

Submission

to the

Constitutional Advisory Panel

on the

Constitutional Review

An authentic democracy is not merely the result of a formal observation of a set of rules but is the fruit of a convinced acceptance of the values that inspire democratic procedures: the dignity of every human person, the respect of human rights, commitment to the common good as the purpose and guiding criterion for political life. If there is no general consensus on these values, the deepest meaning of democracy is lost and its stability is compromised.

Compendium of the Social Doctrine of the Church #407

Summary of key points

- Caritas welcomes the Constitution Conversation.
- Catholic social teaching provides fundamental principles about the role of the State and the exercise of political power which are useful in considering the questions raised in the Constitutional Review.
- The New Zealand Catholic Bishops Conference have proposed a preamble to a written constitution in their submission, and their previous statements on matters such as the place of the Treaty of Waitangi also offer guidance on how Catholic social teaching applies in our context.
- Caritas recognises both positive and negative aspects to our present 'unwritten constitution'. However, on balance we favour a superior-law, written constitution, to ensure that New Zealand law-makers and the public alike are better informed about constitutional matters and more easily able to see where fundamental constitutional matters are being changed.
- The Treaty of Waitangi/te Tiriti o Waitangi is the fundamental agreement on which is based our lives together as tāngata whenua/first peoples and all who have subsequently settled and are settling here. Our constitutional arrangements must reflect and honour that agreement.
- New Zealanders need to recognise that while historic injustices under Article 2 of the Treaty/te Tiriti may have been addressed to some extent through the settlement process, there are significant Article 1 questions about sovereignty/tino rangatiratanga and governorship/kāwanatanga which are yet to be addressed.
- The passing of the New Zealand Bill of Rights Act 1990 (NZBoRA) was a step forward in recognising human rights. However, NZBoRA has not prevented New Zealand from passing discriminatory legislation, and it does not sufficiently recognise all New Zealand's commitments under international human rights agreements and instruments, particularly the right to life.
- The New Zealand Bill of Rights Act need to be more comprehensive, it needs to be superior law, and the Courts must have the ability to uphold it.
- Caritas believes there continues to be an argument for maintaining Māori seats, but notes that all positive discrimination measures must be monitored and reassessed.
- Better structures than Māori seats are likely to be found through dialogue and discussion about how our constitutional arrangements better reflect the Treaty of Waitangi/te Tiriti o Waitangi.
- In the absence of better checks and balances and stronger human rights protections one of the few existing protections against abuse of power in New Zealand is our short three-year electoral term. Caritas does not support extending the term of government under the constitutional status quo.

Introduction

Authority must recognise, respect and promote essential human and moral values. These are innate and flow from the very truth of the human being and safeguard the dignity of the person; values which no individual, no majority and no State can ever create, modify or destroy.

Compendium of the Social Doctrine of the Church #397

1. Caritas Aotearoa New Zealand welcomes the opportunity to be part of the Constitution Conversation. We recognise there are important and fundamental issues at stake. Catholic social teaching provides principles about the exercise of political power which are useful in considering the questions raised in the Constitutional Review. These include but are not limited to:
 - recognition of human rights and human dignity;
 - resolution of historic injustice, and work for restoration and reconciliation;
 - the participation of all members of society in public decision-making processes, particularly the most vulnerable.
2. Catholic social teaching on the role of the State and the exercise of political power comes out of a long tradition of reflection on how ethical principles and moral values can be reflected in political and legal instruments. St Thomas Aquinas was a key thinker who provided the foundations for current Catholic social teaching on political authority and the organisation of the political community. Some key concepts which continue to guide Catholic responses to these questions are:
 - Recognising and respecting the *natural law*, which is to say principles and ethics which are fundamental to human nature. For example, since the atrocities of World War II there has been universal recognition that human rights are natural rights – they are inherent to human dignity, and cannot be granted or taken away, but only recognised.
 - Working for and ensuring the *common good*, which is ‘the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfilment more fully and more easily’ (*Gaudium et Spes* #26).
 - Discerning and applying the appropriate use of *subsidiarity*, which involves identifying the right level at which decisions should be made. Subsidiarity means respecting local autonomy of families, communities, iwi, hapū and different forms of local government and governance. However, subsidiarity is not an excuse for abdicating to a lower level organisation or group responsibilities and duties that are best managed at a higher level.
3. The New Zealand Catholic Bishops Conference has provided specific guidance on how Catholic social teaching applies in our context through their submission to the Constitutional Review Panel, as well as specific statements, for example, on the place of the Treaty of Waitangi/te Tiriti o Waitangi. As well as offering comments from a position of fundamental principles and ethics, Caritas also offers perspectives and experiences gained through engagement in the political process.
4. We agree with the approach taken by the Constitutional Advisory Panel of inviting contributions to a wider conversation. We recognise that many New Zealanders know very little about our existing constitutional arrangements, and may have had few chances to learn about them. However at the same time people may hold very strong opinions about issues such as human rights, the Treaty of Waitangi/te Tiriti o Waitangi and the working of our electoral system, without necessarily recognising these as constitutional matters.

