LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

COMMUNITY INITIATED REFERENDUMS

Report by the Select Committee on Community Initiated Referendums

November 1994

Committee Members

Mr Michael Moore, MLA (Chair)
Ms Annette Ellis, MLA
Mr Gary Humphries, MLA

Secretary
Bill Symington
Tel 205 0199

Assistant Secretary
Chris Papadopoulos

PREFACE

The Select Committee on Community Initiated Referendums was established on 14 October 1994 to inquire into the *Electors Initiative and Referendum Bill 1994* (EIRB) and the *Community Referendum Bill 1994* (CRB).

The Committee has decided to adopt a prudent approach to community initiated referendums (CIR).

The Committee appreciated the responses to its invitation for submissions but, frankly, had expected more. While supporters may feel this is evidence of a lack of opposition to the concept of CIR, it may be that the absence of contrary views is not a reflection of an uninterested electorate, but of one that is satisfied with the present parliamentary process.

Of the 24 submissions received, 15 were from the ACT, and five of those came from current or aspiring MLAs, and the ACT Electoral Commissioner. At the deadline for submissions the Chair publicly called for more submissions, drawing attention to the paucity of information provided by the public.

Most of the submissions supported CIR in one form or another. Many of these did not provide any sort of analysis of the issues involved in enacting such legislation, merely voicing their support of the concept. Others formed arguments in support of CIR from the simple standpoint that what they termed 'direct democracy' was a good thing.

The idea of CIR is at first glance attractive but, as I pointed out in a debate in the Assembly on 14 April, below the surface are all manner of ramifications for democracy, and only after careful study do the complexities of CIR legislation come to light.

The Committee feels that the six weeks allocated to it to inquire into CIR is inadequate to explore in depth all the issues involved in such a far-reaching change to the ACT's system of representation. The legislation being considered represents a fundamental change to the way we practise democracy. That under the *Self-Government Act 1988* a referendum result cannot be binding on the Assembly is only one example of the complications which must be addressed before CIR can be introduced in the Territory. A further cause of concern is that the legislation might be able to be used for 'recall' of politicians, judges or ACT public servants.

Moreover, the CRB's provisions mean that a referendum cannot be held until at least February 1996; and a majority government could overturn the legislation after the election in the new year.

In the light of this, and the laborious growth of the Assembly's stature in the eyes of the community, it would be unwise to rush through legislation which has the potential to drastically alter the way in which representative government works in this Territory.

No compelling arguments were made for haste. While some witnesses urged the Committee to take the opportunity which presented itself, it is clear that another Assembly could just as easily remove the legislation as enact it, as indeed Mrs Carnell's own legislation did with the anti-fluoride legislation adopted late in the last Assembly and rejected early in the current Assembly.

The Committee has done its best to lay before the community all the issues which need to be considered, but cannot, at this stage, recommend rushing to adopt either piece of legislation.

It would therefore seem prudent to establish a new committee early in the life of the next Assembly, with terms of reference that have regard to the nuts and bolts of implementing CIR, and with the time to explore more closely the social ramifications, advantages and problems which other jurisdictions have experienced.

Michael Moore, MLA
Chair

TERMS OF REFERENCE

On 14 September 1994 the Assembly agreed that :

(1) a Select Committee on Community Initiated Referendums be appointed to inquire into and report on:

(i) the *Community Referendum Bill 1994* and
(ii) the *Electors Initiative and Referendum Bill* 1994;

(2) during the course of its inquiry the Committee shall have regard to the political context, rationale for, implementation and operation of similar processes both within and outside Australia;

(3) the Committee shall consist of 3 members, 1 from the Government, 1 from the Opposition and 1 independent member, each of whom shall be nominated to the Speaker in writing by 4.00 pm, 15 September, 1994;

(4) the Committee shall report by 18 November 1994;

(5) if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker, or in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;

(6) on the Committee presenting its report to the Assembly, resumption of debate on the question "that this Bill be agreed to in principle" for the *Community Referendum Bill 1994* and the *Electors Initiative and Referendum Bill 1994* be set down as an order of the day for the next sitting; and

(7) the foregoing provisions of this resolution, so far as they are inconsistent with standing orders, have effect notwithstanding anything contained in the standing orders.

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ACRONYMS/ABBREVIATIONS

CIR	Community Initiated Referendums
CRB	*Community Referendum Bill 1994*
EIRB	*Electors Initiative and Referendum Bill 1994*
RMPB	*Referendum (Machinery Provisions) Bill 1994*

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Assembly:

(a) proceed no further with the *Electors Initiative and Referendum Bill 1994*;

(b) defer consideration of the *Community Referendum Bill 1994* until the implications of the Bill on the good governance of the ACT have been fully examined; and

(c) accept, in principle, the establishment of a select committee with terms of reference as outlined in Recommendation 3 to examine and report upon the concept of a CIR process for the ACT. **(Paragraph 8.17)**

Recommendation 2

The Committee recommends that the Standing Committee on Administration and Procedures examine and report to the Assembly on what changes to Standing Orders 100 and 174 would be required in order to substantially increase public access to the proceedings of the Assembly. **(Paragraph 8.28)**

Recommendation 3

The Committee recommends that the Assembly accept, in principle, the establishment of a select committee to fully examine the concept of CIR and report to the Assembly, and that the select committee's terms of reference include:

(a) the constitutional limitations, if any, which would affect the adoption of CIR in the ACT;

(b) the implications for the good governance of the ACT and the social justice impact should it adopt CIR;

(c) what limits, if any, should apply to the scope of CIR should it be adopted in the ACT;

(d) the appropriate threshold which should apply to any CIR in order to trigger a referendum;

(e) the time limits for the collection of signatures necessary to trigger a referendum, and the holding of referendums;

(f) the verification of signatures;

(g) the cost of referendums and the extent to which the proponents of referendums should, if at all, be responsible for part or all of such costs; and

(h) relevant overseas experience with CIR. **(Paragraph 8.65)**

1. INTRODUCTION

1.1 Legislation to implement community initiated referendums (or, as they are more commonly known, citizen initiated referendums) has been considered and/or introduced by a number of Australian legislatures, Federal, State and local, since the Australian Labor Party introduced the *Popular Initiative and Referendum Bill* in Queensland in 1915. That Bill, like every subsequent CIR bill introduced into a State or Federal parliament, was defeated.

1.2 Although legislation for various forms of CIR has been passed in such countries as Switzerland, the USA and Italy, provisions for CIR in Australia have been restricted to the level of local government, most notably North Sydney Council (where it has never been used because the Council seems to have successfully anticipated referendum issues and put them itself) and Burnie City Council in Tasmania.

1.3 The Select Committee on Community Initiated Referendums invited submissions from the public and sought others. A public hearing was held on 19 October at which evidence was taken from groups and individuals supportive of CIR; the ACT Electoral Commissioner Mr Phillip Green; the ACT Opposition Leader Mrs Kate Carnell, MLA, who introduced the CRB; and Ms Roberta McRae, MLA, in her capacity as Speaker of the ACT Legislative Assembly. Details of submissions received and witnesses at the public hearing are at Attachments 1 and 2.

1.4 With the exception of the Electoral Commission, which restricted itself to the workability and technical aspects of the Bills, and the Speaker, who argued neither for nor against the concept of CIR but suggested ways in which the Assembly's already demonstrable responsiveness to the community could be improved, all submissions to the committee were in favour of legislating for CIR in the ACT. Although the committee was pleased to receive these submissions and to hear from the witnesses in favour of CIR, the committee feels it was disadvantaged in its task by the absence of any organisation or individual presenting a contrary position.

1.5 At the public hearing, discussion tended to focus on the CRB rather than the EIRB. Having regard to the expert views of the Electoral Commissioner on the drafting and workability of the respective Bills, and to the evidence of other witnesses, the Committee considers that the CRB is more likely to be used as a basis for CIR legislation in the ACT should the Assembly decide to enact such legislation, and that the CRB has more support than the EIRB among CIR proponents.

1.6 Accordingly, this report will focus on the CRB, but will make reference to the EIRB where appropriate.

2. THE BILLS

2.1 The Committee was required to consider two Bills before the Assembly, Mrs Carnell's *Community Referendum Bill 1994*, and Mr Stevenson's *Electors Initiative and Referendum Bill 1994.*

On the basis of evidence given to the Committee, the Committee feels that the EIRB

- is poorly drafted
- omits important details and lacks clarity
- has unacceptably low trigger mechanisms
- provides for frequent referendums, which would blow out the cost of introducing CIR
- does not recognise that, under present circumstances, a referendum result cannot be binding on the Assembly.

2.2 The ACT Electoral Commissioner recommended in his submission[1] that, if legislation is to be adopted, it should be based on the CRB rather than the EIRB, because it is more workable and better drafted. In the light of the EIRB's deficiencies, the views of the Electoral Commissioner, and the clear preference of other witnesses for the CRB, the Committee felt that the EIRB would be incapable of being used as a basis for CIR legislation in the ACT and therefore did not warrant the further close consideration by the Committee. **This matter is taken up in Recommendation 1, paragraph 8.17**.

2.3 The CRB's major features are:

- A group of 10-12 electors who want to make or change a law form themselves into a sponsoring committee.

- The sponsoring committee drafts a description of no more than 100 words of the proposal it would like to see become law.

- If a proposal were to involve "considerable cost" the sponsoring committee would be required to indicate the source of funding in terms of revenue to be raised or other expenditure forgone.

- The Electoral Commissioner checks, inter alia, that the petition cannot block the Government's budget, and does not propose or prohibit the spending of a specified amount of money for a particular purpose.

- After the Commissioner's acceptance, the description becomes an initiating request, and the sponsoring committee can seek signatures of 1000 or more electors to support it.

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[1] Submission no 19

- Given that there are sufficient, valid signatures (10 per cent to be checked), the Commissioner registers the proposal.
- The sponsoring committee has six months to obtain the signatures of five per cent of electors (about 10,000 at current ACT population levels) in support of the petition. If successful, the Commissioner approves the proposal. Advice can be sought from the Attorney-General's Department or Parliamentary Counsel's Office.
- The sponsoring committee may present a copy of the proposed law to the Legislative Assembly. If the Assembly passes a law that is identical or substantially the same, there is no need for a referendum.
- If the Assembly has not passed a similar law, the Commissioner must submit the proposal to referendum.
- There will be a minimum of four months between the day a proposed law is tabled in the Assembly and the day of the referendum ("Community Consultation Day").
- Referendums will normally be held on the same day as Territory elections. However, a referendum can be held between elections (on the third Saturday in February) if the petition is signed by at least 10 per cent of eligible voters.
- The preparation of 'for' and 'against' arguments is optional. They are limited to 2,000 words and must be submitted to the Commissioner within two months of the proposal's presentation to the Assembly. The 'yes' and 'no' cases, and a copy of the proposed law, must be sent to all electors no later than 14 days before referendum day.
- The procedures for organising and voting in the referendum are based on the *Electoral Act 1992.*
- The proposed law requires a simple majority for approval.
- The Chief Minister must move that the proposed law be adopted by the Assembly. However, the Assembly may choose not to do so.

