



# Report of the Independent Commission on Referendums

**INDEPENDENT  
COMMISSION ON  
REFERENDUMS**

July 2018

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# Foreword

The current legal framework for conducting referendums in the UK was laid down in 2000. It was based on the recommendations of two reports: of the Nairne Commission on the Conduct of Referendums, which was co-sponsored by the Constitution Unit, in 1996; and of the Committee on Standards in Public Life, in 1998. Twenty years and several referendums later, it is time for a fresh look. The world has moved on, not least through the rise of online campaigning. And we have much more experience of referendums – both in the UK and around the world – to learn from. The quality of the members who accepted an invitation to join a new Commission confirms the need to take stock.

The five referendums that have been held under the current legislative framework, including the 2014 referendum on Scottish independence and the 2016 referendum on whether to leave the European Union, provide plenty of scope for reflection on the pros and cons of referendums and how to run them. Throughout our work we have been aware that recent experience has generated strong views about referendums themselves as well as about their subject-matter. Many people have sent us evidence or have attended one of the seminars we have held in Belfast, Cardiff, Edinburgh and London. That has been a great benefit and we are very grateful to them. But we have been equally aware of the danger of our work being unduly influenced by very recent debate which is still ongoing. We have done our best to learn from recent experience but to focus on the future and a wide range of possibly quite different circumstances. It falls to others to judge whether we have succeeded.

The members of the Commission were not invited to take part because they were sure to be of one mind. As well as their expertise and relevant experience, it was expected that they would hold a variety of views. In the event, they have been a very easy group to chair because each member has been ready to express a personal view but has recognised the need to collaborate with others.

We all owe a great debt to the team from the Constitution Unit: Meg Russell, Alan Renwick, Jess Sargeant and Edd Rowe. We would have made no progress without their knowledge of referendums in the UK and across the world and their skill and speed in preparing and revising draft papers on every aspect of our terms of reference. They played a full part in all our discussions but, whilst acknowledging how much we owe them, the members of the Commission accept full responsibility for the conclusions and recommendations in the report.

**Joe Pilling**  
Chair of the Independent Commission on Referendums

# Commission Members



**Commission Chair: Sir Joseph Pilling KCB**

Joe Pilling has previously served as both Director General of the Prison Service and Permanent Secretary of the Northern Ireland Office. Since leaving the civil service in 2005 he has been involved in several reviews covering, for example, the Civil Aviation Authority, the 30 Years Rule and the Independent Press Standards Organisation. He is a current or former trustee of several charities.



**The Rt Rev. the Lord Eames OM**

Robin Eames was Anglican Archbishop of Armagh and Primate of all Ireland from 1986 to 2006. He is an active Crossbench peer and a member of the Privileges and Conduct Committee of the House of Lords. Along with other church leaders, he had a key role in the peace process in Northern Ireland, where there was a referendum on the Good Friday Agreement in 1998.



**Rt Hon Dame Cheryl Gillan MP**

Cheryl Gillan has been Conservative Member of Parliament for Chesham and Amersham since 1992. Born in Cardiff, she was Secretary of State for Wales (2010–12), overseeing the Welsh devolution referendum of 2011. She is a member of the House of Commons Public Administration and Constitutional Affairs Committee, and represents the UK on the Parliamentary Assembly of the Council of Europe, where she is Rapporteur for an inquiry into referendum rules.



**Rt Hon Dominic Grieve QC MP**

Dominic Grieve has been Conservative Member of Parliament for Beaconsfield since 1997. He was Attorney General for England and Advocate General for Northern Ireland from 2010 to 2014. He had a career in law before entering politics and was appointed a Queen's Counsel in 2008. He has been chair of parliament's Intelligence and Security Committee since 2015, and also chairs the All-Party Parliamentary Group on the Rule of Law.



**Sue English**

Sue English was Head of Political Programmes, Analysis, and Research at the BBC between 2005 and 2015. Before joining the BBC, she worked for ITN between 1983 and 2001, where amongst other roles she was the deputy editor of Channel 4 News and editor of LBC radio.



**Seema Malhotra MP**

Seema Malhotra has been Labour Member of Parliament for Feltham and Heston since December 2011. She is a former management consultant who worked for Accenture and PriceWaterhouseCoopers. She served as a Shadow Home Office Minister (2014–15) and Shadow Chief Secretary to the Treasury (2015–16). She is a member of the House of Commons Select Committee on Exiting the European Union.



**Deborah Mattinson**

Deborah Mattinson is a specialist and regular commentator on British public opinion, and is co-founder of the consultancy BritainThinks. She was previously pollster to Gordon Brown, both as Chancellor of the Exchequer and then Prime Minister. She is the author of *Talking to a Brick Wall* (Biteback, 2010) – the story of the New Labour years through the eyes of the voter.



**Dr Martin Moore**

Martin Moore is Director of the Centre for the Study of Media, Communication and Power at King's College London, where he is also Senior Research Fellow at the Policy Institute. He was previously founding director of the Media Standards Trust (2006–15) and has written extensively on the news media and public policy. His publications include *The Origins of Modern Spin* (Palgrave Macmillan, 2006).



**Professor David Runciman**

David Runciman is Professor of Politics at the University of Cambridge. A political theorist and historian of political thought, he has written widely on democracy and representation, including *How Democracy Ends* (Profile Books, 2018). He is a regular contributor to the London Review of Books and presents the weekly politics podcast, Talking Politics.



**Rt Hon Gisela Stuart**

Gisela Stuart was Labour Member of Parliament for Birmingham Edgbaston from 1997 until 2017. She served as one of the UK's members of the Convention on the Future of Europe, which worked between 2001 and 2003 to draft a constitution for the European Union. She was Chair of the Vote Leave campaign for the 2016 referendum on Britain's membership of the EU.



**Jenny Watson CBE**

Jenny Watson CBE was Chair of the Electoral Commission from 2009 to 2016. In this capacity she was Chief Counting Officer for the referendum on the UK's membership of the EU in 2016, as well as the 2011 referendums on the UK's parliamentary voting system and Welsh devolution. The Electoral Commission also reported on the conduct of the 2014 referendum on Scottish independence and regulated the campaign spending.



**Andrew Wilson**

Andrew Wilson is the co-founder of Charlotte Street Partners, a communications consultancy based in Edinburgh and London. Between 1999 and 2003 he was an SNP Member of the Scottish Parliament and Shadow Minister for Finance and Economy. He chaired the SNP's Sustainable Growth Commission, which delivered its report in May 2018.

# Commission Secretariat



**Dr Alan Renwick**  
Research Director, Independent  
Commission on Referendums



**Professor Meg Russell**  
Director, Constitution Unit



**Jess Sargeant**  
Research Assistant, Independent  
Commission on Referendums

# Executive Summary

The rules by which referendums are conducted in the UK are now almost twenty years old. In that time, five large-scale referendums have been held, including votes on matters of fundamental importance that have sparked unprecedented public interest. Much has changed over these two decades, not least through the rise of the internet and, particularly, of social media and the way these developments have transformed political campaigning. The time has come, therefore, for a comprehensive review.

This report addresses the role that referendums play in democracy in the UK and the manner in which referendums are conducted. Its major recommendations stem from three core points:

- First, referendums have an important role to play within the democratic system, but how they interact with other parts of that system is crucial. They must be viewed as co-existing alongside, rather than replacing, representative institutions. They can be useful tools for promoting citizen participation in decision-making, but they are not the only, or necessarily the best, way of doing so.
- Second, referendums should be conducted in a way that is fair and effective. The rules should enable a level playing field between the competing alternatives. Those rules should also empower voters to find the information they want from sources they trust, so that voters feel confident in the decisions they reach.
- Third, the regulation of referendums must keep up with the changing nature of political campaigning, particularly campaigning through social media.

Following a brief introduction to the Commission, the sections below summarise key implications of each of these points. They do not give the Commission's recommendations in full. These are contained in the body of the chapters that follow, and are listed in full at the end of the report.

## The Commission and its work

The Independent Commission on Referendums comprised twelve individuals (listed at the front of this report), who worked over nine months,

from October 2017 to June 2018. The Commission held eight meetings, invited written evidence from a wide range of individuals and groups, and held consultative seminars in Belfast, Cardiff, Edinburgh and London. The central point in the Commission's terms of reference was 'to consider the future political, legislative and administrative arrangements for the authorisation and conduct of referendums in the UK'.

The Commission was supported by a secretariat based at the Constitution Unit, School of Public Policy, University College London. The Constitution Unit is a nonpartisan academic body, which conducts research on various aspects of constitutions and constitutional change, prioritising outputs that are useful to policymakers. The Commission's work was informed by evidence that the secretariat gathered about the functioning of referendums historically in the UK, and in contemporary democracies around the world.

Members of the Commission were not paid for their time and contributed to its work purely voluntarily. They propose the conclusions and recommendations in this report on a unanimous basis.

## The place of referendums in the democratic system

Referendums have an important role to play within the democratic system. They are particularly suited to resolving fundamental questions of sovereignty and constitutional change.

But referendums also have limits:

- They cannot replace the institutions of representative democracy. Citizens do not have the time or the resources to participate in all the policy decisions necessary for the functioning of a complex modern democracy. Representatives can dedicate time to consider such issues in great detail, engage in deliberation with other representatives and make informed decisions on a wide range of topics. Representative institutions are also needed to provide for 'joined up' thinking across policy areas.

- Referendums encompass one crucial element of democracy: deciding between options through voting. But other equally important dimensions of democracy – discussion, deliberation and compromise – are not intrinsic to referendums.

Given these limits, careful thought should be given to how referendums fit into the wider democratic system:

- Detailed consideration should be given before a referendum is called to what the problems are that policy needs to address, what policy options can be developed for addressing these problems, what the strengths and weaknesses of these options are, and whether a referendum is the best way of making the decision.
- To engage citizens as far as possible in these pre-referendum processes, consideration should be given to using innovative forms of deliberative democratic engagement such as citizens' assemblies, alongside strengthened processes of parliamentary scrutiny.
- Wherever possible, a referendum should come at the end, not the beginning, of the decision-making process. It should be post-legislative, deciding whether legislation that has already passed through the relevant parliament or assembly should be implemented.
- Sometimes a referendum may be needed earlier: for example, to initiate inter-governmental negotiations. In such cases, the government initiating the referendum should set out precise plans for what will be done in the event of a vote for change; the enabling legislation would set out a two-referendum process, for use in the event that the settlement does not deliver what was promised.

## The conduct of referendums

Referendums should be conducted in line with two overarching objectives:

- The alternatives should compete on a level playing field.
- Voters should be able to find the

information they want from sources they trust.

These objectives lead to a range of proposals, including the following:

- Current restrictions on government involvement in referendum campaigns should be extended to cover the whole campaign period, but narrowed in scope to target the behaviour that is of concern during referendums – that is, campaigning for or against a proposal.
- Lead campaigners should be designated as early as possible, to give campaigners time to prepare effectively.
- Measures should be taken to enhance the transparency of campaign spending and the accountability of campaigners for that spending. The Electoral Commission and Information Commissioner's Office should work together in regulating spending and the use of personal data in political campaigning.
- The Electoral Commission should review how any space provided to campaigners in the Commission's voter information booklet is best used.
- More should be done to enable the work of broadcasters, universities, fact-checkers and other independent organisations in facilitating access to balanced information.
- Methods for fostering citizen deliberation on referendum issues and disseminating its results should be piloted.

## Referendums in a digital age

Even during the nine months of the Commission's inquiry, debate about the regulation of online campaigning has developed considerably. The Commission is not the best body to settle all of these issues, but it does make a range of recommendations, including the following:

- An inquiry should be conducted into the regulation of political advertising across print, broadcast and online media, to consider what form regulation should take

for each medium and whether current divergences of approach remain justified.

- Imprints should be required on digital campaign materials, as on other forms of campaign materials.
- A searchable repository of online political advertising should be developed, including information on when each advertisement was posted, to whom it was targeted, and how much was spent on

## Implementing the Commission's recommendations

The Commission hopes that its recommendations will lead to positive and constructive discussion about the future of referendums in the UK, and a strengthening of democratic practice. Some of these recommendations call for action by the UK government or devolved governments. Some propose actions by parliamentary committees, the Electoral Commission, and other official bodies. Others need to be taken up by political parties, campaigners, commentators, and academics. The Commission believes that we require a culture change in how the role of referendums in UK democracy is conceived. The practical implications of this are captured in our checklist of issues to consider before calling for a referendum.

## Checklist for those considering calling for a referendum

Many of the recommendations made by the Commission demand a cultural change in terms of how referendums are used and the circumstances in which they are proposed. This checklist is provided as a quick summary of key points that should be considered by those who may wish to call for a future referendum:

- Is the subject matter suitable for a referendum? Can it be considered a major constitutional issue?
- Is a referendum the best way of involving

citizens in the decision in question, or might some other means of public consultation serve at least as well, or better?

- Is interest in the subject adequate to ensure a high level of turnout?
- Has the topic concerned previously been subject to considerable public debate and deliberation?
- Has it been carefully considered by bodies such as parliamentary committees?
- Have there been opportunities for civil society groups to comment and help develop proposals?
- Have there been opportunities for citizens to contribute to the development of the proposals through bodies such as citizens' assemblies?
- Are the alternatives clear, or do they need further consideration and elaboration?
- If there are more than two options for change, has the possibility of holding a multi-option referendum been seriously considered?
- Will it be possible, in advance of a referendum, for detailed proposals for change to be set out in the enabling legislation?
- Will it be clear to legislators after the referendum what to enact, or is there any risk of uncertainty, and conflict with the public vote?

If the answer to any of the questions above is no, then the referendum should not be held at that point.

Additionally, when planning for the referendum itself and the preceding referendum campaign, the following questions should be addressed:

- What can be done to reduce the risk of polarisation and lasting political divisions after the referendum?
- What can be done to maximise the availability of high-quality information, and minimise the risk of misrepresentation and confusion?
- Should a deliberative exercise for citizens be provided during the referendum campaign itself?

# Introduction

# Introduction

This report sets out the conclusions and recommendations of the Independent Commission on Referendums regarding the role that referendums should play in the UK's democratic system and the manner in which they should be conducted.

The issues considered by the Commission are of great importance. Referendums are now an established part of democratic politics in the UK, as in almost every democracy in the world, and they are used to make some of the most important political decisions. That makes it imperative that the role played by referendums – including how they fit alongside other parts of the political system – should be carefully considered. They must be conducted in a way that can command respect across the political spectrum, among both policy-makers and the public.

Ahead of the substantive discussions contained in the following chapters, this short introduction addresses several preliminary issues. First, it explains why the Commission was established. Then it indicates the Commission's terms of reference and how the Commission chose to interpret these. Third, it briefly describes how the Commission has worked. Finally, it sets out the plan of the remainder of the report.

## Why the Commission was established

The Independent Commission on Referendums was established because a comprehensive review of how referendums are approached in the UK was long overdue. As detailed in chapter 3, the statutory framework for referendums – set out in the Political Parties, Elections and Referendums Act (2000) – is now almost twenty years old. Much has happened in that time.

First, five large-scale referendums have been held: on devolution to the North East of England in 2004, expansion of the powers of the Welsh Assembly in March 2011, reform of the Westminster electoral system in May 2011, Scottish independence in 2014, and the UK's membership of the EU in 2016. Much can be learnt from the experiences in each of these cases.

Second, the world of politics and political campaigning has moved on. Most notably, digital campaigning barely existed in 2000, and social media had not yet even been imagined. Today, by contrast, these platforms are central to how referendum and election campaigns unfold. Over the same period, innovative practices in the conduct of referendums have emerged in a range of other countries around the world. It is useful to reflect on how these work and whether they could be applied in the UK.

## The Commission's terms of reference

The Commission was established by the Constitution Unit – an independent, non-partisan research centre based in the School of Public Policy at University College London. Its members were recruited in the summer of 2017, and the Commission was given the following terms of reference:

To consider the future political, legislative and administrative arrangements for the authorisation and conduct of referendums in the UK, including:

- the place that referendums should have in the UK's system of representative democracy
- the legal effect of referendums and whether any additional constitutional safeguards are needed
- the role of government during the campaign
- the regulation of the designated campaign groups
- the provision of public information and education, and promotion of informed debate.
- and to report and make recommendations.

Beyond this framework, members of the Commission were invited to begin their work with an open mind, and to interpret the terms of reference as they saw fit, drawing in issues relevant to referendums that have appeared important in the course of its deliberations. All of the specific matters that the original terms of reference contain are examined in detail in the subsequent chapters of this report, alongside other particulars such as the referendum franchise, the setting of the referendum question, and the regulation of referendum campaign finance.

The Commission has not sought to pronounce on matters lying outside its broad remit or on questions on which further detailed investigations would be beneficial. For example, it has not made proposals that would imply a change in the current devolution settlement. It urges further inquiry into some issues relating to online campaigning.

The Commission has focused on UK-wide referendums, referendums in the UK's four constituent parts, and regional referendums. Local referendums have also been held on a variety of issues and are now required in law in certain circumstances; but they raise their own particular issues, and the Commission concluded that it could not do justice to these within the time available.

The Commission recognises that the Good Friday Agreement gives rise to particular requirements for referendums on the future status of Northern Ireland. Nothing in this report is intended to challenge these. At the same time, the Commission is aware that the referendum provisions in the Good Friday Agreement and the Northern Ireland Act 1998 are set out only in very broad terms. Further careful thought may be valuable regarding the implications of the Commission's conclusions in this context.

## How the Commission has worked

The Commission has conducted its inquiry over nine months. It held monthly meetings starting in October 2017, each lasting most of a day. These meetings were supported by papers prepared by the secretariat based in the Constitution Unit – comprising a full-time Research Assistant, supported by a part-time administrator, and input from the Unit's Director and Deputy Director (the latter of whom served as the Commission's Director of Research).

The Commission began in its first meeting by reflecting on issues that members themselves saw as important and on papers summarising the issues that had been highlighted in prior reports and other contributions to public debates. Over subsequent meetings, specific issues and potential responses to them were examined in detail, leading to the analysis and conclusions presented in this report. Research conducted for the Commission has examined many aspects of referendum practice both in the UK and throughout the democratic world.

In addition to this background research, the Commission has gathered considerable other evidence in the course of its inquiry. It convened seminars in all four parts of the UK, where it heard about a range of particular referendum experiences and expectations. It invited written submissions from a diverse array of people and organisations, and received 21 responses, which are listed in the Appendix to this report. Various of these submissions are cited throughout the report. The Commission encouraged widespread engagement with its work, including through its website, Twitter feed, posts on the Constitution Unit blog, and invitations to participate in its events. It is very grateful to all those who took the time to contribute

Members of the Commission themselves were not remunerated for their time, though they were reimbursed where necessary for expenses incurred in travelling to meetings. Each member of the Commission, and particularly its Chair, gave significant time voluntarily to this enterprise. The costs of the Commission, including staff time, meetings and the production of this report, were met through kind support provided by donors to the Constitution Unit.

## Plan of this report

This report is divided into four parts.

**Part 1**, comprising the first three chapters, sets out important background evidence. Chapter 1 provides a global context for the Commission's analysis. It shows that the incidence of referendums has increased greatly in recent decades and sets out reasons for this. It also examines the kinds of issues on which referendums are typically held in democracies around the world, and the frameworks within which they operate. Chapter 2 describes the history of referendums in the UK and explains their place in the UK's current democratic system. Chapter 3 sets out how the UK's existing regulatory framework for referendums emerged and what its core principles are. It also examines more recent inquiries into UK referendums and describes international guidance on 'best practice' in referendums.

**Part 2** provides detailed examination of the role of referendums in UK democracy. Chapter 4 begins by setting out a general framework for thinking about the place of referendums in the democratic system. It contains the Commission's broadest recommendations on how referendums should fit in with other elements of the democratic structure in the UK. The remaining five chapters of Part 2 focus on more specific issues. Chapter 5 looks at how – and by whom – referendums can be called. Chapter 6 considers the process of legislating for a referendum. The Commission sees this as a crucial matter that to date has received inadequate attention. Chapter 7 discusses what steps should be taken to prepare for a referendum – again a fundamental issue that the Commission believes has been unduly neglected. Chapter 8 focuses on how the question put to voters in a referendum is decided, including whether it is sometimes appropriate to offer more than two options in a referendum. Finally, chapter 9 considers whether safeguards such as thresholds should be applied to UK referendums. Drawing on international experience, it examines the effects of threshold requirements and considers whether they are likely to be able to command widespread public support.

**Part 3** turns to the conduct and regulation of referendum campaigns. Chapter 10 assesses what the proper role of government is during referendum campaigns and how this can best be assured. Chapter 11 examines whether the UK's unique system of designating 'lead' campaigners in referendums is the best approach and whether any changes should be made to how the system is implemented. Chapter 12 looks into the rules of referendum campaign finance. Chapter 13 explores whether anything should and can be done to improve the quality of information and discourse during referendum campaigns. Chapter 14 focuses on the specific issue of how campaign regulations might be modernised to take account of the rise of online campaigning, particularly on social media.

**Part 4**, finally, discusses how the recommendations set out in Parts 2 and 3 can best be implemented. It proposes actions that might be taken, specifically, by the UK government or devolved governments, by the UK parliament or devolved legislatures, by bodies such as the Electoral Commission and Information Commissioner's Office, and by other political actors such as political parties, campaign groups and media commentators. It proposes a checklist for consideration by any such individual or group when considering proposing a future referendum.

The Commission's recommendations are wide-ranging. They extend from the foundational questions of how big a role referendums should play in our democratic system and how they should relate to other parts of that system to the specificities of how campaign spending should be reported and what information should be available about online advertisements.

The Commission believes that all of these points matter. While some may not be headline-grabbing, collectively they imply a transformation in how we think of referendums in the UK. If we are to maximise the beneficial role that referendums can play within our democratic system, some of the expectations that have built up in recent years for how referendums will be called, and where they will fall within the process of policy-making, need to be reconsidered. The Commission hopes that the analysis and recommendations in this report will provide a useful starting point for that process.

# Part 1: Background

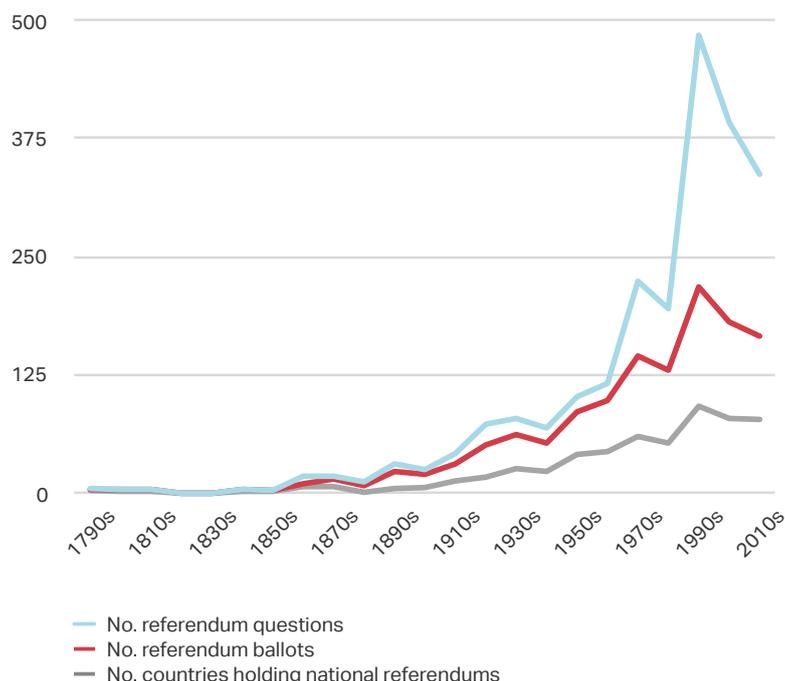
# 1. The Use of Referendums Worldwide

- 1.1. This chapter puts the UK in broader context by surveying the use of referendums around the world. It begins by looking at the incidence of referendums and patterns of public opinion towards referendums. It then examines the range of subjects that different countries put to voters and the place that referendums play in overall systems of democratic decision-making.

## A very brief history of referendums

- 1.2. The first modern national referendum took place in France in 1793. As Figure 1.1, below, shows, such exercises remained rare until the twentieth century, but they have increased greatly in frequency in the last half century.

**Figure 1.1. Frequency of national referendums in sovereign states, by decade**



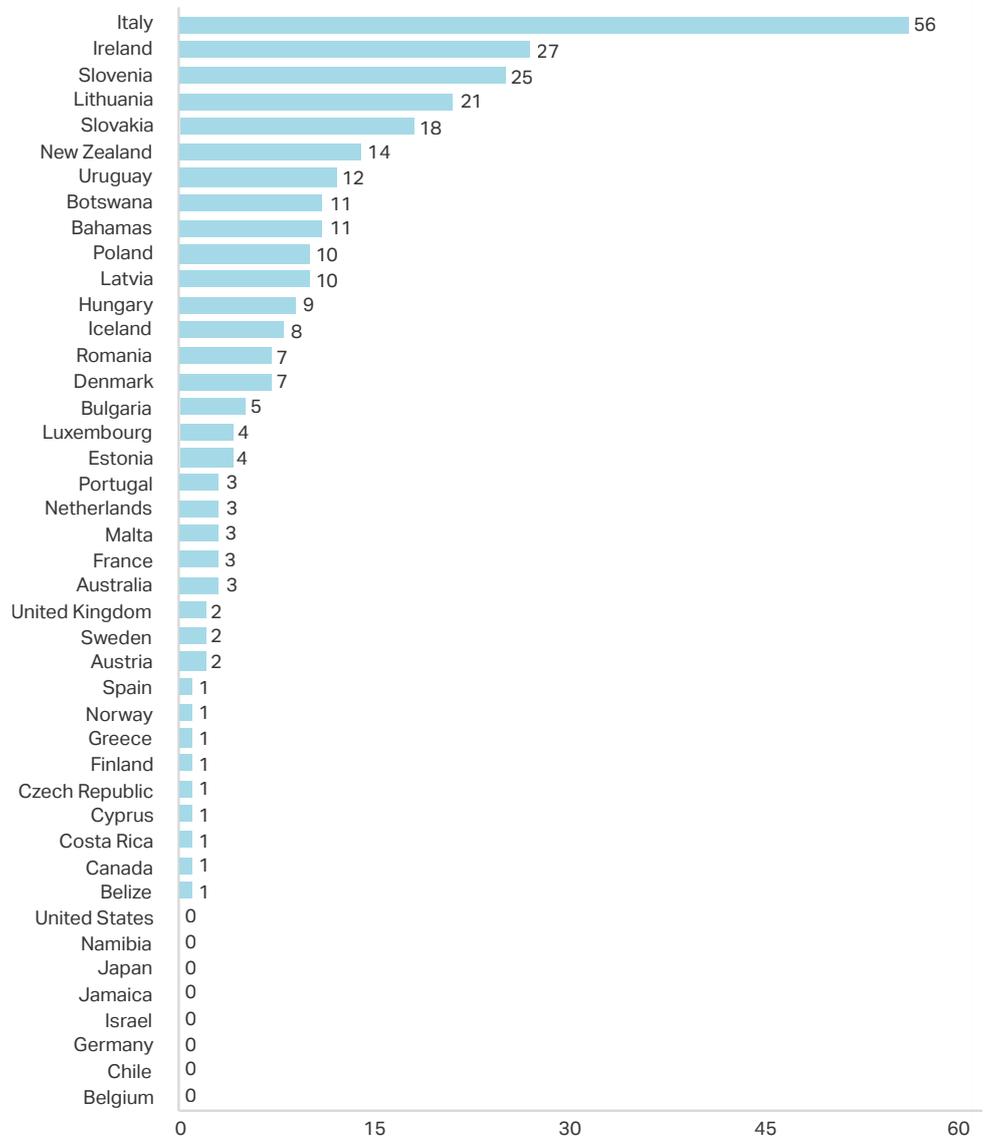
**Note:** Figures for the 2010s are the figures from 2010 to May 2018 weighted upwards to cover a full decade.

**Source:** Renwick, A., 2017, 'Referendums', in Arzheimer, K., Evans, J., and Lewis-Beck, M. (eds.), *The Sage Handbook of Electoral Behaviour*. London, Sage, pp. 433–58, at p. 435. Updated using data available at [www.sudd.ch](http://www.sudd.ch).

- 1.3. There is considerable variation across democracies in how often referendums are held. At one end of the scale, there have been no national referendums in Germany, Japan, or the United States. Indeed, in Germany and the US, national referendums are not constitutionally permitted at the federal level, though such

votes are widespread at state level. At the other end of the scale, Switzerland has held 621 national referendums since the first in 1798, 161 of which have taken place since 2000.<sup>1</sup> Most democracies occupy intermediate positions: there have been 289 state-wide referendums in the forty-three countries besides Switzerland that have been stable democracies since 1990 (not counting microstates) – an average of one every four or so years in each country. The spread of these referendums across the forty-three countries is shown in Figure 1.2. To permit meaningful comparisons, Figure 1.2 includes only referendums covering the whole territory of the sovereign state. Some of these countries, not least the UK, have also held important referendums covering part of their territory.

**Figure 1.2. State-wide referendums in stable democracies since 1990, by country**



**Note:** Switzerland is not shown. There have been 261 federal referendums in Switzerland since 1990.

**Source:** Calculated from data available at [www.sudd.ch](http://www.sudd.ch).

<sup>1</sup> SUDD, 2017, 'Datenbank und Suchmaschine für Direkte Demokratie', [website], (accessed 1 November 2017).

- 1.4. Changes in the frequency of referendums over time partly reflect changes in the issues on the political agenda: the major upsurge in referendums in the 1990s is associated with large numbers of decisions about independence, new constitutions and other such matters that followed the collapse of the Soviet Union and end of the Cold War.
- 1.5. But the rise of referendums also reflects a change in expectations about democracy. In the early post-war decades, what was sometimes called a 'minimalist' conception of democracy prevailed, in which voters' only role was to elect their representatives from time to time.<sup>2</sup> Political and wider social culture was often characterised by hierarchy and deference.<sup>3</sup> References to public opinion were rare in debates about policy choices. Even if politicians and commentators had wanted to make such references, evidence on which to base them was limited: opinion polling was still new and expensive and information transferred through the media – aside from the newspaper letters pages – was overwhelmingly top-down.
- 1.6. Since around the 1970s, however, expectations of citizens' involvement in democracy have risen. Social deference has declined and distrust towards politicians has in many ways risen.<sup>4</sup> The growth in the use of referendums is part of a wider pattern: elections have become more frequent too.<sup>5</sup> References to public opinion are now ubiquitous in political discourse. Over the last ten years, these trends have been propelled further by the rise of the social media, through which it has become normal that ordinary citizens can express their thoughts on any topic in the public sphere at any time.
- 1.7. Concrete evidence on public attitudes towards referendums around the world is provided by Figure 1.3. This draws on a large-scale academic survey of public opinion conducted in thirty-four countries in 2014. Respondents were asked to what extent they agreed or disagreed with the statement 'Referendums are a good way to decide important political questions'. Across all of the countries, 66.4% of respondents either agreed or strongly agreed with the statement, while only 12.5% disagreed or strongly disagreed: those agreeing thus outnumbered those disagreeing by more than five to one. There is much variation across what is a very diverse set of countries, but in only two countries was the proportion agreeing or strongly agreeing below 50%. Voters are clearly attracted to the idea of referendums, at least in the abstract.
- 1.8. Attitudes towards referendums are particularly favourable in Switzerland – the country that holds more such votes than any other. But it is also noteworthy that one of the most sceptical countries is the United States, where some states hold votes on policy questions almost as often as does Switzerland. Looking across the whole set of countries, there is no obvious relationship between the frequency of referendums and voters' attitudes towards them.
- 1.9. British respondents were somewhat more sceptical of referendums on average than were those across the whole set of countries, with 61% agreeing or strongly agreeing that they are a good way to decide important political issues. We analyse further evidence on UK public opinion in chapter 2.

<sup>2</sup> Schumpeter, J., 1994, *Capitalism, Socialism and Democracy*, London, Routledge, p.213.

<sup>3</sup> In the UK, see, for example: Almond, G. A., and Verba, S., 1963, *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Newbury Park, CA, Sage, p.315; for discussion and partial critique, see: Kavanagh, D., 1971, 'The Deferential English: A Comparative Critique', *Government and Opposition*, 6(3), pp.333–60.

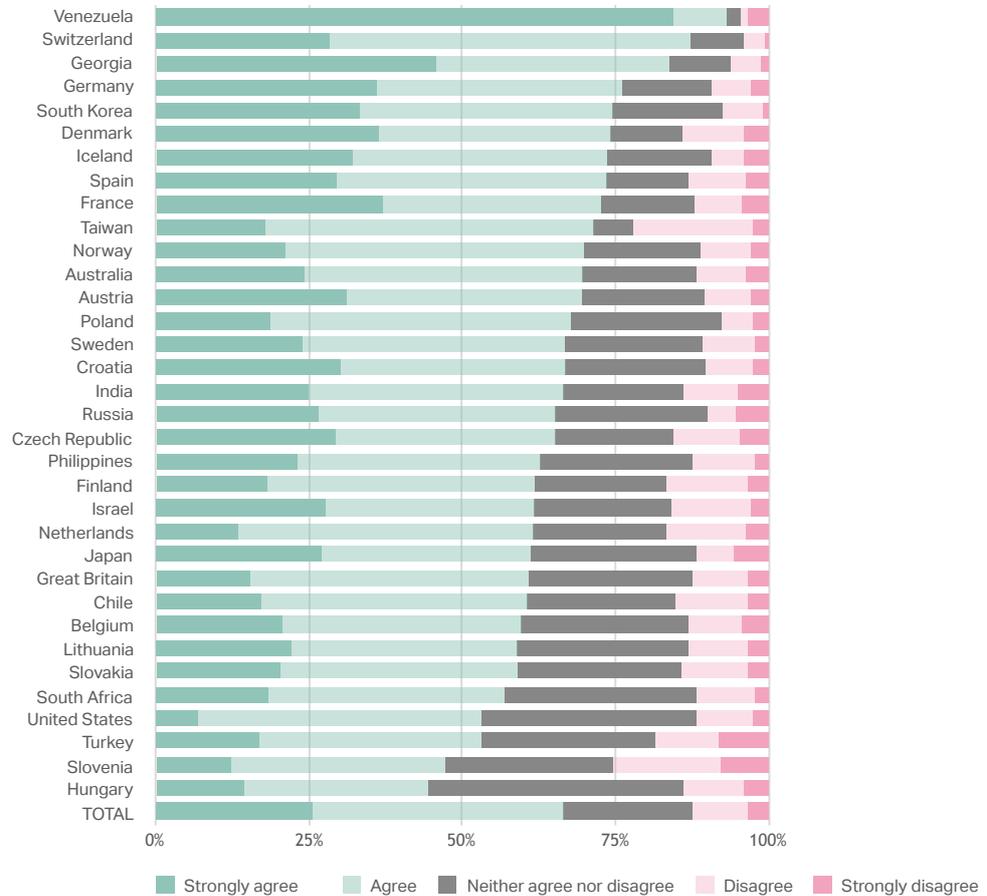
<sup>4</sup> Dalton, R. J., 1999, 'Political Support in Advanced Industrial Democracies', in Norris, P. (ed.), *Critical Citizens: Global Support for Democratic Government*, Oxford, Oxford University Press, pp.59–77; Inglehart, R. F., 2008, 'Changing Values among Western Publics from 1970 to 2006', *West European Politics*, 31(1–2) pp.130–46.

<sup>5</sup> Dalton, R. J. and Gray, M., 2003, 'Expanding the Electoral Marketplace', in Cain, B. E., Dalton, R. J., and Scarrow, S. (eds.), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford, Oxford University Press, pp.23–43.

Figure 1.3. Support for referendums around the world, 2014

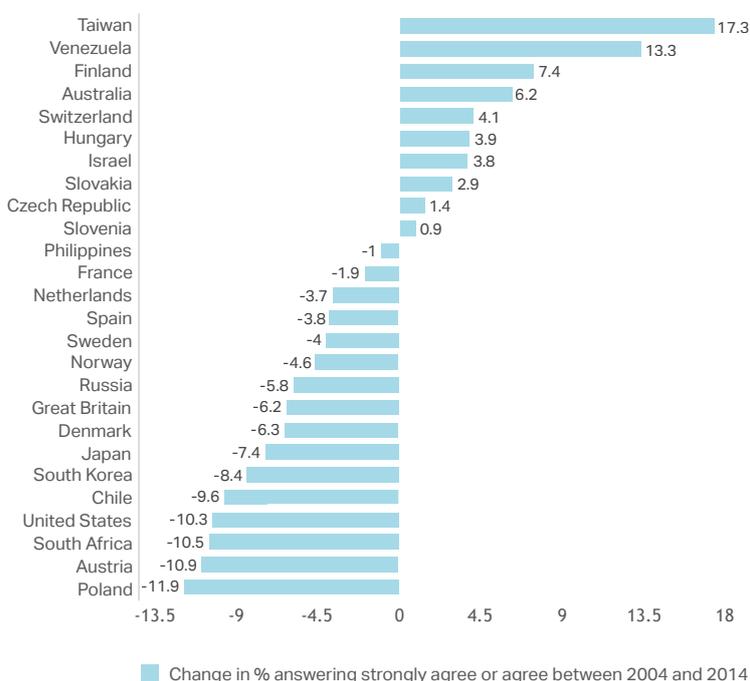
**Note:** Respondents were asked for their view on the statement, 'Referendums are a good way to decide important political questions.' There were 45,591 respondents across the 34 countries.

**Source:** ISSP Research Group, 2016, International Social Survey Programme: Citizenship II - ISSP 2014. GESIS Data Archive, Cologne. ZA6670 Data file Version 2.0.0. doi:10.4232/1.12590, (accessed 22 April 2018).



- 1.10. It is also useful to consider how opinion has changed over time. Surveys asking the same questions about attitudes towards referendums across time are rare, and we have found no sources allowing robust analysis of changes in attitudes in a range of countries before the twenty-first century. The 2014 survey reported in Figure 1.3 was, however, also conducted in twenty-six of the same countries in 2004, so we can at least examine change over this decade. As Figure 1.4 shows, there is no overall pattern: some countries saw support for referendums rise; others (in fact, more than half) saw it fall. Over a ten-year period, the absence of a general trend is not surprising: short-term political events in individual countries – including referendums, proposals for referendums and other factors – are likely to have strong effects. But the numbers do at least give cause to doubt that the most recent years have seen an inexorable rise in support for this democratic mechanism.

**Figure 1.4. Change in support for referendums around the world, 2004–14**



**Note:** In both years, respondents were asked for their view on the statement, 'Referendums are a good way to decide important political questions.' There were 34,028 respondents across the 26 countries included in this analysis in 2004 and 34,966 in 2014.

**Sources:** ISSP Research Group, 2012, International Social Survey Programme: Citizenship - ISSP 2004. GESIS Data Archive, Cologne. ZA3950 Data file Version 1.3.0, doi:10.4232/1.11372 (accessed 22 April 2018); ISSP Research Group, 2016, International Social Survey Programme: Citizenship II - ISSP 2014. GESIS Data Archive, Cologne. ZA6670 Data file Version 2.0.0, doi:10.4232/1.12590 (accessed 22 April 2018).

## How are referendums used internationally?

- 1.11. Each of the chapters in Parts 2 and 3 of this report addresses a specific aspect of referendums and includes a section on relevant international practice. We do not attempt to summarise that here. But it is useful to begin with an overview of how referendums are used around the world. We focus here on two questions. First, on what topics are referendums held? Second, how do these referendums fit into the overall decision-making process?
- 1.12. The discussion below is limited to referendums in democratic countries. It is worthwhile to remember that referendums can also be used for non-democratic purposes: the deeply pernicious use of 'plebiscites' in Germany and Austria in the 1930s led to Germany's post-war ban on national referendums; more recently, referendums in unfree contexts have been used by authoritarian leaders to consolidate their power in countries such as Turkey and Azerbaijan. But it is the use of referendums in democracies that is clearly most relevant, and from which we might want to draw lessons for UK practice.

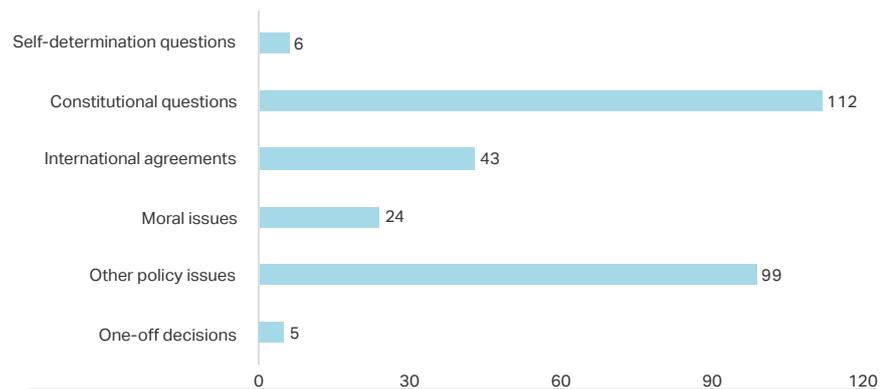
### The topics of referendums

- 1.13. Referendums are used to resolve many kinds of issues in democracies around the world. We identify six types of decision for which referendums are used,

each of which is discussed further below. At the most fundamental level, they are used to decide the boundaries of the democratic community itself: questions about independence, unification, or the delineation of borders. Second, they are used to address other questions about the constitution of that community: the structure of the state or the political system, or changes to political rights or the rules around citizenship. Third, they may focus on international issues, such as participation in international organisations and international agreements. Fourth, they may examine moral questions that in the UK are often dealt with through free votes in parliament: notably, those relating to human reproduction, human relationships, children's rights, death, or recreational drugs. Fifth, they can be used in relation to other non-constitutional policy matters that are typically at the heart of party politics. Finally, referendums are occasionally used to make decisions not on policy matters at all, but on one-off questions such as whether to dismiss the president or call early legislative elections.

- 1.14. Figure 1.5 shows how the 289 state-wide referendums that have been held in democratic countries (except Switzerland) since 1990 spread across these categories. The greatest number of referendums are constitutional. But ordinary legislative referendums are also common. Within this category, the most frequent theme has been privatisation, particularly in countries of the former communist bloc. Many referendums on ordinary legislation are initiated by citizens through petition (as further discussed in chapter 5). Referendums on international agreements are also fairly frequent, and the great bulk of these relate to the European Union.

**Figure 1.5. State-wide referendums in democratic countries since 1990, excluding Switzerland, by topic**



**Note:** See text for category definitions. What counts as a formal 'constitutional' issue varies between countries. We have applied a common definition across all countries, including all questions relating to the structure of the state or political system, or changes to political rights or the rules of citizenship, and excluding other matters.

