

# YOU'RE THE VOICE – TRY AND UNDERSTAND IT: SOME PRACTICAL PROBLEMS OF THE CITIZENS INITIATED REFERENDA ACT

*Ben Goschik\**

---

*This paper examines the New Zealand's Citizens Initiated Referenda Act 1993. The first part of the paper examines the democratic nature of the 'direct democracy' of citizens initiated referenda. The second part of the paper tackles certain of the practical concerns that flow from the legislation and the process that the legislation requires. In particular, the paper considers the uneasy relationship between the Clerk of the House and the role that the Clerk plays in determining the referendum question. Then, the paper examines problems concerning the referendum question itself, considering the limitation of only allowing a 'yes' or 'no' answer, as well as questions that 'demand' one answer over the other or raise more than one issue. The author argues that there is a real concern surrounding the ability of citizens initiated referenda to improve the democratic process through involving people in the legislative process.*

---

## **I INTRODUCTION**

New Zealand is unique. Surely many reasons are conceivable to support this flattering appraisal. However, the introductory statement relates in this context to a comparatively new feature of New Zealand's political system, the Citizens Initiated Referenda Act 1993 (CIR Act). Its long title divulges that this Act:<sup>1</sup>

provide[s] for the holding, on specific questions, of citizens initiated referenda, the results of which referenda will indicate the views held by the people of New Zealand on specific questions but will not be binding on the New Zealand Government.

Many countries in the world have experience with direct democracy. Indeed, since 1945, the only democracies that have not held a national vote on a specific issue are Costa Rica, Germany,

---

\* Submitted in partial completion of the LLB(Hons) degree at Victoria University of Wellington.

1 Citizens Initiated Referenda Act 1993, Long Title.

India, Israel, Japan, the Netherlands, Mexico and the United States.<sup>2</sup> However, where other governments are required to act on the wishes of their voters, New Zealand is unique in having *non-binding* citizens-initiated referendums (CIRs).<sup>3</sup>

This paper<sup>4</sup> has two parts. In Part One, CIRs will be examined from a theoretical perspective. It will be shown how CIRs fit into the context of democracy as such, how this system developed in New Zealand and how it works. Part Two then provides an analysis of the practical difficulties resulting from the introduction of the CIR Act, such as the role of the Clerk of the House, the inherent problems of referendum questions and subject-matter restrictions.

## **II REFERENCE AND DEMOCRACY**

### **A Democracy**

CIRs are a form of direct democracy. Direct democracy, in turn, is a form of democracy. This causal chain, which will be elaborated on in the following chapters, demonstrates the close link between an analysis of the CIR Act and the debate about democracy in general. Therefore, in order to understand the issues, it is important to have an overview of what democracy actually is and of its major forms and functions.

The term democracy is derived from Greek ("demos" means people and "kratos" means rule, authority or power) and translates as the "power of the people". It is a form of government in which the people are sovereign. A rather simple definition, declared by Abraham Lincoln, describes democracy as "government of the people, by the people and for the people".<sup>5</sup> A more elaborate description may be that "in a democracy important public decisions on questions of law and policy depend, directly or indirectly, upon public opinion formally expressed by citizens of the community, the vast bulk of whom have equal political rights".<sup>6</sup> In general terms, a democracy is a form of

---

2 Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 57.

3 The plural of the term referendum proves to be contentious among the scholars. Some use the latin version "referenda" (including the CIR Act itself) and some employ the anglo-saxon version "referenda". In this paper, the term "referenda" has been used, as it is arguably common parlance and etymologically more respectable; see David Butler and Austin Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research Press, Washington DC, 1978) 4-5; Jack H Nagel *Participation* (Prentice-Hall, Englewood Cliffs (NJ), 1987) 90.

4 This article is part of my paper on CIRs, which was written in partial fulfilment of the requirements of a Master of Laws at Victoria University of Wellington.

5 Cited in Catt, above, 4; Arend Lijphard *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999) 1.

6 Albert Weale *Democracy* (St Martin's Press, New York, 1999) 14.

government in which the people have the right to control their own destiny. They have the "ultimate authority"<sup>7</sup> and the right to make or at least influence decisions that affect their everyday lives.

Democracy had its beginnings in certain of the city-states of ancient Greece. Greek democracy, however, was a brief historical episode, followed by a gap of 2,000 years in its practice.<sup>8</sup> There was a time, less than a century ago, when "democrat" was a term of abuse. Today its connotations are honorable, as democracy is now widely seen as the best method to use for government.<sup>9</sup>

Democracy has different manifestations, depending upon the ways in which people can exercise and indeed influence the government. Across every continent democracy is desired, but there is little agreement on exactly how to achieve it. Each country has its own set of procedures, each claiming to be democratic but based on a distinctive attitude towards how to achieve democracy.<sup>10</sup> New Zealand implemented CIRs in 1993. The speeches in Parliament during the introduction of the Bill revealed that this happened with the intention to improve democracy.<sup>11</sup> Thus, there is a variety of forms and modifications that democratic governments can take. The major categorisations will be outlined in the following.

Arend Lijphard divided democracy into majoritarian and consensual forms, examined from the perspective of how decisions in a democracy are *evaluated*. Whereas in a majoritarian system achieving a majority of the people's votes is the decisive factor, in a consensual system the aim is consensus or as many people as possible. The latter system accepts majority rule only as a minimum requirement, but seeks to maximise the size of these majorities.<sup>12</sup> However, since unanimity among human beings about matters of great and topical concern is impossible, the majority principle, insofar as it truly respects the existence of human rights, is the only one that makes democracy a viable system.<sup>13</sup>

Most commonly, democracy is classified according to how and by who decisions are *made*. One can distinguish between direct and indirect democracies. In direct democracy, political decisions are

---

7 *The Encyclopedia Americana* (International ed, Grolier, Danbury (Conn), 1985) vol 8, 684.

8 *The New Encyclopaedia Britannica* (15 ed, Encyclopaedia Britannica, Chicago, 1988) vol 4, 5.

9 Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 4; *The Encyclopedia Americana*, above, 684.

10 Catt, above, 4.

11 Hon Douglas A M Graham, Minister of Justice (10 March 1992) 522 NZPD 6724; Christine Fletcher (10 March 1992) 522 NZPD 6713; Hon Murray McCully (10 March 1992) 522 NZPD 6709.

12 Arend Lijphard *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999) 2.

13 *The Encyclopedia Americana* (International ed, Grolier, Danbury (Conn), 1985) vol 8, 685.

exercised directly by the whole body of citizens who thus choose the content of public policy.<sup>14</sup> Mostly, the citizens decide on specific questions that are posed for them in a referendum. Participatory democracy is a form of direct democracy where the people rule by collectively discussing issues and agreeing on the best solution for the group.<sup>15</sup> This form of democracy was applied in the ancient city-states of Greece in which the whole body formed the legislature, a system only made possible by the small populations of these states.<sup>16</sup> The counterpart to direct democracy is indirect democracy or representative democracy, a form of democracy, in which a few are elected to make decisions for the group. The use of elected representatives instead of having all people meeting together can be attributed to the reality of large populations.<sup>17</sup> To ensure leadership accountability, it is essential to provide both a free and fair electoral system and a wide range of checks and balances by means of a framework of constitutional restraints designed to guarantee all citizens the enjoyment of certain individual or collective rights.<sup>18</sup> This variation of representative democracy is often called liberal or constitutional democracy.<sup>19</sup>

### **B Direct Democracy**

As discussed above, the major forms of democracy are representative and direct democracy. However, there are also distinctions within the direct democracy category. As its long title states, the CIR Act allows citizens to answer specific questions to indicate their view. The referendums held under this Act are thus a means of direct democracy.

Direct democracy in contrast to representative democracy seems to be the only term that is agreed upon in the literature. The classification of the different forms of direct democracy and especially its marking is widely divergent.<sup>20</sup> Walker, for example, states that "the main line of classification is between the initiative on the one hand and the referendum on the other" and goes on

---

14 Albert Weale *Democracy* (St. Martin's Press, New York, 1999) 24.

15 Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 13: Catt, however, puts participatory democracy in a category of its own.

16 *The New Encyclopaedia Britannica* (15 ed, Encyclopaedia Britannica, Chicago, 1988) vol 4, 5.

17 Catt, above, 14.

18 Robert A Dahl *On Democracy* (Yale University Press, New Haven, 1998) 14; *The New Encyclopaedia Britannica*, above, 5.

19 *The New Encyclopaedia Britannica*, above, 5; Catt, above, 13.

20 See Catt, above, 57: "The literature varies in the use of specific terms ..."; Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 12: "Many writers use these definitions very loosely ... ." and "Confusion can be exacerbated by the incorporation of the various sub-categories of Initiatives and Referenda ..."; Jack H Nagel *Participation* (Prentice-Hall, Englewood Cliffs (NJ), 1987) 90-3.

to add that "the initiative itself obviously involves the holding of a referendum".<sup>21</sup> Some of this uncertainty is also country-related, as the Swiss "facultative", for instance, is the same as the United States "referendum".<sup>22</sup> The literature also often uses "initiative and referendum" in a seemingly tautological way.<sup>23</sup> However, whereas "direct democracy" is a term to distinguish direct from representative democracy, the expression "referendum" can be used as a generic term for the technical or procedural mechanism that allows voters to decide directly on an issue. A referendum can therefore be regarded as the practical instrument of direct democracy and occurs itself in various manifestations.

The following chapter briefly considers the arguments for and against direct democracy and describes the diverse forms of referendums, both in general and regarding the experience with different forms of referendums in New Zealand.

### 1 Arguments for and against direct democracy

Arguments against and in favour of the two kinds of democracy exist in profusion. Some of the most important arguments will be outlined briefly.

