

Constitutional Change in the 1990s: Moves for Direct Democracy

Geoffrey de Q Walker

The 1990s show signs of being a time of constitutional debate and possible change unparalleled since the 1890s.

A number of actual changes have come through the High Court of Australia, and more are likely. The *Australian Capital Television* case establishes that the Australian people enjoy a right of political communication and discourse that parliaments are powerless to take away. The case identifies what amounts to a constitutional right of free speech in political matters, and some of the judgments in the case suggest that other rights, such as movement and association, may be similarly protected. The *Dietrich* case appears to be developing a general right in an accused person to a fair trial. The *Mabo* decision calls in question the whole legal basis for the European settlement of the Australian continent. In the *Nationwide News* case, Chief Justice Mason proposed a principle of proportionality to be used in determining whether a purported law of the Commonwealth validly comes within a head of law-making power under the Constitution. Few commentators seem to have appreciated the implications of this principle which, if adopted by a majority of members of the court, would give the High Court a role somewhat similar to that exercised by the United States Supreme Court in substantive due process cases.

Justice Toohey of the High Court has proposed that the courts might identify a wide range of protected civil rights; that is, rights that could not be taken away by ordinary legislation. In a paper delivered in Darwin last year, His Honour suggested that 'the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied bill of rights might be constructed'.

A wide range of other possible changes to the constitutional order are being canvassed by such bodies as the Centenary Constitutional Conference, its successor the Constitutional Centenary Foundation, and its rival the Samuel Griffith Society. Part II of the report of the Western Australian Royal Commission on the Commercial Activities of Government is likely to recommend a number of changes that would give a more Jeffersonian flavour to constitutional structures in that state, and perhaps in others as well.

In addition, the movement for an Australian federal republic is gathering support with remarkable speed. Already the prospect of abandoning the monarchical symbolism in government is giving rise to debate about the arrangements that would replace it. Should a president be appointed by the executive government, as the Governor-General is today, or elected by the Parliament, or directly elected by the people? Should we abandon the Westminster model, with its extreme concentration of power in premier or prime minister, and replace it with the direct election of an executive president?

When so many competing ideas are vying for public attention and support, there is much to be said for returning to first principles. The first principle of constitutional doctrine is that the true constitution of a nation is to be found in the temper of its people. Any meaningful debate about constitutional issues in Australia must start by acknowledging that nowhere has the democratic spirit flowed more strongly than in this country. We were among the first to introduce universal manhood suffrage, well before Great Britain and the United States. We were among the first countries to introduce the vote for women. We pioneered the secret ballot, and indeed in America it is so strongly associated with this country that Americans still call it the 'Australian ballot'. Our Senate was from the outset directly elected by the people, whereas its American equivalent at that time was not, and the Canadian Senate still is not. The British upper house, of course, is entirely unelected. Our federal constitution was among the first national constitutions to be adopted by a direct referendum of the people. The American constitution was adopted by a constitutional convention, and the Canadian, New Zealand and British constitutions have never been submitted to the people at all. Last year when Canadians were for the first time given the opportunity of expressing their views at a referendum on a package of sixty-nine different amendments to their constitution, they sent a resounding message to Ottawa that they were dissatisfied with the current process of constitutional change by political elites.

As the Clerk of the Senate, Mr Harry Evans, in an earlier lecture in this series pointed out, most of the radical constitutional reforms being sought in Canada, Great Britain and New Zealand are already in place in Australia. One Canadian commentator recently described Australia's federal constitution as a 'people's constitution', as opposed to the 'governments' constitution' that exists in his country. The formula for amending the constitution (in our case s.128) answers, he argues, the fundamental question of where sovereignty lies.

Australians have much to be proud of in this connection, and indeed, in the early part of the century, political science textbooks the world over treated the Australians as being second only to the Swiss as innovators of practical democratic reforms. Democracy is natural in this country. Just as in some other countries there is an instinctive habit of deference, in Australia there was seen to be an instinctive habit of democracy.

Yet that central characteristic is almost unrecognised in Australian constitutional debate today. One even hears prominent people such as Mr Hawke declaring that our democratic institutions were inherited from Britain. From Britain we certainly did inherit the traditions of liberty and the rule of law, and they are priceless indeed. But the Westminster constitution, which took its basic form in 1689, was designed mainly as a check on royal power. It was never intended to be a democratic system of government. It later became one, but only grudgingly, incompletely, and well after Australia and other countries had led the way.

