Citizen Initiated Referendum Bill 2013

Reference

1.1 On 14 March 2013, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the Citizen Initiated Referendum Bill 2013 (the bill) to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 24 June 2013. The reasons for referral were for the committee to consider whether:

- Citizens' Initiated Referendum (CIR) promotes greater openness and accountability in public decision-making;
- laws instituted as a result of a CIR are more clearly derived from the popular expression of the people's will;
- government authority flows from the people and is based upon their consent;
- citizens in a democracy have the responsibility to participate in the political system; and
- the Inter Parliamentary Union's call on member states to strengthen democracy through constitutional instruments including the citizen's right to initiate legislation.[1]

Conduct of the inquiry

1.2 The committee invited submissions from interested organisations and individuals, and government bodies. The inquiry was advertised in the *Australian* on 27 March 2013 and on the committee's website.

1.3 The committee received 28 submissions. A list of individuals and organisations which made public submissions to the inquiry is at Appendix 1. The committee held one public hearing in Melbourne on 29 April 2013. A list of the witnesses who gave evidence at the public hearing is available at Appendix 2. Submissions and the Hansard transcript of evidence may be accessed through the committee's website at www.aph.gov.au/senate_fpa.

1.4 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Overview of the bill

1.5 The private senator's bill proposes a new Act to be cited as the *Citizen Initiated Referendum Act 2013.* The purpose of the CIR Bill is to enable the citizens of Australia to initiate the introduction of legislation into Parliament that provides for the holding of a referendum to alter the Constitution.[2] The Explanatory Memorandum (EM) outlines the reasons for the bill:

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1 *Senate Selection of Bills Committee, Report No. 3 of 2013,* Appendix 2, 14 March 2013.

2 Citizen Initiated Referendum Bill 2013, *Explanatory Memorandum*, p. 1.

> The cores of the Democratic principle are that it is each citizen's right (and duty) to participate in the political system and each citizen's right to be heard. This Bill takes a small, long overdue, step along that path.[3]

1.6 The EM notes that Citizen Initiated Referenda (CIR) had been contemplated previously, including prior to federation of the colonies. The EM also summarises how CIR could operate within constitutional requirements and with several steps and criteria to govern their operation:

> This Bill expands and strengthens Australia's democracy in an extremely tempered fashion. Once an Elector's application for a referendum to take place has been approved by the Electoral Commission, the application will be written into a Bill, which will then be introduced into Parliament by the Minister. Once the Bill passes one or both Houses of Parliament, as required by section 128 of the Constitution, the Governor-General will then be able to issue a writ for a referendum to take place. This Bill allows for full compliance with the current requirements in the Constitution for undertaking a referendum to amend the Constitution.[4]

1.7 The EM predicts that the bill would have limited financial impacts and asserts that it is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Provisions of the bill

1.8 The EM of the CIR Bill provides a guide to the parts of the proposed Act:

- Part 2 sets out the process that must be followed and processes which must be met in order for CIR to be held. This includes registration with, and review by, the Electoral Commission; signatures of at least one per cent of Australian electors; and checks of signatures by the Electoral Commission; and
- Part 3 sets out the rules that apply to holding a CIR. The Minister is responsible for introducing a bill to Parliament to initiate legislation to have a referendum to amend the Constitution. Once the bill has been passed by an absolute majority of one House, or both Houses, of the Parliament, in accordance with section 128 of the Constitution, the Governor-General may issue a writ for the CIR. A CIR may only be held once every four years.[5]

1.9 In terms of the arrangements for conducting referenda, the CIR Bill provides that the current *Referendum (Machinery Provisions) Act 1984*, would apply and that the Governor-General may make regulations to ensure the necessary or convenient functioning of the Act.[6]

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3 *Explanatory Memorandum*, p. 1.

4 *Explanatory Memorandum*, p. 1.

5 *Explanatory Memorandum*, pp 2–4.

6 *Explanatory Memorandum*, pp 4, 5.

