

## CHAPTER 7 : THE USE OF REFERENDA

*Term of reference 7: To what extent referenda should be used to determine controversial issues, the appropriateness of provisions governing the conduct of referenda, and whether referenda should be legislatively binding.*

### INTRODUCTION

7.1 The vote of the people is essential to any modern democracy. It is used to elect representatives to Parliament and to choose and reject Governments. It is the major way the people give their consent to Government, and hence by which Governments acquire or lose the support they need in order to obtain general acceptance for their actions. It is the final arbiter when those elected to the House of Representatives are unable to form a Government, or when a Government is unable to have important legislation approved by the House.

7.2 The questions posed in this term of reference concern the extent to which this central democratic mechanism should be extended beyond the election of representatives and Governments to law-making and policy-making by a vote of the New Zealand people. There are several ways of doing so. First, a Government may choose to refer an issue to a popular vote or *referendum*, and may regard the result as either binding on its future actions, or as an expression of public opinion to be taken into account in reaching its own decision. Second, there may be cases where particular legislation can be adopted or amended only by a referendum. The most common referenda<sup>1</sup> of this type concern basic constitutional arrangements. Their results bind the Government. Third, a Government may be legally required to hold a referendum on an issue or proposed law if a certain number of voters demand that such a poll be held. This is known as an *initiative*. It may compel a referendum on a Bill that has been passed by the legislature, or the petitioners themselves may be able to propose the matter to be put to referendum, whether or not the issue is before the legislature. The results of these referenda are usually binding on the Government.

7.3 All these forms of direct popular participation in legislating have been advocated in submissions to the Commission, and all will be examined below. In this chapter we

- (a) outline the use of initiatives and referenda in New Zealand (paras. 7.4 to 7.6);
- (b) briefly discuss their use in other democracies, especially Switzerland and the United States (paras. 7.7 to 7.14);
- (c) describe the submissions to the Commission (paras. 7.15 to 7.17);
- (d) discuss the general arguments for and against initiatives and referenda (paras. 7.18 to 7.32);

<sup>1</sup>We have used "referenda" rather than "referendums" as the plural of "referendum" in accordance with the wording of this term of reference.

- (e) briefly examine the use of referenda for constitutional issues (paras. 7.33 and 7.34);
- (f) consider whether an initiative should be able to compel a referendum on legislation passed by a "free" vote (paras. 7.35 to 7.44); and
- (g) consider legislative provisions for the conduct of referenda (paras. 7.45 to 7.48).

### INITIATIVES AND REFERENDA IN NEW ZEALAND

7.4 The consumption and sale of alcoholic liquor has been the most common subject of nationwide referenda in New Zealand. The Working Party on Liquor has recommended that all licensing polls be abolished.<sup>2</sup> We agree that the triennial General Licensing Poll is anachronistic and ought to be discontinued, and we therefore do not discuss it any further in this chapter.

7.5 A New Zealand Government can choose to hold a referendum at any time. There is no general legislation governing the calling or conduct of a referendum, and no legislative provision for initiatives. There have been 3 nationwide non-licensing referenda in New Zealand's history (Table 7.1). Specific enabling legislation was passed in each case. Each Act was short, containing sections stating the purpose of the poll, giving authority to set the date of the poll by Order in Council, prescribing the ballot paper to be used, invoking the relevant provisions of the current Electoral and Licensing Acts, providing for the roll of electors to be used, and setting down the manner in which the result was to be declared. The referendum held in 1967 on the term of Parliament has been the only occasion on which a proposal to change an entrenched provision of the Electoral Act has been put to the people in terms of Section 189(2) of that Act. Section 6 of the Electoral Poll Act 1967 provided that if a 4-year term was approved, the Electoral Act would not be amended "until after the general election of members of Parliament next following the declaration of the result of the poll".

