NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

PUBLIC VOICES

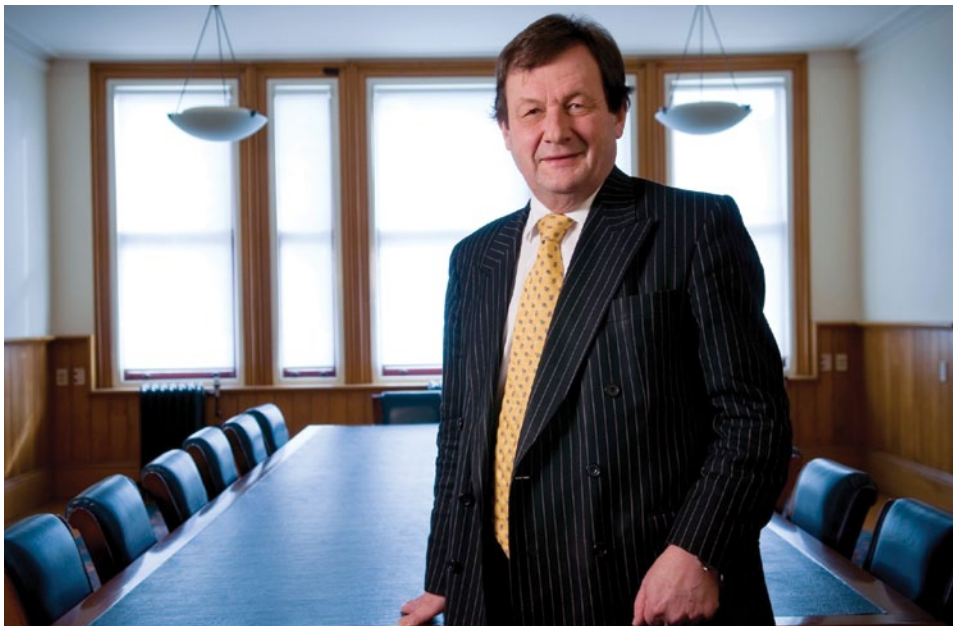
THE NEWSLETTER OF THE NEW ZEALAND CENTRE FOR PUBLIC LAW

ISSUE 3 • FEBRUARY 2012

NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

Victoria University of Wellington
PO Box 600, Wellington
Phone: +64-4-463 6327
Fax: +64-4-463 6365
Web: **www.victoria.ac.nz/nzcpl**

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON



A Happy New Year to all

Welcome to the third edition of *Public Voices*, the e-newsletter from Victoria's Centre for Public Law. This edition is a report on the year past and includes some of the events planned for this year. For more about the Faculty and last year's events, see the 2011 edition of *V.Alum*, our annual report **www.victoria.ac.nz/law/about/alumni/valum.**

2012 has started with a roar. The Urgency Project launched the publication of its findings, *What's the Hurry?* And there is a full account of that research project on **page 3.**

Next week, the New Zealand Law Foundation Regulatory Reform Project launches its first publication, *Learning from the Past, Adapting for the Future.*

As you will see in the programme for this year, there is much to look forward to.

I wish you well.

Professor A.T.H. Smith
Dean of Law
Victoria University of Wellington

A RECENT HIGHLIGHT

ROBIN COOKE LECTURE 2011

The 10th Annual Robin Cooke Lecture was delivered on 8 December 2011 by Professor Cheryl Saunders, laureate professor and the holder of a personal chair in law at the University of Melbourne.