Among arguments in favour of direct democracy, legitimacy arguments loom large.<sup>24</sup> It is contended that direct democracy increases the legitimacy of the legal and/or political system, because laws instituted as a result of referendums are more clearly and directly derived from the popular expression of the people's will.<sup>25</sup> The best way to ensure that government reigns on behalf of a sovereign people, it is argued, is to allow the majority of the people to make their own decisions on particular topics.<sup>26</sup> This, in turn, will promote government responsiveness and accountability, as

---

21 Geoffrey de Q Walker *Initiative and Referendum: The People's Law* (Centre for Independent Studies Press, St. Leonards (NSW) 1987) 11; Lijphard places Referendums and Initiatives in the same category whereas Butler and Ranney distinguish between Initiative and Referendums: David Butler and Austin Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research Press, Washington DC, 1978) 6; Arend Lijphard *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984) 199; see also Laxton-Blinkhorn, above, 11.

22 See Catt, above, 57-8 (Table 4.2).

23 Walker, above, 10; Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 168; see also Laxton-Blinkhorn, above, 12: "Referenda and Initiatives are often spoken about in the same breath ...".

24 John Parkinson "Who Knows Best: the Creation of the Citizens-Initiated Referendum in New Zealand" (2001) 36 *Government and Opposition* 403; also available at <<http://socpol.anu.edu.au/~parkinson/nzcir.pdf>> (last accessed 17 January 2003).

25 Walker, above, 50.

26 Royal Commission on the Electoral System, above, 172.

officials cannot ignore the voter's voice with impunity.<sup>27</sup> By allowing for greater participation, it is believed that voter apathy and alienation can be overcome, thereby bringing the government closer to the people.<sup>28</sup> Furthermore, people can place subjects on the political agenda that are, in their opinion, not adequately discussed.<sup>29</sup> Among some advocates arguments against direct democracy are claimed as arguments against democracy itself. Accordingly, Bogdanor states that "in the last resort, the arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but a logical consequence of accepting a democratic form of government".<sup>30</sup> Budge indirectly queries the system of representative democracy by questioning why ordinary people should be allowed to choose governments by means of regular elections, if one does not grant them the capability to make important direct decisions on particular issues.<sup>31</sup>

However, for every claim put forward on behalf of direct democracy, there is an equally powerful criticism. It is argued that referendums as the means of direct democracy could undermine the effectiveness of an elected government, because popular decisions lessen the responsibility of its members.<sup>32</sup> Moreover, referendums as a majoritarian instrument are believed to jeopardise minority rights if majorities at the ballot box are less sensitive than elected representatives to the rights of minorities.<sup>33</sup> The pivotal reasoning is the reputed lack of competence or even indifference among the voters to decide on complex policy and constitutional questions.<sup>34</sup> This last argument is closely connected with genuine practical difficulties such as how to frame the question, the provision of information or a low voter turnout. The main emphasis of this paper is to examine these practical problems on the basis of the CIR Act in New Zealand.

---

27 Thomas E Cronin *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Harvard University Press, Cambridge (Mass), 1989) 10.

28 Cronin, above, 11.

29 Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 10.

30 Vernon Bogdanor *The People and the Party System: the Referendum and Electoral Reform in British Politics* (Cambridge University Press, New York, 1981) 93.

31 Ian Budge *The New Challenge of Direct Democracy* (Polity Press, Cambridge, 1996) 2-3.

32 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 173; Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 364, 367.

33 Thomas E Cronin *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Harvard University Press, Cambridge (Mass), 1989) 212.

34 Geoffrey de Q Walker *Initiative and Referendum: The People's Law* (Centre for Independent Studies Press, St. Leonards (NSW), 1987) 68.

## 2 *Different forms of referendums*

In this paper on CIRs, referendums are categorised according to the triggering momentum.<sup>35</sup> That being the case, one can distinguish between constitutional referendums (if a constitutional provision is the causal factor), government-initiated referendums (if the government is the driving force which puts an issue to the voters) and citizens-initiated referendums (if the populace gives the impetus).<sup>36</sup>

If the constitution requires that any intended change to the constitution be approved by referendum, one speaks of a constitutional referendum. Parliament may enact a standing provision that certain constitutional amendments are to be enacted only if they are supported by a majority of voters in a referendum. The democratic case for such a requirement rests on the argument that the sovereign people should be entitled to decide on their own fundamental set of values.<sup>37</sup> The New Zealand legal and political system, however, operates on the basis that Parliament has supreme lawmaking powers that cannot be challenged. Furthermore, New Zealand's constitutional arrangements are not found in a single written document, known as a constitution. These fundamental features of the constitutional system make constitutional referendums rather difficult. A constitutional referendum which enacts a constitution is an exercise of popular sovereignty and contradicts therefore with the notion of parliamentary sovereignty that prevails in New Zealand.<sup>38</sup> An unwritten or not fully entrenched constitution, moreover, is readily susceptible to hastily change, instigated by popular vote.

Furthermore, the lack of a constitution poses the problem that New Zealand courts do not have the power to declare unconstitutional referendum results null and void. A Constitution, however, could confer this power on the courts, as happened in California.<sup>39</sup> At least regarding binding constitutional referendums scholars therefore consider it "essential to ensure that there are appropriate constitutional safeguards".<sup>40</sup>

---

35 See Paul Harris "Democracy and Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 47, 48-62; McLean, above, 364-5.

36 Sometimes constitutional referendums are incorporated into government-initiated referendums: see McLean, above, 364-5.

37 Harris, above, 49.

38 Frederic M Brookfield "Referendums: Legal and Constitutional Aspects" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 7, 20; Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 36.

39 Hon Douglas A M Graham (14 September 1993) 538 NZPD 17952.

40 John H Wallace "Commentary on 'Referendums: Legal and Constitutional Aspects' " in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 26, 28-30.

With the introduction of the Electoral Act 1956 and its successor, the Electoral Act 1993, New Zealand's constitution was provided with a standing statutory provision for constitutional referendums.<sup>41</sup> Under section 268 of the Electoral Act, certain sections of the Electoral Act and the Constitution Act 1986 are singly entrenched, which means that these provisions can only be amended or repealed unless it is passed by a majority of 75 per cent of all the members of the House of Representatives or has been carried by a majority of the valid votes cast at a referendum.<sup>42</sup> The 1990 referendum on the parliamentary term was based on these provisions.<sup>43</sup>

Issues that have been put to the voters by government are termed government-initiated referendums. The outcome of referendums that have been sponsored by government can be either legally binding or non-binding.<sup>44</sup> The government of New Zealand has always been capable of referring particular issues to the electorate and over the years it has occasionally done so to test public opinion. Apart from the liquor licensing polls and the referendum on the electoral system in 1993, however, these referendums were indicative only. Before a government-initiated referendum can be held, the government must pass special legislation to authorise the holding of a referendum, including the particular question to be asked.<sup>45</sup> The subjects of the government-sponsored referendums that have so far been held have been constitutional issues and contentious moral issues, such as liquor licensing or gambling.

The third form of referendums is citizens-initiated referendums. In general terms, this process allows electors to propose and then vote on their own legislation. CIRs can occur in various forms which enable electors to:

- directly approve or reject particular laws that have passed through Parliament but have not yet taken effect,

---

41 Brookfield, above, 13-6.

42 Electoral Act 1993, s 268(2)(a) and (b); Section 268, however, is not itself entrenched (no double entrenchment) and can therefore be amended or repealed by single majority of the Members of Parliament.

43 Electoral Act 1956, s 189(1)(a) in connection with Constitution Act 1986, s 17(1); see Paul Harris "Democracy and Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 47, 50; Helena Catt, Paul Harris and Nigel S Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992) 131-2.

44 Mark W Gobbi "We, the Sovereign: Clarifying the Call for Direct Democracy in New Zealand" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 156, 159.

45 Paul Harris "Democracy and Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 47, 57; Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 386, 387.



- to petition for a referendum which is not binding on the government,
- to compel the repeal or enactment of a law; or
- to recall public officials and elected representatives.

Since the introduction of the CIR Act, New Zealand has also experience with this third category of referendums, which will be discussed in the following.

### **C Conclusion**

Arend Lijphard asserted that there are many ways of successfully running a democracy, but although the principles are clear, the details remain to be filled in.<sup>46</sup> The New Zealand Government decided in 1993 that CIRs are such a detail, accompanied by the hope to improve and strengthen the democratic system. In theory, CIRs are certainly a means to achieve this aim. However, if they are also a feasible objective will be analysed in the chapter on practical problems of the CIR Act.

### **III HISTORICAL BACKGROUND**

Since 1840, New Zealanders have repeatedly restructured their governmental system in various forms,<sup>47</sup> including the inauguration of referendums. Hundreds of local referendums,<sup>48</sup> 31 triennial liquor licensing polls and nine government-initiated referendums on both moral and constitutional issues<sup>49</sup> have been held since. New Zealanders, therefore, were not completely unprepared for having their say before the introduction of the CIR Act.

In 1893, a Referendum Bill was first introduced to Parliament. Although this Bill only provided for non-binding government-controlled referendums, it involved the country in a similar debate about whether direct democracy should be part of the established constitutional framework as in California and Switzerland at the same time.<sup>50</sup> The Referendum Bill was reintroduced several times in modified versions and the parliamentary debate simmered for a few years until it eventually

---

46 Arend Lijphard *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984) 4.

47 Mark W Gobbi "We, The Sovereign: Clarifying the Call for Direct Democracy in New Zealand" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 156.