7.6 The use of popular votes on certain constitutional and taxation matters has been accepted for local authorities in New Zealand. For example, a proposal to amalgamate authorities must be put to a popular vote if requested by 15% of the electors of any district affected. Five percent of the electors of a district can require that a vacancy on a council following the death or resignation of a sitting member for the district be filled through a by-election rather than by appointment. A proposed change from one system of rating to another must be approved by a popular vote if requested by 15% of ratepayers. A poll must be held on a proposal to raise a loan if demanded by 5% of the authority's electors. Councils have also chosen to conduct advisory referenda on particular matters of public controversy, such as fluoridation.

<sup>2</sup>*The Sale of Liquor in New Zealand*, Wellington, 1986, Chapter 6.

**Table 7.1: Non-licensing referenda in New Zealand**

Date of poll	Topic	Authority	Turnout (valid votes as % of roll)	Result	Outcome
9 March 1949*	Off-course betting	Gaming Poll Act 1948	54.3†	In favour Against	Gaming Amend- ment Act 1949
3 August 1949	Compulsory military training	Military Training Poll Act 1949	63.5†	In favour Against	Military Training Act 1949
23 September 1967*	Term of Parliament	Electoral Poll Act 1967	69.7	3 years 4 years	None required

\*Held on same day as a special licensing poll on whether to extend the hours for the sale of liquor to 10 p.m. The extension was rejected by 75.5% to 24.5% in 1949, but carried by 64.5% to 35.5% in 1967.

†Based on rolls for 1949 general election.

### INITIATIVES AND REFERENDA IN OTHER DEMOCRACIES

7.7 Many democratic countries use referenda and initiatives in ways which have emerged from their history and their constitutional and political traditions. Some, such as Australia and the Republic of Ireland, have written constitutions which can be amended only by referendum. Other countries have used referenda to approve a new constitution, to retain or relinquish a monarchy, to approve a merger or cession of territory, or for a country's voters to approve an application for membership in a body (such as the European Community) which involves giving up some elements of national sovereignty.

7.8 The democratic countries in which initiatives and referenda are most frequently used on a wide range of issues are Switzerland and the United States. Although both countries have very different constitutional and political systems from New Zealand, we have been strongly urged to recommend that New Zealand introduce similar provisions for initiatives and referenda. The following brief descriptions give an indication of their use in each country.

#### Switzerland

7.9 Amendments to the Swiss federal constitution can be made only by popular vote and must be passed by a majority of all those who vote, and by majorities in more than half the 26 cantons. The constitution covers matters of social and economic policy as well as more strictly constitutional and legal matters. The federal Parliament may propose an amendment. Alternatively, a petition proposing an amendment to the constitution signed by 100,000 of the country's 4.1 million electors and collected within 18 months will force a popular vote on the proposal. The federal Parliament may then put forward a counter-proposal. Both are put to the vote unless the counter-proposal leads the petitioners to withdraw their petition, in which case only the counter-proposal is voted on by the people. From 1848 to 1978, 74 constitutional changes proposed by petition were put to the vote, and 7 were passed. Eleven of the 18 parliamentary counter-proposals were passed. In the same period, 68 of the 108 constitutional amendments proposed by Parliament were passed.

7.10 Swiss voters may also be asked to vote on federal legislation if 50,000 electors or 8 cantons request a referendum within 90 days of the official publication of the measure. The legislation does not then come into force unless it is approved by a majority of voters in the referendum; a majority of cantons is not required.

7.11 On average, the Swiss voter is now called on to vote on 4 occasions per year on a total of about 10 federal questions. This is in addition to other matters which may be the subject of referenda at the canton or commune levels. Up to 6 questions may be decided on one voting day. Large sums of money may be spent during a referendum campaign. Turnout has become low in recent years. The average for 10 voting days from 1975 to 1978 was 42.1%; the average turnout for 4 referenda in 1983-4 was 36.3%. It should be noted, however, that

turnout in the last 3 elections for the Swiss lower house has only averaged 49.6%.

