STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION
Legislation Committee

Inquiry into Citizen Initiated Referendum Bill 2013

General Comments

On its face, this bill is designed to enhance citizen input into constitutional reform. It would formalise a process where sufficient petitioners could require the national parliament to consider a proposal for a referendum. It also creates a potential, quadrennial 'Referendum Day', where the whole country would vote on any proposals approved by at least one house of parliament.

The proposal is interesting and merits careful debate.

By requiring parliament to still approve any proposal before the constitutional amendment would even reach a popular vote, the bill contains a safety valve. It is plausible to imagine the very first petitions under this process being amendments to re-define 'marriage' as heterosexual only AND as not discriminating on gender grounds. Parliament can:

(a) ensure contradictory proposals do not reach a referendum;
(b) scrutinise carefully proposals motivated by financial self-interest or attention-seeking media campaigns; and
(c) debate the substance of, but not approve, issues best left to legislation rather than being entrenched in a constitution.

A key aspect of the flexibility of our system (as opposed to say the US) is that our Constitution is relatively thin: it leaves most issues to parliamentary law which can be amended from generation to generation, and whose interpretation by judges is not holy writ.

Why *Constitutional* Reform?

Assuming the purpose of the Bill is greater direct democracy, it is not clear why it is limited to *proposals* for *constitutional* reform, as opposed to legislative initiatives. Citizen initiated, popular votes on *legislation* have the potential to engage the populace - albeit at risk to the holistic approach of representative and cabinet government.

The likely impact of this bill will not be rational constitutional reform. Rather, it would permit particular segments of the population (especially those marshalled by value and interest groups, whether civic, union or religious movements, or activist groups like Get Up!) to use it as a specialist petitioning process to pressure governments and politicians to get their issues onto the parliamentary agenda. This has democratic appeal: both in its potential to open up the parliamentary agenda, and in the participatory process of advocating/collecting signatures, regardless of whether a proposal reaches the threshold.

If the purpose is to engage citizen input into constitutional reform, a better model would be to hold a regular popular Constitutional Convention (eg five- or ten-yearly). Proposals for reform meeting a petition threshold, as well as proposals from State or Commonwealth parliaments, would be considered by that Convention. Such a Convention could be elected or – preferably – drawn on a randomised jury basis. That Convention's deliberations would be guided by informed commentary and background material on each proposal. Proposals approved at the Convention (perhaps by a heightened majority) could then:

(i) go directly to referendum (this would require a new s 128A of the Constitution)
(ii) be presented to parliament, but with a stated expectation that the Convention's proposals would be accepted as worthy of going to a referendum

The suggested randomised 'deliberative assembly', selected by lot from among citizens eligible to vote, is an increasingly popular model internationally. Publicly- and privately-administered variations have been tested previously in Australia, Belgium, Canada, Ireland, the Netherlands and the US, and proposed for future efforts in the UK and the US. More generally, experimentation with new assemblies populated by ordinary citizens is now commonplace as countries seek to marry the democratic benefits of citizen-initiated lawmaking with the deliberative benefits of a stable, well-moderated assembly. Assemblies promise a more orderly and reflective approach, likely to steer clear of some familiar pathologies of majoritarianism – eg, invidious targeting of minorities, and inconsistency in proposals. There are evident democratic benefits if such assemblies, left alone, generally avoid such problems at the first instance, rather than necessitating a veto by parliament post hoc.

It seems to us that a greater problem for the Australian Constitution is the difficulty of its rational amendment. Our Constitution is largely one about power-sharing between different branches of government, and different levels of government. One oversight in its design is the absence of a power in the States, collectively, to propose amendments.[1] It has not been a Constitution about basic values or rights. The double majority, compulsory voting and disinterest in structural questions about power/government, make amendment via referendum very difficult. Simply adding a citizen-petition method of proposing reforms will not address that.

Technical Suggestions

- The proposal for a four-yearly referendum day is a little quixotic. If no proposals are accepted by parliament, there is no 'day' to be had. Conversely, what if parliament embraces a proposal, but sees it as more urgent, or worthwhile but not needing the expense of a referendum day separate from a national election day?

- The bill makes no specific provision for regulation of petition-gathering, but leaves it to regulation-making power, ie to the executive. This is sensible for details of process, but there are also questions of principle best not left to the government of the day. Eg: should petition-gathering be open to paid signature-harvesters? To corporate donations? Can the executive impose a fee for submitting a petition for

[1] Section 128 seems to assume that the Senate would have played that role in relation to the federal balance in the Constitution. It has not.

checking? Regulatory questions such as this can be answered in ways that could unduly restrict the process, or worse discriminate in favour of wealthy/vested interests – eg allowing paid signature-harvesting encourages astro-turfed proposals; setting high fees is likely to deter grass-roots petitions.

- For a law designed for popular use, it would be worthwhile explicitly defining 'the Minister' – presumably the Attorney-General would have overall carriage of an act like this.

Professor Graeme Orr, Law School, University of Queensland
Dr Ron Levy, Law School, Griffith University