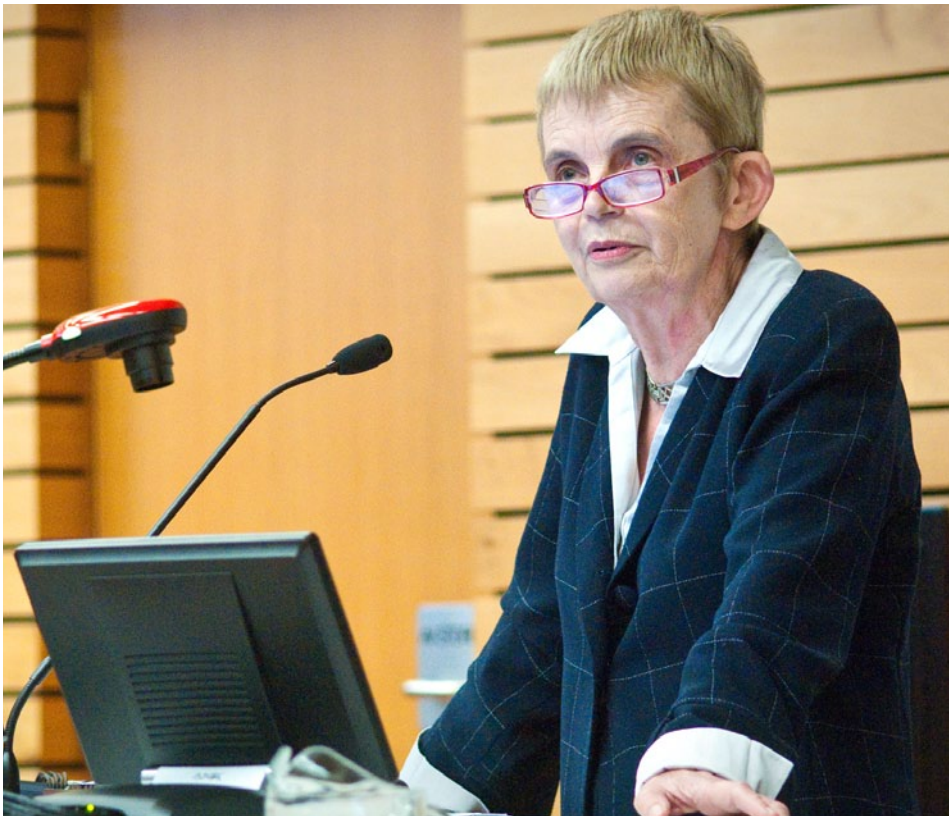
Professor Saunders is the founding Director of the Centre for Comparative Constitutional Studies. Her title "Constitution as Catalyst: Different Paths within Australasian Administrative Law" provided the springboard for a comparison of differences between two jurisdictions, seen against a backdrop of increasing legal globalisation.

Comparative methodology in this area can be a fertile source of material which enables us to achieve a number of valuable objectives – understanding others, understanding ourselves and identifying options to resolve problems and effect change.

Paradoxically, whereas Administrative Law throughout the Commonwealth was formerly relatively homogeneous, the common law paths have more recently tended to fragment into distinct national legal systems, and this makes the comparative method more difficult of application.

To be really useful, attention must be paid to the different national contexts in each jurisdiction, and the remainder of the lecture was an exercise in explaining the contextual differences that exist as between Australia and New Zealand.

The lecture identified five points of difference between the two jurisdictions, viz the retention of jurisdictional error as a category of review, the drawing of a sharp and hard distinction between questions of lawfulness (on the one hand) and the question of merits on the other. This entails a restricted view of the judicial role, which also explains some other less obvious corollaries, such as the absence of a common law right to reasons for a decision, and a more restricted doctrine of standing.



Professor Cheryl Saunders

There is, third, no explicit doctrine of deference, and no variable intensity discourse. Statute plays a larger role in Australian law and practice than in other jurisdictions, and, finally, Australian law is inhospitable to the influence of international law.

The lecture then traced the extent to which these differences have their origins in the Australian Constitution. Space precludes their replication here, but the separation of powers doctrine, for example, embedded as it is in the written constitution itself as developed judicially, is in part the explanation for some of the seeds of the preservation of the distinction between questions that are jurisdictional and others.

The current system was then evaluated in the light of two highly visible cases reaching the High Court in the context of asylum cases. In both cases, the results arrived at by the High Court were unwelcome to the executive, but the decisions of the court were, nevertheless, given immediate effect, which they might have been more reluctant to do had the judges been perceived to be dabbling in merits.

This summary does not begin to do justice to the subtleties and nuances of the treatment of the Constitution as Catalyst of the title. The current intention is that the lecture should ultimately be published. It will make an important addition to the literature when this occurs.

OUR FUTURE PROGRAMME – 2012

MARCH

Professor Andrew Ashworth, New Zealand Law Foundation Distinguished Visiting Fellow 2012 and Vinerian Professor of English Law at the University of Oxford, will visit the Faculty and give a public lecture as well as staff seminars

JULY –AUGUST

The annual meeting 2012 of the CISG Advisory Council is being hosted by Victoria University's Faculty of Law and the New Zealand Law Foundation and is supported by law firms Russell McVeagh and Chapman Tripp, along with the Abitrators' and Mediators' Institute of New Zealand (AMINZ). **Professor Ingeborg Schwenzer**, a world authority on the CISG and an eminent family law lawyer, will be a key part of the annual meeting.

