



*C2D – Centre for Research on Direct Democracy  
ZDA - Zentrum für Demokratie Aarau  
University of Zurich*

## ***C2D Working Paper Series***

**New Zealand's direct democracy experience: an institution found lacking?**

**Maja HARRIS**

**Maja Harris**

**“New Zealand's direct democracy experience: an institution found lacking?”**

**C2D Working Paper Series  
34/2010**

**C2D – Centre for Research on Direct Democracy**

Harris, Maja

“New Zealand's direct democracy experience: an institution found lacking?”

C2D Working Paper Series

34/2010

C2D – Centre for Research on Direct Democracy

ISSN 1662-8152

<http://www.c2d.ch>

## MAJA HARRIS

Maja Harris has an LLB and BA in German and European Studies from the University of Victoria (Wellington, New Zealand) and University of Groningen (The Netherlands). She qualified as a barrister and solicitor in New Zealand in 2008.

## **ABSTRACT**

New Zealand is a constitutional monarchy with a parliamentary democracy sitting in the middle of the South Pacific. Despite its isolation, it is a highly developed nation with a relatively progressive political stance including well-established mechanisms of direct democracy. This paper aims to explore New Zealand's experience with direct democracy, from the introduction of local referendums at end of the 19<sup>th</sup> century, to the 2009 citizens initiated referendum on parental corporal punishment. It will set out the legislative basis that provides for the holding of referendums and initiatives and then, in turn, address the three types of referendums provided for under New Zealand law: constitutional referendums, referendums initiated by the government and citizens initiated referendums.

## **CONTENTS**

1. Introduction.....	6
2. Legislative basis for referendums and initiatives.....	7
3. Constitutional referendums .....	10
4. Referendums initiated by the government.....	12
5. Citizens initiated referendums.....	14
6. The smacking referendum 2009 - a case study.....	19
7. Concluding remarks.....	22
8. Bibliography.....	24

## 1. Introduction

The use of referendums in New Zealand has been infrequent. Political scientists observe that this is not surprising given that while New Zealand flirted early on with quasi-federalism, a constitutional regime was instituted that strongly resembled Britain's in its lack of rigidity (Butler and Ranney, 1994). Attempts to introduce direct democracy on a national scale in New Zealand began almost 120 years ago with the Referendum Bill of 1893 which provided for non-binding, government-initiated referendums. The Bill came about following the successful introduction of referendums at the local level in the 1880s, but failed to receive the majority support in Parliament required to proceed. In the following years the Bill was reintroduced to Parliament a number of times with no success and finally disappeared from the legislative scene in 1906. The issue of direct democracy was brought up again in 1918 and 1919 when the Social Democratic Party introduced the Popular Initiative and Referendum Bill. However, like previous attempts, this too was unsuccessful.<sup>1</sup>

In 1984 the direct democracy movement was revived with the introduction of the Popular Initiatives Bill that would have allowed citizens to force the holding of indicative referendums upon the presentation of a petition signed by more than 100,000 electors. This Bill was likewise unsuccessful, however instead of disappearing like the others, it was referred to the Royal Commission on the Electoral System in 1986 as a submission in support of the use of referendums. In chapter 7 of its report, the Commission carefully considered the many submissions received and the arguments for and against the different types of referendums. The Commission concluded that while it was appropriate for governments to hold referendums from time to time on specific constitutional issues, there should be no provision for citizens initiated referendums (CIRs). It referred to initiatives and referendums as "blunt and crude devices which need to be used with care and circumspection...They would blur the lines of accountability and responsibility of Governments and political parties, and blunt their effectiveness."<sup>2</sup>

Despite the Commission's recommendation, the government showed its support for CIRs by passing the Citizens Initiated Referenda Act in 1993. Thus New Zealand became the first Commonwealth country, and one of only a few countries in the world, to provide for this bottom-up method of direct democracy, alongside the long established top-down methods of constitutional referendums and referendums initiated by government.

---

<sup>1</sup> Morris, Caroline, 'Prospects for Direct Democracy in New Zealand' in Hwang, Jau-Yuan, 'Direct democracy in Asia: a reference guide to the legislation and practice'.

<sup>2</sup> Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System: towards a better democracy*, Government Printer, Wellington, 1986, p. 175.

Having presented a short historical summary of the direct democracy movement in New Zealand, this paper aims to provide an overview of the country's institutions of direct democracy. It sets out the legislative basis that provides for the holding of referendums and initiatives, made up of pieces of constitutional legislation, and a small number of statutes and regulations. The paper then deals, in turn, with the three types of referendums provided for under New Zealand law: constitutional referendums, referendums initiated by the government and CIRs. A special focus is given to the 2009 so-called 'smacking referendum' that stirred up considerable media debate and public emotion, not only towards the issue itself, but also towards New Zealand's system of CIRs generally. Finally, a few concluding remarks will be made about the current situation of direct democracy.

## **2. Legislative basis for referendums and initiatives**

The legislative basis for referendums and initiatives in New Zealand can be found in constitutional laws, a number of specific statutes and two regulations.

### **a. Constitutional legislation**

New Zealand has an unwritten constitution. Constitutional rights and principles are thus found in a number of important parliamentary statutes, treaties, court decisions and customary rules known as constitutional conventions. The New Zealand Bill of Rights Act 1990 sets out the basic 'rule of law' by affirming, protecting and promoting human rights and fundamental freedoms in respect of both individual people and the government. Section 12 provides for the general electoral rights of New Zealanders. The Judicature Act 1908 sets out the jurisdiction of the judiciary in New Zealand, while the Bill of Rights 1689 (England) establishes the theory of parliamentary sovereignty, providing Parliament with supreme law-making power. The Constitution Act 1986 describes the separation of the three arms of government - the executive, the legislature and the judiciary. It accords Parliament with full legislative power and provides for its three-year term. The Electoral Act 1993 provides for the people of New Zealand to decide on certain matters directly through referendum, for example, the term of Parliament.

