

1 December 2022

Hon Nanaia Mahuta  
Minister of Local Government

By email: [n.mahuta@ministers.govt.nz](mailto:n.mahuta@ministers.govt.nz)

Tēnā koe Minister

**Re: Concerns regarding the entrenchment provisions in the Water Services Entities Bill**

- 1.1 I am writing to you as President of the New Zealand Law Society Te Kāhui Ture o Aotearoa to express the Law Society's serious concerns regarding the entrenchment provision now contained in new clause 206AA of the Water Services Entities Bill (**Bill**). In the Law Society's view, the clause is constitutionally objectionable, and the process used to introduce it was inappropriate.
- 1.2 Clause 206AA was inserted by Supplementary Order Paper No 285 (**SOP 285**). It entrenches clause 116 of the Bill which imposes an obligation on water services entities to maintain public ownership and control of water services and significant assets. Clause 206AA now ensures clause 116 cannot be repealed or amended by Parliament without a special 60% majority vote.
- 1.3 Under our constitutional arrangements, the Parliament of the day has the ability to pass, amend or repeal laws with a bare 51% majority vote. The only exceptions to this rule are certain electoral laws and section 17(1) of the Constitution Act 1986, which require a 75% 'supermajority' for their amendment or repeal. The entrenchment of these laws was necessary to protect the integrity of our democratic system.
- 1.4 In contrast, the ownership and the privatisation of water services is a widely debated policy matter. If this Bill passes in its current form, future Parliaments may be bound by the policy decisions made by the current Government regarding the ownership of water services and infrastructure. The use of entrenchment provisions to hinder policy reform in this manner undermines democracy, and is, in our view, unconstitutional.
- 1.5 Several public law academics have raised concerns regarding this entrenchment provision in an open letter. We agree with the concerns set out in that letter.
- 1.6 We are also concerned about the decision to accord urgency to the committee of the whole House stage of this Bill. We believe the use of urgency has compromised Parliament's ability to scrutinise this Bill and the numerous SOPs. Taking urgency also precludes the seeking of

further advice from officials,<sup>1</sup> and the giving of proper consideration to the impacts of the proposed amendments (including the amendments contained in SOP 285).

- 1.7 The Law Society believes it is constitutionally inappropriate to introduce an entrenchment clause under urgency by SOP. This approach prevents cross-party dialogue and public consultation. Such an approach to law making is also undemocratic: it seeks to bind the hands of future governments on a contestable policy position, without consideration of the views of the electorate, and with only a restricted opportunity for scrutiny by those elected to represent the electorate.
- 1.8 The Law Society strongly urges the Government to address these concerns by recommitting the Bill to the Committee of the Whole House before its third reading, and removing the entrenchment provision contained in clause 206AA. Should the Government choose to pursue an entrenchment provision in future, that should be by way of a separate amendment bill, enabling public and legislative scrutiny.
- 1.9 I would be happy to discuss these concerns with you, should you prefer, and can be contacted via [president@lawsociety.org.nz](mailto:president@lawsociety.org.nz).

Nāku iti noa, nā



Frazer Barton  
**President**

Cc: Hon Eugenie Sage ([Eugenie.Sage@parliament.govt.nz](mailto:Eugenie.Sage@parliament.govt.nz))

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<sup>1</sup> Earlier advice from the Department of Internal Affairs and Crown Law was clear that entrenchment would raise constitutional questions, and that, at a minimum, clear cross-party support was required.