Background

1.10 CIR are distinguished from other referendums initiated by parliaments or governments in that the referendums would occur at the request of a required number of electors. Parliaments or governments may have little or no choice in the matter, depending on the nature of the arrangements for conducting CIR.[7]

1.11 Proponents of CIR argue that law-making power has been captured by entrenched political parties and that CIR would reform the political process by giving a wide group of people an opportunity to participate in the political process. Three main types of CIR have been proposed previously in Australia:

> 1. *the direct initiative*, under which voters can put a proposal to referendum without any intervention by Parliament;
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> 2. *the indirect initiative*, by which Parliament is given a specified time in which to enact the measure proposed by the citizen initiative before it is submitted to a referendum; and
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> 3. *the voters' veto*, also known as *the legislative referendum*, under which voters may petition for a referendum to repeal an existing law which has been passed by Parliament (Walker 1987, 11–14).[8]

1.12 It was noted in 2008 that bills for CIR had been introduced in most Australian Parliaments, including several proposals in the Australian Parliament, but none had been passed. In 1987, CIR was considered and rejected by the Constitutional Commission. Reasons suggested for the failure of past CIR bills include a lack of political commitment to the idea, no common agreement on the appropriate form of CIR, and failure to gain popular support. CIR has been used in other countries, including Switzerland, Italy, New Zealand and over 20 states in the United States, most notably in California.[9]

Issues

1.13 The bill received qualified support from a number of private citizens, organisations and academics, with the exception of Electoral Reform Australia which is opposed to any form of CIR.[10] The Gilbert and Tobin Centre of Public Law, while generally not favourable to CIR, saw merit in the bill which it described as offering a 'hybrid model':

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7 Harry Evans, *Citizen Initiated Referendums: Adjunct or Antithesis of Constitutional Government?*, Proceedings of the Sixth Conference on The Samuel Griffith Society, November 1995, Chapter 9.

8 George Williams and Geraldine Chin, 'The Failure of Citizen's Initiated Referenda Proposals in Australia: New Directions for Popular Participation?', *Australian Journal of Political Science*, Vol. 35, No. 1, February 2008, pp 28–29, 36.

9 George Williams and Geraldine Chin, 'The Failure of Citizen's Initiated Referenda Proposals in Australia: New Directions for Popular Participation?', *Australian Journal of Political Science*, Vol. 35, No. 1, February 2008, pp 29–30, 38–40.

10 Mr Stephen Lesslie, Vice President, Electoral Reform Australia, *Proof Committee Hansard*, 29 April 2013, p. 6.

> It retains the deliberative aspects of parliament while also giving people the ability to initiate what may or may not be a referendum. And, personally, we support that, because we think it is very important to broaden out the scope for the community to put issues on the agenda, on the table, for constitutional discussion while also retaining the role of parliament to sift through those suggestions in order to determine which ones ultimately should go to a referendum.[11]

1.14 There was agreement that the bill, because it requires the Parliament to approve any proposal before a constitutional amendment would be put to a popular vote, contains an important safety valve. It was suggested that the elements of representative government that promote openness and accountability are likely to be preserved and possibly enhanced. This is because the Parliament would need to provide open and accountable justifications for preventing a proposal from proceeding to referendum. The key issue here is that the mechanism described in the bill is fundamentally different to what is usually contemplated by conventional CIR processes where citizens and not elected representatives initiate change.[12]

1.15 There was also support for the bill on the basis that CIR provide an avenue to reverse what is sometimes referred to as the 'decline of Parliament', caused by the rise of political parties and their vested interests, and the rising level of cynicism and political disengagement with the political process among the general populace. CIR Australia Inc, for example, submitted:

> We do need to do something to counteract the decline of Parliament brought on by the ascent of political parties…Parliament today very rarely acts as the body we all hoped it would be. Political power now resides with the currently dominant faction of the currently dominant political party. This means more and more power in fewer and fewer hands.[13]

1.16 Notwithstanding the qualified support for the bill's objectives contained in submissions, the committee noted a number of concerns about CIR processes in general and aspects of the bill in particular that relate to qualifying requirements, cost implications, special interests and technical deficiencies.

1.17 These areas of concern are addressed in turn.

Qualifying requirements

1.18 A number of submissions suggested an alteration to the main qualifying requirement for an applicant to successfully initiate a process. The bill stipulates that if a proposal is registered by the Electoral Commissioner, the applicant must lodge with the Electoral Commission a document containing the signatures of one per cent of the total of all electors. In evidence to the committee, the President of CIR Australia Inc argued that three per cent of all electors would be a better figure for a proposal to amend the Constitution. The United States has CIR to amend general

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11 Professor George Williams, *Proof Committee Hansard*, 29 April 2013, p. 10.