### **b. Statutes**

Three statutes govern referendums and initiatives in New Zealand, namely the Electoral Act 1993, the Citizens Initiated Referenda Act 1993 (CIR Act) and the Referenda (Postal Voting) Act 2000.

The Electoral Act 1993 was established to reform the electoral system and to provide, in particular, for the introduction of the mixed member proportional system of representation (MMP) in relation to the House of Representatives. The Act defines who is eligible to vote, the qualifications required for members

of the House, and sets out the structures and processes for the holding of national general elections.<sup>3</sup> Section 268 provides for a restriction on the amendment or repeal of section 17(1) of the Constitution Act 1986 relating to the term of Parliament and certain provisions of the Electoral Act including sections 35, 60(f) and 168 relating to the division of New Zealand into electoral districts, the voting age and the method of voting. According to subsection 2, a reserved provision can only be repealed or amended in two cases. Either the proposal for the amendment or appeal is passed by a majority of 75% of all the members of the House of Representatives, or the proposal is carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts.<sup>4</sup> Section 268 itself is not an entrenched provision, meaning that the entrenchment of the provisions may be repealed and the issue amended at any time by a single majority in Parliament. It is, however, an accepted constitutional convention that those voting requirements also apply to any proposal to amend the protective section 268.<sup>5</sup>

The CIR Act is an Act to provide for the holding, on specific questions, of CIRs, the results of which referendums will indicate the views held by the people of New Zealand on specific questions but will not be binding on the New Zealand Government.<sup>6</sup>

There are six steps in the process. First, a written referendum proposal is submitted to the Clerk of the House of Representatives as according to section 6. Second, the Clerk advertises the proposed question in the *Gazette* and major newspapers. The public then has 28 days to make written comments to the Clerk on the wording of the proposed question. The Clerk has three months to determine the final wording of the question which must clearly convey the referendum's purpose and effect, and be such as to ensure that only one of two answers may be given. Once the wording is determined, the Clerk also approves the form to be used for the collection of signatures to the petition. These requirements are set out in sections 7 to 12. Third, according to sections 14 and 15, the promoter of the question then has 12 months in which to gather the signatures of at least 10% of all registered voters and deliver the petition to the Clerk. The petition lapses if it is not delivered within this time period. Fourth, the Clerk checks the petition for compliance, for example, that all signatures are on approved petition forms. If the procedure has been correctly carried out the Clerk gives the petition to the Speaker who then presents it to the House of Representatives. If there are insufficient signatures, the Clerk certifies that the petition has lapsed and the promoter has a further two months to re-submit the petition with additional

---

<sup>3</sup> <http://www.hrc.co.nz> (last accessed 18/01/10)

<sup>4</sup> <http://www.legislation.govt.nz> (last accessed 09/02/10)

<sup>5</sup> <http://www.cabinetmanual.cabinetoffice.govt.nz> (last accessed 26/01/10)

<sup>6</sup> <http://www.legislation.govt.nz>

signatures. These requirements are stipulated in sections 18 to 21. The fifth step concerns the holding of the referendum. According to section 22, the Governor-General either sets a date for the referendum within one month after the date on which the referendum petition is presented to the House, or specifies that the referendum is to be conducted by postal voting. Section 22AA states that the referendum must be held within a year after the date of presentation to the House unless a 75% majority of members of Parliament vote to defer it. In the final step the referendum is held and the result declared as according to section 40. The result is indicative only, meaning the government can choose whether or not to act on the results of the referendum.

The CIR Act also prescribes certain rules concerning advertising and the limits on expenditure of the campaign. Section 41 states that advertising related to a petition or referendum is only allowed if it contains a statement setting out the name and address of the person for whom or at whose direction it is published or broadcast. According to section 42, it is an offence for a person to spend more than NZ\$50,000 advertising the petition and likewise to spend more than NZ\$50,000 promoting or opposing the answer to the referendum. The maximum fine in both cases is NZ\$20,000.

The Referenda (Postal Voting) Act 2000 provides for the use of postal voting for both government and CIRs in New Zealand, and applies if the Governor-General makes an Order in Council providing that a specified referendum must be conducted by postal voting.<sup>7</sup> The Act overlaps considerably with the CIR Act.

### c. Regulations

There are two sets of regulations relating to the CIR Act, as pursuant to section 58 of that Act; the Citizens Initiated Referenda (Fees) Regulations 1993 and the Citizens Initiated Referenda Regulations 1995.<sup>8</sup> The Citizens Initiated Referenda (Fees) Regulations prescribe the fee that is required to accompany every proposed referendum petition, namely NZ\$500, which is payable on the submission of the proposal to the Clerk of the House of Representatives. The Citizens Initiated Referenda Regulations 1995 prescribe the requirements and forms in relation to the referendums held under the CIR Act, including the form of the voting paper and modifications to provisions of the Electoral Act in relation to special voting at a referendum.

The legislation prescribing referendums and initiatives in New Zealand is by no means prolific and its content is not overly prescriptive. The constitutional legislation sets out principles in general terms while the Electoral Act provides

---

<sup>7</sup> <http://www.legislation.govt.nz>

<sup>8</sup> <http://www.legislation.govt.nz>

for the legal basis for the electoral system as whole. The CIR Act was enacted in the same year as the Electoral Act introducing the new MMP system, and as a consequence, passed almost unnoticed (Mapp, 1995). Although the CIR Act prescribes the steps for the holding of CIRs, as will be discussed below, the specifics are not always clear.

### **3. Constitutional referendums**

As shown in the previous section, under New Zealand law there is no requirement for a referendum to enact constitutional change. In fact, apart from the aforementioned sections of the Electoral Act and section 17 of the Constitution Act, the amendment of constitutional provisions requires only a simple 51% majority of members of Parliament. That said, referendums have been used a number of times to decide constitutional matters.