The Purpose of a Constitution

A Constitution would be hardly worthwhile if it did not uphold the underlying values and virtues on which a free society and an open economy depend. They both need the foundations, the boundaries and the discipline that can come from a nation's underlying moral culture.

New Zealand Catholic Bishops Conference: *Submission to the Constitutional Review Panel*, 2013

5. The main purpose of the State is to serve the common good, which is the good of all of us and of each of us. Our constitutional arrangements concern the exercise of public power, the restraints on that power, the protection of the most vulnerable, the honouring of agreements and commitments, and our stewardship of natural resources.
6. Human beings are social – we live in community with each other as families and whānau, as neighbourhoods and local communities, as iwi and hapū, as workplaces and businesses, as cities and as regions, and as a nation. There are many aspects of our lives together than can be considered and decided at a local level, and a key purpose of government is to recognise subsidiarity to ensure that all the intermediate groups of society have what they need to be able to flourish, grow and make their own decisions. There are also decisions and provisions which need to be made collectively together as a whole society.
7. For us, the chief purpose of a Constitution is to lay the ground rules for the decisions, responsibilities and political authority that are made at a national level. While democracy must be representative, that does not mean that core values of justice, fairness, human dignity and the common good can be left to be endlessly renegotiated depending on the changing tides of political opinion. As the Compendium of the Social Doctrine of the Church explains it:

Those who govern have the obligation to answer to those governed, but this does not in the least imply that representatives are merely passive agents of the electors. The control exercised by the citizens does not in fact exclude the freedom that elected officials must enjoy in order to fulfil their mandate with respect to the objectives to be pursued. These do not depend exclusively on special interests, but in a much greater part on the function of synthesis and mediation that serve the common good, one of the essential and indispensable goals of political authority. (Compendium of the Social Doctrine of the Church #409)
8. Catholic social teaching recognises the importance of the division of powers within the State to balance the use of political power:

It is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the 'rule of law', in which the law is sovereign and not the arbitrary will of individuals. (Pope John Paul II: Centesimus Annus #44).
9. The purpose of a Constitution is to ensure that the laws proposed, passed and enforced by the different divisions of the State pass the fundamental test in first being *just* laws. There are numerous examples through history which demonstrate the insight of St Thomas Aquinas that '*when a law is contrary to reason, it is called an unjust law; in such a case it ceases to be law and becomes instead an act of violence*'.

New Zealand's current constitutional arrangements

We need to recognise that through the legacy of the past, which includes colonisation, we are often caught up in institutions which are inherently unjust. But we must make choices, both personal and collective. Our choices require a shift in emphasis from violence to non-violence, away from systems which stunt, shorten or endanger life, towards a life-giving commitment to community and the protection of the common good.

New Zealand Catholic Bishops Conference: *A Consistent Ethic of Life – Te Kahu-o-te-Ora*, 1997

