

New Zealand's System of Citizens Initiated Referenda

Wayne Mapp

IN 1993 New Zealand took two major steps to modernise its democracy. One was the decision, made in a referendum held at the time of the 1993 general election, that parliament be elected by the Mixed Member Proportional (MMP) system, so that each of the parties' representation would reflect the proportion of votes received. The other reform, which passed almost unnoticed at the time, was the enactment of the Citizens Initiated Referenda Act 1993. It is likely that Citizens Initiated Referenda (CIR) will have at least as great an impact on shaping public policy as any reform of the method of electing politicians.

The Origins of CIR in New Zealand

Referenda have a long history in democratic societies. However, they have usually been initiated by politicians rather than by citizens. In New Zealand they have most often been used by politicians to settle constitutional or moral issues. In the last 50 years New Zealand has conducted six referenda on issues other than liquor licensing. The topics included compulsory military training (1949 — approved), off-course betting (1949 — approved), increasing the term of parliament (1967, 1990 — lost both times) and, most recently, electoral reform. Until recently, a referendum on prohibition or state control of liquor sales was a feature of every general election. This was always lost. In Australia, referenda have been conducted primarily on constitutional amendments, since the Constitution mandates that such amendments be sanctioned through the referendum mechanism. In both countries the results of such referenda are treated as binding, but whereas in Australia this is mandated by constitutional law, in New Zealand it is essentially a constitutional convention.

The current passion for referenda reflects the popular demand that they be initiated by the voters, on any issue that the voters choose. Referenda of this nature were first introduced in various states of the United States early this century by the Progressive Movement. Over the last 20 years, particularly in California, they have become an increasingly important democratic tool as groups of voters have sought direct political change outside the confines of representative government. Major government policy on specific matters can be directly decided by voters, and separated from the broad range of issues that voters face when electing a legislature or a government.

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The move towards CIR in New Zealand was inspired by the United States experience. Conservative and populist groups, notably the Social Credit Party (now known as the Democratic Party) had long promoted the principle of direct democracy as a means of circumventing what was viewed as the entrenched bureaucratic and establishment support for the liberal social agenda. In 1984 the Democratic Party introduced the Popular Initiatives Bill into the House of Representatives. This Bill was referred to the Royal Commission on the Electoral System (which is notable for the fact that it recommended the MMP electoral system). The Royal Commission's report noted a high level of public support for referenda, especially on 'moral' issues that are typically the subject of a 'conscience' vote in parliament. But it opposed the widespread use of referenda on balance, arguing that they may be little more than expensive opinion polls or could be used by the opposition parties to effectively thwart the elected government's program. The Royal Commission on the Electoral System (1986:175) concluded:

In general, initiatives and referenda are blunt and crude devices which need to be used with care and circumspection. Their frequent use would amount to a substantial change in our constitutional and political system. They would blur the lines of accountability and responsibility of Governments and political parties, and blunt their effectiveness.

The only exceptions considered by the Royal Commission were for major constitutional change and the occasional conscience issue. It thought that in both cases the results should be binding on parliament.

Notwithstanding the recommendations of the Royal Commission, the concept of direct democracy struck a chord with conservative rural activists within the National Party, particularly in regions where Social Credit had traditionally enjoyed strong local support from small dairy farmers and businesspeople. These activists were able to convince National Party politicians of the desirability of limited reform, and the legislation for non-binding CIR was enacted in 1993.

Although CIR was originally promoted by the populist Right, the most extensive use of CIR petitions in the two years since the legislation came into force has been made by groups promoting issues that are traditionally the concerns of the Left. It is quite possible that CIR could be used as a major weapon in a concerted effort to roll back the reforms that have occurred in New Zealand over the last decade.

The CIR Legislation

The 1993 legislation is a cautious approach to what is clearly a major innovation in New Zealand's democracy. Referenda have been used only infrequently in New Zealand, and it was not the intention of the government that voters should be suddenly overwhelmed by a large number of referenda on widely disparate issues.

Promoters of referenda issues have to persuade at least 10 per cent of registered voters to sign a petition before a referendum can be held. Once this threshold has been crossed, the referendum must be held. However, even if a referendum is sup-

ported by more than 50 per cent of the voters, the result is not binding on the government of the day.