48 Gilbert Antony Wood *Governing New Zealand* (Longman Paul, Auckland, 1988) 130.

49 See Benjamin Goschzik *You're the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act* (LLM Research Paper, Victoria University of Wellington, 2002) 50 (Appendix I); Colin James and Alan McRobie *Turning Point: The 1993 Election and Beyond* (Bridget Williams Books, Wellington, 1993).

50 Mark W Gobbi *The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 200.

petered out in 1906.<sup>51</sup> Eventually, in 1984, the direct democracy debate resurfaced when the Democrats introduced the Popular Initiatives Bill, which would have enabled a 100,000 electors to trigger a non-binding referendum.<sup>52</sup> The Bill was deferred pending the findings of the Royal Commission on the Electoral System, which was established by the Labour Government in 1985. The Royal Commission did not conclude in favour of referendums, called them "blunt and crude devices"<sup>53</sup> and recommended that legislation allowing the public to initiate referendums not be enacted.<sup>54</sup> However, the political discourse on direct democracy was back on the political agenda and, supported by various interest groups,<sup>55</sup> the National Party included a promise to introduce non-binding direct democracy legislation in its 1990 election manifesto.<sup>56</sup> The National Party won the 1990 general election and the legislative process was instigated immediately. However, it took another two years until the Citizens Initiated Referenda Bill was eventually introduced to Parliament. The CIR Act came into force on 1 February 1994 after several controversial readings in Parliament.

It is arguable that the introduction of the CIR Act resulted from partisan-driven factors rather than from pure enthusiasm for direct democracy.<sup>57</sup> A political minority prevailed, supported by various populist interest groups and buoyed by a deep feeling of dissatisfaction with the political system among the populace. On the whole, New Zealand politics has actually been characterised by a high degree of popular responsiveness through the party system, frequent elections with high participation rates and other factors.<sup>58</sup> However, a number of ill-fated policies led to an opposite

- 
- 51 Gobbi, above, 202 with further evidence; Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 13.
- 52 Gobbi, above, 206-7; Hon Douglas A M Graham, Minister of Justice (14 September 1993) 538 NZPD 17953.
- 53 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 175.
- 54 Royal Commission on the Electoral System, above, 176.
- 55 See for details Gobbi, above, 212-20.
- 56 Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 VUWLR 273, 275; Helena Catt "The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum" (1996) 48 Political Science 29, 30.
- 57 Stephen Church "Crime and Punishment: The Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament" in Jonathan Boston and others (eds) *Left Turn: The New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000) 186; John Parkinson "Who Knows Best: the Creation of the Citizens-Initiated Referendum in New Zealand" (2001) 36 Government and Opposition 403; also available at <<http://socpol.anu.edu.au/~parkinson/nzcir.pdf>> (last accessed 17 January 2003) 8.
- 58 Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 365.

perception and public confidence in elected representatives sank to an all-time low.<sup>59</sup> Furthermore, the public perception of politics was clouded by the swirl of electoral reform that coincided with the passage of the CIR Act.<sup>60</sup> Consequently, the CIR Act came into force almost unnoticed by media and population.<sup>61</sup>

#### **IV THE PROCESS OF CIRS**

Most secondary literature describes the process of CIRS in five different phases: the starting, the question, the signature collection, the checking of signatures and the actual referendum.<sup>62</sup> This five-stage-model will be outlined very briefly in the following.

To start the process, the petitioner, either a natural person or a legal person, has to submit a written proposal asking an indicative referendum to be held to the Clerk of the House of Representatives.<sup>63</sup> Every referendum petition has to contain the suggested wording and shall specify the question that the petitioners propose be put to the voters.<sup>64</sup> The determination of the referendum question is crucial for the whole procedure and is probably the most important aspect of the entire Act.<sup>65</sup> The Act merely states that there can only be one question<sup>66</sup> and this shall be such as to convey clearly the purpose and effect of the indicative referendum and to ensure that only one of two answers may be given to the question,<sup>67</sup> that is to say it allows for only a "yes" or "no" answer. The Clerk has to determine the final question within three months of receipt of the petition.<sup>68</sup> To achieve this aim, the Clerk must consult with the proposer and may consult with any other person or

---

59 By October 1990, only 4.3 per cent of voters had confidence in the New Zealand Parliament; Heylen "Full Trust and Confidence" Polls quoted in Keith Jackson "Commentary on "Referendums: Legal and Constitutional Aspect of Parliamentary Sovereignty" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Department of Politics, Victoria University of Wellington, 1992) 33, 39.

60 See Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44.

61 Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 17.

62 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 186-7; David McGee *Parliamentary Practice in New Zealand* (2 ed, Government Printer, Wellington, 1994) 447-51; see for an illustrative diagram on the referendum process Ministry of Justice *Pamphlet on the Citizens Initiated Referenda Act 1993* (Ministry of Justice, Wellington, 2001) <[http://www.justice.govt.nz/pubs/other/pamphlets/2001/citizens\\_referenda.pdf](http://www.justice.govt.nz/pubs/other/pamphlets/2001/citizens_referenda.pdf)> (last accessed 17 January 2003).

63 Citizens Initiated Referenda Act, s 6(1).

64 Citizens Initiated Referenda Act, ss 5 and 6.

65 Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44.

66 Citizens Initiated Referenda Act, s 5(2).

67 Citizens Initiated Referenda Act, s 10(1)(a), (b).

68 Citizens Initiated Referenda Act, s 11(2).

institution as the Clerk thinks fit.<sup>69</sup> In the following, the promoter has twelve months to collect the signatures of ten per cent of eligible voters<sup>70</sup> (which in 2002 meant 256,779 people).<sup>71</sup> It is then the duty of the Clerk of the House to ascertain whether the returned petition carries the required number of signatures or not. The Clerk has two months from the date of receiving the signatures to fulfill this task.<sup>72</sup> If the required number of electors have signed the signature forms, the actual referendum has to be held within twelve months.<sup>73</sup>

## V PRACTICAL PROBLEMS

The Royal Commission on the Electoral System stated in their report from 1986 that "referenda can also have significant practical difficulties, which diminish their usefulness as a method of deciding important and complex questions of law and policy".<sup>74</sup> The following chapter is concerned with an examination of some of these practical problems.

### A The Role of the Clerk of the House

Caroline Morris observed that "the success or otherwise of Parliament's goal of increasing citizens' opportunities for democracy rests heavily on the person responsible for the determination" of the referendum question.<sup>75</sup> The person responsible for that task under the CIR Act is the Clerk of the House of Representatives.<sup>76</sup> The introduction of the CIR Bill was accompanied by a contentious debate about whether the Clerk is suitable to perform this task.

Robert Anderson, National MP said during the second reading of the CIR Bill regarding the issue of the role of the Clerk that "no doubt we will hear further debate on that matter at another time".<sup>77</sup> So far no such debate has been held. Does that imply that the determination procedure and the involvement of the Clerk proved to work satisfactorily? I argue that that is by no means the case. The practice of the subsequent years rather revealed several difficulties resulting from the Clerk's

---

69 Citizens Initiated Referenda Act, s 9.

70 Citizens Initiated Referenda Act, s 18(2).

71 Elections New Zealand "Useful Election Statistics" <<http://www.elections.govt.nz/votin/mresources-stats.html>> (last accessed 17 January 2003).

72 Citizens Initiated Referenda Act, s 18(1).

73 Citizens Initiated Referenda Act, s 22(3).

74 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 175.

75 Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44; see also Paul Harris "Democracy and Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 61.

76 Citizens Initiated Referenda Act, s 11.

77 Robert Anderson (14 September 1993) 538 NZPD 17957.

engagement with the determination procedure. The following chapter outlines the reservations against the Clerk's involvement during the Parliamentary debate, notes the problems as laid bare through practice, compares the system with that in other countries and analyses alternatives.

*1 The role of the Clerk: the legislative debate*

The introduction of CIRs was called for in the National Party's election manifesto in 1990. The preceding deliberations of National's Caucus Committee concluded with the final recommendation to establish a Commission consisting of a High Court Judge and the Clerk of the House to administer the referendum petitions.<sup>78</sup> Shortly after National won the election in 1990, the new Minister of Justice Douglas Graham provided the Department of Justice with details regarding the intended CIR Bill. However, the Department rejected the National Caucus Committee's idea regarding the involvement of a High Court Judge in the Commission. The Department of Justice took the view that High Court Judges do not normally perform advisory and clerical functions and they they had neither the facilities nor the time to accomplish that task.<sup>79</sup> The Minister of Justice agreed with the Department's recommendations and the originally proposed Commission dwindled quietly to only one person, the Clerk of the House. The Clerk, however, strongly disapproved of his involvement in the CIR process. His disquiet surfaced for the first time during the meeting of the Cabinet Legislation Committee on 5 December 1991, in which the Clerk argued that the House, not the Clerk, should determine the wording of referendum questions.<sup>80</sup> As a result of the Clerk's objections, the Minister of Justice asked him to present his concerns to the Electoral Law Select Committee.

In the meantime, the CIR Bill was introduced to Parliament. In the first reading, the Labour Opposition took up the issue of whether or not the Clerk of the House was the most suitable person to determine the wording of referendums questions, which "emerged as the most contentious issue of the Bill".<sup>81</sup> Several speakers referred to the inevitable politicisation of the Clerk and expressed their concern that the Clerk would be somewhat overtaxed by the additional "raft of obligations".<sup>82</sup>

In the following Electoral Law Select Committee hearing, the issue was on the agenda again. The Clerk had duly filed a submission to the Committee and refined his proposal that the

---

78 Mark W Gobbi *The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 237, 241.

79 Gobbi, above, 259.

80 Gobbi, above, 265.

81 Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 55.