**Source:** Calculated from data at [www.sudd.ch](http://www.sudd.ch).

- 1.15. The following paragraphs examine each of these categories in further detail.

### **SELF-DETERMINATION**

- 1.16. Referendums on issues of self-determination appear in Figure 1.5 to be rare. But that is partly because the data shown relate only to state-wide votes. Referendums on questions of secession typically take place only in the

territory that might become independent, as in Quebec in 1980 and 1995, Scotland in 2014, and (unofficially) Catalonia in 2017. In fact, the argument that issues of secession and unification should go to a popular vote is widely accepted and is reflected in international practice. Political scientist Matt Qvortrup argues that, since the breakup of the Soviet Union, an international norm has developed requiring a referendum before secession can legitimately take place.<sup>6</sup>

- 1.17. Although some peaceful secessions have occurred without a referendum (as in the division of Czechoslovakia in 1993) and some secession referendums have been followed by violence (as in Slovenia in 1990–91), most peaceful secessions have been accompanied by referendums.<sup>7</sup> In some cases, referendums have prevented the breakup of states, as in Canada in 1980 and 1995. Referendums on unification also occur from time to time, as in Newfoundland in 1948 and Cyprus in 2004.

### CONSTITUTIONAL AMENDMENTS

- 1.18. Constitutional referendums are the most common type of referendum in democracies around the world. Many democracies have provisions within their constitutions for referendums on constitutional amendments or revisions. For example, in Ireland, Australia, Switzerland and Denmark referendums are mandatory on all constitutional amendments.<sup>8</sup>
- 1.19. In other countries, such as Lithuania and Iceland, referendums are required to pass amendments only to specific parts of the constitution.<sup>9</sup> In Austria and Spain, amendments to key parts of the constitution require a referendum and the legislature can trigger a referendum on any other amendments.<sup>10</sup> In Italy, regional councils or the electorate can call a referendum on any proposed constitutional amendment, unless it achieves a two thirds majority in both chambers of parliament.<sup>11</sup>
- 1.20. In contrast, the Portuguese Constitution explicitly prohibits any referendums on constitutional amendments.<sup>12</sup>

### TRANSFER OF SOVEREIGNTY OR PARTICIPATION IN INTERNATIONAL ORGANISATIONS

- 1.21. Many recent referendums have concerned participation in international organisations. The most high-profile and most frequent of these have been on membership of the European Union. All of the countries that joined the EU in 1995 – Austria, Finland and Sweden – held a referendum on the issue, as did Norway, where the membership proposal was defeated. Eleven of the thirteen countries that have joined the EU since 2004 have also held such referendums (the exceptions being Cyprus and Bulgaria).
- 1.22. There have also been many referendums on EU treaties: for example, on the Maastricht Treaty in Denmark, Ireland and France in 1992 (and in Denmark again, after limited renegotiation, in 1993), on the proposed EU Constitution in Spain, France, the Netherlands and Luxembourg in 2005, and on the Lisbon Treaty in Ireland in 2008 and 2009.<sup>13</sup>
- 1.23. Beyond the EU, referendums have occasionally been held on other international matters, including NATO membership (Hungary and Slovakia in

<sup>6</sup> Qvortrup, M., 2014, 'Referendums on Independence, 1860–2011', *The Political Quarterly*, 85(1), pp.57–64, at p.60.

<sup>7</sup> LeDuc, L., 2003, *The Politics of Direct Democracy: Referendums in a Global Perspective*, Toronto, University of Toronto Press Higher Education, p.102.

<sup>8</sup> Federal Constitution of the Swiss Confederation 1999 (rev. 2002), article 140; The Constitutional Act of Denmark 1953, section 88; Constitution of Ireland

1937 (rev. 2015), article 46; Commonwealth of Australia Constitution Act 1900 (rev. 1985), chapter VIII, article 128.

<sup>9</sup> The Constitution on Lithuania 1992 (rev. 2006), article 149; Constitution of Iceland 1944 (rev.2013), article 79.

<sup>10</sup> Constitution of the Federal Republic of Austria 1920 (reinst. 1945, rev.2013), article 44; Spanish Constitution of 1978 (rev.2011), article 167–168.

<sup>11</sup> The Constitution of the Italian Republic 1947 (rev. 2012) article 138.

<sup>12</sup> Constitution of the Portuguese Republic 1976 (rev.2005), article 115, section 4(a).

<sup>13</sup> For referendums on EU matters, see: Hobolt, S. B., 2009, *Europe in Question: Referendums on European Integration*, Oxford, Oxford University Press.

1997 and Slovenia in 2003), participation in the International Criminal Court (Ireland in 2001), and free trade agreements (Costa Rica in 2007).

- 1.24. Some states require a referendum for participation in international organisations. The Danish Constitution demands such a vote on any transfer of sovereignty unless a five-sixths majority is achieved in parliament.<sup>14</sup> A referendum is needed in Lithuania if joining an international organisation involves a transfer of competence.<sup>15</sup> Switzerland requires a referendum for 'accession to organisations for collective security or to supranational communities'.<sup>16</sup> The French Constitution, meanwhile, requires a referendum on any bill 'authorising the ratification of a treaty pertaining to the accession of a state to the European Union' unless it the bill is passed in both houses by a three-fifths majority.<sup>17</sup>

### ANSWERING MORAL QUESTIONS

- 1.25. Some issues may be perceived as matters of conscience that should be 'apolitical'. In the UK, these issues are most often addressed through free votes in parliament. Referendums on such moral questions are most common in a small number of democracies with strong Roman Catholic heritage. Portugal has held two referendums on abortion, in 1998 and 2007. Italy has held referendums on divorce (1974), abortion (1981), and IVF and research on embryos (2005). Ireland has held referendums on divorce (1986, 1995), abortion (1983, 1992, 2018), the death penalty (2001) and same-sex marriage (2015).
- 1.26. Elsewhere, US states have frequently held ballots on moral issues such as abortion and LGBT rights. Referendums intended to ban same-sex marriage have been held in Croatia, Slovakia, and Slovenia. In 2017, Australia held a referendum (officially classed as a 'postal survey') to legalise same-sex marriage.<sup>18</sup>

### REGULAR POLICY QUESTIONS

- 1.27. Many referendums relate to matters of ordinary policy-making. They can take a variety of forms. Some ask voters to accept or reject a law that has been passed by the legislature. Others involve a vote on a proposal that has not been adopted by parliament: either a specific draft law or a broadly worded policy suggestion.
- 1.28. Most referendums on policy issues are initiated by citizens through petition, a use that is examined in chapter 5 of this report. Others are initiated by parliaments. In 1996, for example, the Polish parliament put four questions to voters about features of the government's proposed privatisation programme. Others still are triggered by presidents. In Iceland, for example, a referendum is automatically held if the president refuses to sign into law a bill that has been approved by parliament.<sup>19</sup>

### NON-POLICY REFERENDUMS

- 1.29. A small number of democracies allow referendums for matters other than policy-making. The constitutional procedures to impeach the president include a referendum in both Austria and Iceland, though in neither case has the mechanism ever been used. Impeachment referendums have however been held in Romania (in 2007 and 2012). Referendums calling for the early dissolution of the legislature have been held in Latvia (in 2011) and in Slovakia (in 2000 and 2004).

<sup>14</sup> The Constitutional Act of Denmark 1953, section 20.

<sup>15</sup> Law on Referendum 4 June 2002 No IX-929 (Lithuania) (As last amended on 12 September 2012 — No XI-2216), article 4, 1(f).

<sup>16</sup> Federal Constitution of the Swiss Confederation 1999 (rev. 2002), article 140, 1(b).

<sup>17</sup> Constitution of the Republic of France 1958 (rev. 2008), article 88.5.

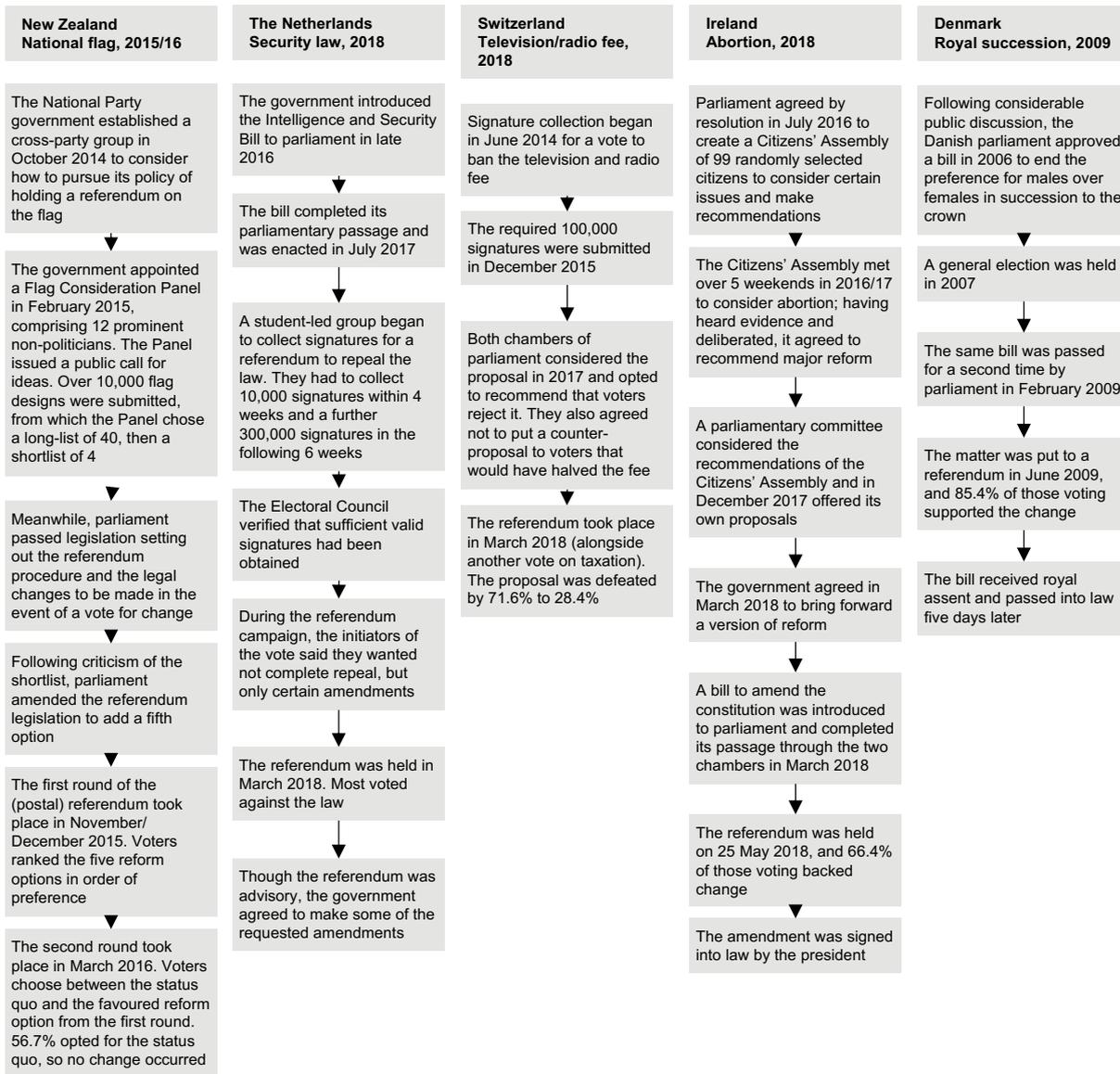
<sup>18</sup> The Australian government was unable to pass the necessary legislation to hold a referendum on same-sex marriage and so a postal survey was held instead.

<sup>19</sup> Constitution of Iceland 1944 (rev.2013), article 26.

## The place of referendums in processes of decision-making

- 1.30. The preceding paragraphs illustrate not only the diverse topics on which referendums are held, but also the fact that referendums come about through a variety of routes: some form part of a process of constitutional amendment, others of the ordinary legislative process; some are called by presidents, others by legislatures, and others still by ordinary citizens. We explore this variety in further detail in chapter 5. For now, it is useful to consider the broader question of how these referendums fit into the overall democratic structure and decision-making process.
- 1.31. Figure 1.6 sets out the steps involved in five recent examples of decision-making that involved referendums: in New Zealand, the Netherlands, Switzerland, Ireland, and Denmark. It is immediately apparent that no referendum sits in isolation from the rest of the political system: there is always interaction between the referendum and the legislature; in some cases, other actors also play a key role.
- 1.32. That is clearly illustrated by the two-round referendum held in New Zealand in 2015 and 2016 to decide the future of the national flag. New Zealand is like the UK in having no codified constitution, so it provides a useful starting point for our discussion. Because there is no constitutional procedure for referendums, it was up to the New Zealand parliament to decide that the referendum would take place.
- 1.33. Interactions among parliamentary, public and other actors take different forms in different cases. The Dutch and Swiss referendums are both examples where the decision to hold the referendum lay in the hands of voters rather than parliament. Even here, however, the legislature was again deeply involved. The Dutch process is an example of what is sometimes called an 'abrogative' referendum: a citizen-initiated referendum in the Netherlands can be used only to abrogate (that is, repeal) a law that has been passed by parliament. The referendum is advisory: parliament could opt not to abide by the result if it wanted. And even if parliament does decide to respond, it can choose how to do so: in this case, it opted not to repeal the law, but only to amend it, and, indeed, to make only some of the amendments proposed by the campaigners behind the referendum. This was generally perceived by media commentators to be a reasonable compromise between the differing perspectives on either side of the debate. A variant of this procedure exists in Italy: here, the result of an abrogative referendum is binding (if turnout meets a certain threshold) and has the direct effect of repealing the law (or part of the law) in question. It still remains, however, for parliament to decide whether to replace that law and, if so, what to replace it with.

Figure 1.6. The process of decision-making in five recent referendums around the world



**Sources:** New Zealand: Arseneau, T. and Roberts, N. S., 2016, 'New Zealand's flag referendums: the story so far', Constitution Unit blog, [blog], 16 February (accessed 26 May 2018); Arseneau, T. and Roberts, N. S., 2016, 'Blowin' in the wind: a postscript on New Zealand's flag referendums', Constitution Unit blog, [blog], 9 May, (accessed 26 May 2018); New Zealand Department of the Prime Minister and Cabinet, 'Flag Consideration Project' [government resources portal], (accessed 26 May 2018).

Netherlands: 'Uitslag referendum over Wiv: meerderheid tegen' [press release], Kiesraad, 29 March 2018, (accessed 15 June 2018).

Switzerland: Swiss government, 'Votation populaire du 4 mars 2018' [information portal for the referendum], (accessed 26 May 2018); Swiss Info, 2017, 'Parliament

rejects "No Billag" licence fee initiative', 26 September, (accessed 26 May 2018).

Ireland: Citizens' Assembly, 2017, *First Report and Recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution*, Dublin: Citizens' Assembly, (accessed 15 June 2018); Joint Committee on the Eighth Amendment of the Constitution, 2017, *Report of the Joint Committee on the Eighth Amendment of the Constitution*, Dublin, Houses of the Oireachtas, (accessed 15 June 2018); *Irish Times*, 2018, 'Referendum result', 26 May, (accessed 15 June 2018).

Denmark: Danmarks Statistik, 2010, 'Folkeafstemning Søndag 7. juni 2009', [website], 11 August, (accessed 26 May 2018), *The Constitutional Act of Denmark 1953*, (accessed 26 May 2018).

- 1.34. It is the Swiss system that gives voters the greatest power: here, citizens can propose constitutional amendments directly via petition, without the need for support from the Federal Assembly. Again, however, the Federal Assembly plays an important role: when sufficient signatures have been gathered for a referendum, the Assembly decides whether to support the proposal or not. If it does not support the proposal, it has the option of adding a counter-proposal to the ballot paper. It also sets out its reasoning in the information booklet that is sent to all voters. In the case shown in Figure 1.6, the Assembly opted not to support the proposal. One political party sought to gain the Assembly's support for a counter-proposal involving partial change, but this was not successful. Another noteworthy feature of the Swiss system is the length of time that it takes: in this case, which is not unusual, almost four years elapsed from the start of signature collection to the referendum itself. This gives ample opportunity for deliberation and may help to prevent knee-jerk decision-making.
- 1.35. The Swiss case is an example of a referendum forming part of a process of constitutional amendment. As seen above, constitutional referendums are the commonest type of referendum, so it is useful to consider further variants of such procedures. The Irish and Danish cases in Figure 1.6 provide examples.
- 1.36. In Ireland, a constitutional amendment requires the consent of parliament and then also the consent of the people through a referendum. Thus, unlike in Switzerland, parliament and public both exercise veto power. This fits the normal practice in countries with codified constitutions of entrenching the provisions of the constitution, so that they can be changed only if there is clear and broad support for the reform – as further discussed below. The 2018 Irish abortion referendum shown in Figure 1.6 also provides an example of a growing trend towards the inclusion of ordinary citizens in direct policy discussions through other mechanisms beyond a referendum. In this case, it was a body called the Citizens' Assembly that proposed reform. This body was established on the government's initiative through parliamentary resolution and operated independently of political control. It comprised a group of ninety-nine citizens who were randomly selected to represent the population as a whole. The Assembly met over successive weekends in 2016 and 2017 to hear evidence, deliberate, and make recommendations.<sup>20</sup> This is an important development, and we explore it in further detail in chapters 4 and 7.
- 1.37. Looking at the final example in Figure 1.6, in Denmark the constitution prescribes a four-step process of constitutional amendment: parliament must vote for the proposal twice, and a general election must happen between the two parliamentary votes; only after these steps can the referendum take place. Support is required in the referendum from 50% of those voting and 40% of those eligible to vote. In the case of the 2009 vote shown in Figure 1.6 (which is the only constitutional referendum to have been held in Denmark since the current constitution came into force in 1953), though 85.3% of those voting backed the amendment, a turnout of 58.3% meant that the threshold was passed only narrowly: 45.1% of eligible voters cast a ballot for reform.
- 1.38. There are various other means by which constitutions commonly build in

<sup>20</sup> Citizens' Assembly, [website], (accessed 2 June 2018).

parliamentary safeguards for constitutional change involving referendums. Denmark's requirement for a general election to intervene notably applies in a case where there is a single-chamber parliament. In countries with bicameral legislatures, proposed amendments frequently need the backing of both chambers before a referendum can be held. In Australia the change must first find support from an absolute majority of members of both chambers; in Italy each chamber must approve a constitutional change not just once but twice, on the second occasion by an absolute majority; Japan sets an even higher hurdle and a two-thirds majority in both chambers is required.<sup>21</sup>

- 1.39. Thus, the norm is for a referendum only ever to form part of a lengthier decision-making process. The legislature plays an important role alongside the referendum in almost all cases, ensuring that proposals are subject to detailed parliamentary scrutiny. Members of the public were also often involved directly at earlier stages beyond just the referendum vote in several of the cases discussed: through petitions, consultations, and, in Ireland, a citizens' assembly. Processes of constitutional amendment are often particularly onerous, to ensure that change to the fundamental rules of the state cannot occur without widespread support and careful consideration.

### Conclusions/Recommendations

1. Referendums now constitute an important part of how democracy functions in numerous countries around the world. They are used with increasing frequency, including to address some of the most fundamental political and constitutional questions. It is essential, therefore, that careful consideration be given to how they operate and how they fit within the rest of the democratic system.

<sup>21</sup> Commonwealth of Australia Constitution Act 1900 (rev. 2013), Chapter VIII, Article 128; The Constitution of the Italian Republic 1947 (rev. 2012), Article 128; Japanese Constitution 1946, Article 96. In Australia, if the two houses cannot agree, a proposed amendment may be submitted to referendum by the Governor General, on the advice of the Prime Minister, if passed on two separate occasions in one house.

## 2. The Use of Referendums in the UK

- 2.1. The previous chapter having reviewed international practice on the holding of referendums, this chapter considers their past use in the UK. In some respects UK experience is in line with worldwide developments, in that referendums have become more frequent. As shown in Table 2.1, the UK's first non-local referendum was held in 1973, in Northern Ireland. There were three further such polls in the 1970s – including the first UK-wide referendum, on membership of the then European Community, in 1975. A further nine non-local referendums have then been held since the late 1990s – two of which were UK-wide.<sup>1</sup>
- 2.2. This chapter includes essential context for the Commission's deliberations by providing a brief political history of the thirteen referendums that have taken place and reflecting upon what principles, if any, have driven the decision to put matters to a referendum. The chapter concludes that, while some conventions are emerging regarding when referendums are held, which are broadly in line with international practice, their use has been driven to a significant extent by pragmatism. The chapter also presents the limited evidence that exists on public attitudes to holding referendums in the UK, concluding that, while there is clearly some support for increasing the use of referendums, this is somewhat patchy, and has declined since the EU referendum of 2016.
- 2.3. This section briefly summarises the circumstances surrounding each of the thirteen non-local UK referendums that have been held.

### 1973 Northern Irish border poll

- 2.4. The first such referendum followed from the UK government's decision to prorogue the Parliament of Northern Ireland following a sharp deterioration in the security situation. When the UK government imposed direct rule, it pledged to hold a referendum on Northern Ireland's future status within the UK.<sup>2</sup>
- 2.5. In 1973 the UK parliament passed legislation enabling a referendum on whether voters wanted Northern Ireland to remain part of the UK or join with the Republic of Ireland. According to Denis Balsom, 'an assessment of popular opinion in Northern Ireland was important to justify current government policy, to define a baseline for negotiations, and to substantiate the commitment made by Britain that Northern Ireland would not cease to be part of the United Kingdom without the consent of the majority of its people'.<sup>3</sup> The referendum was largely boycotted by the Catholic population and so the result was an overwhelming majority (98.9%) in favour of remaining part of the UK, on a turnout of 58.7%. The result was that Northern Ireland stayed within the UK; but the issue was far from settled.

<sup>1</sup> Additionally, many local referendums have been held, but, as indicated in the Introduction, they are outside this Commission's investigation.

<sup>2</sup> Gay, O., and Morgan, B., 1998, 'Northern Ireland: Political Developments since 1972', Research Paper 98/57, London, House of Commons Library, p.22.

<sup>3</sup> Balsom, D., 1996, 'The United Kingdom: Constitutional Pragmatism and the Adoption of the Referendum', in Gallagher, M., and Uleri, P.V. (eds), *The Referendum Experience in Europe*, Basingstoke, Macmillan Press, p.211.

Table 2.1. National and regional referendums in the UK 1973–2016

Date	Area	Topic	Question	Turnout	Results	Outcome
8 March 1973	Northern Ireland	Northern Irish border poll	Do you want Northern Ireland to remain part of the United Kingdom? or Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?	58.7%; the poll was boycotted by most Catholic voters	98.9% support remaining part of the UK 1.1% support joining Republic of Ireland.	Northern Ireland remained part of the UK.
5 June 1975	UK	European Community membership	Do you think the United Kingdom should stay in the European Community (the Common Market)?	64.0%	67.2% Yes 32.8% No	The UK remained in the European Community.
1 March 1979	Scotland	Scottish devolution	Do you want the provisions of the Scotland Act 1978 to be put into effect?	63.6%	51.6% Yes 48.8% No	Threshold requirements were not reached.  Scottish devolution did not proceed.
1 March 1979	Wales	Welsh devolution	Do you want the provisions of the Wales Act 1978 to be put into effect?	58.8%	20.4% Yes 79.7% No	Welsh devolution did not proceed.
11 September 1997	Scotland	Scottish devolution	Part I I agree that there should be a Scottish Parliament; or I do not agree that there should be a Scottish Parliament  Part II I agree that a Scottish Parliament should have tax-varying powers; or I do not agree that a Scottish Parliament should have tax-varying powers	60.2%	Part I 74.3% Agree 25.7% Do not agree  Part II 63.5% Agree 36.6% Do not agree	The Scottish Parliament was established and granted tax-varying powers.
18 September 1997	Wales	Welsh devolution	I agree that there should be a Welsh Assembly; or I do not agree that there should be a Welsh Assembly	50.1%	50.3% Agree 49.7% Do not agree	The Welsh Assembly was established.
7 May 1998	Greater London	London devolution	Are you in favour of the Government's proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly?	34.0%	72.0% Yes 28.0% No	The Greater London Authority was established.
22 May 1998	Northern Ireland	Good Friday Agreement	Do you Support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?	81.1%	71.1% Yes 28.9% No	Public consent for the Good Friday Agreement was achieved.
4 November 2004	North East	North East England devolution	Should there be an elected assembly for the North East region?	47.1%	22.1% Yes 77.9% No	The elected regional assembly for the North East was not established.
3 March 2011	Wales	Powers of the Welsh Assembly	Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?	35.6%	63.5% Yes 36.5% No	The Welsh Assembly was given greater powers.
5 May 2011	UK	Parliamentary voting system	At present, the UK uses the 'first past the post' system to elect MPs to the House of Commons. Should the 'alternative vote' system be used instead?	42.2%	32.1% Yes 67.9% No	The parliamentary voting system was not changed.
18 September 2014	Scotland	Scottish independence	Should Scotland be an independent country?	84.6%	44.7% Yes 55.3% No	Scotland did not become independent from the UK.
23 June 2016	UK	EU membership	Should the United Kingdom remain a member of the European Union or leave the European Union?	72.2%	48.1% Remain 51.9% Leave	The UK began the process of leaving the European Union.

Sources: Johnston, N., 2017, *Referendums*, Briefing Paper Number 7693, London, House of Commons Library; Winetrobe, B.K., 1997, *The Referendums (Scotland*

*and Wales) Bill* [Bill 1 1997–98], Research Paper 97/61, London, House of Commons Library.

## 1975 European Community membership referendum

- 2.6. The UK became a member of the European Communities (commonly known as the European Community) in 1973. At the time, there was some debate about whether a referendum should be held to mandate such a significant change. However, the proposal was rejected by the Conservative government due to lack of constitutional precedent.<sup>4</sup>
- 2.7. In opposition, Labour was deeply divided over Europe. A referendum was first proposed in 1970 by Tony Benn, who opposed European Community membership. Although at this point the idea gained little traction, it was described by future Prime Minister James Callaghan as 'a rubber life-raft into which the whole party may one day have to climb'.<sup>5</sup> In 1972 the proposal to seek the consent of the people for European Community membership through a referendum or election was adopted by the party's National Executive Committee (NEC), prompting the resignation of its deputy leader, Roy Jenkins.
- 2.8. Labour's manifesto for the February 1974 election contained a commitment to renegotiating the terms of European Community membership and submitting them to a vote of the people – through an election or a referendum. In the subsequent October election, the commitment to do this by referendum was made explicit.<sup>6</sup> The referendum was held in June 1975 on the question 'Do you think that the United Kingdom should stay in the European Community (Common Market)?'. The result was 67.2% for Yes on a turnout of 64%. The No campaigners accepted the result of the referendum, which appeared to resolve the intra-party conflict.

## 1979 Scottish and Welsh devolution referendums

- 2.9. When proposals for devolution to Scotland and Wales emerged in the 1970s, the possibility of holding a referendum as part of the implementation process was not even considered. The subsequent legislation – the 1976 Scotland and Wales Bill – contained no such provision. Pressure to hold referendums began to build, orchestrated by Labour backbenchers opposed to devolution, but the Bill eventually collapsed.
- 2.10. In 1977, the government initiated two separate bills, the Scotland Bill and the Wales Bill, which did contain provisions for referendums. In Vernon Bogdanor's words, 'Without the concession of a referendum there would have been no chance of getting the devolution legislation through Parliament'.<sup>7</sup> The government was later forced to concede further by accepting backbench amendments that required 40% of the total eligible electorate to vote for change, despite the clearly obstructionist intentions of the proposers of the amendment.
- 2.11. The referendums were held in March 1979 and asked whether voters wanted the provisions in the respective Acts to be put into effect. In Wales, a substantial majority (79.7%) voted against the proposals, with a turnout of 58.8%. In Scotland, a narrow majority (51.6%) voted in favour. However, with a turnout of 63.6%, the required 40% electorate threshold was not met.

<sup>4</sup> Balsom D, 1996, *The Referendum Experience in Europe*, p.212.

<sup>5</sup> Quoted in Butler, D., and Kitzinger, U., 1996, *The 1975 Referendum*, second edition, London, Macmillan Press, p.12.

<sup>6</sup> Broad, R., and Geiger, T., 1996, 'The 1975 British Referendum on Europe', *Contemporary British History*, 10(3), pp.82–105, at p.89.

<sup>7</sup> Bogdanor, V., 2009, *The New British Constitution*, Oxford, Hart Publishing, p.187.

- 2.12. Consequently, both sets of proposals were abandoned. In the short term, the anti-devolutionists won, but calls for greater autonomy for Scotland and Wales continued throughout the following decades.

### Box 2.1. UK Referendums that never happened

While this chapter focuses on the thirteen major referendums that have taken place in the UK, it is also useful to consider referendum proposals that gained considerable attention but never reached an actual vote. Following the four referendums of the 1970s, talk of holding such votes vanished almost entirely during the 1980s: Margaret Thatcher opposed referendums, and constitutional reform was largely off the political agenda.

Referendum discussion returned in 1991–2 during debates over the Maastricht Treaty. The treaty's opponents understandably argued for a referendum, hoping public opinion might diverge from the pro-European parliamentary majority. Perhaps more surprisingly, some strong pro-Europeans also supported such a vote, hoping a serious public debate would clear the air and help restore public confidence in the European project.<sup>8</sup>

This set a pattern for the years to follow. The 1997 election saw the emergence of the short-lived Referendum Party, which proposed a vote on returning to a simple trading relationship with other European countries. Between 1997 and 2015, all three main parties made some kind of EU-related referendum pledge in every one of their general election manifestos. These concerned three issues:

**Whether to join the euro.** All three parties said in 1997 that they would not take the country into the euro without a positive vote in a referendum. Labour and the Liberal Democrats repeated this pledge in 2001 and Labour recycled it again in 2010. But Gordon Brown's famous five tests for joining the currency were never met, and so the vote did not happen.

**The European Constitution.** All three parties pledged a referendum in 2005 on the proposed new EU Constitution, with the Conservatives saying they would campaign for a No vote. But the Constitution was withdrawn after French and Dutch voters rejected it in referendums held just weeks after the UK general election. Though much of the Constitution was resurrected in 2007 in the form of the Lisbon Treaty, the UK government argued that a referendum was not needed, and the Westminster parliament passed the legislation required to bring the treaty into effect in 2008.

**Transfer of power to the EU.** The Conservatives first proposed in 2001 that a referendum should be held before transferring any further powers to the EU. They reiterated this in 2010. Though no referendum has resulted from this pledge, legislation giving effect to the underlying principle was passed in 2011. This is one of several referendum requirements that now exist in UK law, as set out in Box 2.2.

<sup>8</sup> See, for example, comments by then Liberal Democrat Leader Paddy Ashdown at House of Commons Hansard, 20 November 1991, vol. 199, column 305.

## 1997 Scottish and Welsh devolution referendums

- 2.13. There were no large-scale referendums during the years of Conservative government between 1979 and 1997 – though, as set out in Box 2.1, proposals for referendums on various issues rose up the political agenda from 1991 onwards. The story of actual referendums resumes following Labour’s return to power in 1997.
- 2.14. That year’s referendums on devolution in Scotland and Wales were not as inevitable as is often assumed. Initially, Labour intended to introduce devolution without holding new referendums, arguing that the endorsement of its manifesto in the 1997 election would provide a sufficient mandate.
- 2.15. A Constitution Unit report on Scottish devolution concluded at the time that a referendum was not constitutionally necessary, noting: ‘The precedents are inconclusive: there have been referendums in some cases (e.g. on continued membership of the EEC in 1975) but not in others (the Single European Act and the Maastricht Treaty).’<sup>9</sup> The case for a referendum on devolution in Wales was stronger, as the creation of an assembly would have directly contravened the wishes of the Welsh electorate expressed eighteen years earlier. Nonetheless, initially no referendums were planned.
- 2.16. In June 1996, the Shadow Scottish and Welsh Secretaries announced that Labour would hold pre-legislative referendums on the principle of devolution, justifying these as a means of constitutional entrenchment. Then Shadow Scottish Secretary George Robertson said: ‘We want to be sure that the democratic system we put in place is stable and durable. The best security a Scottish Parliament can have is the support of the people’.<sup>10</sup> Referendums expert Matt Qvortrup argues that this change of heart was simply strategic, as promising a referendum would silence the Conservatives’ claim that a vote for Labour in the 1997 election would be a vote for the breakup of the UK.<sup>11</sup> Nevertheless, the concept of using referendums for constitutional entrenchment is found elsewhere in Labour’s proposals, most obviously those for English devolution (see below). The decision seems to have been influenced by both principle and pragmatism.
- 2.17. Following Labour’s election victory in May 1997, the referendums were held that September. The Scottish referendum contained two questions, the first on whether there should be a Scottish Parliament and the second on tax-varying powers. The Scottish electorate strongly endorsed both proposals, by 74.3% and 63.5% respectively, with a turnout of 60.2%. At the Welsh referendum a week later, the result was much more tentative: an Assembly was endorsed by a very narrow margin (50.3%) on a turnout of just 50.1%.

## 1998 Good Friday Agreement referendum

- 2.18. The idea of holding concurrent referendums in Northern Ireland and the Republic of Ireland as part of the peace process was first proposed in 1996. Following talks with the Taoiseach, Prime Minister John Major raised the prospect of holding such referendums to mandate the start of negotiations in a Commons statement. In his words, ‘The aim would be to give the people of Northern Ireland the opportunity to speak clearly about their own

<sup>9</sup> Leicester, G., 1996, *Scotland’s Parliament: Fundamentals for a New Scotland Act*, London, Constitution Unit, p.51, (accessed 13 June 2018).

<sup>10</sup> Quoted in Winetrobe, B. K., 1997, *The Referendums (Scotland and Wales) Bill* [Bill 1 1997-98], Research Paper 97/61, London, House of Commons Library.

<sup>11</sup> Qvortrup, M., 2006, ‘Democracy by delegation: The decision to hold referendums in the United Kingdom’, *Representation*, 42(1), pp.59–72, at p.68.

commitment to peaceful democratic methods and rejection of violence.<sup>12</sup> Broad provision for holding a referendum in Northern Ireland was included in the Northern Ireland (Entry into Negotiations etc) Act 1996, but no such consultation took place at that point.

- 2.19. It was recognised that the subsequent peace deal required popular endorsement to maximise legitimacy and ensure lasting peace. In addition, implementing the Good Friday Agreement would require a constitutional amendment in the Republic of Ireland, which in turn would require a referendum. The Agreement committed both the British and the Irish governments to holding referendums on the same day, 22 May 1998. The deal received a resounding endorsement. In Northern Ireland, 71.1% voted in favour of the Agreement with a turnout of 81.1%. Survey evidence suggests that around 99% of Catholic voters and 57% of Protestant voters supported the proposals.<sup>13</sup> In the Republic, 94.4% voted Yes with a turnout of 56.3%.

## 1998 London Assembly referendum and 2004 North East Assembly referendum

- 2.20. Unlike the referendums on devolution to Scotland and Wales, the referendums on the establishment of regional assemblies in England formed part of the original proposals to create these bodies. In its 1995 consultation document *A Choice for England*, Labour argued that:

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*'It has been a long-standing principle of the Labour Party that no major change of this kind should be made without the consent of the people affected. We do not therefore believe that it would be appropriate to move towards such elected assemblies, including the strategic authority for London, without there being a test of consent.'*<sup>14</sup>

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- 2.21. The document added that, unlike in Scotland and Wales, manifesto commitments would not suffice, as the issue was less salient with the English electorate and the geographical basis for devolution less settled. As such, referendums would be required. It also noted the benefit of holding a referendum for the purpose of entrenchment, particularly in the absence of any special procedures for constitutional amendments.
- 2.22. In May 1998, the London electorate were asked whether they supported the government's proposals for a London Assembly and Mayor. 72.2% voted in favour, but on a low turnout of 34%.
- 2.23. In 2002, the government produced a White Paper on its proposals for further regional devolution, outlining eight regions where it proposed to establish assemblies. This acknowledged variation in demand for regional devolution, stating that 'referendums will be held when the Government believes there to be sufficient interest in the region concerned to warrant it. In some regions we do not currently envisage referendums being held for some time.'<sup>15</sup> The

<sup>12</sup> Winetrobe, B.K., 1997, *Referendum: Recent Proposals*, Research Paper 97/10 24, London, House of Commons Library, p.12.

<sup>13</sup> Hayes, B. C., & McAllister, I., 2001, 'Who Voted for Peace? Public Support for the 1998 Northern Ireland Agreement', *Irish Political Studies*, 16(1), pp.73–93, at p.80.

<sup>14</sup> Winetrobe, 1997, *Referendums: Recent Proposals*, p.26.

<sup>15</sup> Department for Transport, Local Government and the Regions, 2002, *Your Region, Your Choice: Revitalising the English Regions*, Cm5511, London, HM Government, p.11.

government originally planned three referendums on the establishment of regional assemblies in May 2004: in Yorkshire and the Humber, the North West and the North East. The first two were cancelled due to concerns about the security of the postal ballot, but the postal referendum in the North East went ahead as planned.<sup>16</sup> The result was that 77.9% of voters rejected the government's proposals on a turnout of 35.6%. The government subsequently halted plans for future referendums on the subject.

## 2011 powers of the Welsh Assembly referendum

- 2.24. The 2011 referendum on the powers of the Welsh Assembly was mandated by a provision in the 2006 Government of Wales Act. This referendum requirement represented a compromise between pro-devolution and devolution-sceptic elements of the Welsh Labour Party. The original intention was to hold a referendum on whether to give the Assembly primary legislative powers. In the end, however, the Government of Wales Act gave the Assembly some *limited* legislative powers without a popular vote, while stating that *full powers* would be introduced only after approval in a referendum.<sup>17</sup> Compared to previous devolution votes, the proposed changes were minor, but the legislation made a referendum necessary.
- 2.25. After losing its majority in the 2007 Assembly election, Welsh Labour agreed to trigger the referendum provision as part of a coalition agreement with Plaid Cymru, which it did in February 2010. The UK Labour government began preparing the necessary legislation, and the date of the referendum was announced by the coalition government shortly after the 2010 general election. The referendum took place in March 2011 on the question 'Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?', a proposition which attracted support from 63.5% of voters on a low turnout of 35.6%.

## 2011 parliamentary voting system referendum

- 2.26. The 2011 referendum on the parliamentary voting system arose through the 2010 coalition agreement. The Liberal Democrat manifesto had contained a radical programme of constitutional reform, including the introduction of a proportional voting system for UK general elections, with its favoured system being Single Transferable Vote (STV). Liberal Democrat leader Nick Clegg made clear during the campaign that movement on voting reform would be necessary for any post-election deal.<sup>18</sup> By contrast, the party's coalition partner, the Conservative Party, had run on a manifesto proposing to maintain the status quo.
- 2.27. The referendum on the Alternative Vote (AV) system was thus a compromise. It gave the Liberal Democrats a chance to achieve some electoral reform, but allowed Conservatives to campaign against the change, which they felt confident of defeating.<sup>19</sup> Even had AV won, it was still essentially a majoritarian system and a limited change.
- 2.28. The bill enabling the referendum was introduced to parliament a mere ten weeks after the government was formed, with little time for consultation or

<sup>16</sup> Electoral Commission, 2005, *The 2004 North East Regional Assembly and Local Government Referendums*, London, Electoral Commission, p.14, (accessed 12 June 2018).

<sup>17</sup> Wyn Jones, R., & Scully, R., 2012, *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, Cardiff: University of Cardiff, p.22–2.

<sup>18</sup> Weaver, M., 2010, 'Election 2010: Nick Clegg Warns Labour over Third-place Finish', *The Guardian*, 25 April, (accessed 13 June 2018).

<sup>19</sup> Loughlin, M., and Viney, C., 2015, 'The coalition and the constitution.' in Seldon, A. and Finn, M., (eds.) *The Coalition Effect, 2010–2015*, Cambridge, Cambridge University Press, pp.59–86.

development. It received royal assent on 16 February 2011. The referendum was held in May 2011, on the same day as local elections, and elections to the Scottish Parliament and National Assembly for Wales. AV was rejected by 67.9% of voters on a turnout of 42.2%.

## 2014 Scottish independence referendum

- 2.29. In 2007, the Scottish National Party (SNP) won enough seats to form a minority government in Scotland. Its manifesto pledged a White Paper on Scottish independence, which was published shortly after the election. An additional White Paper was published following public consultation, and announced the Scottish government's intention to hold a referendum on independence in 2010. However, this plan was ultimately abandoned by the SNP in favour of including a clear manifesto commitment to an independence referendum for the 2011 Scottish Parliament election.<sup>20</sup>
- 2.30. Following the SNP's landslide victory that year, the UK government accepted the party's mandate for an independence referendum. In the 2012 consultation document *Scotland's Constitutional Future*, it said: 'while the UK Government does not believe this is in the interests of Scotland, or the rest of the United Kingdom, we will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on.'<sup>21</sup> It could be argued that the UK government had little choice: obstructing the referendum, which had been clearly endorsed by the Scottish electorate, would have likely bolstered the nationalists' cause. Anyway, opinion polls consistently showed only minority support for Scottish independence, and if Scotland chose to remain in the UK in a referendum, that was expected to quieten calls for independence.
- 2.31. The Edinburgh Agreement, signed by the UK and Scottish governments in October 2012, set out the terms on which the UK authorities would recognise the validity of an independence referendum called by the Scottish Parliament,<sup>22</sup> and this arrangement was subsequently confirmed through an Order in Council under section 30 of the Scotland Act 1998. The question posed was 'Should Scotland be an independent country?', and, on an unusually high turnout of 84.6%, 44.7% voted Yes and 55.3% No.

## 2016 European Union membership referendum

- 2.32. Europe had long divided the Conservative Party. As party leader, first in opposition and then in government, David Cameron came under pressure to hold a referendum on the issue. In 2011 the coalition introduced legislation requiring a referendum on any new treaties that transferred power to the EU, but this proved not to be enough. Later that year, eighty-one Conservative MPs defied the whip and voted for a motion calling for an in/out referendum on EU membership. Although the motion failed, it increased pressure on the Conservative leadership.<sup>23</sup>
- 2.33. In January 2013, facing growing dissent from within his party and an electoral threat from UKIP, Cameron announced that he would seek to renegotiate the UK's relationship with the EU and then hold an in/out referendum. The referendum commitment was enshrined in the Conservatives' 2015 election

<sup>20</sup> Adam, E. C., 2014, 'Self-determination and the Use of Referendums: the Case of Scotland', *International Journal of Politics, Culture, and Society*, 27(1), pp.47–66 at p.48.

<sup>21</sup> HM Government, 2012, *Scotland's Constitutional Future*, London: HM Government, p.5, (accessed 13 June 2018).

<sup>22</sup> HM Government and the Scottish Government, 2012, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on Independence for Scotland*, Edinburgh, 15 October, (accessed 12 June 2016).