Although that Australian democratic spirit is still there, and at least as strong as in 1901, it has since then almost ceased to find any outlet in proposals for reform of Australian constitutional structures. The state of war and near-war that prevailed between 1914 and 1989, the rise of iron party discipline and the transformation of political life into a lifetime career have led to a great concentration of power in the hands of the premier or prime minister, the reduction of the significance of parliament almost to vanishing-point and the insulation of expert policy-making and the law-making process from popular pressure. These developments have become accepted in governmental circles and are even regarded as desirable by some. It is probably no coincidence that all the democratic advances mentioned above occurred before the rigid party system took hold, and before politics became a career.

All this has engendered in the public an alienation from the political system so profound that it is causing concern even among governments. In the last New South Wales elections, sixteen percent of the electors voted for independents. A number of candidates were elected who were initially able to force the government to cease treating parliament as a mere instrument of the executive. As the government could no longer rely on a guaranteed majority to pass its legislation, new laws have to be genuinely debated; the need for them has to be explained and their operation justified. Nor is the premier able to call a snap election at his own convenience.

This may be a sign that the old democratic spirit is at last breaking free again, but it is not enough. One cannot rely on independents alone, for it is always possible for a government to change the electoral laws so as to make it difficult for the people to elect them, as recently happened in the Australian Capital Territory, or to use house rules to prevent debate on bills introduced by independent members.

There is widespread agreement that the present state of affairs cannot be allowed to continue. But two conflicting sets of solutions are offered. On the one hand, there are elitist solutions; and on the other there are democratic solutions.

Elitist Solutions

The elitist solutions rest on the premise that the problems of representative democracy stem from the restraints imposed by constitutional checks and balances and by the pressures of almost constant electioneering. One of the main elitist solutions offered is therefore to lengthen the parliamentary term. This has been promoted on the basis that governments will adopt more responsible policies if they are not preoccupied with the next election. The now-defunct Constitutional Commission strongly advocated this solution in its 1988 report. Little evidence has been adduced in support of this proposal, and it is strongly disputed by some constitutional writers. Some critics assert that it will in fact tend to the opposite result. As John Gava of Macquarie law school argues:

Offer a politician the incentive of a longer term and you have a gilt-edged certainty that creative adaptations of the truth will proliferate. Politicians and political parties fight to win elections: the longer the term on offer, the higher the stakes and the bigger the temptation Shorten the term, and the temptation is correspondingly reduced, while the chances of real debate and honest policies emerging would increase.

Gava joins with Lord Hailsham in describing the present state of affairs as 'elective dictatorship' and believes that the political class is 'finding the participation every three years by the citizenry is disturbing to their rule. The further away the citizens can be kept from power the better'.

Another common elitist solution is to propose removing the few remaining checks and balances on the near-absolute power of the premier or prime minister; for example, by curtailing the powers of upper houses. The Constitutional Commission advocated that expedient too. Other proposals of this kind rest on the argument that the solution is to give incentives that will induce better people to enter parliament: higher salaries, increased resources, larger support staffs and the like.

These ideas are not necessarily bad, but they do form part of a broad elitist approach to constitutional development which, overall, is supported by virtually the whole political-media establishment.

In the past few years, however, a competing movement has developed which follows in a straight line from the great democratic tradition I have referred to. This movement argues that the remedy for the failings of our representative democracy is not less democracy, but more.

Democratic Solutions

The democratic proposed solutions to our problems broadly envisage wider use of the ballot box. For example, Mr Brown, Federal Minister for Land Transport, has proposed that High Court justices should be popularly elected, so as to guard against a repetition of the free speech case, to which he takes strong exception. Justice Toohey envisages the constitutional referendum process as a final court of appeal whereby the people could overrule unacceptable High Court developments in what he sees as a common law implied bill of rights. The problem with that view is that currently only the parliament can initiate a constitutional referendum.

This brings me to the main focus of the movement for democratic solutions, which is the campaign for the adoption of direct legislation by the people using the citizen-initiated referendum system ('CIR'). This mechanism was first introduced at the national level in Switzerland in 1874 and was later adopted in twenty-six of the American states. Since the 1970s it has also been used with great success in Italy. In Canada it is widely employed at the local government level.

Direct democracy through the initiative and referendum system has been publicly advocated in Australia since the 1890s. It was one of the main objectives of the Australian Labor Party and remained so, at least nominally, until 1963. Between 1914 and 1919 a number of bills for the introduction of the system were introduced by the Queensland ALP government, but were delayed in the then upper house and eventually abandoned.

After World War I, the ALP lost interest in the idea and it remained forgotten until the late 1970s, when the Democrats in the Senate began introducing a series of bills for a constitutional amendment to provide for the system. In 1988 the Queensland government prepared a comprehensive CIR bill, but it was dropped only days before it was due to be introduced.