82 Rt Hon David Lange (10 March 1992) 522 NZPD 6707; Hon David Caygill (10 March 1992) 522 NZPD 6712; Hon Dr Michael Cullen (10 March 1992) 522 NZPD 6722.

responsibility be given to the Speaker of the House.<sup>83</sup> During the Select Committee deliberations the Clerk informally renewed his opposition and brought up the soon to be created Electoral Commission as a further alternative.<sup>84</sup> However, on 19 August 1993, the Select Committee rejected the Clerk's concerns. The Committee was confident that the Clerk could carry out the responsibility, stating at the same time that no one else could be found who was more suitable.<sup>85</sup> The Clerk, anything but satisfied with this decision, then lodged a formal request with the National Government to amend the Bill.<sup>86</sup> Somewhat different from his proposals brought forward a few weeks before, he requested to give the responsibility to the Electoral Commission, not mentioning the Speaker of the House anymore. Despite the following private meeting between the Clerk, the Minister of Justice and the Leader of the House to discuss the matter, the Clerk was not able to impose his interests and no amendments were made.

The second and third reading of the CIR Bill demonstrated once more the significance of this issue. Gobbi observed that it was "the only point of contention [that remained] between the National Government and the Labour Opposition".<sup>87</sup> Again the speakers emphasised the jeopardised neutral position of the Clerk.<sup>88</sup> Hon David Caygill, Labour MP even moved an amendment to shift responsibility to the Speaker. However, his amendment failed and the task eventually remained with the Clerk.

## 2 *The duties of the Clerk*

The Clerk is the principal permanent officer of the House and head of administration in Parliament. He is appointed by the Governor-General on the recommendation of the Speaker of the House.<sup>89</sup> For the last years this task has been performed by David McGee. In particular, the Clerk notes all proceedings in the House and is responsible for all Parliamentary printing.<sup>90</sup> The Clerk is also involved in the legislative process inasmuch as he or she prepares and presents copies of Bills, which have been passed by the House to the Governor-General for the Royal assent.<sup>91</sup> Statutes and

---

83 Gobbi, above, 279.

84 Gobbi, above, 294.

85 Gobbi, above, 299.

86 Gobbi, above, 301.

87 Gobbi, above, 304; substantiated by Hon David Caygill (14 September 1993) 538 NZPD 17965: "... this measure is being adopted with bipartisan support ...".

88 Caygill, above, 17956, 17964-5; Robert Anderson (14 September 1993) 538 NZPD 17957; Pete Hodgson (14 September 1993) 538 NZPD 17960.

89 Clerk of the House of Representatives Act 1988, s 7.

90 David McGee *Parliamentary Practice in New Zealand* (2 ed, Government Printer, Wellington, 1994) 43.

91 McGee, above, 43.

Standing Orders increase the Clerk's purview considerably. The Clerk is furthermore the principal officer of the Office of the Clerk. The latter is divided in several sub-offices, none of which is first and foremost responsible for the performance of the duties resulting from the CIR Act. On balance, the Clerk of the House is in charge of the administrative matters in Parliament, a traditionally apolitical role.<sup>92</sup>

With the introduction of the CIR Act, the Clerk was instantly confronted with a number of new challenges. The Clerk of the House is the institution that every person who proposes to promote an indicative referendum has to direct his or her petition and the prescribed fee to.<sup>93</sup> The Clerk then enters into preliminary negotiations with the promoter to clarify the petition if necessary.<sup>94</sup> The most important task is the determination of the precise question. The Clerk, for that purpose, consults the proposer, the Legislative Advisory Committee, any other person or institution that the Clerk thinks fit and evaluates any received submission on the proposal.<sup>95</sup> Although the Clerk may seek advice from other institutions,<sup>96</sup> the wording of the question and the negotiations involved often are a lengthy and taxing task.<sup>97</sup> The second major task for the Clerk of the House is the scrutiny of the petition. The Clerk must, within two months from the date receiving a petition, ascertain whether it has been signed by not less than ten percent of eligible electors.<sup>98</sup> This task has proved to be extremely labour-intensive in the "battery-hen" petition case, because the promoter doubted the methods of calculation, which led to extensive correspondence with the Government Statistician.<sup>99</sup>

### 3 *The process in other countries*

The introductory statement of this paper proclaimed that New Zealand is unique, because it adopted a system of non-binding CIRs. However, New Zealand is not the only country with initiatives as such. The "paradigmatic cases"<sup>100</sup> of CIRs worldwide are the systems of Switzerland

---

92 McGee, above, 43; Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 45.

93 Citizens Initiated Referenda Act 1993, s 6.

94 Personal conversation with Carole Hicks, Office of the Clerk of the House of Representatives.

95 McGee, above, 448.

96 Citizens Initiated Referenda Act 1993, s 9.

97 Personal conversation with Carole Hicks, Office of the Clerk of the House of Representatives.

98 Citizens Initiated Referenda Act 1993, s 18.

99 Records of the Office of the Clerk of the House of Representatives; personal conversation with Carole Hicks, Office of the Clerk of the House of Representatives.

100 Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 27.

and California, both of which were factors in the design of the New Zealand system.<sup>101</sup> Against the background of the above outlined New Zealand wording process, it is interesting to examine how other states cope with the difficulties of determining referendum questions.

In Switzerland the initiative must suggest a constitutional amendment. The wording of the proposed legislation is provided by the group that initiated the process and can take two different forms. An initiative can be formulated either as a precise amendment or in general terms and has to be submitted to the Federal Assembly.<sup>102</sup> The great majority of initiatives take the specifically-worded form, as this goes to the people at once. The Government, however, has the opportunity to submit a counterproposal of its own. In the case of an initiative formulated in general terms, the Federal Assembly can either agree or reject the general idea. If the Parliament agrees, it has to elaborate the question itself, which is then put to a popular vote. In case of rejection, the general idea must pass a preliminary referendum. If approved by the electorate, the legislature must draft an appropriate text and send it to the people again.<sup>103</sup>

In California, it is also the promoting group which has to provide all of the details of their new measure using proper legislative language. The proponents, however, may obtain assistance from the Legislative Counsel in drafting the proposed law. The draft must then be submitted to the Attorney-General. As the questions are often very long, with many provisions and clauses, the Attorney-General prepares a title and summary upon receipt of the request.<sup>104</sup>

Catt states that in these examples a similar process is followed to that in New Zealand.<sup>105</sup> However, there are major differences. In New Zealand, it is up to the Parliament to draft specific legislation, not the proponents. Although the question, therefore, covers an issue only broadly and is not written in specific legislative language, the Clerk was given the responsibility to determine the wording of the question that is eventually put to the voters. This means that the Clerk's purview regarding the question wording process is much more extensive than those of the Federal Assembly in Switzerland and especially the Attorney-General in California. The Clerk therefore holds an

---

101 Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 23.

102 Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution of the Swiss Confederation), art 139(2); Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St Martin's Press, New York, 1996) 189.

103 See Kris W Kobach *The Referendum: Direct Democracy in Switzerland* (Dartmouth, Brookfield, 1993) 42-43; Gallagher and Uleri, above, 189.

104 Helena Catt "The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum" (1996) 48 *Political Science* 29, 31; California Secretary of State: Ballot Initiatives 2001-2002 <[http://www.ss.ca.gov/elections/init\\_guide\\_01-02.pdf](http://www.ss.ca.gov/elections/init_guide_01-02.pdf)> (last accessed 17 January 2003).

105 Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 389.



unparalleled position in the CIR process. Problems resulting from this significant role will be addressed in a following section.

#### 4 *Problems and alternatives*

The difficulties resulting from the Clerk's involvement in the CIR process can be divided into those concerning the above mentioned fear of politicisation of the Clerk and those relating to the performance of the task as such. Into the bargain, the problem of the additional workload due to the number of new obligations cast on the Clerk must not be underestimated either.<sup>106</sup>

The neutrality of referendum questions in a democracy is essential. The wording must therefore be carried out by a neutral institution. The Clerk of the House is traditionally such a politically neutral body.<sup>107</sup> At the same time, however, the promoters of referendum petitions undoubtedly pursue political, that is interest-orientated, aims.<sup>108</sup> The wording process is consequently a political one and the person or body responsible carries an immanent suspicion of bias. While every institution concerned with the determination of a referendum question is naturally subject to these reservations, the politicisation of the Clerk of the House, a Parliamentary institution at the heart of democracy, is certainly alarming. During the introductory debate of the CIR Bill, the awareness of this dilemma was ubiquitous. Hon Dr Michael Cullen, Labour MP regarded the politicisation of the Clerk as a "very dangerous process in terms of the standing of Parliament".<sup>109</sup> As was shown above, this problem does not exist to that extent in Switzerland and California, where the proponents formulate the questions themselves, which means that no institution is exposed to any suspicion of bias. However, during the almost ten years of CIR experience the Clerk has never been accused of being politically biased nor has the Office of the Clerk outwardly lost any of its politically neutral reputation. This must, on the other hand, not obscure the fact that the political involvement of the otherwise neutral Clerk has latent overtones of bias.

The second source of difficulties with regard to the Clerk of the House is the sparse criteria that the CIR Act provides for the institution determining the question. The CIR Act gives exactly three instructions. Section 5(2) says that, first, the referendum must not relate to more than one

---

106 See Rt Hon David Lange (10 March 1992) 522 NZPD 6707; the files of the Office of the Clerk reveal the large amount of correspondence, especially regarding the check of signatures; see for an example Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 70.

107 Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 45; Laxton-Blinkhorn, above, 55

108 Pete Hodgson (14 September 1993) 538 NZPD 17960: "the wording of the question is an intensely political act", "neutral but political job"; Hodgson's opinion that the job should be done by a neutral but political person is, however, a contradiction in itself and therefore not comprehensible. A person or institution can be either political *or* neutral.