<sup>23</sup> BBC, 2011, 'EU referendum: Rebels lose vote in Commons', BBC, 25 October, (accessed 13 June 2018).

manifesto. The party unexpectedly won an overall majority at that election, and a bill requiring a referendum before the end of 2017 was introduced shortly afterwards. The referendum took place on 23 June 2016, and voters were asked 'Should the United Kingdom remain a member of the European Union or leave the European Union?'. David Cameron and other senior ministers, such as Chancellor of the Exchequer George Osborne, campaigned strongly against the change. This was the government's official position, though individual ministers were given freedom to dissent from it, and several did campaign for the other side. The result was that 51.9% voted in favour of leaving the European Union, on a turnout of 72.2%.

### Box 2.2. Topics on which referendums in the UK are now legally required

A final aspect of the story of referendums in the UK relates to issues on which referendums are required by law. The first such requirement was introduced in 1998 as part of the Good Friday Agreement. As mentioned in Box 2.1, above, the Conservative–Liberal Democrat coalition government introduced a rule in 2011 preventing any further transfer of powers to the EU without a popular vote. Recent devolution legislation has sought to entrench in law the principle that it is for the people of Scotland and Wales to determine the future of the devolved institutions in their areas. With the addition of a further requirement at local level, there are now five decisions that can be taken only with the support of voters at a referendum:

- that Northern Ireland should cease to be part of the United Kingdom<sup>24</sup>
- to ratify any treaty amending or replacing the Rome or Maastricht treaties in ways that extend the powers of the EU<sup>25</sup>
- to abolish the Scottish Parliament or Scottish government<sup>26</sup>
- to abolish the Welsh Assembly or Welsh government<sup>27</sup>
- for councils to raise council tax above a certain level.<sup>28</sup>

## Referendum practice and the UK's uncodified constitution

2.34. As discussed in chapter 1, the constitutions of many countries set out specific circumstances in which a referendum can or must be held. The UK has no codified constitution, which has enabled the use of referendums to develop more organically. The role of precedent, or 'convention', is famously important to the functioning of the UK constitution, and it can be argued that some conventions have gradually developed regarding the use of referendums.<sup>29</sup> But these remain by their nature both flexible and somewhat unclear. This section reflects upon the purposes that referendums have so far served in the UK, and how their place in the constitutional order compares with that in other countries.

<sup>24</sup> Northern Ireland Act 1996 c. 41, part 1, section 1.

<sup>25</sup> European Union Act 2011 c.12, part 1, sections 2 and 4.

<sup>26</sup> Scotland Act 2016, c. 11, part 1, section 1.

<sup>27</sup> Wales Act 2017 c. 4, part 1, section 1.

<sup>28</sup> Localism Act 2011 c.20, part 1, chapter 1, section 72.

<sup>29</sup> Marshall, G., 1984, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Oxford, Clarendon.

## The purposes of referendums in the UK

- 2.35. The historical account in the previous section allows us to discern some patterns regarding when referendums have been held in the UK. Three key sets of circumstances can be distinguished – which are discussed below, and may be present in different combinations. Some argue that the UK’s use of referendums has been largely opportunistic. For example, Anthony King claimed in 2007 that ‘All of the referendums that have been held so far ... have been held to suit the interests of one or another party’.<sup>30</sup> But the true picture is somewhat more complex than that. The drivers of referendums have included a combination of pragmatism and principle, with the relationship between these two shifting over time as conventions have gradually developed.

### ‘CONSTITUTIONAL’ ISSUES

- 2.36. All of the referendums so far held in the UK have been on issues which could readily be identified as constitutional – including self-determination, governmental power structures and voting rules. As chapter 1 shows, this is in line with one of the commonest uses of referendums around the world: to endorse constitutional amendments. Of course, the UK has no single ‘entrenched’ constitutional document to amend, and theoretically any change can be made by ordinary legislation. But the use of referendums to decide constitutional matters could nonetheless be seen as consistent with a principle that some matters are too fundamental to be decided by parliament alone, and indeed that sometimes (e.g., on electoral systems) politicians may be seen as having too much of a vested interest to decide. Bogdanor has argued that ‘a persuasive precedent has been created to the effect that the powers of Parliament should not be transferred without popular endorsement’.<sup>31</sup>
- 2.37. Although such principles have become increasingly important, it is notable that the use of referendums on UK constitutional matters has been somewhat inconsistent. For example, no referendum was held on the Maastricht Treaty or the Lisbon Treaty – though, as Box 2.2 above sets out, the European Union Act 2011 went on to make referendums on such treaty changes compulsory. Likewise, while the 1997 Labour government held various devolution referendums, no referendum was held on the introduction of the 1998 Human Rights Act or the 1999 reform of the House of Lords. Since that time, Lords reform has frequently been on the political agenda but parties supporting change have tended not to suggest that it should be decided by referendum.<sup>32</sup> Conventions have hence become established regarding some constitutional matters only.
- 2.38. Notably, unlike in some other countries, the UK has no history of holding referendums on ‘moral’ issues, such as divorce, abortion or same-sex marriage. Instead, the UK parliament and devolved legislatures have followed the well-established convention of ‘free’ (unwhipped) votes on these matters, and this has largely been uncontroversial.<sup>33</sup> It is notable that in some countries where referendums are frequent, such as Ireland, no equivalent culture of free votes exists.

### RESOLVING DISPUTES IN OR BETWEEN GOVERNMENTS

- 2.39. The account earlier in this chapter also demonstrates that referendums in the UK have frequently, but not always, been used as a political device to resolve

<sup>30</sup> King, A., 2007, *The British Constitution*, Oxford, Oxford University Press, p.295.

<sup>31</sup> Bogdanor, V., 2003, ‘Conclusion’ in V. Bogdanor, (ed.) *The British Constitution in the Twentieth Century*, Oxford, Oxford University Press, p.697.

<sup>32</sup> In fact, a slightly unusual partial convention has grown up that Lords reform is sometimes treated as a ‘conscience’ issue and is subjected to an unwhipped vote in parliament – as occurred in 2003 and again in 2007. This places it in some ways closer to the kinds of ‘moral’ issues discussed below, which some countries subject to referendums.

<sup>33</sup> Cowley, P., (ed.) 1998, *Conscience and Parliament*, London, Frank Cass. There were calls following the Irish referendum on abortion in May 2018 for a similar vote in Northern Ireland, but, at the time of writing, these appeared not to have gained momentum: McTague, T., 2018, ‘MPs call on Theresa May to allow abortion referendum in Northern Ireland’, Politico, 28 May, (accessed 14 June 2018).

disputes and shut down arguments inside the government. Notably, this motivation played a significant part in the establishment of conventions about the need for referendums on certain constitutional matters. The 1975 referendum on membership of the European Community was largely driven by divisions within the governing Labour Party, as were the devolution referendums of 1979. The same is clearly true of the 2011 referendum on the voting system, where the two coalition partners had very different views, and the promise to hold a referendum was essential for forming the coalition. Internal party disagreement also played an important part in driving the 2016 EU referendum. Reflecting on practice in the 1970s, Vernon Bogdanor was clearly correct to predict that referendums would continue to be used 'on occasions when the party system is unable to provide clear or coherent solutions to major problems'.<sup>34</sup>

- 2.40. The 2014 referendum on Scottish independence had a different, but related, political dynamic. The Scottish government strongly favoured both the idea of a referendum and independence itself: from its perspective, the referendum was a mechanism for advancing the change it wanted. The UK government, by contrast, opposed independence and was hence hostile to the referendum. Despite this, UK ministers had tactical reasons for allowing it to happen: hoping that this would shut down arguments about independence.
- 2.41. In some cases referendums have served as what the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) described as 'bluff calls'.<sup>35</sup> That is, key figures involved in calling the referendum oppose rather than support the change that the public is being invited to vote upon, and hope to defeat it – thus entering the referendum campaign with little intention or enthusiasm for implementing an outcome for change. Prime Minister David Cameron campaigned vigorously against AV in 2011, Scottish independence in 2014 and Brexit in 2016, and he resigned immediately after the result in 2016 became known.

### CONSTITUTIONAL ENTRENCHMENT

- 2.42. A final motivation for referendums, clearly linked to the first, is a desire to entrench changes, which is most obviously relevant on constitutional matters. Given the UK's lack of a written constitution subject to special amendment procedures, any change made by statute can potentially be reversed by a later statute. Changes therefore become vulnerable to reversal by a subsequent government, even if (as is commonplace) it was elected on only a minority of the popular vote. In contrast, as suggested by the Constitution Society:

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*'If a referendum has already been held on some issue, future legislation on the same issue will remain politically difficult without a further referendum. It is not easy to imagine that any government could reverse a constitutional change which had been originally endorsed by referendum without the support of a second referendum.'*<sup>36</sup>

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<sup>34</sup> Bogdanor, V., 1981, *The People and the Party System*, Cambridge, Cambridge University Press, p.76.

<sup>35</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.13.

<sup>36</sup> Constitution Society, 2017, *Written Evidence to the Independent Commission on Referendums*.

- 2.43. Bogdanor comments that this kind of entrenchment was ultimately needed to stabilise Britain's membership of the European Community in the 1970s, suggesting that this was, 'surely, one of a small number of issues which could not be legitimised by Parliament alone, but needed, also, a positive vote of the people'.<sup>37</sup> Following the country's original accession, arguments continued, but were quelled for many years following the 1975 referendum.
- 2.44. This factor can be seen to have played a part in the Labour Party's decisions to hold referendums on devolution in the 1990s. Most notably, the previous Conservative government had abolished the Greater London Council by statute. Approving the creation of the Greater London Assembly by referendum made a similar reversal much less likely. The referendums in Scotland, Wales and Northern Ireland had similar effects: the idea that their results constrained the UK parliament's freedom of action, while not legally enforceable, became politically compelling. In all of these cases, the government supported the change put before the people, and had sufficient parliamentary support to get it agreed without resort to a referendum, but nonetheless sought public endorsement in order to cement the change and create stability. The Scotland Act 2016 and Wales Act 2017 have since given the original political entrenchment legal protection by setting down that the Scottish Parliament and Welsh Assembly cannot be abolished without a referendum.

## The place of referendums in the UK constitution

- 2.45. Reflecting on the three purposes set out above, UK referendum practice could be described as being governed by pragmatism and emerging principle. The decision to hold each specific referendum can only fully be understood in the context of the political circumstances surrounding it. Pragmatic adoption of referendums on some issues has gradually developed into more principled acceptance that certain forms of decision can most legitimately be taken by referendum. Once this principle has been accepted, it is difficult to reverse. The kinds of issues on which referendums have been held are broadly consistent with practice in many other countries: thus far they have been restricted to questions of major constitutional change. However, in the absence of a codified constitution, the precise role of referendums has never been clearly articulated.
- 2.46. A key feature of the UK is that its uncodified constitution does not automatically provide for safeguards against making constitutional changes with limited or fleeting support – since any change can be made via ordinary legislation. Referendums have been used in part to avoid the risks associated with such lack of safeguards. However, the use of referendums itself is not safeguarded in the way that applies in many other countries. As discussed in chapter 1, referendums elsewhere tend to be part of a process that secures endorsement for change among multiple decision-makers, in order to ensure wide support and avoiding hasty decision-making. As further discussed in chapter 5, in some countries referendums are restricted to certain topics, and in others they are required before particular types of change can take place. These kinds of rules are most common with respect to constitutional amendments.

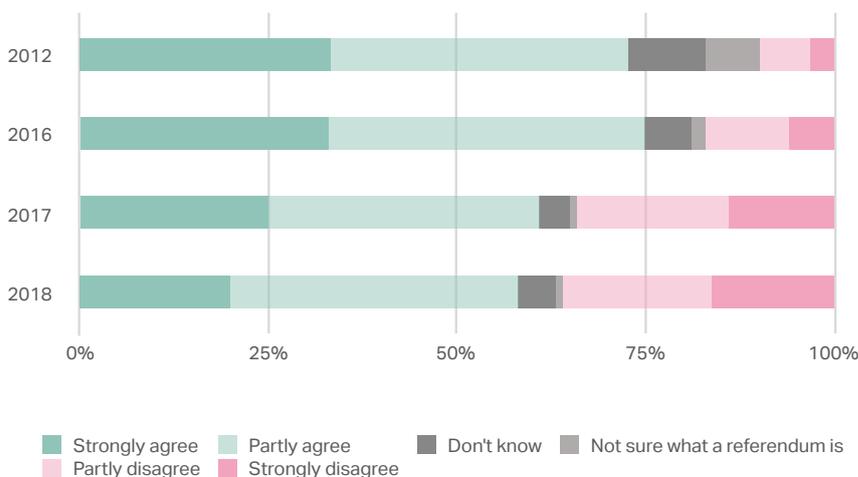
<sup>37</sup> Bogdanor, V., 2009, *The New British Constitution*, Oxford: Hart Publishing, p.181.

- 2.47. The usual practice for making constitutional decisions by referendum elsewhere is that such changes need the endorsement both of the people and of parliament. As illustrated by some of the cases in chapter 1, these processes now also often involve other forms of public participation and consultation before the referendum takes place. The more pragmatic and 'political' uses of referendums in the UK have, in contrast, sometimes meant that one or both of these stages of decision-making is omitted. For example, though parliament officially endorsed the change to AV prior to the 2011 referendum (through the Parliamentary Voting System and Constituencies Act), the issue had been subject to little public discussion, emerging instead as a result of the coalition deal. The EU referendum of 2016, meanwhile, put a change to the people that parliament itself had not endorsed, and that the government opposed. This made the referendum itself the sole decision point, and opened up the possibility of conflict between parliamentarians and the wider public. To make such a major change without explicit parliamentary endorsement would have been impossible in many other countries with written constitutions.
- 2.48. A key theme of this report, explored in later chapters, is hence how referendums can best fit within the wider decision-making process. In chapter 7 we also explore how preparation for referendums can best be managed.

## UK public opinion on referendums

- 2.49. There is relatively limited evidence on the UK public's attitudes to the principle of holding referendums; however, some relevant polling questions have been asked. Figures for support of referendums in Britain in 2014 were given in chapter 1. A particularly useful source of more recent data is the Hansard Society's annual *Audit of Political Engagement*. Four recent surveys in this series have asked participants 'To what extent do you agree or disagree that important questions should be determined by referendums more often than today?'. The results are shown in Figure 2.1.

**Figure 2.1. Support for the use of referendums in the UK**



**Note:** Survey respondents were asked 'To what extent do you agree or disagree that: Important questions should be determined by referendums more often than today?'.  
 Note: The 'Don't know' and 'Not sure what a referendum is' categories are not explicitly defined in the legend but are represented by dark grey bars in the chart.

**Source:** Hansard Society, 2018, *Audit of Political Engagement 15: The 2018 Report*, London, Hansard Society, p. 56.

- 2.50. A clear majority of respondents have supported referendums every year. But there has been a marked decline in such support in the wake of the 2016 EU referendum: the proportion of respondents saying that they 'strongly' or 'partly' agreed with the statement fell from 76% in 2016 (before the referendum) to 58% in 2018, while the proportion disagreeing more than doubled, from 17% to 36%. The evidence suggests that the change in opinions related not just to the referendum, but to how people voted in it. In 2017, only 47% of those who reported voting Remain in 2016 supported more frequent referendums, compared to 74% of those who had voted Leave. By 2018, however, this gap had narrowed: the figures were, respectively, 51% and 68%.
- 2.51. The link between how people voted in the 2016 referendum and their attitudes towards referendums in general is also demonstrated by data from the British Election Study. A survey of over 30,000 respondents at the end of 2016 found that 45% agreed that 'referendums are a good way to make important political decisions', compared to 29% who disagreed. As Table 2.2 shows, however, there was a large gap in attitudes between Remain and Leave voters, with the former much more sceptical of referendums than the latter.

**Table 2.2. UK public attitudes to the use of referendums after the EU referendum**

Referendums are a good way to make important political decisions.				
	Total	Remain voters	Leave voters	
<b>Agree</b>	45%	25%	66%	
<b>Neither agree nor disagree</b>	20%	20%	19%	
<b>Disagree</b>	29%	49%	9%	
<b>Don't know</b>	6%	6%	5%	

**Source:** Wave 10 of the 2014–18 British Election Study Internet Panel: Fieldhouse, E., J. Green, J., G. Evans, G., H. Schmitt, H., C. van der Eijk, C., J. Mellon, J., and C. Prosser, C., Prosser, 2016, British Election Study [dataset], Internet Panel Wave 10, (accessed 9 June 2018).

- 2.52. Although not directly comparable, figures from other polls show varying support for holding referendums, depending on the wording of the question asked and the timing of the survey. For example, the Joseph Rowntree Reform Trust's 1995 'State of the Nation' survey asked participants 'Do you think that parliament should decide all important issues, or would you like Britain to adopt a referendum system whereby certain issues are put to the people to decide by popular vote?'. In response, 77% favoured more referendums.<sup>38</sup> A slightly different question was posed by YouGov in 2012 and 2017, asking participants how 'the four or five biggest policy decisions' taken each year should be made: in parliament or by referendum. In 2012, 45% favoured

<sup>38</sup> Ipsos Mori, 1995, *State of the Nation Survey 1995*, state-nation-survey-1995 (accessed 21 April 2018).

referendums, but by 2017 this had dropped to 30%.<sup>39</sup> YouGov found support for referendums among Remain voters at just 20% (67% preferring parliament to take big decisions), and among Leave voters at 39%.

- 2.53. Looking to determinants of attitudes on this question besides how people voted in the 2016 referendum, the 2018 Hansard Society survey found that just 43% of respondents with university degrees favoured more referendums, compared to 62% of those with no formal qualifications. This is clearly consistent with one of the main factors dividing supporters of Leave and Remain. However, support for referendums by age group followed a different pattern. Among 18–34-year-olds, 60% thought referendums should be used more often, compared to 54% of those aged 55 and over.<sup>40</sup>
- 2.54. Surveys have also explored the kinds of policy issues on which the public are particularly favourable to referendums. The responses are broadly in line with current practice. The Hansard Society's 2017 survey, when presenting respondents with four options – of decision-making by government, parliament, local government or referendum – found greatest support (47%) for referendums when applied to decisions on the electoral system, closely followed (45%) by decisions on assisted dying. There was least support (25%) when considering decisions on funding for the NHS.<sup>41</sup> The 1995 Joseph Rowntree Reform Trust survey asked whether respondents would favour holding a referendum on particular topics, finding majority support for a referendum on establishment of a Scottish parliament and on continued membership of the EU, while 45% supported one on changing the voting system. Since then, of course, referendums all three of these topics have been held.
- 2.55. A final survey, conducted a month after the EU referendum, in July 2016, sought to gauge public attitudes on how often referendums should be held. Conducted by ComRes for Radio 5 Live, this asked respondents whether referendums should be used to decide major issues 'more often', 'only very rarely' or 'never'. Overall, 35% favoured holding referendums more often, while 45% thought they should be held very rarely, and 16% never. There was, again, a clear difference between Leave and Remain supporters, though even a narrow majority of Leave voters (51%) felt that referendums should be held rarely or never.

<sup>39</sup> Smith, M., 2017, 'British Public Turns against Referendums', YouGov, 28 March, (accessed 21 April 2018). The large difference between the proportion supporting referendums here and in the previously cited polls may be partly due to the suggestion of four decisions per year, but also by the fact that the question specified that these were 'currently taken by parliament', while the parliament response option

specified that this allowed for 'MPs to consider them in detail and for the majority view in parliament to determine what happens' (the alternative being 'to hold a referendum and for the majority view among voters to determine what happens').

<sup>40</sup> Hansard Society, 2018, *Audit of Political Engagement 15: The 2018 Report*, London, Hansard Society.

<sup>41</sup> Hansard Society, 2017, *Audit of Political Engagement 14: The 2017 Report*, London, Hansard Society, p.24 (accessed 6 May 2018)

## Conclusions/Recommendations

2. The circumstances in which referendums have been used in the UK have developed over time. Conventions have become established about the use of referendums to decide certain categories of constitutional matters, and, where a referendum has been used once, it often becomes established that this same mechanism should be used again. There are certain decisions, such as Scottish independence, that could not foreseeably be taken without reference to the people. In some instances, the requirement for a referendum has been codified in statute. As such, the use of referendums has by now become established as part of the UK's uncodified constitution. However, it should be recognised that the use of referendums in UK politics has often been driven by political pragmatism, not constitutional principle.
  3. When referendums have been used most successfully in UK politics, it has been to legitimise and provide a degree of entrenchment for key decisions, in the absence of a codified constitution. Where a government clearly supports a major constitutional change, and believes that it has widespread public support, it is appropriate to test this through a referendum in order to bring maximum stability and certainty to the new arrangements. This is most clearly seen in the 1998 referendum endorsing the Good Friday Agreement, and the 1997 devolution referendum in Scotland.
  4. While referendums have at times been successfully used to entrench constitutional decisions, and to avoid over-hasty or partisan decision-making on these matters by parliament, the lack of a codified constitution in the UK means that decision-making through referendum is itself far less regulated and protected than in many other democracies. This opens up risks, which should be carefully considered and addressed.
  5. Evidence on the UK public's attitudes towards referendums is relatively limited. That which exists suggests that at first sight there is broad public support for holding referendums on some topics, particularly those relating to constitutional (and perhaps moral) questions. But there is no consistent majority for increasing the use of referendums. There appears to have been a drop in support for holding referendums following the EU referendum of 2016, particularly among those who voted Remain.
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# 3. Regulating Referendums: History and Recent Debates

- 3.1. This chapter examines how referendums are currently regulated and what has been said about how they ought to be regulated. It begins by setting out the origins and basic principles of the current framework for regulating referendums in the UK, which was developed through a series of reports in the 1990s and enshrined in law in the Political Parties, Elections and Referendums Act 2000 (PPERA). It also outlines how the PERA rules have been used – and sometimes adjusted – in practice. Then it summarises proposals that have been made over the past fifteen years for reforming the PERA framework. Finally, it provides context for the UK discussions by outlining key international contributions to debates about referendum conduct. This section focuses particularly on the Venice Commission's *Code of Good Practice on Referendums*, as well as on recent reform discussions in Ireland.

## The Development of the UK's Regulatory Framework

- 3.2. Prior to 2000, there were no general rules regulating the use or conduct of referendums in the UK. Unlike elections, which were subject to the Representation of the People Act, there was no legislation directly applicable to referendums. Rather, the rules that applied for each referendum were set out in the enabling legislation which authorised that referendum to take place.
- 3.3. In the mid-1990s, as talk of holding referendums on matters such as European integration and devolution within the UK grew (see chapter 2), there was growing recognition of the need for a more systematic approach. Two inquiries set the scene: one by the 1996 Nairne Commission, which was established jointly by the Constitution Unit and the Electoral Reform Society to propose guidelines for the conduct of referendums; the other, in 1998, by the recently formed Committee on Standards in Public Life. The recommendations from these reports strongly influenced the provisions of PERA.

### The Nairne Commission

- 3.4. As seen in chapter 2, all the major UK political parties pledged referendums on topics such as Europe, devolution and electoral reform in the mid-1990s. This context clearly made debate around referendum regulation more salient. In response, the Constitution Unit and Electoral Reform Society jointly established the Commission on the Conduct of Referendums, chaired by Sir Patrick Nairne, in 1996. The Nairne Commission helped to encourage legislation in this area, and set out some specifics about what such legislation should contain.<sup>1</sup>

<sup>1</sup> Nairne, P. et al., 1996, *Report of the Commission on the Conduct of Referendums*, London, Constitution Unit.

## 3.5. The Nairne Commission's twelve members were asked

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*'to prepare for the possibility that referendums may, in future, be invoked as an instrument of decision making in the United Kingdom, by:*

- *examining the problems involved in the conduct of referendums; and*
  - *setting out organisational and administrative guidelines for the conduct of the referendum.'*<sup>2</sup>
- 

3.6. The *Report of the Commission on the Conduct of Referendums*, published in 1996, proposed that an 'independent statutory Commission' should be established to oversee referendums: either an ad hoc Commission to be created when a referendum was called; or a standing Electoral Commission if one was created for other purposes (p. 29). It said that a 'generic Referendums Act' should provide a statutory framework for the conduct of referendums (p.33).

3.7. Among the Commission's most important specific recommendations was a proposal that 'the Government should formally recognise umbrella campaigning organisations if they emerge and should consider providing them with limited public assistance' (p.59). Umbrella groups, not political parties, should be allocated time for referendum campaign broadcasts in order to avoid unbalanced coverage (p.63). The report added that a 'publicly funded leaflet giving general information and statements from the "Yes" and "No" cases' should be distributed to every household.' This should be facilitated by the proposed new independent Commission. If there were no umbrella groups to provide statements, it said that the Commission should take on this role (p.56).

## Committee on Standards in Public Life

3.8. The 1997 Labour manifesto committed to asking the Committee on Standards in Public Life (CSPL) to consider the regulation and reform of political party funding. The Committee's terms of reference were amended accordingly following Labour's victory. The initial scope of the inquiry did not extend to referendums. But submissions to the Committee's consultation stressed the importance of this area. The CSPL report, *The Funding of Political Parties in the United Kingdom*, formed the basis of PPERA 2000.<sup>3</sup>

3.9. Building on the Nairne Commission's findings, CSPL proposed that an Electoral Commission should be established to undertake administrative and regulatory work in relation to the report's recommendations and advise the government on democratic developments (pp.147–8). It said that donations to referendum campaigns should be transparent (p.171) and that campaign spending should be both transparent and capped (pp.170–1).

3.10. In pursuit of balance, the CSPL report suggested that 'Neither side [of a referendum debate] should be prevented from expressing its views merely as a consequence of relative poverty'; each side should have access to equal

<sup>2</sup> Nairne, P. et al., 1996, *Report of the Commission on the Conduct of Referendums*, p.10.

<sup>3</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom* (Fifth Report of the Committee on Standards in Public Life), Vol, 1, Cm 4057-I, London: HM Government, p.169, (accessed 12 June 2018).

core funding and to the same benefits as candidates in elections, including a free mailing to every household and the use of public premises (pp.164–5).

- 3.11. Regarding the role of government in referendum campaigns, CSPL noted that it is difficult for any government to produce impartial information during a referendum campaign, especially if it has expressed a preference. It concluded that 'The government of the day in future referendums should, as a government, remain neutral and should not distribute at public expense literature, even purportedly "factual" literature, setting out or otherwise promoting its case' (p.169).

## PPERA and the UK's regulatory framework

### Where PERA applies

- 3.12. PERA was passed in 2000 and applies to any referendum held under UK legislation throughout the United Kingdom, in one or more of England, Scotland, Wales and Northern Ireland, or in the English regions. It does not apply to referendums held by local authorities or parish councils.<sup>4</sup>
- 3.13. PERA does not automatically apply to referendums called by the devolved legislatures. For example, it did not automatically apply in the 2014 Scottish independence referendum. But the Edinburgh Agreement, which paved the way for that referendum (see chapter 2), bound the Scottish government to hold any referendum on independence in accordance with rules based on PERA.<sup>5</sup>
- 3.14. By contrast, PERA did apply directly to the 2011 Welsh devolution referendum, as this was held under UK legislation: the Government of Wales Act 2006. Similarly, any future border poll held in Northern Ireland under the terms of the Good Friday Agreement would be mandated by the Northern Ireland Act 1998 and so PERA would apply.
- 3.15. For any referendum to which PERA applies, the regulated period during which the PERA rules operate must be no longer than six months and no shorter than ten weeks. The only exception is a Northern Ireland border poll, for which the referendum period would begin as soon as the order mandating the referendum was approved by parliament.

### The PERA framework

- 3.16. PERA establishes the Electoral Commission to oversee the conduct of elections and referendums in the UK. In relation to referendums, it assigns the Commission the following key responsibilities:
- assessing the intelligibility of any referendum question proposed in a bill before parliament
  - registering permitted participants who wish to campaign, and ensuring that they comply with declaration and notification requirements

<sup>4</sup> Political Parties, Elections and Referendums Act 2000, section 101(1).

<sup>5</sup> HM Government and the Scottish Government, 2012, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on Independence for Scotland*, Edinburgh, 15 October, (accessed 12 June 2016).

- designating lead campaigners on each side of the referendum debate
- ensuring that lead campaigners can access the assistance they are entitled to, including grants
- monitoring spending and receiving and publishing spending returns from permitted participants
- ensuring compliance with donation and loan reporting
- advising referendum participants
- producing reports after each referendum as and when requested by the Secretary of State.

In addition, the Chair of the Commission, or someone appointed by her or him, is also the Chief Counting Officer for the referendum.<sup>6</sup>

- 3.17. As discussed in detail in chapter 11, PPERA adopted the Nairne Commission's proposals for umbrella campaign groups: the Electoral Commission may 'designate one permitted participant as representing those campaigning' for each outcome. Designated lead campaigners have higher spending limits than other campaigners and are entitled to certain forms of state assistance.
- 3.18. As chapter 10 explores, section 125 of PPERA restricts what the government, local authorities, and any body or person who is primarily publicly funded<sup>7</sup> may publish during the twenty-eight days before a referendum (sometimes referred to as the 'purdah' period).
- 3.19. Campaigners in referendums are subject to a range of spending limits, depending on their status, as set out in chapter 12. Anyone spending more than £10,000 must register and submit expense returns. Donations and loans over £500 must be recorded and those over £7,500 reported.

## Regulation under PPERA in practice

- 3.20. Since PPERA 2000 was passed, five major referendums have been held (two UK-wide, one in Scotland, one in Wales, and one in the North East of England). As indicated above, the PPERA framework has in practice been applied to all of these. Before a non-local referendum can be held, however, the UK parliament or the relevant devolved legislature must pass additional legislation setting out the question, the timetable for the referendum including the date of the poll and the rules for running the referendum. In practice, this enabling legislation has often stipulated certain deviations from the PPERA framework. Table 3.1 sets out the principal such deviations, which relate to a variety of aspects of referendum conduct. These are explored in further detail in subsequent chapters.

<sup>6</sup> Political Parties, Elections and Referendums Act 2000.

<sup>7</sup> With the exception of the Electoral Commission, the BBC and Sianel Pedwar Cymru.

Table 3.1. Principal deviations from PPERA in recent referendums

	PPERA	2004 North East Assembly	2011 Welsh devolution	2011 AV	2014 Scottish independence	2016 EU
Length of regulated period	10-week minimum period:  Designation Period of 6 weeks followed by a minimum campaigning period of 4 weeks.	14.5 weeks	11 weeks	11 weeks	16 weeks	10 weeks
Lead campaigners	Either one on each side or none				Possible to appoint on only one side	Possible to appoint on only one side (but with limited benefits)
Timing of designation of lead campaigners	6 weeks after start of regulated period				Before regulated period	Before regulated period
Campaign spending limits	Scale of limits set out		Most limits scaled down to reflect Wales's size		Most limits scaled down to reflect Scotland's size	Most limits adjusted for inflation
Working together rules	None			Expenses for joint campaigning count against both groups or lead campaigner	Expenses for joint campaigning count against both groups or lead campaigner	Expenses for joint campaigning count against both groups or lead campaigner
Use of public money	Banned for final 28 days	Banned for 28 days before postal votes sent out – 55 days before referendum	Welsh government applied rule to whole referendum period; UK government did not, but adopted neutral stance			[Government proposed to disapply the rules, but withdrew this after criticisms]

**Note:** Blank cells indicate that the PPERA arrangements stated on the left were maintained in that referendum.

**Sources:** Political Parties, Elections and Referendums Act 2000; Scottish Independence Referendum Act 2013; European Union Referendum Act 2015; The National Assembly for Wales Referendum (Assembly Act Provisions) (Limit of Referendum Expenses Etc.) Order 2010; Parliamentary Voting System and Constituencies Act 2011; ODPM Press Notice, 'The Great North Vote', 8 July 2004, cited in Gay, O., 2004, *Referendums on Regional Assemblies*, Research Paper 04/57, London, House of Commons Library; Jones, C., 2010, 'Referendum Period' Welsh Government Cabinet Written Statement, 16 December,

(accessed 14 May 2018); BBC, 2010, 'Autumn date for Welsh powers referendum 'very tight'' 30 May, (accessed 15 May 2018); Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons.

## Recent discussions of reform

- 3.21. Each referendum held since PPERA came into force has prompted discussions of how the rules have performed and whether any changes ought to be made. The Electoral Commission publishes a report after each referendum. Major reports were also produced by parliamentary select committees in 2010 and 2017. Several independent studies followed the 2016 EU referendum. In order to provide context to the present Commission's deliberations, this section summarises these briefly.

### Electoral Commission reports

- 3.22. The Electoral Commission has a statutory duty to report on the administration of each referendum held under PPERA. The purpose of its report is to assess the effectiveness of current practices and identify any problems. All these reports to date, except that on the 2011 Welsh referendum, have included explicit recommendations for how future referendums should be conducted.
- 3.23. The Electoral Commission has repeated some recommendations in successive reports, including that:
- a generic conduct order should be drawn up to provide a clear legal framework for future referendums
  - the legislation for a referendum should be passed well in advance – in the words of the most recent reports, 'at least 6 months before it is required to be implemented or complied with' (2014: p.40; 2016: p.36)
  - referendums should not normally be held on the same day as other polls
  - the designation of lead campaigners should take place before the ten-week referendum period
  - the period when public funds cannot be used for campaigning should be extended and the section 125 provisions comprehensively reformed
  - the Electoral Commission should not have 'a role in policing the truthfulness of referendum campaign arguments' (2014: p.118).

### House of Lords Constitution Committee

- 3.24. In 2010, the Constitution Committee of the House of Lords conducted a major inquiry into 'the role of referendums in the UK's constitutional experience'.
- 3.25. In its report, *Referendums in the United Kingdom*,<sup>8</sup> the committee recommended that referendums should not be used as a political tool; rather, where possible, cross-party agreement should be sought before calling a referendum (p.20). It said that referendums should be held on 'fundamental constitutional issues' and offered a list of what those issues might be (p. 27; see chapter 5, paragraph 5.26). It said it was 'not convinced by the arguments in favour of citizens' initiatives', but suggested that citizens' assemblies and citizens' juries may be considered further (p.33).

<sup>8</sup> Constitution Committee, 2010, *Referendums in the United Kingdom* (Twelfth Report of Session 2009–10), HL Paper 99, London, House of Lords.

- 3.26. The committee made a range of more specific points, which are mentioned where relevant in the following chapters.

## House of Commons Public Administration and Constitutional Affairs Committee

- 3.27. Following the EU referendum of June 2016, the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) undertook an inquiry into the lessons that could be learnt.
- 3.28. In its report, *Lessons Learnt from the EU Referendum*,<sup>9</sup> PACAC acknowledged that referendums have become part of the UK's uncodified constitution and said they should be used to resolve questions of fundamental constitutional importance or 'when issues cannot be resolved through the usual medium of party politics' (pp.10–11). It proposed that referendums should be held on issues where there is a clear choice, and the consequences of either outcome are clear (p.12). When the government calls a referendum, PACAC argued, it must prepare to implement an outcome it did not support (p.13).
- 3.29. Like the Lords Constitution Committee, PACAC made further recommendations on a series of more specific issues, which we refer to where appropriate in subsequent chapters.

## Other recent reports

- 3.30. Several noteworthy reports on referendums have been published by civil society organisations in the last two years. The following chapters make reference in particular to two of these: the Electoral Reform Society's *It's Good to Talk: Doing Referendums Differently after the EU Vote (2016)*,<sup>10</sup> and the Constitution Society's *Referendums and the Constitution (2017)*.<sup>11</sup>

## International Discussions of Referendum Conduct

- 3.31. The UK is not alone in considering the question of how referendums might best be conducted. Other countries have examined many similar issues, and the following chapters will draw on evidence from some of these. International bodies have also looked into the matter. Most importantly, the Venice Commission – the legal arm of the Council of Europe – agreed a *Code of Good Practice on Referendums* in 2007. This section outlines the key points of the Venice Commission's code and then highlights some ongoing discussions of referendum conduct.

## The Venice Commission's Code of Good Practice

- 3.32. The Venice Commission – formally, the European Commission for Democracy through Law – is the Council of Europe's advisory body on constitutional matters. The Council of Europe (which is entirely separate from the EU) has forty-seven member states, including almost every European country, from

<sup>9</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016–17), HC 496, London, House of Commons.

<sup>10</sup> Brett, W., 2016, *It's Good to Talk: Doing Referendums Differently after the EU Vote*, London, Electoral Reform Society, (accessed 2 May 2018).

<sup>11</sup> Blick, B., and Atkinson, L., 2017, *Referendums and the Constitution*, London, Constitution Society, (accessed 2 May 2018).

Iceland and Portugal in the west to Russia and Azerbaijan in the east. It seeks to enhance democracy, human rights, and the rule of law throughout the continent. The Venice Commission's role 'is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law'.<sup>12</sup> It has issued general guidance on a range of constitutional matters.

- 3.33. The Venice Commission's 2007 *Code of Good Practice* on Referendums is framed in terms of the four fundamental principles of universal, equal, free, and secret suffrage.<sup>13</sup> Most salient for reform discussions in the UK are the Commission's recommendations regarding the second and third of these.
- On **equal suffrage**, the Venice Commission says not only that every voter should have an equal vote, but also that there should be equal opportunities for different voices to be heard during referendum campaigns. Governments should be neutral and any public subsidies should be balanced. The Commission advises that broadcasting should be balanced too, while campaign finance should be transparent.
  - On **free suffrage**, the core principle is that voters should be free to form an opinion. Beyond neutrality, the Commission says that 'The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance' (p.7).
- 3.34. The Venice Commission also sets out conditions facilitating the implementation of these basic principles. Notably, it states that 'An impartial body must be in charge of organising the referendum' (p.9) and basic referendum law should not be changed just before a referendum: 'The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law.' (p.9)
- 3.35. In November 2007, the Parliamentary Assembly of the Council of Europe welcomed the Venice Commission's *Code of Good Practice* and called on member states to comply with it.<sup>14</sup> In November 2008, the Council of Europe's Committee of Ministers followed suit and called

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*'on governments, parliaments and other relevant authorities in the member states to take account of the Code of Good Practice on Referendums, to have regard to it, within their democratic national traditions, when drawing up and implementing legislation on referendums and to make sustained efforts to disseminate it widely in the relevant circles.'*<sup>15</sup>

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<sup>12</sup> Venice Commission [website], (accessed 30 April 2018).

<sup>13</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary

session (Venice, 16–17 March 2007), (accessed 12 June 2018).

<sup>14</sup> Parliamentary Assembly of the Council of Europe, 2007, '*Code of Good Practice on Referendums*', Recommendation 1821 (2007), (accessed 1 May 2018).

<sup>15</sup> Council of Europe Committee of Ministers, 2008, '*Declaration by the Committee of Ministers on the Code of Good Practice on Referendums*' (Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies)', (accessed 1 May 2018).

## Current reform discussions

- 3.36. Discussions of the principles of referendum conduct are ongoing in a number of contexts. Here we briefly highlight two.
- 3.37. First, the Venice Commission has embarked on a process of updating the *Code of Good Practice on Referendums*. In doing so, it is working with the Political Affairs and Democracy Committee of the Parliamentary Assembly of the Council of Europe, which agreed an introductory memorandum on the process in January 2018. This noted concerns that had been expressed in relation to the processes around the 2015 same-sex marriage referendum in Ireland, referendums on immigration in Switzerland and Hungary, the UK's 2016 referendum on the EU, and the constitutional reform referendum in Turkey in 2017.<sup>16</sup>
- 3.38. Second, a notable example of review of referendum practice in a national context comes from Ireland. The Irish Citizens' Assembly, which is explored in more detail in chapter 7, was tasked with considering and making recommendations on (among other topics) 'the manner in which referenda are held'. Its recommendations included the following:
- Current provisions for neutral information provision should be strengthened. The work of Ireland's ad hoc Referendum Commissions (see chapter 13) should be performed by a permanent Electoral Commission, which should 'be obliged to give its view on significant matters of factual or legal dispute that arise during a referendum campaign'.
  - Multi-option constitutional referendums should be permitted.
  - The government should continue its current practice of not using public money to support only one side in a referendum campaign, but it should provide both sides with equal public funding.
  - Citizens should be able to initiate referendums by petition.<sup>17</sup>

### Conclusions/Recommendations

6. Although referendums have become an increasingly common feature of UK democracy, it is a long time since the framework governing them was last comprehensively reviewed. Since legislation was first introduced in 2000, successive referendums and inquiries have raised important issues that remain unaddressed. In addition, international thinking about best practice in referendums has moved on considerably. The need for a wholesale review examining all aspects of the use and conduct of referendums in the UK is evident.

<sup>16</sup> Parliamentary Assembly of the Council of Europe Committee on Political Affairs and Democracy, 2018, 'A commitment to introduce rules to ensure fair referendums in Council of Europe member States: Introductory memorandum' (AS/Pol (2018) 03), 24 January, p.2.

<sup>17</sup> At the time of writing, the Citizens' Assembly had not yet submitted its formal report on these decisions. But full details are available on the [Assembly's website](#) (accessed 1 May 2018).

# Part 2: Role of Referendums in Democracy

# 4. Referendums and Democracy

- 4.1. By drawing together the evidence set out in chapters 1–3 and reflecting further on the lessons that can be learnt from experience of referendums in the UK and around the world, this chapter outlines a broad approach to the role of referendums within UK democracy in the future. The remaining chapters of Part 2 then elaborate on the practical implications of this approach.
- 4.2. The first section of the chapter offers a preliminary overview of basic principles of democracy. Then successive sections set out ways in which referendums can contribute positively to democracy and ways in which they may inhibit the effective functioning of democracy. The fourth section draws out implications for the Commission's approach to referendums.
- 4.3. Finally, this chapter also addresses the issue of the referendum franchise.

## Principles of democracy

- 4.4. In designing a framework for the conduct of referendums, it is important to have a sense of what goals that framework is intended to deliver. Above all, referendums are instruments of democracy, and they should therefore be designed in ways that enhance the operation of that democracy. There is no definitive list of democratic principles, but there is wide agreement on certain key features that democracy should promote.
- 4.5. **Decision-making based on popular will** – At the most basic level, democracy is a set of processes through which citizens collectively determine how the country (or other unit) is governed. In one sense, therefore, decision-making can be seen as more democratic the more direct is the degree of citizen control over the final decision. But democracy should be conceived as being about much more than simply voting between options.
- 4.6. **Depth of participation in the decision-making process** – Democracy extends beyond the simple act of voting because decision-making involves much more than just making a final choice. It must also include the processes of deliberation and compromise through which the options that best serve the interests of the widest range of people are conceived and developed. In diverse societies facing complex policy decisions, such processes of compromise and deliberation are essential.
- 4.7. **Breadth and equality of participation** – If democratic decision-making is to reflect opinion across society as a whole, participation should be high and should spread as equally as possible across all parts of society.
- 4.8. **Freedom to form and express opinions** – As they engage with decision-making processes, citizens should be able to form opinions without undue influence or coercion. They should also be able to access the information that

they want from sources that they trust. It is for citizens themselves to decide what that means: some may want considerable information beyond what they already know, others very little. Trustworthy information should therefore be readily available, but it is for voters to decide whether and how to use it. Citizens should also be able to express and discuss their views freely.