2.4 An example of the CIR process as outlined in the CRB is shown at Attachment 3.

3. DEFINITIONS OF CIR

3.1 Community initiated referendums differ from constitutional referendums in that proposals to alter, repeal or introduce a law (other than a constitutional law) are made by a group of citizens. These proposals are presented in the form of a petition. If a specified number of eligible voters sign in support of the petition, the proposal is then put to referendum. If the required majority of electors votes in favour of the referendum proposal, the proposal becomes law (sometimes automatically, sometimes with the assent of the Parliament).

3.2 There are four main types of CIR[2]. The *direct initiative* petition allows voters to put a proposal to referendum without any intervention by the Parliament. This type of CIR is used in more than a dozen American States.

3.3 The *indirect initiative* gives the legislature a specified time in which to pass an Act of Parliament to give effect to the community's proposal. If the Parliament fails to do so, the proposal is then put to voters at a referendum. This form of CIR is used in Italy and some American States.

3.4 The third form of CIR is the *legislative referendum.* This is also known as the "people's veto" or the "voters' veto". It allows a specified number of voters to petition for a referendum to repeal an existing law which has been passed by Parliament. If the referendum receives the required majority of support, the existing law is repealed. This form of CIR was introduced into the Swiss Constitution as far back as 1874.

3.5 The *recall* allows for the gathering of signatures on a petition and a subsequent referendum to remove a person elected to public office. This person may, for instance, be a judge or a Member of Parliament. This form of CIR exists in some American States and many American cities.

[2] Walker, Geoffrey de Q. *Initiative and Referendum: the people's law.* The Centre for Independent Studies, Sydney, 1987

4. ADVANTAGES AND DISADVANTAGES OF CIR

4.1 There are some generally held arguments both for and against CIR. These are summarised below:

Advantages

- CIR empowers voters by giving them a direct say in government policy
- voters can deal with issues which political parties may be reluctant to address because of their political sensitivity and concomitant effect on popularity at the polling booth
- CIR leads to greater public scrutiny because the process is a matter of public record, and is taken out of the hands of special interest groups, e.g. business and political elites, lobby groups, vocal minorities, etc.
- decisions can be made from the bottom up, rather than from the executive down
- the power of the executive has increased greatly since the system of representative government was established, and CIR helps to make governments more responsive and accountable to voters
- politicians often sell the party line rather than articulate their beliefs and those of their constituents, and CIR overrides the impact of this on specific issues
- CIR allows voters to tell elected representatives what they want throughout the life of a parliament, rather than just on election day
- voters of a certain political persuasion can effectively vote against the party on a particular issue without voting against it at an election. Under the present system, voters would have to vote for their preferred party's opponents, which may not be a realistic option, with the result that they have to go along with a decision with which they don't agree
- CIR fosters participation in democracy by increasing the electors' input to the public debate, as well as heightening their awareness and sense of responsibility

Disadvantages

- by allowing an issue to be determined by having it put to referendum, governments can delay or avoid making controversial and politically sensitive decisions, a particularly useful tool when an election may be as far away as three or four years. This could be read as an abrogation of Government responsibility and breed the sort of cynicism in the electorate which CIR is intended to eliminate

- CIR is a threat to political institutions because it bypasses the safeguards and limits built into the legislative procedure. In the case of the ACT, although a decision by a majority of electors to support a referendum proposal is not binding under the *Self-Government Act 1988*, it is unlikely that a Government would refuse to pass a law giving effect to such a proposal, despite any reservations it may have about doing so

- the referendum oversimplifies issues by reducing complex considerations to a yes/no vote and does not take into account the nuances of the arguments for and against proposals — this could lead to distortion and divisiveness

- lack of legal expertise could lead to poorly drafted legislation which might result in bad laws, additional costs to rectify them, and divisiveness

- governments tend to protect minorities from discrimination — because CIR is purely driven by majorities, minorities could be threatened

- CIR is expensive to implement, especially if legislation allows for frequent referendums

- because voters do not have the ready access to public servants, academics, legal and other experts which governments have, voters may not have the expertise to come to grips with all the complexities of an issue, and therefore may not be in a position to make an informed judgment

- because CIR encourages information to be put directly to voters, and proponents/opponents may therefore make use of the media, there is the possibility that issues will be open to distortion and misrepresentation. Instead of lobbying politicians, who have expertise behind them and a certain amount of objectivity, an argument put directly to the public may appeal more to emotion than intellect, and self-interest to the wider good. Lobby groups may in fact have more influence on the public than they do over politicians

- frustrated political parties, particularly those without a representative in the Assembly, could turn to CIR to try and get their policies up and to enhance their party position in the media, which goes directly against the philosophy of voter power

- if the signature gathering process is expensive, interest groups who may be affected by the referendum decision may be approached or may offer to put resources into the process. Again, this contradicts the spirit of CIR

- there is the possibility of a signature-gathering industry being established and becoming entrenched (although this does not seem not so great a danger in ACT, a small area with no remote locations)

- a referendum held on an election day may overshadow the election both on the day and during the campaign

5. ISSUES

5.1 Many of the philosophical issues which CIR raises can be gleaned from the list of advantages and disadvantages listed in Part 4. Supporters and critics are clearly separated by their philosophical views on CIR. But even among people who support the concept in principle, there are some key issues which spark debate about what CIR legislation should provide for. These issues are discussed with specific regard to the ACT in Part 8 but it is appropriate to summarise them in a general sense.

Thresholds

5.2 The threshold which is to be applied to the number of signatures required to 'trigger' a referendum is a fundamental consideration in any argument for CIR legislation. Too low a figure can mean that a small number of electors is able to put trivial or undesirable propositions to referendum. Too high a figure, supporters argue, would make the entire concept meaningless, as the chances of getting a proposal to the referendum stage would be difficult and too costly, thereby denying ordinary citizens, for whom the legislation is intended, the opportunity to initiate a proposal. Of course, the definitions of 'too high' and 'too low' are at the heart of this controversy.

5.3 The threshold level also has cost implications. A low figure for an ordinary referendum will increase the cost of CIR, as there will be more referendums to vote on. Moreover, provisions for "special" or "emergency" referendums (such as those found in both the CIR and the EIRB), where a referendum can be held on a day other than an election day if a second threshold for signatures is reached, will add further to costs. It follows that if the first threshold is low, the second will also be relatively low, making the holding of a special referendum more likely and very costly.

5.4 Research undertaken in the US by David B. Magleby shows that "the relationship between signature threshold levels and the number of measures qualifying for the ballot is strong and statistically significant."[3]. In States with thresholds at or below 8 per cent, proposals had a 35 per cent chance of succeeding; while proposals put to referendum in States with higher thresholds had a 47 per cent chanceof success: "This relationship between signature thresholds at 10 per cent and above and voter approval may be the result of reduced voter fatigue and negativism as a result of fewer initiatives on the ballot, or it may be that initiatives in high-threshold States are generally more acceptable to voters. In either case, the signature threshold plays a role in the success rate."[4]

Scope

5.5 Another major issue is whether certain types of legislation should be exempt from CIR provisions. Opponents of CIR argue that particular laws and policies can only be made by governments and should not be subjected to the direct approval of people who have a vested interest (for example, how many would vote 'no' to a

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[3] Magleby, David B. *Direct Legislation: voting on ballot propositions in the United States*. The John Hopkins University Press, Baltimore, 1984, p.42
[4] ibid, p.44

proposal to decrease taxation?) or are not qualified to make decisions which are complex and potentially divisive (for example, abortion, euthanasia, immigration, foreign policy). CIR is seen by critics as oversimplifying issues, dividing them into black and white without taking account of the grey areas which most issues encompass.

5.6 Issues such as crime and justice are also controversial in the context of CIR. There is fear among CIR opponents that knee-jerk reactions to certain heinous crimes reported in the media may lead to draconian laws to deal with criminals in general. (For example, capital punishment, though repealed by the majority of American States with CIR legislation, has been reintroduced by others through CIR.) On the back of such public outrage over a crime, a concerted move by a powerful special interest group could lead to the introduction of radical laws.

Signatures: collection and verification

5.7 The time allowed for the collection of signatures, and the method for verifying their authenticity, is another issue which produces a range of arguments. Allowing insufficient time for the sponsors of a proposal to gather the required signatures makes their task an unrealistic one. Allowing too much time would be a waste of effort and money, as it would indicate that a proposal does not have widespread community support.

5.8 Verifying signatures is central to the CIR process. Decisions have to be made about not only what size sample is sufficient to give a reliable result (typically 10 per cent), but, more importantly, how it is to be done. The ACT Electoral Commissioner's evidence to the Committee on this matter, outlined in Part 8, points to the difficulty in ensuring the integrity of this process.

Timing

5.9 The timing of referendums is also a key consideration in framing CIR legislation. As mentioned above, the threshold applied to an ordinary or special referendum will affect the frequency with which referendums are held and their cost to the community. Evidence presented to the Committee indicated that each stand-alone referendum would cost around $1.2 million,[5] a substantial sum. If stand-alone referendums are to be permitted, their urgency must be demonstrable and the threshold high enough to provide a true reflection of the importance which the community places on the proposals involved.

Preferential voting

5.10 Criticism that CIR reduces important issues to black and white arguments is deflected by some supporters by suggesting that provisions be made for preferential voting, thereby giving people some scope to demonstrate their appreciation of the complexity of an issue. But how legislation or proposals can be framed to reflect these options (the legislation having been written before the vote is taken) is not clear, but does warrant further investigation.

[5] Submission no 19

Cost burden

5.11 Who should pay for CIR? Some argue that, since CIR is simply an expression of democracy, the cost should be borne by governments, while others see it as the responsibility of the sponsors of the legislation. These costs may include a deposit lodged with the petition, the cost of collecting signatures, drafting legislation, the preparation of the 'yes' and 'no' cases, and, most controversially, the cost of advertising.

6. THE EXPERIENCE OVERSEAS

Switzerland

6.1 Swiss voters can request a constitutional amendment by collecting the signatures of 100,000 voters in an 18-month period. A two-thirds majority is required for the proposal to pass into law.

6.2 The threshold for putting an indirect initiative to referendum is set at 50,000 signatures, which must be gathered in 90 days. The proposal must win a majority of voters overall, and a specified majority of Cantons, before being put to the Government for approval. Like the CRB, the referendum result is not binding on government.