At a half-day symposium in August, **Sophie Meunier,** co-Director of the EU Program at Princeton University, will present a paper on EU integration and the problems for economic stability.

NOVEMBER

Lucy Reed, a partner at Freshfields Bruckhaus, will give the inaugural Law Foundation International Dispute Resolution lecture

DECEMBER

Dame Mary Arden will give the Robin Cooke Lecture

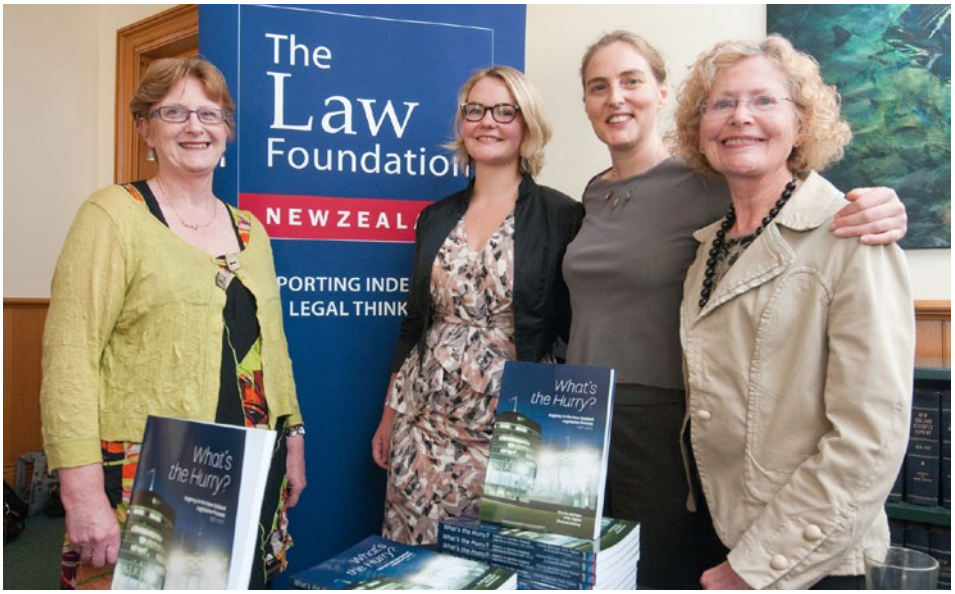
THE URGENCY PROJECT

The full report of the Urgency Project has just been published.

The Urgency Project is a joint project of the New Zealand Centre for Public Law and the Rule of Law Committee of the New Zealand Law Society. It has been generously funded by the New Zealand Law Foundation. The project researchers (Claudia Geiringer, Polly Higbee and Elizabeth McLeay) have been examining the use of urgency in the New Zealand House of Representatives over a 24 year period – from 1987-2010. In addition to collating comprehensive databases that detail every use of urgency over that period, the researchers also conducted interviews with a number of current and former politicians and senior parliamentary officials. Questions the project aims to answer include: what exactly is urgency and why do politicians use it? How much is it used? What factors constrain its use? In particular, to what extent has MMP had an effect on the use of urgency? Why, if at all, should we be worried about urgency, and in what circumstances? What can be done about it?

Earlier this year, the project made a submission to the Standing Orders Committee's tri-annual review of Standing Orders. The Project recommended a number of changes to Standing Orders in order to better regulate the use of urgency. The Committee issued its report in September and has made recommendations in line with some of the project's recommendations. In particular, the committee has recommended that the House be able to sit for extended time to pass a bill through a single stage, without having to resort to urgency to achieve this. The Urgency Project had suggested that an "extended time" provision of this kind would enable urgency itself to be reserved for situations of genuine urgency in relation to a particular bill. The project anticipated that this would promote better public understanding of urgency and, therefore, stronger dis-incentives for its misuse.

What's the Hurry?: Urgency in the New Zealand Legislative Process 1987-2010, Victoria University Press, 2011



From left: Executive Director of the New Zealand Law Foundation, Lynda Hagen, with authors Polly Higbee, Claudia Geiringer and Elizabeth McLeay at the *What's the Hurry?* book launch.

