



For a better working life

New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

Constitutional Review

Submission to the Constitution Review Panel by the Public Service Association: *Te Pūkenga Here Tikanga Mahi*

31 July 2013

Introduction

The New Zealand Public Service Association *Te Pūkenga Here Tikanga Mahi* (the PSA) is the largest trade union in New Zealand with over 58,000 members. We are a democratic organisation representing members in the public service, and the wider state sector (the district health boards, crown research institutes and other crown entities, state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors).

The PSA has a particular interest in the employment issues its members face.

PSA submission

This submission discusses the following topics:

1. Constitutional protection of the legitimacy of local government as a tier of government
2. The role of an independent public service in New Zealand's constitution
3. Incorporation of economic, social and cultural rights, especially workers' rights, into the New Zealand Bill of Rights Act (BORA)
4. Entrenchment of BORA
5. The need for effective monitoring of compliance with BORA and additional checks on Parliament
6. Justiciability of economic, social and cultural rights
7. Incorporation of the principles of equality between men and women, and equal pay for work of equal value, into the constitution
8. Incorporation of disability rights, especially the right of disabled people to work.

The PSA wishes to have an opportunity to make an oral submission.

A. Local government in New Zealand's constitution

The legitimacy of local government as a tier of government should be constitutionally protected.

The PSA submits that the constitutional review should consider the proper constitutional status of local government in New Zealand. Local government has an essential democratic role.¹ The legitimacy of local government as a tier of government should be constitutionally protected, as it is in many European Union states, and in the post-apartheid constitution of the Republic of South Africa.²

As a former Minister of Local Government stated:

“Local government is a key arm of New Zealand’s system of government. It gives citizens a democratic say in local decision making, is part of the system of checks and balances on power, allows a sharing of the administrative load between different tiers of government, and enables effective local service delivery... Local government has a dual accountability: it has a democratic mandate from its communities, but is also subject to Ministers’ statutory and policy decision making. This creates a basic tension in the relationship between local government and the Executive... At an overarching level, the nature and conventions of the relationship between central and local government and respective responsibilities are not clearly defined. This creates potential for confusion about the degree to which local government is subject to central government direction and to whom local government should be accountable.”³

Indeed, the local government sector has endorsed Wellington’s proposal to ensure local government’s role is recognised within New Zealand’s constitution.⁴

Wellington Mayor Celia Wade-Brown stated recently that "The Capital is the heart of New Zealand’s democracy and it is fitting that Wellington City Council should propose a simple but symbolically significant amendment to the 1986 Constitution Act".⁵

Reid proposes three alternatives that might be taken to strengthen the constitutional status of local government: entrenched legislation, parliamentary convention, and the 1986 New Zealand Constitution Act.⁶ Each of these options, he argues, are within the power of Parliament to introduce.⁷

¹ Reid, M. (2011), *Local Government’s Quest for Constitutional Status*, in ‘Along a Fault-line: New Zealand’s changing local government landscape’, Drage, J, McNeill J. & Cheyne, C (eds), Wellington, p 33.

² Reid, M., *op. cit.*, p 30.

³ Office of the Minister of Local Government (2011), *Smarter Government, Stronger Communities: Towards Better Local Governance and Public Services*, discussion document, p 7-8.

⁴ Wellington City Council, 21 July 2013, *Recognising local government’s place in New Zealand’s constitution*. <http://wellington.govt.nz/your-council/news/2013/07/recognising-local-governments-place-in-new-zealands-constitution>

⁵ *Ibid.*

⁶ Reid, M., *op. cit.*, p 36.

⁷ Reid, M., *op. cit.*, p 37.

In sum, the PSA submits that the relationship between central and local government should be based on a clear framework which delineates local government's responsibilities, powers and status vis-à-vis central government. This framework is appropriate for inclusion in New Zealand's constitution. One possible mechanism would be to amend the New Zealand Constitution Act 1986.

B. The role of an independent public service in New Zealand's constitution

The requirement that State servants be apolitical when carrying out their duties, functions and powers is an established constitutional convention in New Zealand.