- 4.9. **Freedom of the media** – Free media are essential for creating an environment rich in ideas, information, and discussion. That includes print media, broadcasting, and an increasingly diverse array of online outlets. It may encompass news media, social media, information sources such as ‘voting advice applications’, and various other relevant channels.
- 4.10. **Transparency and scrutiny** – Any democratic structure will inevitably create imbalances of power: in the context of referendums, for example, leading campaigners exert influence to a degree that ordinary voters do not. It is therefore important that processes of decision-making and of campaigning should, so far as possible, be public and visible to ensure that arguments can be scrutinised and challenged, and those in positions of power can be held to account. The conduct of elections and referendums should also be transparent and fair, so that results can be trusted.

## How referendums can contribute to democracy

- 4.11. Referendums can contribute to the healthy functioning of the democratic political system in multiple ways, drawing citizens into decision-making and in some circumstances enhancing effective governance. This section sets out the most important of such benefits.

### Referendums and the democratic fundamentals

- 4.12. Referendums are mechanisms through which voters can directly influence or determine policy outcomes on specific issues. As above, therefore, there is an important sense in which referendums can be viewed as ‘more democratic’ than representative forms of decision-making, because the impact that public voting exerts upon outcomes is more direct. As the principles above indicate, this is only one aspect of democracy, but it is one that deserves to be acknowledged.
- 4.13. Beyond this definitional point, there is some evidence that the use of referendums can lead to policy outcomes in general that are closer to the preferences of the average voter than is the case when referendums are not held. This link relates specifically to citizen-initiated referendums: if politicians know that the decisions they take may be subject to popular review, this could encourage them to attend more to public opinion. We explore citizen-initiated referendums in chapter 5, and we therefore consider this evidence there.
- 4.14. Another of the democratic principles relates to participation: broadly speaking, wider participation implies more democratic decision-making. Clearly, more people are directly involved in decision-making when

referendums are held than when they are not held, but for reasons of fairness turnout also matters. This in fact varies very widely in referendums – much more than is the case in elections. That is mainly because of variation in how far the subject matter of referendums engages voters' interest.<sup>1</sup> When referendums are held on topics that people deeply care about, they lead to high engagement: the EU referendum in 2016 saw the highest turnout in a UK-wide vote since 1992; the Scottish independence referendum in 2014 produced the highest ever turnout in a large-scale vote in the UK.

- 4.15. Furthermore, such referendums can enhance participation in politics in general, not just on the specific issue. For example, the Hansard Society's *Audit of Political Engagement* recorded a marked increase in levels of political interest and claimed political knowledge in Scotland following the independence referendum.<sup>2</sup> Turnout in the UK general election of 2015 rose significantly in Scotland: it was much higher than in any of the other constituent parts of the UK, having previously been below the UK average for several decades.

## Dealing with constitutive questions

- 4.16. As was suggested in chapters 1 and 2, there is widespread agreement that, for fundamental decisions about who 'the people' are and perhaps also for how they are governed, decision-making solely by the representatives of the people operating within existing governing institutions can be insufficient. The argument is often based on the principle of popular sovereignty, which underpins most democratic constitutions. The logic has been set out, for example, in a judgement by the Irish Supreme Court:

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*'... the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and ... the sovereign authority is the People.'*<sup>3</sup>

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- 4.17. The political scientist and referendums expert Lawrence LeDuc argues that 'in a democratic culture, changes to the basic form of the nation-state cannot be made without some form of popular consent'.<sup>4</sup>
- 4.18. The political system of the UK as a whole is traditionally founded on the notion of parliamentary rather than popular sovereignty. But of course even here parliamentarians serve only for so long as they have the support of voters: fundamental to the system is that the people choose their representatives.
- 4.19. Within the UK, the principle of popular sovereignty has been expressed more explicitly in Scotland: it is seen by many as the basic pillar of the Scottish constitutional tradition. It was asserted in the 'Claim of Right for Scotland' declared at the inaugural meeting of the Scottish Constitutional Convention in March 1989,<sup>5</sup> and the draft interim Scottish constitution proposed by the Scottish government ahead of the 2014 referendum began with the words 'In

<sup>1</sup> Renwick, A., 2017, 'Referendums', in Arzheimer, K., Evans, J., and Lewis-Beck, M., (eds.), *The Sage Handbook of Electoral Behaviour*, London, Sage, pp.433–58, at p.438.

<sup>2</sup> Hansard Society, 2016, *Audit of Political Engagement 13: The 2016 Report*, London, Hansard Society, p.38 (accessed 6 May 2018).

<sup>3</sup> Walsh, J. in *Byrne v. Ireland [1972]*, quoted by Denham, J. in *McKenna v. Taoiseach (No. 2) [1995]*, p. 52.

<sup>4</sup> LeDuc, L., 2003, *The Politics of Direct Democracy: Referendums in a Global Perspective*, Toronto, University of Toronto Press Higher Education, p.102.

<sup>5</sup> Scottish Constitutional Convention, 1990, *Towards Scotland's Parliament: A Report to the Scottish People by the Scottish Constitutional Convention*, Edinburgh, The Scottish Constitutional Convention.

Scotland, the people are sovereign.<sup>6</sup> It is often traced back to the Declaration of Arbroath of 1320.<sup>7</sup>

## Securing major decisions

- 4.20. As seen in chapter 2, referendums can confer legitimacy on major decisions, thereby providing stability and certainty, and enabling effective long-term planning. For example, the fact that the establishment of the Scottish Parliament received the support of a substantial majority of voters in the 1997 referendum, after a lengthy process of rich deliberation, led those who had campaigned against it rapidly to reconcile themselves to the new reality.
- 4.21. Similarly, a referendum can allow a shift in public attitudes on a big social or moral question to be recognised. Ireland's 2015 referendum on same-sex marriage, for example, settled debate on this issue to a degree that a parliamentary vote may not have done. Even more strikingly, the decisive vote in favour of liberalising abortion law in Ireland in May 2018 has not only embedded major change on a fundamental policy issue, but also generated profound shifts in Ireland's self-understanding. It has created opportunities for open discussion that many would previously have considered surprising.
- 4.22. Such effects are, however, clearly contingent on the characteristics of the individual referendum. The three cases just cited were all preceded by processes of detailed, inclusive discussion of the options: in the form of the Scottish Constitutional Convention of 1989–95, the Irish Convention on the Constitution of 2012–14, and the Irish Citizens' Assembly of 2016–18 (see chapter 7). All three cases also saw large majorities for change. The absence of either of these conditions would have weakened the claim that the outcome reflected voters' 'settled will'.

## Extending voter choice

- 4.23. Voters can generally express their opinion at election time by supporting a party that shares their views. Where an issue crosses party lines, however, or where none of the major parties articulates a particular voter's perspective, that becomes harder. In such circumstances, a referendum can overcome this constraint by allowing voters to express their views directly on the specific issue. Such was the case, for example, for supporters of Brexit before 2016: UKIP was the only party that campaigned for the UK's withdrawal from the EU, but it stood little chance of winning election in many Westminster constituencies. Referendums on electoral reform in New Zealand in 1992 and 1993 offer a further example: here too, both main parties opposed change.

## Public support for referendums

- 4.24. As the evidence in chapters 1 and 2 showed, survey evidence persistently suggests widespread public support for the use of referendums to decide at least some major issues. It is important in a democracy that the political process as well as the policy outcomes should command such support. While there is no evidence that the incidence of referendums is a matter of high

<sup>6</sup> Scottish Independence Bill (draft), June 2014, clause 2, as proposed in: Scottish Government, 2014, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland*, Edinburgh, The Scottish Government, pp.7–19, at p.11 (accessed 14 June 2018).

<sup>7</sup> For example, Wright, K., 2009, 'Expressing and exercising Scottish sovereignty', *Open Democracy UK*, [blog], 30 November (accessed 14 June 2018).

salience to many voters, anyone wanting to argue that referendums should no longer have a place in the political system would need to present a compelling case.

## How referendums can inhibit effective democracy

- 4.25. Though referendums can strengthen the operation of the democratic system, they can also inhibit it. The following paragraphs set out some key limitations. Some of these could be mitigated through changes to how referendums are used and conducted, as explored in subsequent chapters. Others are inherent to the referendum as a device.

### Deliberation and scrutiny

- 4.26. Democracy, as seen above, is not just about voting, but also about deliberating, bargaining, and reaching compromises. Referendums allow a vote, but they do not in themselves ensure that the other stages of democratic decision-making also take place.
- 4.27. The system of representative democracy is designed to create space for such discussion. Most voters have neither the time nor the inclination to take part in detailed day-to-day public decision-making. While referendums can be effective when used occasionally on major issues, it would not be practical or desirable for them to be held on every decision to be made. Elected representatives are able to dedicate themselves to making and scrutinising decisions in parliament and government, ensuring so far as possible that a coherent, deliverable set of policies is pursued.
- 4.28. However, many people feel disengaged from the representative system and do not feel their views or needs are adequately respected within it.<sup>8</sup> This suggests a need for greater citizen engagement in public decision-making. Nonetheless, there are other mechanisms for engaging voters in decision-making besides referendums, and these often extend beyond voting to include deliberation and other modes of participation.

### Public engagement

- 4.29. While some referendums generate high public engagement, others do not: as we noted above, there is great variation in turnout across different referendums. Low turnout can lead to questions about the representativeness of the result, especially if the margin of victory is close. Writing about the 1997 Welsh devolution referendum, for example, the political scientist Laura McAllister noted in 1998 that, 'Unlike in Scotland, it did not stifle out opposition to devolution as intended, due to the closeness of the ballot result'<sup>9</sup> – though the large swing from the 1979 vote, combined with the support of the dominant political party, meant that opposition was subdued.

<sup>8</sup> For example, Dalton, R. J., 2004, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies*, Oxford, Oxford University Press, p.28.

<sup>9</sup> McAllister, L., 1998, 'The Welsh Devolution Referendum: Definitely, Maybe?', *Parliamentary Affairs*, 51(2), pp.149–65, at pp.164–5.

- 4.30. In addition, where a referendum is called on an issue that does not spark wide public interest, the breadth and depth of discussion during the campaign can be limited, leading to questions about the solidity of the foundations on which decisions are reached. This problem is accentuated where, as in Ireland, Italy and some US states, multiple issues are put to a vote simultaneously: the lower-profile proposals often garner very little attention.<sup>10</sup>

## Referendums and polarisation

- 4.31. Contrary to the kind of negotiation and compromise that is essential to politics, referendums can require complex issues to be turned into binary choices. They do not allow, as is often useful in politics, a variety of options to be considered and honed, so that solutions maximising the size and spread of benefits can be developed. Rather, they immediately force people to align themselves with one side or the other in a polarised debate. If these identities become 'tribal', considered, open-minded discussion becomes very difficult. The political theorist Simone Chambers argues that the majoritarian character of referendums leads people to stop listening to each other: if it is clear which side is in the majority, its supporters have no incentive to listen to the minority; even if that is not clear, a referendum 'creates the incentive to find arguments that will sway only the needed number of voters'.<sup>11</sup>
- 4.32. Such tribal divisions can persist long after the referendum itself, particularly if the margin of victory in the vote is narrow and those on the losing side feel inclined to continue their fight. This can have a longer-term inhibiting effect upon considered discussion of policy questions. It can also harm bonds within society, leading to mutual suspicions and animosities. Such fears have been expressed by some after both the 2014 Scottish independence referendum and the 2016 EU referendum. They are also found elsewhere. Simone Chambers, for example, writing in 2001, described the Quebec independence referendum of 1995 as 'extremely divisive', adding: 'The campaign, outcome, and recriminatory aftermath threaten to undo the trust and recognition that has been slowly growing between the English and French of that province over the course of the past twenty years.'<sup>12</sup>

## Referendums and the institutions of representative democracy

- 4.33. Representative democracy is the main form that democracy takes, and in large, complex societies that will remain the case: without a structure for ensuring that a coherent overall policy agenda is set and policy decisions are delivered and scrutinised, effective operation of the state becomes very difficult. That is the case even in Switzerland, where referendums play a larger role in policy-making than anywhere else: representative institutions are still needed as well.
- 4.34. In some circumstances, referendums can exist alongside the structure of representative democracy without difficulty. Where a referendum takes place on a precise proposal for change that has already been worked through the representative process, it can make and legitimise a final decision.

<sup>10</sup> For example, Bowler, S., and Donovan, T., 1998, *Demanding Choices: Opinion, Voting, and Direct Democracy*, Ann Arbor, Michigan, University of Michigan Press, pp.48–9; Selb, P., 2008, 'Supersized Votes: Ballot Length, Uncertainty, and Choice in Direct Legislation Elections', *Public Choice*, 135(3), pp.319–36.

<sup>11</sup> Chambers, S., 2001, 'Constitutional Referendums and Deliberative Democracy', in Mendelsohn, M., and Parkin, A. (eds.), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns*, Basingstoke, Palgrave, pp.231–55, at p.241.

<sup>12</sup> Chambers, 2001, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns*, p.244.

Referendums in such circumstances may indeed sometimes strengthen representative institutions by enhancing the connection between representatives and voters.

- 4.35. By contrast, where a referendum takes place on an imprecise proposal, difficulties can be created. As a consequence, parliament can find itself left with an instruction from voters, but with wide disagreement on what that instruction means. That is particularly so if those who called for the change are not among those responsible for its implementation.
- 4.36. These concerns have clearly been expressed by some following the Brexit referendum. They have also often created difficulties in countries, such as Italy and the Netherlands, that allow abrogative referendums: referendums that repeal an existing law (in whole or part) or prevent a new law from coming into force, without stipulating an alternative. In 1993, Italian voters overturned the country's existing electoral system, but parliament was left to work out a replacement; campaigners dissatisfied with the compromise that parliament devised secured further referendums on the issue in 1999 and 2000, and Italy's electoral system remains contested to this day.<sup>13</sup> In 2016, Dutch voters rejected the law enacting the EU–Ukraine Association Agreement, but what changes would be needed to overcome their objections was unclear.<sup>14</sup>

## Referendums and minority rights

- 4.37. Democracy cannot function fully if some parts of society are oppressed. But referendums – particularly citizen-initiated referendums – may be more vulnerable to populism or intolerance than representative institutions. One study of US ballot initiatives found that anti-civil rights initiatives opposing gay rights and anti-discrimination legislation were regularly approved.<sup>15</sup> Many of these went on subsequently to be halted by Supreme Court rulings. In evidence to the Commission, Jonathan Cooper and Kapil Gupta highlighted examples from Croatia, Slovakia and Slovenia where citizen-initiated referendums were used to prevent same-sex marriage.<sup>16</sup> There is a risk that the majoritarian device of the referendum can endanger minority rights if not mediated by other democratic institutions.

## Influences on voters

- 4.38. While referendums may seem to offer a more direct mechanism for popular decision-making than the normal representative process, this should not be exaggerated. First, whoever decides what options are to be put to voters exerts significant power. In the AV referendum of 2011, for example, voters' only options were the existing majoritarian system of First Past the Post and the proposed majoritarian system of Alternative Vote. Those voters who would have preferred a more radical departure from the status quo could not use the referendum to express this view.
- 4.39. Second, campaigners can exert significant influence over voters. Opinion tends to be more volatile during referendum campaigns than during election campaigns: while many voters have pre-existing party loyalties that guide them through an election, they do not always have clear prior views on the

<sup>13</sup> Renwick, A., 2010, *The Politics of Electoral Reform: Changing the Rules of Democracy*, Cambridge, Cambridge University Press, pp.119–23 and 176–8.

<sup>14</sup> Van der Loo, G., 2016, 'The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for Navigating a Tricky and Awkward Situation', *CEPS Commentary*, Centre for

European Policy Studies (accessed 2 June 2018).

<sup>15</sup> Gamble, B. S., 1997, 'Putting Civil Rights to a Popular Vote', *American Journal of Political Science*, 41(1), pp.245–269.

<sup>16</sup> Cooper, J., and Gupta, K., 2017, Written evidence to the Independent Commission on Referendums.

issues put in referendums.<sup>17</sup> There is also evidence that the financial resources available to the campaign groups can be important in determining the result. In particular, well financed campaigns against a change are often – though not always – successful.<sup>18</sup>

## Clarity of choice

- 4.40. In principle, referendums offer voters a clear choice between two (or, occasionally, more than two) alternatives. In practice, the choice can for a number of reasons be unclear. A referendum offering a vote on a broad principle rather than on a precise proposal can create uncertainty not only for parliament, as set out above, but also for voters. There may also be ambiguity around the status quo option. In several EU accession or treaty referendums, for example, supporters of a Yes vote have argued that failure to embrace change would endanger their country's prosperity or its position within the Union.<sup>19</sup> Similarly, in the Brexit referendum, Leave supporters pointed out that the EU is an evolving institution and that the kind of union that the UK would be part of in the future if it stayed in was hence uncertain.
- 4.41. Even where the options are clear, their implications may not be. Where there are competing accounts of the effects that the different options will have, voters may struggle to find information that they feel able to trust. In the 2011 voting system referendum, for example, the different campaigns offered very different accounts of how AV would affect the composition and stability of government.

## Quality of information

- 4.42. Major political decisions should be based on careful thought and good quality evidence. Governments and legislatures have both the resources and the time to gather and digest information, and to debate and interrogate it. Once voters have taken on the responsibility for making policy decisions directly, they too need to be able to access the information they want so that they can feel confident in their decision.
- 4.43. In contrast, referendums are sometimes seen as encouraging particularly mendacious or misleading campaigning. In 2011, for example, one journalist commented that 'The AV referendum has produced the most idiotic political debate in living memory'.<sup>20</sup> In 2016, the House of Commons Treasury Committee declared, 'The public debate is being poorly served by inconsistent, unqualified and, in some cases, misleading claims and counter-claims. Members of both the "leave" and "remain" camps are making such claims.'<sup>21</sup>

<sup>17</sup> LeDuc, L., 2007, 'Opinion Formation and Change in Referendum Campaigns', in De Vreese, C. H. (ed.), *The Dynamics of Referendum Campaigns: An International Perspective*, Basingstoke, Palgrave Macmillan, pp. 21–44, at p.37.

<sup>18</sup> For a summary of evidence, see Renwick, A., 2017, *The Sage Handbook of Electoral Behaviour*, pp.447–8.

<sup>19</sup> Jahn, D., and Storsved, A., 1995, 'Legitimacy through Referendum? The Nearly Successful Domino-Strategy of the EU-Referendums in Austria, Finland, Sweden and Norway', *West European Politics*, 18(4), pp.18–37, at p.21; Hobolt, S. B., 2009, *Europe in Question: Referendums on European Integration*, Oxford, Oxford University Press, pp.179 and 191.

<sup>20</sup> Collins, P., 2011, 'Hot AV News from Oz: it's Not an Issue, Mate', *The Times*, 22 April.

<sup>21</sup> Treasury Committee, 2016, *The Economic and Financial Costs and Benefits of the UK's EU Membership* (First Report of Session 2016–17), HC 122, London, House of Commons, p.4.

# Implications for the Commission's approach to referendums in the UK

## When should referendums be held?

- 4.44. It is clear from the preceding sections that referendums have both strengths and weaknesses as instruments of democracy. If used on an issue that voters want to engage with, they can boost participation in politics and help spark wide-ranging discussion of fundamental policy questions. By contrast, if used unwisely, they can inhibit considered policy discussion and leave a trail of mutual distrust. They also potentially undermine the processes of representative democracy through which the great bulk of policy-making will always take place. It is hence important that how best to enhance the working of the democratic system as a whole should lie at the heart of decisions about when to hold referendums and how to conduct them.
- 4.45. Referendums will continue to play a role in the UK's democratic system, and this seems consistent with the public mood. At the same time, the evidence presented in chapter 2 gives no indication of a great public desire for more frequent use of referendums, or their use on many more policy issues. For most voters, holding occasional referendums on matters of major public concern seems to strike about the right balance.
- 4.46. Regarding the subject matter of referendums, their use is widely accepted as desirable in relation to fundamental questions of sovereignty: for example, on whether parts of the UK – notably, Northern Ireland or Scotland – wish to remain within the Union; whether new devolved institutions should be created or their powers substantially changed; and whether the UK should be part of the EU. Expectations for such referendums have in many cases now been set down in law. The use of referendums in such circumstances has a strong grounding not only in UK practice, but also in democratic principle. Referendums have also either been used or advocated in the UK in relation to other constitutional questions, such as reform of the electoral system. As further discussed in chapter 5, some have suggested that there should be a fixed list of constitutional matters subject to referendums – which is perhaps even prescribed in law. For now, the basic principle holds that referendums are most clearly justified when they are called in relation to major constitutional questions that attract active public interest.
- 4.47. Beyond constitutional matters, the issues (other than local ones) that might most obviously be considered suitable for referendums are moral issues. These normally sit outside the partisan battle and are matters of direct concern to many voters. The polling evidence cited in chapter 2 identified assisted dying as one of the issues on which support for a public vote was relatively high. As this Commission's deliberations drew to a close, the Irish referendum of 25 May 2018, on liberalising abortion law, prompted some to argue that a referendum should now be held on the same issue in Northern Ireland.<sup>22</sup> We cited examples above in which referendums on moral issues have neither protected human rights nor stimulated open, inclusive discussion. In Ireland, a referendum was required to change abortion law due to the need for an amendment to the

<sup>22</sup> McTague, T., 2018, 'MPs call on Theresa May to allow abortion referendum in Northern Ireland', *Politico*, 28 May (accessed 15 June 2018).

Constitution (see chapter 1). Meanwhile the UK has a long-established practice of dealing with moral questions through free parliamentary votes, which ensures that such matters do not become pawns in the partisan battle. The debates that take place in the UK's parliaments and assemblies on such matters are often of very high quality. In contrast, the nature of referendum campaigns means that this quality of discourse is not always replicated, and heated debate can become damaging to those whose rights are at stake. It would be wise, therefore, to take any decision to put a moral question to a referendum only after very great thought; and careful preparation for such a vote would be needed to minimise the danger of a destructive battle between the two sides.

- 4.48. Turning from the subject matter of referendums to their place in the decision-making process, such public votes are particularly effective where they make a final decision on a proposal that has already been worked out in detail. In these cases, voters face a clear choice, and implementation of the result is unlikely to strain the representative system. Referendums are more problematic where they ask voters to choose between broad principles. It is then harder for voters to make an informed choice, and harder for representative institutions to know how best to respond to the result.
- 4.49. The two principal points made in this section – that referendums may be particularly suited to addressing fundamental questions of sovereignty and that they work best when they ask voters to decide on a concrete proposal – may clearly sometimes come into conflict. How best to resolve this conflict is examined in detail in chapters 6 and 7.

## The role of referendums and other democratic mechanisms

- 4.50. The Commission shares the desire that many express for an active civic democracy in which all members of society are able to play a full part in decision-making. It also acknowledges that many people feel disconnected from their elected representatives and from the institutions of representative democracy.
- 4.51. At the same time, referendums offer a particularly blunt mechanism for citizen input. They do not in themselves permit citizens to participate in the process of developing alternative policy options, and they often do not foster considered, open-minded discussion of those options.
- 4.52. There is thus a strong case for giving greater attention to mechanisms other than referendums for strengthening democracy and for enabling citizens to engage more fully in the democratic process. Some of these may involve enhancing the role and capacity of the UK's parliaments and assemblies to open up the policy-making process in ways that encourage more inclusive discussion and deliberation. For example, parliamentary committees work increasingly hard to engage with members of the public, both directly through a variety of consultation processes and indirectly by raising their media profiles.<sup>23</sup> Following a recommendation from the 2017 Commission on Parliamentary Reform, the Scottish Parliament is establishing a Committee Engagement Unit to promote innovative forms of public engagement in

<sup>23</sup> Leston-Bandeira, C., and Thompson, L., 2017, 'Integrating the View of the Public into the Formal Legislative Process: Public Reading Stage in the UK House of Commons', *The Journal of Legislative Studies*, 23(4), pp.508–28.

committee inquiries.<sup>24</sup> The official petitions systems has also been developed greatly.<sup>25</sup> A further option would be to give MPs and members of devolved legislatures greater resources for local engagement through more traditional mechanisms, such as correspondence and surgeries, to better enable representatives to meet increasing demand for contact with constituents.

- 4.53. Democracy can also be strengthened by engaging citizens directly in high-quality policy discussions, notably through greater use of deliberative democratic processes locally, regionally, and nationally. Citizens' juries – small groups of randomly selected citizens who come together for a day or several days to consider an issue in depth and reach conclusions – have been used to explore public opinion on a range of issues since the late 1990s.<sup>26</sup> More recently, larger scale citizens' assemblies – which involve anything from fifty to several hundred randomly selected citizens over several weekends – have gained prominence.
- 4.54. In the context of referendums, such mechanisms may be adopted in pursuit of several purposes. In particular:
- They may be used in the early stages of preparing for a possible referendum, to consider what the issues and options are, which of them deserve greatest attention, and whether a referendum is the best way to make a final decision. The most prominent example is the Irish Citizens' Assembly of 2016–18, which led to the recent Irish abortion referendum. Other examples include citizens' assemblies on electoral reform in Canada (see chapter 7).
  - After a referendum has been called, they may be used during the campaign to help foster informed public discussion. The most developed example of such usage is provided by so-called 'Citizens' Initiative Review' panels in the US state of Oregon, which meet in the early stages of a referendum campaign to hear and consider the arguments and present their own statement on what they perceive to be the key issues (see chapter 13).
  - They may be used as alternative mechanisms for ensuring public input into policy-making, in place of referendums.
- 4.55. Given the Commission's remit, we give most attention in this report to the first and second of these uses. Chapter 7 also examines general principles for the design of deliberative bodies.
- 4.56. The Commission has not examined in detail the use of deliberative mechanisms as alternatives to referendums. But it believes that they matter and deserve attention from others with a broader focus. The conclusion that referendums should be used with caution does not imply that citizens' direct involvement in democratic decision-making is unimportant. Rather, it is based on the principle that such participation should be designed to maximise effective discussion and decision-making. Recent examples of deliberative public engagement in the UK – such as the 2017 Citizens' Assembly on Brexit and the 2018 Citizens' Assembly on Social Care (see Box 7.5) – show the value of these processes.<sup>27</sup> The latter – which was established by two House of Commons select committees as part of an inquiry into the long-term funding of adult social care – shows that parliamentary and participatory approaches to strengthening

<sup>24</sup> Commission on Parliamentary Reform, 2017, *Your Parliament, Your Voice: Report on the Scottish Parliament, Scotland, Commission on Parliamentary Reform*, p. 61 (accessed 11 June 2018).

<sup>25</sup> Leston-Bandeira, C., 2016, 'A Year on, the New Petitions Committee has much to Celebrate', *Constitution Unit blog*, [blog], 20 July (accessed 2 June 2018); Bochel, C., 2012, 'Petitions: Different Dimensions of Voice and Influence in the Scottish Parliament and the National Assembly for Wales', *Social Policy & Administration*, 46(2), pp.142–160.

<sup>26</sup> Smith, G., and Wales, C., 1999, 'The Theory and Practice of Citizens' Juries', *Policy and Politics*, 27(3), pp.295–308.

<sup>27</sup> Renwick, A., Allan, S., Jennings, W., McKee, R., Russell, M., and Smith, G., 2017, *A Considered Public Voice on Brexit: The Report of the Citizens' Assembly on Brexit*, London, Constitution Unit (accessed 2 May 2018).

democracy can be complementary, which is essential if the democratic system as a whole is to cohere. Similar approaches are being pursued by the devolved legislatures: the Scottish Parliament's Commission on Parliamentary Reform recommended that piloting citizens' assemblies and other similar bodies should be one of the functions of the new Committee Engagement Unit;<sup>28</sup> in early 2018, the Welsh Assembly came close to creating a citizens' assembly to examine proposals to increase the size of the chamber, though it ultimately decided on cost grounds not to proceed.<sup>29</sup>

### Conclusions/Recommendations

7. The UK has a long and well-developed history of representative democracy. While demands on democracy are increasing, including pressures for greater citizen participation, representative democracy (through the UK parliament, devolved legislatures and other elected bodies) is likely to remain the primary means of taking most political decisions. **In thinking about the role of referendums we should therefore consider how these can best coexist with our system of representative democracy, and be mindful of the risks of undermining it. We should also explore other mechanisms of citizen participation that can meet these goals.**
8. Democracy involves not just voting, but also deliberation, bargaining, and compromise. Practice around referendums should build upon this basis. Referendums in themselves provide a vote, but this alone is not enough. **Decisions about when to hold referendums and how to conduct them should be taken with a view to ensuring that extensive opportunities for careful deliberation exist:** regarding whether a referendum is the best way forward, what the options should be, and what the strengths and weaknesses of each option are from different perspectives.
9. Referendums can both strengthen and weaken the health of the democratic system as a whole. The recommendations in this report are intended to maximise the benefits that referendums can bring, while minimising the dangers. **Until effective ways of ensuring the democratic quality of referendums have been found, they should be used with caution.**

<sup>28</sup> Commission on Parliamentary Reform, 2017, *Your Parliament, Your Voice*, p.63–5

<sup>29</sup> Presiding Officer (Llywydd), *National Assembly for Wales*, plenary record, 7 February 2018, paragraph 197, (accessed 11 June 2018).

10. **Referendums are best suited to resolving major constitutional issues, such as those relating to sovereignty. They work best when they are held at the end of a decision-making process to choose between developed alternatives.**

11. There are many ways other than referendums to engage citizens in policy development and decision making. These may often be preferable to referendums, which can be a particularly blunt mechanism of citizen input. **Governments, parliaments, and independent bodies should pilot ways of further strengthening the role of parliamentary deliberation, developing methods of deliberative public engagement, and enhancing connections between the two.**

## The referendum franchise

- 4.57. One of the most fundamental aspects of how referendums relate to democracy concerns the referendum franchise.
- 4.58. At present, there is no standing legislation in the UK regarding the franchise for national or regional referendums. Rather, this is determined in the enabling legislation for each referendum. The franchise for both of the recent UK-wide referendums was based on the franchise for elections to the House of Commons, with the addition of members of the House of Lords who are entitled to vote in local or European Parliament elections. In the case of the 2016 EU referendum, those who are entitled to vote in Gibraltar in European Parliament elections were also able to participate.<sup>30</sup>
- 4.59. Other referendums have used the local government franchise, with the addition in the 2014 Scottish independence referendum of 16- and 17-year-olds.
- 4.60. There are two basic approaches to the question of how the franchise in referendums should be decided. Some argue that it should be tailored to the particular question and include all those affected in relevant ways by the outcome of that vote. Different versions of what 'relevant ways' means have led to claims, notably, that Scots living outside Scotland should have been entitled to vote in the 2014 referendum and that EU citizens permanently resident in the UK should have been able to vote in the 2016 referendum.<sup>31</sup>
- 4.61. The dominant view, however, is that this approach creates too much licence for manipulation of the franchise to suit those who call the referendum. On this view, the referendum franchise should be specified in standing legislation and should be the same as the electoral franchise for the corresponding area. This is the view expressed by the Venice Commission, which recommends that the

<sup>30</sup> Parliamentary Voting System and Constituencies Act 2011, section 2; European Union Referendum Act 2015, section 2.

<sup>31</sup> Ziegler, R. 2015, 'The "Brexit" Referendum: We Need to Talk about the (General Election) Franchise', UK Constitutional Law Association, [blog], 7 October (accessed 24 April 2018); Ziegler, R., Shaw, S., and Baubock, R., 2014, *Independence Referendums: Who Should Vote and Who Should Be Offered Citizenship?*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/90 (accessed 14 June 2018).

franchise should be one of several 'fundamental aspects of referendum law [that] should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law'.<sup>32</sup>

### Conclusions/Recommendations

**12. The franchise for future referendums should be specified in standing legislation.** For UK-wide referendums, the franchise should be the same as for elections to the House of Commons (with the addition of members of the House of Lords who are entitled to vote in local elections). For referendums in Scotland, Wales, or Northern Ireland, the franchise should be the same as for, respectively, the Scottish Parliament, Welsh Assembly, or Northern Ireland Assembly. For regional or local referendums, the franchise should be the same as for local elections in the corresponding area. The Commission recognises that deviations may exceptionally be necessary, as in the case of the inclusion of Gibraltarians in the 2016 EU referendum.

In stating this recommendation, the Commission does not take a view on what the boundaries of the various election franchises should be. It notes that there are several ongoing debates, for example regarding the voting rights of 16- and 17-year-olds and EU nationals resident in the UK after Brexit.

<sup>32</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), p.9 (accessed 12 June 2018).

# 5. Calling Referendums

- 5.1. The UK has few rules for when referendums will take place: they are essentially held on an ad hoc basis and mandated by primary legislation. By contrast, many other democracies have rules set out in their constitutions or other law for when referendums should be or can be held.
- 5.2. This chapter examines processes for calling referendums. It considers whether it would be possible, or desirable, to introduce additional rules for calling referendums in the UK, and if so, whether such rules should restrict this power or extend it.

## UK experience

- 5.3. As referendums in the UK are held ad hoc, the relevant parliament or assembly must first pass enabling legislation to authorise such a vote. To date, all referendums except the Welsh devolution referendum of 2011 and the Scottish independence referendum of 2014 have been called by the UK parliament through specific enabling legislation. As seen in chapter 2, the processes leading to these two particular referendums were more complex. The Welsh referendum took place under UK legislation passed in 2006; it was triggered by the UK authorities upon the request of the Welsh Assembly. In Scotland, it was the Scottish Parliament that wanted the referendum; but the constitutional structure of the UK is not a devolved matter, so, to give the referendum a clear legal footing, the UK parliament granted the Scottish Parliament the explicit power to hold the vote. A future border poll in Northern Ireland is the only future non-local referendum which could be held without requiring new primary legislation, as the Northern Ireland Act 1998 contains provision for such a poll.<sup>1</sup>
- 5.4. All successful legislation to call a referendum has been initiated by a government. A referendum could in theory be initiated by a private member's bill (PMB) in Westminster or the equivalents in the devolved legislatures. Six PMBs have attempted to do so in the UK parliament since 1997 (five of which provided for a referendum on the European Union).<sup>2</sup> However, in practice PMBs are very unlikely to pass without government support. The only case in which the legislative initiative for a referendum did not come from the government was when the UK government was forced to concede to backbench pressure and allow referendums on the devolution proposals set out in the Scotland Act 1978 and the Wales Act 1978 (see chapter 2). A similar route remains open to parliamentarians today, should they wish to make agreement of a certain policy conditional on approval through a referendum.
- 5.5. Following the gradual development of constitutional conventions that referendums should be held on certain matters, there are now also some circumstances in which referendums are prescribed in statute. These were listed in Box 2.2, in chapter 2.

<sup>1</sup> Northern Ireland Act 1996 c. 41, part 1, section 1.

<sup>2</sup> Priddy, S., 2017, 'House of Commons Ballot bill since 1997', Parliamentary Information List, Number 04055, London, House of Commons Library.

## International practice

- 5.6. Like the UK, some other countries, such as Norway, have no rules for calling referendums, so can only hold them ad hoc. However, most comparable democracies have specified rules for when referendums are held, set out in the country's constitution or in other law. Generally, rules for holding referendums serve one of three potential purposes:
- to restrict parliament's freedom to call referendums on anything at any time
  - to require a referendum to be called in certain specified circumstances
  - to empower certain groups other than the parliamentary majority to call referendums.

### Rules restricting the power to call a referendum

- 5.7. As we saw in chapter 1, some countries, such as Germany and the United States, have no mechanism for holding referendums, at least at the federal level. In some other democracies referendums can be held only on matters that are specified in the country's constitution. In addition, some countries specify certain subjects on which referendums are *not allowed*. For example, *finance, budgetary, and tax laws cannot be put to referendums in Denmark, Italy, the Netherlands or Portugal*.<sup>3</sup> Legislation relating to treaties is also commonly protected in this way. In Denmark, a bill discharging existing treaty obligations cannot be put to a referendum.<sup>4</sup> In Italy, legislation ratifying treaties is exempt.<sup>5</sup>
- 5.8. To provide one example, the French Constitution specifies that referendums can only be held on a bill which deals with:
- *the organization of the public authorities,*
  - *or with reforms relating to the economic or social policy of the Nation, and to the public services contributing thereto,*
  - *or which provides for authorisation to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.*<sup>6</sup>

### Rules requiring referendums in certain circumstances

- 5.9. Referendums that are required in certain circumstances are known as mandatory referendums. Mandatory referendums are most commonly applied to constitutional amendments or revisions (see chapter 1).
- 5.10. Constitutions may also have provision for mandatory referendums on other matters. In Denmark, a bill on lowering the voting age cannot be given Royal Assent until endorsed by the people in a referendum.<sup>7</sup> In Lithuania, attempts to amend the constitutional act on 'On Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Alliances' would trigger a referendum.<sup>8</sup> The

<sup>3</sup> The Constitutional Act of Denmark 1953, section 42(6); The Constitution of the Italian Republic 1947 (rev. 2012), article 75; Consultative Referendum Act (Netherlands) 2014, section 5; Constitution of the Portuguese Republic 1976 (rev. 2005), article 115(4).

<sup>5</sup> The Constitution of the Italian Republic 1947 (rev. 2012), article 75.

<sup>8</sup> Law on Referendum 4 June 2002 No IX-929 (Lithuania) (rev. 2012), article 4, section 1(4).

<sup>6</sup> The French Constitution of 1958 (rev. 2008), article 11.

<sup>7</sup> The Constitutional Act of Denmark 1953, section 29.

<sup>4</sup> The Constitutional Act of Denmark 1953, section 42(6).

French Constitution requires a referendum on legislation authorising the accession of new states into the EU, and Switzerland requires a referendum to join supranational communities.<sup>9</sup>

- 5.11. In New Zealand, which, like the UK, lacks a codified constitution, certain parts of the Electoral Act 1993 can be changed only by a 75% majority in the House of Representatives or a referendum.

## Rules empowering certain groups to call a referendum

- 5.12. Some democracies have rules that empower specific groups other than the parliamentary majority to call a referendum. Two common provisions are citizen-initiated referendums and referendums triggered by a minority of parliamentarians.

### CITIZEN-INITIATED REFERENDUMS

- 5.13. Some countries have a mechanism through which citizens can initiate referendums, usually on the collection of a specified number of signatures. As touched on in chapter 1, citizen-initiated referendums fall, broadly speaking, into two categories:
- abrogative – citizens can trigger a referendum on a law that is already in force
  - initiative – citizens can put a proposal for a new law or policy to referendum.
- 5.14. The Netherlands and Italy are among the countries that allow abrogative referendums. In the Netherlands, 10,000 signatures are needed to initiate the process and then a further 300,000 signatures must be collected for the referendum to go ahead.<sup>10</sup> In Italy, 500,000 signatures are needed.<sup>11</sup>
- 5.15. Examples of citizen-initiated referendums of the initiative type come from New Zealand and Lithuania. In New Zealand, citizens may petition for a referendum on any question. If the petition gathers the signatures of over 10% of eligible electors within two months, a non-binding referendum is called.<sup>12</sup> Likewise, in Lithuania a referendum may be called on a draft law or provision proposed by citizens or any other proposal 'concerning the life of the State of Lithuania'. Groups of fifteen citizens can submit the initial draft resolution to the Central Electoral Committee; the petition must then reach over 300,000 signatures within three months for a referendum to be held.<sup>13</sup> Many US states also have mechanisms through which citizens can trigger a public vote on their proposal, on the collection of a certain number of signatures.<sup>14</sup>
- 5.16. Some countries allow for both abrogative and initiative referendums. In Switzerland, for example, 100,000 citizens can request a complete revision of the Swiss Federal Constitution or a specific amendment, triggering a referendum. Federal Acts, decrees and certain treaties can be put to abrogative referendums at the request of 50,000 citizens.<sup>15</sup>

<sup>9</sup> The French Constitution of 1958 (rev. 2008), article 88-5; Federal Constitution of the Swiss Confederation 1999 (rev. 2002), article 140 section 1(b).

<sup>10</sup> Consultative Referendum Act (Netherlands) 2014.

<sup>11</sup> A referendum may not, however, be called if the

amendment was passed by over 2/3<sup>rd</sup> of both houses. The Constitution of the Italian Republic 1947 (rev. 2012), articles 75 and 138.

<sup>12</sup> Citizens Initiated Referenda Act (New Zealand) 1993.

<sup>13</sup> Law on Referendum (Lithuania) (2002) No IX-929

(rev. 2012).

<sup>14</sup> For details, see [Initiative and Referendum Institute at the University of Southern California](#), [website], (accessed 2 June 2018).

<sup>15</sup> Federal Constitution of the Swiss Confederation 1999 (rev. 2002), articles 138, 139 and 141.

### MINORITY OF PARLIAMENTARIANS

- 5.17. In some democracies a minority of parliamentarians can trigger a referendum. This procedure most commonly applies to constitutional amendments not already subject to a mandatory referendum. For example, such provisions exist in Austria, Spain and Italy: a referendum is held on a proposed constitutional amendment if it is called for by, respectively, one third, one tenth or one fifth of the members of either chamber of parliament.<sup>16</sup> In Denmark, meanwhile, a minority of members of the Folketing (parliament) can call a referendum on almost any bill (see Box 5.1).
- 5.18. Such minority triggers are, however, rarely used: only three times in Italy, once in Denmark and never in Austria or Spain. One possible explanation could be that the procedure serves primarily to change government behaviour. For example, it could encourage governments to compromise and seek consensus on divisive issues in order to avoid a referendum, rather than rely on their majority to push legislation through in the face of widespread opposition – though there is no conclusive evidence on this point.

#### Box 5.1. The Danish rejective referendum

In accordance with section 42 of the Danish Constitution, one third of members of the Folketing can request a referendum on any bill that has been passed with the exception of the following:

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*'Finance Bills, Supplementary Appropriation Bills, Provisional Appropriation Bills, Government Loan Bills, Civil Servants (Amendment) Bills, Salaries and Pensions Bills, Naturalization Bills, Expropriation Bills, Taxation (Direct and Indirect) Bills, as well as Bills introduced for the purpose of discharging existing treaty obligations'*<sup>17</sup>

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After the bill has been passed, members have three days before the bill receives royal assent to request a referendum. If one third of Folketing members do so, then the Folketing has five days to withdraw the bill – otherwise it is put to a referendum. If the majority of citizens who vote, comprising more than 30% of the electorate, reject the bill, it is declared void.

