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NEW SOUTH WALES



FACULTY OF LAW

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Committee Secretary  
Senate Standing Committee on Finance and Public Administration  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Secretary

**Senate Finance and Public Administration Legislation Committee – Inquiry into Citizen Initiated Referendum Bill 2013**

Thank you for the opportunity to make this submission. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

In this submission, we address the principles underlying citizen initiated referenda ('CIR') generally, with regard to the Committee's terms of reference, as well as particular issues arising from this Bill. In principle, we broadly support the Bill, but note that it is fundamentally unlike earlier CIR proposals. We also raise a number of technical issues relating to its drafting for the Committee's consideration.

Our submission is brief and intended to bring to your attention our views on the key issues in this area. The Committee may be further assisted by the following publications:

- George Williams, 'Distrust of Representative Government: Australian Experiments with Direct Democracy' in Sawyer, M, and Zappalà, G (eds), *Speaking for the People: Representation in Australian Politics* (Melbourne University Press, 2001), 80-99.
- George Williams & Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27-48.
- George Williams & Geraldine Chin, 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?' (1998) 7 *Griffith Law Review* 274-296.

## 1. Brief overview of the Bill

The object of the Bill is set out in section 4, which provides that it is ‘to enable Australian citizens to initiate a proposal for a referendum to amend the Constitution’. Currently no such mechanism exists and all proposals for a referendum are initiated by Parliament alone.

Sections 3 and 6-12 of the Bill set out the process that must be followed in order for a citizen to initiate the holding of a referendum: an elector must register a referendum proposal with the Australian Electoral Commission (‘AEC’), which examines the proposal and verifies that it satisfies certain technical requirements. After this initial process, ‘the Minister must cause [the proposal] ... to be introduced into the Parliament’. If the proposal is passed by Parliament in accordance with s 128 of the *Constitution*, the Governor-General may issue a writ for a referendum to be held.

Frivolous proposals put forward by an individual elector are intended to be frustrated by the requirements for the signatures of 1 per cent of all electors (approximately 140,000 signatures) before a proposal will be considered by the AEC (s 10(1)), and a random sampling process of at least 3 per cent of the signatures (approximately 4,200) to ensure that they were validly obtained (s 11(3)). The cost of processing such proposals and of holding such referenda ‘are expected to be met by existing Electoral Commission funds, and revenue raised through the application fee required to be paid by persons who lodge a proposal to initiate a referendum’, according to the Explanatory Memorandum.

## 2. Departure from conventional CIR

Conventionally, the mechanism contemplated in a CIR allows citizens to initiate, by petition, a referendum *without requiring the approval of a parliament*. That is, rather than a constitutional amendment proposal having to be first endorsed by the legislature, a proposal in an approved form (and usually having been supported by the signatures of a small percentage of the population) is put to the people without any further formality. The principle underlying CIR, therefore, is that it is not the representatives of the people who initiate change, but the people themselves.

However, the mechanism described in the Citizen Initiated Referendum Bill 2013 is fundamentally different to that usually contemplated by CIR proposals. As is clear from s 12 of this Bill, the only requirement would be that such a proposal be *introduced* in Parliament. Under s 14(1)(b), a referendum proposal approved by the Electoral Commission must still have been passed by an absolute majority of one House, or both Houses, of the Parliament (in accordance with section 128 of the *Constitution*), before the Governor-General may issue a writ for a referendum on the proposal. That is, no citizen could ‘initiate’ a referendum.

In adopting this form of citizen initiation, the Bill overcomes many of the weaknesses of conventional CIR. These aspects of the Bill are considered in more detail below, by reference to the Committee’s terms of reference.

## 3. Terms of reference

### (a) *CIR promotes greater openness and accountability in decision-making*

Conventional CIR, contrary to popular understanding, often has the effect of making governments *less* responsive and accountable to voters. This is because referendum initiatives originate directly from the people and frequently require little or no involvement of the legislature before they are put to a vote. The chain of accountability between the people and

their 'representatives' is therefore broken. This has significant consequences for representative government. Overseas experiences have shown that CIR processes are frequently accessible only to organised interest groups and can offer these groups a conduit for the promotion of their self-interest. Unlike representative government, conventional CIR offers no check to the pursuit of self-interest through the ballot box.

However, as noted above, the Bill before the Committee is fundamentally different to conventional CIR. Since the Bill maintains the requirement for the approval of Parliament before a citizen-initiated proposal can proceed to referendum, the elements of representative government that promote openness and accountability are likely to be preserved and even, to some extent, enhanced. The Bill may have the effect of promoting debate in Parliament about constitutional reform proposals, with Parliament needing to provide open and accountable justifications for preventing a proposal from proceeding to referendum.

In this way, the Bill would focus attention on the relative lack of community involvement that currently takes place in respect of referendum proposals, as has been illustrated in the recent examples of the proposals for constitutional recognition of Aboriginal peoples and of local government. Further, misuse of the process by organised interest groups will be filtered by parliamentary deliberation before proposals are put to the people. So, for example, extreme proposals that seek to unreasonably constrict the legislative freedom of Parliament are unlikely to succeed in reaching the referendum stage. This seems to protect against outcomes such as those seen in California, where CIRs have forced the government to expend large amounts of money on popularly mandated items such as education, while simultaneously preventing it from making budget cuts or raising taxes to fund such expenditure.