109 Hon Dr Michael Cullen (10 March 1992) 522 NZPD 6722.

question.<sup>110</sup> Sections 10(1)(a) and (b) provide that, secondly, the question has to convey clearly the purpose and effect of the referendum and, thirdly, must be such as to ensure that only one of two answers can be given. Another unwritten but undisputed criterion is that the wording must enable the referendum result to provide meaningful guidance to Government and Parliament. Two petitions shall be quoted to demonstrate the inherent problems of this limited guidance.

The very first question as determined by the Clerk read: "Should the production of eggs from battery hens be prohibited within five years of the referendum?". The Clerk's determination omitted the promoters' inclusion of the phrase "inhumane practice of battery hen production". Nevertheless, the Egg Producers Federation of New Zealand as the affected organisation sought judicial review of the Clerk's decision, because it took the view that the Clerk still gave excessive weight to irrelevant factors, insufficient weight to relevant ones and indeed misinterpreted the Act. Although the High Court eventually decided in the Clerk's favour,<sup>111</sup> the inner conflict between neutrality, limited guidance and the need for corrections of problematical questions became obvious. Morris got to the heart of the dilemma when she queried how an institution is supposed to tread the fine line between refining the question to make it more easily understandable and being seen to be influencing the wording?<sup>112</sup>

Another problem became obvious in the referendum to reform the criminal justice system.<sup>113</sup> The question comprised in actuality several different ones. How did people vote if they supported one part but not the other parts? The problem of the question itself, which Church called the "most disquieting aspect of the referendum",<sup>114</sup> is subject of the following section, but this referendum also revealed the dilemma of the Clerk. Although the Clerk knew that initiatives must ask only one question and admit only one of two possible answers, he was not able to prevent the question from surviving in its final form. This was because the Clerk is not "required or indeed permitted to turn the proposal into something it does not purport to be".<sup>115</sup> This clearly refutes Parkinson's assertion

---

110 Citizens Initiated Referenda Act 1993, s 5(2).

111 *Egg Producers Federation v The Clerk of the House of Representatives*, above.

112 Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 46.

113 "Should there be a reform of our justice system placing greater emphasis on the needs of the victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?"

114 Stephen Church *Crime and Punishment: The Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament* in Jonathan Boston (ed) *Left Turn: The New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000) 194.

115 *Egg Producers Federation v The Clerk of the House of Representatives* (20 June 1994) High Court Wellington CP 128/94, Eichelbaum CJ; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 188; in addition, Parkinson speculates that "the Clerk simply

that "the Clerk of the House has the final say",<sup>116</sup> which is by no means the case. The Clerk can only influence the wording within limits. The promoter, however, has always the final say. This illustrates vividly that the Clerk has little power to translate the already sparse criteria of the CIR Act into practice.

No lessons can be learned from the overseas experience in Switzerland and California, as the process with petitioners formulating initiatives in proper legislative language is too different from the New Zealand system to draw any beneficial conclusions. However, in the face of the above described difficulties, alterations that take all of these problems into account seem to be appropriate. Surprisingly, the Clerk was chosen to perform the CIR task despite his persistent opposition. The reason for this was that no alternative solution could be found.<sup>117</sup> In the relevant literature, several institutions have been suggested to perform this task. The Speaker and the Electoral Commission also bear the suspicion of bias.<sup>118</sup> High Court Judges were also omitted due to their independent position and their lack of the required facilities.<sup>119</sup>

However, as long as the person in charge has no appropriate legislative guidance as to how to perform the task and, moreover, no power to protect the provisions of the CIR Act, the search of alternative institutions proves futile.<sup>120</sup> The revision of the Act should therefore be the first thing to do. Subsequently, the search for alternatives can be pursued in two directions. If one prefers the task to remain in Parliament,<sup>121</sup> a special Committee, consisting of experts of all parties, could be established. This was envisaged in the Popular Initiatives Bill from 1983,<sup>122</sup> a proposal that has unfortunately never been taken up again. A second opportunity would be to commission an external agency as an "independent third party",<sup>123</sup> which has both the necessary resources and the expert

---

gave up fighting with a distrustful proponent": see John Parkinson "Who Knows Best: The Creation of the Citizens-Initiated Referendum in New Zealand" (2001) 36 *Government and Opposition* 403; also available at <<http://socpol.anu.edu.au/~parkinson/nzcir.pdf>> (last accessed 17 January 2003).

116 Parkinson, above.

117 Mark W Gobbi *The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 268, 299.

118 Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 46.

119 Gobbi, above, 259.

120 See Morris, above, 46: "it does not remove the difficulties caused by the limited legislative guidance".

121 As preferred by the Select Committee on 17 August 1993, see Gobbi, above, 295.

122 Gobbi, above, 206-7; the establishment of a Commission was also called for in the National Party's election manifesto, although this was supposed to consist of the Clerk and a High Court Judge only; the idea of a Commission or a Committee, respectively, quietly died when the Department of Justice ruled out the High Court Judge: see Gobbi, above, 259.

123 Morris, above, 46.

knowledge to cope with the task.<sup>124</sup> Into the bargain, it also seems to be sensible to split up the determination of the question and the evaluation of the signatures and allocate them to different appropriate institutions.

### 5 Conclusion

During the second reading of the CIR Bill, Pete Hodgson, MP held the view that the wording of the question "requires the wisdom of Solomon, [and] it requires overt neutrality".<sup>125</sup> The obligation to frame the question as neutrally as possible within the parameters of the original proposals is indeed an immensely difficult task. However, the instruments the Clerk was provided with to perform this task are less than sufficient. The CIR Act does not live up to the expectations expressed before the introduction of the Act that a "satisfactory procedure for setting and vetting the referendum questions" be essential.<sup>126</sup> In the face of this, it may be appropriate time to tackle these difficulties.

### B The Referendum Question

In theory there is no doubt that referendum questions have to be simple, clear and unambiguous.<sup>127</sup> As was previously shown, precise guidance for the institution in charge of determining the question is crucial. And yet the question remains if in practice it is possible to couch a proposition that meets the above mentioned theoretical requirements. The following section examines problems that are causally related with the referendum question, such as difficulties resulting from the question itself, ramifications for the Government and consequences for the voters.

---

124 Several submissions filed to the Select Committee during the legislative process of the CIR Bill suggested to commission a quango (quasi-autonomous non-governmental organisation): see Gobbi, above, 288; see for another interesting approach also Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 367: "Closer supervision of the question ( ... perhaps, by the Attorney-General, or the Chair of the Electoral Commission) may do something to enhance the quality of the process."; see also Brent Edwards "Referendum Law Up for Review" (4 December 1995) *The Evening Post* Wellington 1: "The chairman of the Electoral Committee, National MP Tony Ryall ... said the law needed changing. Options could include an independent commissioner or committee to decide whether questions were suitable for a referendum."

125 Pete Hodgson (14 September 1993) 538 NZPD 17960.

126 John H Wallace "Commentary on 'Referendums: Legal and Constitutional Aspects'" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 30.

127 Justice and Electoral Committee "Inquiry into the 1999 General Election" [2001] AJHR I 7C; Venice Commission "Guidelines for Constitutional Referendums at National Level" (Venice Commission, Strasbourg, 2001) <[http://venice.coe.int/docs/2001/CDL-INF\(2001\)010-e.html](http://venice.coe.int/docs/2001/CDL-INF(2001)010-e.html)> (last accessed 17 January 2003).

1 *Only one of two answers*

According to section 10(1)(b) of the CIR Act only one of two answers, yes or no, may be given to the question. The appropriateness of this twofold choice is undoubted, as everything else would mostly be impracticable.<sup>128</sup> Reading relevant literature, one can detect that a large number of problems arising from referendum questions are more or less distinctly connected with the requirement to answer yes or no.

(a) Yes or No?

When an initiative proposition is very complex, the voters may not be sure if it is a yes or a no vote that corresponds with their view.<sup>129</sup> In principle it can be said that a 'yes' vote supports the petition of the promoter. If the voters are confused about whether they are voting to repeal or to enact something, a 'no' vote is therefore mostly the safest option to maintain the status quo.<sup>130</sup> Consequently, surveys divulge that the more difficult it is to comprehend a proposition, the more often voters will vote 'no'.<sup>131</sup> However, it is easy to imagine that additional confusion can occur when the promoters do not ask for a 'yes' vote but rather hope for a 'no' vote. Such was the case in the firefighters referendum in 1995, when the Professional Firefighters Union asked whether the number of firefighters should be reduced and sought a negative answer.<sup>132</sup>

(b) Questions that anticipate their answer

---

128 Helena Catt, Paul Harris and Nigel S Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992) 134; Venice Commission, above; see for some exceptions of the twofold choice Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 73; New Zealand experienced a multiple choice referendum on 19 September 1992, when the voters were asked which of four different voting systems they preferred; furthermore, the national liquor licensing polls asked the voters to decide between "national continuance", "state control" or "national prohibition".

129 In California a survey on a certain ballot proposition revealed that 18 percent of the voters did not know what a 'yes' vote meant: see David B Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 143; see also Bob Edlin "A Grand Exercise in Ballot-box Absurdity" (8 December 1995) *The Independent* Wellington 10: "Far too many people who might have voted, had they been better enlightened, seem to have stayed away simply because they did not know what they would be endorsing if they answered 'yes' or 'no' on the ballot paper" (relating to the "firefighters" petition).

130 An advertisement ran in a Salt Lake City campaign saying simply: "Confused? Many are. Play it safe – When in Doubt, Vote No!": see Magleby, above, 142.

