

NEW ZEALAND (/NEWS/NATIONAL) / POLI

## Entrenchment law: What you need to know

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The Three Waters Bill passed its third vote in Parliament today and is now in the final steps before becoming law, after a brief dip into discussions about entrenchment law. Photo: RNZ / Richard Tindiller

*Explainer* - Labour's Three Waters legislation was passed in Parliament today (<https://www.rnz.co.nz/news/political/480346/greens-pull-three-waters-support-citing-lack-of-protection-against-privatisation>), although without the controversial entrenchment provision against privatisation (<https://www.rnz.co.nz/news/political/480101/ardern-on-government-s-u-turn-on-three-waters-entrenchment-we-are-taking-this-as-a-team>) which had quietly entered an amendment to the bill during the committee stages.

Part of the debate surrounding this particular entrenchment provision revolves around how the clause came to be included, which MPs knew it was there, and many understood its significance.

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But entrenched legislation is an obscure legal and political topic not typically heard about in New Zealand's current affairs - so what is it and why is it different to other laws passed by parliament?

RNZ is here to clear that up.

## What is entrenched law?

Victoria University School of Law's Dr Grant Morris talked to *Afternoons* about what constitutional entrenchment is, and said most people outside of the legal and political fields could be forgiven for not having ever heard of it.

Entrenched laws are more difficult to vote into place, and more difficult to change than ordinary laws.

Normally laws are passed on a 51 percent majority.

"Entrenchment means that a particular law is passed by a super majority [of votes in parliament] and can only be modified later on by that super majority - in New Zealand that figure is 75 percent to entrench the law and 75 percent later to modify the law," Morris said.

"This coincides with the idea that you're trying to lock something in."

Both the concept of trying to lock a law in so it cannot be changed easily in the future, and the rarity of using it sets it apart, Morris said. It is something to be entered into carefully.

"This is what a lot of the controversy was around Three Waters entrenchment - the government and Green Party seemed to be wanting to lock this in so it was harder to change. But they come up against this idea of parliamentary supremacy - that you shouldn't be able to bind a future Parliament, so ultimately a new parliament can go back enough steps to repeal any entrenchment because it is ultimately supreme," Morris said.

"So, in a New Zealand context, entrenchment is really hard to get to stick, and we don't have a lot of it."

In the case of the Three Waters legislation, discussions about this legislation between different parties earlier in the year (<https://www.rnz.co.nz/news/political/480002/questions-remain-over-how-three-waters-anti-privatisation-clause-got-past-ministers>) considered including an entrenchment clause on anti-privatisation with a 75 percent margin to be

changed, which was widely unsupported. But the later version that appeared in the committee stages and led to a furore when discovered, before being struck out of the final bill was unusual in that it only required a 60 percent margin.

Morris said an extra detail about entrenched law is that both single and double entrenchment are possible. "Double-entrenchment is when you entrench the clause setting up the entrenchment, and single entrenchment is just the clause itself is entrenched".

## Where does entrenched law fit in?

To understand the significance we have to look at where it sits in the (ongoing) formation of New Zealand's legal and political systems.

"There's really two concepts we often talk of in this space ... the idea of supreme law and entrenchment. They are different concepts but often associated together," Morris said.

"Supreme law is what we think of when we think of the United States with its constitution which sits above all other law - the supreme law of the land and the Supreme Court interprets it ... so there's that idea of supreme law - and all other laws are subject to it.

"In New Zealand we have an unwritten constitution... and therefore we don't have that US-style approach [with supreme law and a Supreme Court], but we do have a small amount of entrenched law, and it's in the electoral space - in the constitutional space."

So in New Zealand, entrenched laws set down some of the rules about elections and how often they are held.

## When has entrenched law come up before?

Morris said the way the Three Waters entrenchment controversy had unfolded hinted that "most [MPs] were unaware ... of the constitutional significance and historical context".

"I include MPs on both sides of the house," he said.

But there are two significant points where the topic had previously arisen on the political landscape in New Zealand, Morris said.

"It really comes into our system in a modern sense with the [now updated]

Electoral Act 1956. This is when National is in power, Sydney Holland is the prime minister, and he manages to get cross-party support to entrench aspects of our electoral law, really important ones like minimum voting age, term of Parliament, the way in which we vote by secret voting.

"They decided as a group, as a Parliament, that these were important enough to entrench them at 75 percent of parliamentary votes to change or 50 percent in a public referendum."

The Electoral Act 1956 was updated over time, and now we talk about the Electoral Act 1993, but "those entrenched provisions remain, and that's a successor to that initial act", Morris said.

"There's a lot of moral power in entrenchment, and that's where a lot of the impact comes from. Ultimately a new Parliament is supreme, so it can change laws that have been previously made.

"But those provisions of that 1956 Electoral Act now have a moral power, the idea that they've lasted so long being entrenched that it would be a very brave government to say 'okay, we're not going to have things like the term in Parliament or voting age entrenched any more, we'll just downgrade them'. So, I think there's a real moral power now to those originally entrenched laws."

The other instance where entrenchment was widely discussed was in the formation of the Bill of Rights Act which passed in 1990 under a Labour government, where there was discussion about making it both supreme law and entrenched law.

"There was a big backlash to both of those ideas, particularly to the supreme law one, because a lot of submitters and members of the public said: 'Well that will allow our judiciary to play a key role, like the US Supreme Court does in America, to be able to interpret that, and we have a judiciary which shouldn't have that role and is unelected, etc, etc'. And many submitters didn't like the idea of entrenchment as well.

"So what we ended up with is the New Zealand Bill of Rights Act, which is ultimately ordinary law, not particularly special in terms of the power it has over other law, but it's not supreme law and it's not entrenched."

Though Morris said the Bill of Rights Act did emerge from that debate with some interesting provisions that can give it "quite a lot of power depending on how it's interpreted".

## Debate needed

Discussions about uses for, or new approaches to, entrenched law and supreme law in New Zealand would be an interesting topic, Morris said, but the focus had been somewhat overshadowed by the context the topic had arisen in.

"We have an unwritten constitution, it changes over time. Maybe this is a time that we need to change the idea of entrenchment and how we see it. I think that's a debate that can be had," he said.

"I think what happened in this instance is, because it was pushed through late at night, under urgency, and no-one seemed to know what was going on, then that's not the way we should have the debate.

"If we are going to do things differently in a constitution, then we should do so, but we should do so with an open debate and discussions from both side."