

Three Waters: Constitutional experts up in arms over 'dangerous' move supported by Government

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Jamie Ensor



Watch: Local Government Minister Nanaia Mahuta guarantees Three Waters will deliver 'long-term resilience' for future generations. Credits: Video - Newshub; Image - Getty Images.

A group of leading constitutional experts have written an open letter urging the Government to rethink its support for an amendment to the Three Waters legislation.

The amendment would add protection to a certain part of the legislation, requiring a special majority to repeal it in the future. This type of legislative action - called entrenchment - has previously only been used for changes to the Electoral Act, the experts say.

The academics warn the provision, which was supported by Labour and Green MPs in Parliament last week, risks creating a "dangerous precedent". National argues there would be outrage if it tried to entrench policies, such as Three Strikes.

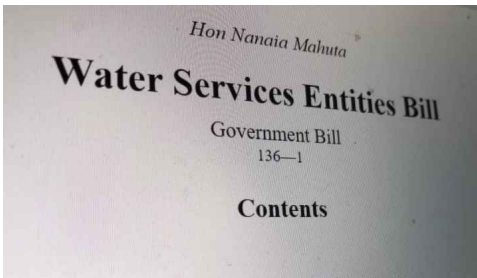


It now has the Prime Minister's attention. Jacinda Ardern said concerns raised are "legitimate" and Cabinet on Monday intends to discuss the principle of entrenchment. She wouldn't commit, however, to the Government backtracking on the amendment.

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The controversial provision - proposed as a Supplementary Order Paper (SOP) by Green Party MP Eugenie Sage - prohibits repealing a specific part of the Water Services Entities Bill (one of the pieces of Three Waters legislation) unless a 60 percent majority of parliamentarians agree.

The clause Sage is trying to protect creates an obligation for water services entities to maintain ownership and control of water infrastructure, therefore meaning services cannot be privatised.



However, while the experts recognise there are concerns about the "ease with which government-owned assets can be privatised", they object to how the amendment was introduced, the "absence" of proper debate, and the "unfortunate precedent" it may set.

"Up until now, the only statutory provisions which require special majorities for their change or amendment relate to certain core provisions of the Electoral Act that specify how electorate are drawn up, the method of voting, the voting age, and the length of the Parliamentary term," they said.







"These provisions, which may properly be viewed as fundamental to our system of representative democracy, have had

unanimous bipartisan support over many Parliaments. The just adopted provision entrenching the protection of water entities from privatisation does not meet the same constitutional threshold."

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The academics said they "urge the Government to think about the dangerous precedent that this legislative action may set".

"It extends the use of entrenchment protection from a very limited range of matters fundamental to our constitutional system to a matter of contested social policy. Not only does this move invite similar attempts in the future, it also risks undermining the seriousness with which entrenchment is taken by Parliament and the public generally."

The experts who signed the letter are Professor Janet McLean, Professor Paul Rishworth, Professor Andrew Geddis, Associate Professor Dean Knight, Associate Professor John Ip, Dr Eddie Clark, Dr Edward Willis and Dr Jane Norton.

Speaking to RNZ on Monday morning, Ardern said she had heard concerns about the amendment that passed last week

and said these are "legitimate".

"The subject matter was on an issue that a majority of parties in Parliament agree with, which is not privatising water assets... We agree [entrenchment] should be used rarely. Cabinet intends to have a bit of a discussion today about that principle."

She wouldn't say if the Government would backtrack its support, but acknowledged some elements of the amendment are "quirky".



Prime Minister Ardern with Local Government Minister Mahuta. Photo credit: Getty Images.

Debate in Parliament

The Bill passed through what is called the 'Committee of whole house' last week when Parliament was in urgency. Urgency meant politicians started earlier and stayed later to debate a raft of legislation quickly, often without the same amount of scrutiny applied in normal times. The legislation still needs to pass through its third reading.

According to Local Government Minister Nanaia Mahuta - who is shepherding the Three Waters legislation through Parliament - the Government wrote to parties previously to seek their support for entrenchment.

"That is certainly the view of members on this side of the House and the Government. However, National and ACT clearly did not want to give that type of assurance," she said in Parliament last week.

"We regret that, because, when we stand in front of this House to progress this particular bill, we want all New Zealanders to know that the House, when they say they're against privatisation, actually mean it—when they say they are against privatisation, they mean it."

She acknowledged the amendment "may not pass the constitutional threshold", but believed there is a "moral obligation of people who believe that privatisation should not occur to support that particular [SOP]".

Sage, who put forward the amendment, argued public submitters on the legislation had been concerned about potential future privatisation

"This SOP responds to that public concern that we avoid privatisation of water services and we maintain them and public ownership with the public interest in ensuring that all New Zealanders have access to affordable water services of high quality, and that the significant revenue involved in operating these services, significant investment involved - we don't want overseas companies taking the services and operating them primarily for profit."

A Select Committee report on the Water Services Entities Bill said the Department of Internal Affairs advised a 75 percent majority entrenchment was "inappropriate for legislation unrelated to constitutional matters".


The report said the Greens disagreed entrenchment should only be for constitutional matters and felt a 60 percent majority "would be appropriate as a check on future privatisation of water infrastructure".

Sage has pushed back on suggestions of the Greens trying to sneak the SOP in, pointing to comments about it in the Select Committee report.

Simon Watts, National's local government spokesperson, said the suggestion that other parties may wish to privatise water assets was just "cynical, political spin".

"This is political spin by both the Greens and Labour to try and rark up a story that doesn't exist. That is a real disappointment, but that is what is going on here - and against the advice of other players. They know it's not a practical mechanism - that, even in an eventuality, which would never occur, this would be effective. It is cynical political spin."





Eugenie Sage proposed the amendment. Photo credit: Newshub.

'Very dangerous precedent'

Paul Goldsmith, National's justice spokesperson, said in a press release on Saturday that passing such an amendment would create a "very dangerous precedent".

"If a National Government had passed a provision like this over, say, for example, the three strikes sentencing regime, Labour and the Greens would be outraged."

He said entrenchment shouldn't be used in these cases.

"Labour and the Greens have now colluded to entrench in law a contentious policy position, without any real debate and while the House was sitting under urgency.

"Entrenched provisions in law should be reserved for matters largely above politics, and when used they should be subject to careful scrutiny and debate. The exact opposite has happened in this case."

National has proposed to return to the committee of the whole house "to excise this unconstitutional and undemocratic clause"

ACT's local government spokesperson Simon Court said the SOP was breaking "dangerous constitutional ground" and would support National's proposal.

"The Greens and Labour have been grossly irresponsible, not realising what they are doing to New Zealand's constitutional framework while trying to fight the imaginary bogeyman of privatisation," he said.

"This amendment is a good example of why laws should not be rushed through under urgency in the middle of the night. It never ends well. It reduces the sovereignty of Parliament, and disenfranchises citizens as voters."

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