The PSA submits that the constitution should embed the responsibility of the New Zealand Public Service to give free and frank, politically neutral advice to the government. This is a cornerstone of a politically neutral and publicly accountable state sector. The requirement that State servants must be apolitical when carrying out their duties, functions and powers is an established constitutional convention in New Zealand. It is a principle that underpins the continuing employment status of State servants and enables State servants to provide consistent services, including policy development, for the government of the day.⁸

This must be balanced with respect for State servants' rights to freedom of expression and association.

However, there must be a proper balance between respect for State servants' freedoms of expression and association, and the public interest in having a politically neutral and effective State services. As a consequence of the statutory right of State servants to join and be active in organisations, including trade unions, it is likely that there will sometimes be, within defined limits, an expression of political views inside the workplace. State servants have the same rights of association as other members of the public; political expression and participation may be undertaken in the individual's own time.

C. New Zealand's Bill of Rights Act

This section argues for the incorporation of all economic, social and cultural rights into the New Zealand Bill of Rights Act 1990 (BORA), particularly the right to work, the right to the enjoyment of just and favourable conditions of work, the right of everyone to form trade unions, the right to strike, women's employment rights, and the right of disabled people to work. It also argues for the entrenchment of BORA, for additional checks on Parliament's compliance with BORA, and for the power for judges to provide remedies.

(i) Should BORA include additional rights, and if so which rights?

The Bill of Rights Act does not protect our rights enough.

The PSA submits that BORA does not protect our rights enough. This is because BORA only covers civil and political rights; economic, social and cultural rights are not comprehensively protected. Notwithstanding existing legislation providing for some elements of economic, social and cultural rights,⁹ the provisions of the

⁸ <http://www.ssc.govt.nz/political-neutrality-guidance> accessed on 4 July 2013.

⁹ Other New Zealand laws relate to individual rights, particularly laws relating to employment, equal pay, minimum wage, health and safety in employment, parental leave and employment protection, and education.

International Covenant on Economic, Social and Cultural Rights,¹⁰ which has been ratified by New Zealand,¹¹ have not been fully incorporated into New Zealand's domestic legal order. Nor have the provisions of the Convention on the Elimination of all forms of Discrimination Against Women¹² or the Convention on the Rights of Persons with Disabilities¹³ been fully incorporated, notwithstanding their ratification.

(ii) Evidence that economic, social and cultural rights, particularly workers' rights, need further protection

There is plenty of evidence that economic, social and cultural rights, particularly workers' rights, need further protection in order to bring New Zealand into compliance with its international obligations.

New Zealand legislation does recognise some economic, social and cultural rights. For instance, the Minimum Wage Act 1983, the Health and Safety in Employment Act 1992, the Employment Relations Act 2000 and the Holidays Act 2003 protect elements of the right to work and the right to the enjoyment of just and favourable conditions of work.¹⁴ However, as we shall see below, gaps in protection remain.

Youth employment

The Committee on Economic, Social and Cultural Rights has expressed its concern that unemployment in New Zealand continues to disproportionately affect young persons.¹⁵ The minimum hourly wage is \$13.50.¹⁶ The separate new entrants' wage for 16-17 year old workers is \$10.80 for nonsupervisory workers with fewer than three months or 200 hour of employment.¹⁷ The Committee referred New Zealand to its general comment No. 18 (2005) on the right to work. Paragraph 12(b) points out that the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex,... or other status, which has the effect of impairing or nullifying exercise of the right to work on a basis of equality.¹⁸ Moreover, the Minimum Wage (Starting out Wage) Amendment Act 2013 extends this to 18 and 19 year olds.¹⁹ Having a separate minimum wage for workers on the basis of their age and/or work status is discriminatory. If the right to work was entrenched, the minimum wage legislation in question would have been struck down as unconstitutional.