(b) *Laws instituted as a result of CIR are more clearly derived from the popular expression of the people's will*

To those who perceive themselves as alienated from, or inadequately represented by, the current system of representative government, conventional CIR is often lauded as offering a chance for greater and direct participation in the political process. However, the reality of conventional CIR mechanisms is that they do not necessarily derive from widespread, popular expression of the people's will. Instead of producing a consensus position through a deliberative process that takes into account a wide array of majority and minority interests, conventional CIR frequently polarises debate around 'yes' and 'no' cases.

The outcome may often favour a set of majority interests at the expense of minority concerns. For example, in late 2009, a CIR in Switzerland passed by 57 per cent of voters banned the building of minarets on Islamic mosques. Californian CIR proposals have included a ban on gay people from teaching in public schools and a quarantine of AIDS patients. Though both of the latter proposals ultimately failed at the ballot box, they provided an opportunity for the vilification of minority groups.

Further, as observed above, organised and well-funded special interest groups frequently dominate conventional CIR processes. Individuals and less wealthy community groups, by contrast, experience significant logistical difficulties in getting a CIR proposal off the ground. Indeed, this has been the experience in California, where signature-gathering firms are engaged (at a price) to assemble the necessary signatures required to initiate a referendum in that state.

By maintaining the pre-eminence of the legislature, the Bill before the Committee avoids some of the aforementioned pitfalls. It preserves Parliament's deliberative function such that majority and minority concerns are considered and negotiated prior to referendum. This is

likely to ensure that even if subsequent public debate is reduced to blunt arguments relating to the ‘yes’ and ‘no’ cases, more nuanced considerations have already been taken into account in the drafting of the referendum proposal. On the other hand, we observe that the Bill’s requirement of at least 1 per cent of the signatures of the electorate prior to consideration by Parliament and the payment of a registration fee – depending on its size – may still favour well-endowed special interest groups over individuals and small-scale community groups. Nonetheless, we recognise that such measures are also prudent barriers against frivolous and vexatious proposals that waste the limited resources available to the AEC and Parliament and we consider that, overall, the balance has been well struck.

(c) *Government authority flows from the people and is based upon their consent*

The democratic maxim that the source of a government’s power is its electors – as reflected in Australia’s system of representative government – is theoretically extended by conventional CIR to grant citizens a more direct influence on constitutional structure and therefore the political process. However, this extended power can also be taken to extremes. Beyond the examples in California noted above, other CIR-based measures there have included caps on State and local spending, term limits for elected officials and the abolition of affirmative action as well as services (such as public schooling) to illegal immigrants.

In Australia, the present referendum machinery is already heavily based on the people’s consent, with the requirement that a referendum proposal be passed by a majority of the people and by a majority of the people in a majority of the States. Partly as a result, out of forty-four proposals that have been put to the people at referenda, only eight have passed. The Bill before the Committee leaves this consent-based referendum process unaltered, with ss 13 and 14 providing that the existing *Referendum (Machinery Provisions) Act 1984* is to apply to a citizen initiated referendum once it has been passed by an absolute majority of one House or by both Houses of Parliament. The focus of the Bill is instead limited to broadening the means by which referendum proposals are introduced into Parliament for its ultimate consideration. The Bill therefore has little impact on the degree to which government authority flows from the people and is based on their consent.

(d) *Citizens in a democracy have a responsibility to participate in the political system*

Citizens in Australia already possess a responsibility to participate not only in elections generally, but also in referenda: s 45 of the *Referendum (Machinery Provisions) Act 1984* (Cth) provides that ‘[i]t is the duty of every elector to vote at a referendum’, with a penalty for failing to do so. It is a feature of our system of representative government that such participation discharges the individual responsibilities of citizens in the political process. Our elected representatives are thereafter entrusted to deliberate and pass laws and citizens need not be directly involved in every governmental decision. However, proponents of conventional CIR argue that the duty of citizens to participate in the political system is not adequately manifested if they cannot influence all stages of the referendum process.

In our view, the Bill before the Committee strikes a reasonable balance between affording citizens the opportunity to directly participate in a referendum proposal should they wish to, without at the same time placing more onerous ‘official’ duties upon citizens beyond those that are already required of them under our system of representative government. The Bill, if passed, is likely to have the effect of promoting more robust public debate, both in and outside Parliament, thereby encouraging wider citizen engagement with the political process.

- (e) *The Inter-Parliamentary Union's call on member states to strengthen democracy through constitutional instruments, including the citizen's right to initiate legislation*

At its 98<sup>th</sup> Inter-Parliamentary Conference in 1997, the Inter-Parliamentary Union called on member states to 'strengthen representative parliamentary democracy with constitutional instruments, including petitions and referenda, parliamentary recall and the right to initiate legislation, wherever these may be appropriate and feasible in the light of the constitutional system and established political culture'.