6.3 Switzerland is often portrayed by CIR supporters as the doyen of democratic societies, chiefly because provisions for holding referendums have been part of the Swiss Constitution since 1848.

6.4 The constitutional initiative and legislative referendum were introduced in 1891, and their continued use is cited as proof of their popularity. But using Switzerland as a benchmark for introducing CIR in the ACT may not be appropriate, as "in Switzerland, less importance is attached to parliamentary elections than in other countries. Whatever the outcome, there is no changeover, with power alternating between a majority party and the Opposition. Switzerland's four main parties have shared governmental power since 1959, and in a way, the people have assumed the role of an Opposition".[6]

6.5 This is very different to the situation in Australian jurisdictions, where parliamentary elections are the cornerstone of democracy.

6.6 Surprisingly, the existence of CIR has not improved the level of voter participation in Swiss elections. "A great many people do not bother to vote, which casts doubts on the true effectiveness of the exercise. Since the end of the Second World War, voter participation has been falling steadily, and the current average is below 40 per cent. The reasons for this abstention are many and include general disinterest, hostility to the whole idea, bewilderment at the complexity of the issue involved, and apathy caused by being required to vote so often."[7]

6.7 It is apparent, then, that CIR does not have the universal support of the Swiss people.

6.8 The Swiss experience in legislating for national CIR proposals also illustrates the vast differences between implementing CIR in municipal jurisdictions and those which have carriage over deeply complex and potentially divisive legislation. The

[6] *Direct Democracy: the basis of political life.* Press release from the Swiss News Agency, Berne, for the Swiss National Tourist Office, July 1990
[7] ibid

people of Switzerland have voted on immigration levels on no fewer than five occasions since the end of World War II.

6.9 Committed CIR supporters would no doubt point to the failure of these petitions and argue that the results show people can be trusted to make decisions based on reason and not bias. But to give such issues voice in a manner entrenched by the Constitution must run the risk of deeply dividing a community. While the ACT Government has no jurisdiction over immigration levels, CIR legislation could enable or even encourage radical groups to put other divisive issues on the CIR agenda, not for the benefit of the community but out of self-interest in building their own political base.

United States

6.10 CIR is widely used in the US, with South Dakota being the first State to adopt CIR legislation in 1898. Depending on which State they live in, voters have the direct initiative, indirect initiative, legislative referendum and the recall at their disposal. Thresholds vary from 2 to 20 per cent, depending on the legislature, the State and the type of CIR. The percentages are usually expressed as a percentage of the number of voters who voted at the previous State election. The median threshold is 8 per cent of those who voted at the previous election for governor.[8] There are no CIR provisions at the Federal level.

6.11 California adopted CIR in 1911 and is the most renowned user of CIR in the United States. The threshold for direct initiative proposals is set at 5 per cent, or around 500,000 signatures. Generally, signatures must be gathered in 90 to 120 days.[9]

6.12 This makes California one of the least stringent States in terms of the threshold, and puts it among the States with the highest number of proposals placed on the ballot through petitions.[10] Literally hundreds of proposals have been put to the vote.

6.13 The best known CIR in California was Proposition 13, the subject of such intense media coverage that it became the principal focus of the 1978 mid-term election campaign.[11] Under this proposal, voters changed the Constitution to limit the level of tax which the Government could levy on property values and sales. It is not surprising that the proposal was carried with a 2:1 majority, despite the opposition of politicians, professional organisations and community groups. Proposition 13 is often cited as an example of some voters' regard for their own finances, rather than those of the government.

6.14 California's embrace of CIR, coupled with a large geographical area and population, has led to a significant growth in professional signature-gathering organisations. The prohibitive expense of gathering signatures under such circumstances, and the fact that there are no limits on how much money an individual

[8] Magleby, op cit, p.41
[9] ibid, p.61
[10] ibid, p.42
[11] ibid, p.6

or corporation can pour into the campaign, has led to such powerful interests having precisely the influence on the political process which CIR is intended to correct.

6.15 These scenarios are perhaps unlikely to develop in a city-state of the size and population of the ACT but these concerns are not well understood. In all, comparing California with the ACT is not comparing like with like.

6.16 In the same way that the political climate in Switzerland is different to that found in Australia, the US States have direct election of their governors (or head of State), who have considerable power in their own right. Where some believe CIR can curtail abuse of such power, the same requirements seem less significant in a parliamentary system with the Chief Minister elected from the floor of the Parliament as the "first among equals".

New Zealand

6.17 The Committee notes that national CIR legislation came into force in New Zealand on 1 February 1994. The New Zealand Parliament most closely resembles parliaments in Australia in that it is based on the Westminster system of parliamentary government, and may provide a better model than Switzerland or the USA when considering the adoption of CIR legislation in the ACT. However, a meaningful comparison is not possible at this stage, as, to date, no CIR proposal has been put to a national referendum in New Zealand. The threshold for triggering such a referendum is 10 per cent of registered voters.

6.18 However, with regard to the general principles of whether the New Zealand experience could be translated to the ACT, the Committee notes the ACT Deputy Law Officer's opinion[12] that adapting such laws to the constitutional framework in which they operate is essential. New Zealand law makers could not simply follow the American or Swiss models because the Westminster system of government operates quite differently to the American and Swiss constitutional systems. Because the ACT has its own unique constitutional system, any proposal for CIR must itself be tailor-made for the ACT constitutional regime.

[12] ACT Deputy Law Officer, Letter to the Committee, dated 3 November 1994.

7. THE AUSTRALIAN EXPERIENCE

7.1 In Australia, the use of CIR to make or change laws has been confined to local government, most notably North Sydney Council in NSW and Burnie City Council in Tasmania. Neither of these jurisdictions has the power to legislate on truly complex and controversial issues such as those which the ACT Legislative Assembly must confront.

7.2 Although some local councils in the Northern Territory have adopted CIR, the Northern Territory Sessional Committee on Constitutional Development, addressing the issue of CIR in the wider context of consideration of matters connected with a new State Constitution, was not convinced that CIR's advantages outweighed its disadvantages. The Sessional Committee noted that "it considers it to be of greater importance to try to enhance the status of Parliament and the representative parliamentary process, with a view to achieving effective and responsible government in the new State. It is not convinced that this is totally compatible with citizens' initiatives which can compel the holding of referendums".[13]

7.3 North Sydney Council advised the Committee that although there was provision for CIR (1000 signatures and lodgement of $1000 to initiate a referendum), the Council had never had such a petition put before it. The Council has successfully anticipated the issues with which residents appear to be most concerned by using a system of consultative neighbourhood committees, or precincts. The Council has said that "the major objective of the Precincts System is to encourage total involvement of all residents in the making and influencing of all Council's decisions. The system is a conscious attempt to evolve a formal system of decentralisation of power and to broaden citizen involvement in the decisions affecting them".[14]

7.4 Public meetings are held regularly in North Sydney and there is much consultation between precinct committees. In this way, North Sydney Council has been able to put referendum questions on ballot papers on municipal election days.

7.5 That the North Sydney precinct system appears to work so well raises the question as to why the Council needs to put matters to referendum at all. With this level of consensus, the Council ought to be in a position to simply make a decision to implement the changes which residents have clearly agreed upon.

7.6 Nevertheless, the Committee believes this is a good example of the kind of consultation which the Speaker Ms Roberta McRae said, in her submission, could forge stronger links between the Assembly and the community.[15]

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[13] Sessional Committee on Constitutional Development, Northern Territory Legislative Assembly, Discussion Paper No. 3, *Citizens' Initiated Referendums,* August 1991, p.22

[14] *Public Participation & Direct Democracy in North Sydney Council,* North Sydney Municipal Council, 1990, p.17

[15] Submission no 23

7.7 Burnie City Council has also made provisions for CIR. The Council cites[16] the substantial increase in voter participation since CIR was introduced in 1990 as proof of the empowerment which voters feel. It should be remembered, however, that voting at municipal elections, unlike State and Federal elections, is voluntary.

7.8 The Committee notes that the sorts of questions put to municipal referendums are of the variety which can be answered with a simple 'yes' or 'no', (e.g. "Should Burnie Refuse Tip be open all day on Saturday and Sunday?") There is no legislation to vote on. Furthermore, such a question cannot compare for gravity with questions on health, education, police powers and the judicial system.

7.9 Arguing for CIR in the ACT Legislative Assembly on the basis of the experience of these Councils would be akin to restricting the ACT legislation to the purview of the Department of Urban Services. But the Assembly also has jurisdiction over State-type matters.

7.10 There are no easy answers to complex issues and, were the ACT to go down the CIR path, it would be the first Australian State or Territory to introduce legislation to allow a majority of voters in favour of a particular proposal to make decisions of such palpable complexity and importance. In short, there is no Australian precedent for CIR at this level of government.

[16] *Citizen & Council Initiated Referendum*. Presentation to Direct Democracy Seminar, Canberra, July 1994.

8. CIR IN THE ACT?

Binding or advisory?

8.1 A common argument made by critics of CIR is that it threatens existing political institutions because it lacks the checks and balances built into the law-making procedures found in the Westminster system. Because a successful CIR proposal bypasses Parliament, there is no opportunity to reconsider or challenge the legislation. On the other hand, supporters of CIR would argue that this form of 'direct democracy' is what makes CIR so appealing.

8.2 The CRB recognises that, under the present *Self-Government Act 1988*, the Assembly lacks the power to make a referendum result binding on the Assembly. The CRB does not therefore circumvent the Assembly. However, almost all the witnesses at the public hearing, while accepting that a binding referendum was not currently possible, urged the Assembly to lobby the Federal Parliament to amend the Act to make referendum decisions binding.

8.3 While urging the Assembly to pass the CRB in its present form, Mr Bruce Chapman said in his submission on behalf of the Movement for Direct Democracy, that where referendums were not binding on governments, the entire process was viewed as a cynical ploy to give the illusion of democracy.[17]

8.4 At the public hearing Mr Chapman said that people who voted at a referendum that was not binding on government, and where the government refused to pass a resulting law, felt there was no point in voting in the first place as the government did not listen to them.[18]

8.5 This may be seen as running counter to CIR's supposed qualities in instilling a sense of meaningful participation in the political process. It is a matter which needs to be addressed before CIR legislation is adopted by the Assembly.