10. We recognise New Zealand's 'unwritten constitution' has both positive and negative aspects. In some ways it has served us well. It has been flexible enough to accommodate changing views and expectations of New Zealanders in relation to the resolution of historic injustice. It was able to accommodate the change to MMP which has provided a Parliament which is now more representative of the New Zealand population than in the past.
11. Compared to many of our partners in the international Caritas Internationalis confederation, the relative ease of access to Parliament and to politicians in this country makes it possible for many New Zealanders to participate in political processes.
12. However, there are significant issues with New Zealand's constitutional arrangements. We have a small Legislature (Parliament) dominated by the Executive (Cabinet), in which the third branch of government – the Judiciary (Courts) – is relatively powerless to hold political decision makers to account. Compared to the role of the courts in Australia and Canada, which have established constitutional power to strike down unconstitutional legislation, New Zealand courts are not likewise empowered. Even public comment by senior judges on constitutional matters is too frequently dismissed by senior politicians as 'judicial activism'.
13. There are insufficient checks and balances in New Zealand law-making. Decisions made by the Executive can fairly easily pass into law because the Executive effectively controls the Legislature. This is also in part because New Zealand lacks a second tier of Parliament, and because Parliament can override Bill of Rights concerns.
14. We are also deeply concerned at the increasing use of urgency or fast-tracked legislative processes to cut-back on the scrutiny of Select Committees. This stage of the legislative process provides civil society with the opportunity to comment on legislation. However, our recent experience of Select Committee hearings is that members appear to have little ability to change legislation or policy which has already been determined by Cabinet. We have found it a forum dominated by party political debate rather than serious cross-party consideration of public concerns which may not have been raised in the process of policy development. The Select Committee process does not currently provide adequate oversight of legislation, particularly in relation to Bill of Rights concerns.
15. We know that some New Zealanders fear entrusting a constitutional watchdog role to appointed judges rather than elected politicians. This would be better overcome if the Judiciary itself was more visibly representative of the diversity of New Zealand's population. However, to ensure that principles are not outweighed by political expediency, we need courts to have teeth. The Judiciary must be a check on the power held by the Executive. They must be a guardian of fundamental human rights. It

is important that selection processes for Judges continue to avoid obviously political choices, and that needs to be more explicitly spelled out.

16. Our 'unwritten constitution' has been unable to sufficiently protect the rights of minorities against the prejudices of the majority. While the *New Zealand Bill of Rights Act 1990* has increased scrutiny of civil and political rights, it has not prevented the passing of discriminatory legislation. The Bill of Rights Act does not include all the civil, political, social and economic rights in international human rights instruments to which New Zealand has signed.
17. There are issues to be managed in recognising economic and social issues as Bill of Rights concerns. The New Zealand approach is usually that these are matters for the political process, rather than the courts, but this is not the only way to approach these issues. Achieving realisation of human rights cannot be left entirely to political pragmatism. Other countries, such as post-apartheid South Africa, have made some economic and social rights justiciable in their constitutions, and this has led to landmark cases, for example on housing.
18. Our founding document as a nation, the Treaty of Waitangi/te Tiriti o Waitangi is already a fundamental part of our constitution and the moral basis for the right of settlers to live here. However, it carries moral and political, but only limited legal, power. Parliament has been able to ignore it. This should not be the case.
19. Attitudes to the use of public power are in a process of transition in a post-colonial era. Many practices in the exercise of public power still operate out of a monocultural worldview drawn from the adoption of the Westminster model of Parliament. This was developed in Europe and has not sufficiently adapted to this part of the world. In 1990, the Catholic Bishops called for attitudinal change in relation to just claims of Māori for participation in decision-making processes. Attitudinal change has occurred in many places, particularly among young people of all ethnicities who may have grown up in a more diverse demographic environment than did many of their grandparents. Many people in our society have fair and reasonable expectations that our constitutional arrangements will reflect Māori and Pasifika tikanga, as well as the contributions made from New Zealand's European legal and political heritage. We support their expectations.
20. The constitutional status quo is hard to understand. Of more concern, it is hard to protect. The scattered nature of the many documents, laws and practices that make up our unwritten constitution makes it vulnerable to sudden change. Even decision-makers may be unaware of the constitutional significance of their decisions. This is a significant flaw in a single-level Parliament, with weak oversight by courts, and where public scrutiny through the Select Committee process is frequently constrained.
21. Although some of the questions posed by the Constitutional Advisory Panel seem quite 'black and white' or 'open and shut', the answers are rarely able to be as black and white as the questions. We recognise there are frequently many possible answers to the questions of what constitutional architecture is able to deliver constitutional outcomes that New Zealanders desire. Our own answers focus on *principles* and *values* which we believe should drive the Constitutional Conversation, more than hard answers about the *form* of a constitution.

