MARRIAGE EQUALITY PLEBISCITE BILL 2015

Submission to Senate Legal and Constitutional Affairs Reference Committee

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We have pleasure in responding to the Committee's invitation to make a Submission to this Committee, of which, many years ago, the first author served as a member.

We wish to start by stating as clearly as possible that we believe that the responsibility for determining the question of marriage equality is one which lies squarely at the feet of the Australian Parliament and that we see it as a gross derogation of its constitutional and legal responsibilities to seek to avoid resolving the question by the artificial device of reference of the matter to a referendum or plebiscite.

We elaborate on those matters with direct reference to the Terms of Reference as set out in the Senate resolution of 20 August 2015.

The matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia, with particular reference to:

(a) an assessment of the content and implications of a question to be put to electors;

We address the issue of what "question" should, if any, be put to the people in my comments about section 6 of the proposed Bill below.

However, as a matter of principle we believe that any question put by way of referendum or plebiscite should be of such a nature that its passage or approval would lead **automatically** and without further intervention or activity by the parliament or executive government, to the coming into effect of that provision by no later than a date specified in that question itself.

This is best achieved by passing a marriage equality Bill through the Parliament, where it can have all the necessary definitions clear and safeguards for religious objections included, and then submitted to the people. If they approve, the legislation would automatically commence on the day specified therein and no further parliamentary or executive government action would be required.

(b) an examination of the resources required to enact such an activity, including the question of the contribution of Commonwealth funding to the 'yes' and 'no' campaigns;

We have slightly differing views on the question of further Commonwealth expenditure in support of the parties involved in the campaign. Mr Puplick is opposed to any Commonwealth expenditure other than that provided for in section 11 of the *Referendum*

(Machinery Provisions) Act 1984, namely the printing and distribution of the yes and no cases. Mr Galbraith is open to additional public funding being available to ensure equal opportunities for the presentation of "yes" and "no" cases but acknowledges that further detailed consideration is require the mechanisms for determining and providing such funding.

We are both agreed however of the need for transparency in the way which both the "yes" and "no" campaigns are funded. There is considerable evidence, for example, that organised and powerful evangelical / fundamentalist "Christian" organisations in the United States provide substantial funds to locally-based Christian and "pro-marriage" groups outside the United States to finance campaigns against marriage equality.[i]

Robust mechanisms are needed to ensure that, as far as is practicable, the actual and original source of all campaign funding is disclosed in real time. While achieving this may be challenging, in particular given the potential for overseas money to be "laundered" through locally-based organisations, it is essential that every effort is made to design the appropriate architecture to achieve this. At the very least, such a scheme must ensure the disclosure of the costs of all media advertising and the source of funds to pay for such advertising.

(c) an assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;

We would submit that there are three reasons why the holding of any plebiscite in conjunction with a general election is desirable:

(1) costs to the public purse are reduced substantially – it is inconceivable that, when the Government is preaching economic restraints and cutting welfare fare payments to the most needy, the expenditure of over $ 100 million to resolve a matter which could be resolved without any cost to the public revenue, by Parliament fulfilling the role it was elected to undertake, could be justified;
(2) This would allow the speedy resolution of a matter which, unless dealt with in the next year will undoubtedly not be submitted to the public until at least 2018. We base this on the Prime Minister's reported opposition to holding such a vote in conjunction with the proposed referendum on Indigenous recognition which is unlikely to take place before 2017. The expenditure of two lots of $ 100 million in one year would be scandalous;
(3) This would guarantee that the provisions of the *Commonwealth Electoral Act* governing such matters as the rolls, electors qualifications, polling places and the conduct and scrutiny of the poll were on the same basis as that provided for at any ordinary general election and not subject to any qualification or special amendment which may have the effect of lessening the fairness and integrity of the poll.

(d) whether such an activity Is an appropriate method to address matters of equality and human rights;

We would posit ten reasons why the use of a referendum or plebiscite on this question is utterly unjustified:

(1) **The Constitution**: section 51(21) is clear and explicit. It vests responsibility for matters of secular marriage within the exclusive remit of the Commonwealth

Parliament. An analysis (see Appendix A) of the background to the constitutional debates about how the Constitution should be amended makes it clear that the Founders explicitly rejected an extended use of referenda/plebiscites to determine matters of public policy. They did not expect Parliament to outsource its responsibilities. Nor should it. We also note that at one stage this was the position of the Prime Minister who believed that the question should be "owned" by the Parliament. On that occasion[ii], we believe he was right.

