

ELECTRONIC VERSION

CITIZENS INITIATED REFERENDA

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1. INTRODUCTION

For many years, the question of how effective democracy is in Australia and other liberal democracies has been debated. Currently the climate of debate on constitutional change, has revived interest in the issue. Many have pointed out that the act of voting once every three or four years for public officials is not enough.¹ The problem of an legislature perceived to be unresponsive and elected representatives loyalty to their parties rather than constituency, has triggered increasing interest in notions of direct democracy, and particularly citizen-initiated referenda (CIR). “**Citizen initiated referenda**” has been suggested as a means of redressing this perceived shortfall in participation and accountability, the aim being to diffuse political power and improve democracy.

This paper focuses on citizen initiated referenda and the arguments both in favour of and in opposition to its introduction. The history and background to the concept and its place in democratic theory are discussed. Overseas experience will be outlined and proposals for CIR in Australia will be highlighted, with suggested safeguards and limits which could be built into the system.

2. BACKGROUND

2.1 HISTORY OF CIR

Notions of direct governance go back at least as far as ancient Athens, the assemblies of the Saxon tribes, and the plebiscite in the Roman Republic.² The Roman plebiscite provided the means for the enfranchised commoners (plebs) to vote on repealing or enacting laws over the opposition of the senate. Optional referenda or plebiscites were also occasionally held in medieval Europe, whilst various forms of direct popular governance have been in use in Swiss cantons since the twelfth and thirteenth centuries.³

The Levellers in mid-seventeenth century England were probably the first modern direct democrats. They had a system whereby political and judicial officials, and local ministers could be popularly elected and subject to recall.⁴ In the US, direct

¹ Thomas E Cronin, *Direct Democracy, The Politics of Initiative, Referendum and Recall*, Harvard University Press, Cambridge MA, 1989, p 1.

² Cronin, p 41.

³ Cronin, p 41.

⁴ Cronin, p 38.

legislation dates back to the 1640's when all or most of the freemen in New England villages assembled to make the laws by which they would be regulated.⁵ In Switzerland, the 1848 constitution provided for a popular constitutional initiative, in which a petition containing 50,000 signatures could be used to propose a constitutional amendment that would be put to the Swiss electorate as a whole. After revisions to the constitution in 1874, direct democracy procedures were extended with the introduction of the legislative referendum.⁶ The effect of this was that any federal law or decree had to be put to the referendum when required by 30,000 electors or eight cantons out of twenty six.⁷

In relation to Australia, it may be useful to consider why citizens' initiatives were not built into the provisions of the Australian Constitution from its inception.⁸ In Sydney in 1891 critics of the "American model" of amendment by conventions only put forward the referendum as an alternative.⁹ It was clear at the Adelaide convention in 1897 that the idea of a referendum was popular, however the citizen initiated referendum was not discussed. For example, when McMillan interjected during Isaacs' explanation of the proposed referendum procedure to amend the constitution, "*You mean there is no initiative like there is in Switzerland*" the point was not pursued.¹⁰ In 1898 at the Melbourne Convention there was debate about whether intercameral disagreement might prevent a reference to the people, which showed awareness of the Swiss system, however once again there was no specific discussion of the citizens' initiative.¹¹

Britain was the primary source of constitutional inspiration in Australia. Whilst Britain had been a leader in liberal democratic theory and representative institutions at the turn of the century, it had not embraced popular participation. Other than several failed attempts to introduce a national referendum mechanism in the early part of the century, and legislation in 1933 which consolidated the tradition of holding local referendums in certain cases when local government authorities were seeking private legislation, there was not much interest shown in any CIR mechanisms until the 1970's with the Common Market referendum proposal.¹²

⁵ Cronin, p 41.

⁶ Cronin, p 161.

⁷ Colin Hughes, 'Commonwealth Constitution: Methods of Initiating Amendments', in *Proceedings of the Australian Constitutional Convention*, Vol 2, Standing Committee Reports, Brisbane, August 1985, pp 34-71, p 49.

⁸ Hughes, pp 47-48.

⁹ Hughes, p 48.

¹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, Government Printer, 1897, p 1021.

¹¹ Hughes, p 48.

¹² Walker, *Initiative and Referendum: The People's Law*, The Centre for Independent Studies, Sydney, 1987, pp 18-19.

The main non-British source of ideas for developing Australia's constitution was the United States. As mentioned above, there had been a long tradition of direct democracy there. However it was not until the late 1890's that the initiative to legislate directly upon subjects other than constitutional questions was launched in any widespread way. The dominant influence on American political thinking up until this time was the democratic theory of James Madison, which favoured legislation by representative bodies that would, according to the theory, filter and refine popular opinions and aspirations through the presumed experience and expertise of the elected representatives.¹³ But whilst by the early 1890's support was growing for the initiative and referendum with the Populist Party and the Progressive Reform Movement expressing support for it, it was not until 1898 that the first state, South Dakota, adopted either.¹⁴ This may go some way to explaining the lack of debate in Australia on the issue. As Colin Hughes suggests: "*Thus there was no direct experience from the United States to encourage Australians in the 1890's to think of bracketing the initiative with the referendum.*"¹⁵

However by the early 20th century the idea was gaining interest in some of the Australian states. A Popular Initiative and Referendum Bill was introduced in Queensland in 1915 under Labor premier T J Ryan. The Bill was initially blocked by the opposition controlled upper house.¹⁶ The Bill was introduced a total of four times over the next couple of years, and was heavily amended such that it was unacceptable to the government.¹⁷ By 1919 the Popular Initiative and Referendum Bill had qualified for submission to a vote of the people under the deadlock breaking mechanism in the Parliamentary Bills Referendum Act 1908, however the Bill was not proceeded with after Edward Theodore took over as Labor premier.¹⁸ Interestingly, Walker notes that Theodore the former mineworker and union official held the people in low esteem as being 'fickle and irresponsible', whereas Ryan was a middle class lawyer and appeared to trust them.¹⁹

After the first World War, the Labor Party lost interest in the idea and it remained dormant until the late 1970's, when the Democrats in the Senate began introducing

¹³ Walker, *Initiative and Referendum: The People's Law*, p 16.

¹⁴ Hughes, p 50.

¹⁵ Hughes, p 50.

¹⁶ Walker, *Initiative and Referendum: The People's Law*, p 20.

¹⁷ Walker, *Initiative and Referendum: The People's Law*, p 20.

¹⁸ Geoffrey de Q Walker, 'Participation by Initiative and Referendum: Could it Work in Australia?' in *Citizen Participation in Government*, ed Margaret Munro-Clark, Hale & Iremonger, Sydney 1992, pp 37-68, p 39.

¹⁹ Walker, *Initiative and Referendum: The People's Law*, p 20.

a series of bills for a constitutional amendment to provide for the system.²⁰ In the last decade there have been various direct democracy bills prepared or introduced in all states and territories.²¹ These bills will be discussed in the final section of this paper.

2.2 THEORETICAL CONTEXT - IMPROVING DEMOCRACY THROUGH CIR

2.2.1 Participation & Power

What?

In general terms, participation is the act of taking part or having a share with others in some action.²² **“Citizen participation”** implies interaction between members of the public, individually or in groups, and representatives of the government, with the aim of giving citizens a direct voice in decisions that affect them.²³ Beyond this, the term does not specify the nature of the interaction, and as such its function is largely ideological.²⁴

In terms of citizen’s political participation though, it has been argued that there must be a fairly direct relationship between the act and the outcome, and as such that voting under a modern representative government is so remotely connected to political decision-making that it can not be ascribed any real participatory quality.²⁵ Instead true political participation has been defined as involving some real transfer of power.²⁶ Parry argues that:

*The political participant must be someone who has a reasonable expectation of influencing the policy decision or at the very least of making his voice heard in the deliberations leading up to it.*²⁷

²⁰ Geoffrey de Q Walker, ‘Models of Direct Democracy and Options for Australia’ in *Direct Democracy Citizen Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, p 3.

²¹ Walker, ‘Models of Direct Democracy and Options for Australia’, p 3.

²² Geraint Parry, ‘The Idea of Political Participation’, in *Participation in Politics*, Chapter 1, Manchester University Press, Manchester, 1972, pp 1-38, p 1.

²³ Margaret Munro-Clark, ‘Introduction - Citizen Participation - An Overview’, in *Citizen Participation in Government*, ed Margaret Munro Clark, pp 13-19, p 13.

²⁴ Munro-Clark, p 13.

²⁵ Parry, p 1.

²⁶ Munro-Clark, p 14.

²⁷ Parry, p 1.

Why?