Should we have a written constitution?

Political authority...must be exercised within the limits of the moral order and directed towards the common good, understood in the dynamic sense of the term, according to the juridical order legitimately established or due to be established. Citizens, then, are bound in conscience to obey. Accordingly, the responsibility, the status, and the importance of the rulers of a state are clear.

Vatican II: *Gaudium et Spes* #74, 1966

22. Caritas believes our current 'unwritten' constitutional arrangements could be improved. A written constitution is likely to provide better protection than the status quo.
23. The problem with our present informal arrangements is that they are very complex. Legislative provisions relating to constitutional matters are found in many different places, and other aspects of our constitutional arrangements are found only in practices such as constitutional conventions. It is very hard for the average New Zealander to understand how our constitution works in practice – and as a result many people believe that we do not have a constitution at all. Many New Zealanders first became aware in 1984 that constitutional conventions cannot be enforced when the outgoing Prime Minister ignored the constitutional convention to take the advice of the incoming government.
24. Some current and recent practices of the government have constitutional implications, but are not being generally regarded or understood as constitutional changes. These include:
 - **The removal of appeal rights** in legislation, including restrictions on appeal rights passed recently in the *Immigration Amendment Act 2013* and *New Zealand Public Health and Disability Amendment Act 2013*, as well as proposed appeal right restrictions in the *Housing Accords and Special Housing Areas Bill*. The right to challenge or appeal decisions was also limited in special legislation passed following the Christchurch earthquakes. Appeal rights are significant aspects of the right to justice under Section 27 of the *Bill of Rights Act*. In the case of the *New Zealand Public Health and Disability Amendment Act*, these rights were removed under Parliamentary Urgency without even a Select Committee process, and it is not clear from the records of the Parliamentary debate that all Members of Parliament understood they were changing a constitutional matter.
 - **The willingness of Parliament to override decisions of the courts**, at present seen in the *Employment Relations Amendment Bill 2013* in which the changes to good faith bargaining overturn decisions of the Employment Court. The *Public Health and Disability Amendment Act*, noted above, was a response to a Court of Appeal decision. We have seen this also in the Labour government's *Foreshore and Seabed Act 2004* which overrode a Court of Appeal decision, and despite being later repealed was substantially confirmed in the subsequent *Marine and Coastal Areas (Takutai Moana) Act 2011*. While recognising that there are occasions that Parliament needs to clarify the law in response to a court decision, Caritas believes that much more consideration is required by the Executive and Legislature before overruling the Judiciary.
 - **The announcement by the Minister of Labour that his Ministry will no longer actively enforce Easter trading hour limitations**. There have been 10 separate Bills proposed since 1990 to liberalise Easter trading hours, each of which has been defeated in the House of Representatives – most recently in June 2012 by a significant margin. It appears to us that the Executive is inviting retailers to break the law, despite repeated demonstrations that it is

not the will of Parliament that the law is changed. We appreciate that public servants do not always have the resources to actively enforce every legal provision to the same extent as others. However, we would not expect to see the Minister of Police publicly announce that due to resource constraints police will not actively enforce laws about burglary, or the Minister of Revenue announce that Inland Revenue does not have the resources to chase tax evasion.

25. We recognise that some advantages of the status quo include the flexibility to adapt to changing contexts and circumstances – for example, New Zealand is not faced with the difficulty of the United States constitution around the right to bear arms, a constitutional principle developed in very different circumstances to that of present day America. We recognise there is a potential danger that a written constitution can set in stone matters which are still evolving and growing, such as our understanding of indigenous rights.
26. While recognising this caution, on balance we believe it would be a step forward to outline significant constitutional matters in a written constitution, as superior law, to ensure that Parliament is not able to lightly change or disregard these matters.
27. A written constitution would need to look beyond *procedures* of government to the *values and ideals* that we strive for as a society. The New Zealand Catholic Bishops Conference have proposed a Preamble to a written constitution which guides people towards thinking of the high level principles and values that should underpin our constitutional arrangements.

The Treaty of Waitangi/Te Tiriti o Waitangi

[There are] universal principles which are prior to and superior to the internal law of States, and which take into account the unity and the common vocation of the human family. Central among all these is surely the principle that pacta sunt servanda: accords freely signed must be honoured. This is the pivotal and exceptionless presupposition of every relationship between responsible contracting parties. The violation of this principle necessarily leads to a situation of illegality and consequently to friction and disputes which would not fail to have lasting negative repercussions.