Having a separate minimum wage for workers on the basis of their age and/or work status is discriminatory

Health and Safety

The Committee on Economic, Social and Cultural Rights has also expressed its concern that the omission of a statutory maximum number of work hours in the Health and Safety in Employment Act falls short of the requirements of article 7 in

¹⁰ International Covenant on Economic, Social and Cultural Rights (1966, entry into force 1976).

¹¹ New Zealand ratified this treaty on 28 December 1978.

¹² New Zealand ratified CEDAW on 10 January 1985.

¹³ New Zealand ratified CRPD on 25 September 2008.

¹⁴ Opie, J. (2012), *A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990*, 43 VUWLR, p 482.

¹⁵ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 15.

¹⁶ Minimum Wage Order 2012, section 4.

¹⁷ Minimum Wage Order 2012, section 5. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, 2012, *Country Report on Human Rights Practices for 2012: New Zealand*, p 15.

¹⁸ Committee on Economic, Social and Cultural Rights, *General comment No. 18 (2005) on the right to work*, paragraph 12(b).

¹⁹ Article 4A, Minimum Wage (Starting out Wage) Amendment Act 2013.

New Zealand has no statutory maximum number of work hours.

the International Covenant on Economic, Social and Cultural Rights regarding the protection of workers' right to rest and reasonable limitation of working hours. The Committee was also concerned at reports that some collective agreements fail to specify work hours, which is in contravention of New Zealand legislation.²⁰ The Committee recommended that New Zealand introduce a statutory maximum number of work hours.²¹ The Minimum Wage Act section 11B(2) states that the maximum number of hours in a week may be greater than 40 if the parties agree.²² If the right to the enjoyment of just and favourable conditions of work were entrenched, the above problems would not have occurred.

Sex discrimination

While the law prohibits discrimination in employment and rates of pay for equal or similar work, a gender earnings gap persists in practice. According to 2013 Department of Labour survey statistics, women earned 9.3% less than men on median hourly rates and 13% less on average hourly rates.²³ The closure of the Pay and Employment Equity Unit in the Department of Labour has effectively meant that there is no monitoring institution for gender pay inequity within New Zealand's administration. This is a disappointing regression.

New Zealand should ensure full incorporation into the constitution the principle of equality between women and men.

The Committee on the Elimination of all forms of Discrimination Against Women, which monitors New Zealand's implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),²⁴ has recommended that, in the context of the current constitutional review, New Zealand should ensure full incorporation into the constitution and/or other legislation, of the principle of equality between women and men in accordance with article 2(e) of CEDAW.²⁵ It urged New Zealand to establish a legal definition of discrimination on the basis of sex in line with article 1 of CEDAW,²⁶ and to extend state responsibility for acts of discrimination by both public and private actors in accordance with article 2(e) of CEDAW, with a view to achieving formal and substantive equality between women and men.²⁷

New Zealand should incorporate the principle of 'equal pay for work of equal value' into the constitution.

In addition, the Committee on Economic, Social and Cultural Rights recommended that New Zealand amend its legislation on equality in employment so as to *effectively* provide for equal pay for work of equal value. The Equal Pay Act and its

²⁰ Article 11B Minimum Wage Act.

²¹ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 16.

²² Minimum Wage Act 1983, Article 11B(2).

²³ Statistics New Zealand, Quarterly Employment Survey, March 2013, www.stats.govt.nz.

²⁴ New Zealand ratified the Convention on the Elimination of all forms of Discrimination Against Women in 1985.

²⁵ Article 2 (e) provides: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."

²⁶ Article I provides: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

²⁷ Committee on the Elimination of Discrimination against Women, 6 August 2012, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: New Zealand*, paragraph 33.

effectiveness as a mechanism to protect the principle of equal pay for work of equal value is currently being litigated.²⁸ The Committee also recommended that New Zealand take steps, with a clear timeline, to correct the gender wage gap in the public sector.²⁹

The PSA submits that if the principle of equality between women and men and the principle of equal pay for work of equal value were constitutionally protected, this would help to close the gender earnings gap in practice.

BORA's current provision on freedom of association should be expanded to incorporate Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 22 of the International Covenant on Civil and Political Rights, and ILO Convention 98 on Collective Bargaining.