There are two main forms of direct legislation. The first is the *legislative petition referendum*, or '*people's veto*'. This allows a specified number of voters (usually between two and five percent) to petition for a referendum on a bill that has passed through parliament in the normal way but has not yet taken effect. When a petition signed by the prescribed number of voters is presented to the government, the statute's operation is suspended until the voters have had the opportunity to approve or reject it in a binding referendum. In Switzerland this mechanism also extends to the ratification of treaties. This type of voters' veto has not been seriously advocated in Australia because of the political resistance to the idea of suspending the effective date of legislation.

The other form is the *legislative initiative*, which permits a prescribed number of voters to compel in the same way the holding of a binding poll on whether a proposed law of their own choosing should be adopted, or whether a particular law already in force should be repealed. This terminology is slightly confusing because the initiative obviously involves the holding of a referendum in the ordinary sense of the word, while the legislative petition referendum incorporates an element of citizen initiative, in the sense that the petition is launched by voters of their own motion. In Australia the term 'CIR' is widely used to denote both forms.

The initiative may also be used to propose amendments to the constitution; in this case it is called the '*constitutional initiative*'. This was the particular form of CIR supported by the Centenary Constitutional Conference.

Whatever form it may take, a true CIR system can be recognised by *two essential characteristics*: (1) the people have the power to initiate a referendum on a particular law or treaty and (2) the result of the referendum is binding on government and parliament.

The arguments for and against CIR I have canvassed in my 1987 book *Initiative and Referendum - The People's Law* (Centre for Independent Studies, Sydney). As public dissatisfaction with the political scene has certainly not decreased, support for CIR has quietly followed. The result is that in every state and territory of the Commonwealth except Victoria there are, or have recently been, draft CIR bills in existence or in preparation.

Another factor that may add intellectual impetus to moves for direct democracy is the growing understanding of public opinion and the way in which people reach judgments on public affairs. A recent influential book by Daniel Yankelovich, *Coming to Public Judgment* (Syracuse University Press 1991), noting a growing gulf, indeed an adversary relation, between expert policy making and public opinion, has identified a basic misunderstanding of public opinion and of the way in which it develops and becomes public judgment. Public opinion, he argues, improves in quality as it moves from snap opinion to public judgment, as people hear the other side of the argument and become aware of the consequences of their preliminary opinions. Views arrived at in this way are stable and responsible, though not always in harmony with elite views.

That public opinion should follow this path from initial impression to considered judgment should not surprise us - such a progression underlies the jury system, and indeed the whole of the system of justice in courts. Indeed, it is the assumption that underlies the process of parliamentary debate. Nevertheless, the failure to distinguish between the stages through which opinion develops, and the preoccupation of the media with quick polls that identify mainly snap opinions, has led to a view that public opinion is fickle and irresponsible. Studies such as Yankelovich's are challenging that view and thereby strengthening the case for direct democracy.

Most of the current CIR bills are private members' bills with uncertain prospects of passage in the short term, though they could become harder to ignore as time goes on. Among them is the set of two bills introduced in the House of Representatives by Mr Ted Mack, MHR, independent member for North Sydney, and seconded by the ALP's Mr Frank Walker MHR, a former New South Wales cabinet minister.

The support of at least one major party will be needed before the system can become law in any Australian jurisdiction. In 1988 the Western Australian Liberals became the first mainstream party for many years to introduce a general CIR bill of their own. In 1991 the Queensland National Party again started seriously considering the idea as party policy. The state's Liberal Party adopted CIR as part of its policy at the last state elections, but did not campaign on the issue. The New South Wales Labor opposition is displaying interest in the idea.

It is Tasmania, however, that currently presents the most interesting picture. The Hon. Neil M Robson MHA in 1990 introduced a private member's bill for a voters' veto system. His Liberal colleagues endorsed the proposal (subject to some quite significant qualifications), and the bill needed the support of only one of the Green Independents to pass the lower house. For two years the Greens assured Mr Robson of this support, but withdrew it just a week before the crucial second reading vote. The Liberals have now apparently decided not to proceed with the bill for the time being, but several ministers are enthusiastic about it, and the debate continues.

Main Current Proposals

In Federal Parliament

Since 1990 the Democrats in the Senate have been promoting two CIR bills and they were part of its platform in the recent elections. One, the *Constitutional Alteration (Electors' Initiative) Bill*, would provide for a binding constitutional initiative. They consider that this makes sense because the people decide the issue now. Five percent of the electors who voted at the last federal election could petition for a federal referendum on a proposal to alter the Constitution. As some 9.2 million people voted formally at the last election, the required number of signatures on the petition would be 462,000. This large number of signatures would need to be collected within six months, a task that would be difficult if not impossible for groups that did not have substantial means.

If the petition qualified, it would be presented to the voters at the next federal election and would be required to satisfy the same majority requirements as those provided by Section 128 of the Constitution. The constitutional initiative was recommended by one of the committees of the Constitutional

Commission (but not by the full Commission) and the Centenary Constitutional Conference supported the idea strongly.