### **The United States**

7.12 Referenda are used extensively in the United States, although at the state and local levels only. In an average year, voters in about half the states will decide several hundred questions of state policy as well as over 10,000 local questions. Famous instances in recent years are the Colorado constitutional initiative in 1972 which prohibited the raising of state funds for holding the 1976 Winter Olympics in Colorado, and the initiative in California in 1978 known as "Proposition 13" which limited the extent of state taxation and expenditure.

7.13 Twenty-one states allow voters to petition that their proposal for a state law be decided by popular vote. Some of those allow the legislature the opportunity to enact or amend the measure before the question is placed on the ballot paper. The range of signatures needed is from 3% to 15% of the number voting in the previous state election; most states require 10%. Some states also require signatures to be obtained in a certain percentage of the counties within the state.

7.14 Twenty-four states allow citizens to petition for a referendum on a law passed by the state legislature. The number of signatures required varies between 2% and 15% of those voting in the previous general election; the average is approximately 6%. Some states also require that the signatures be spread across the counties of the state.

### **SUBMISSIONS TO THE COMMISSION**

7.15 About 30% of the submissions we received dealt with referenda, although some simply wished to oppose the triennial General Licensing Poll. Others who made submissions to us went into considerable detail in support of their views on referenda and initiatives. In particular, we received a wide range of suggestions on how there could be more opportunities for popular participation in Government through referenda, including the use that might be made of new computer and communications technology to allow the popular will to be expressed in ways that were not possible a few years ago.

7.16 The Labour Party stated that it did not oppose the modest use of referenda, especially for constitutional issues. National and Mana Motuhake thought they should be used only for constitutional issues. Only the Values Party and the Democratic Party supported the use of initiatives to compel referenda. The Democratic Party submitted a copy of the Popular Initiatives Bill, a Private Member's Bill introduced into the House by Mr G. T. Knapp MP on 6 November 1984. This Bill was also referred to the Commission by the House following a recommendation of the Select Committee on the Electoral Law tabled on 3 July 1985. Mr Knapp's Bill required the Government to hold a referendum on the subject matter of any petition signed by more than 100,000 qualified electors. The Petitions Committee of the House would formulate the proposals to be put to the electors after calling for public submissions

on the "range of proposals or options to be included in the referendum". The result of the referendum would be laid before Parliament, and would be referred to the Petitions Committee which would have 28 sitting days to report to the House on "such legislative proposals (if any) as may be necessary to give effect to the public will as expressed in the result of the referendum". The appropriate Minister would be required to introduce the Committee's proposals "as legislation" within 14 days of the tabling of the Committee's report. The House would not be obliged to pass this legislation.

7.17 The overwhelming majority of other submissions we received on referenda supported their increased use. Most advocated them for "controversial" or "moral" issues such as nuclear ship visits or South African rugby tours. Others said they should be used on those matters on which MPs traditionally have a "free" or "conscience" vote, such as abortion and homosexuality. Some preferred that they be used only for "constitutional" matters. Opinion was divided on whether referenda should always be binding, should never be binding, or should be binding if certain conditions were met (relating to, for example, turnout, the size of the majority, the type of issue, or not being overruled by a specified majority vote in Parliament). Some submissions suggested that referenda be held only in conjunction with a general election, with several issues (perhaps as many as 5) decided at each election. The particular issues to be put to the vote would be selected according to the number of signatures on the petitions requesting the referenda. Others suggested that the vote should have to be held within a specified time after a successful petition. Two means were suggested for providing a threshold for initiatives: signatures from a specified *percentage* of registered electors (suggestions ranged from 10% to 30%), or from a specified *number* of registered electors (suggestions ranged from 50,000 to 300,000). There were 2,111,651 electors on the roll at the 1984 general election.