Freedom of association and the right to collective bargaining

A 2010 amendment to the law provides that workers in the film industry are contractors unless they have specifically negotiated an employment agreement. Contractors are not covered by most provisions of employment law. For example, they cannot join unions, bargain collectively, or benefit from certain leaves or overtime compensation.³⁰ The 'Hobbit Amendment' was not made in the interests of national security or public order or for the protection of fundamental rights and freedoms and is therefore inconsistent with the right of trade unions to function freely.

Unnecessary restrictions on collective bargaining violate Article 8(c) of the International Covenant on Economic, Social and Cultural Rights, which provides that the right of trade unions to function freely must be subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

While freedom of association is included in the BORA, it is submitted that this right should be expanded to incorporate Article 8 of the International Covenant on Economic, Social and Cultural Rights regarding trade unions. Moreover, it should be expanded to incorporate the entire Article 22 of the International Covenant on Civil and Political Rights.³¹ Furthermore, it should incorporate the ILO Convention 98 on Collective Bargaining.³² This treaty provides that New Zealand should promote and support collective bargaining as a means of wage determination.

²⁸ *Bartlett & Service and Food Workers Union vs. Terranova Homes & Care Ltd*, Employment Court, Auckland.

²⁹ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 14.

³⁰ U.S. Department of State, Bureau of Democracy, Human Rights and Labor, 2012, *Country Report on Human Rights Practices for 2012: New Zealand*, p 14.

³¹ Article 22 states: 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

³² This treaty was ratified by New Zealand on 9 June 2003.

The right to strike should be included in BORA.

The right to strike

The law limits the right to strike to negotiations for a collective bargaining agreement and matters of health and safety.³³ Strikes by providers of 'key services' are subject to certain procedural requirements, including mandatory notice of three to 14 days, depending on the service involved. The listing of some of these sectors is based on broader criteria than the International Labour Organisation's definition of 'essential services'. Also, the law prohibits sworn police officers (which includes all uniformed and plainclothes police but excludes clerical and support staff) from striking or taking any form of industrial action.³⁴

The PSA submits that the right to strike should be included in BORA and should be entrenched.

The constitution should explicitly regard denial of reasonable accommodation to disabled people as discrimination.

People with disabilities and the right to work

The Committee on Economic, Social and Cultural Rights recommended that New Zealand explicitly regard denial of reasonable accommodation as a form of discrimination.³⁵ The PSA submits that BORA should be amended to include this form of discrimination against disabled people.

Moreover, New Zealand has ratified the Convention on the Rights of Persons with Disabilities³⁶ and as such has agreed to incorporate the provisions of this treaty into its domestic law. This treaty has not yet been incorporated into New Zealand's domestic law via an enabling act. The fundamental rights and freedoms of disabled people are appropriate for inclusion in New Zealand's constitution.

The constitution should incorporate disability rights, particularly the right of disabled people to work.

The PSA submits that New Zealand's constitution should incorporate disability rights as provided for in the Convention on the Rights of Persons with Disabilities. The PSA is particularly interested to see included Article 27 on the right of disabled people to work. Article 27 prohibits discrimination on the basis of disability with regard to all matters concerning employment;³⁷ and protects the right of disabled people to just and favourable conditions of work³⁸, to exercise labour and trade union rights on an equal basis with others,³⁹ and to be employed in the public sector.⁴⁰ Moreover, it seeks to ensure that reasonable accommodation is provided to disabled people in the workplace.⁴¹

³³ Moreover, the Employment Relations Amendment Bill, currently being considered in Parliament, seeks to further restrict the right to strike.

³⁴ U.S. Department of State, Bureau of Democracy, Human Rights and Labor, 2012, *Country Report on Human Rights Practices for 2012: New Zealand*, p 14.

³⁵ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 10.

³⁶ On 25 September 2008.

³⁷ Article 27(1)(a).

³⁸ Article 27(1)(b).

³⁹ Article 27(1)(c).

⁴⁰ Article 27(1)(g).