Under the CIR procedure, the promoters of the issue must draft a question for an indicative referendum petition that is capable of being answered in one of only two ways, normally 'yes' or 'no'. This question is submitted to the Clerk of the House of Representatives for consideration. The Clerk consults interested parties, who may make submissions on the question. Following the consultation period, which is three months, the Clerk determines the question for the petition. On determination the proposed question is advertised in the *New Zealand Gazette*.

The promoters then have twelve months to promote the petition and obtain the signatures of 10 per cent of the registered electors on the electoral roll. This amounts to approximately 232,000 electors. If the promoters succeed in obtaining the necessary signatures, the petition is delivered to the Clerk, who then verifies, on a sample basis, that the petition has the support of 10 per cent of eligible electors. The Clerk is assisted in this task by the Government Statistician. The Chief Electoral Officer then checks, on a sample basis, whether the signatories are on the electoral roll. The Clerk has two months from the date of receipt of the petition to undertake the verification process and to certify that the petition is correct. If the Clerk is unable to certify the correctness of the petition, the promoters have two further months to gain additional signatures and to resubmit the petition to the Clerk. If the petition cannot then be certified correct, it lapses.

Once the petition has been certified correct the referendum must be held within twelve months. However, the referendum can be delayed by up to 24 months so that it is held at the time of a general election if parliament so agrees by a 75 per cent majority. But in the event that a general election is to be held within the twelve months after the presentation of the petition to the House of Representatives, the House may pass a resolution requiring the referendum to be held on the day of the election. Since voter turnout for elections is likely to be in excess of 85 per cent of registered voters, it would seem sensible that all referenda should take place at the time of general elections. In contrast, the indicative referendum on electoral reform held in September 1992, one year prior to the general election, had a turnout of 55.2 per cent of registered voters.

Once the referendum has been held, the results in terms of two answers to the question are provided to the Minister of Justice and are made publicly available. Since voters have either to support or to oppose the question, there will always be a decisive outcome (barring a tie). As the result of the referendum is not binding on parliament, the CIR legislation makes no further provision for anything to be done with the results of the referendum.

Once a referendum has been held on an issue, no further proposals for a petition can be made within 60 months. Since there is a twelve-month period to gain the necessary signatures of 10 per cent of the voters on the electoral roll, and between twelve and 24 months after a successful petition before a referendum is held, referenda on the same issue cannot be less than seven years apart. This restriction does not apply to petitions that fail to gain the necessary 10 per cent of signatures to enable a referen-

dum to take place. Thus it would be possible for promoters of a failed petition to put the same question immediately to the Clerk for approval for a new petition.

The legislation includes special provisions designed to subject publicity relating to the referendum to financial limitations. No one, either alone or in combination with others, may spend more than NZ\$50,000 in respect of the twelve-month period during which the petition can be open for signatures. Should the petition be successful and a referendum held, the supporters and opponents have a further period of twelve months to marshal their publicity. As with the petition, the spending limit, either by a person alone or in combination with others, is \$50,000. Clearly, the total amount spent either in support or in opposition to the petition or the referendum can be greater than \$50,000, provided the parties do not act in concert.

The United States, in contrast, allows vigorous, well-funded campaigns both for and against referenda propositions. This can be justified on the grounds that the results of referenda are binding upon the government of the state or municipality.

The Use of CIR since January 1994

The CIR Act has been in force since January 1994. In that time concerned citizens have eagerly grasped the opportunity provided by the legislation. Already, twelve petitions are circulating on a range of issues.

Six of these petitions have been proposed by one organisation, the Next Step Democracy Movement. The other six propose:

- prohibiting production of eggs from battery hens, proposed by the Society for the Prevention of Cruelty to Animals (the twelve-month period for gathering signatures starting on 28 April 1994);
- giving judges the power to recommend that prisoners convicted of murder should be imprisoned for the 'whole of their natural life', promoted by the Christian Heritage Party (23 June 1994);
- the reduction of the number of members of parliament under the MMP system from 120 to 100, proposed by members of parliament Michael Laws, Winston Peters and Geoff Braybrooke (18 August 1994);
- that political parties be legally required to observe their constitutions and honour their manifesto promises, promoted by W. M. Maung (17 November 1994);
- that the number of firefighters be not less than that employed as at 1 January 1995, proposed by the New Zealand Professional Firefighters Union (9 February 1995); and
- that the laws of New Zealand apply equally to all New Zealanders irrespective of ethnic origin, proposed by One New Zealand Foundation (23 March 1995).