This paper is premised on the notion that citizen participation is a desirable objective. There are usually two types of theories advanced for why political participation is important.²⁸

- **‘Developmental theories’** see participation in government as a ‘way of life’ and as important because of the effect it has on those participating; that is enriching their lives, affirming their importance as individuals in a community, and helping them to understand, appreciate and respect others.²⁹ Participation is viewed as a means of ‘stretching’ the individual, enhancing their self-worth, sense of competence, and commitment for their own and society’s betterment.³⁰ As well, participation is seen as part of a process of political and moral education, whereby responsibility can only be developed by wielding it.³¹
- **‘Instrumental theories’** regard participation in government as an important means to the end of effective and efficient government. For example it supplies decision-makers with essential information about people’s situations, wants and needs which is not otherwise available, and provides a wider variety of accountability mechanisms.³² Those who support this strand of theories regard participation as the most effective defence against tyranny or counter to bureaucracy and centralisation, and believe that it is only by participating that people can ensure that their interests are defended and promoted.³³

In general terms, both types of theories suggest participation adds legitimacy and therefore stability to the political system.³⁴ It has been argued that high participation and the related familiarity with democratic procedures can guard against the sudden intrusion of groups which will constitute threats to democratic values.³⁵ For example, much of the support in the United States in the 1950’s for Senator Joseph

²⁸ Geoffrey Airo-Farulla, ‘Participation and Accountability: Administrative Law in Context’, in *Participation & Accountability: Administrative Law in Context*, Federation Press, Forthcoming, Chapter 1, pp 1-37, p 18.

²⁹ Airo-Farulla, p 18.

³⁰ Dennis Kavanagh, ‘Political Behaviour and Participation’, in *Participation in Politics*, ed Geraint Parry, Ch 5, Manchester University Press, Manchester, pp 102-123, p 118.

³¹ Parry, p 26.

³² Airo-Farulla, pp18-19.

³³ Parry, p 19.

³⁴ Kavanagh, p 118.

³⁵ Kavanagh, p 119.

McCarthy, it has been found, expressed not hostility to democratic ideals but often a misguided attempt to defend them.³⁶

How?

However, in most representative systems of liberal democratic government including Australia, there is an 'indirect democracy' where the citizen's role as participant are limited.³⁷ Indirect democracy is characterised by the existence of an elected 'political layer' which performs governing roles, with most citizens accepting that by and large, decision-making is the job of politicians, who can be called to account for their performance at the next election.³⁸

This can be contrasted with the idea of direct democracy which proposes a more continuous, active role for citizens.³⁹

2.3 WHAT FORM SHOULD THIS PARTICIPATION TAKE?

2.3.1 Referendum Process

Constitutional Referendums

The best known referendum process in Australia is that contained in section 128 of the Commonwealth Constitution. This section of the Constitution deals with amendment of the Constitution. In order for an amendment to be effective the proposed law must first be passed by an absolute majority of each House (and failing this an absolute majority of the House of Representatives). The question submitted to referendum must then be passed by an overall majority of electors as well as by a majority of electors in a majority of states. Two important points about the referendum are that it is only parliament who initiates it, and that it is binding upon parliament. Irrespective of whether the electors reject or accept the referendum process, the Government has to abide by the people's decision.⁴⁰

At the State level, most constitutions are more flexible and not entrenched in this way, however, it is fairly common to have referendum requirements in relation to

³⁶ Kavanagh, p 119.

³⁷ Michael Painter, 'Participation and Power' in *Citizen Participation in Government*, ed Margaret Munro-Clark, Hale & Iremonger, Sydney, 1992, pp 21-35, p 21.

³⁸ Painter, p 22

³⁹ Painter, p 22.

⁴⁰ Shaun Major, *The Citizens Initiated Referendum: Direct Democracy or Irresponsible Mass Government*, Western Australian Electoral Commission, Perth, 1994, p 17.

certain provisions. For example in Queensland, any amendments regarding the role of Governor, or the existence of local government require a referendum.⁴¹

Government Initiated Referendums

In addition to constitutional amendment, Federal or State governments have the option of putting other questions to the electorate. Most Australian jurisdictions have the necessary legislation enabling them to call a referendum at any time on almost any subject, the results of which are generally not binding but ‘advisory’.⁴² However, the government may choose to treat the referendum result as binding. In such cases the government chooses to supplement the normal legislative process by “submitting to the people what is often a difficult policy choice”.⁴³

There have been seven state government initiated referendums in Queensland since the inception of the Queensland parliament, on topics as diverse as federation, religious instruction in schools, the abolition of the upper house (legislative council), prohibition, four year parliamentary terms, and daylight savings.⁴⁴ In Queensland the current legislation outlining the procedures to be followed for referendums is the *Referendums Act 1997*.⁴⁵

Citizens Initiated Referendum (Direct Democracy)

In general terms, this process allows electors to propose, and then vote on their own legislation.⁴⁶ As yet, it is not used anywhere in Australia, although a number of proposals have been made for its introduction in various Australian jurisdictions.⁴⁷

⁴¹ see *Constitution Act 1867* (Qld) ss 53 & 56.

⁴² Major, p 18. The *Referendums Act 1997 (Qld)* section 5 provides that the Governor may issue a writ for a referendum if a Bill is to be submitted to the electors or the Legislative Assembly has resolved that a question be submitted to the electors.

⁴³ Major, p 18.

⁴⁴ Queensland Parliament, Legal, Constitutional & Administrative Review Committee, *The Referendums Bill*, Queensland Parliamentary Paper No. 31, November 1996, p 2.

⁴⁵ For a detailed discussion of this legislation see the Queensland Parliament, Legal, Constitutional & Administrative Review Committee, *The Referendums Bill*, Queensland Parliamentary Paper No 31, November 1996, pp 1- 19.

⁴⁶ Major, p 18.

⁴⁷ see appendix for table of proposed CIR legislation.

CIR are not limited to constitutional amendment and can take a variety of forms which enable electors to:

- directly approve or reject particular laws that have passed through parliament but have not yet taken effect, (**the people's veto or legislative referendum**) or
- petition for a referendum which is not binding on the government (**the advisory referendum**) or
- compel the repeal or enactment of a law, (**the legislative initiative**) or
- recall public officials and elected representatives (**the recall**).⁴⁸

Types of Citizens Initiated Referendum

Legislative or Statutory referendum - the People's Veto

The **legislative/statutory referendum** or **people's veto** allows a specified percentage of voters (usually somewhere between 2 and 10 percent) to petition for a referendum on a proposed law that has been passed through parliament in the normal way but is not yet in effect.⁴⁹ This means that once proposed legislation has been passed by the legislature, but before it can become law, there has to be a referendum.⁵⁰ The voter's decision is binding upon the government, which means that if the voters reject the legislation then it cannot be made into law.⁵¹ Presumably, though if parliament wishes to pursue the legislation, then they could enact it with amendments or reintroduce the substance of it in a different format, so that it could be made into law unless another referendum on the 'new' Act was held.

This has been described as one of the milder forms of CIR, because it only gives the electors the power of review, and not the power to initiate legislation.⁵² However, it is still a radical idea in that it gives the electorate a direct say in the laws that are enacted to govern them. From a theoretical standpoint it is also a departure from one of the key features of the Westminster systems of government, namely parliamentary sovereignty or supremacy. Parliamentary sovereignty in basic terms is the idea that parliament is the supreme branch of government and that it can make or unmake any law, its legitimacy coming from the will of the people who elected them. CIR therefore also creates potential conflict with representative government.

⁴⁸ Geoffrey de Q Walker, *Initiative and Referendum: The People's Law*, p 10.

⁴⁹ Geoffrey de Q Walker, 'Models of Direct Democracy and Options for Australia', p 3.

⁵⁰ Major, p 21.

⁵¹ Major, p 21.

⁵² Major, p 21.

However this point is explored greater detail in the section dealing with arguments for and against CIR.

This type of referendum is widespread in the United States, with more than 30 states having some form of legislative referendum. There are variations on the degree to which the electorate or the legislature can initiate the review process.⁵³ In California, the process involves 5% of the number of voters who voted in the last gubernatorial election to sign a petition, which allows voters to decide the fate of a law at the next election. A majority of 'yes' votes allows the measure to become law whereas a majority of 'no' votes defeats the measure.⁵⁴ The extent to which the process has been used in California is as follows:

- during the first 30 years of its use the process was applied to 34 legislative acts, 21 of which were voted down.
- during the next 40 years and until 1982 only one referendum proposition appeared on the ballot, whilst after 1982 there has been something of a resurgence in the usage of this option.⁵⁵

Under the Californian model there is a short time limit of 90 days given to referendum-petition circulation before a legislative goes into operation and this has potentially curtailed the usage of vetoes in this state.⁵⁶

Advisory Referendums

This process involves a petition with the required percentage of signatures being submitted to the government. A referendum is run on the issue and the result serves as an advisory tool as opposed to a binding result for the government.⁵⁷ It has been described as a strange hybrid of direct and representative democracy because it utilises the electorate but does not actually give voters the power to make law.⁵⁸ Its function seems to be that it supplies the government with information about the attitude of the electorate as a whole, especially on controversial subjects.⁵⁹ There is the benefit also, that the government which has the experience and resources, has the task of drafting the legislation and dealing with the various constitutional issues that are necessary for its implementation.⁶⁰ Being not binding can be an advantage

⁵³ Major, p 21.

⁵⁴ E. Dotson Wilson, *California's Legislature*, Californian Legislative Assembly, June 1994, p 92.

⁵⁵ Dotson Wilson, p 92-93.