There have been four instances where the government has held a referendum on a constitutional matter. Enabling legislation was passed in order for the referendum result to be binding and not merely indicative for three out of the four referendums. The first constitutional referendum was held on 23 September 1967 and concerned a proposal to extend the legislative term of Parliament from three to four years. 68.1% voted in favour of staying at a three-year maximum term on a voter turnout of 69.7%.<sup>9</sup> The second referendum held on 27 October 1990 together with parliamentary elections concerned exactly the same matter. The turnout was much higher this time, at 85.2%. With a similar result to the 1967 referendum, 69.3% voted in favour of maintaining the status quo, namely a three-year legislative term.

Both the 1992 and 1993 constitutional referendums concerned the reform of New Zealand's electoral system. Public dissatisfaction with the conduct of both major political parties and a breakdown of confidence in Parliament generally had been steadily growing since the 1970s. Particular criticism was made of the 1978 and 1981 general elections where, while the Labour opposition obtained more votes overall than the National Party, the latter won more seats in Parliament and thus remained in power.<sup>10</sup> The concept of a system of more proportional representation became a hot topic of debate. In 1984, Labour appointed a Royal Commission to look into the electoral system. In 1986 they published a report recommending, amongst other things, the adoption of MMP, a proportional representation system similar to that used in Germany and an increase in the size of Parliament from 99 to 120 seats. Under MMP, members of Parliament are elected not only from constituencies but also party lists, which effectively makes a party's parliamentary representation proportional to its share of the overall vote (Leduc, 2003). The Commission furthermore recommended that a referendum should be held on

---

<sup>9</sup> Statistical information for all referendums held in New Zealand can be found at <http://www.c2d.ch/votes.php?table=votes> (last accessed 23/03/10)

<sup>10</sup> <http://www.elections.org.nz> (last accessed 09/02/10)

the issue. Neither Labour nor the National opposition supported the Commission's report; however in a bid to politically outmanoeuvre each other, both parties included the promise of the holding of a referendum on electoral reform in their 1990 election campaigns.<sup>11</sup> The National party went on to win the 1990 election. The new government soon found itself under increasing pressure from the New Zealand public to hold true to its campaign promise.

On 19 September 1992 the National government finally agreed to hold an indicative referendum on the subject. The question was divided into two parts. Part A asked voters whether they wanted to change the existing voting system or retain the First-Past-the-Post system (FPP) as prescribed in the Electoral Act 1956. Part B asked voters to indicate support for one of the four prescribed new voting systems: Supplementary Member, Single Transferable Vote, MMP or Preferential Vote. The government promised that if the vote resulted in a majority vote for change, a binding referendum would take place the following year with a choice between FPP and the most popular reform option.<sup>12</sup> While the turnout for the referendum was only 55.2%, an overwhelming 84.7% of voters supported change, with 70.5% indicating a preference for the MMP system. In a comment on the results of the referendum, the then Labour leader Mike Moore said: "The people didn't speak on Saturday. They screamed."<sup>13</sup>

The promised binding referendum was held on 6 November 1993. The enabling Act in this case was the Electoral Referendum Act 1993 which, as its title states, was enacted specifically to provide for the holding, in conjunction with the 1993 general election, of a referendum on proposals for the reform of the electoral system.<sup>14</sup> The Electoral Act was drafted prior to the referendum and detailed how the MMP reform option would work. In 1992, the government created the Electoral Referendum Panel, an independent organisation charged with educating the public about the reform options. It gained voters' trust free from any political agenda and in addition to providing information about the various reform options, was able to adjudicate on factual disputes between the opposing lobby groups (Seyd, 1998). The turnout for this referendum was a much higher 85.2%, not surprising given that it was held on Election Day. The result was close compared to 1992 but still clear; 53.9% of voters favoured MMP. Voters who had supported change in the 1992 indicative referendum not surprisingly voted for MMP, but interestingly, among first-time voters in the 1993 referendum, the division favoured FPP (Leduc, 2003). The new electoral system was codified in the Electoral Act which came into force in the same year.

---

<sup>11</sup> <http://www.elections.org.nz>

<sup>12</sup> <http://www.elections.org.nz>

<sup>13</sup> <http://www.elections.org.nz>

<sup>14</sup> <http://www.legislation.govt.nz>

On 20 October 2009 the government announced that it will hold a referendum on the electoral system in conjunction with the 2011 general election. A vote on this issue was part of the National Party's election campaign in 2008. National leader John Key believed there was a strong call from voters to give their opinions on the current MMP system and stated that if the system were to be changed his personal preference would be the Supplementary Member, a system allowing for proportionality while ensuring it was not the dominating factor.<sup>15</sup> The vote will essentially be the same as the 1992 referendum. The question will be divided into two parts; part A will ask whether MMP should be retained and part B will give the voter four voting systems to choose from regardless of their answer in part A. While this vote will not be legally binding, the government has made a commitment that if a majority favour change, a second, binding referendum will be held with the 2014 general election asking voters to choose between MMP and the preferred voting system.<sup>16</sup>

#### **4. Referendums initiated by the government**

##### **a. National level**

The New Zealand government may choose to hold a referendum, either indicative or binding (accompanied by the necessary enabling legislation), on any issue. The referendums initiated by government can broadly be separated into two categories: liquor licensing referendums and other referendums.

Between 1894 and 1914 compulsory local licensing referendums were held with each parliamentary election as provided for in the Alcoholic Liquors Sale Control Act 1893. Voters were given three options to choose from: the granting of new licences, reduction, or prohibition. In 1918, an amendment to the Licensing Amendment Act 1910 repealed the legal requirement for these local referendums on alcohol policy.<sup>17</sup>

In 1910 the Government introduced a referendum on national prohibition that was held in conjunction with general elections between 1911 and 1987. At the first poll a majority did vote for prohibition, however the 60% threshold was not reached and it was not implemented. Nevertheless, many bars were closed and a minimum drinking age set at 21 years. At the 1919 poll, only the last-minute addition of votes from returning World War One servicemen stopped prohibition from being implemented (Hwang, 2006). Though a total ban on alcohol was never implemented in New Zealand, "prohibitionist sentiment remained deeply entrenched...It manifested itself in bizarre and restrictive

---

<sup>15</sup> Travett, Claire, 'Referendum 'no' wouldn't need to spell end for proportionality', *The New Zealand Herald*, 9 August 2008.