The other bill the Democrats have presented, the *Legislative Initiative Bill*, provides for a general legislative initiative to be triggered by a number of voters equivalent to 2.5 percent of those who voted at the last election. A six-month time limit is again provided. The bill lays down stringent requirements for the validity and checking of signatures, but if the petition qualified, it would be placed on the ballot paper at the next federal election. The central feature of the bill, however, is that the result would in no way be binding on parliament. It could not be otherwise, as the Democrats propose the introduction of the system by means of an ordinary Act of parliament without the constitutional amendment that is essential if the manner of exercise of the legislative power is to be altered. Consequently, this bill fails one of the tests for a genuine CIR system and is really on a par with the non-binding initiative system promised by the New Zealand National Party before the last election in that country. However, the Democrats see the proposal as a way in which the CIR could become accepted and could be shown not to be a threat.

The independent member, Mr Ted Mack MHR, who was responsible for introducing a referendum system when he was Mayor of North Sydney, prepared a constitutional initiative bill not unlike that introduced by the Democrats.

The federal parliamentary Liberal party has expressed some interest in CIR, but so far has gone no further than issuing a green paper on the subject. It proposes a trigger requirement of 460,000 signatures (five percent of the votes at the last election), and petitions that qualify would be submitted to the voters on the same day as the next election. The measure would be a general legislative initiative, but the Liberal proposal requires a special majority consisting of a majority of voters in a majority of states, together with an overall majority. Special requirements of this nature are justifiable in the context of constitutional alteration, where something closer to consensus is required, but for ordinary legislation it is unacceptable, enshrining as it does the possibility of minority rule.

Western Australia

The *Referendums (Repeal of Acts and Regulations) Bill* proposed by the Western Australian Liberal Opposition which was introduced into the lower house on a number of occasions is a restricted, but binding, form of voters' veto system. It would permit the voters to petition for the repeal of any legislation in force at the time the Act takes effect for a period of three years, and in the case of future legislation, for a period of three years after enactment. This is one of a number of limitations that reflect party-room compromise. The bill would require a petition to be signed by not less than eight percent of the electors qualified to vote, and each signature would need to be accompanied by the legislative assembly electoral number of the signatory.

The referendum would be held in conjunction with the next election if it were certified no more than twelve months before the due date of the next election, or in any other case within three months. If a majority of those voting at the election favoured repeal of the challenged legislation, the repeal would be automatic. It is expected that the Bill will soon be reintroduced by Mr Reg Davies MLC.

New South Wales

The Call to Australia group in the New South Wales Legislative Council in 1989 introduced a comprehensive initiative and referendum system partly based on the abortive Queensland bill. Under the *Constitution (Citizen-Initiated Referendum) Bill 1989*, a referendum could be triggered by the petition signatures of three percent of the numbers who voted at the last preceding general election for the Legislative Assembly and could propose either the enactment of a new law or the repeal of an existing one. Signatures could be checked by a process of sampling, without the need to check the entire petition. The draft of any proposed new law would be submitted to the chief parliamentary counsel, who would be required to satisfy himself that the form of the proposed law was clear, logical and comprehensible and included all the necessary transitional, machinery and ancillary provisions. This bill, like the Queensland bill on which it is based, includes all its own machinery provisions. The bill was reintroduced in 1992 with new provisions for a special majority of electorates. It is currently 'on hold' and is being reworked. Given the rather uncertain influence of the CTA group at present, this bill should perhaps not detain us for long, but it is worth noting that the state's Labor shadow cabinet has expressed support for the idea.

Queensland

Similarly, the 1988 Queensland *Constitution (Direct Democracy) Bill* was a comprehensive initiative and referendum bill triggered by a number of signatures equal to five percent of the number of electors

who voted in the last Legislative Assembly election. The intention was to make the referendum binding, but this was not possible because of a 1934 constitutional amendment entrenching the abolition of the upper house, which prohibited the establishment of any legislative body other than the Legislative Assembly. A constitutional referendum would have been required to alter that state of affairs, so in the meantime the bill provided for a restricted power in the legislative assembly to overrule the result of the referendum (clause 40). This bill was abandoned shortly before the day of its intended introduction into the Assembly, but the Queensland Nationals are reportedly considering adopting CIR as policy at their state council in July.

Australian Capital Territory

There, a Liberal in the Australian Capital Territory introduced a CIR bill in the territory's Legislative Assembly, partly in order to pre-empt a private member's bill which an independent member had apparently been planning to table. In general terms it was similar to the Tasmanian measure, to which we now turn. The private member's bill is expected to be re-introduced in April.