⁵⁶ Dotson Wilson, p 93.

⁵⁷ Major, p 22.

⁵⁸ Cronin, p 176.

⁵⁹ Major, p 23.

⁶⁰ Major, p 23.

in that it means that a close result will not force the legislation to be enacted prematurely by the government.⁶¹ However, it has been pointed out that some voters ignore questions on the ballot paper that are not binding, precisely because the questions have no power over the government.⁶²

Legislative Initiative

This allows electors to initiate their own legislation, independently of the government. Basically the legislative initiative requires a certain percentage of voters (anywhere from about 3 to 20%) to sign a petition to force the holding of a referendum upon a specified subject. If successful, the effect of the referendum will either be to enact a law chosen by the electors themselves, or to repeal a law that is already in existence.⁶³

United States experience has shown that the Legislative Initiative is the most popular and commonly used form of direct democracy devices.⁶⁴ More than two hundred measures of one kind or another reached the state ballot via citizen initiated petition during the 1980's.⁶⁵ In addition several hundred other campaigns which were mounted failed either through lack of popular support or, in relation to a small number, because they were ruled invalid by the courts.⁶⁶

The Recall

The recall procedure is the process by which the electorate can petition for the holding of an election to remove public officials.⁶⁷ Generally a petition is circulated calling for a ballot on whether the specified public official should continue in office.⁶⁸ When the required number of signatures is reached an election is held to determine whether the official should be removed.⁶⁹

In the United States, electors in fifteen states can recall elected state officials, whilst thirty six states permit the recall of various local officials, who may be not elected

⁶¹ Major, p 23.

⁶² Zisk Betty, *Money, Media and the Grass Roots: State Ballot Issues and the Electoral Process*, Sage Publications, California, 1987, p 68, as cited in Major, p 23.

⁶³ Walker, "Models of Direct Democracy and Options for Australia", p 3.

⁶⁴ Cronin, p 203.

⁶⁵ Cronin, p 203.

⁶⁶ Cronin, p203.

⁶⁷ Walker, *Initiative and Referendum: The People's Law*, p 13.

⁶⁸ Major, p 22.

⁶⁹ Cronin, p 2. In the United States this is normally twenty five percent of those who voted at the previous gubernatorial election.

but appointed.⁷⁰ Recall has occurred for reasons such as corruption, excessive government spending, or increased taxation.⁷¹ It seems that the recall provisions are most likely to be employed at the local level, against officials that the public has close and regular dealings with, and least likely to be used against state officials except in the severest of cases.⁷²

3 ARGUMENTS FOR & AGAINST CITIZEN-INITIATED REFERENDA

A number of arguments have been posited in favour of citizen-initiated referenda. These include:

- Citizens' or electors' initiatives will promote government responsiveness and accountability. If officials ignore the voice of the people, the people will have an available means to make needed law.⁷³
- Citizen initiatives enable voters to separate issues from personalities.⁷⁴
- Citizen initiatives overcome voter apathy and alienation by allowing for greater participation in governmental processes.⁷⁵ It instils a greater sense of responsibility in the electorate for public affairs.
- It would lead to more acceptance of constitutional change and a wider range of alterations being proposed.⁷⁶
- CIR increases the legitimacy of law and therefore promotes a greater respect for the law because laws instituted as a result of CIR are more clearly and directly derived from the popular expression of the people's will.⁷⁷
- The initiative and referendum will produce open, educational debate on critical issues that otherwise might not be adequately discussed. It allows for controversial social issues, which legislators may be loathe to enter into, to be resolved.⁷⁸

⁷⁰ Cronin, p 3.

⁷¹ Major, p 22.

⁷² Major, p 22.

⁷³ Cronin, p 10.

⁷⁴ Geoffrey de Q Walker, *Initiative and Referendum: The People's Law*, p 41.

⁷⁵ Cronin, p 11.

⁷⁶ Australian Constitutional Commission, *Final Report*, Volume 2, AGPS, Canberra, 1988, p 866.

⁷⁷ Walker, *Initiative and Referendum: The People's Law*, p 50.

⁷⁸ Cronin, p 11.

However, for every claim put forward on behalf of direct democracy, there is an almost equally powerful criticism.⁷⁹

⁷⁹ Cronin, p 11.

For example:

- It would undermine the existing form of government - and there are problems of integration within the principles of the Westminster model of government.⁸⁰
- There is no real need for it, given there are adequate levels of participation and accountability in the current system.
- The CIR process can be captured by well financed interest groups and therefore is likely to serve sectional interests.
- CIR is socially divisive and prone to produce short-term radical solutions to complex problems and is totally unsuitable for certain areas of policy making.⁸¹
- The initiative allows a tyranny of the majority/minority and therefore has the potential to undermine civil rights.⁸²
- CIR is costly and destructive of good planning.⁸³
- CIR will encourage radical/conservative measures.⁸⁴
- Voters are not competent to judge particular legislative proposals, and they would support populist measures.⁸⁵

3.1 EXAMINING SOME OF THESE ARGUMENTS IN GREATER DETAIL

Citizen's initiatives will promote greater government responsiveness and accountability but how does it sit with responsible & representative government, the foundations of Westminster government?

It is indisputable that citizen initiatives are a means of achieving greater participation, and as discussed earlier, the aim of greater participation is greater accountability and a redistribution of power. It is also clear that under CIR processes voters are able to propose and repeal laws of their own choosing, giving

⁸⁰ C Puplick 'Citizen Initiated Referendums: The Case Against', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, pp 36-42, p 36.

⁸¹ Margaret Cotton & Bob Bennett, *Citizen Initiated Referenda: Cure-All or Curate's Egg?*, Current Issues Brief No 21, Commonwealth Parliamentary Research Service, Department of the Parliamentary Library, 1994, p 4.

⁸² Puplick, p 36.

⁸³ Cotton & Bennett, p 4.

⁸⁴ Hughes, p 64.

⁸⁵ Walker, p 68.

them a much greater voice in the law-making process.⁸⁶ It is argued then that this enhances the accountability of parliament and makes it more responsible to the electorate through this sharing of law-making power.⁸⁷

However, it is not so clear how CIR can be reconciled with the institutions of representative government, the courts and other less formal tribunals, and the check and balance function they offer.⁸⁸ For example, Puplick argues that CIR could potentially undermine the integrity and independence of courts, given that courts often make controversial decisions on issues which parliament is loathe to enter into for political reasons.⁸⁹ That is, the independence of the judiciary is a cornerstone of our political and legal system, and an important check and balance mechanism, whose effectiveness could be undermined by CIR since it has the potential to open the courts' less popular decisions to referenda.

Similarly it has been suggested that the current system allows people to have their complaints heard through various channels of complaint, whereas CIR could leave individuals vulnerable to a new form of incontestable decision-making.⁹⁰ A further argument against CIR on this point, is that it could weaken the state or national governments concerned and make them afraid to take hard decisions.⁹¹

On the other hand, it can be argued that since our elected representatives only face the people once every three years, CIR should be embraced because it enhances accountability and avoids the pitfalls of an 'elected dictatorship'.⁹² Rather than being an impediment to the current checks and balances on the political system, the CIR is an important method of checking the government's powers.⁹³ Macklin argues that Government normally takes account of any checks and balances on its power and will continue to function in the same way by evaluating laws before they are passed to ensure strong people approval.⁹⁴ This idea of 'strong people approval' leads to the issue of a tyrannical majority and the need to protect minority interests.

⁸⁶ Major, p 48.

⁸⁷ Major, p 48.

⁸⁸ Michael Moore and Philip Pettit, 'Undermining Democracy: The Danger of Citizen Initiated Referenda', *The Parliamentary*, 78(2), April 1997, pp 153-154, p 154.

⁸⁹ Puplick, p 38

⁹⁰ Moore & Pettit, p 154.

⁹¹ Major, p 49.

⁹² Michael Macklin, 'The Case for a Citizen's Initiative', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, pp 19-35, p 21.

⁹³ Macklin p 21.

⁹⁴ Macklin p 21.

As to the compatibility of direct democracy and representative democracy, although there may be some conflict between the two concepts at a theoretical level, there is no reason why in practice the two could not coexist, given that most commentators on the area agree that direct democracy would not be a replacement for the present system, but merely an added dimension to it.

Tyrannical Majorities, Social Divisiveness and Protecting Minority Interests through Responsible Government

One of the strongest arguments against CIR is that it would make it easier for individuals who happen to belong to a majority on some issue to mobilise others in that majority and to enforce their view, at whatever cost to the interests of the minority.⁹⁵ The concern about CIR is that majorities at the ballot box might be less sensitive than elected representatives to the rights of minorities.⁹⁶ According to Derrick A Bell Jnr, a US academic, the referendum has been a most effective facilitator of bias, discrimination, and prejudice.⁹⁷ He argues that the emotionally charged atmosphere often surrounding CIR campaigns can easily reduce voter tolerance in deciding measures.⁹⁸ After surveying a number of zoning and low-income housing campaigns, Bell concludes that the record of CIR:

*..reflects all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices, especially when exposed to expensive media campaigns. The security of minority rights and the value of racial equality which those rights affirm are endangered by the possibility of popular repeals.*⁹⁹

There is no doubt that in a system of responsible and representative democracy, legislation should have the support of the majority of the people. However there are times when governments and politicians have a duty to make decisions which are contrary to popular prejudice.¹⁰⁰ Representatives have a certain level of discretion, which means they are not mere agents of their constituents, because they are expected to exercise their judgment in enacting legislation.¹⁰¹ As the 1988 Constitutional Commission puts it:

Thus, while those in authority should be responsive to the felt interests of the electorate, they also have other duties and responsibilities. In particular,

⁹⁵ Moore & Pettit, p 154.