The section 42 procedure has been used only once to trigger a referendum, on four land reform laws in 1963, when 'the Government used its very small Folketing majority to enact that entire economic package'.<sup>18</sup> The four bills were conclusively rejected at the referendum, which prompted the governing parties to change their approach.<sup>19</sup> Section 42 has not been used since, despite over one third of the Folketing regularly voting against eligible bills.

<sup>16</sup> Unless the amendment was originally approved by a supermajority of two thirds of each house.

<sup>17</sup> The Constitutional Act of Denmark 1953, section 42(6).

<sup>18</sup> Miller, K. E., 1982, 'Policy-Making by Referendum: The Danish Experience', *West European Politics*, 5(1), pp.54–67, at p.59.

<sup>19</sup> Svensson, P., 1996, 'Denmark: the Referendum as Minority Protection', in Gallagher, M., Uleri, P.V. (eds.), *The Referendum Experience in Europe*, Basingstoke, Macmillan, p.45.

## Should the UK have general rules on when referendums are called?

- 5.19. As referendums in the UK are held ad hoc, their use has been somewhat inconsistent and decisions to call a referendum have often been criticised for prioritising political expedience over democratic principle. Establishing rules for when referendums are held and putting those rules into law would ensure that the circumstances in which referendums are held are clear and agreed. As such, it could be argued that the resulting referendum would command greater public legitimacy, as an established procedure would have been followed.
- 5.20. However, in the absence of a codified constitution it would be difficult to institutionalise and entrench specific rules. The concept of parliamentary sovereignty means that any statute can be overturned by subsequent statute. Additionally, there are reasons why it would not be appropriate or advisable to introduce additional rules for each of the three purposes listed above.

## Should the power to call a referendum in the UK be restricted?

- 5.21. As discussed in chapter 4, referendums can be appropriate in some circumstances but less appropriate in others. It could thus be argued that a government's ability to call a referendum should be constrained, to prevent it calling one in inappropriate circumstances. Internationally, as we have seen, many countries' constitutions restrict the use of referendums, either by prohibiting them on certain types of legislation, or by limiting their use to certain matters. But the absence of higher law in the UK means there would be nothing to prevent a parliament or assembly from simply repealing or replacing such restrictions, or legislating to hold an ad hoc referendum outside this framework.
- 5.22. Another option could be to require a parliamentary supermajority for legislation enabling a referendum. This would prevent a government from calling a referendum unless it enjoyed widespread and cross-party parliamentary support. But supermajorities are rare in the UK. The only current example at Westminster appears within the Fixed-term Parliaments Act. The mechanism also applies in the Scottish Parliament to changes to the electoral system and in the Welsh Assembly to the electoral system, the Assembly's name and number of ministers.<sup>20</sup> It could be argued that extending the principle to the calling of referendums would be in line with these tentative steps towards using supermajority requirements on constitutional matters, but the use of such mechanisms in the UK remains in its infancy.
- 5.23. Even if a supermajority requirement were created, it might not act as an effective constraint on a government's ability to call a referendum. If a government announced its desire to hold a referendum, it could prove politically difficult for opposition parties to deny the electorate a chance to express their opinion. This dynamic was seen in April 2017 when the

<sup>20</sup> Scotland Act 2016, section 11; Wales Act 2017, section 9.

Commons voted to hold an early general election by 522 votes to 13, significantly surpassing the two-thirds supermajority required by the Fixed-term Parliaments Act.<sup>21</sup>

### Conclusions/Recommendations

13. In the absence of a codified constitution **it would not be possible definitively to limit the circumstances in which referendums are held or to require a supermajority before a referendum can be called.** Parliament would remain free to repeal any restrictions by simple majority or hold ad hoc referendums enabled by new primary legislation.

## Should referendums be required on specific topics?

- 5.24. As outlined in paragraph 5.5, the UK already requires referendums in certain circumstances. It could be argued that all of the constitutional matters on which it is considered necessary to hold a referendum should be set out in statute. As discussed in chapter 2, referendums themselves can act as a mechanism for constitutional entrenchment, in order to make certain laws harder to repeal or amend, and to ensure that major constitutional changes have popular support.
- 5.25. However, as discussed above with respect to legislation to restrict referendums, there would be nothing to prevent a parliament or assembly from repealing any requirement to hold a referendum through future statute. In New Zealand putting referendum requirements in ordinary legislation has fostered a norm that it would be inappropriate to repeal this legislation by simple majority. However, there is no guarantee that this would occur in the UK. Whilst there has been no suggestion to date of repealing any of the existing referendum requirements, these have roots in constitutional conventions. It is not clear whether new requirements would command similar respect.
- 5.26. A further obstacle is that, beyond those requirements that are already in law, there is a lack of consensus as to the topics on which a referendum should be required. In many other countries this requirement is simpler to articulate, at least in the case of constitutional reform, because it applies to the amendment of the written constitution – but the UK has no such document. In its report of 2010, the House of Lords Constitution Committee proposed that the UK should embrace a similar principle, by requiring referendums to be held on ‘fundamental constitutional issues’. It suggested that such issues should be understood to include proposals:

<sup>21</sup> House of Commons Hansard, 19 April 2017, Vol 624, column 708–12.

- 
- *To abolish the monarchy;*
  - *To leave the European Union;*
  - *For any of the nations of the UK to secede from the Union;*
  - *To abolish either House of Parliament;*
  - *To change the electoral system for the House of Commons;*
  - *To adopt a written constitution; and*
  - *To change the UK's system of currency.'*<sup>22</sup>
- 

- 5.27. At the same time, the committee acknowledged that a precise definition of a 'fundamental constitutional issue' is impossible, and clearly stated that its list was not definitive, nor intended to be so. It concluded that ultimately 'Parliament should judge what issues will be the subject of referendums'.<sup>23</sup>
- 5.28. There is broad acceptance, and precedent, that referendums should be held on certain constitutional issues but there is a lack of cross-party agreement on which specific topics should be subject to mandatory referendums. This would make it very difficult, if not impossible, to set out a list of issues on which a referendum should be required.

### Conclusions/Recommendations

14. Referendums are already required by law in certain circumstances. However, beyond these specific circumstances, **the Commission does not consider it appropriate to attempt to legislate for all the topics on which referendums should be required.** Although there is broad consensus that referendums should be held on 'constitutional issues', there is a lack of cross-party agreement on what should be considered a 'constitutional issue' and whether all 'constitutional issues' are appropriate to be put to referendum.

## Should the power to call a referendum be extended?

### TO CITIZENS

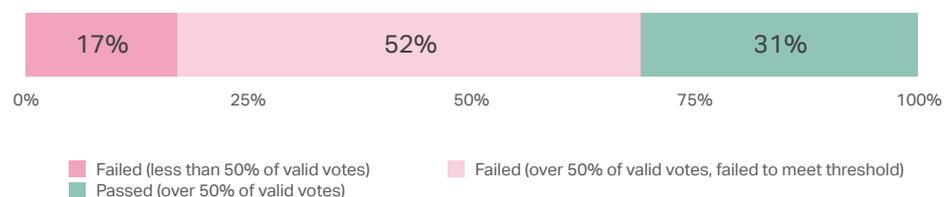
- 5.29. Citizen-initiated referendums allow citizens to determine directly the issues that will appear on the ballot paper. Initiative referendums allow citizens to propose new laws, while abrogative referendums allow them to veto legislation passed by parliament.

<sup>22</sup> Constitution Committee, 2010, *Referendums in the United Kingdom* (Twelfth Report of Session 2009-10), HL Paper 99, London, House of Lords, p.27.

<sup>23</sup> Constitution Committee, 2010, *Referendums in the United Kingdom*, p.30.

- 5.30. There is evidence that citizen-initiated referendums may lead governments and legislatures to be more responsive to public opinion. Based on a study of Switzerland, political scientist Lucas Leemann argues that 'if citizens can potentially force a vote, politicians are constantly under that threat and so can be expected to pursue policies closer to the median voter's preference.'<sup>24</sup> Similarly, several studies comparing US states that allow citizen-initiated referendums with those that do not have found that the first group tends to have policies that are closer to popular preferences.<sup>25</sup>
- 5.31. Despite these strengths, a number of concerns are also raised about the effects of citizen-initiated referendums on the democratic system as a whole. One such concern questions whether policy congruence with majority opinion is always desirable, particularly where minority rights are at stake. As discussed in chapter 4, referendums have sometimes been used to limit minority rights, most notably in recent years through the introduction of constitutional bans on same-sex marriage in some countries.
- 5.32. A second concern is that citizen-initiated referendum processes may be dominated by small, vocal minorities. The need to collect signatures requires proposers of such initiatives to be well organised and resourced. As a result, they have more often been utilised by well organised interest groups, or by political parties themselves, than by ordinary citizens. This effect is particularly acute in US states with ballot initiatives, where a signature collection 'industry' has developed.<sup>26</sup>
- 5.33. As Figure 5.1 shows, most citizen-initiated referendums fail: nearly 70% are defeated due to lack of support or because they miss a specified turnout threshold. This suggests that the proposals put to citizen-initiated referendums often do not represent the concerns of the population as a whole. There is a danger that some groups will use the process to attract attention to themselves and their niche concerns, even when they have no expectation of winning. While pressure groups clearly have every right to promote the causes they campaign for, it is not clear that the millions of pounds of public spending that it takes to run a referendum can be justified in this context.

**Figure 5.1. Success of citizen-initiated referendums in democratic countries since 1990, excluding Switzerland.**



**Source:** Calculated using data at [www.sudd.ch](http://www.sudd.ch). The data cover the 115 national citizen-initiated referendums held in stable democracies (excluding Switzerland) since 1990.

<sup>24</sup> Leemann, L., 2016, 'Is Direct Democracy Effective? Yes, if it is Citizens who Start the Process', *Democratic Audit UK [blog]*, 22 June (accessed 26 April 2018).

<sup>25</sup> Arceneaux, K., 2002, 'Direct Democracy and the Link between Public Opinion and State Abortion Policy', *State Politics and Policy Quarterly*, 2(4), pp.372–387; Lewis, DC., and Jacobsmeier, M. L., 2017, 'Evaluating Policy Representation with Dynamic MRP Estimates: Direct Democracy and Same-Sex Relationship Policies in the United States', *State Politics and Policy Quarterly*, 17(4), pp.441–64.

<sup>26</sup> McCaun, D., Bowler, S., Donovan, T., and Fernandez, K., 1998, 'California's Political Warriors: Campaign Professional and the Initiative Process', in Bowler, S., Donovan, T., and Tolbert, C.J. (eds.), *Citizens as Legislators, Ohio*, The Ohio State University.

- 5.34. Beyond the concerns above, the introduction of citizen-initiated referendums in the UK would likely result in more frequent referendums on a broader range of topics. The Commission concluded in chapter 4 that, given the problems associated with referendums, their role should not be increased and they should be restricted to major constitutional issues. Extending the ability to call a referendum to citizens would run counter to this recommendation.
- 5.35. Although citizen-initiated referendums can allow citizens to influence policy-making directly, they carry significant risks. In its review of referendums, the House of Lords Constitution Committee did not recommend adoption of this mechanism, but instead suggested that ‘citizens’ assemblies and citizens’ juries may be worthy of consideration’.<sup>27</sup> As highlighted in chapter 4, there are many ways to engage citizens in the decision-making process, and these are often preferable to citizen-initiated referendums. We explore these further in chapters 7 and 13.

#### TO A MINORITY OF PARLIAMENTARIANS

- 5.36. Historically, there have been suggestions that referendums should be triggered in the UK on issues considered sufficiently controversial by parliamentarians – for example, it was proposed as a mechanism for resolving disputes between the House of Lords and the House of Commons.<sup>28</sup> More common internationally is a procedure whereby a minority of MPs can trigger a referendum. As seen above, where this procedure is available in other democracies it is rarely used, but it may have indirect effects.
- 5.37. Recent UK debates on the use of referendums have, however, contained few calls to introduce a mechanism of this kind. There are other ways in which minority groups of parliamentarians can influence the political process, such as opposition and backbench debates. As such, there is little reason why such a procedure should be introduced in the UK.

#### Conclusions/Recommendations

15. The Commission understands the importance of public input into policy-making. Recognising the complex process issues around referendums raised in this report, **the Commission recommends that citizen-initiated referendums should not be introduced in the UK at present.** Instead of this mechanism, attention should be directed towards strengthening and improving existing mechanisms for public involvement in decision-making and piloting new methods of public engagement.

16. The Commission does not recommend the extension of the power to call referendums to minority groups of parliamentarians.

<sup>27</sup> Constitution Committee, 2010, *Referendums in the United Kingdom*, p.33.

<sup>28</sup> A.J. Balfour, as leader of the opposition at the time of the Parliament Act 1911 was a proponent of this idea: Balsom, D., 1996, ‘The United Kingdom: Constitutional Pragmatism and the Adoption of the Referendum’, in Gallagher, M., and Uleri, P.V. (eds.), *The Referendum Experience in Europe*, Basingstoke, Macmillan Press, p.210.

## 6. Legislating for a Referendum

- 6.1. In the previous chapter we concluded that it would not be appropriate to introduce rules for when a referendum should or can be held beyond those that presently exist: the nature of the UK's uncodified constitution makes it inevitable that referendums will continue to be mandated on a case-by-case basis, enabled by primary legislation.
- 6.2. Such enabling legislation can come in two forms. In the first of these, the Act not only sets out provisions regarding the referendum itself, but also contains the full details of the arrangements that will come into force if the referendum is passed. Referendums generated by legislation of this kind are known as post-legislative referendums, as they happen after the change being voted on has been approved by the legislature. In the second form, the enabling legislation provides for a referendum and sets out the question that the public will be asked, but it does not contain the new law that will come into being if the proposal is approved. Voters are thus asked to vote on a broad principle rather than a fully worked-through package of change. In the event that change is supported in the referendum, it is for politicians afterwards to flesh out how the proposal is implemented. Referendums produced in this way are called pre-legislative referendums.
- 6.3. Though it may seem technical, this difference is of fundamental importance for two main reasons. First, chapter 4 argued that the proposition put to voters in a referendum should be as clear as possible; second it emphasised that the tensions between direct and representative democracy should be minimised so far as possible. Both of these conditions are much more likely to be met by a post-legislative than by a pre-legislative referendum. This chapter examines the implications of each approach, and recommends significant changes to existing referendum practice in the UK.

### UK experience

- 6.4. The UK has held both pre- and post-legislative referendums.
  - 6.5. The 1979 referendums on devolution and the 2011 referendums on AV and the powers of the Welsh Assembly were all post-legislative: the laws enabling these referendums also set out the provisions that would come into effect in the event of a Yes vote.
  - 6.6. The UK's constitutional arrangements mean that it is not possible to hold referendums that are legally binding. However, post-legislative referendums come as close to that as is possible. Under this mechanism the change on which voters are asked to vote can be given immediate effect in the event of a vote for change: the matter does not need to return to parliament.
  - 6.7. Any proposal put to a post-legislative referendum goes through the full legislative process and is therefore subject to parliamentary scrutiny. Nonetheless, this does not guarantee that parliament fully endorses the
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change, only that it is willing to accept the decision of a referendum on the matter. For example, parliament passed the Parliamentary Voting System and Constituencies Act 2011, enabling the AV referendum, though the majority of MPs opposed the introduction of AV. The change was sufficiently limited that parliamentarians were clearly prepared to accept the outcome of the vote.

- 6.8. By contrast, the 1997 devolution referendums, the 2014 Scottish referendum, and the 2016 EU referendum were all pre-legislative. Thus, additional legislation to give effect to the result was either subsequently required, or would have been required had voters supported the proposed change. The results of the 1997 devolution referendums were implemented by the 1998 Scotland Act and the 1998 Government of Wales Act. After the vote to leave the European Union, parliament voted to trigger article 50 and the government began negotiations. This is being followed by further legislation to put in place arrangements for withdrawal. Similarly, if the 2014 Scottish independence referendum had returned a Yes result, this would have begun a process of negotiation between the Scottish government and UK government regarding Scotland's future.
- 6.9. A pre-legislative referendum result cannot legally bind parliament to take any particular action. However, referendums of this kind are usually seen as politically binding: it would be problematic for politicians simply to ignore the referendum result. Nonetheless, politicians are by necessity left with some flexibility regarding how the result should be interpreted.
- 6.10. The 1998 referendum on the Good Friday Agreement was unique in that a specific agreement was put before voters, but additional legislation was still required to give effect to aspects of that agreement.

## International experience

- 6.11. Chapter 1 described how it is the norm for constitutional changes to have required prior approval by the legislature (often at multiple stages, and/or by supermajority) before they are put to the people for decision.
- 6.12. Internationally, binding referendums are usually post-legislative. For example, in Denmark, any referendum enabled by the constitution comes only after a bill has passed through the Folketing.<sup>1</sup> The bill is then voided if it is rejected at referendum, subject to specific threshold requirements. The constitutions of France and Ireland outline comparable procedures.<sup>2</sup>
- 6.13. Pre-legislative referendums are also common, but are often, at least in principle, only advisory. For example, in Spain, 'political decisions of special importance' can be put to a consultative referendum,<sup>3</sup> and this procedure has been used to hold referendums on NATO and the EU Constitution. The Austrian National Council has called referendums on nuclear power and conscription.<sup>4</sup> New Zealand allows advisory pre-legislative citizen-initiated referendums on general principles or proposals.<sup>5</sup> In Lithuania, whether a citizen-initiated referendum is binding or advisory depends on whether it is pre- or post-legislative: referendums on specific laws or provisions are binding, whilst those on general proposals are advisory.<sup>6</sup>

<sup>1</sup> Folketinget, 2012, 'Referenda', Facts and Figures, 25 January.

<sup>2</sup> The French Constitution of 1958 (rev. 2008), articles 11 and 89; Constitution of Ireland 1937 (rev. 2015), articles 27, 46 and 47.

<sup>3</sup> Spanish Constitution of 1978 (rev. 2011), section 92(1).

<sup>4</sup> Constitution of the Federal Republic of Austria 1920 (reinst. 1945, rev. 2013), article 49b.

<sup>5</sup> Citizens Initiated Referenda Act (New Zealand) 1993.

<sup>6</sup> Law on Referendum 4 June 2002 No IX-929 (Lithuania) (rev. 2012), articles 4 and 5.

- 6.14. Holding referendums post-legislatively clearly means that the change that is proposed can be specified precisely. It also often means that the proposals have the support of parliament, such that the referendum serves as an addition, rather than an alternative, to the normal processes of representative democracy. There is, however, evidence from Italy and Ireland that, as in the UK, MPs may pass legislation putting a proposal to voters that they do not actually support. They might do so because they believe that voters have a right to decide the matter, because they feel political pressure to allow a vote or perhaps sometimes in the hope that voters will reject the proposal. Our discussions with country experts suggest that the 2015 Irish referendum on reducing the minimum age for presidential candidates and the 2016 Italian referendum on Senate reform were examples of this.

## A lack of clarity: the problems with pre-legislative referendums

- 6.15. In chapter 4 we concluded that referendums can generate significant problems if they are held on unclear proposals. As pre-legislative referendums are often held on general principles rather than specific legislation, there is a risk that the proposals will be unclear. Clarity is required for voters to make their decision in a referendum and for parliament to implement the result effectively.

### Voters

- 6.16. To make an informed decision in a referendum, citizens must know what they are voting for. Some voters may feel that knowing the broad principles is sufficient to make a choice that they are confident in. For other voters, however, the choice will depend on how the principles are fleshed out in practice. Without further details, such voters may be unable to make an assessment that they feel confident about regarding whether to support change or stick with the status quo. For example, in a hypothetical referendum on abolishing the monarchy, some voters might be happy to vote just on the core principle, while others would want to know first how a new head of state would be selected.
- 6.17. There are also concerns that unclear proposals can affect voter behaviour and bias the outcome of a referendum. Some scholars and commentators argue that voters are risk averse and thus that, if a proposal for change is ill-defined, uncertainty about its implications could create a bias towards the familiar status quo.<sup>7</sup> But it could also be that, if proposals are not fully developed, the complexities and challenges of change may not be apparent to voters; this could lead to bias in favour of change. Systematic evidence either way on these possibilities is lacking, but both are potentially problematic.
- 6.18. If the need for clarity is not satisfied, this creates room for the legitimacy of the referendum result to be questioned. Some could claim that voters were unable to decide based on full information, or that the lack of clarity biased the outcome, suggesting that there would have been a different result had the

<sup>7</sup> For example, Whiteley, P., Clarke, H. D., Sanders, D., and Stewart, M. C., 2013, *Affluence, Austerity, and Electoral Change in Britain*, Cambridge, Cambridge University Press, p.198.

details of change been more apparent. In its report *Lessons learned from the EU Referendum*, the House of Commons Public Administration and Constitutional Affairs Committee argued that:

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*'If the results of referendums are to command the maximum of public support, acceptance and legitimacy, then they must be held on questions and issues which are as clear as possible. Voters should be presented with a choice, where the consequences of either outcome are clear.'*<sup>8</sup>

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- 6.19. The problems of pre-legislative referendums for voters were nicely summed up by David Davis MP, the current Secretary of State for Exiting the European Union, in a House of Commons debate in 2002. Commenting on the proposed referendums to create English regional assemblies, he said:

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*'...pre-legislative referendums of the type the Deputy Prime Minister is proposing are the worst type of all.*

*Referendums should be held when the electorate are in the best possible position to make a judgment. They should be held when people can view all the arguments for and against and when those arguments have been rigorously tested. In short, referendums should be held when people know exactly what they are getting. So legislation should be debated by Members of Parliament on the Floor of the House, and then put to the electorate for the voters to judge.*

*We should not ask people to vote on a blank sheet of paper and tell them to trust us to fill in the details afterwards. For referendums to be fair and compatible with our parliamentary process, we need the electors to be as well informed as possible and to know exactly what they are voting for. Referendums need to be treated as an addition to the parliamentary process, not as a substitute for it.'*<sup>9</sup>

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## Parliament

- 6.20. Pre-legislative referendums require that the issue be returned to parliament to implement. Unclear proposals will require interpretation by political actors, and this interpretation could be contested. In the absence of a clear instruction on how to proceed with change, it can be difficult for parliamentarians to translate a referendum result into detailed proposals for constitutional change. In evidence to the Commission, Dr Leah Trueblood said:

<sup>8</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016–17), HC 496, London, House of Commons, p.12.

<sup>9</sup> House of Commons Hansard, 26 November 2002, vol. 295, column 202.

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*'Votes in referendums are very well placed to tell us what voters do not want. Given the variety of views that voters have when they vote, referendums are not well placed to articulate what voters do want out of a proposal for constitutional reform. When referendums begin processes for reform they are too blunt an instrument to aggregate political will about what those reforms should include.'*<sup>10</sup>

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- 6.21. The change that is delivered after such a referendum may differ considerably from public expectations. This problem may be particularly acute if ambiguity over the shape of change allowed campaigners to promise proposals that are not coherent or achievable, in which case it may not even be possible for a parliament or assembly to meet public expectations. In these circumstances, voters may feel that politicians have not honoured the result of the referendum, or even that they have actively sought to undermine it.
- 6.22. As indicated above, the 1997 devolution referendums were pre-legislative. In these cases, few problems occurred, partly due to the intense discussion and preparation that had taken place regarding the shape of the new institutions – particularly in Scotland (see chapter 7). Nonetheless, the implementation of the Yes votes demanded subsequent legislation at Westminster. Had such legislation diverged from the expectation of voters, perhaps due to arguments within or between the political parties about issues such as the size of the new legislative bodies, their powers or their electoral system, this could have created significant tensions. It might even have led to public questioning about the implementation of the result.
- 6.23. Tensions between the legislature and the electorate are particularly likely if the outcome of the referendum is a vote for a change that most parliamentarians oppose. Ongoing parliamentary struggles following the Brexit referendum illustrate the conflict between popular and parliamentary sovereignty that can arise.
- 6.24. Such public sentiments can erode trust in representative institutions and make people feel that they are not being listened to or taken seriously. These risks pose a genuine threat to healthy democratic culture.

### Conclusions/Recommendations

- 17.** It is of utmost importance for the proposals put to a referendum to be clear and for voters to know what will happen in the event of a vote for change. Hence, **the Commission considers standalone pre-legislative referendums to be highly problematic.**

<sup>10</sup> Trueblood, L., 2018, Written Evidence to the Independent Commission on Referendums.

## A new norm: post-legislative referendums

- 6.25. Post-legislative referendums avoid many of the problems of pre-legislative referendums:
- First, the proposals for change are specified in legislation, so voters are able to find out what change will look like, and be confident that the exact proposals on which they based their vote will be implemented
  - Second, development of the proposals and parliamentary scrutiny of them take place prior to the referendum, so there is no need for parliamentarians to interpret a principle endorsed by voters, and little risk that they could be accused of betraying it. This can improve the chances that a referendum commands legitimacy and public acceptance.
  - Third, because the proposals that are put to the vote have undergone the full legislative process, they are more likely to be coherent and implementable. Important processes of careful deliberation, compromise and bargaining can take place before, rather than after, the issue has been reduced to a potentially polarising binary choice.
  - Fourth, parliamentary debate on the legislation may help raise public awareness of the issues, and go on to help to inform public discourse during the referendum campaign itself.
  - Fifth, civil servants can undertake the necessary preparatory work for implementation in the event of a vote for change. This can help ensure a smooth transition, and minimise the disruption that is inevitable when undertaking major constitutional reform.
- 6.26. Although, as explained in paragraph 6.7, passing legislation cannot guarantee parliamentary support for the proposals put to the referendum, it at least ensures that there is clarity on all sides about what the alternative to the status quo would be. It also ensures that parliamentarians have consented to accept the result. The potential for a clash between representative and direct democratic processes is hence greatly diminished.
- 6.27. Post-legislative referendums are possible in most circumstances. For any matter within a parliament or assembly's legislative competence, there is no reason why a referendum could not be post-legislative. Even for matters that are not solely in the competence of the parliament or assembly calling the referendum – notably, where agreement from external bodies is required – any referendum can often be held at the point where a clear decision is to be made. For example, the proposed referendum on the Lisbon Treaty, had it been held, could have been post-legislative.

### Conclusions/Recommendations

- 18.** Referendums should be held on proposals that are clear and immediately actionable. This means that, **wherever possible, referendums should be held post-legislatively**: the relevant parliament or assembly should legislate in detail for the change, subject to approval by voters in a referendum. Should the result favour the change, the provisions would then be implemented.

## When a standalone post-legislative referendum is not possible

- 6.28. The Commission recognises that there are examples of changes for which it is widely agreed a referendum would be necessary, but for which a standalone post-legislative referendum would not be possible. This most obviously applies when a referendum is needed to mandate the start of negotiations needed to implement a constitutional change.
- 6.29. One clear example of this is Scottish independence. As the Constitution Society pointed out in its evidence to us, a post-legislative referendum on this topic would be politically impossible 'unless a future UK government were unexpectedly converted to the cause of Scottish independence'.<sup>11</sup> Instead, a pre-legislative referendum would be necessary before meaningful negotiations on future relations between Scotland and the UK could take place. Even if negotiations prior to a referendum were politically feasible, consulting voters first might be thought desirable.
- 6.30. In cases where a pre-legislative referendum is necessary, the principles that we have set out above imply that every effort should be made to ensure the proposals for change are as clear as possible so that voters can make an informed decision about which option they prefer. This requires a detailed prospectus to be developed setting out what is expected to happen in the event of a vote for change. Such a prospectus would provide details of how the government proposing the referendum intended to proceed, and what it hoped to achieve, alongside impact assessments and an examination of any problems that might be encountered. Such information would need to be presented in a White Paper, or equivalent document, published sufficiently far in advance to allow meaningful parliamentary scrutiny and wider public debate. The document would also be available and accessible to voters when subsequently making their decision in the referendum.
- 6.31. Nonetheless, even if efforts are made to clarify the proposed change through such a process, the final form it takes would remain dependent on post-referendum negotiations, meaning that the outcome could ultimately diverge considerably from what was suggested during the campaign. There hence

<sup>11</sup> The Constitution Society, 2017, Written Evidence to the Independent Commission on Referendums.

remains a danger that the proposals supported by voters in the referendum would not be those that are eventually delivered, leading to the problems of low clarity, weak legitimacy and ongoing post-referendum confusion outlined in paragraphs 6.15–24.

- 6.32. To avoid such problems, there may therefore be circumstances in which the best option is to allow voters an opportunity to vote again once the precise form of the change is known. Such a vote would be justified if no detailed prospectus was in fact provided before the pre-legislative referendum or if the expectations set out in the prospectus were not delivered. However, it would be essential for the whole process of decision-making to be clearly set out before the first, pre-legislative referendum. Otherwise, it could fall prey to manipulation by those dissatisfied with the result of the first referendum and keen to pursue a different result.
- 6.33. The idea of holding both pre- and post-legislative referendums in circumstances such as these is not new. It was proposed by Constitution Unit researchers in the early 2000s for any future Scottish independence referendum.<sup>12</sup> In 2011, then Scottish Secretary Michael Moore subsequently suggested a two-referendum process for Scotland to become independent.<sup>13</sup> This was rejected by the Scottish government, and was seen by some as an attempt by Unionists to place an additional obstacle in the way of independence.<sup>14</sup> But there is also good reason to take the opposite view and expect a two-referendum process to make change more likely. Voters might feel encouraged to back change at the first vote, since doing so would carry few risks and would be an opportunity to see what alternative might be available; this success might then build momentum for change in the second vote. Indeed, this was one reason offered by Dominic Cummings, the campaign director of Vote Leave, when he proposed a two-referendum process for leaving the EU in 2015.<sup>15</sup>
- 6.34. A double-referendum process would clearly be a significant departure from past practice, and the Commission acknowledges that this approach is not without problems, which deserve careful consideration. We consider three concerns in particular.
- 6.35. First, there is a worry that the intention to hold a second referendum could create adverse incentives during negotiations: if those with whom the government pursuing the change is negotiating oppose that change, they may deliberately engineer a bad deal in the hope that voters will reject it. This is a genuine concern. At the same time, however, it should not be exaggerated. Similar dangers exist to some extent even when the deal is subject only to parliamentary approval. Furthermore, a negotiating strategy of this kind would be high-risk: voters might resent being manipulated and vote for the deal anyway. Exactly how the process would pan out is difficult to predict.
- 6.36. Second, a two-referendum process creates a period of instability where major change is agreed in principle, but may still be reversed. That could be both economically and socially damaging. Again, however, the degree to which this situation is different from one in which a legislature is in control after the referendum could be exaggerated. This is illustrated by the ongoing uncertainty over Brexit two years after the 2016 referendum.

<sup>12</sup> Murkens, J. E., 2002, 'Part One: The Road to Independence' in Murkens, J.E., Jones, P., and Keating, M., *Scottish Independence: A Practical Guide*, Edinburgh University Press, Edinburgh.

<sup>13</sup> BBC, 2011, 'Michael Moore: 'Independence Needs Two Referendums'', 6 June (accessed 25 May 2018).

<sup>14</sup> Macwhirter, I., 2011, 'Why stop at only having two referendums on Scottish independence?', *Iain Macwhirter's Blog*, [blog] 9 June (accessed 2 June 2018).

<sup>15</sup> Cummings, D., 2015, 'On the Referendum #6: Exit plans and a second referendum' *Dominic Cumming's Blog* (accessed 25 May 2018).

- 6.37. Third, there is a question over what should happen if a change that was accepted at the first referendum were rejected in the second. Supporters of change would probably argue that the in-principle vote in the first referendum remained valid and that only the means of fulfilling this had been rejected. Opponents would contend that voters rejected the proposal once they saw its details, and that the whole matter should be dropped. In reality, how such disputes are resolved would depend on the political situation surrounding the referendum and the closeness of the vote.
- 6.38. This final concern points to the fact that a binary question at a second referendum may be insufficient to allow voters to express their views. Some may wish to reject the change altogether; others may support change in principle but wish to see revised proposals; yet others will support the package on offer. This problem could be mitigated by a multi-option referendum question: a topic discussed further in chapter 8.
- 6.39. The concerns set out here are genuine and ought to be taken seriously. At the same time, however, the problems highlighted are likely to exist to some degree even without a two-referendum process. Such problems are inherent to the fact that details need to be worked out after a pre-legislative referendum, and that contentious negotiations may be involved. Maintaining democratic control over the process of negotiating such detail will create tensions, however that is done. Given the alternatives, the advantages of a two-referendum process for clarity and democratic legitimacy are considerable.

### **A proposal to maximise clarity**

- 6.40. The Commission considered whether to propose a two-referendum process in all circumstances where a pre-legislative referendum is necessary. It concluded, however, that this was unnecessary: there may be cases in which a government sets out a clear prospectus for change and then delivers this successfully. That was clearly the case for the 1997 devolution referendums, and it may prove so for future referendums that require intergovernmental negotiations.
- 6.41. Rather, the guiding principle is that the process should deliver clarity. If one referendum is sufficient to allow voters genuinely to choose the future direction to be taken, then only one referendum is needed. If not, a process involving two referendums should be required. The following recommendations are intended to deliver this principle.

## Conclusions/Recommendations

19. The Commission recognises that there are examples of changes for which it is widely agreed approval by a referendum is needed, but for which a standalone post-legislative referendum would be impossible – for example, where implementing the result of a vote for change would require negotiations with other bodies.

**Where a pre-legislative referendum is necessary, a detailed White Paper setting out how the government calling the referendum would proceed in the event of a vote for that proposal should be produced.**

20. Any legislation enabling a pre-legislative referendum should set out a process to be followed in the event of a vote for change.

**If a government does not produce a detailed White Paper on the proposals for change, a second referendum would be triggered when the legislation or treaty implementing the result of the first referendum has passed through the relevant parliament or assembly.**

**In cases where a government does produce a White Paper detailing what form of change it expects to secure, the second referendum would be triggered only in the event that there is a 'material adverse change' in circumstances:** that is, if the expectations set out in the government's paper are not fulfilled. It would be for the parliament or assembly that called the referendum to determine whether such a 'material adverse change' had occurred.

The process to be followed should be specified in the legislation enabling the first referendum, so that the requirement for or possibility of a second referendum, and the reason for it, is clear to the electorate before the first vote takes place. The Commission's recommendation hence applies to future processes of change requiring a referendum, and is not intended to apply retrospectively. **The Commission does not take a view on whether there should be a further referendum on Brexit.**

# 7. Preparation for a Referendum

- 7.1. Chapter 6 set out the goal that a referendum should be on a clear, actionable proposal. This chapter examines processes leading up to that point. In chapter 4 we concluded that referendums are most appropriate for deciding major constitutional issues. It is important that change of this kind proceeds with the maximum possible agreement. Given the risk that referendums can polarise opinion, a substantial period of preparation, deliberation and consultation on the proposals for change is ideally needed. This should include both the development of the proposals and consideration of whether a referendum is the best mechanism for making the change.
- 7.2. This chapter examines the various forums through which preparation can be undertaken, and examines case studies of preparatory processes that have preceded referendums in the UK and in other democracies.

## UK Experience

- 7.3. The level of preparation prior to UK referendums has varied greatly. Some referendums, such as the 1997 Scottish devolution referendum and 1998 referendum on the Good Friday Agreement, have come at the end of long processes spanning years, during which proposals have been developed and agreement on them has gradually been built. Nine years prior to the 1997 referendums, the Scottish Constitutional Convention was established to examine the proposals for devolution (see Box 7.1). Similarly, the 1998 referendum on the Good Friday Agreement came after a long period of negotiation and compromise. Although the Democratic Unionist Party refused to support the deal, the Agreement was endorsed by all the other major parties, which were able to mobilise their supporters and appeal to their communities. Voters were asked explicitly whether they supported the deal reached 'at Multi-Party Talks'; 71% of Northern Irish voters said Yes.
  - 7.4. Conversely, some other referendums have been used more as 'quick fix' solutions to political problems, largely divorced from wider processes of examination, reflection and policy development. For example, prior to the 2011 AV referendum, there was little consideration of which electoral system might be most appropriate for the UK, or which system had the most public or political support. The options were defined by what was politically acceptable to the two coalition parties.
  - 7.5. Although the details of the UK's future relationship with the EU would always depend on negotiations, prior to the EU referendum there was no attempt to seek agreement or develop proposals on the type of relationship that might be desirable in the event of a Leave vote. As a result, since the vote, there has been a lack of certainty around the form that Brexit should take. The rivalry between different interpretations of the referendum result has become highly contentious.
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### Box 7.1 The Scottish Constitutional Convention

The Scottish Constitutional Convention met intermittently between 1989 and 1998. It comprised 143 elected politicians and party representatives plus sixteen civil society representatives. Although the Conservative Party did not participate, and the SNP withdrew when it became clear that its preferred constitutional position, independence, would not be discussed, the proposals were endorsed by the two political parties with most MPs in Scotland at the time: Labour and the Liberal Democrats. They were also endorsed by many groups from Scottish civil society.

In its first year, the Convention agreed broad proposals for a devolved parliament, and established working groups responsible for developing certain aspects in detail. The subsequent years were spent developing a comprehensive and complete blueprint for a future Scottish Parliament. This included: the establishment of a Commission to consider electoral systems, gender balance, and the implications of the parliament for local government; detailed work on parliamentary procedures, including producing draft standing orders; and the development of comprehensive proposals for the operational aspects of a future Scottish Parliament.<sup>1</sup> The Convention's detailed proposals for a Scottish Parliament were presented in its final report, published in 1995: *Scotland's Parliament, Scotland's Right*.<sup>2</sup>

In 1997, the Labour Party won the UK general election on a manifesto which contained a commitment to holding a referendum on the establishment of a Scottish Parliament. During the campaign for the referendum, held later that year, the main Yes campaign, Scotland Forward, evolved from the Convention, with the addition of SNP support. This group campaigned on the basis of the Convention's detailed proposals. A group of prominent political scientists commented shortly afterwards that, 'to a remarkable extent, Scotland Forward presented a united front: on the whole, the parties managed to set aside their differences and worked together towards a common end'.<sup>3</sup> The result of the referendum showed wide public agreement, with 74% voting in favour of establishing a Scottish parliament and 64% in favour of tax-varying powers. This result clearly cannot be wholly attributed to the role of the Convention, but it most likely had a positive effect.

<sup>1</sup> Brown, A., 2000, 'Designing the Scottish Parliament', *Parliamentary Affairs*, 53(3), pp.542–556, at pp.544–5.

<sup>2</sup> Scottish Constitutional Convention, 1995, *Scotland's Parliament, Scotland's Right*, Edinburgh, Scottish Constitutional Convention.

<sup>3</sup> Pattie, C., Denver, D., Mitchell, J., and Bochel, H., 1999, 'Settled will or divided society? Voting in the 1997 Scottish and Welsh devolution referendums', *British Elections & Parties Review*, 9(1), pp.136–153.

## International experience

- 7.6. As discussed in chapter 1, referendums around the world are typically embedded in multistage processes of decision-making. In particular, legislatures tend to play a crucial role, and almost always do so where constitutional change is involved. Hence there is normally extensive scope for parliamentary scrutiny and discussion of proposals before they reach the referendum ballot paper. This is important in itself in order to enhance deliberation on major decisions; but parliamentary discussion will also often attract significant media and wider public attention, meaning that pressure groups and citizens have had previous opportunities to engage with discussion about the change as well.
- 7.7. Chapter 1 has also already indicated how some countries have used other forums to develop proposals for constitutional change prior to the legislative process. Extensive constitutional reforms in Finland in 2000 and in France in 2007 were prepared by expert committees before going to parliament (though these are both processes that did not involve referendums).<sup>4</sup> In Iceland in 2010–11, a specially elected Constitutional Council was tasked with drafting proposals.<sup>5</sup> In Australia, a Constitutional Convention was established in 1998 to examine the question of moving from a monarchy to a republic. It comprised 152 delegates, half appointed by the Prime Minister, half elected. At the end of the process 59% of its members endorsed becoming a republic, but they were split on whether to recommend an appointed or an elected head of state. Ultimately, 48% recommended an appointed head of state, while 37% supported an elected head of state and 17% abstained.<sup>6</sup> The proposals were put to a referendum but were rejected by 54.9% of voters.
- 7.8. Some countries have also used citizen-led forums to consider important constitutional issues. As introduced in chapter 4, deliberative exercises such as citizens' juries and citizens' assemblies are major innovations in democratic practice in recent years. Each such body comprises a representative group of citizens, chosen randomly from the population at large, who meet over a number of sessions, receive expert evidence and deliberate. At the end of the process they decide what, if any, reforms they wish to recommend and these are often put to a referendum for voters to accept or reject.
- 7.9. As we indicated in chapter 4, citizens' juries and citizens' assemblies can be used for a variety of purposes. In this chapter we concentrate on their use as mechanisms for preparing for a possible decision to hold a referendum, while in chapter 13 we examine their use in the context of a referendum campaign. Examples of the first type include the Irish Constitutional Convention and Citizens' Assembly (see Box 7.2), and citizens' assemblies on electoral reform in the Canadian provinces of British Columbia and Ontario (see Box 7.3).

<sup>4</sup> Husa, J., 2011, *The Constitution of Finland: A Contextual Analysis*, Oxford, Hart, p.26; Comité constitutionnel, committee [website] (accessed 29 May 2018).

<sup>5</sup> Renwick, A., 2014, *After the Referendum: Options for a Constitutional Convention*, London, Constitution Society, pp. 57–65.

<sup>6</sup> Galligan, B., 2001, 'Amending Constitutions through the Referendum Device', in Mendelsohn, M., and Parkin, A. (eds.), *Referendum Democracy, Citizens, Elites and Deliberation in Referendum Campaigns*, Basingstoke, Palgrave, pp.109–124.

### Box 7.2. Ireland's Constitutional Convention and Citizens' Assembly

The Irish Constitutional Convention was established in July 2012 by resolution of the Irish parliament (Oireachtas). Its membership comprised:

- sixty-six randomly selected citizens, carefully recruited by a polling company to be representative of the Irish population in terms of region, gender, age, class and work status
- thirty-three parliamentarians nominated by political parties, including a representative of each of the political parties in Northern Ireland that wished to participate
- an appointed Chair.

The Convention was asked to examine eight topics and report on them to the Oireachtas. These were:

- reducing the presidential term of office from seven to five years and aligning it with local and European elections
- reducing the voting age from 18 to 17
- the electoral system for the Dáil (lower house of parliament)
- giving Irish citizens resident abroad the right to vote in presidential elections
- provision for same-sex marriage
- amending the clause on the role of women in the home and encouraging greater participation of women in public life
- increasing the participation of women in politics
- removal of the offence of blasphemy from the Constitution.

The Convention also considered two further topics chosen by its members: Dáil reform; and economic, social and cultural rights.