<sup>16</sup> <http://www.beehive.govt.nz> (last accessed 01/03/10)

<sup>17</sup> <http://www.elections.org.nz>

liquor laws and in peculiar social experiments such as licensing trusts.”<sup>18</sup> The prohibition referendums were finally abolished by the Sale of Liquor Act 1989.

There have also been two referendums on longer drinking hours in pubs. The first was held on 9 March 1949. At that time alcohol could only be served between 9.00 and 18.00. The government considered extending this period to 22.00. However, on a turnout of 56.3%, a three-to-one majority voted to retain the existing hours. The second referendum was on held on 23 September 1967. On this occasion there was a much higher turnout of 71.2% and voters opted for the government’s proposal to extend drinking hours.

Other referendums have been held in cases where the government was faced with a difficult or potentially unpopular decision, or where opinion was split within government. On 9 March 1949, voters were asked whether to allow off-course gambling. Betting on horse races outside the racecourse had been forbidden since 1920. On the recommendation of a Royal Commission on Licensing, the government launched a referendum under the Gaming Poll Act 1948 to allow betting once more. On a turnout of 54.3%, 68.0% voted in favour of the government’s proposal.

On 3 August of the same year, New Zealanders were again called to vote, this time on the issue of compulsory military training during peace time. The vote reflected British Commonwealth solidarity and was endorsed by both major parties (Butler and Ranney, 1994). 77.9% of voters supported peace-time conscription however the turnout for the vote was a relatively low 63.5%. Commentators suggest that, “recourse to the referendum was probably intended more to circumvent opposition within the governing Labour party than to let the people decide” (Butler and Ranney, 1994:169). The last of the referendums in this category was held on 26 September 1997 and concerned the introduction of a compulsory retirement savings scheme. It was New Zealand's first referendum held by postal vote. The vote came about as part of the coalition agreement between the National Party and New Zealand First party. In New Zealand's first election under the new MMP system in 1996, neither Labour nor National gained enough support to govern alone. New Zealand First had won enough seats to hold the balance of power in Parliament and duly entered into negotiations with both major parties, until finally deciding to side with National, the referendum being one of the coalition conditions (Preston, 1997). On a turnout of 80.3%, an overwhelming 91.8% voted against the introduction of the scheme.

#### b. Local level

Though New Zealand is divided into regions, there is no autonomous regional governance and no provision for referendums to be held at a regional level.

---

<sup>18</sup> Du Fresne, Karl, 'The wowser tradition runs deep', *The Nelson Mail*, 12 March 2003.

Referendums can, however, be held at the local level. Historically, as previously discussed, triennial local liquor licensing polls were held under the Alcoholic Liquors Sale Control Act 1893. Under the Local Elections and Polls Act 1976, non-binding local referendums could be initiated. For example, in 1992, Tauranga locals voted on the question of fluoridation of the local water supply (Hwang, 2006). More recently, the Local Electoral Act 2001 includes several provisions on the holding of binding and indicative referendums by local authorities as part of providing fair and effective representation for individuals and communities and upholding public confidence in, and understanding of, local electoral processes.<sup>19</sup> According to section 29 of the Act, 5% of local electors may demand a referendum be held on a proposal by those electors to use a particular electoral system at the elections of the local authority. Section 34 states that the result of such a referendum will be binding. According to section 54, there is a requirement that in the case of a binding referendum, the consequences of each possible result must be stated. Additionally, in the case of a non-binding referendum, the intentions (if any) of the local authority on whose behalf the referendum is conducted in respect of each possible result of the poll must be stated.

## **5. Citizens initiated referendums**

The use of CIRs in a democracy is seen by many as being an alternative to representative democracy. Judging by the majority support its introduction received in the New Zealand Parliament, it appears this was not the case in New Zealand. As MP Chris Fletcher noted at the time, "I see this Bill as being complementary to our current electoral system. I think that it is progressive legislation...New Zealand will be the first Commonwealth country to introduce legislation of this kind..." (Morris, 2004:116).

The New Zealand system of CIRs has a number of features that sets it apart from other models, namely its non-binding nature, associated wording process, high signature target, and spending limit on signature gathering and voting campaigns (Parkinson, 2001). Unlike many other countries, New Zealand's constitutional framework does not provide the courts with the power of judicial review to strike down legislation or referendum results which are contrary to New Zealand's basic constitutional and democratic principles. Making referendums non-binding gives Parliament the flexibility to ensure that rights and freedoms are not compromised by referendum results (Graham, 1994). Former Justice Minister Douglas Graham gave two reasons as to why CIRs had been made advisory only. Firstly, decisions on security, foreign and some fiscal policy were too important and only the government would have access to all the information, and secondly, the threat of the tyranny of the majority where, given low turnout rates, very small numbers of people could impose their will.<sup>20</sup> This feature did not escape critique. In 1992, in a widely published criticism, MP and former Prime Minister David Lange expressed

<sup>19</sup> <http://www.legislation.govt.nz>

concern about the indicative nature of the proposed initiative system. "[I]t is actually a fraud on the community for the Government to ask it for its opinion when the Government has said it will not necessarily follow that opinion" (Morris, 2004:116).

In the New Zealand context, the wording of referendum questions is less precise than in Switzerland or California. The question covers an issue broadly and the drafting of specific legislation is the responsibility of the government, not the promoters of the referendum. Though section 11 provides that the Clerk shall determine the wording of the precise question to be put to voters, in practice he can only influence the wording within limits. This is because the Clerk is not "required or indeed permitted to turn the proposal into something it does not purport to be."<sup>21</sup> It is the promoters, therefore, who effectively have the last say in how the question will be put. The very first petition brought under the CIR Act showed how the wording could be problematic. The question determined by the Clerk was:

'Should the production of eggs from battery hens be prohibited within five years of the referendum?'

The promoters of the petition, the Egg Producers Federation of New Zealand, protested that the Clerk failed to keep the wording neutral. Caroline Morris highlighted an important problem in this regard when she asked how an institution was supposed to find a balance between refining the question to make it more easily understood by voters and being seen to be influencing the wording (Morris, 2002).