⁹⁶ Cronin, p 212.

⁹⁷ Cronin, p 94.

⁹⁸ as discussed in Cronin, p 94.

⁹⁹ Bell, quoted in Cronin, p 94.

¹⁰⁰ Australian Constitutional Commission, p 869.

¹⁰¹ Australian Constitutional Commission, p 869.

*Governments have a duty to guard against the persecution of an unpopular minority.*¹⁰²

However, it has been pointed out that whilst the potential to thwart the interests of unpopular minorities is a very real concern, it is not obvious that citizen initiated processes are intrinsically more likely to produce such an outcome.¹⁰³ For example it was the Menzies government in the 1950's which sought to outlaw the Australian Communist Party by changing the Constitution. The referendum on the issue was unsuccessful - illustrating that popular opinion is not necessarily going to go against the interests of an unpopular minority and that threats to the rights of these groups can occur under the present representative government model.¹⁰⁴

A related concern that has been raised by Puplick is that CIR will be socially divisive because it will require the constant, repeated and direct confrontation of one citizen against another on difficult, sensitive and emotional issues.¹⁰⁵ The proponents of CIR claim that one of its benefits is that it will bring into the open the difficult, highly-charged issues which the current political system often ignores. Their claim is that this will be a bonus to the community, yet Puplick's argument is the converse, namely that CIR institutionalises hatred and promotes deep community division.¹⁰⁶ His argument is that the present representative system has the benefit of placing conflict at arms length, whilst CIR brings it to the forefront with electors set against each other, face to face. Implicit in his argument is that any debate preceding a referendum is unlikely to be constructive or balanced, and that long-term harm could be done to minority groups through this process.

One response to Puplick's arguments is that, as discussed in the next section, CIR need not replace the current system as such, and that it is a tool to be used sparingly. Furthermore, there may well be some safeguards which could be built into any proposal for CIR to minimise any such effects, for example a minimum period during which a defeated proposal could not be put to referendum again.¹⁰⁷ As well, it has been suggested that free discussion is the best way of airing the points of view of minorities and that prejudice and suspicion breeds when debate is suppressed.¹⁰⁸ Stereotypes of minorities can be shaken when they are seen eloquently representing their case.¹⁰⁹

¹⁰² Australian Constitutional Commission, p 869.

¹⁰³ Cotton & Bennett, p 24.

¹⁰⁴ Cotton & Bennett, p 24.

¹⁰⁵ Puplick, p 41.

¹⁰⁶ Puplick, p 41.

¹⁰⁷ Alliance for Democratic Reform, 'Rebuttal of Arguments Against the ADR Direct Democracy Policy', Internet Article, <http://www.cs.su.oz.au/~mrj/adr/rebut.html>, p 2.

¹⁰⁸ Alliance for Democratic Reform, p 2.

¹⁰⁹ Alliance for Democratic Reform, p 2.

Responsibility & the Current System. Do We Really Need CIR?

Currently our political model is based on responsible government & representative democracy. That is, ministers as heads of departments are collectively and individually responsible to parliament for their decisions and conduct, and a popularly elected parliament represents the community's various interests and groups.¹¹⁰ The Constitutional Commission describes this as involving:

*...regular and free elections at which the electors choose between contending political parties on the basis of alternative and coherent sets of policies which reflect genuinely different views on a wide range of economic, social and political matters. Fundamental to the system is the notion of accountability. At election time, governmental decisions are subject to review by the electors.*¹¹¹

Further, they state that the concerns of individual voters and interest groups alike are channelled through their parliamentary representatives.¹¹²

There is no dispute about the fact that our political tradition displays these features, however it still begs the question as to whether in fact the current system is adequate, and whether there should be an opening for a striking innovation such as CIR. In its Final Report, the Constitutional Commission majority concluded that under the present system there are sufficient and reasonable avenues through which citizens can participate in the processes of representative democracy.¹¹³ They gave the example that individuals can join political parties if they wish, and influence its policies and structures, but beyond this anecdotal example did not offer any empirical or normative evidence to support their opinion. The Commission suggested that a danger in the CIR proposal was that whilst it purports to generate popular involvement in politics, in fact it may be taken up by a new breed of 'professionals', with real involvement being limited to these professionals.¹¹⁴

There are however, additional issues which are relevant to this line of argument but do not appear in the Commission's reasoning. For example, CIR is intended to augment the existing structures, not to replace or fundamentally restructure parliamentary processes, and to the extent that representatives of the electorate adequately 'represent', recourse to referenda should be rare.¹¹⁵ Furthermore, the Commission's reasoning seems to rest on the assumption that maximum responsibility for elected delegates under traditional representative democracy is to

¹¹⁰ Australian Constitutional Commission, p 868.

¹¹¹ Australian Constitutional Commission, p 868.

¹¹² Australian Constitutional Commission, p 868.

¹¹³ Australian Constitutional Commission, p 868.

¹¹⁴ Australian Constitutional Commission, p 869.

¹¹⁵ Cotton & Bennett, p22.

be preferred to maximum and continuous accountability under direct democracy.¹¹⁶ It could be argued that CIR rather than encouraging a government to escape its responsibilities, actually provides the government with an effective method of tackling the hard issues by letting the people decide.¹¹⁷

A related point is that CIR advocates promote CIR as a means of giving greater responsibility and involvement to the electorate for public affairs and through this, overcoming the apathy and alienation felt by many voters. Macklin points out that whilst CIR places an extra burden of responsibility on the voter, overseas experience shows that this has not proved a problem in countries where the initiative operates.¹¹⁸ He gives the example of a Californian initiative to cut land tax. He says that critics of CIR fail to mention that the cuts were warranted because real estate values had boomed and the Californian government had collected and held on to billions in windfall property taxes.¹¹⁹ Macklin also points to the experience of other American states where similar propositions were proposed on eleven occasions, and on eight of those occasions, were rejected. Another Californian referendum proposition which would have halved income tax was overwhelmingly defeated.¹²⁰ He also argues that the greater sense of involvement and responsibility that people have through CIR encourages them to be more far-sighted in their decision-making.¹²¹

Voter Competence

There is a two pronged argument here. Firstly, regarding voter rationality, an argument used regularly is that the average voter is simply not capable of making a rational and intelligent decision.¹²² Voter apathy and negativity won't be changed by simply giving them another ballot to decide on and it has been found that people generally vote according to their own self-interests.¹²³

Secondly, the argument is that people are basically ignorant and don't know enough to decide for themselves on complex policy and constitutional questions. Stemming from this is the issue of the quality and impartiality of information distributed to the public and who is in fact conveying such information. The role of informing the

¹¹⁶ Cronin p 249.

¹¹⁷ Canadians for Direct Democracy, 'Direct Democracy in Canada', Internet Article, <http://www.npsnet.com/cdd/common-2.htm>, p 2.

¹¹⁸ Macklin, p 21.

¹¹⁹ Macklin p 21.

¹²⁰ Macklin, p 21.

¹²¹ Macklin p 21.

¹²² Major, p 49

¹²³ Major, p 49.

public of the issues for referendum is largely in the hands of the media, which means that it is open to the influences of well-financed interest groups. As Major says: “*Money and the media combined can distort and misinterpret the information that is being supplied to the electors.*”¹²⁴

On the other hand, it is worth noting that this criticism is not limited to CIR, but could equally apply to the current legislative process. In relation to the current process, the effect of moneyed groups is potentially more insidious given that they have the potential to influence policy agendas without the electors even knowing what is taking place.¹²⁵ Major suggests that effective limits and provisions need to be installed to curtail this.¹²⁶ For example, it has been proposed that measures such as strict guidelines for advertising and public funding can greatly minimise the problem.¹²⁷ However in terms of how this would be done, it is important to consider the High Court’s decision in *Australian Capital Television v the Commonwealth*¹²⁸, which invalidated a Commonwealth statute intended to limit political advertising. The High Court’s decision was based on the notion of representative democracy inherent in the Commonwealth Constitution, and the implication which they found deriving from this notion was that there is an implied right of political free speech, which includes the right to receive and exchange information of a political nature. The majority of the High Court did not enter into any consideration of the quality of the information passed on through television advertisements around election times. Only Brennan J seemed to recognise the trivial nature of such advertising and that a limit on it would not necessarily inhibit the free exchange of political ideas and information. Any proposal to curtail political advertising then would need to be based on a close reading of this decision, or otherwise face constitutional challenge.