(2) **The High Court**: When the matter of the ACT's proposed same-sex marriage legislation was before the High Court, the Commonwealth quite explicitly invited the Court to rule on the question of whether the Commonwealth Parliament had power to legislate for same-sex marriage. The unambiguous and unanimous determination of the High Court was that it did. As such there is certainly no case for a referendum to alter the Constitution on this point – unless the question is designed to somehow specifically bar same-sex marriage in the Constitution itself: which of course is what may be in the minds of opponents of marriage quality.

(3) **The 2004 amendments** to the *Marriage Act* which were introduced for cynical political reasons and designed to be both anti-homosexual and discriminatory were passed by the Parliament, with the support of both the Coalition and Labor Parties. Having created this impasse it is up to the Parliament to redress it. It is not up to the people to correct the Parliament's mistake (which in our view the amendments constitute), it is up to Parliament. Having enacted legislation against same-sex marriage without reference to the people it should do the same thing in terms of enacting legislation to permit it. A simple repeal of the offending provisions (section 88EA) would suffice.

(4) **Marriage legislation** itself has always been "beneficial" in terms of extending and improving the right of people to marry divorce and conduct the legal affairs which are entailed in marriage. Starting with the *Marriage (Overseas) Act 1955* and on through the *Matrimonial Causes Act 1959, Marriage Act 1961, Hague Convention and Marriage Amendment Act 1985, Family Law Act 1974* and *Family Law Amendment Act 1983* the Parliament has always moved in a beneficial fashion. At the same time, on every single occasion these pieces of legislation were submitted to a free vote of all members, with Prime Minister Menzies stressing the centrality of this principle. The 2004 Ruddock-Howard amendments supported by the ALP, were the first violation of both of these principles, to which the Parliament should return.

(5) **Expenditure** of in excess of $ 100 million, as noted above, to resolve a matter which Parliament could address without cost is utterly unjustified. At a time when the Commonwealth is seeking to penalise the most vulnerable (eg the *Social Services Legislation Amendment Bill 2015* seeks to remove the paltry pension payments from individuals confined in forensic mental health hospitals who generally have no other source of income and face long periods of detention) there is no justification for such extravagance and waste of public money.

(6) **Unnecessary delay**: Almost all support for a plebiscite has come from sources which have stated their overt opposition to marriage equality. As noted above, the use of a plebiscite or referendum on this question is nothing more than a delaying tactic.

(7) **The "question**" put to the electors, will be meaningless unless it results directly in the introduction of marriage equality – without the need for any further parliamentary action – then no guarantee can be given that a positive outcome of such a process would actually lead to a satisfactory piece of legislation being passed in a timely fashion. Any mendacious Executive Government would be able to find ways to thwart or at the very least weaken and delay the enactment of the people's decision.

(8) **A dangerous precedent**. The argument that marriage quality is somehow so "fundamental", or that the change is so "momentous" as to require an extraordinary process such as a plebiscite is not justified. It should be noted that no such "fundamental" changes have occurred in those many nations where same-sex marriage has been provided for, in some instances over many years.

Let us posit this: the question of euthanasia is infinitely more "fundamental" to the nature of our society than changes in secular marriage legislation. The latter goes to a limited number of personal relationships but the former redefines the whole ethos about life and death/the doctor-patient relationship and the most basic right of any individual – the right to life. When this matter came before the Commonwealth Parliament which was asked to over-turn the law passed in the Northern Territory, there was no thought of referring this matter to "the people" – it was seen as a clear responsibility of the Parliament. [One suspects, of course that another argument for its non-referral was that all opinion polls show a majority of Australians in favour of voluntary euthanasia and the same Parliamentarians who oppose same-sex marriage and want a referendum on this were determined not to allow the will of the public to be given effect on this issue – which they characterised as a "matter of conscience."]

Exactly the same might be said about the issue of abortion – we would assert equally that this is a much more "fundamental" question than same-sex marriage. If so, why is it not to be put to "the people" for their determination? We suspect the answer is exactly the same as it was to the question of euthanasia – the conservative controllers of the parliament could not "trust" the people of Australia to give them the answer they want. [At Appendix B we attach a commentary on the question relevant to both plebiscites and Citizen Initiated Referenda within the context of our current Westminster system of representative democracy.]