Tasmania

The Tasmanian bill is perhaps the most interesting, not because it is particularly comprehensive, but because in present conditions it has the best chance of being enacted. The subject of CIR is a matter of steady political debate in Tasmania, and the local media, especially the press, take it seriously and are generally supportive. The movement gained a substantial boost when Burnie Municipal Council adopted its own CIR system, which requires a petition bearing 500 ratepayers signatures and a deposit of \$500. The mechanism is not provided for in the *Local Government Act*, and therefore has no legally binding force, but the council treats the results of the referendum as conclusive. Two referendums have already been held, one on the subject of saving a small park in the municipality, and another concerning the establishment of a pulp mill. Polling takes place over a period of a week, and the council sent a mobile polling booth into the more remote parts of the quite large municipality.

The Citizen-Initiated Referendums (Elector-Initiated Repeals) Bill 1991 was sponsored by a private member, the Hon. Neil Robson, but had the support of his colleagues in the Liberal Party and required only one more vote to pass through the lower house, after which upper house approval would have followed as a matter of course. For two years, while the bill was in preparation, the Green independents indicated that they would support it, but withdrew their support at the eleventh hour even though the bill incorporated substantial concessions requested by them. The bill was to be re-introduced, minus the concessions previously made to the Greens, but the Liberals have decided not to proceed with it at present. However, it is still a live issue and is gathering wider support.

As the name implies, the bill provides for essentially a voters' veto system under which citizens could seek the repeal of any legislation except appropriation or tax acts. The trigger is 18,000 electors (about five percent of the enrolled voters), of whom twenty percent or more must be enrolled in each of three House of Assembly electorates. Petitioners have twelve months to collect the signatures, and the chief electoral officer is under an obligation to make reasonable inquiry as to the genuineness and validity of signatures. Sampling techniques may be used for this purpose. The petition may seek the repeal of more than one enactment. The referendum is to be held on the same day as the next election, if such election is due within twelve months, otherwise a special date may be set.

The chief electoral officer is required to circulate a summary of the arguments for and against, rather like that which we saw in Queensland in the recent referendum on the four-year term proposal. But, in an appalling provision inserted at the insistence of the Greens, all other citizens were originally to be prohibited from publishing or circulating any arguments for or against once the date of the referendum was notified. This clause was removed from the new version of the bill to be presented at a future session and would in any event now be unconstitutional in light of the High Court's decision in the *Australian Capital Broadcasting case*.

The bill then proceeds in clause 33 to state the effect of the referendum results. Again at the insistence of the Greens, the bill required a double majority - a majority of voters and a majority of voters in a majority of electorates, a provision unknown in any other country where CIR is in use for ordinary legislation. This requirement is indefensible as it clearly enshrines the possibility of minority rule in relation to ordinary (as opposed to constitutional) legislation. The use of separate electorates as subdivisions of a state or territory is usually a necessary concomitant of representative democracy, which rests on the premise (somewhat questionable in modern conditions) that members of parliament seek to represent the views of their constituents in legislative debate. In direct democracy, however, electoral boundaries are irrelevant, and indeed improper, as all people are bound equally by the same laws, no matter where they may happen to live in the state. It is notable that in all other Australian states, even constitutional referendums are determined by a simple majority of voters in the state.

Further, as electoral boundaries are the plaything of governing parties, the proposal would reintroduce some of the evils that direct legislation is meant to obviate. Mr Robson removed this provision from the later version of the bill and returned to a simple majority requirement.

Modest though the Tasmanian bill is, it is difficult to exaggerate the legal and constitutional consequences that would flow from its enactment. It would change the entire constitutional order of the country by showing that it is possible in Australia to move away from the servile constitutional doctrines that have swamped our democratic tradition and helped to distance the parliaments from the people. The old Diceyan theory of parliamentary omnipotence, for which there is not, and never has been, a shred of binding authority, would be finally discredited. Similarly, the old theory of the British constitution according to which all power flowed from the crown. The Westminster constitution was never intended as a democratic system of government, but as a method of restraining royal power. Subject only to those restraints, it was the duty of the citizens (or rather 'subjects') to submit to the crown, and not vice versa. With the advent of *de facto* republicanism under the *Australia Acts* 1986 and the clear possibility of *de jure* republicanism within the decade, that would be a dangerous theory, in that it would tend to give an additional element of spurious legitimacy to the already extreme concentration of power in the hands of premier or prime minister.

With the enactment of any CIR legislation in Australia, however, we would begin to move towards the democratic doctrine of delegation, under which the institutions of government are conceptualised as agents or delegates of the people. This would constitute nothing less, on the theoretical plane, than a democratic revolution.

Questioner — You mentioned that the Tasmanian bills would exclude tax and appropriation measures. Can you think of any other areas that ought to be excluded?