### INITIATIVES AND REFERENDA

7.18 We now consider the arguments for and against the more extensive use of initiatives and referenda, first in general terms, then concerning constitutional issues, and finally with respect to legislation passed by a free vote.

#### Arguments for initiatives and referenda

7.19 **More democratic government.** We have already referred to the important place which a vote of the people holds within any democracy and to the ways this has been recognised at various levels within New Zealand's political system. There are several arguments for extending the scope of direct popular democracy within New Zealand by the use of binding or non-binding referenda. First, Government ought to be on behalf of a sovereign people, by and with their consent. The best way of ensuring this, it is argued, is to allow the majority of the people to make some decisions, particularly on topics selected by a process responsive

to significant popular demand. Since the election platform of a Government contains many items of various degrees of detail, and even though a Government may claim a "mandate" for all the policies it put before the voters, it cannot be said that all those policies will have the support of those who voted for that Government, or that none will have the support of those who voted for other parties. Allowing issues to be the subjects of separate referenda, it is claimed, would reveal the true levels of support for the planks in the governing party's platform. It would also enable the voters to express an authoritative view on policies the government adopted after the election. Modern democracies ought to take advantage of the fact that technology now allows referenda on important issues to be held much more easily than in the past, thus making it possible for the democratic ideal of government by the people to be more fully realised.

**7.20 Restraint on Government.** Second, New Zealand's Governments have extensive powers, yet our political system contains few of the safeguards against the power of the executive that exist in other countries. It is claimed that we therefore need greater security against the abuse of governmental power. The ability to force a referendum against the wishes of the Government would help provide that security.

**7.21 Extending democratic participation.** Third, it is argued that allowing decisions by popular vote would increase the opportunities for popular participation in Government and bring Government closer to the people it is supposed to serve. It would improve our democracy by decreasing the people's alienation from decision-makers, and increasing their sense that their opinions and their votes really could make a difference to decisions.

#### **Arguments against initiatives and referenda**

**7.22** These arguments cannot be rejected lightly. However, for a number of reasons, we do not regard them as sufficient to justify a recommendation that initiatives and referenda, whether binding or non-binding, should be more frequently used in New Zealand to provide a more direct public input into the general legislative and executive processes of Government.

**7.23 Referenda and responsible government.** New Zealand's political system is based on representative and responsible government. Governments are elected to govern, according to their overall assessment of the public interest and of the best way to attain it in the circumstances. They must then submit themselves to the judgment of those they represent at a general election, by reference to their past and promised actions and policies, taken as a whole. Although they are expected to consult widely in reaching their decisions and developing their policies, in the final analysis Governments must take responsibility for their actions.

**7.24** That responsibility would be lessened if there were particular decisions, policies, and laws which could be subject to a popular vote,

yet over which Governments had no control. A Government might regard an issue forced to a popular vote as central to its economic policy, for example, and its rejection at a poll as undermining its overall programme, whether or not the result was legally binding. The issue might be a complex matter which had taken a long time to implement, or the clear results of which would not be apparent until the Government's policy had been given time to work. It might be a matter on which a Government has a deep philosophical objection or commitment. Special interest groups might use referenda to promote their own particular advantages, without the overall view that the Government must have. The frequent use of referenda as the result of initiatives could thus undermine the effectiveness of an elected Government.

**7.25 Popular influence on government.** Responsiveness to a wide range of popular opinion on policies and decisions is a continuing process for legislators, political parties, and Governments; it does not occur only at election time. It is one of the major characteristics of our political system that decision-makers at all levels are expected to be accessible to the public and to be generally responsive to their opinions. Governments consult with major interest groups. Individuals and groups have opportunities to lobby legislators, to present submissions to select committees and to advisory bodies, and to petition Parliament. MPs are in regular contact with constituents, who thus have a clear focus for the expression of their opinions to Parliament and to their MP's political party. There is now an increasing emphasis on open government and on the proper provision of official information. Governments do not need to use referenda to discover the state of public opinion since they can now do so in a variety of ways, including regular opinion polls commissioned by the news media and by the political parties themselves. There are thus considerable opportunities for public input into New Zealand's policy-making and decision-making processes, although there is still scope for extending the range of individuals and groups able to take advantage of these opportunities.