Pope John Paul II: *Message for the World Day of Peace, 2004*

28. The Catholic Church recognises the Treaty of Waitangi/te Tiriti o Waitangi as the fundamental agreement on which is based our lives together as tāngata whenua/first peoples and all who have subsequently settled and are settling here. It was an agreement freely entered into by Iwi and Hapū , and the British Crown on behalf of all settlers, and it must be honoured. Our constitutional arrangements must reflect this reality.
29. If the Treaty did not exist, the government and the people of Aotearoa New Zealand would still have many other reasons for recognising and respecting the rights of Māori as indigenous people. Catholic social teaching on property rights recognises the rights of first peoples to land as much as it recognises the property rights of settlers who later acquired land legally. Internationally agreed human rights norms, as well as the principle of subsidiarity, recognise the rights of specific communities to participate in decisions that affect their lives.
30. Most New Zealanders now recognise and are aware of the legacy of historic injustice towards Māori. The leadership of rangatira as well as politicians of a wide range of political persuasions has led us towards our own process of 'truth and reconciliation' through the Waitangi Tribunal hearings and settlement negotiations. The settlement of historic and current Article 2 Treaty breaches concerning ownership of land, fisheries, forests and other treasured possessions has been a big step towards reconciliation of historic injustice. However, these settlements themselves do not wipe clean the slate of history overnight. In international peacemaking work, Caritas Internationalis peacemaking guidelines advise that the period of healing can often take as long as the period of injustice that preceded it. We are still at an early stage of that process.
31. However, with so much attention focused on historic injustice of Article 2 breaches, many New Zealanders are not yet aware of the important and valid debates and discussions about honouring Article 1 (concerning sovereignty/rangatiratanga – governorship/kāwanatanga) and Article 3 (concerning equal rights of citizenship) of the Treaty/te Tiriti. Significant constitutional questions are raised within Article 1, made more complex because the Māori and English versions of the Treaty/te Tiriti are not translations.
32. Catholic understanding of the rangatiratanga/sovereignty question has been consistent. Bishop Pompallier, who was present at Waitangi in 1840, recorded in his diary in 1845 that 'New Zealand is like a ship, the ownership of which should remain with the New Zealanders (Māori) and the helm should be in the hands of the Colonial authorities'. In 1990, the New Zealand Catholic Bishops Conference reaffirmed 'We understand that the Māori signatories were not giving away ownership of their lands, seas and resources, but were allowing the Crown to exercise governance over these'.

33. We are aware that there is a wide diversity of opinion among Māori about the extent to which the Treaty/te Tiriti should be incorporated into New Zealand law. On the one hand, its lack of legal status has meant inconsistent treatment by Parliament and the Courts. However, we find it understandable that some are reluctant to see a document which currently holds moral and political power becoming statutory law which might be changed at the whim of Parliament. Caritas can understand these concerns – as an extreme example, while wishing to see our deepest values reflected in political life, we would be concerned if Parliament attempted to legislate Catholic Social Teaching, and thereby claimed for themselves the authority to interpret or apply Catholic religious values, rather than Bishops.
34. The problem is still that there has been only partial recognition and realisation of some aspects of the Treaty in our legal and political systems. Our constitutional arrangements must reflect the Treaty/te Tiriti. Its special and superior status needs better protection. There are a range of possible solutions on the table at present. It is to be hoped that this Constitutional Conversation will bring forth more. We see wisdom and truth in Moana Jackson's insight that the question is not how the Treaty fits into the Constitution, but rather how the Constitution fits into the Treaty. We also see merit in further consideration of Matthew Palmer's proposal of a Treaty of Waitangi Act and Treaty Court.
35. Important principles that need to be reflected in the Constitutional Advisory Panel's recommendations on the Treaty of Waitangi/te Tiriti o Waitangi:
- Agreements made must be honoured;
 - The Treaty/te Tiriti is not simply about resolution of historic injustices. Our constitutional arrangements must in time resolve and reflect the Article 1 matters of sovereignty/tino rangatiratanga and governance/kāwanatanga;
 - The responsibilities of upholding human dignity, protecting the common good and respecting subsidiarity apply to all who govern at every level, including both tāngata whenua and manuhiri.
36. Caritas appreciates that many New Zealanders are still struggling to understand and recognise the significance of the Treaty/te Tiriti. New Zealanders continue to need education and opportunities for discussion about the Treaty/te Tiriti, especially people educated before the Waitangi Tribunal process brought to wider public attention the truth of the impact of Treaty/Tiriti breaches. One problem with our current process of reconciliation is that it is primarily between the Crown and Iwi/Hapū. Those who have had the opportunity to be involved in the process have been touched and changed by it, but the settlement process has by-passed many other New Zealanders. Many fears, misunderstandings and even prejudices have been unchanged, and even unchallenged.
37. While recognising the need for ongoing educational and attitudinal change, Caritas finds no merit in arguments that the Treaty of Waitangi/te Tiriti o Waitangi should be removed from current statutory law and legal decisions. Even if we wanted to, it is not possible to consign the Treaty/te Tiriti to the dustbins of history. As followers of a 2000-year-old Christian tradition, we do not find the 173 years that have passed since the signing in 1840 have reduced its relevance in 2013. Despite all its difficulties and complications, the Treaty/te Tiriti is an agreement entered into in good faith and we must continue to strive to honour it in our constitutional arrangements. For a country trying to overcome the injustices of our colonial origins, the Treaty/te Tiriti is not the problem – it is an essential part of the solution.