12 Professor George Williams, Gilbert and Tobin Centre of Public Law, *Submission 18*, pp 2–3.

13 CIR Australia Inc, *Submission 7*, p. 1; see also Australia Protectionist Party, *Submission 11*.

legislation in 24 of the 50 states, many of which have a two per cent threshold of electors. Anything less than three per cent threshold to amend the Constitution, it was argued, is too low:

> We are concerned that you might get too many requests and that will spoil the whole thrust of the bill, if too many things come before parliament. The parliament might get a bit angry with that, so three per cent might make it a bit better.[14]

Cost implications

1.19 The bill in its current form stipulates that should the requirements for a CIR be met, it would be held on the first Saturday in October 2016 and subsequently every four years on the same date. The committee was told that such a process would be needlessly expensive to run because referendums and federal elections would be out of kilter. It would be more cost effective to hold them both at the same time. One submitter argued that referendums and federal elections held concurrently would enhance citizen participation and minimise logistical difficulties and cost to taxpayers.[15]

1.20 The Australian Electoral Commission (AEC) also commented on costs associated with the mechanism proposed in the bill and stated that it did not agree that implementation of the bill would have limited financial impact. In particular, the AEC argued that costs would be incurred in relation to processing applications, including verification, and development of appropriate systems. The AEC also identified elements in the bill which would require ongoing funding.[16]

Special interests

1.21 The committee noted the concern that was raised in evidence relating to the CIR process in the Unites States, and particularly in California, which empowers lobby groups and other special interest with the resources to gather the sizeable number of petitions required to proceed with a referendum proposal. It was put to the committee that there have been occasions in California where organisations have decided not to invest money in directly lobbying members of parliament but in gathering the signatures for a proposal to be put on a CIR ballot paper. The Gilbert and Tobin Centre of Public Law submitted:

> …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 price) to

14 Mr Ronald Evans, President, CIR Australia Inc., *Proof Committee Hansard*, 29 April 2013, p. 1.

15 Liberal Democratic Party, *Submission 6*, p. 2.

16 Australian Electoral Commission, *Submission 27*, p. 3.

> assemble the necessary signatures required to initiate a referendum in that state.[17]

1.22 This corporatisation of the CIR process can undermine the genuine expression of community attitudes. Professor Williams told the committee:

> It does mean that it provides an avenue for strong, well-financed interests, particularly insurance companies, in California to take advantage of the process. It is where I think the claims of it being a popular democratic process unfortunately do break down and too often you see these other interests hijacking these processes.[18]

1.23 The concern was echoed by Professor Graeme Orr and Dr Ron Levy who submitted:

> 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.[19]

1.24 Dr Levy contended that a bill of this nature carries the risk to the holistic and deliberative approach that representative and cabinet government brings to law-making. It is possible that the negotiated process of law making where bills are subject to parliamentary scrutiny would be bypassed in favour of financial self-interest of attention-seeking by minority interests:

> The potential problem with citizen initiated reform is…essentially being in isolation outside of the parliamentary process [which] means we are no longer necessarily taking account of the larger complex diversity of public interest in Australia. So we might simply end up legislating for one set of interests without adequately taking considering the costs or any countervailing interests. You could call this legislating out of context.[20]

Matters raised by the Australian Electoral Commission

1.25 The committee received a submission from the AEC which addressed a number of aspects of the bill.

The Register

1.26 The AEC noted that in clause 6 of the bill, there is reference to the register, applications being on an approved form and accompanied by a prescribed fee which in some (as yet specified) circumstances may be refunded. The AEC went on to comment that it is not apparent what the purpose of the register is or how it is to be

17 Professor George Williams, Gilbert and Tobin Centre of Public Law, *Submission 18*, p. 3.

18 Professor George Williams, *Proof Committee Hansard*, 29 April 2013, p. 11.

19 Professor Graeme Orr and Dr Ron Levy, *Submission 19*, p. 1.

20 Dr Ron Levy, *Proof Committee Hansard*, 29 April 2013, p. 13.

assessed and maintained and the bill does not provide details concerning the application fee including how its quantum is to be established.[21]

Role of the Electoral Commission and Electoral Commissioner

1.27 Clauses 7 and 8 provide a role for the Electoral Commissioner in reviewing an application to register a proposal for a referendum to determine if it contains a proposal to amend the Constitution. While acknowledging that there may merit in the assessment being conducted by an independent arbiter, the AEC stated that it is not apparent why it should be undertaken by the AEC, let alone the Electoral Commissioner. Further, a proposal to amend the Constitution would inevitably involve matters of significant legal complexity and require expertise in constitutional law. Neither the AEC nor the Electoral Commissioner have such expertise and 'more notably, neither are responsible for advising the Government or the Parliament on constitutional matters'. The AEC suggested that this falls within the responsibility of the Attorney-General's Department.

