinary. I am amazed pretty much every day by what my colleagues do. And without taking away from what has been done

of strength that people care. The nicest thing about my promotion this month was that people from my home told me that I had done a good job. In case any of you are in doubt, you all do a great job.

*“ I am amazed pretty much every day by what my colleagues do.... We have very little resources compared to many places, but none of you ever makes that an excuse for doing less than you ought. You make a real contribution to our little country and our wide world. And most importantly you all believe in helping people. ”*

Professor Geoff McLay

before, the staff seminars of last week and this week tell us that the best is yet to come. We have very few resources compared to many places, but none of you ever makes that an excuse for doing less than you ought. You make a real contribution to our little country and our wide world. And most importantly you all believe in helping people. When people tell me about the legendary arguments of yore at the faculty over teaching I always tell them it is sign

“This Law School has been my home from just about the first LAWS 101 with Bill Hastings – I am very lucky that some of the people in that class remain my very best friends (including the learned judge). That is now 22 years ago. It has always been an honour and privilege to have been a student here and then a colleague of all of you, and of those who have gone on to other things.

“What I have most enjoyed is the sheer variety of people (academics, student, student admin, support staff) who work here, study here and otherwise pass through. There is nothing I would rather do than stand in front of our torts class. But the opportunity that I have accepted was not one which I could refuse. It is a chance to learn from some of the best legal people in New Zealand and to give a little bit back to the wider community.

“To change a phrase well known around these parts, *amicitia magis auro desideranda.*”

# The Urgency Project



The Urgency Project is examining the use of urgency by the New Zealand House of Representatives. The project is conducted under the auspices of the New Zealand Centre for Public Law and the Rule of Law Committee of the New Zealand Law Society. The principal funder is the New Zealand Law Foundation.

In essence, urgency enables the government to extend the sitting hours of the House and to prioritise certain items of business to be conducted within those hours. As such, it is an extremely important tool for governments seeking to progress their legislative programmes.

On the other hand, urgency also enables governments to dispense with the various stand-down periods between the different stages of the legislative process and, indeed, to dispense with the select committee stage in its entirety. The use of urgency, therefore, raises issues of considerable significance for the quality and integrity of New Zealand's law-making processes. Urgency motions can be a means to foreshorten democratic deliberation – both amongst parliamentarians and with the wider community.

For these reasons, the use of urgency is an issue of major public importance with significant implications for the democratic foundations of

the New Zealand constitution and for the law-making function of Parliament. Nevertheless, there has been surprisingly little in the way of in-depth study of the use of urgency within New Zealand.

The Urgency Project aims to fill the gap in our knowledge of this important topic by providing a contextualised account of the use of urgency by the New Zealand Parliament. The Project is identifying the trends in the use of urgency, commenting on the constitutional implications of the use of such powers, and providing suggestions for reform of the regulatory matrix in which they occur.

Questions the Project is particularly concerned with include:

- + What factors motivate the use of urgency?
- + What sorts of uses of urgency are troubling from a constitutional or democratic legitimacy perspective, and in what circumstances?
- + What constraints exist on the use of urgency, and how robust is the regulatory framework that governs it?
- + What effect have multi-party governments had on the use of urgency? Have they constrained governments from using urgency?

The research team consists of Claudia Geiringer (Senior Lecturer in Law at Victoria University of Wellington), Polly Higbee (Research Fellow at the New Zealand Centre for Public Law) and Dr Elizabeth McLeay (adjunct Professor of Political Science at Victoria University of Wellington, and Visiting Senior Research Fellow at the New Zealand Centre for Public Law).

At the heart of the project are two research exercises. First, databases have been created which document every use of urgency by the New Zealand House of Representatives between the years 1987-2009, and the data produced from them is being analysed by the research team. Secondly, interviews have been conducted with 18 current and previous members of Parliament and senior parliamentary officials on their experience and perceptions of the use of urgency. The interviewees have had careers that have spanned the full 23-year period under study and beyond, and have fulfilled a number of parliamentary roles.

In November, the research team held an expert roundtable with a range of senior academics, legal practitioners and officials, to discuss some of the preliminary results being produced by the project. Final results of the study will be made available during the course of 2011 by way of an NZCPL occasional paper and public lecture.

# Taking the pulse – a constitutional checkup



Father Frank Brennan



## RECONSTITUTING THE CONSTITUTION CONFERENCE

**New Zealand Centre for Public Law in association with the Institute of Policy Studies**

2-3 September 2010

Wellington, New Zealand

IT HAD BEEN NEARLY A DECADE since academics, officials, business leaders and representatives of civil society gathered at Parliament for a major conference on ‘Building the Constitution’.

The aim of the 2000 conference was to bring together a representative cross-section of New Zealand society, including people with a range of relevant expertise, to explore the foundations of the constitution, debate how it might be developed, and consider some of the critical issues that would need to be resolved if there was to be a new constitutional ‘settlement’.