131 Jeffrey A Dubin and Gretchen A Kalsow "Participation in Direct Legislation: Evidence from the Voting Booth" (1997) 997 *California Institute of Technology Social Science Working Paper* 10, para 13-4; Catt, Harris and Roberts, above, 71.

132 Helena Catt "The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum" (1996) 48 *Political Science* 29, 36; however, 87.8 per cent voted 'no' and there is no evidence of whether voters may have been confused by the reversed question; Professional Fire Fighters Union Cartoon (30 November 1995) *New Zealand Herald* Auckland.

Another problem of referendum questions is that they are often couched in a way that anticipates an answer.<sup>133</sup> Voters then feel compelled by the formulation of the question to answer yes or at least find it hard to say no (for example "Should there be less crime on the streets?"). The same issue can be formulated so differently that both questions, although exactly opposite, would almost certainly produce an overwhelming answer in the opposite direction. These reservations have been expressed during the introduction debate of the CIR Bill by consulting the issue of abortion. The contradicting propositions "Are you in favour of giving statutory protection to the right to life of the unborn child?" and "Do you think women should have control over their own bodies?" would both almost certainly result in a distinct affirmative answer.<sup>134</sup> This demonstrates vividly to what extent the formulation of the question can influence the outcome. The previous CIR experience confirmed these reservations. In the case of the "battery hens" petition, the Clerk of the House was accused of having incorporated emotive and question-begging language in referring to "battery hens".<sup>135</sup> Although the Court rejected this view, the Judge "readily accept[ed] that a question framed in emotive or prejudicial terms is unlikely to fulfil the section 10 requirement of clarity".<sup>136</sup> However, this did not exclude answer-anticipating questions from the agenda in the following. Hon Douglas Graham, the then Minister of Justice, said that Next Step's questions on health and education inherently biased the results. The proposition "Should all New Zealanders have access to comprehensive health services which are fully government funded and without user charges?" would certainly have provoked a different result than if the promoters had proposed a tax increase to finance the health services.<sup>137</sup> Another example was the "firefighters" petition, when the promoters asked if the number of firefighters should be reduced, which the overwhelming majority of voters

---

133 The literature uses a large number of expressions to describe this problem; see for examples Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 366: "leading questions"; Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 VUWLR 273, 288: "emotive"; Catt, Harris and Roberts, above, 139: "contentious"; Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 87: "biased".

134 Hon Dr Michael Cullen (10 March 1992) 522 NZPD 6722; see also Rt Hon Jonathan Hunt (10 March 1992) 522 NZPD 6715-6; Catt, Harris and Roberts, above, 139.

135 The Clerk had already turned down the originally proposed word "inhumane" (battery egg production) as this would otherwise "compromise the integrity of a referendum" being "emotive and prejudic[ing] a fair assessment of the merits of the question proposed": see Note in the files of the Office of the Clerk of the House of Representatives.

136 *Egg Producers Federation v The Clerk of the House of Representatives* (20 June 1994) High Court Wellington CP 128/94, Eichelbaum CJ, 7.

137 Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 87.

disapproved. The Government took the view that "the public has been taken in by a rather large dose of emotional clap trap".<sup>138</sup>

The Clerk, as was previously described, lacks the power to prevent these questions from being raised, as the promoter has the final say. However, even if the Clerk had this power, the problem of loaded questions seems to be inherent to all referendum petitions.

(c) Two or more issues in one question

Section 5(2) of the CIR Act unambiguously stipulates that referendum petitions may not relate to more than one question. However, the "criminal justice" petition revealed that "it is not self-evident that the question met even the[se] sparse statutory criteria".<sup>139</sup> The question rather comprised at least three different issues, to which the voters had to give only one yes or no answer. Voters were caught in the dilemma of how to respond if they agreed to emphasise the needs of the victims on the one hand, but disapproved the imposition of longer sentences or hard labour on the other hand. Church put it in a nutshell: "Even if voters found it difficult to agree with all aspects of the question, it was equally difficult to disagree with every aspect".<sup>140</sup>

---

138 Letter from the Minister of Internal Affairs to AV Hunter, 26 May 1995: cited in Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 VUWLR 273, 288; see also "Referendum a \$10m Nonsense" (4 December 1995) *The Dominion* Wellington 8: "It can only be speculated what the result might have been if the public had been asked: 'Should the New Zealand Fire Service be as efficient and effective as possible?' or 'Do you favour reorganising the Fire Service to make firefighters more productive?'".

139 Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 366; "Criminal justice" petition: "Should there be reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences"; see for details on all CIR petitions submitted so far Benjamin Goschzik *You're the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act* (LLM Research Paper, Victoria University of Wellington, 2002) 52-8.

140 Stephen Church *Crime and Punishment: The Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament* in Jonathan Boston and others (eds) *Left turn: The New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000) 194; see also "Acting on Referendums" (30 November 1999) *The Press* Christchurch 4; John Parkinson "Who Knows Best: the Creation of the Citizens-Initiated Referendum in New Zealand" (2001) 36 *Government and Opposition* 403; also available at <<http://socpol.anu.edu.au/~parkinson/nzcir.pdf>> (last accessed 17 January 2003); Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 24; Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 45.

In general, one can observe that referendum proposals are prone to confusing two or more issues,<sup>141</sup> which leads to bewildered and nonplussed voters who are faced with the problem that they have to vote yes or no on the whole proposition.

(d) Simple and simplistic

Framing the question in a way that allows only one of two answers theoretically rules out the consideration of complex issues.<sup>142</sup> Referendums are simplistic devices, which are not capable of dealing with intricate policies if they want to remain comprehensible.<sup>143</sup> As an example, many regarded the "firefighters" dispute as too complex to be put to the voters.<sup>144</sup>

However, in practice this rarely leads to the exclusion of complicated matters but rather to the attempt to simplify the question. This is an undertaking that often fails. Trying to take all different aspects of the issue into consideration, some questions are extremely long-winded.<sup>145</sup> Other questions contain vague and unclear words, making them difficult to understand and leading to confusion among the voters. The very first CIR petition, for example, caused a contentious debate about what "battery egg production" meant.<sup>146</sup> The "criminal justice" petition generated a number of

---

141 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 188.

142 Hon Dr Michael Cullen (10 March 1992) 522 NZPD 6721.

143 See Joseph, above, 188; Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 202; John Collinge "Keeping a Watch on Democracy by Use of Public Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 79, 83; "Dialogue: No Power to the People in Citizens' Referendums" (15 February 2001) *New Zealand Herald* Auckland.

144 "Referendum a \$10m Nonsense" (4 December 1995) *The Dominion* Wellington 8; Alison Tocker "Low Poll Turnout Sparks Rethink of Referendum Rules" (4 December 1995) *The Dominion* Wellington 1; Brent Edwards "Referendum Law Up for Review" (4 December 1995) *The Evening Post* Wellington 1; Bob Edlin "A grand exercise in ballot-box absurdity" (8 December 1995) *The Independent* Wellington 10; Hon Douglas A M Graham, Minister of Justice (4 December 1995) Radio New Zealand Interview (Good Morning New Zealand); the Egg Producers Federation also argued in the "battery hens" petition that the issue was too complex to be reduced to a simple yes/no answer: see Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 69.

145 For example: "Should New Zealand adopt direct democracy by binding referendum whereby ideas for laws would be submitted and voted upon as of right by the public and, according to the result, submissions collected from the public and then assessed by opinion poll, resulting in draft law alternatives being prepared by independent groups, from which one opinion would be chosen by majority vote by the public; the resulting legislation to be binding?".

146 Note in the files of the Office of the Clerk of the House of Representatives: "... it is not a term of art. There are legitimate differences in interpretation of what it might mean".



indefinite terms, such as "serious violent offences" or "hard labour".<sup>147</sup> Another question asked if Members of Parliament should be elected by "single transferable vote (STV)" with "constituency-based multi-member electorates".

Thirdly, often complex issues can not be compressed into black and white answers. There are often variations, options and conciliatory opinions that a simple yes or no question does not reflect appropriately.<sup>148</sup> Whereas voters have to make clear-cut decisions one way or the other, part of the role of parliament in contrast is to debate issues, to look at how one issue impacts on others and resolve matters by compromise.<sup>149</sup> Referendum decisions, therefore, lack the quality of parliamentary deliberation.<sup>150</sup>

## 2 *The government response or "What's that you say...?"*

The long title of the CIR Act stipulates that CIRs under the Act are only indicative, thus not binding on the Government. However, it is believed that if the people appear to speak with a loud and united voice, the Government will find the result hard to overlook.<sup>151</sup> Three referendums have been held so far, but the Government did not react noticeably.<sup>152</sup> This lack of response can certainly lead to frustration among the voters.<sup>153</sup>

---

147 See Caroline Morris "Citizens' Referenda: Time to Review?" (2002] NZLJ 44, 45; John Parkinson "Who Knows Best: the Creation of the Citizens-Initiated Referendum in New Zealand" (2001) 36 *Government and Opposition* 403; also available at <<http://socpol.anu.edu.au/~parkinson/nzcir.pdf>> (last accessed 17 January 2003).

148 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 175; Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 202.

149 Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 391; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 188; Royal Commission on the Electoral System, above, 175; Into the bargain, "meanwhile in all democratic countries specialists proliferated in the ministries, departments, and other executive and administrative organisations": Robert A Dahl *Democracy and its Critics* (Yale University Press, New Haven, 1989) 336.

150 Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (2 ed, MacMillan, New York, 1998) 111.

151 Richard Mulgan *Politics in New Zealand* (2 ed, Auckland University Press, Auckland, 1997) 285.

152 See Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 *VUWLR* 273, 290: "It is not clear whether the result has actually had any impact" (relating to the "firefighters" referendum).