Professor Walker — Whether you are using direct legislation or parliamentary legislation, I think people should have some rights that cannot be taken away. The High Court has recently said that that is the case already. It should certainly be the case that if we had a federal CIR system it could not be used to abridge people's right to political free speech. Similarly, at the federal level, the Parliament has no power to take property from people except on just terms. I think you would have to have that sort of safeguard. Personally, I would quite like to see that at the state level too.

Whatever safeguards you need against legislative encroachment, I think they are the same whether you are using parliamentary legislation or direct legislation. There may be some other areas also where the system might not operate. We have mentioned Appropriation Bills. Perhaps you should not be allowed to use the system to block supply. Tax should not be accepted, I think, because historically taxation is the central issue in the whole problem of government. The English, French and American revolutions all revolved around tax questions. The nearest we came in Australia to a violent rebellion was the Eureka Stockade, which was a tax revolt. Surely the people should have a direct say in relation to tax laws.

There is one area in which I would argue that a federal CIR system should not apply, and that is in foreign affairs. I do not mean treaties necessarily. I think that perhaps treaties should be subject to people's veto, but not foreign affairs generally. First of all, it is the primary function of government to protect the nation from external threats. Secondly — and I think this is more conceptually important — in foreign affairs the Government often has to act on information that is not generally available. It has to act on secret intelligence information and various pieces of information it gets from diplomatic posts which cannot be made public because it could sour relations with other countries and create international tension. Ordinarily, foreign affairs is probably not an area suitable for this because the public are not in a position to make an informed judgment. In all other areas I do not see why they are not in a position to make an informed judgment.

Questioner — I have two points, one of which concerns voting systems. It is possible for the federal parliament to change the methods of voting. For instance, it could introduce certain forms of so-called proportional representation into the House of Representatives, although that would be extremely difficult with the Constitution. It could mess around with the voting system and deprive the citizens of a power that they do not realise they have — the power of getting rid of a member of parliament by putting him or her last on the preferential voting ballot.

In the last two elections, the sitting member could have been put last and the other major parties' candidates second last. Under those circumstances, except in the Northern Territory at the latest election, there would not have been an ALP representative, a Liberal or a National Party representative in the House. This is a power which is very much neglected because it has not been taught in schools.

Do you think that there should be further constitutional restrictions other than those in the Constitution at the moment about electoral powers?

My second point is more of an assertion than a question, but I would like you to comment on it. The move for a republic — there is to be a referendum after a great deal of propaganda in favour of it — is, in the view of many people throughout Australia, part of the process of constitutional referenda that we have seen in the last ten or fifteen years in which the aim is fundamentally to concentrate power in Canberra, particularly power in the hands of the Prime Minister. The introduction of a republic in many forms would leave the Prime Minister as virtually a three-year dictator and that effect is one of the reasons for opposing it.

I think it is also important that, in 1988, the various referenda which had the effect of concentrating power and decision-making in Canberra were defeated throughout Australia, except in the Australian Capital Territory. Do you think that is a danger of misuse of the constitutional referendum procedures?

Professor Walker — The tendency of Australian voters to reject referendum proposals that have or may have the effect of concentrating more power in Canberra is deplored by some constitutional writers. They feel that there ought to be more power in Canberra, that States are an anachronism and so on. They further go on from that proposition, which one can agree or disagree with, to say that it also shows that people are stupid.

You can be for or against having more power vested in parliament, the executive and the judiciary in Canberra, but it is not the same thing as saying that people are stupid, that people always vote no at referendums, or whatever the case may be. If you look at the history of referendum proposals at the Federal level that do not have that effect, you would see that about half of them have passed. A lot of debate about the CIR system consists of criticism about Australia's alleged tendency to vote no. You can approve or disapprove of the tendency, but what I am trying to say is that it is not a general tendency. It is a tendency in relation to certain types of proposals.

One possible form of republican government might well increase the powers of the Prime Minister. I would certainly think that the Prime Minister and Premiers have enough power as it is. But we do not have to follow that model. I noticed that in one opinion poll recently something like twenty per cent of the people said that they were in favour of an American system of a directly elected executive president. That is very interesting because that has never even been debated in Australia, to my knowledge. Yet twenty per cent of the people are already in favour of it. It may be just a snap opinion, but it is interesting that a proposition that has never really been ventilated is seen as promising by quite a large proportion of the population. I presume the reason it is seen as promising is that it would move away from this tendency of Premiers and Prime Ministers having so much power, bearing in mind that they are not necessarily directly elected at all. They are not directly elected and people may have voted for a different candidate for that office.

Questioner — I was not criticising the CIR proposal.