As for people’s ignorance, it may well be that giving electors more responsibility in determining the way their society works results in a more informed and responsible electorate. Further, new technology increasingly offers people greater opportunities to become informed on major issues.¹²⁹ The Alliance for Democratic Reform and others¹³⁰ argue that given electors are already trusted to give three year mandates to politicians in the “*feverish atmosphere of an election campaign*”, it seems not unreasonable to trust them to judge a single issue.¹³¹ A further point to consider is

¹²⁴ Major, pp 49-50.

¹²⁵ Major, p 50.

¹²⁶ Major, p 50.

¹²⁷ Macklin, p 23.

¹²⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹²⁹ Alliance for Democratic Reform, p 1.

¹³⁰ see Macklin, p 23.

¹³¹ Alliance for Democratic Reform, p 1.

that the requirement for a minimum petition size before a vote is triggered ensures only issues which generate significant interest in the community go to referendum.¹³²

Extremist Views

A number of critics of CIR have argued that it is a dangerous process because it offers “*an opening for cranks and those with bees in their bonnet*”.¹³³ Whilst it is true that certain radical or ultra conservative groups have shown interest in CIR this doesn’t mean that CIR is an exclusive device of these particular interest groups. Nevertheless, Macklin highlights the fact that in a democratic society we should not be afraid of allowing groups which espouse values to which we do not necessarily subscribe, to offer their alternatives.¹³⁴ In addition, it is significant that only those petitions which have a prescribed percentage of support will even get off the ground.

Furthermore, it seems that this concern could also be levelled at the current system. As Macklin says:

*It would be naive to suggest that the current parliamentary system, with its rigid party structure, is not subject to pressure from strong special-interest groups. A small number of these groups can exert enormous and, by community standards, disproportionate influence.*¹³⁵

He points out that CIR gives other groups that do not have this access an outlet for their proposals.¹³⁶

Cost

There is a practical consideration of the additional cost involved in holding citizen’s initiated referenda. Potentially the money could be used in other worthwhile ways. However, the following points should be borne in mind when considering this issue:

- Referenda can be decided concurrently with elections, so that the increased cost is minimal.
- Electronic tallying methods allow referendums to be conducted at about 5% of the cost of paper ballots.¹³⁷

¹³² Alliance for Democratic Reform, p 1.

¹³³ Moore & Pettit, p 154.

¹³⁴ Macklin, p 23.

¹³⁵ Macklin, p 23.

¹³⁶ Macklin, p 23.

¹³⁷ Alliance for Democratic Reform, p 2.

- Referendums create employment and can be seen as a ‘job creation strategy’. As Reimar Krocher says: “*What better way to create jobs while making our system more democratic?*”¹³⁸

3.2 CONCLUSIONS FROM THE FOR AND AGAINST ARGUMENTS

It seems that there are sound theoretical reasons for increasing citizen participation and that there are a number of practical advantages which flow from CIR. On the other hand, there are also a number of strong concerns raised against CIR. However, it needs to be highlighted that these concerns are probably not insurmountable and in many cases apply equally to the current system. CIR is a common practice in other representative governments.

4. MODELS OF CIR

4.1 OVERSEAS PROPOSALS

As mentioned earlier, the United States, and Switzerland have incorporated direct democracy into their political systems. In Canada, the right of citizen initiative is widespread at the local government level with some provinces also having initiative legislation.¹³⁹ Italy and Austria also have some direct legislation provisions, which although used infrequently in the past have been utilised over issues like the environment.¹⁴⁰ In New Zealand the *Citizens Initiated Referenda Act* was enacted in 1993.

4.1.1 The New Zealand Procedure

The *Citizens Initiated Referenda Act 1993* (NZ), gives voters the power to initiate non-binding referenda on any subject. The procedure has been outlined by Douglas Graham MP as involving six stages.¹⁴¹ Briefly these stages are:

- A person submits a proposal for a referendum to the Clerk of the House of Representatives along with a \$500 fee.

¹³⁸ Canadians for Direct Democracy, p 2.

¹³⁹ Walker, *Initiative and Referendum: The People's Law*, p 2.

¹⁴⁰ Walker, *Initiative and Referendum: The People's Law*, p 2.

¹⁴¹ Douglas Graham, MP, ‘Direct Democracy: Citizens Initiated Referenda - A Question of Public Confidence’, *The Parliamentarian*, April 1994, pp89-91, p 89.

- The Clerk in consultation with the person and others, determines the final wording of the referendum question. Section 10 of the Act provides that the wording of the precise question to be put to the voters should clearly convey the purpose and effect of the referendum, and that it should be that only one of two answers may be given to the question. The Clerk then approves the petition form that will be used to collect signatures for the referendum.
- The person gathers a minimum of ten percent of voters' signatures and delivers the petition to the Clerk, within 12 months of the date of the determination.
- The Clerk checks the petition for erasures and blank lines within twenty days. Pages with errors are sent back to the person to correct within two months. If the petition complies with these requirements, the Clerk takes a sample of the signatures to verify that the petition has been signed by 10 percent of voters. If not, then the petition lapses; if yes, then the Clerk certifies the petition correct and presents it to the House of Representatives. (sections 16-18)
- The Governor-General has a month from the date of presentation to set a date for the referendum. The referendum must be held within 12 months of the date of presentation unless 75 percent of the members of the House vote to defer it. The House may defer the date for 12 to 24 months from the date of presentation, or they may change the date to coincide with a general election if Parliament will expire within 12 months of presentation. (section 22)
- The referendum is held although the result is non-binding, ie the government is not legally bound to give effect to the result - the referendum is 'indicative' only. However, as Graham points out unless a fundamental principle is at stake, the government is unlikely to place itself in a position where it would be required to justify its refusal.¹⁴²

It is worth noting that in New Zealand voting is not compulsory, although registration to vote is. Interestingly, the report of the New Zealand Royal Commission on the Electoral System in 1986 was quite critical of CIR, describing it as "*blunt and crude devices*" the frequent use of which "*would blur the lines of accountability and responsiveness of governments and political parties and blunt their effectiveness*".¹⁴³

¹⁴² Graham, p 89.

¹⁴³ Report of the Royal Commission on the Electoral System, *Towards a Better Democracy*, in Appendix to the Journals of the House of Representatives of New Zealand, 1986-87, vol 9, Royal Commissions, Wellington New Zealand, December 1986, p 175.

Citizen initiated referenda has not been used frequently in New Zealand. At the time of writing although various petitions have been circulated,¹⁴⁴ there has only been one referendum which has gone to the electorate. This was the Firefighters Referendum in 1995, which was initiated by the firefighters union in response to the proposed restructuring of the Fire Service. The restructuring would have meant reducing staff and increasing working hours. The initiating petition was signed by approximately 12 percent of registered electors. Voting turnout for the referendum was just under 28 percent of the total registered electors, and of these votes 12 percent were in favour of the restructuring whilst 88 percent voted against it.¹⁴⁵ The New Zealand government is not bound by the results of citizen initiated referenda and as such did not put the Fire Service restructuring on hold so that it could take the result of the referendum into consideration. Instead various ministers claimed that the topic of industrial relations was inappropriate for referendum.¹⁴⁶ It is not clear what sort of impact the result actually had given that “community safety personnel” have been employed to replace retiring firefighters.¹⁴⁷ These community safety personnel are employed on the same terms and conditions which were rejected by the union prior to the referendum.¹⁴⁸ Arguably the effect of the referendum was more subtle; it sent a message to the government about public dissatisfaction with economic rationalism and cutting costs through cutting essential services.

Some of the suggested weak points of the legislation are:

1. there is no requirement in the Act that a neutral summary of the issues be distributed to electors prior to the referendum,¹⁴⁹
2. the Act provides no basis on which to exclude defamatory, vexatious, indecent or scandalous questions.¹⁵⁰

¹⁴⁴ Topics for petition have included: euthanasia, public ownership of forests, replacing the Treaty of Waitangi with a new national constitution, reforming the justice system to take greater account victims rights, and government spending on health services.

¹⁴⁵ Gabriela Wehrle, ‘The Firefighters Referendum - Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under The Citizens Initiated Referenda Act 1993?’ *Victoria University of Wellington Law Review*, vol 27, 1997, pp 273-299, p 288.

¹⁴⁶ Wehrle, p 288.

¹⁴⁷ Wehrle, p 290

¹⁴⁸ Wehrle, p 290.

¹⁴⁹ Wehrle, p 294.

¹⁵⁰ *Egg Producers Federation of New Zealand v. Clerk of the House of Representatives*, unreported, 20 June 1994, High Court of New Zealand, Wellington Registry, CP 128/94, per Eichelbaum CJ at p 7, as cited in Wehrle p 281. For a more detailed discussion of the New Zealand legislation see Wehrle pp 274-281.

4.1.2 The Swiss System

Switzerland is one of the most well-known examples of direct democracy, having been one of the first modern countries to utilise it.