⁴¹ Article 27(1)(i).

Minimum wage exemptions for disabled people are discriminatory.

The PSA is concerned about New Zealand legislation which allows for minimum wage exemptions for disabled people⁴². This is discrimination on the basis of disability. If disability rights were included in New Zealand's entrenched constitution, such legislation would be struck down as unconstitutional.

(iii) The proposed solution? Incorporate economic, social and cultural rights, including workers' rights, into BORA

The Bill of Rights Act should include economic, social and cultural rights.

The PSA submits that all economic, social and cultural rights should be incorporated into BORA. The Committee that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights, has called upon New Zealand to take the necessary measures, in the context of the Constitutional Review process, to give the Covenant full effect in its domestic legal order.⁴³ The Committee further urged New Zealand to incorporate economic, social and cultural rights into the 1990 Bill of Rights Act.⁴⁴ Its general comment No. 9 (1998) on the domestic application of the Covenant notes that there is a duty to give effect to the Covenant in the domestic legal order,⁴⁵ and that this has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws.⁴⁶ As Amnesty International New Zealand commented, New Zealand has not fulfilled its human rights obligations because, as a signatory to the International Covenant on Economic, Social and Cultural Rights, New Zealand is bound to incorporate or formally adopt the treaty into domestic law.⁴⁷

The PSA submits that the following rights in particular should be included in BORA:

The Bill of Rights Act should incorporate additional specific rights.

- (i) The right to work⁴⁸
- (ii) The right to enjoyment of just and favourable conditions of work⁴⁹
- (iii) The right of everyone to join trade unions⁵⁰
- (iv) The right to strike⁵¹
- (v) Special protection for working mothers before and after childbirth⁵²
- (vi) The principle of equality between men and women
- (vii) Women's employment rights, including the principle of equal pay for work of equal value

⁴² Minimum Wage Act 1983, Article 8.

⁴³ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 9.

⁴⁴ Committee on Economic, Social and Cultural Rights, *op. cit.*, paragraph 10.

⁴⁵ Committee on Economic, Social and Cultural Rights, 1998, *The domestic application of the Covenant*, E/C.12/1998/24, CESCR, paragraph 1.

⁴⁶ *Ibid*, paragraph 6.

⁴⁷ Amnesty International New Zealand (2013), *Make our rights law: the need for stronger legal protections of economic, social and cultural rights in Aotearoa New Zealand*, p 6.

⁴⁸ Article 6, International Covenant on Economic, Social and Cultural Rights.

⁴⁹ Article 7, International Covenant on Economic, Social and Cultural Rights.

⁵⁰ Article 8, International Covenant on Economic, Social and Cultural Rights.

⁵¹ Article 8(1)(d), International Covenant on Economic, Social and Cultural Rights.

⁵² Article 10(2), International Covenant on Economic, Social and Cultural Rights.

- (viii) The right of disabled people to work. This includes explicit recognition of denial of reasonable accommodation to disabled people as a form of discrimination.

All of these rights are protected in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, and the Convention on the Elimination of all forms of Discrimination Against Women, all of which have been ratified by New Zealand.⁵³ Incorporating these rights in the domestic legal order via BORA is therefore appropriate.

Article 6 of the International Covenant on Economic, Social and Cultural Rights protects the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts.

Article 7 recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of ICESCR.
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his or her employment to an appropriate higher level, subject to not considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8 ensures the following rights:

- (a) The right of everyone to form trade unions and join the trade union of his or her choice, subject only to the rules of the organization concerned, for the promotion and protection of his or her economic and social interests;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

⁵³ New Zealand ratified this treaty on 28 December 1978.

- (d) The right to strike, provided that it is exercised in conformity with the laws of New Zealand.

Article 10(2) recognizes that special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Article 3 provides for the equal right of men and women to the enjoyment of all economic, social and cultural rights.