A number of these petitions have either reached or are close to reaching the end of the twelve-month period available for gathering the signatures of 10 per cent of eligible electors. It is apparent that some of these petitions have failed to gain the necessary signatures and will therefore lapse. However, the CIR Act does not prevent the promoters from submitting a new proposal for a petition on the same issue to the Clerk of the House of Representatives at any time after the expiry of the twelve-month period.

The six petitions proposed by Next Step Democracy Movement form the political agenda of the Left. The questions are:

- should all New Zealanders have access to comprehensive health services which are fully funded by government without user charges;
- should all New Zealanders have access to public education services from early childhood to tertiary level which are fully funded and without user charges;
- should full employment with wages and conditions which are fair and equitable be the primary goal of government economic policy;
- should all New Zealanders on income support and benefit receive an income based on what it actually costs to live;
- should increases in New Zealand's electricity demand be met from energy conservation and from sources that are environmentally sustainable; and
- should New Zealand's defence expenditure be reduced to half its 1994/95 level by 2000 with the savings spent on health, education, conservation and promotion of full employment.

The Next Step Democracy Movement had proposed these questions in June 1994. They were subsequently withdrawn and substituted to the Clerk in December 1994 and finally approved in February 1995. The intention was to use the run-up to the general election as a means of increasing public awareness of the petitions, and to focus public attention on the political issues facing the electorate at the first MMP election, which must be held no later than November 1996.

The twelve-month period for gathering signatures on the petition for the proposed referendum of prohibiting egg production from battery hens closed on 28 April 1995. The Society for the Prevention of Cruelty to Animals was apparently successful in obtaining signatures from 10 per cent of the registered voters. However, the Clerk of the House of Representatives found sufficient errors in the ages and names of signatories to prevent him certifying that the Society had obtained the necessary 10 per cent of registered voters. The Society used the additional two months available to it to gain further signatures, and resubmitted the petition for certification by the Clerk in August 1995. If approved, a referendum will take place, probably at the time of the

next general election, which is expected to be held in late 1996. This is outside the twelve-month period which allows the House of Representatives to pass a resolution by simple majority that the referendum shall take place at the same time as the general election. Thus the House of Representatives will be asked to vote by a 75 per cent majority that the referendum is to take place at the same time as the general election. Since there is no pressing reason for the referendum to take place any earlier than the general election, it is expected that the House will pass the necessary resolution.

The referendum proposed by the New Zealand Professional Firefighters Union not to reduce the number of firefighters below that employed in 1 January 1995 has received substantial public support. Within two months of the petition being open for signature, 400,000 people (about 17 per cent of all registered voters) had signed the petition. The Clerk certified the correctness of the petition. Preliminary discussions were held among the political parties in parliament as to whether the referendum should be postponed to the date of the general election. As it was apparent that there was insufficient support for such a delay, the referendum will take place 1 December 1995. This arguably suited the government by shifting a potentially embarrassing issue away from the general election. A stand-alone referendum is estimated to cost \$11 million. A referendum undertaken at the time of the general election would clearly cost less and would also have a higher turnout of voters.

This referendum is somewhat unusual in that it directly concerns not a political issue but rather an employment one. Although the New Zealand Fire Service is a state-owned entity, its management is autonomous. In the event that the referendum is approved, the result could be included in the collective employment agreement, or parliament could pass appropriate legislation. Alternatively, both the government and the Fire Service could ignore the results of the referendum.

The Prime Minister, Jim Bolger, recently expressed his belief that the referendum process was inappropriate for settling industrial-relations disputes. Sir Geoffrey Palmer, the former Prime Minister, has stated that CIR is not appropriate in an MMP electoral environment, and that parliamentarians ought to have the sole prerogative of making law. This view ignores the desire of voters to directly indicate to parliamentarians their views on particular issues. Referenda give this opportunity to electors without requiring them also to decide which political party to support.