The signature threshold requirement of 10% of enrolled voters is very high. With current statistics indicating the number of enrolled voters to be almost three million New Zealanders<sup>22</sup>, 300,000 signatures are therefore required. In comparison, the threshold in Switzerland is 100,000 signatures (a little under 2% of eligible voters) and in California either 5% for legislative initiatives or 8% for constitutional initiatives is required. The reason for setting the threshold so high was to limit the number of successful petitions, both because of the high cost of holding a referendum (approximately NZ\$10-12 million), and to stop referendums being used in a vexatious manner.<sup>23</sup>

---

<sup>20</sup> 'Citizens Initiated Referenda Bill', *New Zealand Parliamentary Debates*, Wellington, 1992, Vol. 522, p. 6704-05.

<sup>21</sup> *Egg Producers Federation v The Clerk of the House of Representatives* (20 June 1994) High Court Wellington CP 128/94, Eichelbaum CJ cited in Goschik, Ben, 'You're the voice - try and understand it: some practical problems of the Citizens Initiated Referenda Act', p.712-13.

<sup>22</sup> <http://www.elections.org.nz>

<sup>23</sup> *Op. cit.*, 'Citizens Initiated Referenda Bill', p. 6705.

The final significant unique feature is the spending limit on signature gathering and voting campaigns. Neither the Swiss nor Californian systems have such limits.<sup>24</sup> The spending limits were imposed to ensure that the process was not dominated by moneyed interests, to create a level playing field between supporters and those in opposition. However, an effect has been "not to equalise power between the different sides of a referendum debate but to ensure that voters remain unaware and uninformed about CIR issues" (Parkinson, 2001:414).

Of the 34 petitions brought under the CIR Act so far, only four have successfully made it to a referendum. The reason most never made it that far is threefold. In eight cases, including four of those proposed by the Next Step Democracy Movement in 1994, the petition was withdrawn by its promoter. Four petitions failed to reach the required signature target, being 10% of eligible voters. In these cases the petition was presented on time, however checks revealed that there were insufficient valid signatures. The remaining 17 petitions lapsed, meaning they were not presented to the Clerk on time.<sup>25</sup> While the NZ\$500 petition submission fee has been enough to stop completely frivolous questions, it is the signature target that presents the most significant hurdle for serious petition promoters.

The CIR Act does provide for some restriction on the subject matter of petitions. Section 4 excludes proposals that call for an inquiry into the way a previous referendum was conducted, while section 11(2)(b) excludes issues that have been voted on in a referendum within the five years prior to the receipt of the petition. Despite these minor restrictions, the subject matter of the petitions has been diverse and, much to the surprise of politicians, by no means limited to difficult moral or political issues. They have ranged from battery hens and tobacco products to euthanasia, forestry licences and a new national flag. In Switzerland and California initiatives are primarily a tool of established elites.<sup>26</sup> New Zealand CIR petitions, on the other hand, have, for the most part, been initiated by private individuals and groups without any

---

<sup>24</sup> Serdült, Uwe, '*Referendum campaign regulations in Switzerland*' in Gilland Lutz, Karin and Hug, Simon (Eds.), '*Financing Referendum Campaigns*', Palgrave/Macmillan, New York, 2010, pp. 165-179.

<sup>25</sup> Office of the Clerk of the House of Representatives, '*Citizens Initiated Referenda*', Parliamentary Bulletin 94:10-99:23 (1994-1999) in Parkinson, John, '*Who knows best? The creation of the citizen-initiated referendum in New Zealand*'; Information provided by Professor Caroline Morris of the Victoria University Law Faculty, Wellington, New Zealand in Hwang, Jau-Yuan, '*Direct democracy in Asia: a reference guide to the legislation and practice*'. For the 10 January 2005 petition promoted by John van Buren titled '*Should the proprietor of licensed premises be able to determine whether those premises are smoke-free?*' there are no results available.

<sup>26</sup> Particularly in the case of Switzerland, the elites are no longer primarily political actors but rather members of civil society. See Serdült, Uwe and Welp, Yanina, '*Referendos e iniciativas populares: análisis de "la ciudadanía" que activa la democracia directa*'. Paper presented at the 21<sup>o</sup> IPSA World Congress of Political Science, Santiago de Chile, 11-16 July 2009.

direct role in the legislative process. The few exceptions have been attempts by the Christian Heritage Party and a number of members of Parliament (Parkinson, 2001).

The first successful petition under the CIR Act was sponsored by the New Zealand Professional Fire-Fighters Union. The initiative was in protest of a proposed restructuring within the fire service which would have meant a reduction in staff and an increase in working hours (Gregorczyk, 1998). The question read:

‘Should the number of professional fire-fighters employed full-time in the New Zealand Fire Service be reduced below the number employed on 1 January 1995?’

The question was unusual on two counts: one, that it aimed to generate a 'No' response and two, that it directly concerned an employment rather than a political issue. The referendum was held on 2 December 1995 with a dismal 27.0% turnout. A mere 12.2% voted 'Yes', while 87.8% voted 'No'. Despite the measure passing easily, the government ignored the result, citing "the loaded question and the low participation rate as well as the general inappropriateness of dealing with a complex issue of industrial relations and budgeting priorities by such a blunt yes/no question" (Mulgan, 2004:286).

Two CIRs were conducted simultaneously with the 1999 General Election on the questions:

‘Should the size of the House of Representatives be reduced from 120 members to 99 members?’

‘Should there be a 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?’

The vote on whether the number of members of Parliament should be reduced was promoted by Wellington superannuitant Margaret Robertson. She claimed that “a smaller Parliament would be more efficient, harder working, and better ordered because politicians would be too busy to behave badly.” On a turnout of 84.8%, 81.5% voted in favour of the proposal, despite opposition from a group of 70 political scientists who said that the measure would result in a *less* responsive Parliament. The Labour government ignored the result and though New Zealand First MP Barbara Stewart introduced a bill in 2006 to reduce the size of Parliament to 100, the bill was voted down.