Other treaties that New Zealand has ratified provide the basis for the inclusion of other rights in New Zealand's constitution. The Convention on the Elimination of all forms of Discrimination Against Women recognises the principle of equality between men and women (Article 2) and the principle of equal pay for work of equal value (Article 11(1)(d)).⁵⁴ The Convention on the Rights of Persons with Disabilities recognises that discrimination on the basis of disability includes denial of reasonable accommodation (Article 2).⁵⁵ It also recognises the employment rights of disabled people (Article 27).

The PSA submits that all economic, social and cultural rights should be incorporated into BORA, but especially workers' rights. This would give full effect to New Zealand's international obligations in the domestic legal order. This would also bring New Zealand to the forefront of jurisdictions that recognise economic, social and cultural rights in their constitutions, together with Argentina, Colombia, Egypt, Germany, India, Indonesia, Latvia, and South Africa.⁵⁶ Indeed, most national constitutions now affirm economic, social and cultural rights.⁵⁷

However, as the next section argues, even more effective would be to entrench BORA and/or the provisions of international human rights treaties over any inconsistent domestic laws, thereby making such constitutional provisions supreme law.

(i) Entrenchment of BORA

Entrenchment can ensure the stability of key constitutional provisions.

The PSA submits that BORA should be entrenched, and given a higher legal status than other laws. Entrenchment is based on the principle that the entrenched law expresses a public agreement about the values in the law and so should only be amended for a good reason and with wide support. In particular, entrenchment can be said to protect minorities from the 'tyranny of the majority', as more than a simple majority is required to change the law.⁵⁸ Moreover, entrenchment can

⁵⁴ New Zealand ratified the Convention on the Elimination of all forms of Discrimination Against Women on 10 January 1985.

⁵⁵ New Zealand ratified the Convention on the Rights of Persons with Disabilities on 25 September 2008.

⁵⁶ Amnesty International New Zealand (2013), *Make Our Rights Law Campaign – Questions and Answers*, p 3.

⁵⁷ Opie, J, *op. cit.*, p 510.

⁵⁸ Constitutional Advisory Panel, (2012), *New Zealand's Constitution, The conversation so far*, p 44.

ensure the stability of key constitutional provisions. Entrenchment embeds the values of the current generation and limits future Parliaments' ability to reflect significant alterations in society's values.⁵⁹

Making all civil, political, economic, social and cultural rights supreme law would give due legal protection to human rights.

Making all civil, political, economic, social and cultural rights supreme law would give due legal protection of human rights and fundamental freedoms to New Zealanders and restrain the abuse of governmental power. It is appropriate to entrench human rights because these rights are inherent to all human beings; we are all equally entitled to our human rights without discrimination. Human rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, particularly in supreme law such as a constitution. Furthermore, in many other countries fundamental rights and freedoms have a higher legal status over other laws, making human rights supreme law.⁶⁰ In such jurisdictions, the Courts can typically review Parliament's decision and may have powers to declare legislation inconsistent or strike it down.

There are few other jurisdictions in which Parliament has the power to override fundamental rights and freedoms.

Similarly, there are few jurisdictions in which Parliament has the power to override fundamental rights and freedoms.⁶¹ In New Zealand, it is currently Parliament that is the ultimate decision maker about whether legislation limits rights and whether any limit is justified. As argued below, the principle of Parliamentary Supremacy has proven grossly inadequate to protect the human rights of New Zealanders. Entrenchment of such rights would provide a much more effective means to guarantee the fundamental rights and freedoms that should be protected from interference by the state, and from changing political will.

(ii) Monitoring compliance with BORA

The PSA submits that BORA as it currently stands does not provide adequate mechanisms to protect rights.

The section 7 check on the power of Parliament is an ineffective safeguard of human rights.

Firstly, at present Parliament is the final decision maker about whether legislation limits rights and whether any limit is justified. Ultimately, Parliament can choose to legislate in a way that is contrary to BORA. In practice this means that since 1990 over 2900 laws have been passed in New Zealand; there have been 59 section 7 reports; and yet only nine of the laws in question have been upheld as inconsistent with BORA.⁶² In all other instances, the inconsistent legislation was passed in the face of conflict with BORA. This is a stark illustration of the ineffectiveness of the section 7 check on the power of Parliament, and the ability to safeguard human rights.