Professor Walker — I understand that. But if we are to have a referendum on whether Australia should become a republic in the near future, we do have to look very closely at what type of alternative arrangements are proposed. At the moment, the most popular arrangement, at least in the sense that you hear it most often, is that a president would be elected by the Parliament — not directly elected and not appointed by the Prime Minister. That would be a sort of halfway stage between a directly elected president, as in Ireland, or an appointed one. Your other question related to electoral matters. I am not an expert on electoral systems and I would get into deep water if I tried to answer that question.

Questioner — The phrase you used which disturbed me most was 'both sides of the argument'. It seems to me that one of the problems with democracy is that we take the view that most things can be reduced to two simplistic views one way or the other, whereas in fact most matters are complex. Would the sort of proposition you have been putting forward be strengthened or weakened if such referenda as you have been referring to contained a series of propositions wherein people voted preferentially so that the complexities of the matter could be more fairly explored?

Professor Walker — I think that is a very constructive idea and it is available. I have not been able to go into the complexities of various types of CIR arrangements. In California, if a petition for a new law qualifies — a proposition qualifies — and is going onto the ballot paper, the legislature can put a competing proposal on the ballot paper. So people can choose between two different approaches to the same problem. Of course, they can also urge people to vote no to the original proposal and not put forward an alternative. The problem with the Californian approach is that people cannot vote preferentially. They have to choose one or the other.

Our practice of preferential voting in Australia is very much admired in the United States. I was there last year during the presidential election campaign. When it became apparent that there would be three candidates, I told them about our system of numbering one, two or three and they thought that was a brilliant idea. Normally, they have not had more than two candidates so the question has not arisen much. A preferential system is a very desirable arrangement. It gives the legislature the power to put forward a compromise proposal or perhaps a proposal in which something has been thought of that was not thought of previously.

In the broader sense, I am not so sure that all problems are, at bottom, so complicated. Acts of parliament are complicated when you look at them because there is so much machinery, so much need for definitions and so many consequential matters to deal with. But the basic principle behind most acts of parliament is simple; for example: 'Do you want income tax or don't you?' 'Do you want a Goods and Services Tax or don't you?'. The basic principle does lend itself to voting yes or no and, in fact, that is what the Parliament does; it votes yes or no once the proposal is formulated. That is what the High Court does when a matter comes before it in which there may be merits and equities on both sides. At the end of the day the court still has to decide yes or no. Although in one sense matters are complicated, life would become impossible if ultimately all problems of government were complicated. At bottom, I think they basically have a certain simplicity.

Questioner — Firstly, when some people first hear about CIR, they are concerned that we will be having a lot of referendums on a lot of issues. Secondly — and this goes to the point that was brought up earlier — some people who are in favour of the legislative veto are very concerned about the initiative of new legislation because of the power of the media. Do you have comments on those two issues?

Professor Walker — The power of the media argument comes up when the result turns out the same way as the media want it to. You can point to many examples where people have totally disregarded media opinion. For example, one study was done on the CIR system in the city of Los Angeles. It involved twelve million people, which is nearly as big as Australia in population terms. They examined samples of a couple of thousand ballot papers; to be exact it was 1,500. Not one of those ballot papers had been marked in accordance with the recommendation of the *Los Angeles Times* or the local dominant television station. That referendum had been the subject of a saturation campaign by the media.

Proposition thirteen, which put a cap on property taxes in California — and it has since been reaffirmed a number of times — got a two-thirds majority, despite almost unanimous media opposition, except from one evening paper in Los Angeles. I cannot remember the name of it. All the other media — television, radio and press — were against it, yet people decided that they had just had enough. Their property taxes had trebled in a period of five years and they thought that was enough. I think that although the influence of the media certainly cannot be discounted — if I were involved in a public debate, I would much rather have the media on my side than against me — it is not insuperable either. Once people have made up their minds, once public opinion has gone through the three stages that Yankelovich mentions, it does not matter what the media say.

Your other point was about people having more reservations about the initiative system than the veto system. It is true that a lot of people who are very favourable to the voters' veto system are much more wary of the initiative system. In fact, as far as the voters' veto system goes, it is almost impossible to develop an argument against it that is not also against democracy.

In relation to the initiative system, it is easier to develop arguments against it. I do not think they are supported by the evidence. Because of the ordinary human experience that it is easier to strike down something that is bad than to build something that is good, you can understand that people would have reservations, that they might fear excessive numbers of propositions, and so on. But it does not seem to have worked out that way.

You hear in the media reports about Californian voters having to vote on thirty-seven referendum propositions, and it is true; they do. But what you do not hear is that thirty or thirty-one of those propositions are not citizen measures; they are government measures for minor amendments to the Constitution; bond issues, which in America for historic reasons have to be approved by the voters; and a variety of other sorts of relatively minor housekeeping matters. There is only an average of two citizen measures per ballot, even in California, which is a very big user of the system per election. It has an election every two years. So that fear does not seem to have been borne out.

