LEGISLATION DESIGN AND ADVISORY COMMITTEE

3 February 2023

Adrian Rurawhe
Chairperson
Standing Orders Committee
Parliament Buildings
Wellington

Dear Chairperson

Review of Standing Orders 2023 – Entrenchment

1. As part of the Review of Standing Orders 2023, the Komiti Whiriwhiri Whakataunga Tū Roa (**Standing Orders Committee**) has invited public submissions on the House's rules and principles relating to proposals for entrenchment.[1]

2. This submission is made by the Legislation Design and Advisory Committee (**LDAC**).

3. LDAC has been given a mandate by Cabinet to review legislative proposals and introduced Bills against the *Legislation Guidelines* (2021 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.

4. LDAC's focus is not on policy, but rather on legislative design and the consistency of a legislative proposal or Bill with the principles contained in the Guidelines.

Background

5. In its current form, Standing Order 270 requires that any proposal for entrenchment must itself be carried in a committee of the whole House by the majority that would be required to amend or repeal the provision had it been entrenched.

6. As part of its 2023 review, the Standing Orders Committee has sought submissions on the following three questions on proposals for entrenchment:

[1] Under Standing Order 270(2), a proposal for entrenchment is any provision in a bill or amendment to a bill that would require that that provision or amendment or any other provision can only be amended or repealed by a majority of more than 50 percent plus one of all the members of the House.

- Are there any conventions, principles, or cases that you consider that the committee should take account of in its consideration of how the House should approach proposals for entrenchment?

- Should the House's rules relating to proposals for entrenchment be changed; if so, how? If not, why not?

- What would be the points for and against changing the House's rules relating to proposals for entrenchment by:

    - explicitly restricting proposals for entrenchment to particular subject matter;

    - preventing the proposal of any required majority of the House other than 75 percent of all members; or

    - imposing a notice requirement before a proposal for entrenchment can be considered in a committee of the whole House?

Our submission

7. Our submission is directed at the first two questions you have identified for feedback. In answering those questions, we provide some points for and against entrenchment.

Are there any conventions, principles, or cases that you consider that the committee should take account of in its consideration of how the House should approach proposals for entrenchment?

Parliamentary sovereignty and entrenchment

8. Legislation Guideline 4.1 states that "*Legislation should be consistent with fundamental constitutional principles, including the rule of law".* The commentary to Guideline 4.1 goes on to identify 'parliamentary sovereignty' as one of the most fundamental constitutional principles in New Zealand law. For current purposes, it is important to note that parliamentary sovereignty applies equally to the current and future parliaments. Put simply, one Parliament cannot impose itself on a subsequent Parliament by preventing or hindering the repeal or amendment of existing legislation, or the passing of new legislation.

9. By definition, entrenchment is the imposition of a barrier (i.e., the requirement for a super majority[2]) to future parliaments exercising their law-making functions. As such, on its face, entrenchment will run counter to the principle of continuing parliamentary sovereignty.

10. The starting point, therefore, is that entrenchment is inconsistent with fundamental constitutional principles and is therefore not usually justified.

[2] A super majority is a requirement that a proposal gain a specified level of support which is greater than the threshold for a simple majority (one half plus one).

11. However, in terms of Legislation Guideline 4.1, 'parliamentary sovereignty' is not the only constitutional principle that may be in play. It may be constitutionally acceptable to entrench a provision, despite the fact that this imposes a restriction on parliamentary sovereignty – if doing so protects some other fundamental constitutional value, including those identified in chapter 4 of the Guidelines, namely: the rule of law; representative democracy and free and fair elections; and the separation of powers.

12. The case for entrenchment is strongest for those constitutional matters that go to the structure of the law-making process itself. For example, the entrenchment of the length of the parliamentary term is generally considered to be constitutionally appropriate.[3] The entrenchment protects the rule of law and the integrity of our democratic system and elections. It prevents a government with a bare majority in Parliament extending the length of its term and using its majority to change the 'rules of the game'.

13. If entrenchment is constitutionally justified, it can be done using an appropriate "manner and form" provision. Manner and form provisions set the statutory conditions of law-making. As noted in *Parliamentary Practice in New Zealand,*[4] Parliament is required to comply with the statutory conditions of law-making.

14. In contrast, using a manner and form provision to entrench a matter of policy is not only inconsistent with the principle of continuing parliamentary sovereignty but also has the capacity to undermine the integrity of the democratic system and create legal uncertainty. This is for three reasons:

    a. The entrenchment of any substantive policy setting, even one of constitutional importance, creates a significant precedent. It risks the loss of political and democratic consensus around when it is appropriate for entrenchment to occur, and may lead to over, or retaliatory use of the power.

    b. The entrenchment of substantive policy risks a constitutional stand-off between the judiciary and Parliament. While the courts have held that they can enforce the statutory conditions on law-making[5], it is still uncertain whether this would extend to the entrenchment of matters of substantive policy. It is also uncertain how the courts would treat an attempt to repeal an entrenching provision. These uncertainties are reflected in *Parliamentary Practice in New Zealand* where it is stated *:* "*…it is unlikely that the courts would enforce manner and form provisions purporting to entrench substantive public policy settings*".