(9) **Divisive Debates**: The strength of our representative system of government is that it helps confine major disagreements about issues and policies within the Parliament itself and limits their spread into the wider community. Australia is not a society like the United States wracked by hostile community debate on issues such as gun control, the death penalty or abortion – because the strongly held views of most citizens are worked out, not in the streets but in parliamentary chambers – by their "representatives". No one should be in doubt that the strongly held views on both sides of the marriage equality debate will lead to outbursts of intolerance, nastiness, hatred and insult. This cannot be good for a society which already has enough divisive issues to confront and the idea that this should in fact be facilitated by the Commonwealth Parliament does not appear to us to be an acceptable one.

(10) **Public Respect for Parliament and the Democratic Process**: Quite recently a "National reform Summit" was held in which leaders of the business, unions and welfare communities came together to address the issues of "reform" in Australia.

> Politicians and parliamentarians were not invited to participate as delegates. The reason they are not invited was, in large part, that their hyper-partisanship was identified as part of the national problem not the national solution. Public respect for parliament and the democratic process in Australia is at a low level already: we do not see a case for further reducing this level of respect by telling the people that the Parliament is either unwilling or incapable of dealing with such an issue as marriage quality.

We would make a final point: we do not believe that fundamental issues of human rights should be determined by simple majorities – we remind honourable Senators of the fact that JS Mill (rightly) regarded the "**tyranny of the majority**" as the worst tyrant of all. We have evolved a system of representative government to ensure that this tyranny is mediated by elected representatives who can bring a mature and sober adjudication to such issues.

Neither Magna Carta, nor the *Bill of Rights* nor the *Act of Habeas Corpus*, nor the Acts extending the franchise to women, nor Australia's accession to international human rights instruments are matters subjected to majority determination: they were enacted by Parliaments. Rightfully so.

(e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate

We refer to concerns with various sections of the Bill as follows:

Section 3(2) "majority of electors"

This should read "majority of votes cast in the plebiscite". If a plebiscite is to be held then the outcome should be determined by a majority of those electors casting valid or formal votes. It is possible that a majority of valid votes may not actually be a majority of votes cast (if there is a high informal vote) or a majority of electors (if this is taken to mean those persons whose names appear on the electoral roll.) [eg. If there are 1,000 registered electors, 92% of whom turned out to vote, with 10 voting informally (leaving 828 valid votes) and a result of 415 in favour and 413 against: the question is clearly carried by a majority of 50.1% but that vote is neither a majority of the votes cast on the day nor the "majority of electors" enrolled.]

Of course the whole clause is meaningless if this matter is submitted to a referendum as it fails to satisfy the requirements of section 128 of the Australian Constitution (a majority of votes in a majority of States) which cannot be displaced by any legislative act.

3 (2) (a) "Parliament will pass any legislation…."

This is to all intents and purposes meaningless since it invokes or establishes no recognised mechanism for giving it effect. In the first instance Parliament could in effect just ignore the provisions and there is no means of enforcing the Parliament to act; or the Parliament could

pass an Act to repeal the provisions. No sanctions are provided for non-compliance nor are there any constitutionally available.

The Committee will be aware that on several occasions legislation has been passed by both Houses of Parliament but never proclaimed (in whole or in part) – so even legislated acts of Parliament are subject to being ignored/undermined by the Executive government.

The term "any" legislation is equally meaningless since it implies, for instance, that this could be subject to all sorts of qualifications – for example, that both parties be over the age of 50; that neither having ever been married previously; that both be Australian citizens. Such qualifications would meet the requirement of "marriage between two people regardless of their gender" and would be "any" legislation as envisaged by the terms of the Bill.

Unless a plebiscite determines:

(a) the precise terms and conditions of a marriage between two people of the same sex on a basis equivalent to that of persons of opposite sex as provided for under the *Marriage Act* and
(b) a precise date upon which such legislation comes Into effect without requiring any further activity by the Parliament or the Executive Government,

then such formulas as the one proposed In the Bill are open to subversion and are without meaning.

Section 4: "on the date of the next general election"

If this is to imply that the plebiscite will take place on the day of that election, how does this square with the closing of electoral rolls at a date prior to that election. Will it be possible to enrol on and up until the day of the election?

Section 4: "after this Act commences"

This makes the commencement of the Act dependent upon the whim of the Executive Government which may well simply fail to have the Executive Council advise the Governor General to sign the Bill. To be effective legislation should provide that it commences on a specified date e.g. "x months after the passage of the Bill". Senators will recall that the failure of the Hawke Government's *Australia Card* legislation turned on the failure to provide for a commencement date in the Act itself. A commencement date should be provided in clause 2. Even so this would not necessarily prevent an unscrupulous government from manipulating this provision.