THE NEW ZEALAND LAW FOUNDATION REGULATORY REFORM PROJECT

The Faculty of Law at Victoria University Wellington is conducting a research project about regulatory reform in New Zealand. The project is interdisciplinary and includes researchers from the Faculty of Law and the New Zealand Institute of Economic Research, and practitioner input from Chapman Tripp.

It is one of the most extensive research projects that the New Zealand Law Foundation has funded.

The project analyses the economic, legal and political challenges that New Zealand faces in achieving regulatory reform. Many regulatory reform issues are found all round the world. This project looks at the international issues in the New Zealand specific context, in particular the size and scale of New Zealand, the country's strong legal and political institutions, its dependence on international trade and market economy.

During the first year of intensive research, the research team identified many issues that arise in the development of an efficient and effective regulatory regime. A book of essays, *Learning from the Past, Adapting for the Future – Regulatory Reform in New Zealand*, which discusses these issues, will be launched next week.

For further information see **www.victoria.ac.nz/law/research/research-projects/regulatory-reform/default.aspx**, or contact Project Leader Professor Susy Frankel, **susy.frankel@vuw.ac.nz**, or Project Administrator Christine Gibson, **christine.gibson@ vuw.ac.nz**

COMMUNITY JUSTICE PROJECT

The Wellington Community Justice Project is a student- driven organisation that engages over 100 law students in community volunteering opportunities, with the aim of improving access to legal services in the wider community. Students can volunteer in one of four areas: advocacy, education, human rights and law reform. Our students have adopted a dynamic range of work with a public law focus.

The Project's Law Reform team has been working closely with Adoption Action Inc in its goal to have the outdated Adoption Act 1995 reviewed and reformed. Adoption Action Inc is committed to enhancing the rights and wellbeing of children affected by adoption and to eliminating discriminatory provisions in New Zealand's current adoption laws.

Its members include persons who have had personal experience of adoption and professionals with specialist knowledge and experience of adoption law and practice. The Law Reform team produced a memorandum for the members of Adoption Act explaining the process for obtaining a declaration of inconsistency from the Human Rights Review Tribunal (HRRT). Members of the Project also helped to draft the Statement of Claim filed at the HRRT in July 2011.

The essence of the claim is that the Adoption Act and other adoption laws are inconsistent, in 15 different respects, with the anti-discrimination provisions of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. Adoption Action and the Wellington Community Justice Project are continuing communication with the Crown as to the progress of the claim and are engaged in other activities seeking to raise awareness and generate reform in this important area.

The Human Rights team has been involved in multiple projects with human rights and law reform focuses. A key partner organisation is the Human Rights Commission, which constantly provides students with opportunities. The students have also developed their own blog (**wcjphumanrightsblog.wordpress.com**) which has provided critical commentary on human rights issues throughout the past year.

Finally, the team assisted Justice Acts New Zealand, a charity dedicated to combating human trafficking and modern day slavery in New Zealand. The team researched New Zealand's compliance with international anti-human trafficking provisions, and is now undertaking a more intensive review of the New Zealand legislation to assess how it applies practically. This research will inform a report and recommendations being made to the Government.

The Wellington Community Justice Project is also interested in engaging young people with politics and constitutional development. With the help of a Wellington City Council grant, the Law Reform and Education teams prepared and presented modules on voting in the elections and the referendum to young people around the Wellington region. The team recognised the low representation of youth in voting statistics and aimed to present modules that were fun, informal and neutral that empowered young people to partake in the election.

The presentations began with a brief focus on voting in the elections (explaining how to enrol to vote, and important concepts like electorates and Maori seats). The module then focused on the referendum. It explained the two different questions they would be asked in the referendum and the different forms of electoral representation (with the help of useful resources such as the Electoral Commission's videos).

We then examined some tools young people could use for evaluating each system (by looking for example at effective representation, accountability, and fairness). Student volunteers presented at Porirua College, Hutt Valley High School, Wellington Girls' College, Wellington High and the Evolve Youth Centre.

BILL OF RIGHTS SYMPOSIUM

In August 2011, Victoria University hosted the *New Zealand Bill of Rights -21st Birthday Celebrations Conference*. Bill of Rights academics from across New Zealand and overseas attended to discuss the future of the Bill of Rights in New Zealand.