[3] The length of a parliamentary term is set by section 17(1) of the Constitution Act 1986. In turn, section 268 of the Electoral Act 1993 entrenches section 17 by providing that a 75% supermajority is required before the section can be amended or repealed.
[4] David McGee (4th ed., edited by Mary Harris and David Wilson), Oratia Books, Auckland, 2017
[5] Re Shaw [1997] 3 NZLR 611

c. The entrenchment of a policy position has, by design, the intention of making it harder to change that provision. The direct consequence of this is that entrenched legislation is harder to maintain over time in line with society's expectations. An example might be that entrenchment of the Human Rights Act 1993 might make it harder to augment or amend the included rights in line with modern expectations (of, say, gender or relationship status).

15. LDAC's conclusion is that entrenchment should be used sparingly, where there is a clear, strong constitutional rationale, and following extensive engagement that has led to a broad consensus that its use is justified in the circumstances.

Should the House's rules relating to proposals for entrenchment be changed; if so, how? If not, why not?

16. There is no current guidance in the House rules/ Standing Orders concerning what can or ought to be entrenched. As noted above, the threshold required to entrench a provision is the same majority required to subsequently amend or repeal the provision (had it been successfully entrenched).

17. Given the centrality of parliamentary sovereignty to our constitutional democracy, we consider that Standing Orders should seek to: limit entrenchment to constitutional matters, ensure that there is appropriate debate and scrutiny over entrenchment proposals, and set the required majority for entrenchment at 75 percent of all members the of the House in all cases.

Limitation to constitutional matters

18. As noted above, restricting proposals for entrenchment to core constitutional matters is already the current, albeit informal, practice set out in *Parliamentary Practice in New Zealand.*

19. While House rules/Standing Orders are procedural in nature and should reflect, but not create or modify, substantive rules we support the formal recognition of the prevailing position in Standing Orders. Formal recognition promotes debate and scrutiny about any proposal for entrenchment and sends a strong signal to law makers and to the public that Parliament recognises the constitutional implications of entrenchment and the legal risks.

20. We note that such an amendment to the Standing Orders would not itself impinge on Parliamentary sovereignty, as Parliament may suspend Standing Orders if it wishes. However, by requiring Parliament to do so brings transparency and political accountability to any proposal for entrenchment. In this way, amending the Standing Orders may be seen as a moral or political barrier and not a legal one.

Appropriate debate and scrutiny

21. In addition, we recommend adopting a process for bringing entrenchment proposals to the attention of the House, providing for debate on those proposals and public input. This might involve, for example, a role for the Business Committee in agreeing to any entrenchment proposal being included in a Bill or an SOP and a requirement that any proposal to entrench is both referred to a select committee for consideration and specifically debated in the House.

Setting the majority required for entrenchment at 75%

22. We note that the Standing Orders currently allow for entrenchment so long as the proposal is carried in a committee of the whole House by the same majority that would be required for the amendment or repeal of the provision to be enacted.

23. Although that requirement makes sense as a procedural one, we consider that the danger with having this flexible threshold for entrenchment expressly recorded in the Standing Orders is that it sends the signal that it is appropriate for a majority of the current Parliament to entrench a provision so that it requires, say, 55 per cent of a future Parliament to amend or repeal the provision simply because 56 per cent of the current Parliament supports that measure. The implication is that it *is* appropriate to use entrenchment for policy settings.

24. We are of the view that Standing Orders should set and entrenchment threshold at 75% for all proposals. The requirement for a 75% "super majority" represents the importance that any entrenchment of law is seen as legitimate.

25. While we are not aware of any precise science behind the figure, 75% is the threshold in existing manner and form provisions and appears to be broadly appropriate. In most parliaments it would ensure that the provision commanded the support of at least the largest party in Government and the largest party in Opposition.

26. We note that on each of the four occasions that Parliament has amended the parliamentary term entrenched under the provisions of the Electoral Act (or its antecedents), it has acted unanimously. [6] On other occasions, where it became apparent that unanimity would not be obtained, Parliament dropped proposals to amend the entrenched provisions even when it had the required "supermajority" support.[7]

27. This implies that the level of consensus required to impose entrenchment should be higher than 75% - and approaching unanimity. However, we are satisfied that 75% gives a reasonably good indication of the minimum level of support that should be required.

[6] Andrew Geddis Electoral Law in New Zealand: Practice and Policy (2nd ed, LexisNexis, Wellington, 2014) at [46] cited in *Ngaronoa V Attorney-General* [2018] NZSC 123 at [56]
[7] McGee Parliamentary Practice in New Zealand (4th ed, Oratia, Auckland, 2017) at [446] cited in *Ngaronoa V Attorney-General* [2018] NZSC 123 at [56]

28. But changing the threshold is not enough. What justifies entrenching a provision is the *nature* of the provision to be enforced, not the level of support it currently enjoys. We consider that this should be reflected in the Standing Orders so that the sole criterion for entrenchment is not the level of support the provision enjoys in the current parliament.

Recommendation

29. LDAC recommends that the Standing Orders should be amended to:

- restrict entrenchment to constitutional matters; and
- provide for the focussed Parliamentary debate and scrutiny of entrenchment proposals, including opportunities for the public to provide input
- restrict entrenchment to cases where at least a majority of 75 percent of all members supports entrenchment.

30. Thank you for considering our submission. We are able to appear before the committee if the committee would find that useful.

Yours sincerely

Mark Steel
Chair
Legislation Design and Advisory Committee