The context in which these remarks were made – being in a resolution that also urged member states to condemn acts of violence against electors and political candidates, and to protect the human rights of parliamentarians – demonstrates, however, that the Union was more concerned with the political record of member states with weak or no democracies, rather than of states with more established democratic histories, such as Australia. The constitutional system and established political culture in Australia is one of strong representative democracy and, in such circumstances, it would be inappropriate for citizens to, for example, directly initiate legislation. Nevertheless, insofar as the Bill before the Committee is one that strengthens representative democracy by facilitating petitions for referenda that are ultimately considered by Parliament, it aligns with the general sentiment expressed by the Inter-Parliamentary Union.

In our view, the Bill before the Committee would improve the current processes of constitutional reform and enhance political discourse in Australia, while avoiding the typical shortcomings of a conventional CIR mechanism. The Bill is likely to encourage greater public participation in the constitutional amendment process while maintaining essential elements of our system of representative government.

### **3. Advice on the adoption of the proposed Bill**

Although the general aim sought to be achieved by the Bill is a worthy one, we are concerned that the Bill raises a number of technical issues that may warrant further consideration by the Committee. Some of these concerns relate to issues that are inadequately covered by the Bill, while others relate to issues that are not canvassed at all.

- (a) *On what matters could a referendum proposal be made?*

The Bill makes little attempt to circumscribe the subject matters on which a referendum proposal could be made: s 8(2) only requires that a proposal 'relat[e] to a constitutional matter'. This would seemingly enable proposals on a number of matters which currently fall within the exclusive domain of the Executive: for example foreign affairs or the armed forces, which fall within s 51(xxix) and s 51(vi) of the *Constitution* respectively. There are strong arguments for restricting proposals on such matters, at least where an informed popular vote would be impossible without public access to sensitive information, the release of which would potentially be irresponsible and damaging. While the fact that parliamentary passage of a proposal is required in order for a referendum to occur serves as a significant check, Parliament may nonetheless be susceptible to public pressure to approve referendum proposals that have emanated from incomplete information.

(b) *How would the drafting process take place?*

The Bill is silent as to the degree of specificity or the formal criteria required of the initial proposal. The extent to which a proposal must demonstrate awareness of the nature of its constitutional significance, and its impact on other constitutional provisions, is unclear. The Bill also fails to address the nature of the drafting process that would need to take place between the AEC's approval of the initial proposal and its subsequent introduction into and approval by Parliament. Section 12 states that the introduced Bill need only be 'in accordance with the proposal'. In the event of a dispute, the Bill does not provide guidance as to who would have the ultimate authority to decide on the precise terms of a proposal. This leaves open the possibility that a proposal ultimately put to referendum may not conform completely or in material respects with the proposal initially registered with the AEC. This in turn raises concerns that a referendum proposal, although ostensibly citizen-initiated, may not actually reflect a popular expression of the will of the people.

(c) *Who would introduce the proposal in Parliament?*

Section 12 of the Bill requires 'the Minister' to introduce a compliant referendum proposal into the Parliament, but no definition of 'Minister' is provided. It is unclear why the proposal must be introduced by a minister at all, given the capacity of all members of Parliament to introduce Bills.

(d) *Would there be provision for judicial review?*

The Bill does not adequately address the issue of judicial review, for example of a decision by the AEC under s 8. Although natural justice appears to be provided for by s 8(3), the referendum proposal process would be undermined if the AEC's decision was not subject to the ordinary processes of judicial review.

(e) *How would a fair referendum campaign be ensured?*

The Bill fails to address the need for campaign spending limits and allocated advertising time, in the event that a proposal is put to the public in a referendum. To avoid wealthy and powerful interest groups from exerting a disproportionate influence on the resulting referendum, it would be prudent for the Bill to impose mandatory disclosure of campaign contributions and limits on spending in a referendum campaign, and to provide free broadcasting time and perhaps even public funding for community organisations that wish to support or oppose a constitutional amendment proposal.

(f) *Which form(s) of 'signatures' would be accepted?*

The word 'signature' is not defined in the Bill, raising the question of whether handwritten signatures would be required or whether electronic signatures would suffice. Given that a compliant proposal would need to have collected around 140,000 signatures, a restriction to only handwritten signatures would limit accessibility to the mechanism proposed by the Bill, both by geography and by the availability of resources to mount an effective handwritten signature campaign. On the other hand, acceptance of electronic signatures may increase the risk of fraud, and make it more difficult for the AEC to verify the validity of signatures. As

the question of which signatures qualify is likely to impact significantly on the application of the Bill in practice, reaching a reasoned conclusion on this point before it is adopted would be desirable.

The technical issues discussed above are not superficial – many of them have the potential to significantly affect the way in which the Bill impacts upon the practice of democracy in Australia. Accordingly, we do not recommend that the Bill be adopted until these issues have received thorough consideration. Notwithstanding this, we express in-principle support for the Citizen Initiated Referendum Bill 2013. The Bill strikes a balance between, on the one hand, a desire to increase community participation in the constitutional amendment process, and, on the other hand, upholding the well-entrenched and well supported principle of representative government on which Australia’s system of democracy is predicated.

Yours sincerely,

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