



LEGISLATION DESIGN AND ADVISORY COMMITTEE

16 September 2019

Meka Whaitiri MP
Chairperson
Justice Committee
Parliament Buildings
Wellington

Dear Meka Whaitiri

Referendums Framework Bill

Introduction

1. The Legislation Design and Advisory Committee (**LDAC**) has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 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.
2. The LDAC's focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. Our submission is directed at the scope of the power conferred on the Executive by clause 8 of the Referendums Framework Bill (**Bill**). We are concerned that this clause effectively allows the Executive to determine matters that an elector has put in front of them at the polling booth at the general election. In our view, some caution should be exercised around this kind of power.
4. Our submission is not directed at those referendums declared by an Act to be a referendum for the purposes of this Bill, but only those that are declared by Order in Council.¹

¹ Clause 5 definition of referendum provides that "referendum means a referendum declared by an Act or by an Order in Council made under section 8 to be a referendum for the purposes of this Act"

Clause 8: Declaration of referendum by Order in Council

Proposed power

5. Clause 8 would empower the Executive by way of Order in Council both to declare a referendum and to specify the wording of the question, or the proposal or issue, on which electors may vote. This power is broadly similar to section 6 of the Referenda (Postal Voting) Act 2000 insofar as that Act relates to a government initiated referendum (there defined as an indicative referendum to be conducted by postal voting) but there is a key difference in that the Referenda (Postal Voting) Act provides a process for referenda held outside of the general election.
6. By way of comparison, s 11 of the Citizens Initiated Referenda Act 1993 provides for the Clerk of the House to set the wording for an indicative referendum under that Act.

Concern about the proposed power

7. We recognise that the Bill is being introduced with an eye to one particular referendum that is planned for the 2020 election (on cannabis), and another which may be stipulated for in legislation (euthanasia), but note the Bill is intentionally generic in character. That means it is possible for the power in clause 8 to be exercised by the Executive so as to declare there shall be a referendum and then to specify the question, proposal or issue that is to be put to voters at the 2020 election.
8. Our concern is with the Executive's power to frame questions to the electorate at the time of a general election without Parliamentary input (such as is possible when legislation is enacted in a manner dependent on a majority vote by way of referendum to bring it into force).
9. The experience of the United Kingdom with the referendum on Brexit demonstrates how far-reaching the consequences of a referendum on a particular issue may be. The decision on whether to hold a referendum and the framing of questions and proposals ought not to be left to the Executive alone.
10. We recognise that the proposed Bill would expire at the next election but raise these issues as important points of principle, lest the Bill serve as a model for future legislation on referendums in general.

Risk of inconsistency with the Legislation Guidelines

11. The salient principle in the Guidelines is in chapter 4.1 ("Fundamental constitutional principles and the rule of law"). Taken literally as permitting a referendum on any subject, clause 8 may be said to "change or reshape State power" by "significantly shifting power between branches of the State, or removing powers from the State". That would be so, for example, to the extent that a Government advising the Governor-General could (we are

speaking generally and hypothetically) procure a referendum on a question or issue that has a political dimension.

12. A referendum of this kind occurring in conjunction with a General Election would be problematic. Chapter 4.1 of Guidelines also provides that “free and fair elections” are a fundamental constitutional principle. One component of free and fair elections is that they are administered neutrally and impartially.² This tells against giving the Executive a broad power to procure referendums and to frame the wording for such referendums.
13. An additional relevant principle is in chapter 14 of the Guidelines (“Delegating law-making powers”). The principle is that legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act. In balancing what is appropriate a key consideration is the legitimacy of the law - important policy content should be a matter for Parliament to determine in the Act through an open democratic process. Too much delegation, or having delegated powers that are too broad or uncontrolled, undermines the transparency and legitimacy of the law.
14. Further, the Guidelines require that secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review. Safeguards can take a variety of forms. They can be substantive preconditions or procedural requirements. They can apply before a power is exercised or provide a remedy after it is exercised.

Proposed changes

15. We consider the power conferred on the Government by clause 8 would benefit from safeguards relating to scope and procedure. We suggest the following options which would enable the policy intent of clause 8 to be met while reducing the risks identified above.
16. Our key recommendation is an additional procedural step in the determination of referendums for the election. We propose that once the Government has prepared the question for a referendum, Parliament’s endorsement through a positive affirmative resolution be required. This change will ensure Parliament is the decision-maker for the wording of any referendum question put at the General Election, rather than the Executive.
17. We also propose that advice on the wording of the referendum question be required to be obtained before it is adopted by Order in Council. This safeguard is important given the effect that the wording of the question may have on the outcome of a referendum and that it is to be provided to electors at the General Election.
18. In the case of the Brexit referendum, the advice of the United Kingdom’s Electoral Commission was provided, which resulted in a change to the wording of the question. We

² See, for example, the Inter-Parliamentary Union *Declaration on Criteria for Free and Fair Elections* (26 March 1994) at 4(2).

suggest that the Electoral Commission (which although it does not currently have this function does determine other material available to electors at the General Election) or the Clerk of the House (who determines the question for citizens initiated referendums) could be appropriate to advise on the wording of the question. Clarity in the wording will be particularly appropriate if the commencement of an Act is made conditional on being approved in a referendum.

19. We also consider that Parliament should be able to determine the scope of referendum issues in advance, at least in broad terms. In terms of the Guidelines, safeguards are not a substitute for clearly and precisely defining the permitted subject matter of the secondary legislation and the purposes for which it may be made (see 14.2). Consequently, the above safeguards would not be a sufficient remedy for an empowering provision that gives to a decision maker too significant a discretion.
20. To address this concern, if the only referendum expected to be set by Order in Council relates to the regulatory regime for cannabis, the clause 8 power could explicitly be limited to a referendum on this issue. The matter for determination by referendum will as a result have approval by Parliament through the enactment of this Bill, and the Government may decide upon the details of the referendum. Then, if the safeguards above are adopted, the Executive would obtain expert advice on the question, and Parliament would be asked to affirm the wording of the question. This option could extend to other issues the Government chooses to address through a referendum set under this Bill.
21. This would not affect proposed referendums that were declared by an Act to be a referendum for the purposes of this Bill and so directly determined as such by Parliament (as would presumably be the case for any referendum associated with the Abortion Legislation Bill and/or the End of Life Choice Bill).
22. We recognise that the Order in Council would in theory be reviewable by the Regulations Review Committee (RRC). As currently drafted, however, it is difficult to determine what ground under the Standing Orders would provide a basis for an RRC review. In any event, it seems unlikely that the RRC would be able to carry out a substantive review in sufficient time before the election. As a result, we do not consider an RRC review to be a sufficient safeguard to meet the concerns outlined above.

Recommendations

23. We **recommend** that the following scope and procedural safeguards are implemented to limit the scope of the power conferred on the Executive by clause 8 of the Bill:
 - Parliament's endorsement of the question be required through a positive affirmative resolution
 - Expert advice on the wording of the referendum question be obtained before it is adopted by Order in Council
 - The scope of referendum issues be limited to issues that have, at least in broad terms, been determined by Parliament in advance.

24. Thank you for considering our submission. We wish to be heard in person.

Yours sincerely

A handwritten signature in black ink, appearing to read 'K. Simpson', written in a cursive style.

Karl Simpson
Chairperson
Legislation Design and Advisory Committee