The Convention met over nine weekends between December 2012 and February 2014. It took evidence, deliberated, voted and produced a report on each issue, along with recommendations. The recommendations were then referred back to parliament which subsequently called referendums on two of the Convention's recommendations: marriage equality and lowering the age threshold for presidential candidacy. The proposal on the presidential age threshold was rejected, but the Convention's proposal on marriage equality was passed by 62.1% to 37.9%.

The Oireachtas established the Irish Citizens' Assembly in 2016. Unlike the Constitutional Convention, there were no political representatives: the Assembly comprised ninety-nine randomly selected citizens and an appointed Chair. It was tasked with considering and making recommendations on the following matters:

*(Box 7.2 continued on the next page)*

*(Box 7.2 continued from the previous page)*

- the Eighth Amendment of the Constitution (which tightly limited abortion)
- how to respond to the challenges and opportunities of an ageing population
- fixed-term parliaments
- 'the manner in which referenda are held'
- 'how the State can make Ireland a leader in tackling climate change'.

The Assembly followed a similar process to the Constitutional Convention. It agreed recommendations on abortion in April 2017 after five weekends of evidence and deliberation, holding its final meeting in April 2018. The Assembly's recommendation on the Eighth Amendment was put to a referendum on 25 May 2018. In a remarkable outcome, 66.4% of voters supported the removal of restrictions on abortion from the constitution.

The Constitutional Convention and Citizens' Assembly are widely recognised in Ireland as having played major roles in opening up thoughtful discussion across the country as a whole on fundamental questions of morality and identity. Immediately following the abortion referendum in May 2018, one commentator described the Citizens' Assembly as 'a portent of shifting public attitudes on abortion'. Another noted that 'the Citizens' Assembly [had previously] voted by 64% to 36% for abortion on request'; hence, 'The assembly was set up to be representative of the Irish people and it proved to be'. A third observed that 'the process has proven, with both same sex marriage and abortion, that it is an effective way of preparing the ground for wider public debate on contentious issues'.

### **Box 7.3. Canada's citizens' assemblies on electoral reform**

In the mid-2000s, in response to a variety of pressures and concerns, the Canadian provinces of British Columbia and Ontario established citizens' assemblies to examine options for electoral reform and make recommendations. Both assemblies were composed of randomly selected citizens – 140 in British Columbia and 103 in Ontario – plus an elected Chair. Each assembly met for twelve weekends over the course of a year and conducted its work in three phases:

**The learning phase** – members learnt about different electoral systems and their consequences through impartial briefings, expert lectures and small discussion groups.

**The public hearing phase** – members held public hearings around the province to listen to citizens' views. They also met with advocacy groups

*(Box 7.3 continued on the next page)*

(Box 7.3 continued from the previous page)

and political parties and read written submissions.

**The deliberation phase** – members deliberated, using the information gathered in the first two phases, and gradually worked towards conclusions.

At the end of the process, members took final votes on which electoral system they would recommend. In British Columbia, 80% voted for Single Transferable Vote (STV). In Ontario, 84% opted for Mixed Member Proportional (MMP).<sup>7</sup>

In the ensuing referendum in British Columbia in 2005, though 58% voted for the Assembly's recommendation, a 60% supermajority threshold meant the proposal failed to be approved. Recognising that many found this result illegitimate, the government repeated the referendum four years later, but momentum had by then waned, and only 39% of voters backed the change. In Ontario, the impetus behind reform was always weaker, and only 37% of voters supported MMP in the referendum of 2007.

A study of the British Columbia referendum found that the more voters understood about the composition and process of the Assembly, the more likely they were to trust its recommendations. Some respondents liked the 'ordinariness' of the Assembly's members, while others highlighted the 'expertise' that members built up over the course of the Assembly's work as their reason for trusting it.<sup>8</sup> This evidence suggests that, while the level of deliberation achieved within a citizens' assembly cannot be replicated across the entire population, such exercises can still help voters cast an informed ballot.<sup>9</sup>

But these benefits require voters to be aware of the deliberative exercise, its composition and its process. Political scientist Lawrence LeDuc argues that a key difference between the relatively high vote for change in the 2005 British Columbia referendum and the clear majority for the status quo in Ontario related to the reputations of the two citizens' assemblies.<sup>10</sup> Cutler and Fournier argue that there was a lack of information on and understanding of the citizens' assembly in Ontario:

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*'The media paid little attention to the assembly and often described it as "set up by the government" – a half-truth that did nothing to dispel voters' assumption that the proposal was coming from the usual political suspects. At the start of the campaign, half said they knew nothing about the assembly and, amazingly, there was no gain in awareness over the campaign.'*<sup>11</sup>

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Thus, how the media – traditional and social – respond to a citizens' assembly is likely to be crucial to its ultimate success.

<sup>7</sup> Fung, A., 2009, 'British Columbia Citizens' Assembly on Electoral Reform', Participedia [website] (accessed 14 June 2018); Peery, A. T., 2010, 'Ontario Citizens' Assembly on Electoral Reform', Participedia [website] (accessed 14 June 2018).

<sup>8</sup> Cutler, F., Johnston, R., Carty, R., Blais, A., and Fournier, P., 2008, 'Deliberation, Information, and

Trust: the British Columbia Citizens' Assembly as Agenda Setter', in Warren, M. E., and Pearce, H. (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, Cambridge, Cambridge University Press.

<sup>9</sup> Cutler et al., 2008, *Designing Deliberative Democracy*, pp.169.

<sup>10</sup> LeDuc, L., 2011, 'Electoral Reform and Direct Democracy in Canada: When Citizens Become Involved', *West European Politics*, 34(3), pp.551–567, at p.562.

<sup>11</sup> Cutler, F., and Fournier, P., 2007, 'Why Ontarians said No to MMP', *Globe and Mail*, 25 October (accessed 14 June 2018).

## What form could preparation for a referendum take in the UK?

- 7.10. A referendum in itself only facilitates a final choice between two (or occasionally more than two) options. It is not in itself an opportunity for prior consideration of what the key issues are, which options deserve most attention or what the details of those options should be. Nor, clearly, is it the time to decide whether a referendum is actually the best mechanism for making a decision. If a referendum is to be well-grounded, all of these steps need to come before the referendum is called. This early, preparatory phase of a referendum process deserves as much attention as the process for the referendum itself. Such preparation involves working out what the options are, considering which options have the most support, developing specific proposals for reform, planning for the implementation of that change, and agreeing whether or not a referendum is the best way of making a decision.
- 7.11. As the preceding discussion indicates, such preparation can take place in a variety of forums, and the best approach may depend on the topic in question. This section therefore examines different types and means of preparation.

### Governmental preparation

- 7.12. At a minimum, significant governmental preparation for implementing the outcome of a vote for change in a referendum is necessary, just as it is in any other policy-making process. This can occur through detailed planning by civil servants, including the development of impact assessments and White Papers on the procedural aspects of the change. PACAC criticised the government's lack of contingency planning prior to the EU referendum and stated that the government had 'a constitutional and public obligation to prepare for both outcomes from the referendum'.<sup>12</sup>
- 7.13. Where the change is proposed by the government, there should ideally also be wider processes for gathering evidence, developing the options for change and consulting on those options. This will often be in large part a task for the civil service. However, a thorough consideration of the options, and the appropriateness of the referendum, should be a broader process involving a wide range of relevant stakeholders encompassing different perspectives.

### Parliamentary preparation

- 7.14. If a referendum is held post-legislatively, as recommended for most circumstances in chapter 6, a certain amount of preparation by the legislature is guaranteed to take place: the normal process for passing a Bill involves line-by-line scrutiny of proposals, allowing potential difficulties to be identified and addressed.
- 7.15. In addition, before legislation is introduced, or if a pre-legislative referendum is needed, parliamentary preparation can often play a vital role in policy development. This may, for example, involve inquiries into the options by

<sup>12</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.51.

existing parliamentary committees, or committees specially convened for the purpose of looking at the proposals. Given that referendums take place on matters of major importance, there is a strong case for saying that such inquiries should happen before the commitment to a referendum has been made, and certainly before legislation is introduced, in order to help define the options that may be appropriate to put to a referendum and to consider the implications of different outcomes.

- 7.16. Parliamentary forums both create scope for cross-party development of proposals and provide opportunities for experts and the public to feed into the process on the public record. Committees have a unique power to demand responses from witnesses, and to require a government response. They are also influential on wider parliamentary and public debates, including through the media. Parliamentary committees at Westminster and in the devolved legislatures are increasingly using innovative methods for engaging members of the public in their work, such as holding public consultation phases on bills, and commissioning deliberative exercises (see Box 7.5).

## Extra-parliamentary preparation

- 7.17. Often the proponents of constitutional change, or other key stakeholders, may come from outside parliament. In order to build broad support and agreement around proposals for change, it is important that such actors also have a role in the development process. This may sometimes best be achieved through the creation of extra-parliamentary bodies. The Scottish Constitutional Convention (see Box 7.1) demonstrates how key parts of the preparation process can take place without government backing.
- 7.18. It also demonstrates how thorough preparation can result in well-developed proposals for change that command widespread support. In Wales, where there was no comparable process for developing proposals for a Welsh Assembly, the referendum result was extremely narrow (50.3% in favour) and turnout was comparatively low (50.1%) – though that lack of enthusiasm for devolution was partly a cause, rather than just a consequence, of the lack of preparation.

## Deliberative processes

- 7.19. Deliberative processes such as those used in Ireland (see Box 7.2) and Canada (see Box 7.3) allow direct citizen engagement in developing proposals for change. They can empower citizens to shape the options, rather than merely cast a vote on the options presented by politicians. They provide opportunities for citizens to consider issues in depth, and foster deliberation among people with a representative range of perspectives and experiences, in a forum largely removed from party politics or societal divides. Ireland's deliberative exercises have developed proposals on highly contentious and sensitive issues – same-sex marriage and abortion – both of which were roundly endorsed by the electorate in referendums. The proposals emanating from deliberative processes have the legitimacy of being developed by ordinary citizens from across all sections of society, which may also increase their chances of success at a referendum, if they are put to one. Although it is difficult to replicate this quality of deliberation for the entire electorate during

referendums, the Canadian and Irish evidence suggests that citizens' assemblies can have a positive effect on wider public discourse.

- 7.20. If they are to bring these benefits, citizens' assemblies need to be designed well. Key principles are set out in Box 7.4. While such a body would ideally be established on an official basis, and thus be created by one of the UK's governments, parliaments or assemblies, in order to minimise the danger of any bias (or accusations of bias), it would need to operate independently from any political interference. Close attention would need to be paid to the process of recruitment, the selection of experts, and the production of briefing materials for members. Experts in the design and facilitation of neutral deliberative processes would need to be engaged.

#### Box 7.4. Principles of citizens' assembly design

There is now considerable experience of running citizens' assemblies and other similar deliberative processes in the UK and in many other countries. This shows that, if they are designed and delivered with great care, deliberative exercises can be very successful. In particular, they can generate high-quality discussions that are fair between competing perspectives, enable a very diverse range of people to take part, and yield considered conclusions that deserve serious attention. A number of key principles of good assembly design can be identified:

- **Recruitment of members.** The members of a citizens' assembly should be recruited at random from the population as a whole. Civil servants conducted this process in the Canadian citizens' assemblies, while an opinion research company performed it in Ireland. Care is needed to ensure that the composition of the assembly reflects the composition of the wider population, as some types of people are more likely to accept an invitation to participate than others.
- **Facilitated discussions.** Assembly meetings should be designed and run by professional facilitators with expertise in ensuring that all members can fully participate and that discussions remain on track. Discussions should take a range of formats to ensure variety and accommodate a range of learning styles. Most take place in small groups of around eight members working with a facilitator. Some can be larger, including plenary sessions with invited speakers.
- **Diverse expertise.** Two kinds of expertise are brought to bear in assembly discussions. First, the members themselves are expert on their own perspectives. Members of past assemblies often comment on how much they learn from speaking in great depth with people whose life experiences are very different from their own. Second, expertise on the topics in question is brought in through written briefing materials, presentations and Q&As.
- **Guarantees of impartiality.** It is essential that the design and delivery of a citizens' assembly should maintain strict impartiality: organisers should not promote one view over another, whether consciously or subconsciously. Professional facilitation is important for this. In addition, an advisory board of people with diverse perspectives should be recruited and be consulted on the design of assembly's programme, invitation of speakers and development of written materials.

(Box 7.4 continued from the previous page)

- **Time.** Quality deliberation requires time. Assembly members need to get to know each other and become comfortable in discussing what may be difficult topics in such a forum. They need opportunities to reflect on their own priorities, hear and think about the perspectives of others, learn about the issues and options, and deliberate in depth on what might, from their perspective, be best. A quality citizens' assembly needs at least two weekends, allowing time for learning at the first weekend, reflection between the weekends, and deliberation and decision at the second weekend. For complex topics, more time may be preferable.
- Evidence on and further discussion of these points is available in the reports of past citizens' assemblies.<sup>13</sup>

7.21. All of these things can be done successfully, and have been demonstrated to work effectively in Canada, Ireland and elsewhere. In the UK, they have been trialled and demonstrated to work well by the Citizens' Assembly on Brexit (convened by a group of academics led by the Constitution Unit in 2017 to consider the form that Brexit should take<sup>14</sup>) and by the Citizens' Assembly on Social Care (see Box 7.5).

### Box 7.5. The Citizens' Assembly on Social Care

The Citizens' Assembly on Social Care was commissioned jointly by two select committees of the House of Commons – the Health and Social Care Committee and the Housing, Communities and Local Government Committee – as part of an inquiry into the long-term funding of adult social care. It comprised forty-seven people who were carefully recruited to reflect the make-up of the population of England. It met over two weekends in April and May 2018.

At the end of the second weekend the assembly made recommendations, designed to feed into the inquiry and be considered alongside other evidence. The two committees had not yet published their report at the time of writing, and so further information was not yet available. On the launch of the Assembly, Sarah Wollaston MP, Chair of the Health and Social Care Committee said:

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*'If this proves helpful I hope citizens' assemblies could be rolled out as a way of helping Parliament to engage with the public ahead of other challenging and complex decisions.'*<sup>15</sup>

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<sup>13</sup> British Columbia Citizens' Assembly on Electoral Reform, 2004, *Making Every Vote Count: The Case for Electoral Reform in British Columbia: Technical Report*, Vancouver, Citizens' Assembly on Electoral Reform; Ontario Citizens' Assembly on Electoral Reform, 2007, *Democracy at Work: The Ontario Citizens' Assembly on Electoral Reform: A Record of Ontario's First Citizens' Assembly Process*, Toronto, Ontario Citizens' Assembly Secretariat; Flinders, M., Ghose, K.,

Jennings, W., Molloy, E., Prosser, B., Renwick, A., Smith, G., and Spada, P., 2016, *Democracy Matters: Lessons from the 2015 Citizens' Assemblies on English Devolution*, London, Constitution Unit (accessed 4 June 2018); Renwick, A., Allan, S., Jennings, W., McKee, R., Russell, M., and Smith, G., 2017, *A Considered Public Voice on Brexit: The Report of the Citizens' Assembly on Brexit*, London, Constitution Unit (accessed 4 June 2018). See also Renwick, A.,

and Hazell, R., 2017, *Blueprint for a UK Constitutional Convention*, London, Constitution Unit (accessed 4 June 2018).

<sup>14</sup> Renwick, A., et al, 2017, *A Considered Public Voice on Brexit*.

<sup>15</sup> Housing, Communities and Local Government Committee, 2018, 'Citizens' Assembly Considers Best Way of Funding Adult Social Care', UK Parliament [website] 22 April (accessed 6 June

- 7.22. As noted above, deliberative processes such as these have potential uses not just in preparing for referendums, but also during referendum campaigns. We discuss this in chapter 13.

### Conclusions/Recommendations

- 21.** Referendums are mechanisms through which final decisions on matters of great importance can be made. They are not in themselves appropriate mechanisms for working out what options should be considered in order to address the widest possible range of concerns and perspectives. Thus, **a referendum should always be seen as part of a wider process of decision-making rather than as a 'quick fix' solution.** In the UK, referendums that were preceded by significant preparation and consideration have proved more likely to settle an issue. The failure to undertake the necessary preparation for a referendum risks significant problems later in the policy process.
- 22.** If a government wishes to hold a referendum, it should demonstrate to the relevant parliament or assembly that it is able to present a viable alternative to the status quo; it should enable civil servants to undertake the preparation necessary to implement a vote for change.
- 23. Governments and political parties should avoid making commitments to hold referendums without first undertaking significant preparatory work.** Preparation could be in the form of traditional processes including government consultations, cross-party talks, parliamentary select committee inquiries or the establishment of extra-parliamentary bodies to explore the policy alternatives. Where deeper public involvement would be desirable, deliberative processes such as citizens' assemblies may be appropriate.
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# 8. The Referendum Question

- 8.1. This chapter explores two issues: the processes for deciding referendum questions; and the format of these questions – specifically the possibility of using multi-option referendums.

## The process for setting the question

- 8.2. The process for setting a referendum question matters because it is important that questions should not be worded in a way biased towards one outcome. Research into public opinion surveys suggests that question wording can significantly affect responses in some (but not all) circumstances.<sup>1</sup> Question wording effects are likely to be less acute in referendums, as voters are more likely to have had the time and motivation to consider the issue upon which the referendum is being held, rather than simply respond to the question<sup>2</sup> Nonetheless, even if the question is only perceived as biased, this can undermine confidence in the process. The Venice Commission's Code of Good Practice on Referendums recommends that the question put to voters 'must not be misleading; it must not suggest an answer.'<sup>3</sup>

## UK experience

- 8.3. For referendums mandated by the UK parliament, the referendum question is decided by parliament in the legislation enabling a referendum. PPERA 2000 confers a statutory duty upon the Electoral Commission to consider the wording of any referendum question proposed in a UK bill and publish a statement of its view on the 'intelligibility of that question' (s.104(2)). Once a referendum question is proposed in a bill enabling a referendum, the Commission must begin its assessment. Its findings are presented in a report, usually around 10 weeks later.
- 8.4. The Electoral Commission's question-testing criteria and methods have developed over time. Since 2009 it has used a rigorous evaluation process according to set referendum assessment guidelines. The guidelines state:

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*'A referendum question should present the options clearly, simply and neutrally. So it should:*

- *be easy to understand*
  - *be to the point*
  - *be unambiguous*
  - *avoid encouraging voters to consider one response more favourably than another*
  - *avoid misleading voters'.<sup>4</sup>*
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<sup>1</sup> Schuman, H., 1986, 'Ordinary Questions, Survey Questions, and Policy Questions', *Public Opinion Quarterly*, 50(3), p.433; Zaller, J. R., 1992, *The Nature and Origins of Mass Opinion*, Cambridge: Cambridge University Press.

<sup>2</sup> Druckman, J.N., and Lupia, A., 2000, 'Preference Formation', *Annual Review of Political Science*, 3(1), pp.1–24.

<sup>3</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007 (accessed 12 June 2018) p.7.

<sup>4</sup> Electoral Commission, 2009, 'Referendum Question Assessment Guidelines' (accessed 14 June 2018).

- 8.5. The Electoral Commission undertakes qualitative research with the public, usually in the form of focus groups and one-to-one interviews.<sup>5</sup> This helps it gauge how easy or difficult the question is to understand, whether any parts are unclear or easy to misinterpret, and whether participants feel the question leads them to any particular answer. Alternative wordings are also proposed and assessed using the same criteria. The Commission undertakes consultations with accessibility and language experts, and potential referendum participants are invited to give their views. The Commission also reports on Welsh-language versions of questions.
- 8.6. Based on this evidence, the Electoral Commission produces a report that either states its approval of the proposed wording or suggests alternative wording. The Electoral Commission has recommended changes to all of the five referendum questions put to the public under the PPERA 2000 framework. Some of the suggested changes related to the way the information was presented on the ballot paper, making it easier to understand and more to the point. This has been the case for complicated topics requiring a long preamble, such as the 2004 North East Assembly referendum and 2011 Welsh devolution referendum.
- 8.7. Other recommendations have been based on concerns that the proposed question could be perceived as biased, and could encourage voters to consider one response more favourably than the other. For example, the question originally proposed for the 2014 Scottish independence referendum was 'Do you agree that Scotland should be an independent country?' During the Commission's assessment, both the public and campaign groups raised concerns that the phrase 'Do you agree' could be leading towards a Yes vote. The Electoral Commission assessment recommended that 'the question is redrafted to ensure that it is asked in a more neutral way that avoids encouraging voters to consider one response more favourably than another'.<sup>6</sup> It proposed the wording 'Should Scotland be an independent country?'.
- 8.8. The government and parliament are not bound by the recommendation of the Electoral Commission. They are entitled to ignore the Commission's advice entirely. However, with one exception where the government amended some instructional wording,<sup>7</sup> successive governments have implemented Commission recommendations on national and regional referendum questions in their entirety.<sup>8</sup>

## International practice

- 8.9. Many democracies have a fixed format for referendum questions, especially when the referendum is on a specific bill or constitutional amendment. This is the case in Austria, Ireland, Italy, and Lithuania.<sup>9</sup> A fixed format removes opportunities for manipulation, but can often cause questions to contain highly technical language, making them difficult for the average voter to understand. For example, the question on the ballot paper of the 2016 Italian constitutional referendum was:

<sup>5</sup> Electoral Commission, 2009, 'Our Approach to Assess the Intelligibility of Referendum Questions' (accessed 12 June 2018).

<sup>6</sup> Electoral Commission, 2013, *Referendum on Independence for Scotland, Advice of the Electoral Commission on the Proposed Referendum Question*, London, Electoral Commission (accessed 18 May 2018).

<sup>7</sup> In the North East Assembly referendum question, the government changed instructional wording from the Commission's recommendation of 'see Option A' to 'see Map for Option A'.

<sup>8</sup> Some legislation mandating local referendums (e.g. Local Government Act 2000 and Localism Act 2011) requires the Secretary of State to consult the Electoral Commission before making any regulations setting questions. These

recommendations have not always been implemented.

<sup>9</sup> Entire legal provision for referendum law (Volksabstimmungsgesetz) 1972 (Austria), 9(2) and (3); Referendum Act 1994 (Ireland), section 24; Law 352 of 25 May 1970 (Italy), articles 16 and 27; Law on Referendum 4 June 2002 No IX-929 (Lithuania) (amended 2012), article 10 and 12.

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*'Do you approve the text of the Constitutional Law concerning 'Provisions for overcoming equal bicameralism, reducing the number of Members of Parliament, limiting the operating costs of the institutions, the suppression of the CNEL and the revision of Title V of Part II of the Constitution' approved by Parliament and published in the Official Gazette no. 88 of 15 April 2016?'*<sup>10</sup>

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- 8.10. The government determines the wording of the question for all referendums in Spain,<sup>11</sup> government-initiated referendums in Portugal,<sup>12</sup> and constitutional referendums in Iceland.<sup>13</sup> This creates greater potential for manipulation. In Australia, 'the wording of the question is entirely in the hands of the parliamentary majority that proposes the question'.<sup>14</sup> In Canada, the question is approved in a parliamentary resolution following consultation with MPs and opposition leaders.<sup>15</sup>

## Could the UK's process for setting the referendum question be improved?

- 8.11. Internationally, the UK has one of the most rigorous processes for assessing referendum questions. By contrast, requiring a fixed format creates the danger that the question becomes difficult to understand, while giving political institutions discretion over the decision is open to manipulation.
- 8.12. The fact that each referendum question has been amended on the basis of the Electoral Commission's recommendation demonstrates the value of the current process. There have been few accusations that the questions put to referendum in the UK have been biased or misleading, suggesting that the system works well. It could be argued that parliament's discretion to accept or reject the Commission's recommendation should be removed. Ultimately, however, the system allows the final decision to be made by elected representatives. Thus far, parliament has accepted the Electoral Commission's recommendations, and it is likely to continue to do so in future.

### Conclusions/Recommendations

24. **The Commission believes that the UK's process for assessing referendum questions generally works well.** The impartial analysis of the proposed question by the Electoral Commission is essential to this. It is right that the Electoral Commission's recommendation should not be binding, as this means the final decision is taken by elected representatives. But it is also right that governments and parliaments normally accept that recommendation.

<sup>10</sup> Translation from Millar, L., 2016, 'Italy Goes to the Polls to Answer High-stakes Constitutional Referendum', ABC News, 2 December (accessed 12 June 2018).

<sup>11</sup> Organic Law 2/1980 on 18 January (Spain), article 6.

<sup>12</sup> Law no. 15-A/98 of 3 April 1998 (Portugal) (rev. 2016), articles 12, 20 and 23.

<sup>13</sup> Act on the Conduct of Referendums 91/2010 2010 June 25<sup>th</sup> (Iceland), article 3.

<sup>14</sup> Orr, G., 2000, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective', *Public Law Review*, 11, pp.117–32, at p.125.

<sup>15</sup> Referendum Act 1992 (Canada) c.30, section 5(1).

## Binary or multi-option referendums?

- 8.13. The second issue around the setting of referendum questions concerns their format, and specifically the possibility of using multi-option referendums. This section considers whether multi-option referendums could be preferable to the usual two-option referendums in some circumstances.

### UK experience

- 8.14. The UK has never had a referendum question in which voters were asked to choose among more than two options.
- 8.15. The only deviation from the standard single-question, binary referendum format was the 1997 Scottish referendum on devolution. Voters were asked two questions: on the establishment of a Scottish parliament; and on tax-raising powers for the parliament. But for each question voters could only answer Agree or Do Not Agree.
- 8.16. A multi-option question with a third option of 'devo-max' was suggested by the Scottish government for the 2014 Scottish independence referendum. The House of Commons Scottish Affairs Committee recommended against this proposal, which was eventually abandoned.<sup>16</sup> The Edinburgh Agreement confirmed that there would be a single question on independence with just two options<sup>17</sup>

### International practice

- 8.17. The overwhelming majority of referendums across the world are held on binary questions, but a small number of multi-option referendums have been held. In these, a variety of voting systems have been used.

#### FIRST PAST THE POST

- 8.18. First Past the Post has been used for several multi-option referendums: the 1977 Australian referendum on the national song; the 1980 Swedish referendum on nuclear power; and the 1998 Slovenian referendum on the electoral system.
- 8.19. Under this system, voters are presented with a number of options. They vote for one of these, and the option receiving the highest percentage of the vote wins. There is no requirement for an option to achieve over 50% of the vote.
- 8.20. This approach can easily lead to inconclusive results. For example, in the Swedish referendum, option 1 received 18.9% of the vote, option 2 39.1% and option 3 38.7%. From these numbers, it is impossible to know whether option 2 would have won in a pairwise contest with option 3 or not.

#### PREFERENTIAL VOTING

- 8.21. Preferential voting is rarely used for multi-option referendums. In 2013, however, Jersey used preferential voting in a referendum offering three options for the future composition of the island's legislature.

<sup>16</sup> Scottish Affairs Committee, 2012, *The Referendum on Separation for Scotland: a multi-option question?* (Third Report of Session 2012-12), HC 543, London, House of Commons (accessed 12 June 2018).

<sup>17</sup> HM Government and the Scottish Government, 2012, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on Independence for Scotland*, Edinburgh, 15 October (accessed 12 June 2016); Black, A., 2012, 'Scottish independence: Cameron and Salmond strike referendum deal', BBC, 15 October (accessed 7 June 2018).

- 8.22. Under this system, voters rank the options in order of preference. First preference votes are counted. If no option passes 50%, the least favoured option is eliminated. The second preferences of the supporters of the eliminated option are then redistributed. This continues until one option exceeds 50% of the vote.
- 8.23. In the case of Jersey, for example, option A received 39.6% of the votes, option B 40.9% and option C 19.5%. The third option was therefore eliminated and votes were redistributed. Of voters who expressed a preference between options A and B, 45% preferred A and 55% B. It was therefore possible to work out with confidence which was the more popular of these two options.

### TWO-REFERENDUM 'RUN-OFF' PROCESSES

- 8.24. New Zealand has held a number of two-referendum 'run-off' processes. At the first referendum voters are asked to choose among multiple alternatives to the status quo. At the second referendum they are asked to choose between the option selected at the first referendum and the status quo. Two slightly different models have been used.
- 8.25. **Model one.** At the first referendum voters are asked two questions. The first question is a 'gateway question' and asks whether the voter is in favour of change; the second question asks voters to choose which of several possible change options they prefer. If a majority votes against change in the 'gateway question', the results on the second question are disregarded and the process ends. If the majority votes for change, the option chosen in the second question is the first round winner, and goes on to be pitted against the status quo in the second referendum. This model was used in the 1992/3 referendums on electoral reform, which led to the adoption of a new voting system. It was repeated in 2011 on the same topic, but a majority of voters chose to retain the existing voting system at the first ballot.<sup>18</sup>

**Table 8.1. Options in the 1992/3 New Zealand electoral reform referendums**

	Option(s) as posed on the ballot paper
<b>1st referendum 19 September 1992</b>	<p>Part A I vote to retain the present First-Past-The-Post system. I vote for a change to the voting system.</p> <p>Part B I vote for the Supplementary Member system (SM). I vote for the Single Transferable Vote system (STV). I vote for the Mixed Member Proportional system (MMP). I vote for the Preferential Voting system (PV).</p>
<b>2nd referendum 6 November 1993</b>	<p>I vote for the present First-Past-The-Post system as provided in the Electoral Act 1956.</p> <p>I vote for the proposed Mixed Member Proportional system as provided in the Electoral Act 1993.</p>

<sup>18</sup> Jackson, K., and McRobie, A., 1998, *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?*, Aldershot, Ashgate, pp.251–7; Tierney, S., 2013, *The Multi-Option Referendum: International Guidelines, International Practice and Practical Issues*, Edinburgh, University of Edinburgh.

- 8.26. **Model two.** Unlike in model one, in model two there is no 'gateway question'; voters are asked only to choose among options for change at the first referendum. At the second referendum, the preferred option from the first referendum is pitted against the status quo. In effect, the first referendum is a primary among change options, while the second is the opportunity to decide one way or the other. This was used in the New Zealand flag referendum of 2015/16.

**Table 8.2. Options in the 2015/16 New Zealand flag referendums**

	Question(s)
<b>1st referendum 15th December 2015</b>	If the New Zealand flag changes, which flag would you prefer? Option A: Silver Fern (Black, White and Blue) Option B: Red Peak Option C: Koru Option D: Silver Fern (Black and White) Option E: Silver Fern (Red, White and Blue)
<b>2nd referendum 30 March 2016</b>	What is your choice for the New Zealand flag? Option A: Silver Fern Flag Option B: Current New Zealand Flag

The five options in the referendum of December 2015, running right to left from option A to option E. Photo credit: Nigel S. Roberts.



- 8.27. The advantages and disadvantages of these alternative multi-option processes are discussed further below.

## Should multi-option referendums be encouraged?

- 8.28. The majority of referendums worldwide present voters with only two options – usually one change option and one status quo option. But this sometimes creates problems, particularly in circumstances where supporters of change disagree about what change they would like to see.
- 8.29. First, imposing a binary choice on a non-binary debate makes it difficult for large numbers of voters to express their true preferences.<sup>19</sup> For example, if a referendum is held on a proposed law, those voting No are expressing their objection to the law but have no way of expressing their reasons for this. Some No voters may think the law goes too far, others that it does not go far enough; voters on opposite ends of the spectrum may be counted as having expressed the same opinion. As written evidence to the Commission from the Constitution Society said, 'There may be specific circumstances in which a binary question is unable to capture the views of the electorate.'
- 8.30. Second, binary choices can encourage polarisation. Campaigners are incentivised to present the two options as completely opposed to each other, encouraging voters to position themselves as For or Against with little room for nuance. This can increase the focus on political or even societal divisions, rather than on common goals or positions, and promote an adversarial rather than deliberative approach to debate.
- 8.31. Drawing upon evidence from the Swedish multi-option referendum, political scientist Lawrence LeDuc suggests that a multi-option referendum debate may be less divisive than a binary referendum, as opinion will be less polarised.<sup>20</sup> Furthermore multi-option referendums conducted through preferential voting would offer voters a choice as to what they would be prepared to compromise on should their first choice not win support.
- 8.32. However, evidence from New Zealand's multi-option referendums on electoral reform suggests that debate is likely to remain binary if there are not multiple options with strong public support, as proponents of change will likely coalesce around the one option with the greatest chances of success.<sup>21</sup> Multi-option referendums are therefore only advisable if they are justified by the underlying spread of opinion. They are most appropriate where a number of distinct, clearly defined options already exist and when opinion is clearly split between them.
- 8.33. In the UK, a government might choose to propose a multi-option referendum in certain cases. The Electoral Commission might also want to suggest such an approach if it found during the question assessment process that voters found the absence of an option from the proposed ballot paper confusing. In its report *Referendums in the United Kingdom*, the House of Lords Constitution Committee considered it sensible to 'look to the Electoral Commission to assess the merits of multi-option questions in their referendum question assessment exercise.'<sup>22</sup> But clearly it would remain for elected representatives to decide in the end how many options there are and

<sup>19</sup> Constitution Society, 2017, *Written Evidence to the Independent Commission on Referendums*.

<sup>20</sup> LeDuc, L., 2015, 'Referendums and Deliberative Democracy', *Electoral Studies*, 38, pp.139–48.

<sup>21</sup> Jackson, K., and A. McRobie (1998), *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?*, Aldershot: Ashgate, pp.167–8.

<sup>22</sup> Constitution Committee, 2010, *Referendums in the United Kingdom* (Twelfth Report of Session 2009–10), HL Paper 99, London, House of Lords, p.38.

what they should be. If the Electoral Commission were able to recommend a multi-option question, this would need to be taken into account in the parliamentary timetable for scrutinising the legislation: parliament would need sufficient time to consider the recommendation.

## Which voting system should be used?

- 8.34. As shown in the Swedish example above, multi-option referendums using First Past the Post risk unclear outcomes. They can potentially lead to perverse results in which an option that would defeat every other option in a series of binary votes fails to win. It could easily be viewed as illegitimate to make major changes on the basis of the votes of a minority and therefore the use of this voting system is clearly undesirable. Both preferential voting and two-referendum run-off processes avoid these problems and have specific advantages and disadvantages.
- 8.35. Preferential voting can promote compromise and ensure that proposals have broad support. Voters in England and Wales have little experience of such voting mechanisms, so some might fear that this could cause confusion. However, similar concerns were raised prior to the multi-option referendum in Jersey, where in fact fewer than 1% of ballot papers were spoilt. Almost half the voters expressed a second as well as a first preference, so that 90% of voters' preferences were included in the final round of counting.<sup>23</sup> Nonetheless, preferential voting carries greater risks of confusion the more options there are on the ballot paper. Therefore, it may not be appropriate for referendums with more than three options.
- 8.36. Two-referendum run-off processes may be better suited to questions with more than three options. There could be concerns that voters may disengage with the process between the two referendums, leading to a lower turnout at the second referendum and reduced legitimacy for the final outcome. However, in the New Zealand flag referendums of 2015/16 the second referendum achieved a higher turnout than the first: rising from 48.7% to 67.7%. It also rose between the 1992 and 1993 electoral reform referendums, but that was at least partly because the second vote, unlike the first, was held at the same time as an election.
- 8.37. Another fear with two-referendum run-off processes is that they could create perverse incentives for supporters of the status quo to vote and campaign for the least likely change option in the first round, in order to boost the chances of the status quo in the second round. In addition, model A creates difficult tactical voting decisions for voters whose preference ordering puts the status quo somewhere in the middle of the other options: do they support change or the status quo in the 'gateway question'? Model B, meanwhile, denies opponents of change an opportunity to advocate for their position until the second referendum, which may be politically untenable.

<sup>23</sup> 'Referendum on the States Assembly Composition', gov.je, [website] (accessed 12 June 2018).

- 8.38. The best voting system will depend on the issue put to a referendum and the circumstances surrounding it. The Electoral Commission is best placed to assess which voting system is most appropriate during question testing.

### Conclusions/Recommendations

25. Although they are not appropriate in all circumstances, referendums where voters can choose among multiple options may sometimes be preferable to those which offer a binary choice. Allowing voters to choose between a number of different options can indicate where the broadest possible agreement on change lies and thereby help to promote unity rather than polarisation. **When a referendum is proposed, the possibility of presenting voters with multiple options should be borne in mind.**

26. **The Electoral Commission's remit should be clarified to specify that, if, during the testing of a proposed question, voters express confusion about the omission of a specific option or options, the Commission can recommend to parliament and government that a multi-option referendum be held.** Final decision-making on the number and content of the options to include should remain, however, with elected representatives.

27. The Commission notes that there are a number of models for holding multi-option referendums. If there are only three options, a single referendum using preferential voting may prove most suitable. If there are more than three options, decision-making becomes more complex, and may require other models such as run-off processes. In such cases the Electoral Commission should be fully involved in testing and advising upon the structure of the question process, as most appropriate for the subject matter of the referendum.

# 9. Thresholds and Other Safeguards

- 9.1. Some countries place safeguards on referendum results so that significant change is not mandated by a narrow or temporary majority, or without the support of a significant proportion of the electorate. The most common safeguard is to require a threshold beyond or in addition to the default of 50% of votes cast. Such thresholds may take a variety of forms, including:
- **turnout thresholds:** a specified percentage of the electorate is required to cast a vote
  - **electorate thresholds:** a specified percentage of the eligible electorate is required to vote for the change
  - **multiple majority thresholds:** a majority is required not only across the country as a whole, but also in a specified number of geographical areas within it
  - **supermajority thresholds:** the percentage of actual voters who support the change must exceed a threshold greater than 50%.
- 9.2. There are further options beyond thresholds, such as a requirement to hold two referendums on the same question separated by a period of reflection. This chapter explores the different types of safeguards and considers whether they should be applied in the UK.

## UK Experience

- 9.3. Most referendums held in the UK have been subject to no requirements beyond the default threshold. The sole exception is that an electorate threshold was required for the 1979 devolution referendums (see Box 9.1).
- 9.4. Since the 1979 referendums there have been a number of unsuccessful attempts to require thresholds in subsequent referendums. Lord Rooker moved an amendment to the Parliamentary Voting System and Constituencies Bill 2010–11 requiring 40% of the electorate to vote in favour of AV in order for the referendum to be binding.<sup>1</sup> An SNP amendment to the European Union Referendum Bill 2015 sought to require a UK-wide majority and majorities in England, Scotland, Wales and Northern Ireland. The 'quadruple lock', as it became known, was rejected at House of Commons committee stage.<sup>2</sup>

<sup>1</sup> Gay, O., and Horton, L., 2011, *Thresholds in Referendums*, SN/PC/02809, London, House of Commons Library.

<sup>2</sup> House of Commons Hansard, 16 June 2015, Vol 597, Column 283–85.

### Box 9.1. Electorate thresholds in the 1979 devolution referendums

The Scotland Act 1978 and the Wales Act 1978 required that at least 40% of the total electorate voted Yes in a referendum in order for their provisions to be implemented. This additional requirement was the result of a backbench amendment proposed by George Cunningham, a Labour MP who was opposed to devolution.<sup>3</sup>

The threshold requirement had no effect on the result of the Welsh referendum, as a majority voted against the proposals. In Scotland, however, though a majority (51.6%) of voters voted Yes, turnout was only 63.6%, meaning that only 32.8% of the electorate had voted for devolution. The Scotland Act was therefore repealed.

This outcome was particularly controversial due to suspected inaccuracies in the electoral register. In the absence of a modern rolling electoral register, the Secretary of State for Scotland was tasked with determining the number of ineligible voters on the register. The official figure of c.90,000 was much lower than academic calculations, some of which put the number at 630,000.<sup>4</sup> If that higher figure had been correct, the threshold would very nearly have been met. In his written evidence, David Torrance told the Commission that 'the so-called "40%" rule was widely seen as unfair, and the effect was that all future referendums in Scotland operated on the basis that 50 per-cent-plus-one would constitute a majority.'

- 9.5. In the absence of safeguards, several constitutional changes have been mandated by narrow referendum majorities or low turnouts. The National Assembly for Wales was established on a 50.1% vote for change and a turnout of 50.3%, while the London Mayor and Assembly were agreed on a turnout of 34%.

## International practice

### Turnout thresholds

- 9.6. Turnout thresholds are used for at least some referendums in countries such as Italy, Malta, and the Netherlands, as well as in much of Eastern Europe. The threshold is most commonly set at 50% – a majority of the electorate. This applies to all referendums in Lithuania<sup>5</sup> and abrogative referendums in Italy (see box 9.2).<sup>6</sup> In these cases, if a referendum fails to reach 50% turnout, the result is declared void. A 50% turnout is required in Portugal, but only for a referendum to be binding.<sup>7</sup> Parliament may still implement a result that has failed to achieve the quorum but it is not obliged to do so. The Netherlands requires a lower turnout threshold of 30% for a citizen-initiated referendum to be valid.<sup>8</sup>

<sup>3</sup> Institute for Government, 2011, *Scottish Devolution (1997–9)*, Institute for Government Scottish Devolution Policy Reunion (accessed 13 June 2018).

<sup>4</sup> Bogdanor, V., 1980, 'The 40% rule', *Parliamentary Affairs*, 33(1), pp.249–63, at p.254.

<sup>5</sup> Law on Referendum 4 June 2002 No IX-929 (Lithuania) (rev. 2012), article 7(1), 8(1).

<sup>6</sup> The Constitution of the Italian Republic 1947 (rev. 2012), article 75.

<sup>7</sup> Constitution of the Portuguese Republic 1976 (rev. 2005), article 115.

<sup>8</sup> Consultative Referendum Act 2014 (Netherlands), c.1 art 2.

**Box 9.2. Turnout thresholds in Italy**

In Italy, of those abrogative referendums that have failed since 1990, 79% did so because they did not meet the turnout threshold, compared to 21% that did not achieve 50% of valid votes cast. It is often easier for opponents of a proposal to defeat it by encouraging abstention, rather than by convincing voters to vote against it. Referendums expert Pier Vincenzo Uleri notes that political parties have often 'favoured, or even promoted, demobilisation'.<sup>9</sup>

At least one Italian referendum, in 1999, failed because inaccuracies in the electoral register led to an incorrect indication of turnout. 91.5% of voters supported change; but recorded turnout was 49.6%. The electoral rolls were said to include 'many who were either dead or uncontactable';<sup>10</sup> it is widely assumed that, with accurate data, the change would have passed.<sup>11</sup>

**Electorate thresholds**

- 9.7. Electorate thresholds are also used in a range of countries, including Denmark, Uruguay and, until 2011, Hungary. Denmark, for example, requires 30% of the electorate to reject a bill that has passed through the legislature in order for the bill to be void. The Danish constitution may be amended only if 40% of the electorate vote in favour of the change.<sup>12</sup> In addition to turnout thresholds for all referendums, Lithuania has electorate thresholds that vary from one third to 75% of the electorate depending on the subject matter.<sup>13</sup>

**Multiple majority thresholds**

- 9.8. Multiple majority thresholds are mainly used in federal states, such as Australia and Switzerland. In Australia, a majority of electors and a majority of states – four out of six – must vote in favour of a proposed constitutional amendment in order for it to receive royal assent.<sup>14</sup> Swiss federal referendums on constitutional amendments or on 'accession to organisations for collective security or to supranational communities' require a majority of votes both overall and in a majority of the twenty-six cantons.<sup>15</sup>

<sup>9</sup> Uleri, P.V., 2002, 'On Referendum Voting in Italy: YES, NO or Non-Vote? How Italian Parties Learned to Control Referendums', *European Journal of Political Research*, 41(6), pp.868–83, at p.868.