Switzerland is a confederation divided into 26 different cantons, each of them being a state with sovereign jurisdiction.¹⁵¹ Switzerland's political system integrates many forms of CIR, at the federal level and in the Cantons. Cantons cannot organise themselves as monarchies, but must either be republican or democratic, and can copy the Westminster model or the American or French presidential system, yet none of the Cantons have chosen these models.¹⁵² This may be one reason why the Constitutional Commission described the Swiss experience as being "*of dubious validity in Australia*".¹⁵³

However, their system is well-established so it may be useful to briefly highlight its key features. Switzerland's Constitution provides for direct democracy procedures which allow for a legislative referendum and for citizen's initiative in relation to constitutional modifications.¹⁵⁴ For example, Article 89 provides that federal laws must be submitted to the people for approval or rejection if 50,000 Swiss citizens entitled to vote or eight Cantons so demand. Article 89 also applies to international treaties. Article 121 provides that partial revision of the Constitution may be carried out either by means of a popular initiative or in accordance with the forms laid down for federal legislation. The popular initiative consists of a request, presented by a hundred thousand Swiss citizens entitled to vote, aiming at the introduction, setting aside or modification of specified articles of the Federal Constitution. (Article 121(2)).¹⁵⁵ The Swiss have had more than 300 referenda and launched more than 135 initiatives since the mid 1800's.¹⁵⁶

4.1.3 Canadian Experience

Direct democracy is gaining momentum in Canada, as it seems to be in Australia. The structure of the Canadian federation is such that the provinces, two territories and federal government have considerable freedom in relation to their choice of

¹⁵¹ Thomas Fleiner-Gerster, 'The Initiative and Referendum in Switzerland', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, October 1996, pp12-18, p 12.

¹⁵² Thomas Fleiner-Gerster, p 14.

¹⁵³ Australian Constitutional Commission, p 867.

¹⁵⁴ Federal Constitution of Swiss Confederation 1874, as at 1991. Internet version at http://www.uni-wuerzburg.de/law/sz00000_.html

¹⁵⁵ The full text of Article 121 and Article 121bis are included in Appendix B.

¹⁵⁶ Cronin, 161.

electoral and consultative system.¹⁵⁷ Constitutionally, the provinces have specific heads of power to legislate upon, whereas the federal government has the residue.¹⁵⁸ There is considerable variation between provinces on their popular consultative system.

At the federal level, the Canadian government has invoked national referendums at critical points in history, for example, in 1898 on the establishment of prohibition and in 1942 on conscription. In 1989 Patrick Boyer MP proposed a bill to establish a popular initiative mechanism including the use of petitions, but the bill was never adopted by the parliament. In 1992 the *Referendums on the Constitution of Canada Act* was passed. However this Act does not deal with citizen initiated referenda, but merely operates where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada.¹⁵⁹

At the provincial level, Alberta had a law on initiative referendums enacted in 1913, but it was never used and finally repealed in 1958.¹⁶⁰ The recall process was used briefly in the 1930's. In British Columbia the 1991 Constitutional Amendment Approval Act forced a referendum on constitutional changes which gave rise to the *Recall and Initiative Act 1996*, which includes provisions on recall of representatives as well as on initiative referendums. This mechanism has not been utilised much.¹⁶¹ Saskatchewan has the *Referendum & Plebiscite Act 1991* which allows for a non-binding referendum with a petition signed by 15% of the voters as the trigger. Quebec, New Brunswick, Prince Edward Island, Newfoundland and the Northwest Territories and the Yukon all have some sort of general government-initiated law on referendums, whilst the other provinces don't have any specific referendum legislation.¹⁶²

4.2 AUSTRALIAN PROPOSALS

Federal and State Governments in Australia have held referendums to ascertain public opinion on several subjects, such as military subscription in World War 1, secession of Western Australia in 1933, hotel trading hours after World War II, a national anthem in 1977, a proposed dam in Tasmania in 1982, and daylight savings

¹⁵⁷ R Cantin, 'Direct Democracy in Canada', Internet Article, <http://www.oricom.ca/%7Ercantin/ACanada.html>, p 1.

¹⁵⁸ This is the inverse to the Australian position.

¹⁵⁹ *Referendum Act 1992* (Canada), Section 3.

¹⁶⁰ Cantin, p 2.

¹⁶¹ Cantin, p 2.

¹⁶² Cantin, p 2.

in Western Australia and Queensland in the early 1990's. However, none of these polls had a constitutional or legislative effect.¹⁶³ Interestingly, although the majority of the Constitutional Commission rejected the recommendation that the Commonwealth Constitution be amended to include a citizen initiated legislative petition to alter the Constitution, they did say that they expected that the electors' initiative would make some progress in the Australian States before its time was seen to have arrived in the federal sphere.¹⁶⁴

There have been over 20 Australian proposals to implement direct democracy. Eighteen of the more recent ones have been examined by Peter Reith in a chart partially reproduced in appendix A to this paper. In general, the proposals have not included the concept of recall. The number of signatures that would be required to **trigger an initiative** generally ranges from 2% to about 6% of voters. Some of the federal proposals have required a double majority (ie 2 percent of voters as well as a majority of states). At the federal level the requisite for **passage** of an initiative required a double majority. Some of the states have also opted for this double majority requirement for passage, with the requirement for approval by a majority of voters and a majority of electoral districts within the State. The idea seems to be to protect the process from capture by the larger districts to the detriment of smaller less populated districts (eg rural ones).¹⁶⁵ In terms of timing of the referendums, there is most widespread support for the referendums to be held concurrently with general elections.

In Queensland, the Citizens' Electoral Council was formed in 1988 with Trevor Perrett as its candidate for the seat of Barambah. Its major policy was to work towards the introduction of CIR at all levels of government.¹⁶⁶ The underlying goal of the group was to represent the 'will of the people' at all times rather than having specific policies on particular issues.¹⁶⁷ The Council was on the decline by 1989 and is not currently registered as a political party in Queensland.

Most recently the Community Referendum Bill was introduced by the ACT government in 1995, and in identical terms again in June of 1996. Both times it failed to get passed. Some of the interesting features of the Bill were that:

- It was to be entrenched such that it could not be repealed or amended by parliament without some special procedure.

¹⁶³ Australian Constitutional Commission, p 867.

¹⁶⁴ Australian Constitutional Commission, pp 866 - 867.

¹⁶⁵ Peter Reith, 'Appendix - Review of Australian Direct Democracy Initiatives' in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Canberra, 1996, p 43 - 51, p 49.

¹⁶⁶ Trevor Perrett, 'My Experience with the CEC Movement', *National Outlook*, No 24, June 1989, pp 12-13.

¹⁶⁷ Perrett, p 12.

- It required support of the majority of voters under compulsory voting.
- Once a proposed law was tabled in the Assembly the Chief Minister was to give an estimate of the costs or savings of the law, and the Auditor General was to provide an independent assessment of that estimate. The purpose of this was to give the community reliable information on how much the proposal would cost to implement or the savings that might be made.
- If a proposal was successful (ie registered the proposal with the support of 1000 electors, then within 6 months the support of 5% of electors) the Bill required people to vote on drafted laws as opposed to simple propositions as in most referendums. This may well have been difficult to implement, given that any legislation will have some complexity to it, and a simple 'yes' or 'no' response may not be adequate to register people's support for it.

4.3 SUGGESTED SAFEGUARDS & LIMITS

4.3.1 Ensuring Rights are Protected, and Deterring Frivolous Petitions

New Zealand experience is useful to consider. New Zealand has a Westminster style parliamentary system, as does Australia. The government there realised that in creating a system of direct democracy it was essential to tailor it to the country's unique constitutional circumstances. For example, New Zealand does not have a written constitution which embodies the supreme law of the land. This has meant that the Courts do not have a power of judicial review to strike down legislation or referendum results which are contrary to New Zealand's basic constitutional and democratic principles. For this reason it is important then that the referendum results are not binding. This gives Parliament the flexibility to ensure that rights and freedoms are not compromised by referendum results.¹⁶⁸ This can be contrasted with the position in Australia, where there is a written constitution at federal level, which ensures that the Courts have power to strike down laws which are in conflict with the provisions of the Constitution. As such, this is an additional already existing safeguard in the Australian system.

Furthermore, the New Zealand CIR Act deals with the fear of radical change motivated by passion or political expediency in the following ways:¹⁶⁹

1. The procedure required to initiate a referendum is long enough to allow emotions to level out, and reason to prevail.

¹⁶⁸ Graham, p 90.

¹⁶⁹ Graham, p 90.

2. The ten percent signature requirement ensures that any measure that is placed before the electors is of concern to a substantial portion of the community.