The second question, regarding New Zealand's Justice system, was initiated by a petition started by Norman Withers of Christchurch as a result of the brutal assault on his elderly mother and the lenient sentence he considered the perpetrator received. The measure passed with a massive 91.8% majority. Much criticism was made of the complex wording of the question. There were suggestions that the question was not understood by most voters and that it even breached sections 5(2) and 10(1)(b) of the CIR Act, namely that initiatives must ask only one question and allow only one of two possible answers. Furthermore, terms such as 'hard labour' or 'serious violent offences' were not defined. This time the results of the vote were not completely ignored by the government. Some minor amendments were made to the sentencing and parole provisions in the Criminal Justice Act 1985 and Sentencing Act 2002, such as an increase in some penalties for serious crime and a modest improvement in victim's rights.<sup>27</sup>

A major issue of the 1999 referendums was the lack of public debate surrounding them. Media coverage focussed instead almost entirely on the general election. New Zealand's largest newspaper, the *New Zealand Herald*, published only four articles mentioning Robertson's initiative, and when political scientists attempted to stimulate debate on the issue, they were heavily criticised by the media as trying to advance their personal agendas. The non-binding nature of the referendums may have been the reason why the media did not treat the issues seriously, nor placed importance on their coverage.<sup>28</sup>

A feature of all three CIRs was the lack of information provided to the public on the issues. The CIR Act does not require the government to provide information to voters unlike in Switzerland and California. Attempts were made to produce a pamphlet prior to the fire-fighters referendum however the parties could not agree on what information should be provided.<sup>29</sup> Prior to the 1999 referendums, the Crown Law Office gave instructions to the Chief Electoral Officer that it was not allowed to educate the public on referendum questions unless they related to an electoral matter. While a brochure on the members of Parliament petition was produced - though not able to be made readily available - no official information was produced for the Justice system petition.<sup>30</sup>

---

<sup>27</sup> Kirkness, Murray, 'Editorial: The referendum fiasco', *Otago Daily Times*, 24 June 2009.

<sup>28</sup> Parkinson, John, 'Who knows best? The creation of the citizen-initiated referendum in New Zealand'; Qvortrup, Matt, 'Citizen initiated referendums (CIRs) in New Zealand: A comparative appraisal'.

<sup>29</sup> Wherle, Gabriela, 'The Firefighter's referendum - should questions arising from industrial disputes be excluded from referenda held under the Citizens Initiated Referenda Act 1993?' (1997) 27 VUWLR 273, 287 in Goschik, Ben, 'You're the voice - try and understand it: some practical problems of the Citizens Initiated Referenda Act'.

<sup>30</sup> Justice and Electoral Committee. 'Inquiry into the 1999 General Election', [2001] AJHR I 7C 55.

## 6. The smacking referendum 2009 - a case study

Between 31 July and 21 August 2009 New Zealand's fourth and most recent CIR was held by postal vote on the question:

'Should a smack as part of good parental correction be a criminal offence in New Zealand?'

The petition for the referendum was initiated in February 2007 by Sheryl Savill, with support from Kiwi Party leader Larry Baldock, in response to the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill - colloquially the 'anti-smacking bill' - that was before Parliament aiming to repeal the old section 59 of the Crimes Act 1961.<sup>31</sup>

Following intense debate both in Parliament and publicly, Green party MP Sue Bradford's bill passed with an overwhelming majority of 113 votes to 7 on 16 May 2007. The result was the Crimes (Substituted Section 59) Amendment Act 2007 which removed the legal defence of 'reasonable force' for parents prosecuted for assault on their children.<sup>32</sup> Many objected to the law change. Some outspoken members of the public claimed "that parliament was becoming a 'Nanny State' and intruding on the lives of ordinary New Zealanders."<sup>33</sup>

The petition was initially presented to the Clerk on 29 February 2008, however the number of signatures fell some 10,775 short of the 280,275 required to force a referendum. Many signatures were excluded because they were either illegible, had incorrect date of birth information, or involved people who had signed more than once. The promoters were given an extra two months to collect the remaining signatures and have their legitimacy confirmed.<sup>34</sup> On 23 June 2008 the petition was presented by Larry Baldock for the second time with 390,000 signatures.<sup>35</sup> The Clerk certified that there were enough signatures within the two month time period and a month later the Government named the date for the referendum. To the disappointment of the promoters, Prime Minister Helen Clark announced that the referendum would not take place alongside the 2008 general election, but rather by postal ballot and not until August 2009. The decision for a postal ballot was based on advice from the Chief Electoral Officer who said that holding the referendum

---

<sup>31</sup> Collins, Simon, 'Petition offers voice against Bradford bill', *The New Zealand Herald*, 23 February 2007.

<sup>32</sup> NZPA. 'Anti-smacking bill becomes law', *The New Zealand Herald*, 16 May 2007.

<sup>33</sup> Baron, Steve, 'Smacking referendum: a biased New Zealand Herald', p. 2 [www.betterdemocracy.co.nz/studies/php](http://www.betterdemocracy.co.nz/studies/php) (last accessed 13/01/10)

<sup>34</sup> Watkins, Tracy, 'Smacking petition falls short', *The Dominion Post*, 29 April 2008.

<sup>35</sup> NZPA. 'Smacking petition runs out of time', *The New Zealand Herald*, 24 June 2008.

at the same time as the election would lead, among other things, to voter confusion.<sup>36</sup>

The wording of the referendum question received a lot of criticism. As provided for by the CIR Act, the precise wording of CIR questions rests upon the Clerk of the House, who must make sure the purpose and effect of the referendum is clearly conveyed.<sup>37</sup> However the Clerk is under no obligation to ensure that the question is balanced or framed in a neutral way. Like the fire-fighters referendum in 1995, the question aimed to elicit a 'No' response, yet it was also seen as a very loaded question that created confusion. Prime Minister John Key described the question as "ambiguous" and remarked that it "could be read in a number of different ways." In fact, many people both in support and in opposition of the current law were not sure whether to answer 'Yes' or 'No'.<sup>38</sup> Murray Aldridge, of Barnados New Zealand, claimed "the question presupposes that smacking is a part of good parental correction [but] it also says parents who smack their children are likely to become criminals and neither of those things are correct."<sup>39</sup> The word 'good' was not defined.