Section 6

We would submit that this is the wrong question.

- There is confusion about the term "gender" being used instead of "sex". While we understand that this may be in order not to discriminate against people who are or identify as transgender (Trans*) it adds confusion to the debate and is generally an unfamiliar term in this context.
- It is unqualified

    - It could be interpreted (and would be by opponents) as referring to "people" who are not adults or otherwise qualified (as per the current provisions of the *Marriage Act*)
    - Similarly it could be interpreted by opponents as allowing marriage between "2 people" who might be otherwise unqualified by reasons of consanguinity (i.e. brothers/sisters)
- It may be seen as undermining current legislative initiatives designed to prohibit arranged/forced/coerced or under-age marriages.

A critical issue for many people who would nominally support marriage equality is that such legislation should provide for protection for people or organisations who have genuine religious or doctrinal objections. Almost all supporters of marriage equality support this proposition which should be reflected in the question.

We would submit that potentially better alternatives would be:

- The question should be for the simple approval/rejection (yes/no vote) of a specific piece of legislation passed by the Parliament which has already dealt with all matters of definition and religious exemptions;

- Be In a form such as:

  Do you approve of the proposed law to amend the Marriage Act 1961 to

  - *Enable all couples to marry by defining marriage as "the union of 2 adults to the exclusion of all others voluntarily entered into for life"; and*

  - *Provide that no minister of religion is required to solemnise a marriage which is contrary to the minister's beliefs or understanding of the doctrines, tenets, beliefs or teachings of the minister's denomination.*

Linking the plebiscite question to the *Marriage Act* would provide an immediate and absolute rebuttal to the kinds of misleading claims referred to above. It would be a simple matter to point out that Part II of the *Marriage Act,* "Marriageable Age and Marriages of Minors" would remain unchanged and continue to apply. Similarly the offences listed in Part VII of the Act would remain unchanged.

Section 8 (1)

This section suggests that section 11 (4) (b) of the *Referendum (Machinery Provisions) Act* will apply to the conduct of this proposed plebiscite. This empowers the Electoral Commission to provide "*other information relating to, or relating to the effect, of the proposed law.*" We submit that this is not the role of the Electoral Commission – it is the role of the proponents/opponents; nor is the Commission likely to be able to produce non-contentious or contested material about matters "relating to the effect of" such changes in legislation, which are, of course highly debatable.

Section 9 – Regulations

This section should specify that any Regulation affecting the operation of this Act must be promulgated no later than three months prior to the date set for the plebiscite (or at least prior to the dissolution of the Parliament) if it is to be held in conjunction with an election. There is a possibility that once the Parliament is dissolved for the election, a Regulation could be promulgated by the Governor General (on the advice of the Executive Council) that would cause the ballot to be conducted unfairly (eg by reducing the number of polling places, by changing the rules for pre- and postal voting etc) and these would not be subject to Parliamentary disallowance as there would be no parliament to so act.

f) Any other related matters.

(1) There is no case for this matter to be subjected to a Referendum.
- It does not require any amendment to the Constitution for necessary legislation to be enacted.
- The Attorney General (Senator Hon George Brandis QC) has effectively nailed the bogus nature of arguments in support of a referendum.[iii]
- There is no need for the "super-majority" which a constitutional referendum requires – namely a majority in a majority of States as this question does not have any impact on the federal balance or the rights of the States, and thus questions of state-based majorities are utterly bogus. We note that supporters of this proposition are in fact quite happy to see the question fail even if it achieves an absolute majority of the people of Australia but is defeated by state-based requirements.

(2) We draw attention to our previous comments about the need for real-time disclosure of campaign donations and our concerns about the possible role of the Electoral Commission under s. 11 (4) (b) of the *Referendum (Machinery Provisions) Act.*

(3) Will free time be provided on television (specifically the ABC) for the opposing interests to state their views? If so, who will appear in such broadcasts, and how might they be chosen?

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2 September 2015

The authors draw attention to their previously published work: ***Marriage Equality for All Australians: Guaranteeing Security and Certainty for Everyone*** (2014) which may be accessed at the Australian Marriage Equality website at australianmarriageequality.org

Attached:

Appendix A: The Referendum and the Australian Constitution

Appendix B: the Plebiscite Alternative: Citizen Initiated Referenda

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[i] See current Intervention of the American Alliance Defending Freedom in proceedings before the Colombian Supreme Court

[ii] "A big decision on a matter such as this, it ought to be owned by the parliament and not by any particular party". Prime Minister Tony Abbott, Question Time House of Representatives, Wednesday 27 May 2015.