These sessions were followed each day by public lectures, one by Rabinder Singh QC and the other by Professor Janet McLean. A primary theme of the conference was the mainstreaming of the Bill of Rights Act into all spheres of legal reasoning and the uptake of recognition of rights by the community. The conference was flavoured with realism and pragmatism about the state and the future of the Bill of Rights in New Zealand.

In the first public lecture, Rabinder Singh QC spoke on the moral force of the United Kingdom Human Rights Act. He began by situating the United Kingdom Human Rights Act, and more generally human rights, within the broader context of society. His first point was that the Human Rights Act starts with the statement that all human beings are born into rights. This does not focus on all *men* are born free, or that people earn rights, rather that they exist in sheer humanity and can be neither gained nor lost.

Janet McLean continued with her public lecture on the Bill of Rights and Constitutional Conventions. Her concern is that New Zealand has become too concerned with written constitutional arrangements and, in doing so, lost the power of convention and moral politics. This, she suggests is due to the peer pressure of a world in which the norm is to have the law contained in formal documents.

She explored conventions surrounding the Human Rights Act in the United Kingdom and compared them to New Zealand's conventions. Section 19 of the United Kingdom Human Rights Act is comparable to section 7 of the Bill of Rights in that is provides for reporting to Parliament of potential Human Rights Act violation. She noted that a negative section 19 report is considered as a very serious matter to the British legislature. She notes that Bills that have been returned with negative section 19 report have also been returned to the Human Rights Review Committee as many as three times. In every case so far, a negative section 19 report has resulted in the Bill being changed.

One of the core themes of Janet McLean's lecture was the extent that human rights law should be contained within primary legislation. Sir Geoffrey Palmer delivered a paper on the history of the Bill of Rights and the culture of constitutional interest by the public. While he too emphasised the importance of cultural uptake by society, he warned against relying on convention and strongly considered constitutional legislation better at protecting people from the excesses of power. He warned that convention is only as strong as it is regarded, and people in power often have little regard for restriction to what they want.

This theme continued onto whether there should be rights added to the Bill of Rights. Two rights discussed were property rights and privacy rights. This merged back into the theme of mainstreaming by looking at how adding these rights into the Bill of Rights would aid development of these fields of law in light of human rights status. Even as a backstop that is utilised rarely, rights provide assurance for the courts and for the development of new common law and convention.

Left, Professor Janet McLean and, right, Rabinder Singh QC at the *New Zealand Bill of Rights – 21st Birthday Celebrations Conference*

Mark Bennett is working on his doctoral thesis at the University of Toronto, analysing the way in which legal positivism understands the ideal of the rule of law and its relationship with the idea of legality. He recently published a related article re-examining HLA Hart and Joseph Raz's analysis of the moral value of Lon Fuller's account of the rule of law; it is available at **http://ssrn.com/abstract=1884655** . He is also involved in a New Zealand Law Foundation project on Regulatory Reform, working with Joel Colon-Rios on the topic of participation in regulatory rule- and decision-making. Mark also presented a paper on Bill of Rights interpretation at the Auckland Law Faculty's public law symposium and commented on the right of privacy at the New Zealand Centre for Public Law Bill of Rights Act symposium.

Richard Boast is currently working on an edited collection of the judgments of the Native Land Court for the period 1866-1894. Mostly these cases have never been published before and there has never been a properly edited collection of the Court's decisions at any time. Many of the cases are of considerable importance, including the Court's decisions relating to title to the Chatham Islands (1870), the investigation of title to the Rohe Potae (King Country) block in 1886, covering about 1.5 million acres of land, and numerous cases relating to areas of the foreshore and seabed or water bodies such as the Wairarapa lakes. The collection will be published by Brookers and will be completed within a few months. Richard is now planning a second volume, which will be from the period 1894-1929. The hope is to make a solid selection of the Native Land Court's cases available to the public for the first time.

Petra Butler has had a busy year completing several research projects and starting others. She is involved in the Regulatory Reform Project, where she researches the impact on human rights on regulatory reform. She contributed an article on the use of foreign jurisprudence in the Supreme Court (of Germany?) as a contribution to the Festschrift for the 60th birthday of Professor Ingeborg Schwenzer.