Thresholds

8.6 All the submissions to the Committee in favour of CIR argued that the threshold for signatures required to refer a proposal to referendum be set at 5 per cent or less, in line with what is claimed to be common overseas practice. Some witnesses argued for a threshold of 2-2.5 per cent, which the Committee feels is too low to guard against frivolous or undesirable proposals being put to referendum. The Electoral Commissioner has stated that a referendum would cost the people of the ACT something in the order of $1.2 million per referendum if held on a non-election day.[19]

8.7 Mr Chapman, who advocated a threshold no higher than 2.5 per cent, said in evidence that to obtain the 5 per cent of signatures required by the CRB (approximately 10,000 at current population levels) would mean that more than 53,000

[17] Submission no 5
[18] Transcript, p.67
[19] Submission no 19

people would have to be approached. While Mr Chapman said this was unrealistically high, the Committee feels that, taking Mr Chapman's calculations at face value, the logical conclusion of his argument is that fewer than one in five electors would be willing to sign a petition. Such a statistic would clearly indicate that the petition did not have the support of the community. Lowering the threshold would artificially bolster the apparent support for a proposal.

8.8 Mr Chapman proposed that sponsors be given 18 months to gather the required signatures.[20] The Committee, however, feels that if 2-2.5 per cent of signatures could not be gathered well within this period of time, the proposal would in any case have little hope of gaining community support.

8.9 Mr Chapman also noted that setting the threshold at greater than 2-2.5 per cent would foster the growth of professional signature-gathering organisations,[21] such as those on which many of California's CIR sponsors depend.

8.10 Collecting 5 per cent of signatures in the ACT is an entirely different proposition to collecting the same percentage in California, which covers a very large area and has a population of around 30 million. There are no remote areas in the ACT. The population is quite small and very compact. The high concentration of 'traffic' in the few major centres (eg shopping malls in town centres) ensures relatively easy access to voters. A 5 per cent threshold may not be realistic in terms of setting a target which reliably reflects wide support for a legislative proposal.

8.11 For these reasons, it seems unlikely that professional signature-gathering organisations pose a threat to the integrity of CIR in the ACT, but the Committee is of the view that a decision should be made as to whether such organisations should be permitted at all.

8.12 In his submission and at the public hearing, Mr Lyle Dunne expressed similar views about the relative ease with which signatures could be gathered in the ACT, and with the low probability of the growth of professional signature gathering. But the Committee notes that Mr Dunne considers a 5 per cent threshold reasonable.[22]

8.13 The comparison with California should be qualified by noting Mrs Carnell's evidence at the public hearing,[23] where she drew attention to the fact that signature gathering in the US is fundamentally different because voting is not compulsory, so the threshold for signatures is a percentage of people who voted at the last election, and not, as would be the case in the ACT, of the total number of eligible voters. Mathematically, this argument goes, it should be easier to collect signatures in places where voting is voluntary because fewer people vote. However, sponsors in California have between 90 and 120 days to gather the required number of signatures (approximately 500,000), as opposed to the CRB's six months. A further complication is the additional difficulty in the US of identifying those people who voted at the

[20] Submission no 5
[21] ibid
[22] Submission no 3; Transcript p.112
[23] Transcript, p.97

previous election. This means the signature-checking process would also be more difficult.

8.14 In his submission on behalf of the Belconnen Community Council, Mr Norman Henry agreed with the CRB's 5 per cent threshold for an ordinary referendum and 10 per cent for a special referendum. In addition, he proposed that a petition attracting 2 per cent of signatures qualify "a proposal for public funding for presentation of for and against cases to establish whether the requisite 5 per cent emerges".[24]

8.15 The Committee believes the support of 2 per cent of the community insufficient to justify the cost of Mr Henry's suggestion, particularly as the CRB's threshold of 5 per cent has not been convincingly shown to reflect overwhelming community support.

8.16 The Committee considers the threshold for CIR in the ACT is a matter worthy of further study and consideration. **This matter is taken up in Recommendation 3, paragraph 8.65.**

Recommendation 1

8.17 The Committee recommends that the Assembly:

(a) proceed no further with the *Electors Initiative and Referendum Bill 1994*;

(b) defer consideration of the *Community Referendum Bill 1994* until the implications of the Bill on the good governance of the ACT have been fully examined; and

(c) accept, in principle, the establishment of a select committee with terms of reference as outlined in Recommendation 3 to examine and report upon the concept of a CIR process for the ACT.

Community consultation

8.18 Many CIR supporters have argued that, on the Federal level, voters are remote from the decision-making process in Canberra; that parliamentarians are influenced by a bureaucracy which has little contact with or understanding of people in the States; and that CIR will therefore give voters the opportunity to let the parliament know directly what they expect of their representatives. In short, proponents argue that parliamentarians no longer are true representatives of their constituents. This overlooks the fact that Members of the ACT Legislative Assembly are much closer to their constituents than is the case with State and Federal Members of Parliament, and that election through proportional representation gives voters the opportunity to approach like-minded politicians.

[24] Submission no 14

8.19 The concept of voters' alienation from debate and decision-making does not seem to apply to the ACT. Apart from the sheer accessibility of the Members to their constituents, and the Assembly's record on responsiveness to the community, the Territory is generously represented by the media, which cover local politics exhaustively.

8.20 Following the 1995 ACT election, voters from the three new electorates will have a choice of five or seven Members of the Legislative Assembly to approach for assistance, or to lobby. With the exception of Tasmania, this is very different from the situation with the Federal and State legislatures, where there is a single member representing an electorate. The new system ensures choice for electors who feel they are not being heard by an individual MLA within their particular electorate.

8.21 In her evidence at the public hearing, Ms McRae stated:

> I do not think that our Assembly has been alienating. I do not think that we have systematically disempowered people. I do think that collectively, all of us have a very good record of opening up, of listening, of going to community groups. Now, I think that what is happening is that there is a transferral from the Federal mode ... that somehow in the noise about where politics is at federally ... we are falling victim of that discussion.[25]

8.22 Ms McRae stressed that she appeared at the public hearing in her capacity as Speaker, and not as a representative of the Government.[26] She did not want to argue in favour or against the pieces of legislation before the Assembly. Ms McRae suggested ways in which the Assembly could improve its already good record on responsiveness to individual constituents and community groups.

8.23 Ms McRae pointed to Standing Orders 100 and 174, "which, if altered, could substantially increase public access to the proceedings of the Assembly and make for more direct and immediate response to the interests of constituents".[27]

8.24 Standing Order 100 States that the Clerk shall refer every petition lodged with him/her and received by the Assembly to the Minister whose portfolio covers the matter raised in the petition. It says a Minister *may* respond to a petition by lodging a response with the Clerk for presentation to the Assembly. Ms McRae said she could not recall any situation, with the exception of the petition on the closure of Royal Canberra Hospital, where a Minister had been asked in the Assembly about a petition brought to that Minister's attention.

8.25 Ms McRae suggested that if the wording of the Standing Order were changed to compel a Minister to respond in the Assembly to a petition, "then petitions will become very powerful tools to be used by the electorate".[28]

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[25] Transcript, pp4-5
[26] ibid, 2
[27] Submission no 23
[28] ibid

8.26 Ms McRae also suggested modifying Standing Order 174, which states that "Immediately after a bill has been agreed to in principle a Member may move that the bill be referred to a standing committee."[29]

8.27 Ms McRae suggested that proposed amendments "should be the trigger for delay or broader consideration of the legislation before debate in the House".[30] Proposers of amendments could make known to the Speaker how they would like their amendments to be dealt with. Procedures for dealing with amendments might include delaying legislation while all parties receive clarification, public discussion if there has been no previous inquiry, or seeking comments from groups who have participated in the hearings. The Speaker advised the Committee that "the overall objective would be to further ensure that for complex legislation it becomes a matter of course that a high level of public discussion is sought at the critical stage of the legislative process".[31]

8.28 The Committee considers that the Speaker's suggestions are worthy of further consideration, and recommends accordingly.

Recommendation 2

8.29 The Committee recommends that the Standing Committee on Administration and Procedures examine and report to the Assembly on what changes to Standing Orders 100 and 174 would be required in order to substantially increase public access to the proceedings of the Assembly.

Maintaining the independence of the Electoral Commission

8.30 In his submission to the Committee the Electoral Commissioner, while acknowledging the CRB's superior drafting and workability when compared to the EIRB, nevertheless raised several concerns with the legislation.

8.31 The Commissioner commented on the potential threat to the Commission's status as an independent statutory authority:

> "It is a matter of concern that the CRB and the EIRB would confer duties on the Electoral Commissioner that could potentially lead to the Electoral Commissioner being seen as a participant in the political process rather than an independent arbiter of it."[32]

8.32 The Commissioner referred to the Bills' requirement for the Commissioner to determine whether the objects sought to be achieved by a referendum proposal are

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[29] ibid
[30] ibid
[31] ibid
[32] Submission no 19

capable of implementation by legislation, and to be satisfied that a proposal refers "to no more than one legislative proposal". This, the Commissioner argued, was beyond the legal expertise of the Commissioner and could jeopardise his/her independent status. He recommended that any contentious decisions other than those directly related to the conduct of a referendum not be made by the Commissioner, and that decisions requiring expert legal advice be referred to an appropriate legal authority.[33]

8.33 The Committee acknowledges the concerns held by the Electoral Commissioner and considers they should be subject to further investigation. **This matter is taken up in Recommendation 3, paragraph 8.65.**

CIR and the ACT's constitutional framework

8.34 The Commissioner also pointed out that clause 87 of Mrs Carnell's Bill, which states that the Assembly may not amend a CIR law for 12 months, may be beyond the Assembly's powers.

8.35 The Committee sought a legal opinion on the questions raised by the Electoral Commissioner with respect to both the CRB and the EIRB.

8.36 The legal opinion provided to the Committee by the ACT Deputy Law Officer[34] in essence was that Clauses 86 (2) (a) and 87 of the CRB, would be invalid if passed in their current form and that clause 26 of the EIRB would also appear to be invalid on constitutional grounds.

8.37 The Deputy Law Officer's extended opinion is provided in Attachment 3. However, the Committee draws attention to the general discussion of the law contained in the opinion and in particular, the three constitutional issues which, in the opinion of the Deputy Law Officer, require careful consideration. These are :

> (i) whether the Bills, if enacted, amount to an invalid abdication of power by the legislature to the CIR process;
>
> (ii) whether the Bills prevent future Assemblies from amending or repealing citizens initiated laws even though they may purport to do so; and
>
> (iii) whether the Bills would be invalid on the basis that they are inconsistent with the *Australian Capital Territory (Self-Government) Act 1988.*

8.38 The Committee is of the view that the constitutional issues raised by the Deputy Law Officer are crucial to any further consideration of the Bills.

8.39 Accordingly, the Committee will recommend that a future select committee examine and report on the constitutional limitations, if any, of CIR proposals in the ACT. See Recommendation 3, paragraph 8.65.