**7.26 Misuse of referenda.** Initiatives and referenda can come to be misused. Particularly by choosing an advantageous time, a Government might use a referendum on an issue to bolster its own public standing, or to undermine that of the Opposition. Referenda can also be used by a Government as a way of avoiding difficult decisions and of preserving party unity over controversial issues. Opposition parties, on the other hand, may try to use an initiative to thwart a Government's programme, or to have an effective popular vote of no-confidence in a Government's overall performance. Unless Governments are clearly bound (whether legally or morally) to implement their results, referenda amount to little more than elaborate and expensive opinion surveys, conveying the shadow rather than the substance of popular participation in decision-making. Initiatives and referenda can also be used by Governments, parties, and interest groups, perhaps with considerable resources, to



promote points of view using populist means outside the accepted and legitimate channels of politics.

**7.27 Lack of protection for minorities.** In particular, initiatives and referenda can be used against minorities. Larger groups can see them as a vehicle for the expression of popular prejudices, to curb special programmes for disadvantaged minorities, or to enforce their own cultural dominance. By its very nature, a minority has no defence against the voting power of these larger groups in a context where only numbers count. It is of major concern to the Commission that the extensive use of referenda—particularly as the result of popular initiatives—can pose very real threats to minority rights and interests.

**7.28 Practical difficulties.** Referenda can also have significant practical difficulties which diminish their usefulness as a method of deciding important and complex questions of law and policy. The framing of the question or questions to be asked is crucial. They need to be precise and easily understood, yet this is often very difficult to achieve on complex issues where there may be many options and many shades of opinion. Neither a simple question on a general issue, nor a referendum involving total acceptance or total rejection of a single detailed proposal, can take account of those variations. Indeed, some of these matters are better resolved by compromise rather than by a clear-cut decision one way or the other.

**7.29** The turnout of voters is also very important. Acceptance of the result can be undermined if a referendum is won or lost on a low turnout, for that can amount to a decision by a very small proportion of the population. One way to avoid problems with low turnout is to hold referenda in conjunction with general elections. That, however, can lead to the referendum issue being dominated by the contest between the parties. Conversely, the referendum issue can overshadow or become entangled with the major election issues, and can thus constitute a diversion from the proper function of the election. There can also be problems with the acceptance of the result if a referendum is decided by a very low margin of the popular vote, irrespective of the level of turnout, since that might not be seen as resolving the issue and public controversy could continue.

### **General conclusion**

**7.30** In general, initiatives and referenda are blunt and crude devices which need to be used with care and circumspection. Their frequent use would amount to a substantial change in our constitutional and political system. They would blur the lines of accountability and responsibility of Governments and political parties, and blunt their effectiveness. In our view, those elected to govern should be able to do so without formal reference to the people as a whole, provided they can be formally held to account at regular and frequent intervals, provided they are responsive to an informed public opinion, and provided there is continued development of restraints on the power of Government such as through parliamentary select committees, the Ombudsmen, the

Official Information Act, and administrative review through the courts. There are other ways through which popular opinion can be expressed and have an effect on the legislative and decision-making processes. Initiatives and referenda can adversely affect minorities. There are very real practical difficulties. It is our view that under our present political and constitutional system, the regular use of initiatives and referenda would detract from rather than enhance the ways our democracy generally works.