The principal supporters of the referendum were the Kiwi Party, advocates of direct democracy led by Larry Baldock, and Family First New Zealand, a conservative lobby group. A 'Vote No' campaign authorised by Family First was launched in June 2009, explaining the referendum to voters and providing proof that the new section 59 was not working and that police were now prosecuting good parents when really the important issue should be addressing the causes of child abuse.<sup>40</sup>

The 'Yes Vote' campaign was supported by a number of prominent child-focussed organisations including the Royal New Zealand Plunket Society, Barnados, Save the Children, UNICEF and Women's Refuge as well as many smaller community groups. The 'Yes Vote' campaign claimed the referendum question was poorly worded and misleading. In their opinion the new section 59 "was working well as shown by: Increased awareness of positive discipline and other non-violent parenting techniques; parents who overstep the mark and use heavy handed discipline...not getting away with a defence of 'reasonable force' and being given compassionate and appropriate sentences like anger management courses; and no criminal convictions of parents who have only lightly smacked their children."<sup>41</sup>

---

<sup>36</sup> Trevett, Claire, 'Smack referendum next year, says Clark', *The New Zealand Herald*, 26 June 2008.

<sup>37</sup> Citizens Initiated Referenda Act 1993, section 10 and 11.

<sup>38</sup> Kelly, Norm, 'The smack', *Inside Story*, 28 July 2008 <http://inside.org.au> (last accessed 03/12/09)

<sup>39</sup> 'Anti-smacking debate goes to referendum', 15 June 2009 <http://3news.co.nz> (last accessed 26/11/09)

<sup>40</sup> <http://www.voteno.org.nz> (last accessed 16/02/10)

<sup>41</sup> <http://www.yesvote.org.nz> (last accessed 16/02/10)

The leaders of both major parties decided not to vote in the referendum, with Prime Minister John Key calling the question “ridiculous”<sup>42</sup>. In his opinion there was no evidence the current law was not working and he therefore saw no need to change it.<sup>43</sup> Leader of the opposition, Phil Goff, argued that the question implied that voting ‘Yes’ meant approval of criminal sanctions being taken against reasonable parents.<sup>44</sup>

The final date for enrolment was 30 July 2009 and voting opened the next day. Voting ran until 7pm on 21 August and on 25 August the official result of the referendum was announced by the Chief Electoral Officer. According to the results, an overwhelming 87.4% of New Zealanders voted 'No', on a turnout of 56.1%.<sup>45</sup>

Notwithstanding the massive support for a law change, both the Prime Minister and Goff had already made clear statements prior to the non-binding referendum that no action would be taken.<sup>46</sup> Despite the indicative nature of New Zealand's CIRs, Parliament's decision to once again ignore the result prompted much public criticism. Media reports<sup>47</sup> spoke of the NZ\$9 million spent on the referendum as a waste of money and, given the governments failure to act, a complete waste of time. Former Prime Minister, Mike Moore, considered the referendum an expensive scam and mistake on the part of the government given the reality of the new section 59. He said, “[t]he legislation was never going to achieve what its promoters claimed, and was never going to send good parents to court, as its opponents suggested.” The editor of the *Otago Daily Times* was of the opinion that inaction would only cause more damage to the concept of CIRs. Given that it was such a controversial topic, the smacking referendum should have received in-depth and balanced coverage by the media however this was not the case.

On 21 November 2009 a protest march was held against the government's dismissal of the referendum. The 'March for Democracy', held in Auckland and funded by Auckland businessman Colin Craig, involved approximately 4000 people. The march, and indeed the ongoing 'March for Democracy' campaign, wants to see law changes that reflect the results of those CIRs

---

<sup>42</sup> Trevett, Claire, 'Key sees merit in Greens' referendum bill', *The New Zealand Herald*, 23 June 2009.

<sup>43</sup> NZPA, 'Key dragged into centre of smacking debate', 18 June 2009 <http://www.3news.co.nz> (last accessed 26/11/09)

<sup>44</sup> *Ob. cit.*, Kirkness, Murray, 'Editorial: The referendum fiasco'.

<sup>45</sup> <http://www.elections.org.nz>; <http://www.electionresults.govt.nz> (last accessed 09/02/10)

<sup>46</sup> *Ob. cit.*, Kelly, Norm, 'The smack'.

<sup>47</sup> George, Garth, 'Referendum no answer to parental worry', *The New Zealand Herald*, 18 June 2009; Temple, Philip, 'Referendums an expensive distraction', *Otago Daily Times*, 10 December 2009; Moore, Mike, 'Smacking - referendum hoax John Key's biggest mistake', *The New Zealand Herald*, 3 September 2009.

deliberately overlooked by the government.<sup>48</sup> A further response has been the preparation of a petition for a referendum on binding CIRs, promoted by Larry Baldock. The question for the referendum was approved by the Clerk on 14 January 2010 and, provided enough signatures are collected, will be held with the General Election in 2011.<sup>49</sup> The question is:

'Should Parliament be required to pass legislation that implements the majority result of a citizens initiated referendum where that result supports a law change?'

The Legislation Advisory Committee, chaired by former Prime Minister Geoffrey Palmer, has called for a veto of the proposed referendum on the grounds that it would "contradict the fundamental purpose of the Citizens Initiated Referenda Act 1993, which provided for non-binding referendums."<sup>50</sup> Better Democracy New Zealand, on the other hand, supports the petition and believes that binding referendums are not a replacement for representative democracy but a supplement; a check and balance on Parliament and the next step to real democracy.<sup>51</sup>

In addition to the petition on binding CIRs, there is one other pending CIR petition, the signature deadline of which is 7 May 2010. The promoter is a trade union called Unite Union and the question is:<sup>52</sup>

'Should the adult minimum wage be raised in steps over the next three years, starting with an immediate rise to \$15 per hour, until it reaches 66% of the average total hourly earnings as defined by the Quarterly Employment Survey?'