4.3.2 Structural Issues

Structural issues have been defined as the problems which are related to the initiative process. For example the questions of who may sign the petition, who may circulate it, how should the signatures be verified, what percentage of voters should be required to initiate it and the like.¹⁷⁰ The New Zealand example discussed above offers one model. The important point coming out of it is that whatever the conclusions on these questions, they should be addressed specifically in the legislation setting up CIR. In terms of the percentage of voters to initiate the process, an important balance needs to be struck, so that it is high enough to offer some sort of safeguard against frivolous claims, but at the same time is not too high so as to make it too difficult to place any initiative on the ballot.¹⁷¹

An off-shoot of the structural issues is the need for limits to be placed upon the whole process, the chief of these being limits on financial contributions to a campaign.¹⁷² As mentioned earlier a problem with CIR is that it can be manipulated by moneyed groups who have the finances to conduct extensive advertising to promote their views and interests. One response of the American states that use CIR has been the implementation of forced disclosure legislation, whereby all companies supporting a campaign committee or placing ads concerning an initiative would have to declare such support publicly.¹⁷³ The timing of the disclosure and the campaign would be crucial to the effectiveness of this safeguard.¹⁷⁴ The New Zealand *Citizens Initiated Referenda Act 1993*, in section 42 limits the amount of money that may be spent on referenda advertising to \$50000 for either the petition stage or the answer to the question stage, so that the maximum that could be spent in total is \$100,000. Similarly, the British Columbian legislation the *Recall and Initiative Act 1996* in Part 4 deals extensively with the financing of initiative petitions and Part 5 with initiative vote financing.

By the same token, it is important to redress the imbalance of resources by which a less wealthy committee may not be able to effectively convey its message to the public without some measure to balance up media access. Limits on media access

¹⁷⁰ Major, p 54.

¹⁷¹ Major, p 56.

¹⁷² Major, p 56.

¹⁷³ Major, p 57.

¹⁷⁴ Major, p 57.

need to be carefully drafted so as to not infringe the implied right to political free speech in the Constitution.

4.3.3 Substantive Issues

Drafting

The drafting of a proposed piece of legislation is a significant issue in any CIR proposal, given that a well drafted statute will create fewer problems in future. Drafting legislation is a highly technical skill which requires specialised knowledge. For this reason it has been proposed that some form of government legal advice or government funding for legal drafting advice should be made available.¹⁷⁵ This should ensure that the referendum question and proposed legislation are phrased in the most clear and precise way, whilst still retaining the original intention.¹⁷⁶

The Ballot Date & Compulsory Voting

Many writers on the subject suggest that the polling for an initiative or referendum should be held in conjunction with a general election, so as to save costs. However, given that elections are once every three-four years or so it is uncertain whether this would be regular enough to deal with single issues as they arose in a way that was workable and readily accessible. One suggestion has been that voting could be made cheaper and simpler by using electronic means. For example, the Alliance for Democratic Reform propose that voting could be as simple as dialling a toll-free number and entering a series of four digit numbers. Similarly they propose that electronic tallying of votes will be much cheaper.¹⁷⁷

Stemming from this is the concern that if voting for the initiative or referendum is not compulsory then the turnout and participation will be too low to really give a result which is a true reflection of the electorate's view on a topic. Puplick argues that compulsory voting is essential to maintain in Australia given that it ensures that the power of money and organised pressure groups are kept in check and that the power of a pressure groups at the ballot box is the same as that which it is in the community generally and not distorted by the effects of participation and non-participation.¹⁷⁸ Compulsory voting creates a sense of obligation and attaches importance to the process of voting and participation. Compulsory voting on the other hand has been described as undesirable in any liberal democracy given that any

¹⁷⁵ Major, p 60.

¹⁷⁶ Major, p 60.

¹⁷⁷ Alliance for Democratic Reform, p 2.

¹⁷⁸ Puplick, p 42.

coercive law is an impingement upon freedom.¹⁷⁹ As well, there is always the problem that even if people are compelled to vote, they can leave the ballot paper blank or referendum question unanswered, simply from lack of interest, or knowledge of what is being asked of them, thereby not truly participating. United States system is one of non compulsory voting and voter turnout in direct democracy ballots has proved to be only slightly lower than that of the voter turnout for governor and senator elections, and as such is not perceived to be major problem.¹⁸⁰ However this does not address the point that voting at governor and senator elections may be relatively low. United States experience may therefore not be the best comparison for Australian purposes because the starting point there is a non compulsory voting system, so American commentary on the topic doesn't even explore the issue of compulsory voting, and the hidden pitfalls such as marginalised groups potentially becoming excluded from the process. Perhaps the best view is that experience in Australia will reveal whether the system will work or not if voting is optional.¹⁸¹

Amending & Repealing Law made by Initiative

This is an issue which would need to be dealt with in any proposal for CIR. It is important that the methods and procedures for amendment or repeal of law made by initiative be clearly spelt out so as to be able to deal efficiently with changing circumstances.

5. CONCLUSION

The concept of CIR has been proposed as one way of improving democracy in Australia, and of enshrining sovereignty in the people. Although the idea is gaining popularity, as evidenced by the plethora of proposals put forth in the last decade, there is obviously some deep seated reluctance to implement such a submission, given the fact that over 20 proposals in Australia have all been knocked back. There are a number of arguments against implementing CIR and it seems that to date they have prevailed in Australian parliaments over the reasons for CIR. However, as this paper has illustrated, it may well be that experience of a well drafted and carefully thought out Citizens' Initiated Referenda statute with adequate limits could demonstrate the strength or otherwise of these arguments. It is important to note that proposals for CIR have not been intended to replace all other form of participative decision-making; but rather to be one more tool to

¹⁷⁹ Walker, *Initiative and Referendum: The People's Law*, p 146.

¹⁸⁰ Cronin, pp 209 -210.

¹⁸¹ Walker, *Initiative and Referendum: The People's Law*, p 146.

complement the range of mechanisms currently available for input into public policy.¹⁸² Perhaps Kavanagh puts it best when he says:

*Empirical study of political behaviour has undoubtedly added a new perspective to our appreciation of the complex relationships between participation and democratic theory. In particular it has pointed up how promiscuous is the term participation; it is mistress to many masters.*¹⁸³

He concludes by quoting:

*It seems plain enough that participation in itself is neither good nor bad but that it takes its character from the social and political context in which it occurs as well as from the motivation of the participants.*¹⁸⁴

The same conclusion could be drawn on citizen's initiated referenda.

¹⁸² Gary Humphries, *Community Referendum Bill 1996*, Debates of the Legislative Assembly for the Australian Capital Territory, *Weekly Hansard*, 27 June 1996, p 2234.

¹⁸³ Kavanagh, p 121.

¹⁸⁴ Kavanagh, p121, quoting H McClosky, 'Political Participation', in *International Encyclopaedia of the Social Sciences*, Macmillan & Free Press, New York, 1968.

BIBLIOGRAPHY

MONOGRAPHS

- Australian Constitutional Commission, *Final Report*, Vol 2, AGPS, Canberra, 1988.
- Cotton M & Bennett B, *Citizen Initiated Referenda: Cure-All or Curate's Egg?*, Current Issues Brief No 21, Commonwealth Parliamentary Research Service, Department of the Parliamentary Library, 1994.
- Cronin T E, *Direct Democracy, The Politics of Initiative, Referendum and Recall*, Harvard University Press, Cambridge MA, 1989.
- Dotson Wilson E, *California's Legislature*, Californian Legislative Assembly, June 1994.
- *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, Government Printer, 1897.
- Queensland Parliament, Legal, Constitutional & Administrative Review Committee, *The Referendums Bill*, Queensland Parliamentary Paper No 31, November 1996.
- Report of the Royal Commission on the Electoral System, *Towards a Better Democracy*, in Appendix to the Journals of the House of Representatives of New Zealand, 1986-87, Vol 9, Royal Commissions, Wellington New Zealand, December 1986.
- Major S, *The Citizens Initiated Referendum: Direct Democracy or Irresponsible Mass Government*, Western Australian Electoral Commission, Perth, 1994.
- Walker, *Initiative and Referendum: The People's Law*, The Centre for Independent Studies, Sydney, 1987.

CHAPTERS OF MONOGRAPHS

- Airo-Farulla G, 'Participation and Accountability: Administrative Law in Context', in *Participation & Accountability: Administrative Law in Context*, Federation Press, Forthcoming, Chapter 1, pp 1-37.
- Fleiner-Gerster T, 'The Initiative and Referendum in Switzerland', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, October 1996, pp 12-18.
- Hughes C, 'Commonwealth Constitution: Methods of Initiating Amendments', in *Proceedings of the Australian Constitutional Convention*, Vol 2, Standing Committee Reports, Brisbane, August 1985, pp 34-71.
- Kavanagh D, 'Political Behaviour and Participation', in *Participation in Politics*, ed Geraint Parry, Ch 5, Manchester University Press, Manchester, pp 102-123.

- Macklin M, 'The Case for a Citizen's Initiative', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, pp 19-35.
- Munro-Clark M, 'Introduction - Citizen Participation - An Overview', in *Citizen Participation in Government*, ed Margaret Munro Clark, pp 13-19.
- Painter M, 'Participation and Power' in *Citizen Participation in Government*, ed Margaret Munro-Clark, Hale & Iremonger, Sydney, 1992, pp 21-35.
- Parry G, 'The Idea of Political Participation', in *Participation in Politics*, ed Geraint Parry, Manchester University Press, Manchester, Chapter 1, 1972, pp 1-38.
- Puplick C, 'Citizen Initiated Referendums: The Case Against', in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, pp 36-42.
- Reith P, 'Appendix - Review of Australian Direct Democracy Initiatives' in *Direct Democracy: Citizens Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Canberra, 1996, p 43 - 51.
- Walker G, 'Models of Direct Democracy and Options for Australia' in *Direct Democracy Citizen Initiated Referendums*, ed Kenneth Wiltshire, Constitutional Centenary Foundation, Melbourne, October 1996, pp 1-11.
- Walker G, 'Participation by Initiative and Referendum: Could it Work in Australia?' in *Citizen Participation in Government*, ed Margaret Munro-Clark, Hale & Iremonger, Sydney 1992, pp 37-68.