Occasionally, a period of intense ferment and controversy will occur in some state or country as there will be up to ten citizen measures on the ballot paper. I would rather see those get onto the ballot paper and be resolved by the people than have them seized upon by pressure groups, extremist groups and all sorts of people over whom you and I have no control. I would much rather have a say in it myself than let other people decide for me.

Questioner — I have two propositions on which I would be interested in hearing your comments. Firstly, is the apparently needless republican push that we are enduring at the moment really to take away certain rights that may not yet be articulated; for example, things that the High Court has not even identified? Secondly, how much rejuvenation of the electorate do you envisage that CIR in operation would cause? Will the voting public get to realise that it is not faced with having to choose between Heckle and Jeckle or terrible and much worse, as we had to perhaps last Saturday? If it realised that there were alternatives, that it could exercise a democratic right, do you think the Australian apathy would, to a large extent, evaporate?

Professor Walker — Yes. If I may say so, you have put your finger on one of the central advantages of the system. It enables the voters to separate issues from personalities. Most people seem to think that the election last Saturday turned into a referendum on Goods and Services Tax (GST). You can be for or against a GST, but that is not really what it was about. It was about the government of the country for the next three years. In the absence of CIR, we are constantly having to decide these mixed issues. It may be that you think both issues went the same way, and that is fine. But there might have been a lot of people who did not, but they are forced to accept one party or another because they disapprove of one of the policies of one of the groups. Under CIR you could vote for the party and the people that you prefer and just reject one or more of their policies.

The other aspect you have put into the spotlight is the effect that it has on the general citizenship of the country. I do not think Australians are, in any general sense, apathetic. But it is true that on particular questions you might find that people are apathetic. I would suggest that is because their opinion does not really make any difference, except on one Saturday every three years. Basically the individual's opinion is completely irrelevant. So why should you become well-informed about some current issue? Why should you knock yourself out? It will not make any difference. All you get is the same bundle of issues and personalities once every three years. If people know that they have the ultimate power to decide the laws under which they and their children are going to live, they think about these things more.

Any lawyer who has ever had a jury trial knows that jurors who are just taken off the streets, metaphorically, take their duties very seriously. Lawyers will tell you — and I have seldom met a lawyer with criminal law experience who would disagree — that although they have often had verdicts that they did not like, they have never had a verdict which they regarded as irrational, vindictive, malicious or anything like that. People, once you give them responsibility, do take their duties seriously.

I think it would elevate the whole tone of the life of this nation, it would make people into real citizens; whereas at the moment we are sort of subjects in a way, subjects with a right to vote. We are basically just a walk-on crowd that walks on once every three years and applauds one or other of the groups of people who are put before us.

Questioner — From what you have been saying, CIR has stalled basically around the nation. It seems like a rather exciting idea. Can you see any government in Australia actually deciding to give itself less power, to give away some of its power to the people?

Professor Walker — Yes, because it is not just about giving yourself less power. They are not actually reducing their own powers in an ultimate sense. They are creating a check on their powers, that is true. What they should realise from overseas experience is that it gives them greater security of tenure. If people do not have to throw out a government that they basically like just because they disagree with one of the things that it is doing, they will leave them in for longer. You can see this in Switzerland, where members of parliament — as long as they are satisfactory in other respects — tend to get re-elected much more reliably than they do in Australia because all that is at stake is that person's competency to represent you. It is not the policies that that person and a group of others are advocating.

Questioner — I was interested in your idea that foreign affairs is one of the areas that should be excluded from CIR because it requires specialist knowledge. I think one of the ways we have understood democracies to date is that they have geographic limits and the decisions taken within those democracies should not be seen as having effect outside of them. But we seem to live in an era where the internationalisation of finance increasingly compromises that idea of state sovereignty and perhaps begins to render the idea of the nation state and state sovereignty as obsolete. Given the ability of

international finance markets to have influence on domestic political outcomes, why should people not have some chance to use the CIR to restate their wishes in regard to international finance?

Professor Walker — I can see the force of your argument. I have not thought along those lines but, if anything, there is a slight trend in that direction. There is a new book that has just come out. It has just reached our library so I have not read it yet; I have just leafed through it. I cannot even remember the exact title, but if you give me your address I will send you a copy of the title page. It is about the greater use of direct democracy in international affairs and looks at a lot of recent developments, such as the referenda in Russia, or in the former Soviet Union, over the break-up of the Soviet empire, if you want to call it that. If anything, the trend is in the direction that you are suggesting. I still have reservations because of the need to use information that is not generally available. But there is a movement in that direction.