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[33] ibid

[34] Deputy Law Officer, op cit

8.40 The Committee is not convinced that CIR should be precluded from amendment for any period of time.

Signature verification

8.41 A practical problem with the CRB — and, indeed, with CIR legislation in general — is the system used to verify signatures appearing on a petition. In his submission to the Committee and at the public hearing, the Electoral Commissioner expressed the following concern over the CRB's provisions for the verification of signatures.

> "It would be insufficient for the Commissioner simply to verify whether a name and address on a request matched an elector's name and address on the electoral roll — it would be a simple matter for someone wanting to fraudulently use several names to obtain this information from the published rolls. To adequately verify the signatories, the Commissioner would either have to compare signatures on requests with signatures on electoral claim cards, or contact signatories by mail or phone to confirm their support for a request. Both methods would require time and expense."[35]

8.42 The Commissioner pointed out that the ACT community's transient nature would complicate the verification process because between the six months a person signs a petition and the petition's lodgement with the Electoral Commissioner, that person's address may have changed.

8.43 The Commissioner indicated that to undergo a verification process which would safeguard the integrity of a CIR proposal, the Electoral Commission would have to be given additional resources.

8.44 While the Committee recognises that the consequences of the CRB's provisions for signature verification are unintentional, it considers the whole question of how best to ensure the integrity of the verification method needs clarification. **This matter is taken up in Recommendation 3, paragraph 8.65.**

Appeals

8.45 The Commissioner drew the Committee's attention to Clause 129 of the CRB, which allows for review of a limited number of decisions.[36] The Commissioner argued that these provisions should be widened. Specifically, he pointed to the lack of an appeal mechanism against:

- a decision by the Commissioner to accept a proposal for lodgement under clause 5; and

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[35] ibid

[36] ibid

- a decision by the Attorney-General to refuse to give a certificate under clause 14 stating that a proposed law gives effect to a registered proposal.

8.46 Moreover, the Commissioner stated that the absence of a mechanism for overturning a referendum where illegal practices or administrative error are shown to have affected the result was a significant omission and should be rectified.[37]

8.47 The Committee considers the Commissioner's views on the inadequacy of the CRB's review provisions should be the subject of further scrutiny.

Machinery provisions

8.48 The Electoral Commissioner also expressed the view that it would be desirable for the machinery provisions to be removed from any proposed CIR Bill, and for the Assembly to adopt the Government's *Referendum (Machinery Provisions) Bill 1994* (RMBP). This would ensure that provisions for the conduct of any referendum held in the ACT would be covered by one Bill, and would therefore eliminate the need to reproduce machinery provisions in each piece of legislation requiring a referendum. (Any provisions in RMPB could be overridden by specific provisions in another Bill.) The Commissioner argued that adopting this strategy would ensure consistency with the *Electoral Act 1992*, and would overcome the CRB's shortcomings in providing for the overturning of a referendum result where such action is warranted.[38]

8.49 The Committee's view is that the RMPB should be adopted and inserted "for information" in the CIR Bill.

Cost

8.50 As stated elsewhere in this report, the Electoral Commissioner estimates that the cost of a referendum using one ballot paper held on its own would be in the order of $1.2 million. A referendum held with an election would cost $300,000 over and above the cost of the election. The precise cost would depend on the number of questions put at a referendum and the level of government-funded advertising and/or information campaign.[39] The Committee notes that these are not inconsiderable sums.

Recall

8.51 There is nothing in the CRB which excludes the possibility of electors using CIR to remove a democratically-elected person from office. The Committee has serious concerns about this omission, if it is an omission, particularly since the threshold for triggering a referendum would be 5 per cent, far lower than the 12-20 per cent range in place in California.

[37] ibid
[38] ibid
[39] ibid

8.52 Furthermore, were a recall referendum to be triggered, it may be assumed that all ACT electors would be required to vote. The Committee does not think it appropriate that a person living in, say, Ginninderra should have the right to vote for the removal of someone elected to the electorate of, say, Molonglo.

8.53 The Committee also considers that when electors vote for a person to represent them in Parliament, particularly in a proportional representation system, they should not be overruled by a majority, many of whom will have an allegiance to a party other than the one to which the ousted representative belongs.

8.54 The Committee considers that the issue of whether CIR should include the right of recall be the subject of further investigation. **This matter is taken up in Recommendation 3, paragraph 8.65.**

Public awareness

8.55 In his evidence to the public hearing, Mr Evans drew attention to what he saw as the CRB's shortcomings in ensuring that the debate surrounding a CIR proposal is a substantive one. Mr Evans cited the recent NRMA election as an instance of what happens when there is a scarcity of relevant facts put before voters.[40]

8.56 At the hearing, Mr Henry agreed with Mr Evans that, though they could see no reason why the Assembly, given its resources, could not amend the legislation and still pass it in the life of this Assembly, it would be wiser to defer the legislation than to pass it in its to present form.[41]

8.57 Mr Evans expressed his concern at the notion that only bureaucracies and parliaments can give considered views on matters of importance, and that the people are incapable of doing so.[42]

8.58 While the Committee recognises Mr Evans' concern, it draws attention to the considerable resources and the level of expertise which governments have at their disposal. Decisions are made and legislation drafted after consulting with, and seeking expert advice from, a whole range of government and other experts. How this process could be reproduced under CIR remains unclear.

8.59 In his evidence to the Committee, Mr Lyle Dunne noted of CIR:

> "In terms of timing, I think we have a unique opportunity here. The committee will have been aware, and I am sure, have been reminded today that virtually every Australian legislature in Australia has considered this proposition. Virtually every party in Australia has adopted it at some stage, but, yet, somehow, it has never made it into law. Clearly the reason is that political parties who are enthusiastic about

[40] Transcript, p29
[41] Transcript, p30
[42] Trancript, p31

this sort of system in Opposition somehow lose their enthusiasm when they get into Government."[43]

8.60 The Committee does not believe these considerations warrant the rushing through of the legislation.

Scope

8.61 The question of the scope which any CIR legislation in the ACT should have has already been alluded to. The Committee has expressed its view that it would be undesirable to have people in one electorate voting to remove a representative of another.

8.62 It has also been noted elsewhere in this report that the Legislative Assembly's jurisdiction over weighty and potentially controversial matters with respect to health, education, police powers and justice makes the adoption of CIR legislation in the Territory a very different proposition to enacting such legislation in legislatures whose powers are restricted to municipal functions.

8.63 While the CRB merely precludes people from putting CIR proposals on a line item in the Government's budget and, of course, matters outside the Assembly's jurisdiction, the Committee is of the view that more thought should be given as to precisely what scope CIR legislation in the ACT should have.

8.64 The Committee is further concerned about other possible ramifications as serious as those concerned with recall which have yet to be raised. **This matter is taken up in Recommendation 3, paragraph 8.65.**

Recommendation 3

8.65 The Committee recommends that the Assembly accept, in principle, the establishment of a select committee to fully examine the concept of CIR and report to the Assembly, and that the select committee's terms of reference include:

(a) the constitutional limitations, if any, which would affect the adoption of CIR in the ACT;

(b) the implications for the good governance of the ACT and the social justice impact should it adopt CIR;

(c) what limits, if any, should apply to the scope of CIR should it be adopted in the ACT;

(d) the appropriate threshold which should apply to any CIR in order to trigger a referendum;

[43] Transcript, p110-111

(e) the time limits for the collection of signatures necessary to trigger a referendum, and the holding of referendums;

(f) the verification of signatures;

(g) the cost of referendums and the extent to which the proponents of referendums should, if at all, be responsible for part or all of such costs; and

(h) relevant overseas experience with CIR.

Michael Moore, MLA
Chair

8 November 1994

DISSENTING REPORT FROM MR G. HUMPHRIES, MLA

The majority report to which this dissenting report is annexed represents, I believe, a low-point in the committee process used in the Legislative Assembly. This process has generally been a valuable tool in addressing complex and sometimes controversial issues in the public arena in a non-partisan fashion. On this occasion, it has thrown up a result which bears little resemblance to the evidence put before the Committee and which merely anticipates the arguments which would be likely to be put in the course of debate on this issue on the floor of the Assembly.

It may be that the Assembly should, in future, avoid putting intensely controversial issues — ie. election issues — to a committee late in the life of a parliament. Based on this present experience, a less-than-satisfactory outcome is probable.

I cannot support the majority report because I do not believe that the report reflects the evidence put before the Committee. It is rather a statement of the prejudices of the authors which have apparently not been tempered by the volume of evidence supporting community initiated referenda (CIR).

Not one of the 24 submissions received by the Committee (notwithstanding earlier comments by the Chair, the number of submissions was quite healthy) expressly argued against CIR. Yet the majority report meticulously seeks out arguments against CIR (mostly from sources other than the evidence put before the Committee) and portrays quibbles with the thrust of CIR as major hurdles against proceeding with CIR at this time.

The report is replete with conclusions such as:

- "CIR ... bypasses the safeguards and limits built into the legislative procedure"
- "CIR is purely driven by majorities, minorities could be threatened"
- "Allowing too much time [to collect signatures for a referendum] would be a waste of effort and money, as it would indicate that a proposal does not have widespread community support"
- "CIR legislation could enable or even encourage radical groups to put other divisive issues on the CIR agenda, not for the benefit of the community but out of self-interest in building their own political base"
- "The concept of voters' alienation from debate and decision-making does not seem to apply to the ACT."

These conclusions are either completely unsupported by evidence put to the Committee or positively run counter to the overwhelming weight of that evidence. Indeed, much of the argument about the merits and, more especially, the demerits of CIR is drawn from a fairly selective use of the literature on CIR. It is worth noting that Mrs Carnell's Bill was drafted with an eye to the experiences thrown up by this literature. In this respect, it is worth quoting perhaps Australia's leading expert on CIR, Professor Geoffrey de Q. Walker, of the University of Queensland:

> "The bill [Mrs Carnell's] is a cautious, well-thought-out step towards direct democracy. If enacted, it will establish the Territory as a pathfinder for the states and territories and will prove that the Australian political system is capable of properly recognising the sovereignty of the people."[1]

I would like to make some specific comments on aspects of the majority report. I do support some limited aspects of the recommendations, specifically Recommendation 1 (a), in that it is clear that the *Electors Initiative and Referendum Bill 1994* is seriously inadequate and would not be a useful starting point for a genuine debate on CIR. I also support Recommendation 2, although half-heartedly in that I believe it has little to do with the substance of this debate. Other specific comments are as follows:

Timing of Inquiry

The Chairman, in his preface, reaches the not-altogether astounding conclusion that "the six weeks allocated to [the Committee] to inquire into CIR is inadequate to explore in depth all the issues". Although this conclusion is entirely supportable, it was also eminently foreseeable prior to the referral of the inquiry to the Committee. I draw the conclusion that this process was intended to achieve an enriching of the rationale for not progressing with either of the CIR Bills prior to next February's election. It was not intended to amplify any of the reasons why the ACT needs CIR, although it did so despite the best efforts of the Select Committee's architects.