JOURNAL ARTICLES

- Graham D, 'Direct Democracy: Citizens Initiated Referenda - A Question of Public Confidence', *The Parliamentarian*, April 1994, pp 89-91.
- Moore M and Pettit P, 'Undermining Democracy: The Danger of Citizen Initiated Referenda', *The Parliamentarian*, 78(2), April 1997, pp 153-154.
- Perrett T, 'My Experience with the CEC Movement', *National Outlook*, No 24, June 1989, pp 12-13.
- Wehrle G, 'The Firefighters Referendum - Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under The Citizens Initiated Referenda Act 1993?' *Victoria University of Wellington Law Review*, vol 27, 1997, pp 273-299.

INTERNET ARTICLES

- Alliance for Democratic Reform, 'Rebuttal of Arguments Against the ADR Direct Democracy Policy', Internet Article, <http://www.cs.su.oz.au/~mrj/adr/rebut.html>.
- Canadians for Direct Democracy, 'Direct Democracy in Canada', Internet Article, <http://www.npsnet.com/cdd/common-2.htm>.
- Cantin R, 'Direct Democracy in Canada', Internet Article, <http://www.oricom.ca/%7Ercantin/ACanada.html>, p 1.

CASES

- *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
- *Egg Producers Federation of New Zealand v. Clerk of the House of Representatives*, unreported, 20 June 1994, High Court of New Zealand, Wellington Registry, CP 128/94, per Eichelbaum CJ at p 7, as cited in Wehrle p 281.

LEGISLATION

- Federal Constitution of Swiss Confederation 1874, as at 1991. Internet version at http://www.uni-wuerzburg.de/law/sz00000_.html
- *Referendum Act 1992* (Canada), Section 3.
- *Referendums Act 1997 (Qld)*.

HANSARD

- Humphries G, *Community Referendum Bill 1996*, Debates of the Legislative Assembly for the Australian Capital Territory, *Weekly Hansard*, 27 June 1996, p 2234.

APPENDIX A - DIRECT DEMOCRACY INITIATIVES

This table is adapted from Peter Reith's 'Appendix - Review of Australian Direct Democracy Initiatives' in *Direct Democracy - Citizens Initiated Referendums*, Kenneth Wiltshire ed, Constitutional Centenary Foundation, October 1996, pp 43-51.

Federal Level Direct Democracy Initiatives

Title of Proposed Legislation	Constitution Alteration (Electors' Laws) 1988 (Cth)	Constitutional Commission Advisory Committee on Individual and Democratic Rights	Constitutional Alteration (Alterations of the Constitution on the Initiative of the Electors) 1990	Constitution Alteration (Making of Laws on the Initiative of the Electors) 1990	Constitution Alteration (Electors' Initiative) 1989
Introduced in bill form to Parliament?	No	No	Yes	Yes	Yes
Constitutional or Legislative Initiative	Legislative	Constitutional	Constitutional	Legislative	Constitutional
Trigger for referendum (minimum no. of signatures required)	5% within 6 months	500,000	3% total and a majority of States within 6 months	3% total and majority of States within 6 months	5% within 6 months
Timing of vote	Next general election	within 2 - 6 months	next general election	next general election	next general election
Requirement for passage	Majority of electors and Majority of States	Majority of electors and Majority of States	Majority of electors and Majority of States	Majority of electors and Majority of States	Majority of electors and Majority of States
Subject to parliamentary review?	yes	no	yes	yes	no
Bar on repeal or amendment of initiative by parliament after referendum	Within 12 months	no	not applicable	limited	no

Some State and Territory Proposals

Title of proposed legislation	Constitution (Citizen Initiated Referendums) 1991 (NSW)	Binding Electors' Referendum 1993 (ACT)	Electors' Initiative & Referendum Bill 1994 (Vic)	Queensland Constitution (Direct Democracy) Bill 1988	Community Referendum Bill 1996 (ACT)
Introduced	Y	N	N	N	Yes (June 1996)
Constitutional or Legislative Initiative	legislative	Legislative	legislative	legislative	Legislative
Trigger for referendum	2.5% total and a majority of electoral districts	2% total and majority of divisions within 18 months	2% total and majority of electorates within 18 months	5% of electors who voted in the last election	5% of electors within 6 months
Timing of vote	Next election or referendum within 6 months if 5% petitioners	Next General election or referendum within 3 months if 5% petitioners	Next general election or referendum within 3 months if 5% petitioners	Next state or local authority election or earlier at parliament's discretion	Next general election or if over 10% petitioners and tabled before 31 October then referendum held on 3 rd Saturday in February next year
Requirement for Passage	Majority and majority of electoral districts	Majority	Majority and Majority of electoral districts	Majority of electors	Majority
Parliamentary review	No	No	No	Yes	Yes where inconsistency in two laws.
Bar on repeal or amendment of initiative by parliament after referendum	Can't be repealed or altered except by electors.	No	No	No	No

APPENDIX B -EXTRACTS OF THE SWISS CONSTITUTION

Switzerland - Constitution - Subsection C Powers of the Federal Assembly

Article 89 [Federal Assembly Legislation]

- (1) Federal laws and federal decrees must be approved by both Councils.
- (2) Federal laws and generally binding federal decrees must be submitted to the people for approval or rejection if 50,000 Swiss citizens entitled to vote or eight Cantons so demand.
- (3) Paragraph (2) shall be applicable also to international treaties which:
 - a) are of unspecified duration and cannot be denounced;
 - b) provide for adherence to an international organization;
 - c) entail a multilateral unification of the law.
- (4) By a decision of both Houses Paragraph (2) shall be applicable to other treaties.
- (5) Adherence to collective security organizations or to supranational bodies shall be submitted to the vote of the people and the Cantons.

Article 89bis [Federal Assembly Decrees]

- (1) Generally binding federal decrees whose entry into force ought not to be delayed may be put into effect immediately by a majority of all members of each of the two Councils; the period of validity is to be limited.
- (2) If 50,000 Swiss citizens entitled to vote or eight Cantons request a popular vote, the decrees put immediately into effect shall lose their validity one year after their adoption by the Federal Assembly if they have not been approved by the people during that period; in that case, they may not be renewed.
- (3) Decrees put immediately into effect which have no constitutional basis must be approved by the people and the Cantons within one year after their adoption by the Federal Assembly; failing this, they shall lose their validity after the lapse of this year and may not be renewed.

Switzerland - Constitution - Chapter III Revision of the Federal Constitution

Article 121 [Constitutional Partial Revision Procedures]

- (1) Partial revision may be carried out either by means of a popular initiative or in accordance with the forms laid down or federal legislation.
- (2) The popular initiative consists of a request, presented by a hundred thousand Swiss citizens entitled to vote, aiming at the introduction, setting aside or modification of specified articles of the Federal Constitution.
- (3) If by means of a popular initiative several different provisions are to be modified or introduced into the Federal Constitution, each one must be the subject of a separate initiative request.
- (4) An initiative request may consist of a general proposal or take the form of a complete draft.
- (5) If such a request consists of a general proposal and if it meets with the approval of the Federal Chambers, the latter shall prepare a partial revision along the lines of the proposal and submit their draft to the people and the Cantons for adoption or rejection. If the Federal Chambers do not approve of the request, the question of partial revision shall be submitted to the decision of the people; if the majority of the Swiss citizens casting a vote decide in the affirmative, the Federal Assembly shall undertake the revision in conformity with the decision of the people.
- (6) If the request is in the form of a complete draft and if it meets with the approval of the Federal Assembly, the draft shall be submitted to the people and the Cantons for adoption or rejection. If the Federal Assembly disagrees, it may prepare its own draft or recommend the rejection of the proposed draft and submit its own draft or recommendation of rejection together with the draft proposed by the initiative to the decision of the people and the Cantons.

Article 121bis [Constitutional Alternative Revision Procedures]

- (1) If the Federal Assembly draws up a counter-draft, three questions shall be submitted to the voters on the same ballot paper. Every voter can state unreservedly
 - 1) whether he prefers the popular initiative to the law in force;
 - 2) whether he prefers the counter-draft to the law in force;

- 3) which of the two texts should enter into force if the people and the Cantons prefer both texts to the law in force.
- (2) The absolute majority shall be determined for each question separately. Unanswered questions shall not count.
- (3) If both the popular initiative and the counter-draft are accepted, the result of the third question shall decide the issue. The text which obtains more of the people's and Cantons' votes on this question shall come into force. If, on the other hand, one text obtains more of the people's votes and the other more of the Cantons' votes, then neither of the texts shall come into force.