[iii] Attorney-General Brandis: Transcript of interview, SkyNews, 16 August 2015

Appendix A

THE REFERENDUM AND THE AUSTRALIAN CONSTITUTION

There has been much discussion about the question of whether the issue of same-sex marriage should be determined, not by parliamentary discussion, debate and decision, but rather by subjection of the question to a popular plebiscite/referendum.

The Australian Constitution provides for a referendum to be used in only the most narrow and specific circumstances, namely for obtaining public approval for changes to the Constitution itself (section 128).

At the various Constitutional Conventions which met to draw up the original constitution there was considerable debate about the use of the referendum for other purposes, specifically for resolving deadlocks between the House of Representatives and the Senate, and for the determination of broader mattes of public policy.

In relation to the "deadlock" provisions, the Conventions eventually determined that the mechanism to resolve them should be through a double dissolution of both houses of the parliament followed by a Joint Sitting of both Houses to repass the blocked legislation (section 57). This position was arrived at after lengthy debate in which both the submission of the contested legislation to a popular referendum and a simple joint sitting of both Houses (the so-called "Norwegian system") were considered and rejected as alternatives.

The Convention debates display an impressive depth of knowledge and understanding of the various constitutions and electoral systems used around the world at the time, with examples from both the United States and Switzerland in particular advanced as alternatives or modifications to the traditional British model.

This was particularly evident in discussions about a more extensive use of referenda for the determination of contentious political questions. Isaac Isaacs was a great proponent of this device and was generally a most persuasive Convention delegate. However in the Melbourne Convention of 1898 he ran up against Bernard Wise, a NSW delegate who, in a lengthy and impressive speech on

10 March 1898 persuaded the Convention to reject completely any wider use of this legislative device.

The arguments used by Wise are utterly resonant today of the objections which proponents of same-sex marriage would advance in relation to any proposed plebiscite. They are worth quoting at considerable length and attaching to his principles of objection.

(a) British parliamentary traditions

"Now we, both by our British descent, and of our own deliberate choice, since we have had free institutions, have been trained in the theory and practice of parliamentary government, which rests upon a system of representation that is altogether incompatible with that of direct legislation which is of the essence of the referendum. To make use of the referendum as we do in the Constitution, for the purpose of determining whether the Constitution shall be accepted or amended, is justifiable upon the simple ground of necessity. There is no other way of ascertaining what the people wish shall be the limits of the representative system. But when once a Constitution has been framed, based on parliamentary government, which is a combination of the systems of Representation and of Ministerial Responsibility, I hope to satisfy the committee that to introduce into this Constitution, in any form, the principle of the referendum, is to introduce a subtle poison, which before long will altogether destroy the vitality of Parliament."

(b) The Swiss model

"Is there any similarity between the circumstances of Switzerland, and the history and the circumstances of Australia? [Wise goes on to discuss the differences of history and especially geography which are relevant here.] The Swiss look upon a Member of Parliament as a mere month-piece of a district, or estate; and have never risen to the higher conception of an independent representative, deliberating and deciding in the general interest on behalf of the country as a whole."

(c) The United States model

"No one has pointed out more clearly ….. that the cause of the popularity of the referendum in the United States is the growing and widespread distrust in the honesty and the capacity of the legislative bodies. It is the most striking development of modern politics in the United States that no one believes in the power of Parliament to accomplish anything good. So strikingly is this spirit manifested that without the committee by giving many instances - in some states, as we know, Parliament is not allowed to assemble more than once in two years; and even then, in order to limit its capacity for mischief as much as possible, it is not allowed to remain in session for a period than six weeks …. I am not speaking at random when I say that it is this feeling of distrust and of dissatisfaction with Parliament that is at the root of the agitation for the referendum."