Bill of Rights

The movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity. The Church sees in these rights the extraordinary opportunity that our modern times offer, through the affirmation of these rights, for more effectively recognising human dignity and universally promoting it as a characteristic inscribed by God the Creator in his creature.

Compendium of the Social Doctrine of the Church #152

38. The passing of the *New Zealand Bill of Rights Act 1990* was a step forward in acknowledging human rights. The examination of proposed legislation to see whether it accords with the Bill of Rights Act (NZBoRA), and the reports by the Attorney-General to Parliament, has enabled greater scrutiny of human rights obligations than was previously the case.
39. However, this scrutiny has been insufficient to ensure that New Zealand does not pass discriminatory legislation or to guarantee human rights. The protection given by NZBoRA is limited by Section 5 which allows legislation to breach the human rights where 'limits prescribed by law can be justified in a free and democratic society'.
40. NZBoRA assessments which recognise a breach in human rights, while arguing a Section 5 policy justification, are increasingly found. On numerous occasions in making submissions on legislation before Parliament, Caritas has taken issue with the Ministry of Justice or Attorney-General justification for an apparent Bill of Rights breach. The 1985 White Paper anticipated the Bill of Rights would be a 'set of navigation lights' that would guide political and social discourse, but we have experienced little interest in discussing Bill of Rights justifications in the Select Committee process, which is the only formal opportunity for public input into Parliamentary consideration of legislation. Sometimes the Bill of Rights issues are not even mentioned in the Select Committee report to Parliament.
41. Since the Attorney-General's argument cannot be tested in court, but only guides Parliament's deliberations, Caritas considers there is insufficient discussion and debate even where there is significant disagreement about the 'limited justification' proposed.
42. One example was the 2004 *Foreshore and Seabed Bill* NZBoRA assessment, which recognised a prima facie breach of section 19 – the right to freedom from discrimination. The Bill of Rights assessment justified the breach, and the legislation was passed. A review of the legislation by the United Nations Committee on the Elimination of Racial Discrimination (CERD) confirmed that external assessment also found the law was discriminatory. The Act was subsequently repealed, and the United Nations CERD report was cited as one reason for its review; however, the NZBoRA assessment for the subsequent *Marine and Coastal Areas (Takutai Moana) Bill* found almost identical justifications to again breach Section 19 of NZBoRA. The public and political debate around this issue showed that minority rights were not sufficiently protected from majoritarian fears and prejudices.
43. A number of NZBoRA assessments have considered whether limiting appeal rights (as noted earlier) breached section 27 concerning the Right to Justice, and again have regularly found a policy justification.