1.28 The AEC recommended that 'sections 7 and 8 of the Bill should be reviewed to establish whether or not it is appropriate to require the Electoral Commissioner, and indeed the AEC itself, to decide whether or not an application submitted contains a proposal to amend the Constitution'.

1.29 Other clauses in the bill provide for a role for the AEC or the Electoral Commissioner to be responsible for certain functions. This would require the AEC and the Electoral Commissioner to perform functions other than those which relate directly to the conduct of the referendum event itself. The AEC commented that there was a need to consider the appropriateness of such a role.[22]

Impact of an election on proposed timeframes

1.30 The bill proposes a timeframe for the AEC to make a decision about an application for a proposal for a referendum. The AEC commented that, in relation to processes proposed to be conducted by the AEC, it is possible that relevant timeframes may not be met should they overlap with the conduct of an election. The AEC stated that, should the AEC remain responsible for certain activities under the bill, consideration should be given to inserting a provision which suspends the obligation of the AEC to meet these timeframes from the issue to the return of the writ for a Senate or House of Representatives election. Such a provision already exists in the Electoral Act in relation to applications for the registration of a political party between the day of the issue of the writ and the day of the return of the writ for a Senate or House of Representatives election.[23]

21 Australian Electoral Commission, *Submission 27*, pp 1–2.

22 Australian Electoral Commission, *Submission 27*, p. 2.

23 Australian Electoral Commission, *Submission 27*, p. 4.

Technical aspects

1.31 The Gilbert and Tobin Centre of Public Law submission identified a number of technical shortcomings with the bill, some of which relate to issues that are not adequately covered while others relate to issues that are not addressed at all. The main issues identified are as follows:

- the bill does not set out or limit the subject matters on which a referendum proposal could be made. It would be possible for proposals to be raised in areas that are the exclusive domain of the executive, such as foreign policy and the armed forces, and for which informed public debate would be impossible;
- the bill does not specify the formal criteria required of the initial proposal or require proposals to demonstrate awareness of their constitutional significance or impact on other constitutional provisions. The bill also does not address the drafting process for a proposal once it has been accepted by the Electoral Commission but before it has been introduced and considered by the Parliament;
- the bill, at section 12, does not specify which minister would introduce a referendum proposal into the Parliament, and it remains unclear whether any member or senator other than a minister may introduce a proposal; and
- the bill does not specify whether electronic or handwritten signatures meet the registration requirements, which has implications for the proposal's accessibility especially in geographically remote areas.[24]

1.32 The committee was told that these technical deficiencies are not superficial and have the potential to significantly affect the way in which the bill impacts upon democratic processes in Australia. Professor George Williams argued that it is for this reason that further consideration should be given to these issues before the bill proceeds any further:

> …significant questions are left unanswered, such as the nature of the involvement of the initiators in the drafting process and the mechanisms for resolving any disputes that might arise. The answers to these questions have the potential to greatly impact on whether the final proposal that is put to referendum accurately reflects the will of the people who have initiated it.[25]

1.33 The AEC also pointed to a number of technical considerations:

- Clause 6: the bill does not contain a requirement for an elector to demonstrate any form of popular support for the application to the AEC to register a proposal for a referendum to alter the Constitution. This is in contrast to the approach in relation to the registration of parties and nomination of candidates;

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24 Professor George Williams, Gilbert and Tobin Centre of Public Law, *Submission 18*, pp 5–7.