⁵⁹ *Ibid.*

⁶⁰ For example, the United States of America, Canada, Ireland, France, Germany, Finland, South Africa, Brazil.

⁶¹ One notable exception is the UK.

⁶² Radio New Zealand, 5 May 2013, Constitutional Review debates, *Debating the Constitution: Human Rights*.

The PSA submits that section 7 of BORA should be amended to the effect that if an inconsistency with BORA is found, Parliament would be obliged to amend the legislation to ensure consistency.

Second, BORA does not provide any effective mechanism by which to challenge Parliament's decision. Accordingly, section 7 BORA is not a sufficient safeguard of the human rights of New Zealanders.

The PSA submits that more checks and balances are required to monitor compliance with BORA. There are several additional avenues that could be added to supplement the section 7 mechanism.

The Courts should have the power to decide whether legislation is inconsistent with BORA, and to invalidate inconsistent parts of legislation.

First, the PSA submits that the Courts should have the power to decide whether legislation is consistent with BORA, and to invalidate inconsistent parts of legislation. New Zealand may take inspiration from Canada, which does not have an equivalent to section 7 in its legislation because it is simply unnecessary. In Canada, any legislation that is inconsistent with the Canadian Charter of Rights and Freedoms would be struck down by the Canadian courts. Therefore, the Canadian Parliament does not even attempt to pass inconsistent legislation. At present in New Zealand, judges can merely note their view that a statute is inconsistent with BORA. However, they must uphold and apply such law if it cannot be interpreted in a way that is consistent with BORA.

Giving Courts the power to monitor is in line with international best practice, and better protects the balance of powers between the three branches of government.

The PSA supports a judicial role in enforcing BORA and submit that BORA should be supreme law. The judiciary should have the power to strike down legislation, in effect invalidating legislation or parts of legislation it finds to be inconsistent with BORA. The PSA submits that the Courts should have the power to decide whether legislation is consistent with BORA because this is in line with international best practice, and better protects the balance of powers between the three branches of government. The Committee on Economic, Social and Cultural Rights has consistently recommended that New Zealand take steps so that the competent authorities review draft laws, regulations and policies to ensure their compatibility with the provisions of the Covenant.⁶³

Other ideas for further monitoring of compliance with BORA include the following:

1. BORA specialists could be working with legislative drafters before the bill is even proposed in Parliament to ensure that it is consistent with BORA.
2. Establishment of a Human Rights Select Committee to more effectively vet proposed legislation.

⁶³ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 10.

(iii) The power for judges to provide remedies

BORA should expressly provide for the power of judges to provide remedies for breaches of economic, social and cultural rights.

The PSA submits that BORA should be amended to ensure that individuals may apply to courts to also provide remedies for breaches of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has also called on New Zealand to ensure that redress for violations of the Covenant rights can be sought through New Zealand's varied recourse mechanisms.⁶⁴

Amnesty International New Zealand has pointed out that New Zealand law currently lacks effective remedies for breaches of economic, social and cultural rights.⁶⁵ Unless economic, social and cultural rights are included in domestic law, they do not create obligations that are enforceable in judicial proceedings in New Zealand.⁶⁶

New Zealand has asserted that citizens can seek remedies for breaches of economic, social and cultural rights through judicial review.⁶⁷ In theory, judicial review should be available because elements of certain economic, social and cultural rights are included in legislation, and because of the influence of international law on NZ law.⁶⁸ It is true that aspects of the rights or entitlements that the Minimum Wage Act, the Health and Safety in Employment Act, the Employment Relations Act, the Holidays Act and other statutes establish are justiciable in New Zealand courts. For example, an employee who alleges that he or she has been unjustifiably dismissed, disadvantaged or discriminated against may sue in the Employment Relations Authority or the Employment Court (or under the Human Rights Act in relation to discrimination) for a series of remedies including compensation.⁶⁹

The current legislative recognition of aspects of economic, social and cultural rights is piecemeal.