Petra also contributed to *Rights protection under the UK's statutory bill of rights: constitutional and comparative perspectives* (provisional title) edited by Professor Ian Leigh and Dr Roger Masterman (both University of Durham), discussing the impact of the UK Human Rights Act 1998 on the New Zealand jurisprudence under the New Zealand Bill of Rights Act. Together with her colleague, Claudia Geiringer, she organised the symposium and public lectures celebrating the Bill of Rights' 21st birthday. Her research project for that celebration asked the question whether the New Zealand Bill of Rights Act should be amended to incorporate a right to privacy.

Joel Colon-Rios recently completed a book manuscript titled *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*. The book will be published by Routledge in 2012, and argues that the democratic legitimacy of a constitutional regime depends on its susceptibility to highly participatory constitutional change, ie, whether it provides an opening for constituent power to manifest from time to time. The book engages with Anglo-American constitutional theory as well as examining the theory and practice of constituent power in different constitutional regimes, including Latin American countries, where the theory of constituent power is now part of the region's legal and political discourse.

Joel also recently published a paper titled "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Colombia and Venezuela" (*Constellations*, Vol. 18-3), and has another paper forthcoming in the *Canadian Journal of Law and Jurisprudence*, titled "The Counter-Majoritarian Difficulty and the Road Not Taken: Democratizing Amendment Rules". Moreover, together with Robert Alexy, Jon Elster, Vicki Jackson, Larry Sager, and Mark Tushnet, he is one of ten academics invited by the President of the Colombian Constitutional Court to speak on the occasion of the 20th Anniversary of the Colombian Constitution.

Grant Morris is researching an article which looks at the nature of negotiation in the New Zealand Treaty of Waitangi settlement process. The type of negotiation used in this process is often claimed to be "interest-based" and inspired by the approach made famous by the Harvard Negotiation Process. Grant's work questions the extent to which this claim is accurate. This involves working out exactly what "interest-based" negotiation is and then looking for evidence of it in the settlement process (in both policy documents and practical examples). While rejecting the criticism that the process is not actually negotiation at all, the article questions the extent to which it is truly "interest-based". In conclusion the article asks two questions: 'If the negotiation used in the process is not primarily "interest-based" then what is it?' and 'Should the process be made more "interest-based" and if so, how?'. Negotiation is central to the Treaty settlement process and it is important to explore the nature of that negotiation.

Caroline Sawyer has published widely in the fields of nationality and immigration law, especially in the law and policy relating to citizenship. She is the author of the chapter on "Nationality and the Right of Abode" in the Oxford University Press *Textbook on Immigration and Asylum Law* (editor: Gina Clayton) and of the forthcoming New Zealand *International Encyclopedia of Laws: Migration Law: New Zealand*. Earlier in 2011 she published *Statelessness in the European Union* (Cambridge University Press), a jointly edited work with Professor Brad Blitz of the UK, which set out the context and results of an externally-funded five-year comparative study of the position of those without status in four European countries. Caroline is currently finalising an article on the rights of second generation "migrants", which feeds into migration-related undergraduate and postgraduate teaching developed at Victoria.

Tony Smith has recently published the fourth edition of *Arlidge, Eady and Smith on Contempt*. He presented a paper at the conference, The Legacy of Glanville Williams: The Sanctity of Life and the General Part of the Criminal Law, which was held at the School of Law, King's College London in December. He is currently working on the biography of Lord Cooke of Thorndon.

Kate Stone has, over the past year, been involved in various activities related to getting young people out to vote, particularly in light of the 2011 referendum on our electoral system.

She is involved in the Campaign for MMP and recently wrote an op ed for the campaign published in the Dominion Post under 'Why this Vote is Vital for the Young'. She was also interviewed by Selina Powell from Salient about ways to address youth voter turn out for the story 'The Revolution will be Live', and by Sarah Robson of Te Waha Nui (AUT) on why young people should vote in the Referendum.

Kate has been working with the Wellington Community Justice Project Law Reform Team on their Referendum Education programme which was launched at Evolve Youth Centre on 29th September and will be going into schools.

In conjunction with the Law Students Society, she organised a debate at Law School on the referendum between Sandra Grey (Campaign for MMP) and Jordan Willams (Vote for Change), other high profile debaters and students, in the Law School Common Room.

Kate has also recently given the Wellington Community Law Centre's Law for Lunch talk on the Referendum at the Wellington Public Library.