(d) Australian applicability

"But is this our condition? Do the symptoms of that political disease for which the referendum is demanded as a remedy exist in Australasia? Are our Parliaments debased and venal? Are they corrupted by a moneyed lobby? Do our leaders seek only their own private ends, and have our people lost all control over the Legislature and the Executive? One has only to ask those questions in order to have them answered and it is a matter of just pride that we can put those questions, confident what the answer will be. If then we are not suffering here from any of those diseases in the body politic, which require the desperate remedy that been demanded in the United States, of what avail is it to catalogue to us a long series of case in which the referendum has proved useful in that great community ? There is, again in case of Switzerland, no analogy whatever between the political condition of the United States, with their corrupt Legislature, their lack of responsible government, the absence of Ministers from the legislative body and our Parliaments, which are the healthy representatives of public opinion, controlled by leaders whom the people trust, and who, being in the confidence of the people, are altogether subject to the direction of the people."

(e) Principles of democracy

"But I deny that the principles which justify a wide, or even a universal, suffrage have any application to this question of the referendum. The people are the best of what is good government, because the people are the first to suffer from, and suffer most from, bad government.

In the words of Bagehot ….. to do so would be to submit to the government *"Of immoderate persons far from the scene of action, instead of to the government of moderate persons close to the scene of action*". It is to accept the judgment of "*Persons judging in the last resort, and without a penalty, in lieu of persons judging in fear of dissolution, and fully conscious that they are subject to an appeal*"."

(f) Principles of Parliamentary and Ministerial responsibility in Australia

"If the authority of Parliament is to be maintained, we can only keep it at its present high position by making the authority of Parliament supreme, and its decrees final. If, on the other hand, the people are to act as legislators then the authority of Parliament, and with it the importance of parliamentary discussion, must suffer diminution.

But by every step by which we diminish the importance of Parliament, by so much do we lessen its attractiveness to men of individuality and men of character. I believe there never was a period in our history when men of individuality and men of character were more needed in the councils of the state than they are to-day, when a noisy section of the community--not, I am glad to say, at present a very influential one is preaching as a message of good tidings to the poor and suffering the reduction of every citizen in the community to one dead level of mediocrity and sloth.

How can we expect any Ministry, threatened by parliamentary complications, to avoid the obvious refuge which a measure of this kind offers?

> It is in every way, however we may look at the question, incompatible with the responsibility of Ministers as we understand it to-day --I mean by that that Ministers should insist on carrying the measures they introduce, and when they have carried them through Parliament must accept the responsibility for their proper execution - it is inconsistent with that Ministerial responsibility as we know it to-day, and with parliamentary government as we know it to-day, to introduce in any form or shape into this Constitution the principle of direct legislation by the people."

The principles and arguments which led the Framers of the Australian Constitution to so emphatically reject the widespread use of referenda remain absolutely central to the rejection of a plebiscite as a method of resolving such issues of public policy.

Unless we are to admit that public distrust of parliament, the venality of elected members and the cowardice of ministers has reached the levels so eloquently described by Bernard Wise, it would be wise (no pun intended) to listen to the wisdom of these Ancients.

APPENDIX B

The Plebiscite Alternative : Citizen Initiated Referenda

Citizen Initiated Referenda (CIR) are used in a number of countries and jurisdictions and operate as a form of plebiscite, with the key difference being that they are initiated not by the legislature but by citizens though some form of petition mechanism.

Generally, CIR require that a set number of people (or proportion of the electorate), usually within a prescribed period of time, sign a petition requiring legislative action to be taken on the specific issue or question outlined in the petition.

CIRs may cover a variety of issues, such as:

- Amending the Constitution
- Initiating legislative proposals which may
    - Either require the legislature to consider a matter, or
    - Have direct legislative effect and become law once passed
- Veto legislation already passed
- Provide for the recall of elected representatives.

Unless already specified in the Constitution (as is the case in Switzerland) it is generally up to the legislature to establish the mechanisms by which CIR may be initiated; the number of people required to support; the timeframes within which matters must be determined; the status of the outcome of the result; the matters which might be brought forward for consideration and the majority required to secure passage.

CIRs are a feature of both the Swiss political system (originating in 1874) and are used in 26 of the states of the USA. Since 1970 they have also been used in Italy.

They are generally uncommon in Westminster-style political systems and have been used only twice in the United Kingdom: in 1975 to approve British membership of the European Union and in 2011 when (at the insistence of the then minority coalition party, the Liberal Democrats) an attempt to end the first-past-the-post electoral system was rejected. The current British government has promised a simple "In/Out" referendum on continued membership of the European Union by 2017.

While many people see CIR as strengthening the operations of democracy, there are cogent reasons why this may not necessarily be so.