44. We agree with concerns raised by Professor Janet McLean of Victoria University that there is a danger that the Bill of Rights, rather than providing a check on human rights concerns, in some cases appears to have liberated Parliament to do whatever it wants in relation to human rights. In some criminal justice cases she notes that an adverse Bill of Rights assessment is almost a 'badge of honour'.¹ We consider there is insufficient priority given in the Parliamentary process to hearing and considering different arguments and claims about human rights breaches.
45. A very contemporary example of this has been played out during this Constitution Conversation submission period. On 9 July, the Human Rights Commission used its direct reporting function to address the Prime Minister about human rights concerns in the *Government Communications Security Bureau and Related Legislation Bill* and the *Telecommunications (Interception and Security) Bill*. Paragraph 19 of the Human Rights Commission report agrees with the Ministry of Justice NZBoRA assessment that there are inconsistencies in these proposed Bills with sections 14, 19, 21 and 27 of the Bill of Rights, but disagrees with the Ministry's analysis that all inconsistencies could be justified. This is another example of how the Parliamentary process gives insufficient weight to well-founded arguments and questions about the application of NZBoRA in the passing of legislation.
46. The New Zealand Bill of Rights Act does not sufficiently recognise and reflect international Human Rights agreements and instruments that New Zealand has signed up to. As one example, the 9 July 2013 Human Rights Commission report refers to NZBoRA failing to safeguard the protection to privacy found in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.
47. The most fundamental right is the right to life. The universal significance of this right is recognised in it being the first of the rights listed in the New Zealand Bill of Rights Act 1990, and it is the third article in the Universal Declaration of Human Rights. Additionally, the United Nations Convention on the Rights of the Child recognises the right of children to protection before birth. However, the New Zealand Bill of Rights falls short of our international commitments in this regard. The NZBoRA recognition of the right to life is a very watered-down version of the equivalent clause in the Universal Declaration of Human Rights:
- *Everyone has the right to life, liberty and security of person.* (Universal Declaration of Human Rights, article 3)
 - *No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.* (New Zealand Bill of Rights Act 1990, section 8)
48. Catholic teaching recognises the right to life as extending from conception until natural death. *The Church teaches that human life begins at conception and lasts until we draw our final breath...the unborn child is the most vulnerable, most innocent and most defenceless of all beings. The protection of such a person is clearly a moral obligation no one can avoid. Our responsibility extends to creating an environment within families and society where pregnant mothers are supported, children are made welcome and abortion is not seen as the only possibility in cases of forced and problematic pregnancies.* (NZCBC: *A consistent ethic of life*, 1997)

¹ Quoted by Chief Justice Sian Elias in: *Fundamentals: a constitutional conversation*. Harkness Henry Lecture 2011

49. We are deeply concerned about the erosion of the right to life as demonstrated in international examples of legalised euthanasia:

The experience of those countries that have already legalised euthanasia shows that the demand for euthanasia cannot be limited to a carefully defined group. In the Netherlands, euthanasia was initially only available to dying adults with terminal illness who were able to give informed consent and who repeatedly requested euthanasia. Since 1973 all of these restrictions have fallen away and lethal injections can now be given to newborns and teenagers with disabilities, as well as to persons with dementia and depression. In some of these cases there is no explicit request from the person concerned. (NZCBC: The Dangers of Euthanasia, 2011)

50. We are aware that there are a wide range of views on matters such as abortion and euthanasia in a pluralist society. Catholic views have a legitimate place in those discussions and debates. However, more fundamentally, the right to life cannot be left only to majoritarian decision making and to the sway of political opinion. Protection of the right to life remains a fundamental constitutional question.

51. Caritas recognises limits to the doctrine of parliamentary sovereignty. Discussions around these limits are sometimes framed around British constitutional theorist AV Dicey's claim that there are inbuilt internal and external limits to what a legislature could do:

If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it. (AV Dicey: Introduction to the Study of the Law of the Constitution, 1889)

52. Dicey's 19th century assertion that rulers would never pass unreasonable laws nor governed people submit to them should not have survived 20th century atrocities such as the Nazi genocide in Europe, which was carried out by people obeying laws passed by an elected government. The development of human rights agreements and instruments immediately following World War II was an immediate response to these fundamental human rights breaches.