<sup>10</sup> Donovan, M., 2000, 'The End of Italy's Referendum Anomaly?', in Gilbert, M., and Pasquino, G. (eds.), *Italian Politics: The Faltering Transition* (Italian Politics: A Review: Volume 15), New York, Berghahn, p.61.

<sup>11</sup> Renwick, A., 2010, *The Politics of Electoral Reform: Changing the Rules of Democracy*, Cambridge, Cambridge University Press, p.122.

<sup>12</sup> The Constitutional Act of Denmark 1953, section 42(5) & section 88.

<sup>13</sup> The Constitution on Lithuania 1992 (rev. 2006), article 149; Law on Referendum 4 June 2002 No IX-929 (Lithuania) (rev. 2012) article 7(2), (3) and (4).

<sup>14</sup> Commonwealth of Australia Constitution Act 1900 (rev. 1985), chapter VIII, article 128.

<sup>15</sup> Federal Constitution of the Swiss Confederation 1999 (rev. 2002), article 140.

## Supermajorities

- 9.9. Though supermajority thresholds are used in legislatures in many countries for constitutional amendments, and sometimes for certain other matters, they are strikingly rare in referendums. However, they have been used at the provincial level in Canada. Referendums on electoral reform in the Canadian provinces of British Columbia (2005 and 2009) and Ontario (2007) required that 60% of votes cast supported the proposals in order for reform to go ahead. This was decisive in British Columbia in 2005: 57.7% of voters supported the change, but the high threshold preserved the status quo.<sup>16</sup>

## Simulating thresholds for past UK referendums

- 9.10. Table 9.1 sets out what the result of past referendums in the UK would have been had thresholds such as those described above been in place, and assuming that voting patterns had been unchanged as a result. The shaded rows are referendums that did not pass. Dark shaded cells indicate referendums that did pass in fact but would not have passed had the specified threshold been applied. For the purposes of this table, the For result is that in favour of change, while Against is in favour of the status quo.
- 9.11. The caveat that Table 9.1 assumes unchanged voting patterns is important: in reality, it is very likely that at least some types of threshold would affect the votes cast. For example, as noted in Box 9.2, above, a turnout threshold could lead to higher abstention. Multiple majority requirements might lead to changed patterns of campaigning. Table 9.1 should therefore be interpreted as giving only a broad indication of the effects that alternative thresholds might have had.

<sup>16</sup> Beramendi, V., et al., 2008, *Direct Democracy, The International IDEA Handbook*, Stockholm, International Institute for Democracy and Electoral Assistance, p.18.

**Table 9.1. Simulation applying threshold requirements to past UK referendums**

Referendum	Voting figures				Possible thresholds						
	For (%)	Against (%)	Turnout (%)	For as % electorate	50% of vote	Turnout	Electorate		Supermajority		Multiple-majority <sup>a</sup>
							40%	30%	55%	60%	
1973 Northern Irish border poll	98.9	1.1	58.7	58.0	✓	✓	✓	✓	✓	✓	n/a
1975 EEC	67.2	32.8	64.0	43.0	✓	✓	✓	✓	✓	✓	✓
1979 Scottish devolution	51.6	48.4	63.6 <sup>b</sup>	32.9	✓ <sup>c</sup>	✓	✗	✓	✗	✗	n/a
1979 Welsh devolution	20.3	79.7	58.8	11.9	✗	✗	✗	✗	✗	✗	n/a
1997 Scottish devolution (Scottish Parliament)	74.3	25.7	60.2	44.7	✓	✓	✓	✓	✓	✓	n/a
1997 Scottish devolution (tax varying powers)	63.5	36.6	60.2	38.2	✓	✓	✗	✓	✓	✓	n/a
1997 Welsh devolution	50.3	49.7	50.1	25.2	✓	✓	✗	✗	✗	✗	n/a
1998 London devolution	72.0	28.0	34.0	24.4	✓	✗	✗	✗	✓	✓	n/a
1998 Good Friday Agreement	71.1	28.9	81.1	57.6	✓	✓	✓	✓	✓	✓	n/a
2004 North East England devolution	22.1	77.9	47.1	10.4	✗	✗	✗	✗	✗	✗	n/a
2011 Welsh devolution	63.5	36.5	35.6	22.2	✓	✗	✗	✗	✓	✓	n/a
2011 AV referendum	32.1	67.9	42.2	13.5	✗	✗	✗	✗	✗	✗	✗
2014 Scottish independence	44.7	55.3	84.6	37.8	✗	✗	✗	✗	✗	✗	n/a
2016 EU referendum	51.9	48.1	72.2	37.4	✓	✓	✗	✗	✗	✗	✗

**Notes:** This example requires a majority (3 out of 4) of nations of the UK to also vote in favour of the proposal. The results would be the same if majorities in all four nations were required, as all four supported European Community membership in 1975 (source: Butler, D., and Kitzing, U., 1996, *The 1975 Referendum*, London, Macmillan, p.266. A multiple majority threshold such as this is not applicable to referendums held in only one of the UK's constituent parts.

Unadjusted turnout was 63.0%.  
When calculating whether 40% of

those eligible to vote had voted in favour of the proposal, adjustments to the estimated electorate were made to allow for deaths, students and nurses registered at more than one address, convicted prisoners, and those who were on the register but had not yet reached the age of 18 years. This yielded the turnout estimate shown here.

Scottish devolution did not proceed as a result of the 1979 Scottish referendum as a threshold of 40% of the electorate was required.

## Should thresholds be required in the UK?

- 9.12. Some of the arguments for and against the use of special thresholds in referendums are general, applying to any kind of threshold. Others are specific to individual threshold types. The following paragraphs consider each of these in turn.

### Thresholds in general

- 9.13. The argument in favour of thresholds beyond the default 50% + 1 rule is that they promote stability and prevent what may be major change on the basis of only limited support. As described in chapter 1, many countries entrench key constitutional principles through complex amendment procedures, so that the basic rules and structures of the state are not changed unless there is clear and broad support for doing so. Requiring safeguards when such decisions are taken through a referendum is consistent with this approach. In evidence to the Commission, Vicky Seddon from Sheffield for Democracy argued that ‘in any mature democracy, checks and balances are essential if referenda as tools for democracy are to have credibility and legitimacy’.<sup>17</sup>
- 9.14. The existence of a clear and secure majority may also enhance the legitimacy of a major decision, leading to greater acceptance among those on the losing side. In our Edinburgh seminar, for example, Joyce McMillan (who supported independence in the 2014 Scottish referendum) reiterated a point she had made previously, that a narrow Yes victory in that vote would have produced a very difficult birth for a new independent country – making it harder for the community to unite around the new settlement.<sup>18</sup>
- 9.15. The UK, however, has no history of applying special thresholds. With only very few recent exceptions – such as the early dissolution of parliament under the Fixed-term Parliaments Act 2011 or changes to the electoral systems of the Scottish Parliament or Welsh Assembly<sup>19</sup> – law is made in the UK through simple majorities. Nor are any thresholds imposed for the election of representatives. To apply special thresholds only to referendums would require clear justification. It would risk creating a perception that the political elite was imposing added hurdles in order to thwart the voters’ will. In its written evidence to the Commission, the Constitution Society argued that the UK’s ‘strong majoritarian tradition’ meant that referendum thresholds would be unlikely to command public support.

### Conclusions/Recommendations

28. For UK referendums, the default threshold is 50% of total votes cast. It is often argued that this is insufficient to mandate major change, especially if turnout is poor, and that supplementary or varied thresholds should therefore be required. However, a simple majority is considered sufficient for electing MPs and for almost all parliamentary decisions, even those of major constitutional importance. Therefore, the Commission believes it would be inconsistent to require supplementary thresholds for referendums only.

<sup>17</sup> Seddon, V., 2018, Written Evidence to the Independent Commission on Referendums.

<sup>18</sup> McMillan, J., 2017, ‘Thatcher may have been right about referendums’, *The Scotsman*, 22 December (accessed 27 April 2018).

<sup>19</sup> Scotland Act 2016, section 11; Wales Act 2017, section 9.

- 9.16. There are also additional arguments as to why specific types of threshold requirements should not be used.

## Turnout thresholds

- 9.17. Turnout thresholds follow the logic that, for a referendum to be considered a legitimate expression of the public will, a high proportion of the public should participate. However, turnout thresholds often have paradoxical effects: rather than promoting democratic participation they can depress it, as demonstrated by the Italian evidence cited in Box 9.2.
- 9.18. The Venice Commission's *Code of Good Practice on Referendums* advises against a turnout threshold on the basis that 'it assimilates voters who abstain to those who vote no'.<sup>20</sup> This means that opponents of referendums can tactically abstain to prevent change: '[f]or example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority.'<sup>21</sup> There are therefore incentives for opponents to encourage disengagement rather than democratic participation.
- 9.19. A further issue is that turnout is calculated using the electoral register to determine the number of eligible voters. Electoral registers can be subject to two kinds of error: *inaccuracies* are entries that should not be there – for example, because the person has died, is no longer at the address or no longer eligible to vote; *incompleteness* means that some people who are eligible to register are not registered. The Electoral Commission's most recent calculations of accuracy and completeness date from 2015, when it estimated that the parliamentary registers were 91% accurate and 85% complete.<sup>22</sup> If we are interested in turnout among those who are eligible to register, the two kinds of error partly (though not entirely) cancel each other out. If we are interested in turnout among those who are correctly registered, incompleteness means that official turnout data are always underestimates: a group of academics has recently calculated that UK turnout understood this way has been underestimated in recent elections by on average 9.4 percentage points.<sup>23</sup> Under a turnout threshold, inaccurate entries would be treated as voters who had abstained. These abstentions alone could prevent a referendum from resulting in change, as was believed to have happened in Italy in 1999 (Box 9.2).

## MECHANISMS FOR PROMOTING TURNOUT

- 9.20. Nevertheless, the Commission recognises the problems associated with low turnouts. Given the disadvantages of turnout thresholds, it has examined mechanisms for boosting turnout.
- 9.21. One approach to encouraging high turnouts would be to hold referendums on the same day as other polls. The 2011 AV referendum, for example, was held on the same day as devolved and local elections. Whilst this may promote turnout and has the added benefit of reducing the costs of the referendum, it also has major disadvantages. First, other elections may distract attention from the referendum issues. Second, party political elections can hamper cross-party working on referendum campaigns. The Electoral Commission

<sup>20</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007), p.13 (accessed 12 June 2018).

<sup>21</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, p.122.

<sup>22</sup> Electoral Commission, 'Accuracy and Completeness of Electoral Registers', Electoral Commission [website] (accessed 1 June 2018).

<sup>23</sup> Mellon, J., et al., 2018, 'Opening the Can of Worms: Most Existing Studies of Aggregate Level Turnout are Meaningless', SSRN Electronic Journal, p.6 (accessed 1 June 2018).

recommends that referendums – particularly those on ‘significant constitutional questions’ that require cross-party working – ‘should not normally be held on the same day as other significant or scheduled polls.’<sup>24</sup>

- 9.22. Another approach would be to introduce compulsory voting, as in Australia. However, the UK does not have compulsory voting for elections, and there is no clear justification for treating referendums differently.
- 9.23. Turnout tends to correlate with the level of public interest in the subject. Both the 2016 EU referendum and the 2014 Scottish independence referendum had turnouts significantly higher than at the previous general or Scottish parliamentary elections. If an issue is of genuine interest to voters, therefore, good turnout can be expected. If, by contrast, an issue is unlikely to generate significant public engagement, and therefore a sufficient turnout, there is good reason to say that it is not an appropriate topic for a referendum. Consideration should be given to this prior to the decision to hold the referendum.

## Electorate thresholds

- 9.24. Like turnout thresholds, electorate thresholds are designed to ensure that a proposal has sufficient support among the population and to ‘prevent active minorities from imposing their will upon a passive majority.’<sup>25</sup> However, they are also subject to many of the same criticisms about inaccuracies in the electoral roll as turnout thresholds. Following the 1979 referendum on devolution in Scotland, for which a 40% electorate threshold was applied, some blamed inaccuracies in the electoral roll for the failure of the Yes vote to meet the required quorum (see Box 9.1 above).<sup>26</sup>
- 9.25. The Venice Commission also recommends against using an electorate threshold ‘since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold’.<sup>27</sup>

### Conclusions/Recommendations

29. The Commission recognises that a significant turnout in a referendum is desirable to ensure that the result has legitimacy. However, **there are a number of problems with the use of turnout and electorate thresholds that mean they are not recommended.** Turnout thresholds can encourage opponents of change to undertake disengagement campaigns, as it is easier to promote abstention than to convince voters to vote against the proposal. This is harmful to democratic culture and debate. Both turnout and electorate thresholds could potentially be compromised by small inaccuracies in the electoral register.

<sup>24</sup> Electoral Commission, 2016, *The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK’s Membership of the European Union*, London, Electoral Commission, p.36 (accessed 12 June 2018).

<sup>25</sup> Anguiar-Conraria, L., and Magalhães, P. C., 2010, ‘How Quorum Rules Distort Referendum Outcomes: Evidence from a Pivotal Voter Model’, *European Journal of Political Economy*, 26(4), pp.541–57, at p.542.

<sup>26</sup> Winetrobe, B.K., 1997, *The Referendums (Scotland and Wales) Bill [Bill 1 1997–98]*, Research Paper 97/61, London, House of Commons Library.

<sup>27</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, p.13.

30. The Commission notes that at the last two referendums – the 2014 Scottish independence referendum and the 2016 EU referendum – turnout was higher than at the preceding general elections. An issue that is suitable for a referendum should inspire significant public engagement, rendering turnout thresholds unnecessary. **Parliaments and assemblies should avoid putting issues to a referendum that are unlikely to generate sufficient interest.**

31. Holding referendums on the same day as other elections should not be used as a method of ensuring higher turnout. This practice draws attention away from the referendum issues and inhibits cross-party campaigning on the referendum. The Commission agrees with the Electoral Commission's recommendation that referendums **should not normally be held on the same day as other electoral events**

## Multiple majority thresholds

- 9.26. Multiple majority thresholds are designed to protect minorities and ensure that proposals have broad support rather than support only in certain areas. They might potentially be used in the UK to ensure that there was support for a proposal in a majority of the constituent parts of the Union – as was proposed by the SNP in 2015–16 (see paragraph 9.4).
- 9.27. The Commission is sympathetic to the idea that decisions of major importance should have support across the UK. But there are two arguments against the introduction of multiple majority thresholds. First, the UK's constituent parts are very different from each other in terms of population. Given this, the legitimacy of an outcome could be called into question if a multiple majority threshold prevented a change that the great majority of the UK population favoured. If a multiple majority threshold required a majority in three of the four nations, the votes of 7.5% of the population (the combined population of Wales and Northern Ireland<sup>28</sup>) could potentially determine the outcome of a referendum. This might be justified if a constitutional change was likely to have a disproportionate effect on one (or several) of the nations. But if this were the case, a UK-wide referendum might not be the best mechanism for decision-making on the matter.
- 9.28. Second, unlike Australia and Switzerland, where multiple majority thresholds are used, the UK is not a federal state. Requiring the consent of all, or a majority, of the devolved nations to take a decision on a policy matter reserved to the UK parliament would reflect a principle that is not currently present in the UK's constitutional arrangements. It is not the Commission's place to recommend such a shift. At the same time, the Commission recognises that the constitution is subject to change. In particular, the

<sup>28</sup> Population of Wales is 4.7% and the population of Northern Ireland is 2.8%; ONS, 2017, 'Revised population estimates for England and Wales: mid-2012 to mid-2016', Statistical bulletin (accessed 13 June 2018).

process of leaving the European Union is likely to alter the balance of power within the UK. It seems possible that it may lead to a more federal constitutional structure, in which the devolved legislatures gain strong influence over UK-wide policy frameworks on some issues. In the light of this, the question of multiple majority thresholds might be revisited.

### Conclusions/Recommendations

32. The Commission is sympathetic to the argument that there should be support for major constitutional changes in all parts of the UK. However, the UK is not a federal state and the UK's present constitutional arrangements do not afford the devolved administrations veto powers over decisions on reserved matters. As such, to apply this principle to referendums through **the application of multiple majority thresholds would represent a fundamental shift from the constitutional status quo. It is not the place of the Commission to recommend this.**

## Supermajorities

- 9.29. As noted in paragraph 9.9, supermajorities are rarely applied to referendums internationally, even in countries that require them in the legislature when passing a constitutional amendment. In the UK, they are extremely rare even in parliamentary decision-making. To apply supermajorities to referendums only would seem inconsistent.
- 9.30. The House of Lords Constitution Committee recommended in its report on referendums that there should be a 'general presumption against the use of thresholds' but suggested that these could be used in 'exceptional circumstances'.<sup>29</sup> While not specifying what such circumstances would be, the report discussed two possible examples: referendums on major constitutional issues; and referendums where communities are divided, as in the case of a border poll in Northern Ireland. Nonetheless, the difficulties set out above apply to these cases as they do to others.

### Conclusions/Recommendations

33. Supermajority requirements are extremely rare in other mechanisms for political decision making in the UK. To impose them for popular but not parliamentary decisions would challenge legitimacy. **It would therefore be inappropriate to require a supermajority for a referendum.**

<sup>29</sup> Constitution Committee, 2010, *Referendums in the United Kingdom* (Twelfth Report of Session 2009-10), HL Paper 99, London, House of Lords, p.44.

## Double referendum requirements

- 9.31. A different approach to thresholds would be to require two referendums with a period for reflection in between, on occasions when the first result is narrow. A central argument for this approach is that it would be more difficult to question the legitimacy of a proposal that had been accepted twice by voters, even if by a narrow margin. Such a rule would also ensure that preferences for the change were stable and not the result of short-term political events or public mood. Stable preferences are particularly important for significant constitutional changes which would be difficult to reverse.
- 9.32. There is little international precedent for referendum processes of this kind. But the concept of voting twice is at the heart of the bicameral system that exists in the UK and many other democracies. UK legislation passes through both the Commons and the Lords; the defeat or amendment of the bill in the second chamber (which is usually the Lords, but sometimes the Commons if the bill is introduced in the Lords) allows time for reflection on the arguments that took place during its passage through the first chamber, and sometimes results in compromise and change. Reflection takes place not only in parliament, but often also in the media and among the wider public once the initial decision becomes known.
- 9.33. Taking an approach such as this in the case of referendums would overcome some of the objections to special thresholds set out above. A proposal for change with clear majority support would never be blocked; it would only be delayed, if the initial majority in its favour was small.
- 9.34. Nevertheless, given the UK's majoritarian traditions, this approach could still be viewed by some as imposing an illegitimate hurdle in the way of implementing voters' wishes. It would also add to the complexity of referendum processes.

## Other ways of ensuring legitimacy

- 9.35. The preceding paragraphs suggest that there are considerable disadvantages in a system that allows major changes to be made on the basis of a narrow majority vote or a vote in which many eligible electors have not participated. At the same time, there are great difficulties associated with any kind of formal threshold. It is therefore valuable to consider alternative means of ensuring that a referendum result, and by implication any change mandated by it, commands public acceptance and legitimacy. Attention may best be focused on the decisions and processes preceding a referendum, rather than the validity requirements at the very end. Three considerations in particular may be noted.
- 9.36. The first is for politicians and others calling for referendums to exercise restraint, by avoiding proposing referendums on topics unlikely to generate wide public interest and participation. This would make it less likely that an important matter would be decided on the basis of limited turnout. The calling of a referendum
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on major change might also be delayed until there is good reason to think it reflects voters' settled will. This would increase the likelihood of a final decision that will be accepted on both sides of the argument, allowing the community to come together afterwards. It may not always be feasible to follow such principles, but they may serve as useful guidelines. It is apparently the approach that Scottish First Minister Nicola Sturgeon favours: she said in 2015 that a further referendum on Scottish independence should not take place until polls persistently put support for the proposition at 60%.<sup>30</sup>

- 9.37. Second, as outlined in chapter 1, internationally referendums often come at the end of a constitutional amendment process where different branches of government are required to approve the amendment at various stages. These multiple decision points can act as a safeguard. In the absence of a codified constitution, it would be difficult to institutionalise such a procedure in the UK. But holding referendums post-legislatively would ensure that proposals for change had parliamentary approval, although not necessarily parliamentary support, and could act as a 'double lock' on major constitutional decisions.
- 9.38. Third, the processes set out elsewhere in this report for preparing for referendums, for strengthening the quality of information available to voters during referendums, and for ensuring clarity on the proposal put to a referendum, could help significantly by embedding the referendum vote within wider processes of discussion and deliberation. This could enhance the legitimacy of the referendum result and ensure that it commanded public acceptance without the need for threshold requirements.

## Conclusions/Recommendations

34. While it does not recommend the use of special thresholds, the Commission does acknowledge the case for ensuring that the result of a referendum, especially on a decision that would be difficult to reverse, reflects the settled will of a clear majority of voters. The Commission believes this will be best achieved by locating referendums firmly within broader processes of careful policy development and discussion, as set out elsewhere in this report.

<sup>30</sup> *The Scotsman*, 2015, 'SNP: 60% Support Needed Before Next Independence Referendum', 18 October (accessed 1 June 2018).

# **Part 3: The Regulation of Referendum Campaigns**

# 10. The Role of Government in Referendum Campaigns

- 10.1. There is wide agreement that the principle of equality of opportunity requires governments not to use the resources of the state in support of one side during a referendum campaign. This view is strongly supported by the Venice Commission in its *Code of Good Practice on Referendums*.<sup>1</sup>
- 10.2. Beyond fairness, there is also evidence that, if a government strongly supports a particular outcome, voters will be more likely to use their votes to express an opinion on the government of the day, rather than on the question put to them,<sup>2</sup> which is undesirable when seeking a considered public response on the question.
- 10.3. Conversely, any limits on government should be balanced with freedom of speech, and the government's need to sustain its usual activities during a referendum period.
- 10.4. This chapter outlines the restrictions currently placed on governments and other public bodies during UK referendum campaigns, and examines ways in which they could be reformed and supplemented so that they most effectively serve their intended purpose.

## UK Experience

### Government intervention in referendum campaigns pre-PPERA 2000

- 10.5. Governments have generally not been neutral parties in referendums in the UK. Rather, they have publicly expressed a preference for one outcome over the other. That governments and the ministers within them should express their views is not controversial. But the use of public resources to promote one side of the debate has often attracted criticism. In the lead up to the 1975 European Community referendum, the UK government distributed pamphlets for each side of the campaign to all households. However, it also distributed a government pamphlet summarising the deal the government had negotiated and setting out its case for accepting that deal. There was no pretence of neutrality and the front cover contained a quotation from the Prime Minister stating: 'Her Majesty's Government have decided to recommend to the British people to vote for staying in the Community'.<sup>3</sup>

<sup>1</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007), p.6, [http://www.venice.coe.int/webforms/documents/CDL-AD\(2007\)008rev.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2007)008rev.aspx) (accessed 12 June 2018).

<sup>2</sup> Franklin, M., 2002, 'Learning from the Danish Case: A Comment on Palle Svensson's Critique of the Franklin Thesis', *European Journal of Political Research*, 41(6), pp.751–7, at p.753.

<sup>3</sup> HM Government, 1975, 'Britain's New Deal in Europe' [leaflet], London, HM Government.

**Source:** HM Government, 1975, 'Britain's New Deal in Europe' [leaflet], London, HM Government.

**Figure 10.1. Government leaflet from 1975 referendum**



- 10.6. Problems have also arisen when a government has had a stated position on a referendum issue and has also been responsible for providing balanced information. During the 1997 devolution referendum campaigns, leaflets summarising the UK government's devolution proposals were distributed to every household in Scotland and Wales. Although the government's stated intention was to provide impartial information, the material was seen by No campaigners as biased towards a Yes vote. Accusations of unfairness were intensified by the fact that no free postal mailings were available to campaign groups during this referendum. The No campaign therefore felt that it was disadvantaged in its ability to reach voters directly.<sup>4</sup>
- 10.7. The Nairne Commission noted how a government's distribution of material during referendum campaigns could amount to campaigning. For this reason, it recommended that the publication and distribution of information should be handled by an independent body not subject to government control or direction.<sup>5</sup> The 1998 CSPL report also examined accusations of bias directed at the government-produced leaflets during the 1997 devolution referendums. It concluded that governments should 'remain neutral and should not distribute at public expense literature, even purportedly "factual" literature, setting out or otherwise promoting its case'.<sup>6</sup> The ensuing legislation, PPERA, did not implement this recommendation to its full extent, only limiting the use of government resources for referendum-related activities in the final 28 days of the campaign.

## Section 125 of PPERA 2000

- 10.8. Section 125 of PPERA places restrictions on government and other public bodies during referendum campaigns. It prohibits the publication of any material relating to the referendum or the subject of the referendum during the 28 days before polling day (see Box 10.1).

<sup>4</sup> BBC, 1997, 'Two Million Devolution Leaflets for Scottish Homes', *Politics 97* [website], (accessed 12 June 2018).

<sup>5</sup> Nairne, P. et al., 1996, *Report of the Commission on the Conduct of Referendums*, London, Constitution Unit, p.61.

<sup>6</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom* (Fifth Report of the Committee on Standards in Public Life), Vol. 1, Cm 4057-I, London: HM Government, p.169, (accessed 12 June 2018).

**Box 10.1. Political Parties, Elections and Referendums Act 2000, section 125**

**125** Restriction on publication etc. of promotional material by central and local government etc.

- (1) This section applies to any material which—
- (a) provides general information about a referendum to which this Part applies;
  - (b) deals with any of the issues raised by any question on which such a referendum is being held;
  - (c) puts any arguments for or against any particular answer to any such question; or
  - (d) is designed to encourage voting at such a referendum.
- (1) Subject to subsection (3), no material to which this section applies shall be published during the relevant period by or on behalf of—
- (a) any Minister of the Crown, government department or local authority; or
  - (b) any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority.
- (3) Subsection (2) does not apply to—
- (a) material made available to persons in response to specific requests for information or to persons specifically seeking access to it;
  - (b) anything done by or on behalf of the Commission or a person or body designated under section 108 (designation of organisations to whom assistance is available);
  - (c) the publication of information relating to the holding of the poll; or
  - (d) the issue of press notices; and subsection (2)(b) shall not be taken as applying to the British Broadcasting Corporation or Sianel Pedwar Cymru.
- (4) In this section—
- (a) “publish” means make available to the public at large, or any section of the public, in whatever form and by whatever means (and “publication” shall be construed accordingly);
  - (b) “the relevant period”, in relation to a referendum, means the period of 28 days ending with the date of the poll.

## The application of section 125

- 10.9. Prior to the 2011 Welsh devolution referendum, the Electoral Commission requested that the UK government and the Welsh government adopt section 125 restrictions for the entire referendum period. The Welsh government agreed; the UK government did not, but it did declare a neutral position in the referendum.<sup>7</sup>
- 10.10. There have also been attempts to remove some of the restrictions on government activity. The European Union Referendum Bill 2015–16 as introduced included provisions to disapply section 125 of PPERA 2000 for the 2016 referendum. Then Minister for Europe David Lidington said the restrictions would disrupt the government’s ability to conduct ‘ordinary day-to-day EU business’ and ‘make it impossible to explain to the public what the outcome of the renegotiation was and what the Government’s view of that result was’.<sup>8</sup>
- 10.11. After concerns were raised by the Electoral Commission and the House of Commons Public Administration and Constitutional Affairs Committee (PACAC), the government removed the section disapplying section 125 from the bill. Instead, it inserted a power enabling ministers to modify the application of 125 and to exempt certain communications, following consultation with the Electoral Commission.<sup>9</sup> Nonetheless, though it abided by the section 125 restrictions during the pre-EU referendum regulated period, the UK government was heavily criticised for a leaflet sent out to all households just before section 125 came into force (see Box 10.2).

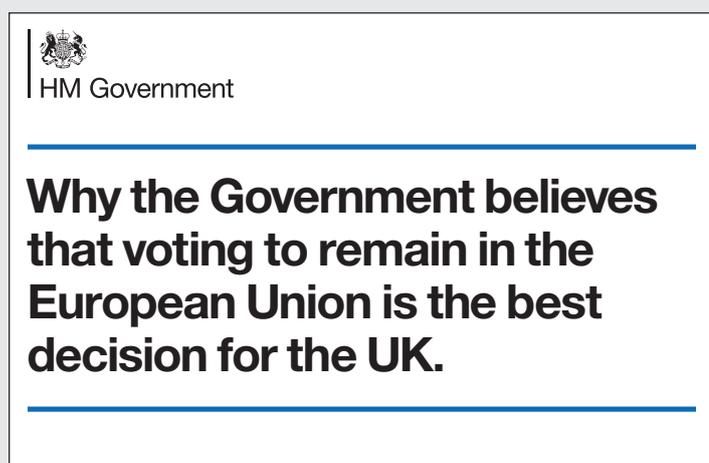
<sup>7</sup> Electoral Commission, 2011, [Report on the Referendum on the Law-making Powers of the National Assembly for Wales, 3 March 2011](#), London, Electoral Commission, p.15, (accessed 12 June 2018).

<sup>9</sup> Electoral Commission, 2016, [The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK’s Membership of the European Union](#), London, Electoral Commission, pp.26–7, (accessed 12 June 2018).

<sup>8</sup> House of Commons Hansard, 16 June 2015, Vol 597, Column 233–4.

### Box 10.2. The UK government leaflet on the EU referendum

Less than three months before the EU referendum, the UK government spent £9.3 million of public funds distributing a leaflet entitled 'Why the government believes that voting to remain in the EU is the best decision for the UK', the purpose of which, it claimed, was 'to help the public make an informed decision in the upcoming EU referendum.'<sup>10</sup> The leaflet outlined the government's arguments for remaining in the EU, and encouraged voting.



The leaflet drew criticism from prominent Leave campaigners. Peter Bone MP called it 'an inexcusable waste' and 'EU propaganda' whilst Graham Stringer MP commented 'It's not actually against the law, but it's clearly unfair.'<sup>11</sup> The government defended its actions by arguing that it was responding to 'public desire for EU facts'.<sup>12</sup> In its post-referendum report, PACAC said the leaflet was 'inappropriate and counterproductive for the government.'<sup>13</sup>

## International practice

10.12. Internationally, it is rare for governments to be restricted from expressing a view on a referendum question altogether. The Venice Commission acknowledges that, unlike in elections where the authorities should not support any party or candidate, in referendum campaigns, 'it is legitimate for the different organs of government to convey their viewpoint in the debate'.<sup>14</sup>

<sup>10</sup> Cabinet Office, 2016, 'Government responds to public desire for EU facts' [press release], 6 April, (accessed 9 June 2018).

<sup>11</sup> Parker, G., 2016, 'Leaflet drop favouring EU angers Leave campaigners', *Financial Times*, 7 April, (accessed 9 June 2018).

<sup>12</sup> Cabinet Office, 2016, 'Government responds to public desire for EU facts' [press release]

<sup>13</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.46.

<sup>14</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007), explanatory note, p.17, (accessed 12 June 2018).

10.13. One exception is Portugal. Article 45(1) of Portuguese referendum law states that:

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*'The entities and organs of the state, of the Autonomous Regions and local authorities, of other public-law legal persons, of state-owned enterprises and mixed economy enterprises, and of enterprises that hold public-service concessions or concessions for property in the public domain or public works, together with their officeholders when acting in that capacity, may not directly or indirectly intervene in referendum campaigns, or undertake acts that in any way favour or prejudice a position to the detriment or advantage of one or more other positions'*<sup>15</sup>

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Breaches of this principle of neutrality are punishable by up to two years in prison.<sup>16</sup> It should be noted that political parties are permitted to campaign and so ministers can express a view when acting on behalf of their parties, rather than in their governmental capacity.

10.14. Restrictions on the use of public funds for campaigning are much more common internationally than outright bans on the government expressing a view. In most cases, public information provisions are exempt. In Australia, legislation states that public funds cannot be used to make arguments for or against a referendum proposal, with the exceptions of the public information pamphlet, information from the Electoral Commission, and normal payment of salaries for MPs and their staff.<sup>17</sup>

10.15. In some countries where specific restrictions do not exist in law, the use of public funds to support one side of a referendum campaign has been deemed unconstitutional. In 1995, a court case was brought against the Irish government for using public funds to encourage a Yes vote in a referendum on divorce. The court ruled that this violated the constitutional rights to equality, freedom of expression and democratic procedure in a referendum.<sup>18</sup> Similarly, in Switzerland, although there is no legislation restricting the role of the federal government in referendum campaigns, the political rights of freedom to form an opinion and the unaltered expression of will have been interpreted to mean that the use of public funds on one side is unconstitutional.<sup>19</sup>

10.16. Conversely, in some countries, there are no restrictions on government campaigning in a referendum. For example, in France, the government's arguments for the ratification of a constitutional amendment are sent out with the referendum ballot papers.<sup>20</sup>

<sup>15</sup> Law no. 15-A/98 of 3 April 1998 (Portugal) (rev. 2016), article 45.

<sup>16</sup> Law no. 15-A/98 of 3 April 1998 (Portugal) (rev. 2016), article 19.

<sup>17</sup> Referendum (Machinery Provisions) Act 1984 (Australia), section 11(4).

<sup>18</sup> McKenna v An Taoiseach [1995] S.C. (Ireland) Nos 361 and 366 of 1995.

<sup>19</sup> Serdült, U., 2010, 'Referendum Campaign

Regulations in Switzerland' in Lutz, K. G., and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.169.

<sup>20</sup> Richard, A., and Pabst, R., 2013, *Evaluation of the French Referendum on the EU Constitution*, May 2005, Democracy International, (accessed 12 June 2018).

## The case for revising section 125

- 10.17. The purpose of introducing the restrictions on publications by government and other public bodies set out in section 125 of PPERA was to prevent the use of public funds to support a government's preferred outcome in a referendum. However, by limiting the application of these restrictions to just 28 days, this purpose is undermined. Under current arrangements, governments are free to use potentially unlimited public resources to advocate their position during the earlier stages of the referendum campaign (see Box 10.2). At present, the UK's approach falls below international standards of best practice.
- 10.18. Despite repeated recommendations from both the Electoral Commission and PACAC, governments have resisted calls to extend the application of section 125 to the full regulated referendum period on the basis that to do so would hamper their ability to conduct 'day-to-day' business.<sup>21</sup> This argument is given some grounding by the fact the section 125 restrictions are very wide in scope: they ban any publications relating to the referendum itself, or the issues surrounding the referendum question, and they apply to all bodies in receipt of public funding, except public broadcasters and the Electoral Commission. As such, section 125 restrictions are likely to prohibit activity beyond that of concern during a referendum campaign, such as publications encouraging voter participation or statements made by public bodies in fulfilment of their statutory duties.

### The scope of section 125

- 10.19. The activity of concern during referendum campaigns is that which could be considered 'campaigning' for or against a particular outcome. There is a strong case for narrowing the scope of section 125 so that it applies only to activity that can be considered as campaigning. There could, however be some difficulty in defining exactly which behaviours this would cover.
- 10.20. The Electoral Commission has proposed that the activities of governments that are restricted should be linked to those activities for which campaigning organisations are already regulated. Its suggestion is that the government could be prohibited from undertaking activities for the purposes of 'promoting or procuring' a particular referendum outcome for which campaigners incur expenses, as set out (with necessary amendments) in schedule 13 of PPERA.<sup>22</sup> These include preparing, producing or distributing unsolicited material to electors, advertising of any nature, and holding press conferences or public events.<sup>23</sup>
- 10.21. Moving away from a blanket ban would present civil servants with some additional challenges in interpreting what should be considered 'promoting and procuring a particular outcome'. However, the Electoral Commission has offered to provide advice on this.

<sup>21</sup> Cabinet Office, 2017, *Government Response to the Public Administration and Constitutional Affairs Committee Report on Lessons Learned from the EU Referendum*, Cm 9553, London, HM Government, p.2, (accessed 12 June 2016).

<sup>22</sup> Electoral Commission, 2016, *The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK's Membership of the*

*European Union*, London, Electoral Commission, p.115, (accessed 12 June 2018).

<sup>23</sup> Political Parties, Elections and Referendums Act 2000, Schedule 13.

## The bodies to which section 125 applies

- 10.22. Section 125 restrictions apply equally to any 'person or body whose expenses are defrayed wholly or mainly out of public funds'. However, unlike government, public bodies are unlikely to have been involved in the decision to call a referendum and therefore are less likely to have a direct interest in the outcome. Whilst it is still of utmost importance that they are not perceived to be campaigning for one side of the argument or the other, there is a case for treating certain publicly funded bodies differently to government officials or departments.
- 10.23. First, section 125 restrictions may prevent public bodies from fulfilling a statutory duty. For example, both the Bank of England and the UK Statistics Authority received letters from the Electoral Commission in response to public statements relating to the EU referendum campaign. However, the Bank of England argued that it had to assess the implications of leaving the EU in order to achieve its core objectives,<sup>24</sup> and the UK Statistics Authority cited its statutory responsibility to promote the best use of government statistics.<sup>25</sup> Section 125 restrictions are blunt and do not permit any discretion for cases in which publications relating to the referendum or the referendum topic may be necessary. This forces some public bodies to choose between potentially breaching section 125 and failing to fulfil their statutory duties.
- 10.24. Furthermore, some arms-length public bodies, such as the House of Commons Library, the Office for National Statistics and the Economic and Social Research Council, produce high-quality information that could be valuable to voters during referendum campaigns. But this information cannot be promoted or fully utilised because of the restrictions placed on such bodies by section 125. Narrowing the scope of section 125 to campaign activity could address this concern somewhat, but there may also be a case for exempting some specific public bodies further.
- 10.25. If there is such a case, questions follow as to which bodies should be exempt and whether these exemptions should apply to all referendums or be decided on a referendum-by-referendum basis. The latter approach would allow flexibility and ensure that the subject matter of the referendum could be taken into account; but it would also risk politicising the decision.

## The duration of section 125 restrictions

- 10.26. If section 125 is revised so that it only captures activity that promotes a particular outcome in a referendum, then the objection that it could hamper the government's ability to conduct 'day to day' business no longer applies. As such there is a no reason why section 125 cannot apply throughout the regulated referendum period. PACAC concluded that '[n]othing but the Government's political intentions are served by maintaining the 28 day purdah period'.<sup>26</sup>
- 10.27. It should be noted that lengthening the period of section 125 restrictions would not prevent individual ministers or the Prime Minister from participating in the referendum campaign in a personal or party political capacity.

<sup>24</sup> Carney, M., 2016, 'Annex 6: Letter from the Governor of the Bank of England Mark Carney OC to Chair of PACAC dated 14 June 2016', in Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons.

<sup>25</sup> UK Statistics Authority, 2016, 'Letter from the UK Statistics Authority to the Electoral Commission regarding publicly-funded bodies and the referendum on the UK's membership of the European Union dated 7 July 2016', (accessed 12 June 2016).

<sup>26</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.24.

## Conclusions/Recommendations

35. The Commission is concerned that the current restrictions on government during referendum campaigns permit potentially unlimited spending of public money in favour of one side of the debate before the final four weeks of the campaign. To address this problem, the Commission recommends extending section 125 restrictions so that they come into force at the beginning of the regulated referendum period.
36. Prior to the EU referendum, the government argued that the section 125 restrictions, which apply to all publications relating to the referendum topic, were too broad and could **hamper the government's ability to conduct day-to-day business. The Commission recommends that section 125 restrictions be revised so that they apply only to 'campaigning' activity which promotes one side of the debate.** This is the activity which is of concern during referendum campaigns. The Commission notes the Electoral Commission's suggestion that an amended version of schedule 13 of PPERA, which defines a list of regulated activities for which campaigners in a referendum incur expenses, may be a useful way of defining such activities.
37. At present, section 125 restrictions apply to 'any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority.' This has caused concern in some public bodies that have public communication functions. Restricting section 125 to campaigning activities would clarify this somewhat, but some bodies may need a specific exemption to make it clear that certain activity is necessary and/or legitimate during the course of the referendum campaign. **A parliamentary committee should conduct a review of the kinds of public statements by public bodies that may either be necessary, or that could usefully provide information helpful to voters, during the course of referendum campaigns. Where general exemptions from section 125 are found to be desirable, these should be made explicit in the standing legislation. Others, relevant to specific referendums, may be appropriate for inclusion in the enabling legislation.**

## Enforcing section 125 restrictions

- 10.28. In order for section 125 restrictions to be effective, there must be a mechanism for enforcing them. The powers of investigation and sanction that the Electoral Commission possesses for enforcing the regulation of campaigners in PPERA do not apply in relation to section 125. There are therefore few deterrents against misuse of public funds during a referendum campaign.
- 10.29. One proposal for enforcing section 125 would be to give the Electoral Commission the ability to fine public bodies for breaches. This would be consistent with its power to fine referendum campaigners. But this approach has a number of problems. First, fining a publicly funded body would in effect constitute fining the taxpayer. Second, it could be considered inappropriate for an unelected body to have the power to directly sanction an elected government. Finally, a fine would not necessarily be effective in ensuring compliance and stopping the activity that is in breach of the restrictions as it would likely be issued after the referendum campaign. And notwithstanding their obligations under the ministerial code, some ministers might be tempted to see a financial penalty as 'a price worth paying' to support their favoured outcome in a referendum.
- 10.30. A better approach would be to give the Electoral Commission the power to seek an injunction to stop any activity in breach of section 125. This would stop such activity during the course of the campaign itself, rather than relying on punitive action taken retrospectively.

### Conclusions/Recommendations

38. The Electoral Commission should be given a clear mandate to seek an injunction for breaches of section 125 to ensure that the restrictions are properly enforced.

## The impartiality of the civil service during referendum campaigns

- 10.31. In addition to section 125 restrictions, the civil service is also bound by a duty of impartiality. Impartiality is especially important during electoral events but, whilst the appropriate activity during elections is well understood, the application of this principle to referendums is less clear. If the civil service is perceived to favour a particular outcome in a referendum, then this can undermine trust in public institutions.