For example in Switzerland such CIR have been held on questions such as the reorganisation of the sugar industry (1948 – rejected) or attempts to remove public health insurance coverage for abortion procedures (2014 – rejected). However in recent years such CIR have been highly divisive in the Swiss community which in 2014 voted by the narrowest of margins 50.3% to 49.7% (with a margin of 19,000 votes in an electorate of 5.2 million) to impose restrictions on immigration. This led to Switzerland being excluded from a number of European Union programmes. Similarly in 2009 by a vote of 57.5% a ban was placed on the building of new minarets on mosques throughout the country.

CIR have also had extensive use in the United States. In a number of instances, CIR have been used to prevent States imposing or raising taxes, often with significant consequences for the management of state budgets.

The potential misuse of such initiatives has been summarised by one commentator:

> *"There is no big secret to the formula for manipulating California's initiative process. Find a billionaire benefactor with the ideological motivation or crass self-interest to spend the $1-million plus to get something on the ballot with mercenary signature gatherers. Stretch as far as required to link it to the issue of the ages (this is for the children, Prop. 3) or the cause of the day (this is about energy independence and renewable resources, Props. 7 and 10). If it's a tough sell on the facts, give it a sympathetic face and name such as "Marsy's Law" (Prop. 9, victims' rights and parole) or "Sarah's Law" (Prop. 4, parental notification on abortion). Prepare to spend a bundle on soft-focus television advertising and hope voters don't notice the fine print or the independent analyses of good-government groups or newspaper editorial boards...Today, the initiative process is no longer the antidote to special interests and the moneyed class; it is their vehicle of choice to attempt to get their way without having to endure the scrutiny and compromise of the legislative process."*

Similarly, state legislatures might not always respect the result of such initiatives. In some cases, voters have passed initiatives that were subsequently repealed or drastically changed by the

legislature. Legislation passed by the voters as an Arizonan medical cannabis initiative was subsequently gutted by the Arizona legislature. A number of states have made changes to their constitutions to prevent the legislature from arbitrarily ignoring voter decisions. For example, Colorado requires a two-thirds vote for the legislature to change statutes passed by the voters through initiatives, until five years after such passage. On the other hand it is worth noting that in a number of cases citizen initiated referenda have been used to take the corrupt process of "redistricting" (redrawing of electoral boundaries) out of the hands of self-interested legislators and place it in the hands of independent panels or citizen councils. Such efforts have often been fiercely resisted by the legislatures so brought to account.

Same-sex marriage in the United States has been subject to endless citizen initiated attempts to prevent. Thirty states passed referenda to prohibit same-sex marriage. All were subsequently ruled to be unconstitutional. One attempted ban was defeated by the electorate (Minnesota) and in two states same-sex marriage was supported by such initiatives (Hawaii, Maine).

Citizen initiated referenda have been debated in the Australian context since at least the early days of the federation movement. The 1891 Draft Constitution Bill promoted by Charles Kingston drew on the Swiss model and provided that:

> *"No Bill passed by the federal Parliament could be assented to until after a referendum, if that were demanded within three months by one-third of the members of either House, or Resolutions of both Houses of any of the local legislatures, or 20,000 qualified electors. Assent should be given or withheld according to the results of the referendum, determined by a simple majority of voters."*

Although Kingston's draft did not make it through to the final Constitution it is interesting to note that he proposed that if there were a referendum, the Parliament would be bound to honour its outcome – something not otherwise always guaranteed.

Citizen initiated referenda (referred to locally as elector initiatives) were adopted into the Australian Labor Party's Platform in 1908 and extended to provide for voter recall of elected representatives in 1912. Both were removed as policy from the Platform in 1963.

There were several debates on CIR in the federal parliament in the 1980-1987 period being brought forward by the Australian Democrats. The most extensive debate occurred in 1988 on Senator Michael Macklin's (Australian Democrats) *Constitutional Alteration (Electors' Initiative) Bill 1987*.

Opposition to the Macklin Bill was led by then Opposition Front-bencher Senator Chris Puplick. Apart from dealing with the technicalities of the legislation, Senator Puplick made three major points in opposition:

(a) Compatibility with the Westminster Model

> *"The first and obviously the most crucial question to analyse is whether citizen initiated referenda, or electors' initiatives, are entirely compatible with the system of representative*

democracy which is practised in Westminster-style parliament. This is not, never has pretended to be and never was intended to be a direct legislative chamber; it was intended to be a representative legislative chamber in which members and senators are preselected by the parties, in the first instance, and then elected by the people to represent them and to bring to bear their own mature judgment in decisions on laws and proposed laws."