7.31 The Commission accordingly does not recommend that general provision be made for an initiative to compel a referendum on any issue chosen by the petitioners. Although we consider that referenda should not be used often—as, indeed, they have not been in New Zealand—Governments should continue to have an unfettered power to hold a referendum when they judge it to be appropriate. We do not think that these referenda should be used as merely another way of surveying public opinion. The voters' decisions should carry real weight. If a vote is on a Bill that is being considered by the House, the Bill might contain a clause providing that it would come into force only if approved by a majority of those who vote in a referendum. To provide a safeguard against a decision being made by a small and unrepresentative minority, such a clause could also require that the decision would only be binding if a certain percentage of those on the roll (say, two-thirds) had turned out to vote. If the popular vote is not on a Bill that is before the House, Parliament should be seen as having a moral obligation to pass legislation giving effect to the result of the referendum, particularly if a reasonable percentage of the electorate has voted. Referenda should be held according to the procedures outlined in paras. 7.46 to 7.48.

7.32 There are, however, 2 specific situations where the arguments we have used to reject the general use of initiatives and referenda do not apply: constitutional changes, and legislation passed by Parliament on a "free" vote where the political parties allow their MPs to vote as individuals irrespective of the votes of their party colleagues, and where the parties cannot be held responsible for the result. We discuss each in turn.

### **Constitutional referenda**

7.33 It is an accepted principle in many democracies that basic changes to the constitutional framework of government should be matters of broad agreement, and should not be decided by a Government itself constituted in accordance with that framework. A large percentage of the referenda held in other countries are on matters of constitutional change. The requirement for broad agreement has also been recognised in New Zealand's constitution since 1956 in that s.189 of the Electoral Act provides that certain sections of that Act can only be amended by a 75% majority of all MPs, or by a simple majority of electors voting in a referendum. The difference between the 75% majority of all MPs (which will usually require agreement between the two major political parties) and the simple majority needed to carry an

amendment in a referendum reflects the need to ensure that a Government should not be able to change the basic rules governing its own existence at will and in its own interest.

7.34 We discuss the entrenchment of these fundamental matters in detail in paras. 9.174 to 9.188. In brief, we agree that certain fundamental matters should continue to be entrenched. In our view, it is appropriate that some should be changed only by referendum rather than by a vote of 75% of all MPs, but the way in which a particular matter should be dealt with should be left to political judgement (para. 9.187). Where a constitutional referendum is held, we suggest that the general procedures outlined in paras. 7.46 to 7.48 should be followed.

#### **Initiatives and referenda on legislation passed by a free vote**

7.35 A very small proportion of all legislation is passed on a "free" or "conscience" vote of members of Parliament, on issues where the parties do not enforce party discipline in the House. Matters considered in this way in recent years include homosexuality, capital punishment, abortion, contraception, gambling, the consumption and sale of alcoholic liquor, and the compulsory wearing of seat belts. They are usually the result of a Private Member's Bill, although there are also occasions when a Bill is introduced by a Government, but made the subject of a free vote either in whole or in part.

7.36 These issues can raise deep feelings among the populace at large, cutting across political and social divisions. They frequently give rise to popular requests for a referendum to decide the matter. On the other hand, they often concern questions which many people regard as at the heart of personal, and therefore private, morality which should be outside the province of law altogether. Questions of personal or group rights may also be involved.

7.37 Conscience issues can be "fractious, stimulating, moving, and confusing by turns".<sup>3</sup> Parliamentarians do not find them easy to deal with. MPs can face the dilemma whether they should vote on them according to their own private moral views, or according to the majority view (if any) within their constituency. They may not be helped by vigorous campaigns waged by pressure groups on each side of the issue. The processes of voting on a Bill that evokes different shades and intensities of opinion, perhaps with shifting groups of MPs supporting and opposing various clauses and amendments, have to be followed unstructured by the normal and accepted methods of party organisation and competition in the House.