In reality, however, the courts have been reluctant to exercise judicial review or to take account of international economic, social and cultural rights obligations because there is a lack of a framework for the judiciary to apply legislation and policy to and determine their effectiveness in promoting and protecting these rights.⁷⁰ The current legislative recognition of aspects of economic, social and cultural rights is piecemeal. The critical difference between civil and political rights and economic, social and cultural rights in New Zealand domestic law is that the law does not recognise economic, social and cultural rights themselves as fundamental, justiciable rights. As Geiringer and Palmer state, "[w]hat the New

⁶⁴ Committee on Economic, Social and Cultural Rights, 31 May 2012, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, paragraph 13.

⁶⁵ Amnesty International New Zealand (2013), *Make Our Rights Law: The Need for Stronger Legal Protections of ESCR in Aotearoa New Zealand*, p 9-10.

⁶⁶ *CPAG v AG (HC)*, referring to *Yee v Minister of Immigration* [2010] 1 NZLR 104 at para 24 re provisions of the Immigration Act 1987 and *Huang v Minister of Immigration*, [2009] 2 NZLR 700 (CA) at para 34.

⁶⁷ Sangaroonthong, J, *Justice-Ability: An Analysis of the Purported Non-Justiciability of ESCR in NZ* 2012, p 5-6.

⁶⁸ Amnesty International New Zealand, *op. cit.*

⁶⁹ Opie, J., *op. cit.*, p 482.

⁷⁰ Palmer, M. and Geiringer, C., *Human Rights and Social Policy in New Zealand*, *Social Policy Journal of New Zealand*, 30/12, 2007, p 37.

Zealand courts lack is the ability to test state and/or private action against broad [economic, social and cultural rights] protections.⁷¹

A remedies provision would facilitate direct enforcement of economic, social and cultural rights.

The courts' reluctance to find economic, social and cultural rights justiciable under the current legal framework is clearly a significant limitation on direct enforcement of economic, social and cultural rights⁷² and the ability of victims to claim redress. Incorporation of economic, social and cultural rights into BORA, together with a remedies provision, would send both courts and litigants a clear message that the government expects such rights to be upheld and for violations to be addressed, allowing the courts to fulfil their role in adjudicating such rights and providing remedies.⁷³

Conclusion

In sum, the PSA has made the following recommendations with respect to New Zealand's Constitutional Review:

1. The legitimacy of local government as a tier of government should be constitutionally protected. The relationship between central and local government should be based on a clear framework which delineates local government's responsibilities, powers and status vis-à-vis central government.
2. The constitution should embed the responsibility of the New Zealand Public Service to give free and frank, politically neutral advice to the government. However, there must be a proper balance between respect for State servants' freedoms of expression and association, which may be undertaken in their own time, and the public interest in having a politically neutral and effective State services.
3. The New Zealand Bill of Rights Act should be amended to incorporate all economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights. The PSA is particularly interested in the incorporation of the right to work, the right to the enjoyment of just and favourable conditions of work, the right of everyone to form trade unions, the right to strike, and the right of mothers to be accorded special protection during a reasonable period before and after childbirth. Other rights that should be incorporated include the principle of equality between women and men, women's employment rights and the principle of equal pay for work of equal value, employment rights of disabled people, and the explicit recognition of denial of reasonable accommodation to disabled people as discrimination.
4. The New Zealand Bill of Rights Act should be entrenched or made supreme law.

⁷¹ Opie, J., *op. cit.*, p 483.

⁷² Sangaroonthong, J., *op. cit.*, p 6.

⁷³ Amnesty International New Zealand, *op. cit.*, p 9-10.

5. There should be proper enforcement of Parliament's compliance with the New Zealand Bill of Rights Act.
6. The New Zealand Bill of Rights Act should include a provision that confers the power for judges to provide remedies for breaches of economic, social and cultural rights.

For further information about this submission contact

Chantelle McCabe, Policy Advisor

E: chantelle.mccabe@psa.org.nz

T: 04 816 5040

www.psa.org.nz