153 See for details Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 46.

In the context of referendum questions, however, another problem becomes apparent. Some questions create problems for the Government in deciding how it should respond to the outcome of the referendum. Regarding multiple questions, such as the "criminal justice" petition, it is difficult for the Government, if it was inclined to react, to determine which part or parts of the question won the support of voters.<sup>154</sup> Does a 'yes' vote signal agreement with the entire proposition or only with certain parts?<sup>155</sup> Furthermore, MPs will find it difficult to know which action to take if voters deliver a mixed mandate, ie if their party policy and the referendum result contradict.<sup>156</sup>

### 3 *The measurement of effects on voters*

The impact of referendum questions on voters is difficult to determine. Surveys regarding the voter feelings, such as apathy or confusion, have not been conducted in New Zealand. However, the effects on voters can be measured by looking at turnout levels and by examining the CIR propositions regarding their understandability.

#### (a) Voter turnout

All three CIRs that have been held so far showed overwhelming support in favour of the promoter's petition.<sup>157</sup> However, the voter turnout is also very important, as a low turnout means a decision by only a small proportion of the population. Experience shows that referendums held alongside general elections will result in a significantly higher turnout.<sup>158</sup> Consequently, the "Members of Parliament" petition and the "criminal justice" petition, both held alongside the 1999 general election, attracted a high turnout of almost 83 per cent. On the other hand, the "firefighters" petition drew only 28 per cent of the total registered electors to the voting booth, the lowest turnout

---

154 Stephen Church "Crime and Punishment: The Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament" in Jonathan Boston and others (eds) *Left turn: The New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000) 194.

155 Morris, above, 45.

156 See Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 391: "If in 1996 there had been a vote suggesting that 'there be a fully-funded tertiary education system, with no user charges', opinion polls suggest it would have passed. However, in 1996 voters also elected a National-led government whose policy was explicitly opposed to fully-funded tertiary education."; problems resulting from the fact that the Government is indeed not able to respond on the proposal will be addressed in the chapter on subject-matter restrictions.

157 "Firefighters" petition: 88 per cent 'no' (no vote intended by the promoter); "Members of Parliament" petition: 81.5 per cent 'yes'; "Criminal justice" petition: 91.7 per cent 'yes'; see also Benjamin Goschzik *You're the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act* (LLM Research Paper, Victoria University of Wellington, 2002) 52-8.

158 Catt, above, 393; the seven government-initiated special polls in New Zealand attracted an average turnout of 61.9 per cent, whereas the two government-initiated referendums that have been held alongside general elections resulted in an average turnout of 83.8 per cent; see Goschzik, above, 50.

ever recorded for a referendum.<sup>159</sup> It is easily imaginable that there is a connection between the low voter turnout and a lack of interest among the voters. According to surveys, a connection is also discernible between a low turnout and the understandability of the proposition or, vice versa, the higher the voter's knowledge, the greater is the probability that he or she will vote.<sup>160</sup> This corresponds with the above made ascertainment that the "firefighters" dispute was very complex, however, there is no evidence for a connection between the complexity and the low turnout.

In terms of a low turnout, the decision to implement only indicative referendums appears to be sensible. If the referendum was binding, the question would clearly arise if the Government should be bound by a referendum result with a turnout of a meagre 28 per cent.<sup>161</sup> Furthermore, as referendums are a majoritarian instrument, it is conceivable that initiatives are used against minorities.<sup>162</sup> On the other hand, it is also possible that a minority, taken the low voter turnout, imposes measures against a largely apathetic majority.<sup>163</sup>

A means to prevent a low turnout is to hold CIR referendums always alongside general elections.<sup>164</sup> However, critics express the concern that referendums at elections entangle the referendum issue and the major election issue and voters might get somewhat confused.<sup>165</sup> Other alternatives would be to make increasing use of postal votes,<sup>166</sup> phone polling<sup>167</sup> or the Internet.<sup>168</sup>

---

159 Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 VUWLR 273, 289; see for a comparison of the turnout in general elections and in special polls in New Zealand and other countries Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 70.

160 Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St. Martin's Press, New York, 1996) 201; Jeffrey A Dubin and Gretchen A Kalsow "Participation in Direct Legislation: Evidence from the Voting Booth" (1997) 997 California Institute of Technology Social Science Working Paper 12-3.

161 Catt, above, 393: "In Italy, votes are only binding if over half of the people vote, but this is not the rule in either the United States or Switzerland".

162 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 175; Catt, above, 393.

163 See Jack H Nagel *Participation* (Prentice-Hall, Englewood Cliffs (NJ), 1987) 92.

164 Catt, above, 393: "In the United States a referendum vote must coincide with an election, but in Italy and Switzerland the two types of votes must be separate".

165 Royal Commission on the Electoral System, above, 175; Justice and Electoral Committee "Inquiry into the 1999 General Election" [2001] AJHR I 7 C 54-5.

166 Referenda (Postal Voting) Act 2000, s 5(b); the government-initiated referendum on the introduction of compulsory superannuation savings from 5-26 September 1997 was a postal ballot and reached a turnout of 80.34 per cent.

## (b) Comprehension

Determining the extent of the voter's knowledge about the propositions they are deciding on is essential to an evaluation of the quality of mass participation in direct legislation. Within the context of the debate about direct democracy, scholars, supported by empirical studies, have often argued that policy choices have become too complex for most people to understand.<sup>169</sup> Inequality in civic competence is a serious problem of democracy, particularly in its direct form. The capability of voters depends mainly on two factors: the level of education and the complexity of the text submitted to the vote.<sup>170</sup> In general, it has been observed that referendums as a means of direct democracy favour more educated citizens.<sup>171</sup>

A means to prove this ascertainment is to apply readability formulas on ballot propositions in order to assess their understandability. Readability formulas calculate the probable difficulty of any text by measuring the variables of vocabulary, sentence length, complexity and conceptual difficulty. Two standard readability formulas, the FOG Index and the Flesch Reading Ease Formula, have been applied to the CIR petitions in New Zealand to ascertain their comprehensibility.<sup>172</sup> The result, being naturally only a rough statistical approximation, clearly revealed the complexity of the CIR propositions. According to the FOG Index, the petitions have an average complexity degree of 17.4, indicating the number of years of education the reader needs to understand the text. The Flesch Reading Ease Formula resulted in a complexity degree of 27.12, with 100 being extremely easy and zero being extremely difficult. A score of 65 stands for plain English.<sup>173</sup> If the readability score is a proxy for the voter's ability to comprehend the proposition,<sup>174</sup> these results divulge that the above statement is correct. Referendums patently handicap less educated people. If voters do not

---

167 Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 86; Jane Clifton "Referenda by Phone" (18 August 1996) *Sunday Star Times* Auckland 10.

168 Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 10-1.

169 See Robert A Dahl *Democracy and its Critics* (Yale University Press, New Haven, 1989) 337-40; Helena Catt *Democracy in Practice* (Routledge, New York, 1999) 14 with further evidence.

170 Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St Martin's Press, New York, 1996) 198.

171 Press, above, 29; David B Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 141; Catt, above, 70.

172 See for details the Appendix.

173 Readability formulas have already been applied to ballot propositions in some US states, showing a very similar result with a Flesch Reading Ease score of between 24.5 and 32.9: see Magleby, above, 119.

174 Jeffrey A Dubin and Gretchen A Kalsow "Participation in Direct Legislation: Evidence from the Voting Booth" (1997) 997 California Institute of Technology Social Science Working Paper para 9.

understand propositions, they are likely to either give an uninformed vote or "drop off" completely, which, in turn, can result in skewed results or a low turnout, respectively.<sup>175</sup>

#### 4 Information

The complexity of referendum questions and the information policy governments are closely connected. The more complex and difficult propositions are, the more important is the public voter education.

Most countries that hold referendums provide basic information for the voters during the campaign period. A booklet, detailing each initiative, plus a short statement from each side, is sent to all voters in American states. In Switzerland, a Government-produced pamphlet is provided and each side is given free television time.<sup>176</sup> Despite these attempts to inform the voters, surveys demonstrate that only a minority of people actually reads this information, let alone understands it.<sup>177</sup> Consequently, voting studies in other countries have documented that people's knowledge about major public issues at stake was low even after an intensive campaign.<sup>178</sup>

Unlike American States and Switzerland, there is no statutory provision in the CIR Act, requiring the New Zealand Government to distribute some sort of information to the voters.<sup>179</sup> Justifiably, Wehrle considers this a flaw in the legislation. Despite the lack of a statutory obligation, some attempts have been made to provide information regarding the three referendums that have been held so far. However, these attempts proved to be half-hearted and insufficient. Although the Cabinet agreed that a pre-referendum pamphlet regarding the "firefighters" petition would be distributed to each household, nothing of that kind happened, because the parties could not agree on the information to be provided.<sup>180</sup> Prior to the 1999 referendums, the Chief Electoral Officer learned

---

175 Magleby, above, 111-9; Dubin and Kalsow, above, 14; Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (2 ed, MacMillan, New York, 1998) 95, 111-2.

176 Helena Catt "The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum" (1996) 48 *Political Science* 29, 32; Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St Martin's Press, New York, 1996) 198.

177 Gallagher and Uleri, above, 198; Dubin and Kalsow, above, 10.

178 Magleby, above, 127; Linder, above, 111.

179 Despite the strong request from both scholars and the public before the introduction of the CIR Act to implement appropriate arrangements concerning the provision of accurate information: see John H Wallace "Commentary on 'Referendums: Legal and Constitutional Aspects' " in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 30; Mark W Gobbi *The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 280: "... three submissions [to the Select Committee] suggested that the CIR Bill should contain provisions requiring the Government to supply ... balanced information".