7.38 It can be argued that, since a voter's main task at a general election is to judge the policies and performance of the parties aspiring to Government, that is not a suitable occasion on which to hold an MP accountable for his or her actions on a free vote issue. By definition, parties cannot be held responsible for the results of a free vote, even where a party in Government introduced the legislation. Yet voters can

<sup>3</sup>David McGee, *Parliamentary Practice in New Zealand*, Wellington, 1985, p.63.

regard free vote issues as very important matters for which their representatives should be able to be formally held accountable. It is thus argued that the public should be able to have a referendum on legislation passed by a free vote. The referendum would be on a specific legislative measure, perhaps drafted with the assistance of Parliamentary Counsel, the legal effects of which could be assessed and debated. Allowing referenda on legislation already passed by Parliament would recognise the importance of Parliament as the legislative body within our political and legal system, subject only to an opportunity for the people to approve or reject a particular example of Parliament's work where parties had not taken responsibility for the result.

7.39 We consider that there is some merit in these arguments. The submissions made to us indicate that they have considerable public support. It is, of course, always possible that a Government could in any event choose to hold a referendum on an issue that would be subject to a free vote, and from time to time a party will include such a provision in its manifesto. We would not want to see this possibility removed, provided great care was taken in determining the scope and wording of the questions to be put to the people. Nevertheless, allowing an initiative to compel a referendum on a Bill passed by a free vote might give that legislation a greater degree of public acceptance than is the case when a simple majority of MPs can, through a free vote, legislate for the rest of society on what are often important and delicate matters, and when general elections are dominated (and properly so) by wider considerations.

7.40 An outline of a possible procedure by which legislation passed by a free vote could be subject to a referendum compelled by an initiative is as follows: once the Bill had proceeded through all its stages in the House, it would not receive the Royal Assent for, say, 120 days after the third reading. Those who wished to have a referendum on the Bill would have that time to gather the signatures of, for example, 10% of all registered electors requesting a referendum on the Bill. If they did not gather that number of signatures, the Bill would receive the Royal Assent and would become law. If they succeeded in gathering that number, a referendum would have to be held within a certain time (say 3 months) in which all registered electors would be able to vote for or against the Bill as it was passed by the House. The result of the referendum would determine the fate of the Bill, irrespective of the turnout or size of the majority for or against the Bill. If a majority of those who voted approved the Bill, it would receive the Royal Assent and would become law. If the Bill was rejected, it would not be presented for Assent and would effectively lapse. Legislation already passed on a free vote prior to the adoption of such a procedure could not, of course, be the subject of an initiative and referendum.

7.41 We recognise, however, that initiatives and referenda on legislation passed by a free vote would still have some of the general disadvantages of initiatives and referenda outlined in paras. 7.26 to

7.29. They could still be used for party advantage, even though the issue was regarded as non-party. They might deny rights to unpopular minorities, although it might also be argued that the protection of minority rights is a responsibility of Government and should not be determined by free votes. Important questions might be decided on a low turnout or by a narrow margin.

7.42 There are also some specific objections to this particular type of initiative and referendum. First, MPs are in Parliament to make difficult decisions on their constituents' behalf, and they exhibit considerable responsibility in dealing with free vote issues, often working out worthwhile compromises. A subsequent referendum would run the risk that these compromises would be defeated. Second, it might be undesirable to have a formal process which allowed the controversy over such an issue to continue to divide the country after Parliament had passed the legislation in question, usually having given very extensive opportunities for views to be expressed on the matter. Third, some way would have to be found to define a "free vote" such that it was clear which legislation could be the subject of an initiative campaign and which was excluded.

7.43 Consideration of the objections outlined in the previous 2 paragraphs has led the Commission to conclude that it is unable to recommend that there be a system of initiatives to enable voters to compel referenda on legislation passed by a free vote, although some Commissioners place more weight on practical difficulties than on the objections of principle. This should not, however, be interpreted as an indication that Governments should never hold referenda on such issues. It may well be desirable for a Government to do so on some occasions, particularly if requested by a sizable public petition to Parliament. Much would depend on the nature of the issue and the Government's attitude towards it.