25 Ms Shipra Chordia, *Proof Committee Hansard*, 29 April 2013, p. 10.

- Clause 8: subclauses 8(1) and 8(2) should be redrafted to ensure a clear basis for the acceptance or rejection of applications to register a proposal. The nature of the opportunity given to applicants pursuant to subclause 8(3) to be heard before the Electoral Commissioner can reject an application is unclear;
- Clause 9: it is unclear as to the basis for the inclusion of the time period for the provision of statements of reasons following the making of a decision under clause 8;
- Clause 10: the AEC stated that it might be desirable that the document referred to in this clause is in an approved form so as to provide greater certainty that signatories are provided with consistent information concerning the proposal, the information they are required to provide, and notification of how that information may be used. The clause appears to impose an obligation on the AEC to establish that the document contained signatures from at least one per cent of electors at the time of lodgement. The AEC stated that it may take time to ascertain the number of electors on the role on a given day because of processing requirements. It therefore may be desirable that the one per cent threshold is linked to the total number of electors enrolled in each Division, based on the determination by the Electoral Commissioner (under subsection 58(1) of the Electoral Act) at the end of the month prior to the month in which lodgement occurs;
- Clause 11: the method of verification of signatures contained in the bill would require significant allocation or diversion of AEC resources. Further, the mere provision of a signature would not enable the AEC to undertake any verification that a person was an elector. Although an address is required for the signatory, the AEC would need to contact the elector at that address to verify that the signature was validly obtained. This would involve considerable time and expense. If the AEC finds that signatures were not validly obtained, pursuant to clause 12, the proposal must be rejected. There appears to be no mechanism by which an applicant may vary or resubmit the document containing signatures;
- Clause 12: the clause does not make clear which minister is to cause the proposed law that will alter the Constitution in accordance with the proposal to be introduced into Parliament; and
- Clause 14: the AEC drew the committee's attention to the existing requirements in section 128 of the Constitution, that proposed laws to change the Constitution passed by each House of Parliament shall be submitted to the vote 'not less than two nor more than six months after its passage through both Houses'. The AEC noted that bill appears to provide that a CIR proposal could not be submitted to a vote earlier than one year from the day the proposal to change the Constitution passed Parliament, or any more than five years from the day the proposal to change the Constitution passed Parliament.[26]

26 Australian Electoral Commission, *Submission 27*, pp 4–9.

Committee view

1.34 The committee accepts that the bill in its current form is a very modest proposal that would in no way threaten Australia's robust constitutional system. Indeed it accepts the view that the bill is not even a clear illustration of how CIR operate in other countries such as the United States, and in particular in California. The bill would only provide for popular initiation of debate in the Parliament that may or may not lead to a referendum. According to Professor Williams, the bill is not proposing a true CIR, but rather a citizen initiated debate in the Parliament which may lead to a referendum.[27]

1.35 While the committee is generally supportive of the view that citizens in a democracy have a responsibility to participate in the political system, it does not believe CIR are the most effective way to encourage active participation by citizens in the political process. At best, the process proposed in the bill would promote only a very narrow form of political participation. The committee is of the view that proponents of CIR overstate the potential benefits to society of direct democracy and underplay the stability and robustness of the system of representative democracy.

1.36 Nor does the committee accept the view that laws derived from CIR are more clearly the popular expression of the will of the people than those derived from elected representative government. The committee notes the argument provided in evidence by the Gilbert and Tobin Centre of Public Law that CIR mechanisms cut against some of the strengths of representative democracy where citizens choose their elected representative to make decisions and to act on their behalf and in the best interests of the nation.

1.37 While the bill represents a modest proposal for CIR, the committee is of the view that bill may compromise the integrity of the current method of proposing referenda in Australia by encouraging citizens into signing petitions in the mistaken belief they will automatically lead to a referendum. The committee also accepts the argument that complex social and economic issues within the political process should not be reduced to simple yes or no answers, especially if they were to hamper successive governments facing unforseen political and economic circumstances.

1.38 The committee accepts that while the bill may avoid some of the pitfalls of conventional CIR processes by deliberately retaining Parliament's central role in approving citizen-initiated proposals, it nonetheless involves significant risk. In particular, the committee cannot ignore the fact that the CIR process contained in the bill may provide an unwelcome platform for extreme and divisive political agendas, engage parliamentarians in protracted debates over issues which have little chance of success, and result in policy debate in Australia being hijacked by well-resourced professional lobby groups. These potential shortcomings, which have long been associated with CIR processes in the United States, particularly in California, are of concern to the committee. When combined with the bill's numerous technical shortcomings, the committee concludes that it is unable to support this bill.

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27 Professor George Williams, *Proof Committee Hansard*, 29 April 2013, p. 11.

1.39 The committee also notes the comments made by Australian Electoral Commission particularly in relation to the role of the AEC and the Electoral Commissioner envisaged by the bill as well as the costs that it would impose on the AEC.

Recommendation 1

1.40 The committee recommends that the bill not be passed.

Senator Helen Polley
Chair