At that time, New Zealand was undergoing a significant transition in terms of its identity and its sense of independence, and various long-standing political norms were being challenged. Debates about the role of the Treaty of Waitangi, our relationship with the international community and our identity within that community had led many to call for a written constitution of New Zealand.

The 2000 conference did not produce a roadmap for future constitutional development and many who took part regretted that. However, it did identify issues that would need to be addressed if major constitutional change were to be attempted.

The purpose of the 2010 conference was to build on the 2000 conference and discuss relevant issues that have arisen over the past decade.

Domestic developments, such as the creation of the Supreme Court, the passage of the Foreshore and Seabed Act 2004, New Zealand’s involvement in the international debate over climate change, the controversy over the regulation of electoral finance, and the continuing debate over the design of the electoral system (including the merits or otherwise of proportional representation and separate Māori representation), have all had an impact on New Zealand’s legal and political culture.

Various recent events, too, highlight that constitutional issues are far from settled. These include the discussion of the appropriateness of the Chief Justice’s comments in regard to offending and prison reform, comments by the Prime Minister favouring a fixed four-year parliamentary term, the government’s decision

to hold a further series of referenda on the electoral system, and the reform of Auckland’s governance.

Equally important, the National and Māori Parties have agreed to establish a group to review various constitutional matters and it should be possible for the conference to contribute in various ways to this group’s work programme.

Quite apart from this, calls for a conversation on the constitution have come from beyond New Zealand in the form of international treaties on indigenous rights and important environmental issues such as climate change. The UN Committee for the Elimination of Racial Discrimination (CERD), for example, noted in 2007 that New Zealand lacks a constitution to protect indigenous and other human rights, and stressed the need for an ongoing ‘constitutional conversation’ aimed at addressing the status of the Treaty of Waitangi in New Zealand law.

Given the significant developments since 2000, together with the range of constitutional issues currently being debated (and/or soon to be debated) in the public domain, there is a strong case for a serious public discussion on the future of New Zealand’s constitution. This conference provided such an opportunity. Moreover, the focus of the event was not only

Rt Hon Jim Bolger, Dean Knight,  
Hon Michael Cullen  
Professor Robert Hazell,  
Professor Heinz Klug



on the issues which will shape New Zealand's future but also on how New Zealanders should be engaged in a constitutional reform process.

The keynote speakers surpassed expectations. Professor Klug presented an insight into constitution-making, having been an active participant in South Africa's anti-apartheid struggle and its constitution-making process. He has recently published a book on the South African constitution.

Professor Robert Hazell examined the recent constitutional developments in the UK, and Father Frank Brennan gave an overview of the Australian public outreach in regard to the incorporation of a Bill of Rights Act into Australian law.

A key aim of the Conference was to inject greater discussion of constitutional issues into the public domain and it is anticipated that the ideas presented and discussed will influence future policy and law in this area.

*This conference was available to a world-wide audience via a live stream on the NZCPL website and more than 300 followed the conference this way. It was also open to the public free of charge. Seventy people took advantage of this and followed the Conference proceedings from the public gallery.*

## Celebrating 20 years of the Bill of Rights

The 20th anniversary of New Zealand's Bill of Rights was celebrated at Victoria University's Centre for Public Law on 26 August.

SIR KENNETH KEITH, former Supreme Court judge and currently judge at the International Court of Justice in The Hague, and Rayhan Langdana, a 17-year-old Wellington College student, discussed the Bill of Rights – Sir Kenneth from the aspirations for the legislation at its inception, and Rayhan its meaning for a young person today.

Rayhan also spoke on the Bill of Rights at the Reconstituting the Constitution conference. He said of his generation:

“We cannot really comprehend a way of life in which our lives could be at risk because of our race or religion: these rights have prevented such a situation here. Therefore the fact that they are taken somewhat for granted by the youth is not an indictment upon my generation as a whole; on the contrary, it is simply a mark of how effective the Bill of Rights has been in creating a safe society.

“We youth are a valuable resource. We are eager to learn and, because of the society we've been brought up in, we have good

values. However, we run the risk of becoming detached from reality. In New Zealand we don't have internal problems as big as other countries. For most of us, our biggest concern is schoolwork or relationships; things that matter but can be resolved on an individual level.

“Elsewhere, people our age are fighting for their country and for their religion. They face national problems; they don't have a hand in their destiny.

“In order to harness our potential (which I believe there is a lot of), we should become more involved in Parliament. I think the voting age should be lowered by one year. This will make us more politically aware and active.

“It will mean that the running of the country will be something real. We need to be challenged; we need to feel like our opinions are valid. I just think that our society is so safe, so democratic, so equal that very soon, my generation could gain a seriously skewed outlook on life and an utter lack of perspective.”



“We youth are a valuable resource. We are eager to learn and, because of the society we've been brought up in, we have good values...

To harness our potential, we should become more involved in Parliament.”

17-year-old Wellington College student, Rayhan Langdana