53. Senior New Zealand legal figures have mused informally on Dicey's theoretical example in exploring whether there is a role for Courts in determining core rights that Parliament must not ignore. Chief Justice Robin Cooke went further than musing in a 1984 judgement:

I do not think that literal compulsion by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them. (Taylor v New Zealand Poultry Board 1984)

54. Caritas strongly agrees that some human rights lie so deep that even Parliament cannot override them. The Bill of Rights must be strong enough that such 'theoretical' legislation can never be passed by the Legislature (Parliament), and it must be emphatically understood that the Judiciary (Courts) has the ability to enforce that. On the question of whether such a law can bind the sovereignty of future Parliaments, we reply that it not only can, but should. There are laws and principles that override and exist prior to the decisions of particular states and governments. A superior law Bill of Rights would articulate those laws and principles, in the same way that the development of international Human

Rights agreements and instruments occurred because some States feel able to legislate against the human rights of their citizens, including their fundamental right to live.

55. Caritas concludes that this requires that the Bill of Rights becomes superior law. Human rights flow from our inherent human dignity. They are *universal* because they are present in all human beings, without exception of time, place or subject. They are *inviolable* because it is vain to proclaim them without respecting them everywhere and for all people. And they are *inalienable* because they cannot be granted or taken away – they are inherent in every person made in the image of God.
56. For Catholics, the question of whether a legitimately elected-government could pass legislation that limits the right to life is not a theoretical discussion. Current abortion legislation and a proposed private members' bill on euthanasia have already set limits, or show a willingness to set limits, on the right to life which we find unacceptable. Other voices in New Zealand society are calling for the reintroduction of the death penalty; for increased barriers to deny entry to New Zealand of desperate people seeking to claim asylum from violence and persecution; while discussions of contraception and even sterilisation of beneficiaries show discredited eugenic theories still hold weight here. Internationally, former Chief Justice Cooke's question of whether governments can legitimately use torture is not a theoretical but a real human rights battle being waged in legislatures and courts following the 'War on Terror'.
57. New Zealanders may not all agree on where to draw the line on human rights issues, and we recognise these are complex matters for all branches of government – Executive, Parliament and Courts. But we cannot be complacent about the necessity of protecting human rights, particularly the right to life, which is about protecting the most vulnerable members of society – people with serious illnesses and disabilities, unborn children, frail elderly people, the poor and people in prison. When the right to life is breached for any of us, none of us is safe.

Electoral issues

The subject of political authority is the people considered in its entirety as those who have sovereignty. In various forms, this people transfers the exercise of sovereignty to those whom it freely elects as its representatives, but it preserves the prerogative to assert this sovereignty in evaluating the work of those charged with governing, and also in replacing them when they do not fulfil their functions satisfactorily...The mere consent of the people is not, however, sufficient for considering 'just' the ways in which political authority is exercised.

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58. It is important that all people have an opportunity to participate in decision-making, including voting for representatives. Voting is not only a right but also a duty of citizenship.
59. Catholic social teaching recognises a limited role of positive discrimination in ensuring that minorities groups are able to achieve an equal enjoyment of human rights – including political representation - to less disadvantaged groups. However, Catholic Social Teaching reflects the limitation in the *International Convention on the Elimination of all Forms of Racial Discrimination* that positive discrimination measures should be regularly examined to see if they are still meeting their objectives.
60. In the case of Māori seats in Parliament, Caritas believes there continues to be a strong positive discrimination argument for ensuring Māori representation in Parliament through the Māori electoral roll. Māori continue to be overrepresented in most measures of social and economic inequality. However, we note that this specific New Zealand electoral solution has always been a compromise – we believe better outcomes for shared decision-making need to be found through discussion and dialogue about Article 1 Treaty/Tiriti rights concerning sovereignty/tino rangatiratanga and governorship/kāwanatanga, as noted in paragraphs 28-37 of our submission.
61. Catholic teaching does not prescribe the form of Government, or the length of a Parliamentary term. There is room for legitimate debate among people of good-will about the best form of representation and the length of term.
62. However, Caritas believes that in the absence of better checks and balances between the arms of the State (Executive, Legislature and Judiciary) and in the absence of stronger protection for the Bill of Rights and the Treaty of Waitangi/ te Tiriti o Waitangi, one of the few existing protections against abuse of power in New Zealand is our short three-year electoral term. We do not support extending the term of government under the constitutional status quo.