CIR Litigation

The referenda petitions have already produced litigation. The Egg Producers Federation of New Zealand initiated proceedings against the Clerk of the House of Representatives and the Society for the Prevention of Cruelty to Animals to challenge the wording of the proposed referendum on the production of eggs from battery hens. The Society for the Prevention of Cruelty to Animals had proposed the wording: 'Should the inhumane practice of battery egg production be phased out within five years from this referendum?'. This was modified by the Clerk to read: 'Should the production of eggs from battery hens be prohibited within five years of the referendum?'. The Egg Producers Federation considered that the word 'battery' was emotive. However, the Chief Justice considered that the wording was not so prejudicial as

to invalidate the question. He also noted that since the topics for referenda are chosen by the promoters, there would always be some difficulty in ensuring a fair contest. The role of the Clerk is to ensure that the criteria set out in Section 10 of the Act are observed, so that the question shall clearly convey the purpose and effect of the indicative referendum, and that only one of two answers may be given to the question; moreover, account shall be taken of the promoter's proposal, by comment made on it and the results of the consultation. The Chief Justice considered that the Clerk, in fulfilling his obligations, could not frame a question in emotive or prejudicial terms.

One of the issues that the Chief Justice referred to was the scope of referenda. He noted that the subject matter of referenda was not limited to 'matters on which action by Government would be competent or appropriate', referring to the possibility that there could be a referendum on whether a named captain of the All Black rugby team should have been dropped from the team.

It is noteworthy that the other twelve referenda petitions deal with a wide range of matters. With the exception of the those on the number of firefighters and the enforceability of political manifestos, the petitions all raise issues that the government could be reasonably expected to deal with in a modern democracy.

Should Referenda be Binding?

The current CIR legislation provides only for non-binding referenda. However, referenda in New Zealand have traditionally been binding in practice, in that the government has undertaken to introduce appropriate legislation into parliament, and political parties understand the convention that such legislation should be passed into law. The crucial difference between this traditional approach and the new CIR legislation is that the voters can now require a referendum on any issue, notwithstanding the views of government and political parties. Can the electorate be trusted to directly make law on any issue they choose?

The United States experience with CIR provides an insight into the possible future direction and use of referenda in New Zealand. Many states and municipalities of the US permit use of CIR, usually called 'initiatives' and 'propositions'. The California constitution guarantees the right of referenda and initiatives, which are 'reserved' to the people. In most cases the results are binding on state governments or municipalities.

The binding nature of initiatives and propositions has meant that the voters typically approve specific legislation. In the case of the initiative, the legislature implements the legislation to enact the referendum, while in the case of propositions the voters directly enact the legislation, which is distributed to voters in advance or appended to the ballot paper. In both cases it is essential that the measures are capable of being enacted by government. Considerable concern has been expressed that popular legislation is bad legislation, since it does not go through the usual committee procedure to iron out defects, and voters do not have the same resources as legislators to carefully weigh the merits of particular measures (Fontaine, 1988). But the enduring popularity of binding referenda stems from the fact that voters have the opportunity to make their own law without the interference of legislators.

In general terms, state and local referenda can have the same scope as the powers of the state or local legislature. Given the limited authority of state and local legislatures, referenda tend to be held on matters relating to state or city budgets, whether to mandate expenditure or to limit the power to collect revenue. They may also be held on matters directly affecting private property rights, such as zoning and planning restrictions. However, referenda cannot override the US Constitution or federal legislation. Yet even these limitations leave considerable scope for referenda on a wide range of issues of social and political significance. Thus, at the elections in November 1994, Californian voters approved a measure that will prevent children of illegal immigrants from attending state-funded schools. The measure has been challenged in court on the grounds that it infringes the equal protection provisions of the Bill of Rights. The lower courts have already found the measure to be unconstitutional. This latter point is of great significance.

It is not possible under the US Constitution for a majority of voters to approve a measure that would deny the rights of a minority where those rights are protected by the Constitution. In addition, many state constitutions provide for the protection of fundamental rights. It may be that written constitutions and Bills of Rights act as important bulwarks against the tendency of referenda to deal with emotional issues without regard for the civil rights of minorities.