180 Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 *VUWLR* 273,

from the Crown Law Office that it cannot undertake public education on referendum questions, unless the referendum relates to an electoral matter.<sup>181</sup> This applied only to the "Members of Parliament" petition. Consequently, the Chief Electoral Office only produced a brochure regarding the "Members of Parliament" petition and no official information was available to voters about the CIR on "criminal justice". Moreover, due to the limited funding of the Office, the brochure was only distributed to those people who made inquiries about the referendum.<sup>182</sup>

In the face of this, Catt is certainly right when she implies that the voters were not sufficiently informed on the three CIRs.<sup>183</sup> The implementation of provisions requiring appropriate arrangements as to who is in charge and what kind of information has to be supplied in which way is therefore essential.

### **C Subject-matter Restrictions**

The CIR Act excludes issues that have been subject of a referendum held within five years prior to the receipt of the petition<sup>184</sup> and propositions that call for an inquiry into the way a previous referendum was conducted.<sup>185</sup> Apart from that, virtually any issue can be subject of CIRs in New Zealand. In the judicial scrutiny of the "battery hens" petition, the High Court thought this extraordinary.<sup>186</sup> However, it can be argued that even these sparse restrictions have not been observed, as three of the 34 petitions filed so far asked for the reduction of the number of MPs.<sup>187</sup>

During the CIR introduction debate, the Government clarified that it wanted the public to be able to voice its opinion on any topic.<sup>188</sup> However, subliminally there was the hope that only "sensible" and "suitable" questions on big moral or social issues such as capital punishment,

---

287; Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 22.

181 Justice and Electoral Committee "Inquiry into the 1999 General Election" [2001] AJHR I 7C 55.

182 Justice and Electoral Committee, above, 55.

183 Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 391.

184 Citizens Initiated Referenda Act 1993, s 11(2)(b).

185 Citizens Initiated Referenda Act 1993, s 4.

186 *Egg Producers Federation v The Clerk of the House of Representatives* (20 June 1994) High Court Wellington CP 128/94, Eichelbaum CJ, 6.

187 See the Appendix; see regarding repetitive questions in detail Caroline Morris "Citizens' Referenda: Time to Review?" [2002] NZLJ 44, 46.

188 Hon Douglas A M Graham (14 September 1993) 538 NZPD 17952.

eutanasia and homosexual law reform would be filed to the Clerk.<sup>189</sup> It was suggested that the 10 per cent threshold, the cost factor and not least common sense and maturity of the voters would prevent irrational and unsuitable questions from being raised.<sup>190</sup> This appraisal proved to be wrong. By many and especially the Government, the "firefighters" issue was regarded as an industrial dispute, not appropriate to be decided on in a referendum.<sup>191</sup> In the public debate arising from this, politicians and media called the referendum questions that had been filed until then inadequate, "a bit loopy", "motherhood and apple pie" or just generally unsuitable.<sup>192</sup> Furthermore, the High Court readily supposed that vexatious, defamatory, indecent or scandalous questions might appear on the referendum agenda.<sup>193</sup> It seems that this problem is initiative-inherent, as it is largely impossible to define which types of issues are unsuitable and then exclude them beforehand.<sup>194</sup> The implementation of a general statutory subject-matter restriction, however, seems to be possible for three fields that can clearly be defined.

First, referendum petitions that contravene the constitution, for example, violations of the Human Rights Act 1993, must not be put to the voters. Against that, the argument runs that New Zealand does not have a single-document Constitution and the courts do not have the power to render referendum results null and void.<sup>195</sup> Yet, New Zealand has a constitution and if the Parliament implements a subject-matter restriction on constitutional infringements, the courts clearly would have the power and even the obligation to ensure that this provision was not breached.

---

189 Bonnie Laxton-Blinkhorn *Half Hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand* (MPP Thesis, University of Auckland, 1996) 81, 86.

190 Christine Fletcher (10 March 1992) 522 NZPD 6714; *Egg Producers Federation v The Clerk of the House of Representatives* (20 June 1994) High Court Wellington CP 128/94, Eichelbaum CJ, 6.

191 See Hon Douglas A M Graham, Minister of Justice, and Hon Warren Cooper, Minister of Internal Affairs in Alison Tocker "Low Poll Turnout Sparks Rethink of Referendum Rules" (4 December 1995) *The Dominion* Wellington 1; in contrast Gabriela Wehrle "The Firefighters' Referendum – Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens Initiated Referenda Act 1993?" (1997) 27 VUWLR 273, 298-9.

192 See Graham and Cooper, above, 1.

193 *Egg Producers Federation v The Clerk of the House of Representatives*, above, 6.

194 The Chairman of the Electoral Law Committee in 1995, Tony Ryall, National MP, said that "options could include an independent commissioner or committee to decide whether questions were suitable for a referendum": see Brent Edwards "Referendum Law Up for Review" (4 December 1995) *The Evening Post* Wellington 1; without any statutory criteria, however, this seems to be an impossible task.

195 Hon Douglas A M Graham (14 September 1993) 538 NZPD 17952; in Italy and California, the Courts do have the right to declare referendum results unconstitutional, whereas Courts in Switzerland do not have this right: see Kris W Kobach *The Referendum: Direct Democracy in Switzerland* (Dartmouth, Brookfield, 1993) 41; Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St Martin's Press, New York, 1996) 107.

Secondly, issues that do not lie within Parliament's competence should also be excluded beforehand. Petitions, for example, that contravene international obligations can evidently not be acted on by the Government. It was observed that the demand for "hard labour" in the "criminal justice" petition probably did not comply with international standards.<sup>196</sup> The Swiss Constitution, therefore, stipulates that the Federal Assembly declares initiatives invalid, which violate regulations of international law.<sup>197</sup>

Thirdly, some issues should be restricted to Government either because of its superior knowledge or because it is a matter on which the public would not cast an unbiased vote. This would for instance include matters of defence and national security as well as tax and budget matters.<sup>198</sup>

The Government saw these problems before the introduction of the CIR Bill and therefore chose to implement non-binding referendums only.<sup>199</sup> This certainly reduces the urgency of amendments of the CIR Act in the above mentioned way. However, the confidence of the populace in the political process and CIRs suffers, if the Government chooses not to act on the outcome of a referendum. It is therefore better to impose limits at the outset in order to reduce arguments and annoyance at a later time.

## **VI CONCLUSION**

Two years after the introduction of the CIR Act, 20 proposals had already been filed. However, in the following six years only 14 more petitions have been delivered to the Office of the Clerk. This obvious decline of usage coincides with the facts that only three out of these 34 petitions have been successful in triggering a public vote and that the Government has not acted on one of those three referendums. CIRs were introduced in times of voter disenchantment as a means to re-establish public confidence and to control the Government. However, the statistics clearly reveal that an instrument that promises public influence without the compulsion to keep what it promised can neither re-establish confidence in politics nor can it control the Government. Justifiably, many have

---

196 Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 366-7; Mel Smith "Referendum Question Fails Scrutiny" (21 January 2000) *Evening Post* Wellington 7.

197 Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution of the Swiss Confederation), art 139(3).

198 This would have probably excluded the CIR petition from 30 November 1994: "Should New Zealand's defence expenditure be reduced to half its 1994/95 level by the year 2000 with the savings spent on health, education, conservation and the promotion of full employment?".

199 Hon Douglas A M Graham, Minister of Justice (10 March 1992) 522 NZPD 6704, 6723; see for further reference Mark W Gobbi *The Quest for Legitimacy: A Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 271.



therefore called CIRs a large and expensive public opinion poll.<sup>200</sup> Yet, the conclusion must not be that CIRs should be binding. Neither does New Zealand's constitutional system have the necessary safeguards, nor does it allow that amount of popular sovereignty.

The examinations of this paper show that a number of things can be improved. The person or institution in charge of the referendum process needs clear criteria as to how to perform this task. Moreover, for several reasons it is questionable if the Clerk of the House is the appropriate institution to perform this task. Subject-matter restrictions should be implemented as extensive as possible to prevent clearly inappropriate questions from being put to the voters. Furthermore, the implementation of provisions concerning voter information is indispensable. As a means to increase the voter turnout, moreover, the intensification of the use of phone, internet or postal votes is highly desirable.

However, this paper also reveals that several problems are referendum-inherent. The increasing complexity of modern politics contrasts with the necessity to reduce referendum questions to a yes/no vote. Often, the complex issue subverts this necessity for simplicity, making the referendum questions long and extremely difficult. Due to educational inequalities among the populace, these questions favour the more educated voters and clearly overtax the less educated, leading in turn to skewed or uninformed votes. The outcome of referendum votes, moreover, depends to a great deal on the way a question is couched, placing considerable responsibility on the institution in charge.

CIRs were introduced with the claim to improve and strengthen democracy, but have done little to increase the role of the people in the legislative process. Apart from the flaws in the Act itself, which is in need of considerable reworking, it seems that referendums cannot compete with a Parliamentary process of deliberation and compromises.

Genetic Engineering is a matter of topical interest and arguably among the big moral issues that the Government had in mind when it introduced the CIR Act. However, the group GE Free NZ recently considered the collection of 250,000 signatures too onerous and argued that it was the Government's duty to hold a referendum on this topic.<sup>201</sup> This, and the fact that not a single petition has been lodged during the last year, does not bode well for the future of CIRs in New Zealand.

---

200 Helena Catt, Paul Harris and Nigel S Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992) 141; Janet McLean "Making More (or Less) of Binding Referenda and Citizens-Initiated Referenda" in Colin James (ed) *Building the Constitution* (Victoria University Press, Wellington, 2000) 366; Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 202.

201 "GE Referendum Crusade Canned" (4 September 2002) *New Zealand Herald* Auckland.