(b) Manipulation of the Process

"The second point at issue which needs to be addressed and thought about carefully is whether the citizens' initiated referenda proposal empowers citizens or simply empowers the organised and the privileged. In other words, does it make it easier for those who are powerful and organised to have access to political machines, to have access to substantial financial resources to assemble machines for political purposes to be the primary beneficiaries of such a system? Is this device one that will not primarily empower citizens but will empower lobby groups, the rich, the powerful and the organised?"

(c) Continual political and social divisions on sensitive issues

"I believe that those who are fundamental proponents of citizen-initiated referenda have to turn their minds to the matter of whether the constant and permanent polarisation of the electorate over questions, many of which people would prefer not to have to face up to personally but would properly prefer to have debated and decided by their political representatives, is an issue which is worth addressing.

As I have said, the Bill in itself is open-ended as to the issues about which referenda may be called. I have already mentioned the death penalty, control of IVF, abortion and Aboriginal land rights. It may be uranium mining, it may be conscription, it may be the use of the external affairs power of the Constitution in relation to local land use questions, it may be the control of animals in experiments, it may be whether i should quarantine people who are found to be antibody positive to acquired immune deficiency syndrome, it may be the divisive issue of immigration policy, and it may be a whole range of moral or economic issues, the debate about which, in terms of Senator Macklin's Bill, may well be retarded rather than advanced as part of the political debate."

As a consequence Senator Puplick moved an amendment to the motion for the Second Reading of the Bill:

> *"while declining to give this Bill a second reading, the Senate is of the opinion that the concept which would enable citizens to have a direct opportunity to participate in the initiation of legislation for the peace, order and good government of Australia is worthy of careful and detailed consideration by both the people and the Parliament, and in recognition of the significance of the concept for our system of democracy is also of the opinion that to unreasonably pre-empt such consideration may jeopardise the right of the people to make an informed decision on the most appropriate mechanism for achieving the concept and, accordingly, the Bill should not be proceeded with at this time."*

This amendment was passed by 55 votes to 6.

From 1989 to 1993 the Australian Democrats continued to introduce similar legislation, although none of these Bills proceeded to debate or decision.

Around the same time, on 5 April 1988, Shadow Attorney-General, Mr Peter Reith, issued a Green Paper on voter initiated laws. This called for extensive public debate on such a proposal but in the event nothing came of it, although Mr Reith continued to promote the idea after he left the Parliament.

There have also been further considerations given to this proposition by the Australasian Study of Parliament Group and the Constitutional Reform Unit of the Sydney Law School.

The issue of CIR resurfaced in a parliamentary sense in 2013 when (then) Democratic Labor Party Senator John Madigan introduced his *Citizen Initiated Referenda Bill 2013.* In the *Explanatory Memorandum* he drew on the example of Charles Kingston:

> *"The cores of the Democratic principle are that it is each citizen's right (and duty) to participate in the political system and each citizen's right to be heard. This Bill takes a small, long overdue, step along that path. The concept of citizens being able to initiate a referendum has been contemplated for many decades, including prior to Australia's Federation in 1901. Charles Cameron Kingston (1850-1908), who was born in South Australia, was a lawyer and colonial politician and described as "a radical democrat and a man committed to the federation of the colonies". He took the idea of citizen initiated referendum to the first constitutional convention in Sydney which was held in March/April of 1891.*
>
> *The likes of Kingston have promoted citizen initiated referendums, not to take away from the strong, robust democracy i have today, but rather, to add to it. Democracy is a system which allows the people to have an equal and fair say in the governing of their society. This is a definition with great breadth and depth and allows for many layers of accessibility and transparency to be included in the overall structure of what makes our political system precious. This Bill leads the challenge in contemporary Australia to advance the Australian democratic system and will empower the people to construct a more vibrant, transparent and accountable democratic Australia."*

Senator Madigan's Bill remains on the Senate Notice Paper but is unlikely to ever be brought forward for debate.

The Citizen Initiated Referenda, like the plebiscite, has been a device rarely used in Australia – and for good reason. It is not compatible with our Westminster-style polity which is based upon having a representative parliament and it is not an appropriate way, in particular to determine matters of fundamental human rights. It has the potential to be the ultimate weapon for the imposition of that "tyranny of the majority" against which John Stuart Mill argued so cogently and which has been a hallmark of genuine liberalism ever since.

Footnotes for both Appendices are available on request.