New Zealand currently has a limited Bill of Rights Act (see Mapp, 1994). This Act is not supreme legislation, although the trend of the cases is that legislation that directly infringes the Bill of Rights Act needs to be very specific to override the provisions of the Act. Generally, legislation is applied in a manner that accords with the Bill of Rights Act. It could therefore be anticipated that the courts would so interpret any legislation derived from a CIR referendum as to avoid a conflict with the Act. In addition, the non-binding nature of referenda provides an opportunity for the legislature to ensure that any legislation derived from a CIR referendum would not infringe the Bill of Rights Act. The US experience suggests that a Bill of Rights should become supreme law in advance of any move to make CIR binding. The Canadian Charter of Rights shows that such a status for a Bill of Rights can be achieved in a parliamentary democracy. Alternatively, CIR legislation could include a provision that any binding referenda be subject to the Bill of Rights Act.

Concluding Comments

The option of direct democracy provided by CIR is clearly a major development of the constitutional framework of New Zealand. The enthusiasm shown by proponents of the various issues that have been the subject of referenda petitions is a very clear indication of the popularity of direct democracy. The fact that the firefighters could convince 17 per cent of all registered voters to sign a petition within two months demonstrates the electorate's desire to have a say on particular issues distinct from the electoral choice of political party.

The CIR legislation could be improved by requiring all referenda to take place at the time of a general election. This would save money. More important, it would ensure that referenda properly reflected the views of the community given that typi-

cally in excess of 85 per cent of all registered voters exercise their franchise at general elections. The reality is that New Zealand voters will become accustomed not only to choosing their parliamentary representatives, but also to expressing their views on a range of specific issues.

However, in order to be effective, referenda do need to be confined to specific issues. The questions posed by the Next Step Democracy Movement demonstrate the limitations of referenda. The wide-ranging nature of these petitions pose awkward dilemmas. It would be quite possible for voters to elect a centre-right government and also to support one or more of these petitions in a referendum. It is hard to imagine how such a government could implement the results of the referenda and still honour its own manifesto commitments (which a current referendum petition would require it to do!). Alternatively, a centre-right government may argue that it is promoting free education by providing a voucher system, that the free market is the most appropriate method of promoting full employment, and that income support and benefits are in fact based on what it costs to live. But this presumably would not be how the promoters of the petitions envisage the fulfilment of the electorate's wishes.

Referenda are not a suitable means of implementing a complete political agenda. The issues are more complex than six short but open-ended questions. Affirmative answers to the questions leave enormous leeway for governments to implement the results in ways quite possibly at odds with the agenda of the promoters. Referenda containing such open-ended questions would frustrate voters since there is no guarantee, even if the results were binding, that parliament would implement them in a manner acceptable to the promoters. Voters need to know that, when they support a referendum, it will result in specific legislation implementing the measure they have supported. A succession of referenda on issues susceptible of fulfilment in a wide variety of ways would quickly dim the enthusiasm for referenda.

If New Zealand follows the example of the United States, the results of referenda will become binding and will be an important part of the legislative process. But two reforms are required for binding referenda to be an effective part of a liberal democracy. First, a Bill of Rights that overrides all other legislation, including that derived from binding referenda, would be necessary if the results of referenda were binding. The status of the Treaty of Waitangi would also need consideration. Incorporation of the Treaty of Waitangi into a Bill of Rights, as was proposed in the 1986 White Paper on a Bill of Rights, may also be desirable. This would ensure the protection of minority rights and the rights of Maori enshrined in the Treaty of Waitangi. In effect, binding referenda would not be able to deal with issues that directly affected rights guaranteed by a Bill of Rights that was supreme law.

Second, referendum questions need to be limited to issues that can be effectively dealt with by specific legislation which is known in advance. The legislation can either be promulgated by parliament in advance, as occurred with the 1993 Electoral Act, or the legislation could be part of the referendum as an annexure to the question. In the latter case, the select committee process would not be an appropriate way to modify the legislation after it had been approved by referendum. The option of referenda with annexed legislation would suit only those issues that are narrow in scope, such as

the term of parliament. Such legislation would not require the legislative fine tuning of the select committee process following the referendum. It would obviously be important to ensure that the legislative measures had been subject to careful scrutiny before the referendum is put to the electorate for approval.

However, even the current non-binding referenda on specific questions capable of clear resolution by parliament will have a major impact on law and policy-making. It can be expected that politicians will be reluctant to ignore the results of referenda, particularly where there is a substantial majority in support of a particular proposition.

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