Significantly, not one person appearing before the Committee believed that this legislation ought to have been deferred (although some were not asked for an opinion). Despite this, the majority has concluded that this legislation should be held over until after next February's election.

Competency of the Electorate

A major theme of the majority report is the incompetency of the electorate to shoulder the responsibilities inherent in CIR. Arguments which denigrate the capacity of voters to either understand the process or the issues suffuse the report, eg:

- "voters may not have the expertise to come to grips with all the complexities of an issue, and therefore may not be in a position to make an informed judgment"
- "Lobby groups may in fact have more influence on the public than they do over politicians"
- "On the back of ... public outrage over a crime, a concerted move by a powerful special interest group could lead to the introduction of radical laws [eg. capital punishment]".

Many of the arguments against entrusting people with the right to vote on discrete issues amount to nothing more than arguments against holding elections per se. I believe the Committee has overlooked the potential of the ACT population to understand and cope with this concept. Australian voters, after all, are hardly strangers to the idea of considering complex issues at a referendum, as many Constitutional referenda signify. Again, to quote Professor Walker:

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[1] Submission Number 24, p.1

"With its concentrated, politically-aware population, the ACT is the ideal entity to pioneer direct democracy for Australia."[2]

The majority's concerns smack of the fears of an elite whose monopoly over political power is under threat.

Supposed Disadvantages of CIR

The list of disadvantages of CIR which appears on pages 7 and 8 refers to the concept in general rather than the legislation referred to the Committee — this apparently broadens the scope to include more extraneous matter. Worse, it is so transparently tendentious as to be an embarrassment to all who participated in the committee process. The themes are simple: citizens can't be relied on to make their own decisions, they're too naive, ignorant or venal and will fall for the blandishment of powerful interest groups and frustrated political parties. Politicians, by contrast, are honest, upright, well-informed, wise and pure and know what's good for us.

The first 'disadvantage' — that Governments can use CIR to "delay or avoid making controversial and politically sensitive decisions" — assumes politicians can control the CIR process, and "refer" issues to the public under CIR. In fact, governments don't need CIR to put issues to the people — they can do this now, very easily when the *Referendum (Machinery Provisions) Bill 1994* is passed. We already have provision for government-initiated referenda. The Carnell Bill merely gives this power to the people.

The proposition that CIR "is a threat to political institutions because it bypasses the safeguards and limits built into legislative procedure" is an insult to the intelligence of the citizens of the ACT. The ACT has no upper house, no process of royal assent with reserve powers — what safeguards can the Committee be thinking of? Perhaps Independent MLAs? And how could what is in the strictest legal sense nothing more than a process for requesting the Assembly to pass a Bill, have fewer "limits" than the Legislature which created it?

It is claimed that the referendum "oversimplifies issues by reducing ... to a yes/no vote". When did any member of the Assembly last exercise a preferential vote on a Bill in the Assembly?

The reference to a "lack of legal expertise lead[ing] to poorly drafted legislation" ignores the provision in the Carnell Bill for drafting services from the Office of the Parliamentary Counsel once initial support is demonstrated, and the requirement of independent scrutiny and certification that a Bill is within the Assembly's power — more scrutiny than Mr Moore's, or the Government's, Bills receive.

The notion that laws made by the people would discriminate against minorities is a gratuitous slap in the face for the people of Canberra: one wonders how this bunch of narrow-minded bigots ever chose — or deserved — such a wise and even-handed Government!

[2] Ibid, p.2

It is claimed that "CIR is expensive ... especially if legislation allows for frequent referenda." The Carnell Bill does not; perhaps that is why this section is couched in such generic, hypothetical terms.

It is claimed the voters lack "the expertise to come to grips with the complexities of an issue" because they don't have enough public servants and lawyers to advise them. This is yet another variation on the "people are too dumb" argument. This is only a problem if you think people will vote for a change in the law because they don't understand it.

The next point expands on the theme that only politicians are fit to make decisions. We learn that "Politicians ... have expertise and a certain amount of objectivity", and the public make decisions on the basis of emotion and self-interest rather than intellect and the common good.

It is claimed that "frustrated political parties ... could turn to CIR to try and get their policies up ... which goes directly against the philosophy of voter power"[3] . No arguments are presented to justify this extraordinary claim. One would have thought that the voters, in having the final say on an issue, retained some power. Is the idea that ideas supported by the "frustrated" (ie. non-government) political parties should be excluded even if the majority of people support them?

The next two points on the supposed expense of signature-gathering don't even take themselves seriously.

The fear that a referendum "may overshadow an election" seems to be about political egos again. How dare the people consider any issue more important than the luminaries of ACT politics! And if they do, that's even more argument for refusing to let them decide on such an issue, isn't it?

Constitutional Capacity for CIR

I believe the majority has used the legal advice annexed to this report as an argument against proceeding with CIR, when in fact it should be viewed merely as advice on how to strengthen its application in the future.

It is clear that Mrs Carnell's Bill was never intended to make referendum results binding on the Legislative Assembly. The provisions of clauses 86(2)(a) and 87 of her Bill are clearly declaratory. It was also made clear that the Liberal Party would seek to supersede the declaratory nature of the legislation by lobbying for Federal amendments to the *Australian Capital Territory (Self-Government) Act 1988* to make results of referenda binding. In the meantime, the Committee has substantially overlooked the value passing such a Bill would have in terms of the political weight such a declaration by the electorate would carry. The legal advice certainly does not amount to a reason not to proceed with the legislation; if there was any fear of the legislation failing because of clauses 86 and 87, they could easily be excised without affecting the integrity of the package.

[3] Majority report, p.8

Standing Orders 100 and 174

The suggested reforms of these Standing Orders put by the Speaker are worthy of consideration but are hardly in the same category as CIR. I regard them as a red herring, predicated on the assumption that tinkering with Westminster-style Parliamentary procedures will scotch the need for direct democracy. It is ludicrous to suggest, for example, that satisfaction with the present processes will rise because Ministers are compelled to table responses to petitions presented to the Assembly.

Poor or muddled research

The majority report bears the hallmarks of a document based on information fished hurriedly from a variety of sources to justify a conclusion which other evidence could not support. The report eschews entirely works such as Professor Walker's definitive *Initiative and Referendum: The People's Law* in favour of more obscure publications. An unconvincing case is made against the CIR experiences of other jurisdictions based on selective comments about them. It is suggested, for example, at pages 20-21 of the report of the Committee majority that there is difficulty in California obtaining certain proportions of voters who had voted at previous elections to sign a referendum petition. In fact, there is no such requirement in CIR legislation anywhere in the United States.

No barrel's bottom is left unscraped. Arguments against the Swiss method of CIR are drawn from a press release prepared for the Swiss National Tourist Office!

Recall

The majority report asserts that "There is nothing in the [Carnell Bill] which excludes the possibility of electors using CIR to remove a democratically-elected person from office. The Committee has serious concerns about this omission..." The Committee recommends further investigation of this sinister implication of the Bill.

The "recall" of members of the Legislative Assembly through CIR is clearly inconsistent with the *Self-Government Act*, and as such is beyond the scope of the Carnell Bill. Section 10 of that Act provides that:

> "The term of office of a member duly elected begins at the end of the day on which the election of the member is declared and, unless sooner ended by resignation, disqualification or expulsion, or by dissolution of the Assembly, ends on the polling day for the next general election."

Provisions for vacation of office are set out elsewhere in the Act.

A referendum to remove an MLA would thus clearly be *ultra vires* the Carnell legislation, as it would the Assembly itself, for the reasons outlined in the legal opinion at Attachment 4. Furthermore, it would be a relatively simple matter to exclude from the scope of a CIR statute the "recall" of judges and public servants if the Assembly so desired. To raise this issue in this context is to clutch at straws indeed.

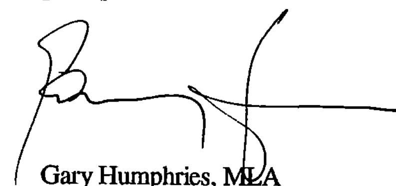
Conclusion

CIR does represent, as the Chair suggests in his preface, "a fundamental change to the way we practise democracy". The change has been preceded by literally decades of debate in general terms at the national level and at least a year's discussion in the ACT media and the broader community. Yet some suggest that the public is still not ready for that change. Perhaps it is politicians and not the public who are not ready.

I believe the majority's excessive caution is misplaced. Of all the initiatives the Assembly could embark upon at this point, CIR is perhaps the *least* adventurous in that the success or failure of this move is very much in the hands of the electorate. Let us suppose that the threshold is too low, the scope of referenda is too broad, referendum outcomes can be considered advisory only, or whatever else the majority purports to find inadequate about CIR comes to pass. The electors' response to any of these shortcomings is very simple: they can reject proposals under them, just as they rejected those perceived to be the proponents of an unwanted self-government in 1989. If proposals are passed nonetheless, it would suggest to me that the electorate is prepared to forgive any shortcomings. I suspect, in fact, that if the ACT electors don't like CIR, proposals put up will generally fail.

An essential difference between CIR as proposed in the ACT and as it has operated elsewhere — and a difference completely ignored by the majority report — is that voting is compulsory in ACT elections and would be compulsory, under these proposals, in citizens' initiated referenda. Many of the shortcomings supposedly identified in other jurisdictions would, I am confident, disappear in this environment. I am also confident that what the Assembly does not get right the first time can be remedied either by experience or by the very process which this legislation would establish.

It is tragic that so little vision exists among some in the Assembly — or once did but has deserted them — and the electorate will not soon have the opportunity to put these principles to the test.