7.44 Although the Commission is unable to recommend that there be initiatives and referenda on free vote issues, we recognise that the ability to vote on these issues would be attractive to many New Zealanders. Because it is an important matter on which there can be legitimate differences of opinion, we have set out both sides of the argument in some detail to assist informed debate. We do not see the difficulty of defining a free vote as insuperable. Although all votes in the House are technically "free", it is usually quite clear which Bills or parts of Bills are to be subject to a free vote. A formal statement to the House on behalf of the Government, or perhaps by the Speaker, could suffice. A way would also have to be found to cater for the situations where only some of the clauses of a Bill are to be subject to a free vote whereas voting on other clauses is under party discipline, and where a measure is to be divided into several Acts. It must be acknowledged, however, that procedures for defining a free vote and hence for allowing an initiative and referendum would be unlikely to prevent a determined Government from avoiding a referendum by allowing what is in effect a

free vote, though not defining it as such, yet still trying to disassociate itself from responsibility for the result.

### **Legislation governing the conduct of referenda**

7.45 Although we do not recommend the extensive use of referenda, we accept that they will be used from time to time at the discretion of Government, and that they ought to be held on major constitutional issues. We see no need for general legislation governing the conduct of these 2 kinds of referenda, although legislation would be necessary if it were decided to permit an initiative to compel a referendum on legislation passed by a free vote.

7.46 Where the government decides to hold a referendum, we consider it desirable that it follow previous practice and pass special legislation through Parliament authorising the holding of the poll, specifying the question or questions to be asked, and establishing the procedures to be used in conducting the campaign and the poll. The Bill should go to a select committee in the normal way for the hearing of public submissions. Whether the referendum should be held separately or in conjunction with a general election should be a matter for decision in each case. The result of the referendum should be regarded as binding on Parliament, though there may be cases where it is appropriate that a minimum turnout would be required to make the result binding. Because it is important that there should be as much public information and discussion about the issue as possible, an unbiased summary of the arguments for and against the question or questions to be decided should be distributed to each household, and this summary should be extensively advertised in the print and electronic media.

7.47 Political parties, interest groups, and individuals may wish to spend money during a referendum campaign for the purposes of public education or to advise people how to vote on the issue. That raises issues of principle and practice similar to those we consider in Chapter 8. Although access to money can have as important an influence on the outcome of a referendum as of an election, we do not consider it justified at present to attempt to control income or expenditure in referendum campaigns. There may, however, be grounds for reviewing that conclusion if expenditure in referenda campaigns becomes large.

7.48 It is, however, desirable that the public be informed about the sources of advertising and publicity on a referendum issue, and we consider that all such advertising and publicity should be required to carry the name and address of the person or body authorising it. Those campaigning on a referendum issue should be able to buy television time to advance their case, though this too should be kept under review in the light of experience, and may become unnecessary if a suitable system of free time could be devised similar to that used for general elections. Where a referendum is held with an election, money spent on the referendum campaign should count as an election expense if it is used, or appears to be used, to promote or procure the election of a

candidate or a party. Paid advertising on television used, or appearing to be used, for those purposes should be prohibited (see para. 8.90).

**Recommendations:**

- 22. It is appropriate for Governments to hold referenda from time to time, but there should be no provision for public petitions to compel referenda (para. 7.31).
- 23. There need be no general legislation governing the calling or conduct of referenda. Special legislation should be passed in each case specifying the question or questions to be asked and the procedures to be used in conducting the campaign and the poll (para. 7.46).
- 24. The result of a referendum should be regarded as binding on Parliament (para. 7.46).
- 25. All publicity on a referendum issue should be required to carry the name and address of the person or body authorising it (para. 7.48).
- 26. Expenditure by candidates and parties on a referendum held in conjunction with an election should count as an election expense if it is used, or appears to be used, to promote or procure the election of a candidate or a party. Paid advertising on television used, or appearing to be used, for those purposes should be prohibited (para. 7.48).