For the binding referendums petition in particular, if the required signatures can be collected to force a referendum, it will be interesting to see how New Zealanders vote. Given the government's attitude towards the results of CIRs in the past, however, there appears to be little hope for the promoters that any big changes will be brought about.

## **7. Concluding remarks**

Despite initial expectations, the introduction of CIRs "has not opened the floodgates of direct democracy" (Qvortrup, 2008:76). In the year after the CIR Act came into force, a total of 12 petitions were filed. Since then, however, the usage has declined rapidly, not least due to the government's failure to act on

<sup>48</sup> <http://www.themarch.co.nz> (last accessed 23/02/10)

<sup>49</sup> <http://www.4democracy.co.nz> (last accessed 13/01/10)

<sup>50</sup> Collins, Simon, 'Group calls for veto of referendum', *The New Zealand Herald*, 17 November 2009.

<sup>51</sup> Better Democracy NZ, 'New Zealand: an introduction to binding referendums', 2009 <http://www.betterdemocracy.co.nz/studies/php> (last accessed 13/01/10)

<sup>52</sup> <http://www.parliament.nz> (last accessed 24/02/10)

the results of the few which did make it to a vote. The high signature requirement and spending limits on signature gathering and voting campaigns have also inhibited participation on any significant scale. In fact, rather than strengthen democracy and give New Zealanders the opportunity to be more involved in the legislative process, some political commentators have gone as far to say that CIRs are nothing more than large and expensive public opinion polls.<sup>53</sup>

The New Zealand experience certainly exposes some underlying problems with the CIR instrument of direct democracy. Yet would making CIRs binding, as is the case in Switzerland and California, improve the situation? A review of the CIR Act may be a more useful cause of action. The Act could provide more guidance on the framing of referendum questions to prohibit bias for example. A requirement that the government publish information assisting voters in understanding the issue and explaining the effect of their voting choice may also have positive effects (Morris, 2004).

The attitudes of the leaders of both major political parties in the smacking referendum is also cause for concern in terms of the future of CIRs in New Zealand. Their decision not to vote undermines the legitimacy of this very important democratic mechanism.

Independently of CIRs, New Zealand's other experience with referendums, especially those on constitutional issues, show that direct democracy has been at least partly successful. However, given that there is no statutory requirement for referendums to enact constitutional change, there is therefore, no formula for deciding which constitutional issues should be subjected to a referendum and which should not.

The way in which direct democracy progresses in New Zealand is something which will be monitored with interest. The current position suggests that there is a significant divide between the attitudes of the government and the citizens of New Zealand. Perhaps the greatest challenge will be figuring out a working compromise between representative and direct democracy rather than favouring one or the other.

---

<sup>53</sup> For example: Palmer, Geoffrey and Palmer, Matthew, 'Bridled power: New Zealand Government under MMP', 3<sup>rd</sup> edition, Oxford University Press, Auckland, 1997.

## 8. Bibliography

- Butler, David and Ranney, Austin (Eds.), 'Referendums around the world: the growing use of direct democracy', AEI Press, Washington, 1994.
- Catt, Helena, 'Commentary: the New Zealand election of 27 November 1999', *Australian Journal of Political Science*, Vol. 35, No. 2, pp. 299-304.
- Goschik, Ben, 'You're the voice - try and understand it: some practical problems of the Citizens Initiated Referenda Act', *VUWLR*, Vol. 34, 2003, pp. 695-727.
- Graham, Douglas, 'Direct democracy: Citizens Initiated Referenda - A question of public confidence', (1994) *75 The Parliamentarian* 89.
- Gregorczyk, Helen, 'Citizens initiated referendums: republican innovation or scourge of representative democracy?' *Griffith Law Review*, Queensland, Vol. 7, No. 2, 1998, pp. 247-273.
- Hwang, Jau-Yuan, (Project Coordinator), 'Direct democracy in Asia: a reference guide to the legislation and practice', Taiwan Foundation for Democracy, Taipei, 2006. pp. 259-288: New Zealand, pp. 313-318: Direct democracy practice in New Zealand, pp. 409-418: C. Morris, Prospects for direct democracy in New Zealand.
- Leduc, Lawrence, 'The politics of direct democracy: referendums in global perspective', Broadview Press Ltd, Toronto, 2003.
- Mapp, Wayne, 'New Zealand's system of citizens initiated referenda', *Agenda*, Australian National University, Canberra, Vol. 2, No. 4, 1995, pp. 445-454.
- Morris, Caroline, 'Citizen's Referenda: Time to Review?' [2002] *NZLJ* 44.
- Morris, Caroline, 'Improving our democracy or a fraud on the community? A closer look at New Zealand's Citizens Initiated Referenda Act 1993', *Statute Law Review*, Oxford Journals, Vol. 25, No. 2, 2004, pp. 116-135.
- Mulgan, Richard, 'Politics in New Zealand', 3rd edition, Auckland University Press, Auckland, 2004.
- Parkinson, John, 'Who knows best? The creation of the citizen-initiated referendum in New Zealand', *Government and Opposition*, Vol. 36, No. 2, 2001, pp. 403-421.
- Preston, David A., 'The Compulsory Retirement Savings Scheme Referendum of 1997' *Social Policy Journal of New Zealand*, Issue 9, November 1997.
- Qvortrup, Matt, 'Citizen initiated referendums (CIRs) in New Zealand: A comparative appraisal', *Representation*, Vol. 44, Issue 1, 2008, pp. 69-78.
- Serdült, Uwe, 'Referendum campaign regulations in Switzerland' in Gilland Lutz, Karin and Hug, Simon (Eds.), 'Financing Referendum Campaigns', Palgrave/Macmillan, New York, 2010, pp. 165-179.
- Seyd, Ben, 'Regulating the referendum', *Representation*, Vol. 35, Issue 4, 1998, pp. 191-199.