Gary Humphries, MLA

8 November 1994

ATTACHMENT 1

Submissions received

1. Mr J. Verhueff (Tasmania)
2. Mr John Reavell
3. Mr Lyle Dunne, Liberal candidate for Ginninderra
4. Mr Keith Mortensen (Orange, NSW)
5. Mr Bruce Chapman, The Movement for Direct Democracy
6. Mr Stephen McKenzie
7. Mrs Kathryn Davis & Mr Ronald Davis
8. Mr Merv Goldstiver (Queensland)
9. Ms Gloria Wood and others (Mudgee, NSW))
10. Mr. R. H. Butler, Citizens Electoral Councils of Australia Group (Victoria)
11. Mr Victor Bridger, The National Recovery Council (Queensland)
12. R & L Coleman and others
13. Mr Graeme Evans
14. Mr Norman Henry, Belconnen Community Council Inc
15. Mr Bogey Musidlak, Proportional Representation Society of Australia
16. K. Anderson
17. Mr Alex Proudfoot, The Public Policy Assessment Society Inc
18. Mrs Kate Carnell, MLA, Leader of the Opposition
19. Mr Phillip Green, ACT Electoral Commissioner
20. Mr Colin Harding (NSW)
21. Australian Democrats (ACT Division)
22. Mr Arthur Burns
23. Ms Roberta McRae, MLA, Speaker, ACT Legislative Assembly
24. Professor Geoffrey de Q. Walker, University of Queensland

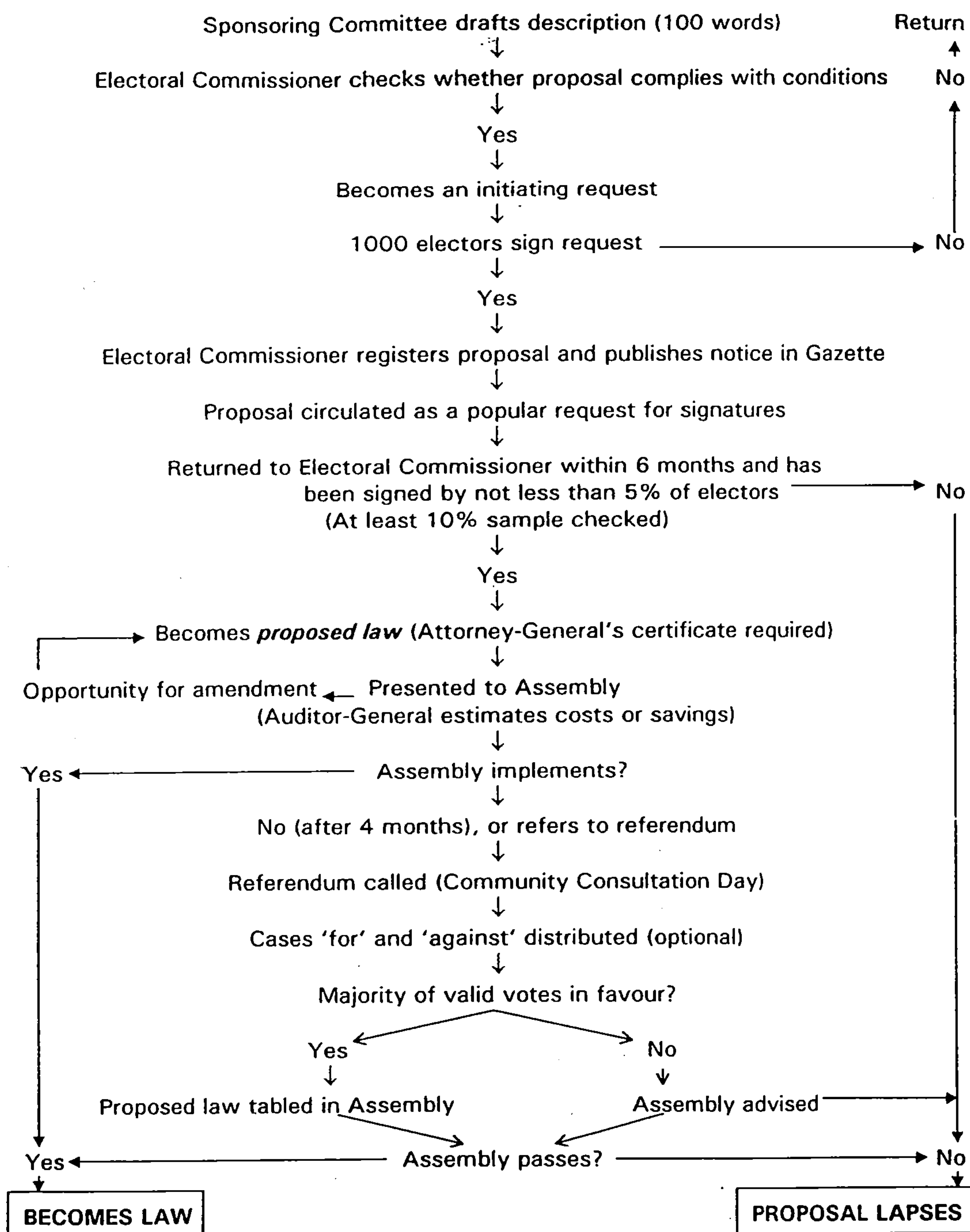
ATTACHMENT 2

Witnesses at public hearing

Ms Roberta McRae, MLA, Speaker, ACT Legislative Assembly
Dr Peter Main, Australian Democrats (ACT Division)
Mr Graeme Evans
Mr Norman Henry, Belconnen Community Council Inc
Mr Bogey Musidlak, Proportional Representation Society of Australia
Mr Bruce Chapman, The Movement for Direct Democracy
Mr Phillip Green, ACT Electoral Commissioner
Mrs Kate Carnell, MLA, Leader of the Opposition
Mr Ian Wearing, Chief of Staff, Office of the Leader of the Opposition
Mr Lyle Dunne, Liberal candidate for Ginninderra

ATTACHMENT 3

An example of the CIR process as outlined in the CRB



ATTACHMENT 4 LEGAL OPINION FROM ACT DEPUTY LAW OFFICER

ATTORNEY-GENERAL'S DEPARTMENT

Parliamentary & Constitutional Section
Constitutional and Law Reform Branch

Phone 2070549
Fax 2070538

Subject: Community Referendum Bill 1994 & Electors Initiative and Referendum Bill 1994

Mr M. Moore MLA
Chair,
Select Committee on Citizen's Initiated Referendums

Legal Opinion

I refer to your request for legal advice dated 20 October 1994 regarding comments made by the Electoral Commissioner in relation to Mrs Carnell's *Community Referendum Bill 1994* and Mr Stevenson's *Electors Initiative and Referendum Bill 1994.*

Short Answer: Clauses 86(2)(a) and 87 of the *Community Referendum Bill*, would, in my opinion, be invalid if passed in their current form. Clause 26 of the *Electors Initiative and Referendum Bill* would also appear to be invalid on constitutional grounds.

1. Background - A Brief Overview of the Bills

Community Referendum Bill

The *Community Referendum Bill* sets out a process for allowing members of the community to initiate laws. A committee who sponsor a proposal for a law may lodge a notice with the Electoral Commissioner. Provided a specified number of electors support the proposal, it may be registered and public support for the proposal may be gained. Where the proposal is supported by enough electors within the required time, the proposal is required to be put to a referendum of voters.

If the referendum is successful, the proposal does not automatically become law. Instead, clauses 85-87 of the Bill set out a procedure for adoption of the law by the Assembly. After a successful referendum, the Commissioner is required to provide the Speaker with a notification of the result. When the notification is received, clause 85(4) provides:

"The Speaker shall, on the first sitting day of the Legislative Assembly after receiving a notification ... **lay the notification before the Legislative Assembly**." (emphasis added)

Under clause 86, the Chief Minister is then required to move that the Assembly enact the proposed law. Clause 86 provides:

"(1) Subject to this section, where a proposed law has been approved at a referendum, **the Chief Minister shall**, on the next day of sitting after the laying of the relevant notification before the Legislative Assembly under subsection 85(4), **move in the Legislative Assembly that it enact the proposed law**.

(2) **Notwithstanding any provision of any other law** or of its standing rules or orders, where the Chief Minister has moved a motion under subsection (1), **the Legislative Assembly -**
(a) may not amend the proposed law
(b) shall consider and vote on the motion of the day on which it is moved.

(3) **Where -**
(a) more than 1 proposed law has been approved on the same community consultation day; and
(b) the Chief Minister is satisfied that 2 or more of those proposed laws are inconsistent with each other;
the Chief Minister shall only move under subsection (1) a motion relating to the proposed law that has been supported by the greatest or greater number of approval votes." (emphasis added)

Once passed by the Assembly, the Assembly may not amend or repeal the law for 12 months. Clause 87 provides:

"(1) Where the Legislative Assembly enacts a law -

...

the Assembly may not, for a period of 12 months commencing on the making of that law -
(d) **repeal that law**; or
(e) **amend that law**, or any other law, in such a manner that any object of the law ... ceases to be implemented according to its tenor.

(2) **A law enacted in contravention of subsection (1) has no effect**." (emphasis added)

Electors Initiative and Referendum Bill

The *Electors Initiative and Referendum Bill* provides a mechanism for electors to introduce, amend or repeal laws by direct vote at referendum. Accordingly, it establishes a new mechanism for making laws in the ACT similar to citizen initiated referendum systems operating in other parts of the world.

Under the Bill, electors may propose that a law be submitted to referendum. There is then a formal procedure for collecting signatures in support of the law. Provided the requisite number of voters sign the electors' Bill and the signatures are verified, the Bill will be put to a referendum of voters.

If a referendum is passed by a majority of voters in a majority of electoral divisions, the Chief Minister must notify the law in the Gazette and the law commences upon notification (unless the law provides otherwise). Clauses 26(6) and (8) provide:

"(6) Where a proposed law has been approved by the electors, **the Chief Minister** or another person authorised by enactment to do so, **shall notify the approved law in the *Gazette*.**

...

(8) **The approved law shall take effect on the day of notification** or, if the approved law otherwise provides, as so provided." (emphasis added)

Accordingly, there is not necessarily any role for the Assembly in the making of laws under the *Electors Initiative and Referendum Bill.*

2. A General Discussion of the Law

Citizen initiated referenda laws exist in a number of countries. Each system operates in a different way because of the differing constitutional systems of the countries in which they exist. Adapting such laws to the constitutional framework in which they operate is essential. Thus, when New Zealand considered adopting citizen initiated referenda, the New Zealand law makers could not simply follow the American or Swiss models, because the Westminster system of Government operates in a quite different manner to the American and Swiss constitutional systems.[1] The ACT has its own unique constitutional system that is different again. Accordingly, any proposal for citizen initiated referenda in this jurisdiction must itself be tailor-made for the ACT constitutional regime. In relation to the two Bills that I have been asked to consider, there are three constitutional issues that require careful consideration.

A. Will the Bills, if enacted, amount to an invalid abdication of power by the legislature to the citizen initiated referendum process?

B. Will the Bills prevent future Assemblies from amending or repealing citizen initiated laws even though they may purport to do so?

C. Will the Bills be invalid on the basis that they are inconsistent with the *Australian Capital Territory (Self-Government) Act* 1988?

[1]. Hon Douglas Graham MP "Direct Democracy" in *The Parliamentarian* April 1994 p 90

A. Abdication of legislative power

The ACT Assembly is constituted under section 8 of the *Australian Capital Territory (Self-Government) Act 1988.* Section 22 of that Act states that the Assembly has the power to make laws for the 'peace, order and good government of the Territory'.

The Assembly, like other Westminster style parliaments, is prevented from abdicating or abrogating its law-making function. The rule against abdication of power does not prevent a parliament from *delegating* to some other person or body of people, the power to make laws or regulations - provided the parliament retains actual control over the law making function - through disallowance or the power to amend or repeal such laws.[2]

The rule against abrogation or abdication of power has been considered in relation to a number of cases. However, the precise nature and extent of the rule is unclear. The principle that a parliament must not abdicate its legislative power and responsibilities is well entrenched in constitutional law. In the context of Australian law, Evatt J affirmed in the High Court decision known as *Dignan's*[3] case:

> *"On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its power of legislation."*

While the Assembly may delegate its legislative powers to other bodies or people , it is still required to keep some degree of supervision or ultimate control over that other law making body if the delegating legislation is to be valid. It cannot restrict its own powers over law making by abdicating those powers to another person, body or group of people.

The only case that I have been able to uncover in the time available, in relation to the validity of citizen initiated referenda in a Commonwealth country, is *Re Initiative and Referendum Act.*[4] In that case, concerning the Manitoba Provincial legislature in Canada, the Privy Council observed that as the *British North America Act 1867* declared that each province of Canada should have a Legislature, "the Legislature could not confer that power upon a body other than itself." The Manitoba legislature had passed a law requiring a referendum where 8% of the electors desired a particular law. If passed at referendum, the proposed law became a law, without requiring assent or a vote by the legislature. While accepting the need for delegation of legislative power, the Law Lords said:

> *"... it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which itself owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."*

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2. *Grisis Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365, per Barwick CJ at 373.

3. *Victorian Stevedoring and General Contracting Pty. Ltd and Meakes v Dignan* (1931) 46 Commonwealth Law Reports at page 121.

4. [1919] AC at 945.

This case needs to be read with some caution. The Manitoba legislature was a colonial legislature and therefore not a sovereign parliament. There is a legal principle that once one body (in this case, the British Parliament) has delegated powers to another body, the second body cannot further delegate that power to another body. It may be that this was an influencing consideration in the Manitoba case. There are various Australian and English decisions in which Judges have expressly supported the power of a legislature to create new legislative bodies such as parliaments and councils and delegate extensive legislative powers to those bodies.[5] Accordingly, the extent to which this case concerning the Manitoba legislature would be applicable in Australia is not clear.

It is clear that dominion parliaments, state and territory parliaments and local councils may be created by a superior parliament. However, it may be that the creation of new parliaments to allow for responsible government in smaller geographical areas should be seen as an exception to the rule that a parliament cannot abdicate its power.[6] The exception probably does not extend to creating an alternative legislative mechanism for the entire jurisdiction of the superior parliament.[7] In other words, while the British Parliament could create a Parliament for Manitoba and the Parliament of Manitoba could create local government councils, the Parliament of Manitoba would not be able to abdicate its legislative power to an alternative or substitute law-making body for the whole of Manitoba unless it had specific power from the Parliament that created it to do so - namely, the British Parliament.

This is a complex area of constitutional law. However, the point still remains that in the only common law case decided directly in relation to the validity of citizen initiated referenda that I have been able to ascertain, it was held that such a law is an invalid abdication of legislative power. While the case did not involve the powers of a sovereign parliament, it necessarily raises serious doubts about the constitutional validity of any law that allows a law to be directly made by referendum without the need to be passed by the Assembly. The rule against citizen initiated referenda would not prohibit referendums that were merely advisory - that is, that still left it to the Assembly to actually pass the law.

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5. see for instance *R v Burah (1877) 3 App Cas 889; Hodge v Queen (1883) 9 App Cas 117; Powell v Apollo Candle Co Ltd (1884) 10 App Cas 282; Spratt v Hermes (1965) 114 CLR 226 per Taylor J at 264; Berwick Ltd v Gray (1976) 133 CLR 603 per Mason J at 607; R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 at 279 per Wilson J who said :"The Constitution of the (Northern) Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial Statute. In my opinion, the Self-Government Act is a valid exercise of the power conferred on the Parliament by s 122 of the Constitution. ;and Capital Duplicators Pty Ltd v ACT (1993) 177 CLR 248*

6. *R v Burah (1877) 3 App Cas 889; Hodge v Queen (1883) 9 App Cas 117; Powell v Apollo Candle Co Ltd (1884) 10 App Cas 282; R v Toohey; Ex parte Northern Land Council (1981) 151 CLR @ 279; Commonwealth v Carkazis (1978) 23 ACTR 5 @ 10.*

7. see for instance the comments of Mason CJ and Dawson and McHugh JJ in *Capital Duplicators Pty Ltd v ACT (1993) 177 CLR 248 @ 263 - 265.*

B. Supremacy of Parliament - binding future Assemblies

The notion that parliaments and other representative governing bodies should be able to enact, amend and repeal laws is central to the operation of the Westminster system. One aspect of this fundamental tenet is that a sovereign parliament cannot make laws that are binding on future parliaments. In other words, a provision of a law that says this law cannot be amended or repealed by the Assembly, is of no effect. At any time in the future, the parliament *can* pass a law that amends or repeals the law. The only way a parliament can be fettered from amending, repealing or passing laws is where there is a specific constitutional power that allows for this.

In the ACT, section 26 of the *Australian Capital Territory (Self-Government) Act 1988* sets out a mechanism for preventing the Assembly from amending or repealing laws. Unless the procedure set out in section 26 is followed, it is not possible to bind or restrict the Assembly from voting to amend or repeal any ACT enactment in the future. In brief, section 26 provides that the Assembly can make a law that specifies a 'manner and form' for amending or repealing that law in the future.[8] To be effective, the law that sets out the restrictions on the Assembly's powers must itself be referred to a referendum. For the purposes of this advice, I note that neither Bill relies on the procedures set out in section 26.

C. Australian Capital Territory (Self-Government) Act 1988 .

Section 28 of the Self-Government Act provides that to the extent that an enactment is inconsistent with "a law in force in the Territory (other than an enactment or a subordinate law)" the enactment has no effect. The laws of the Assembly cannot be directly inconsistent with Commonwealth legislation, and in particular, they cannot be inconsistent with the *Australian Capital Territory (Self-Government Act) 1988* itself. Section 28 provides that if a law that can operate concurrently with a Commonwealth law it will not be invalid, provided it is not directly inconsistent with the Commonwealth law.

3. Analysis of the Bills

Electors Initiative and Referendum Bill

Clause 26 of the *Electors Initiative and Referendum Bill* purports to vest law making power in the voters directly. The Assembly has no role to play in the making of the laws passed at referendum. They become laws upon notification. These elements of the Bill are essentially the same as those considered by the Privy Council in relation to the Manitoba legislature.[9] Accordingly, the Bill would be open to challenge on the basis that the Assembly would be abdicating legislative power.

8. Just what is meant by 'manner and form' has been discussed in a number of cases including *Clayton v Heffron (1960) 105 CLR 214 ; Trethowan v NSW [1932] AC 526; (1937) 47 CLR 971.* It is not necessary for the purposes of this advice to expand on the precise meaning of the term.

9. [1919] AC at 945: see above.

On the other hand, it could be argued that the *Electors Initiative and Referendum Bill* does no more than delegate law-making power to a group of people, in much the same way as other laws vest law-making powers in statutory bodies and office-holders. Laws made under the *Electors Initiative and Referendum Bill* are not expressed to be binding on the Assembly. There are no clauses in the Bill that prevent the Assembly from amending or repealing such laws at any time, and there is no attempt to entrench the *Electors Initiative and Referendum Bill* itself. The Bill could therefore be seen as a delegation, rather than abdication, of law-making power.

However, while extensive law making powers have been validly given to new legislatures - provided they have a smaller jurisdiction than the parliament setting up the legislature - the Courts have held invalid, delegations of law making power to any body or group of people where the legislative power is co-extensive with the powers of the legislature. In my opinion, clause 26 of the *Electors Initiative and Referendum Bill* would therefore constitute an invalid delegation of power by the Assembly. If clause 26 were amended so that referenda were merely advisory, with the Assembly retaining control over whether or not to enact the referenda law, then this problem would be removed.

Community Referendum Bill

Under the *Community Referendum Bill,* the Speaker and Chief Minister are required to take certain steps after a referendum to enable the Assembly to consider the proposed law passed at referendum.[10] The Assembly may not move an amendment to the proposed law.[11] However, the Assembly has ultimate power under clause 86(2)(b) to either pass or reject the law. Once passed by the Assembly, clause 87 of the Bill purports to bind the Assembly for 12 months after the enactment of a successful referendum proposal. Clause 87 also purports to restrict the Assembly's capacity to amend another law that prevents a referendum law from being implemented according to its tenor for 12 months.

This Bill sets up a scheme for advisory referenda only, and therefore does not offend the rule against abdication of legislative power. However, to the extent that clauses 86 and 87 attempt to bind the Assembly from amending the proposed law or amending or repealing the enacted law, they represent an invalid attempt to bind a future Assembly. Although the Explanatory Memorandum states that clause 87 is 'declaratory in nature', the actual clause is cast in mandatory terms and could only be interpreted as such. Clauses 86 and 87 could not validly prevent the Assembly from amending or repealing enactments as the Assembly saw fit.

The process adopted in clauses 86 and 87 to try and restrict the Assembly from taking legislative action is most probably inconsistent with section 22 of the *Australian Capital Territory (Self-Government) Act* which gives the Assembly the power to make laws for the peace order and good government of the Territory. In addition, the time restriction of 12 months on the Assembly before it can amend or repeal a law approved at a referendum, is, in my opinion, a restriction of 'manner and form '.

10. cl 85 and 86

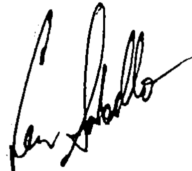
11. cl 87(2)(a)

If the Assembly wishes to impose such restrictions on future actions by the Assembly, it must follow section 26 of the *Australian Capital Territory (Self Government) Act 1988* , otherwise the restriction is of no effect. The procedure for passing the *Community Referendum Bill* does not implement the procedure set out in section 26. Accordingly, the proposed restrictions in clauses 86 and 87 would be of no effect.

4. Conclusion

Clauses 86(2)(a) and 87 of the *Community Referendum Bill* , would, in my opinion, be invalid if passed in their current form. Clause 26 of the *Electors Initiative and Referendum Bill* would also appear to be invalid.

In accordance with the usual protocol for advising the Assembly I shall be forwarding a copy of this advice to the Attorney-General.



Len Sorbello
Deputy Law Officer
Constitutional & Law Reform Branch
3 November 1994

Contact Officer: Andrew Barram
Telephone : 207 0533