- 10.32. During the Scottish independence referendum there was controversy following publication of ministerial advice from the Permanent Secretary to the Treasury, Sir Nicholas McPherson, advising of the difficulties of a currency union with an independent Scotland. The Public Administration Select Committee (PASC, the predecessor to PACAC) argued that 'its publication compromised the perceived impartiality of one the UK's most senior civil servants'.<sup>27</sup> There was also controversy prior to the EU referendum, when how the Treasury presented its assessments of the economic effects of leaving the EU was seen as biased in favour of a Remain vote.<sup>28</sup>
- 10.33. In order to avoid accusations of partiality in future, clear guidance on the kind of activity that civil servants should and should not undertake during referendum campaigns is required. This would be of particular importance should section 125 be revised to cover 'campaign' activity. PASC recommended that a specific paragraph relating to referendums be inserted into the Civil Service Code; this recommendation was reiterated by PACAC in its 2016 report.<sup>29</sup>

### Conclusions/Recommendations

39. As is the case during election campaigns, it is important that the civil service should be perceived to act in accordance with the principle of strict neutrality during referendum campaigns.  
**The Commission supports the recommendations made by PACAC and its predecessor PASC that there should be a new paragraph of the Civil Service Code which clarifies the appropriate role and conduct of civil servants during referendum campaigns.**

<sup>27</sup> Public Administration Select Committee, 2015, *Lessons for Civil Service Impartiality from the Scottish Independence Referendum* (Fifth Report of Session 2014-15) HC 111, London, House of Commons, p.23.

<sup>28</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.44.

<sup>29</sup> Public Administration Select Committee, 2015, *Lessons for Civil Service Impartiality from the Scottish Independence Referendum* (Fifth Report of Session 2014-15) HC 111, London, House of Commons, p.30; Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.44.

# 11. Lead Campaigners

- 11.1. One central feature of how referendums are regulated in the UK is the designation of a 'lead' campaign group on either side of the debate to represent the arguments for that outcome. Each group is entitled to certain benefits, including public funding. The system is designed to ensure that both sides of the argument can be clearly and fairly heard.
- 11.2. The lead campaigner system is unusual: few other democracies have anything comparable. This chapter considers whether it is the best approach. It then examines the process of designating lead campaigners and whether there are ways in which it could be improved.

## UK Experience

- 11.3. Umbrella campaign groups were commonplace in UK referendums prior to PPERA 2000. However, the only referendum in which they were formally recognised was the 1975 European Community referendum. In this instance, umbrella campaign groups for each outcome existed prior to the introduction of the legislation and were specified in the legislation itself, so no designation process took place. The Nairne Commission recommended that, if umbrella groups arose in referendum campaigns, they should be formally recognised and provided with public assistance.<sup>1</sup>
- 11.4. PPERA 2000 allows the Electoral Commission to designate permitted participants to receive certain forms of assistance. Designated lead campaigners have a higher spending limit than others. They are also entitled to:
- a grant of up to £600,000
  - a free 'referendum address' mailing to all voters
  - the use of certain rooms for holding public meetings free of charge
  - referendum campaign broadcasts.
- 11.5. In addition, for some referendums – including the 2016 EU referendum – the Electoral Commission has provided designated campaigners with a dedicated page in its public awareness booklet distributed to all households.<sup>2</sup>

## The designation process

- 11.6. PPERA gives the Electoral Commission the task of appointing lead campaigners. It states that campaign groups must apply to the Commission for designation within the first twenty-eight days of the regulated referendum period, and that the Electoral Commission should make its decision within fourteen days of this deadline.<sup>3</sup> In recent referendums, the enabling legislation has allowed the Electoral Commission to conduct the process before the start of the regulated referendum period.

<sup>1</sup> Nairne, P. et al., 1996, *Report of the Commission on the Conduct of Referendums*, London, Constitution Unit, p.59.

<sup>2</sup> This entitlement was not provided in either of the 2011 referendums. In the Welsh referendum, there were no lead campaigners designated. In the referendum on the voting system, the public awareness booklet contained information on each of two options instead, as required by the Parliamentary Voting System and Constituencies Act 2011.

<sup>3</sup> Political Parties, Elections and Referendums Act (PPERA) 2000, section 109(2) and (3).

- 11.7. Applicants must submit a form detailing how they meet the Electoral Commission's assessment criteria and provide supporting evidence. To be eligible for designation, they must meet the statutory requirement to 'adequately represent those campaigning for that outcome'<sup>4</sup>. The Commission's assessment is based on five criteria:
- how the applicant's objectives fit with the referendum outcome it supports
  - the level and type of support for the application
  - how the applicant intends to engage with other campaigners
  - the applicant's organisational capacity to represent those campaigning for the outcome, and
  - the applicant's capacity to deliver their campaign.<sup>5</sup>
- 11.8. If there are multiple applicants for designation for one outcome, the Electoral Commission must assess which applicant 'represents to the greatest extent those campaigning for that outcome'.<sup>6</sup> The 2016 EU referendum was the first in which the Electoral Commission received two applications that met the statutory test for the same campaigning outcome. Therefore, this was the first time it was required to make this assessment (see Box 11.1).

#### Box 11.1. Designation of lead campaigners at the 2016 EU referendum

The Commission received four applications for lead campaigner status: one for Remain and three for Leave.

**Remain** – The In Campaign

**Leave** – Trade Unionist and Socialist Coalition; Vote Leave; Go Movement.

On an initial assessment the Commission concluded that the In Campaign met the statutory test for those representing the Remain outcome; both Vote Leave and Go Movement met the statutory test for those representing the Leave Campaign, but the Trade Unionist and Socialist Coalition did not.

After seeking further evidence on the two applicants meeting the test for Leave, the Commission concluded that, although both were strong, Vote Leave had better structures in place to ensure that the views of other campaigners were represented. As such, it represented those campaigning for that outcome to the 'greatest extent', and the Commission decided to designate Vote Leave as lead campaigner for the Leave outcome.<sup>7</sup>

<sup>4</sup> PPERA 2000, section 109(5).

<sup>5</sup> Electoral Commission, 2016, *The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK's Membership of the European Union*, London, Electoral Commission, p.94, (accessed 12 June 2018).

<sup>6</sup> Electoral Commission, 2016, 'The Designation Process', (accessed 13 June 2016).

<sup>7</sup> Hawthorn, T., 2016, 'EU Referendum: Designation of lead campaigners', Board paper EC 27/16, (accessed 13 June 2016).

- 11.9. Based on these assessments, a recommendation is made to the Electoral Commission Board, which makes the final decision.

**Table 11.1. Lead campaigners in referendums since 2000**

Referendum	Designated lead campaigners
2004 North East Assembly	<b>Yes:</b> Yes4theNorthEast <b>No:</b> North East Says No
2011 Welsh devolution	None
2011 AV	<b>Yes:</b> Yes to Fairer Votes <b>No:</b> No to AV
2014 Scottish independence	<b>Yes:</b> Yes Scotland <b>No:</b> Better Together
2016 EU	<b>Remain:</b> The In Campaign <b>Leave:</b> Vote Leave

## Inability to designate a lead campaigner on one side

- 11.10. According to PPERA 2000, if the Electoral Commission cannot designate a lead campaigner for each outcome then there should be no designation at all. This was the case in the 2011 Welsh referendum (see Box 11.2).
- 11.11. On the advice of the Electoral Commission, the enabling Acts for the Scottish independence referendum<sup>8</sup> and the EU referendum<sup>9</sup> both contained clauses modifying the application of PPERA 2000 to allow the Commission to make a designation for only one outcome in the event that there was no suitable applicant for the other outcome. In the case of the EU referendum, the rights of a sole lead campaigner would have been curtailed; such a campaigner would not have been entitled to:

- the grant of up to £600,000

<sup>8</sup> Scottish Independence Referendum Act 2013, Schedule 4, Part 2, section 6(3).

<sup>9</sup> European Union Referendum Act 2015, Schedule 1, section 9(2).

- the referendum campaigner broadcasts, or
- the content in the Commission's public awareness booklet.<sup>10</sup>

### Box 11.2. Designation of lead campaigners at the 2011 Welsh devolution referendum

The Electoral Commission received two applications for designation in the Welsh devolution referendum of 2011, one for each outcome. The applicant for the Yes campaign 'Yes for Wales' met the statutory test. However, the expected No campaign 'True Wales' chose not to apply; the only applicant was an individual named David Alwyn ap Huw Humphrey, who was judged not to adequately represent those campaigning for a No outcome. As a result, the Commission was unable to designate any lead campaigners.

The failure to designate any lead campaigners had significant implications. There was no campaign group that could make use of free mailings, free broadcasts or a higher spending limit, restricting campaigners' ability to reach voters directly. The Government of Wales Act empowered the Electoral Commission to provide arguments for and against the referendum proposals in the event that no lead campaigners could be designated. However, given the late stage in the campaign at which the decision was reached, the Electoral Commission felt that there was insufficient time to produce and distribute booklets. It was also concerned that making the arguments would compromise its neutrality. Its solution was to ask all registered campaigners to provide 200-word statements which would be displayed on the Commission's website along with links to each campaign's website.<sup>11</sup>

11.12. At the Scottish referendum, there were no grants available to lead campaigners, so such conditions were not deemed necessary. These modifications only applied to the specific referendums in question and will not automatically apply to future referendums.

## International practice

11.13. Ad hoc umbrella groups are fairly common in other countries but are rarely formally recognised. One exception is Australia: when a constitutional amendment is passed, a majority of those in parliament who voted for and against it must form 'case committees' for Yes and No. These committees are responsible for a range of activities and are required to prepare a 'case', which is lodged with the Electoral Commission and sent out to all households.

<sup>10</sup> Electoral Commission, 2016, 'The Designation Process'.

<sup>11</sup> Electoral Commission, 2011, *Report on the Referendum on the Law-making Powers of the National Assembly for Wales, 3 March 2011*, London, Electoral Commission, p.34, (accessed 12 June 2018).

When a proposal is passed unanimously by parliament, a No committee is not formed.<sup>12</sup>

- 11.14. In France and Spain, political parties are the main actors in referendum campaigns. Opinion on the referendum outcome tends not to be divided equally between parties and so balance between the two sides is rarely achieved.<sup>13</sup>
- 11.15. A number of democracies have registration requirements for referendum campaign groups but no process for designating umbrella groups. These include Canada, Ireland and Lithuania.<sup>14</sup> In Portugal, political parties or coalitions of parties must declare to the National Electoral Commission that they wish to participate in the referendum campaign. Groups of more than 5,000 registered electors must register with the National Electoral Commission.<sup>15</sup>

## Is designating one lead campaigner on each side desirable?

- 11.16. The UK's practice of designating one lead campaigner to represent each outcome in a referendum debate aims to ensure that both proponents and opponents of a referendum proposal can be clearly and fairly heard. However, it could be argued that the practice does so at the expense of a plurality and diversity of perspectives within each side of the debate. Alternative approaches would be to designate multiple campaigners on each side or no lead campaigners at all.
- 11.17. One criticism that has been made of the current approach is that it imposes unity where in fact there may be a plurality of different perspectives. The democratic theorist Simone Chambers argues that designating umbrella campaign groups 'aggregates differences in one or two camps where many voices with particular concerns may be silenced or not heard above the campaign din.'<sup>16</sup> There is a question as to whether one group *can* 'adequately represent all those campaigning for that outcome'<sup>17</sup>
- 11.18. However, binary referendums are polarising in themselves. There is little reason to believe that changing the approach to designation would be sufficient to change the nature of debate. Unofficial opposing umbrella groups would likely form anyway, as is common in democracies without statutory lead campaigners.
- 11.19. Indeed, there are advantages in encouraging campaigners to coalesce. One is that voters are likely to receive a clearer core message about what the proposed change is intended to achieve. It could be confusing for voters if there are multiple prominent campaign groups with competing visions, but only two options on the ballot paper. Another is that this practice may

<sup>12</sup> Australian Electoral Commission, (no date), 'What are referendums and plebiscites?', Australian Electoral Commission, [website], available at: (accessed 13 June 2018).

<sup>13</sup> Montero, C. C. and Bellolio, F. C., 2010, 'Financing Referendum Campaigns in Spain', in Lutz, K. G., and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.151; Hamon, F., 2010, 'The Financing of Referendum Campaigns in France', in Lutz, K. G., and Hug, S. (eds.), *Financing Referendum*

*Campaigns*, Basingstoke, Palgrave Macmillan, p.112.

<sup>14</sup> Referendum Act 1992 (Canada) c.30, section 13(1) and 15(1); Standards in Public Office Commission, 2016, *Annual Report 2016*, Dublin: Standards in Public Office Commission, pp.21–2, (accessed 1 May 2018); Law on funding of, control over funding of, political parties and political campaigns 2004 No IX-2428 Vilnius (Lithuania) (amended 2011), article 3.

<sup>15</sup> Law no. 14-A/98 of 1997 (Portugal) (rev. 2016), articles 39, 40 and 41.

<sup>16</sup> Chambers, S., 2001, 'Constitutional Referendums and Democratic Deliberation', in Mendelsohn, M., and Parkin, A. (eds.), *Referendum Democracy, Citizens, Elites and Deliberation in Referendum Campaigns*, Basingstoke, Palgrave, p.250.

<sup>17</sup> PPERA 2000, section 109(2).

increase the possibility of holding campaigners accountable for what has been promised after the referendum.

- 11.20. There is clearly a trade-off between achieving perfect balance between the two sides on the one hand and enabling a plurality of perspectives on the other, and the current UK system seems to get this trade-off about right. The designation of lead campaigners does not prevent other campaign groups, representing a range of perspectives, from participating. At the 2016 EU referendum, 123 campaign groups registered with the Electoral Commission. Current arrangements hence give opportunities for voters to be exposed to a plurality of voices.

### Conclusions/Recommendations

40. The Commission considered alternative options for designating lead campaigners, including designating multiple lead campaigners on each side and removing the requirement to designate entirely. It concluded that the current practice of designating one lead campaigner for each outcome in a referendum leads to fewer problems than the alternatives, and should be retained.

## Improving the designation process

- 11.21. Experience of designation at the past five referendums has led to a number of proposals for improving the designation process that are explored below.

### Should the Electoral Commission be able to designate for one side only?

- 11.22. As explained in paragraph 11.11, since the experience of the 2011 Welsh devolution referendum, the Electoral Commission has recommended that it should be allowed to designate for one side of the debate if there is no suitable applicant for the opposing side. This recommendation was implemented for the 2014 and 2016 referendums, with conditions attached for the latter.
- 11.23. The question of whether designation on one side only should be permitted in the standing legislation for future referendums deserves consideration. In evidence to the Commission, True Wales, the expected applicant for the No campaign at the 2011 Welsh referendum, told us that their decision not to apply was primarily driven by a lack of resources. They felt that, as a small grass-roots campaign, they were unable to describe themselves as an 'umbrella group', and, with little funding, they were unable to take full advantage of the benefits to which lead campaigners are entitled. For

example, they said, 'The free postal delivery of one piece of literature to every elector was, on the surface, appealing but, ultimately, was not free; we would have had to fund the printing of 1.3 million leaflets and arrange their boxing and enveloping for the Post Office, an absolute impossibility given our financial position as a subscriptions-funded grassroots campaign'.<sup>18</sup> On consideration of these issues, True Wales decided it was not in their interests to apply for designation as lead campaigner.

11.24. Had the Electoral Commission been permitted to designate for only one outcome during this referendum campaign, it could be argued that this would only have increased the advantage enjoyed by the Yes campaign, so that there would have been no level playing field during the referendum campaign. However, True Wales may have had greater incentive to apply for lead campaigner status had it been the case that the Yes campaign would have been designated regardless.

11.25. The Electoral Commission explained its recommendation on the basis that the 'PPERA framework is open to campaign groups on one side of a referendum debate deciding not to apply for designation for tactical reasons, to limit the public assistance available to campaigners on both sides of the debate'.<sup>19</sup> This, it said, should not form part of the decision as to whether to apply for lead campaigner status. The Electoral Commission also argued that, as the inability to designate lead campaigners meant that lead campaigner entitlements such as free referendum addresses and referendum broadcasts were not utilised, there 'must have been an impact on how easily voters could get information on the reasons to vote Yes or No in the referendum'.<sup>20</sup> This negative effect of information and debate must be balanced against the issues raised by True Wales.

11.26. Restricting the public benefits available to a single lead campaigner, as was done in the enabling legislation for the 2016 referendum, adequately balances concerns about the relative advantage enjoyed by one side and the need for voter information.

### Conclusions/Recommendations

41. The Commission recommends that **PPERA be amended so that the Electoral Commission can designate a lead campaigner for one side if no suitable application has been submitted to the other side. In this circumstance, the single lead campaigner should have reduced entitlements to public benefits, as was provided for in the legislation enabling the EU referendum.**

## Earlier designation of lead campaigners

11.27. Under the terms of PPERA, designation could take place as late as four weeks before polling day. This leaves lead campaigners very little time to utilise their

<sup>18</sup> True Wales, 2018, Written Evidence to the Independent Commission on Referendums.

<sup>19</sup> Electoral Commission, *Report on the referendum on the law-making powers of the National Assembly for Wales*, p.36.

<sup>20</sup> Electoral Commission, *Report on the referendum on the law-making powers of the National Assembly for Wales*, p.36.

statutory entitlements and make their case to voters. The enabling legislation for recent referendums has allowed the Electoral Commission to designate lead campaigners before the start of the regulated period, but PPERA has not been amended to reflect this change in practice. In its post-EU referendum report, the Electoral Commission recommended that 'designation of lead campaigners should take place before the start of the referendum period; alternatively, the referendum period should be extended'.<sup>21</sup> The Electoral Commission suggested a period of sixteen weeks. However, there is a strong case that designation could and should take place even earlier.

- 11.28. In the EU referendum, because there were two applicants for designation on the Leave side that met the statutory test, but only one on the Remain side, the In Campaign was able to be confident of designation, whilst the applicants for Leave designation had to await the Electoral Commission's decision. In written evidence to us, the elections expert Professor Justin Fisher outlined a number of ways in which this ultimately disadvantaged the Leave campaign:

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*'The relatively short period between designation and the commencement of the controlled period presented significant problems for the designated Leave campaign, as well as those participants who were ultimately not designated. First, the designated Leave campaign experienced significant problems attracting donors until it was clear that the group would be designated. Equally, candidate participants (to be designated) could not risk engaging in preliminary activity such as printing or booking poster sites in advance of designation, as were they to be unsuccessful, this activity would have counted for a significant proportion of a non-designated participant's spending limit. These constraints did not apply to the Remain side where designation was uncontested.'*<sup>22</sup>

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- 11.29. Fisher argued that extending the time period between designation and the start of the controlled campaign period could mitigate this problem. He recommended that 'designation should take place at least a month before the commencement of the controlled campaign period'.<sup>23</sup> The Commission is persuaded by Fisher's case for earlier designation of lead campaigners. It sees no reason why designation should not take place as early as possible. The process could begin as soon as the question to be put to referendum has been finalised: that is, when the bill enabling the referendum has received royal assent.
- 11.30. What the preceding sentence means depends, clearly, on when the enabling legislation is in fact passed. The Electoral Commission recommends that this should be at least six months before polling day.<sup>24</sup> This is a recommendation that was originally made by the elections expert Ron Gould in a review that he conducted for the Electoral Commission of the conduct of parliamentary and local elections in Scotland in 2007.<sup>25</sup> It has subsequently also been endorsed by the Association of Electoral Administrators, which sharply criticised the

<sup>21</sup> Electoral Commission, *The 2016 EU Referendum: Report on 23 June 2016 referendum on the UK's membership of the European Union*, p.15.

<sup>22</sup> Justin Fisher, 2017, Written Evidence to the Independent Commission on Referendums.

<sup>23</sup> Justin Fisher, 2017, Written Evidence to the Independent Commission on Referendums.

<sup>24</sup> Electoral Commission, *The EU Referendum: Report on 23 June 2016 referendum on the UK's membership of the European Union*, p.15.

<sup>25</sup> Gould, R., 2007, *Scottish Elections 2007: The Independent Review of the Scottish Parliamentary and Local Government Elections*, London, Electoral Commission, p.112, (accessed 8 May 2018).

government's failure to comply with this proposal in the 2016 referendum.<sup>26</sup> The proposal is designed to ensure that both administrators and campaigners have sufficient time to understand and comply with regulatory provisions, and to prevent last-minute, potentially politically motivated adjustments to the rules.

- 11.31. Some might argue that designating earlier could put a strain on campaigners, who would be required to form groups and submit their applications to a much earlier deadline. However, if proper preparation as outlined in chapter 7 takes place prior to the referendum, proponents and opponents of a proposal should have ample time to organise. Additionally, legislation enabling a referendum will take several months to pass through parliament, providing further opportunities to form formal campaign organisations. Beginning the designation process earlier would also have the benefit of giving lead campaigners more time to build the infrastructure necessary to utilise the benefits of designation and comply with financial regulations.
- 11.32. While recommending that designation of lead campaigners should happen earlier, the Commission also recognises that problems may arise if lead campaigners are designated before the start of the regulated referendum period: this would create a gap during which the lead campaigners would be in place but their spending would not be regulated. Therefore, if this recommendation is accepted, there may be a case for extending the regulated referendum period.

### Conclusions/Recommendations

42. If there are multiple credible applications to be lead campaigner for one outcome, but only one for the other outcome, designation too close to the campaign period potentially disadvantages the former. To avoid this, **the Commission recommends that the designation process begin as soon as possible after legislation enabling the referendum is passed and the question is known.**

43. The Commission supports the recommendation made by the Electoral Commission and the Association of Electoral Administrators, on the basis of Ron Gould's 2007 review, that **legislation relating to the conduct of a poll be clear at least six months before polling day.** The Commission recognises that in some exceptional circumstances this may not be possible.

<sup>26</sup> Association of Electoral Administrators, 2016, *Pushed to the Absolute Limit: 2016 – The Electoral Year Never to Forget*, pp.20–1, (accessed 8 May 2018).

## A 'fit and proper' person test for lead campaigners

- 11.33. Lead campaigners receive public money and other public benefits. There is therefore a strong case that senior figures in such organisations should be held to the standards expected of those in other areas of public life. In its report *Lessons Learned from the EU Referendum*, PACAC recommended that the Electoral Commission should consider whether a 'fit and proper' person test should form part of the designation process.<sup>27</sup>
- 11.34. Charity trustees, directors of NHS providers, holders of broadcast licenses, and other public figures are required to meet such a test in order to be eligible for their positions. An example is provided by Ofcom's test for holders of broadcast licences (see Box 11.3).
- 11.35. The Electoral Commission could produce similar guidance based on broad criteria designed to apply to individuals associated with lead campaigner applications, including the responsible person, Chair, Chief Executive, Treasurer and other board members. Some criteria might be financial. Others might relate specifically to the electoral context: for example, a person could fail a 'fit and proper person' test who had been previously convicted of an electoral offence.

### Box 11.3. Ofcom's fit and proper person test

Ofcom is required by law to conduct a fit and proper person test before granting a broadcasting licence and to revoke a licence if it is no longer satisfied that the holder continues to meet the necessary standards. There is no specific test in legislation. Ofcom provides the following explanation of how it conducts the test:

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*'In judging whether someone is fit and proper to hold a broadcast licence, the central consideration is whether they can be expected to be a responsible broadcaster. Key to this will be:*

- a) **how well they have complied with regulatory standards and licence conditions.** *Serious, repeated or ongoing breach of standards may suggest a lack of fitness and properness. A good record of compliance would suggest fitness and properness.*
  - b) **how well they have conducted themselves beyond the broadcasting arena.** *A broadcaster with a good compliance track record could be deemed unfit and improper for reasons outside the broadcasting arena that could affect their standing as a broadcaster. A broadcaster who committed a serious crime – for example, fraud or theft – could be deemed to pose a risk of substantial harm to an audience. Non-broadcast*
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*(Box 11.3 continued on the next page)*

<sup>27</sup> Public Administration and Constitutional Affairs Committee, 2017, *Lessons Learned from the EU Referendum* (Twelfth Report of Session 2016-17), HC 496, London, House of Commons, p.60.

(Box 11.3 continued from the previous page)

*behaviour – like lying on oath – could be taken as an indication that the broadcaster lacks respect for, or the ability to comply with, the regulatory regime to the extent that retaining a licence to broadcast would undermine that very regime. Equally, non-broadcast conduct could weaken public confidence in the regulated activity. For example, four radio broadcast licences controlled by Owen Oyston were removed from him when he was convicted of rape.*

*As well as taking into account the broadcaster's own conduct, we can also consider the behaviour of people who exercise material influence or control over the broadcaster. These people might include directors, shareholders or any other person exercising control. The extent to which we do so will depend on their level of influence and on the circumstances such as the seriousness of the conduct.'*<sup>28</sup>

## Conclusions/Recommendations

44. **As lead campaigners receive public money it is important that key individuals associated with them meet certain standards. A 'fit and proper' person test should be required for the board members and the responsible person of groups applying to be lead campaigner.**

Each organisation that applies for designation would have to certify that all its board members are 'fit and proper' according to criteria specified by the Electoral Commission. If the Electoral Commission has reason to believe prior to or during the campaign that a person is not 'fit and proper', it should be required to conduct validity checks. If it is concluded that any member is not a 'fit and proper' person, that person should be removed from the board. If the person is not removed, the organisation should be barred from designation if designation has not yet occurred. If designation has occurred, the Electoral Commission should have the power to withdraw some or all of the public money and public benefits available to the organisation in virtue of designation.

<sup>28</sup> Ofcom, 2017, 'Decision Under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Limited', (accessed 13 June 2018).

# 12. Campaign Finance

- 12.1. A common concern about the use of referendums is the potentially corrupting influence of money in campaigns. Evidence, largely from studies of US ballot initiatives, suggests that high spending can influence outcomes.<sup>1</sup> Campaign finance regulation is designed to ensure an even playing field between the different sides of the debate.
- 12.2. There are several aspects to financial regulation. First, public funding is designed to ensure that each side has an equal opportunity to participate in the campaign. Second, spending limits prevent excessive spending on one side, or both sides, of the campaign. Finally, transparency measures relating to donations and spending are intended to discourage corrupt practices and allow citizens to make decisions knowing who has funded each campaign. This chapter examines the UK framework for financial regulation, compares it to other democracies and considers how it could be improved.

## UK Experience

### Permitted participants

- 12.3. In accordance with PPERA, campaigners in a referendum wishing to spend over £10,000 during the regulated referendum period must register as permitted participants. A permitted participant may be any of the following:
- an individual on the UK electoral register
  - a UK-registered company carrying on business in the UK
  - a trade union
  - a building society
  - a limited liability partnership carrying on business in the UK
  - an unincorporated association of two or more persons
  - a political party that has submitted a declaration stating what outcome it proposes to campaign for.<sup>2</sup>
- 12.4. Permitted participants are subject to the financial regulation outlined in PPERA, as modified by any enabling legislation for that particular referendum, during the regulated campaign period. The regulated period is a minimum of 10 weeks.
- 12.5. As discussed in chapter 11, the Electoral Commission may designate one permitted participant from either side of the debate as a 'lead' campaigner, entitling them to certain benefits such as public funding and a higher spending limit.

<sup>1</sup> Lutz, K. G., and Hug, S., 2010, 'Introduction', in Lutz, K. G. and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.3.

<sup>2</sup> Political Parties, Elections and Referendums Act 2000, 105(1) and 54(2).

## Public funding

- 12.6. In the first UK-wide referendum, on the European Community in 1975, the government awarded public grants of £125,000 to each side of the campaign. Campaigners in subsequent pre-PPERA referendums did not receive any public funding. In some cases, this caused significant imbalances in the resources and capacity of the campaigns. For example, in the 1997 Welsh devolution referendum, the last-minute No campaign was seriously underfunded compared to the Yes campaign, which was supported by most of the main political parties in Wales. In part as a result of this situation, the CSPL report which provided the basis for PPERA 2000 argued that 'neither side should be prevented from expressing its views merely as a consequence of relative poverty'.<sup>3</sup> It recommended the introduction of public assistance for designated lead campaigners.
- 12.7. PPERA 2000 allows grants of up to £600,000 to be made available to each designated lead campaigner during a referendum campaign. Grants were not, however, made available for campaigners by the Scottish government for the 2014 Scottish independence referendum (see Table 12.1)<sup>4</sup>
- 12.8. It is up to the Electoral Commission to determine the exact amount to be paid to campaigners, which may be varied according to the size of the electorate in a referendum, and to determine the terms and conditions to which the grant will be subject. Table 12.1 shows the grants available in recent referendums. Lead campaigners are also entitled to three further benefits (see chapter 11): first, a free referendum address mailing, which the Electoral Commission reported cost around £12 million for each side in the EU referendum;<sup>5</sup> second, free public broadcasts; and, third, the use of certain rooms free of charge.

## Spending limits

- 12.9. Prior to PPERA 2000, no spending limits for campaign groups in referendums existed. This was consistent with the absence of spending limits for national campaigns during general elections. The Nairne Commission recommended against introducing spending limits, stating that 'the difficulties of restraining such activity [campaigning] in a free society are very great'.<sup>6</sup> When CSPL recommended national spending limits for elections, it too recommended against introducing spending limits for referendums. It said that, given the large number of organisations that can participate in a referendum and the short timescale involved, trying to control spending would be 'futile and possibly also wrong'.<sup>7</sup>
- 12.10. Nonetheless, the Labour government was in favour of spending limits during referendum campaigns and PPERA 2000 introduced them. These vary according to the type of participant. Spending limits for political parties are determined by vote share. The figures for the 2016 EU referendum are shown in Table 12.2.

<sup>3</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom* (Fifth Report of the Committee on Standards in Public Life), Vol. 1, Cm 4057-I, London: HM Government, p.164, (accessed 12 June 2018).

<sup>4</sup> Griesbach, D. et al., 2012, *Your Scotland, Your Referendum: An Analysis of Consultation Responses*, Edinburgh, Scottish Government Social Research, p.45, (accessed 12 June 2018).

<sup>5</sup> Electoral Commission, 2016, *The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK's Membership of the European Union*, London, Electoral Commission, p.127, (accessed 14 June 2018).

<sup>6</sup> Nairne, P. et al., 1996, *Report of the Commission on the Conduct of Referendums*, London, Constitution Unit, p.60.

<sup>7</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom*, pp.169–170.

**Table 12.1. Grants available to lead campaigners at post-PPERA referendums**

Referendum	Grant available to each side	Comments
2004 North East Assembly	£100,000	The full amount was paid to each designated lead campaigner.
2011 Welsh devolution	£70,000	The grant was never awarded, as the Commission was unable to designate any lead campaigners.
2011 AV	£380,000	<p>The grant was calculated as a base of £70,000, plus £28,000 for every week of the referendum period.</p> <p>The campaigns were required to submit claims against the grant during the referendum period. Their total claims were well below the amount available:</p> <p>No to AV: £147,479.22</p> <p>Yes to Fairer Votes: £140,457.06</p>
2014 Scottish independence	None	Responses to the Scottish government's public consultation 'Your Scotland – Your Referendum' suggested that the Scottish public did not favour public funding for campaigners during the independence referendum. On this basis, the Scottish government did not make grants available.
2016 EU	£600,000	Both campaigns submitted claims to the full amount.

**Source:** Electoral Commission, 2005, *The 2004 North East Regional Assembly and Local Government Referendums*, London, Electoral Commission, p.34 (accessed 12 June 2018); Electoral Commission, 2011, *Report on the Referendum on the Law-making Powers of the National Assembly for Wales, 3 March 2011*, London, Electoral Commission, p.31 (accessed 12 June 2018); Electoral Commission, 2011, *Referendum on the Voting System for UK Parliamentary Elections: Report on the May 2011 Referendum*, London, Electoral Commission, p.97 (accessed 14 June 2018); Electoral Commission, 2014, *Scottish Independence Referendum, Report on the referendum held on 18 September 2014*, London, Electoral Commission, p.95 (accessed 14 June 2018); Electoral Commission, 2016, *The 2016 EU referendum, Report on the 23 June 2016 Referendum on the UK's Membership of the European Union*, London, Electoral Commission, p.121 (accessed 12 June 2018).

**Table 12.2. Spending limits for registered referendum campaigners at the 2016 EU referendum**

**Source:** Political Parties, Elections and Referendums Act 2000, Part VIII, Chapter II, section 117(1), updated by European Union Referendum Act, Schedule 1, paragraph 25.

Type of campaigner	Spending Limit
Designated lead campaigner	£7 million
Political party >30% vote share	£7 million
Political party 30–20% vote share	£5.5 million
Political party 20–10% vote share	£4 million
Political party 10–5% vote share	£3 million
Political party < 5% vote share	£700,000
Permitted participant	£700,000
Not registered	£10,000

12.11. When a referendum takes place only in part of the UK, the Electoral Commission is required to advise the Secretary of State on appropriate spending limits. It did not publish its methods for determining the spending limit of £665,000 for designated campaigners in the 2004 North East Assembly referendum.<sup>8</sup> For the 2011 Welsh devolution referendum and the 2014 Scottish independence referendum, it calculated proposed spending limits using average spending during election campaigns to the relevant devolved body.<sup>9</sup>

12.12. Experience from the 2004 North East Assembly referendum suggested that spending limits could be easily circumvented by registering multiple permitted participants. As a result, enabling legislation for the AV referendum, Scottish independence referendum and EU referendum contained specific rules for the spending limits of campaigns 'working together'. If campaign groups are considered to be 'working together' they must report joint spending. If one of the groups is a designated lead campaigner, group spending will count towards its limit.

<sup>8</sup> Electoral Commission, 2005, *The 2004 North East Regional Assembly and Local Government Referendums*, London, Electoral Commission, p.32, (accessed 12 June 2018).

<sup>9</sup> Electoral Commission, 2010, 'Note on Calculating spending limits for Wales referendum', (accessed 9 June 2018); Electoral Commission, 2013, 'Electoral Commission advice on spending limits for the referendum on independence for Scotland', (accessed 29 May 18).

## Reporting campaign expenditure

- 12.13. Registered permitted participants must submit campaign expense returns no more than three months after the date of the referendum containing all payments and expenses incurred, along with invoices and receipts, to the Electoral Commission. A participant whose expenditure exceeds £250,000 must submit audited accounts within six months. The returns are then analysed and published by the Commission.

## Donations

- 12.14. Only 'permissible donations', from UK-based individuals or organisations, may be accepted by campaigners. All donations and loans received during the regulated referendum period over £500 must be recorded, and donations over £7,500 must be reported to and are subsequently published by the Electoral Commission. There are no requirements for any group or individual registering as a 'permitted participant' to show the sources of their existing funds at the point of registration.

## International practice

- 12.15. Some democracies – for example, Canada and the Netherlands – have legislation governing campaign finance that is specific to referendums. In others, including Portugal and Ireland, the financial regulation of referendums is covered by generic rules on party finance. In France, unlike for elections, there is no standing legislation governing referendum campaigns and campaign finance; legislation is passed ad hoc for each referendum that is held.<sup>10</sup>

## Public funding

- 12.16. The Venice Commission argues that equality of opportunity requires that any public funding should be equally available to opponents and proponents in a referendum campaign. Failing that, funding may be allocated to political parties in proportion to the votes they received at the preceding election.<sup>11</sup>
- 12.17. The UK is one of the few democracies with standing provisions for public funding of one group on either side of the referendum debate. Nonetheless, some countries have allocated funding to a single umbrella group on each side on a referendum-by-referendum basis. For example, despite a prohibition on the use of public funds for referendum campaigns in standing legislation, the 1999 Australian republic referendum was considered to be of such significance that the Australian government disapplied these rules and provided the Yes and No campaigns with public funding.<sup>12</sup>
- 12.18. Where political parties are the main actors in referendum campaigns, public funding is often distributed to them. In the 2005 referendums on the EU constitution in France and Spain, for example, parties were reimbursed for campaign expenses. In France, parties with more than a 5% vote share in the previous election or with more than five MPs were all entitled to an equal

<sup>10</sup> Hamon, F., 2010, 'The Financing of Referendum Campaigns in France', in Lutz, K. G., and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.110.

<sup>11</sup> Venice Commission, 2007, *Code of Good Practice on Referendums*, CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006)

and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007), p.6.

<sup>12</sup> Referendum Legislation Amendment Bill 1999 (Australia), section 4.

amount, of €800,000.<sup>13</sup> For the Spanish referendum, the amount available was a function of the product of seats in parliament and votes obtained by parliamentary candidates in the last election.<sup>14</sup> Both methods of allocation resulted in an unequal distribution of funds between the two sides: in Spain, 95% of subsidies went to parties supporting Yes and just 5% to parties supporting No.

- 12.19. In some democracies, campaign funding is allocated by an independent body. One example of this comes from the Netherlands (see Box 12.1).

### Box 12.1. Allocation of public funding by the Dutch Referendum Commission

The Dutch Referendum Commission is responsible for allocating funding to campaigners in consultative citizen-initiated referendums. The Commission awards grants for activities promoting public debate and information on the law that will be subjected to the referendum. Each grant must fall into one of the following categories and each category has a cap.

Activities in favour of the law – capped at €700,000  
 Activities opposed to the law – capped at €700,000  
 Neutral activities – capped at €600,000

Within each category, 20% of the money available is reserved for individuals and 80% for legal entities. Those seeking grants must apply to the Referendum Commission. Provided applications are accepted, grants are distributed on a first-come-first-served basis until the limit is met.<sup>15</sup>

- 12.20. As explored further in chapter 13, in Ireland and New Zealand public money is allocated to an independent body responsible for information provision rather than to the campaigners themselves. Speaking during scrutiny of the enabling legislation for New Zealand's 2011 referendum on the voting system, the chair of the responsible parliamentary committee (and MP from the then-governing National Party) Amy Adams said:

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*'we will have a public education campaign, and around \$5 million has been allocated for that. Against that, we now have spending limits of \$300,000 on independent campaigners in this process. I think the relativity between those amounts should not go without comment. It is important that the public information is out there and dominates the debate.'*

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<sup>13</sup> Decree No. 2005-238 of 17 March 2005 on the campaign for the referendum (France), articles 3 and 8.

<sup>14</sup> Montero, C. C., and Bellolio, F. C., 2010, 'Financing Referendum Campaigns in Spain', in Lutz, K. G. and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.151.

<sup>15</sup> Regeling van de Referendumcommissie van 12 november 2015, houdende nadere regels over de verstrekking van subsidies voor activiteiten die tot doel hebben het publieke debat in Nederland over een aan een referendum te onderwerpen wet te bevorderen (Subsidieregeling raadgevend referendum)(2015) (Netherlands) article 5.

12.21. She indicated that her personal preference would have been for a higher spending limit, but that this was the figure reached by the committee 'on a consensus basis'.<sup>16</sup>

## Spending limits

12.22. In many democracies – including Australia, Denmark, France, and Ireland – there are no spending limits for campaigners in referendums.

12.23. In Canada and Lithuania, spending limits are calculated on the basis of the number of electors in the area where the group intends to campaign.<sup>17</sup> In Portugal, the limit is a function of the base value that is used to calculate welfare entitlements.<sup>18</sup>

## Transparency of spending

12.24. Campaign expenses are commonly scrutinised through a requirement to submit audited accounts which are then made publicly available. For example, in Lithuania and Portugal this is required for all political parties and campaign groups.<sup>19</sup> In Denmark the law only applies to political parties in receipt of public funding.<sup>20</sup>

12.25. For citizen-initiated referendums in New Zealand, it is spending on advertising rather than total spending that is monitored. After a citizen-initiated referendum, any person publishing or broadcasting advertisements must make a return to the Electoral Commission providing a list of all advertisements, where they were published and/or broadcast and the cost of each.<sup>21</sup> The Electoral Referendum Act 2010 requires registered promoters to submit expense returns within seventy days if expenses exceed \$100,000.<sup>22</sup>

## Donations

12.26. Restrictions on donations from foreign entities or governments are common, whether stipulated by referendum-specific legislation, as in Canada, or in legislation regulating political party finances, as in Portugal.<sup>23</sup> In some cases, where legislation is specific to parties, non-party campaigners avoid financial regulation: Denmark is one such case.<sup>24</sup>

12.27. In countries such as Ireland, Spain, Lithuania, and Portugal, the amount that each individual or entity can donate is capped.<sup>25</sup> In Portugal and Lithuania, the cap is linked to the average income.<sup>26</sup>

<sup>16</sup> New Zealand Parliament, [Second Reading debate on the Electoral Referendum Bill 2010](#), 7 December 2010, (accessed 12 June 2018).

<sup>17</sup> Referendum Act 1992 (Canada) c.30, section 15(1); Law on funding of, control over funding of, political parties and political campaigns 23 August 2004 – No IX-2428 Vilnius (Lithuania) (amended 2011) article 17.

<sup>18</sup> Financing of Political Parties, Law no 19/2003 of 20 June (Portugal), article 20.

<sup>19</sup> Law on funding of, control over funding of, political parties and political campaigns 23 August 2004 – No IX-2428 Vilnius (Lithuania) (amended 2011) article 21; Financing of Political Parties, Law no 19/2003 of 20 June (Portugal), articles 15 and 19.

<sup>20</sup> Holbolt, S. B., 2010, 'Campaign Financing in Danish Referendums', in Lutz, K. G., and Hug, S. (eds.) *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.65.

<sup>21</sup> Citizens Initiated Referenda Act 1993 (New Zealand), section 34.

<sup>22</sup> Electoral Referendum Act 2010 (New Zealand), sections 57, 61 and 62.

<sup>23</sup> Referendum Act 1992 (Canada) c.30, section 14; Financing of Political Parties, Law no 19/2003 of 20 June, (Portugal) article 8.

<sup>24</sup> Holbolt, 2010, *Financing Referendum Campaigns*, Basingstoke, Palgrave Macmillan, p.65.

<sup>25</sup> Standards in Public Office Commission, 2016, [Annual Report 2016](#), Dublin: Standards in Public

Office Commission, p.p.21–22, (accessed 1 May 2018); Organic Law 8/2007 of 4 July on the funding of political parties (Spain), articles 4-7.

<sup>26</sup> Financing of Political Parties, Law no 19/2003 of 20 June (Portugal), article 8, 16, 21, 22, 27, 28–33; Law on funding of, control over funding of, political parties and political campaigns 23 August 2004 – No IX-2428 Vilnius (Lithuania) (amended 2011) article 10 and 11.

## Campaign finance: What is the right balance?

### Public funding

- 12.28. Chapter 11 considered whether multiple campaign groups should receive official designation, and by implication public funding. The Commission concluded that the current practice of allocating one lead campaigner on each side was the correct approach. Providing equal public funding to each lead campaigner is consistent with this. It is intended to achieve equality of opportunity between each side of the debate and to ensure that each side is represented in the debate.
- 12.29. Irish political scientist and referendums expert Michael Gallagher argues that parity of funding may lead to a situation of false balance, particularly if public opinion is heavily weighted towards one outcome. He says: 'setting up an organisation to campaign for the weaker side and giving it substantial amounts of public money could be seen as not so much levelling the playing pitch as tilting it.'<sup>27</sup>
- 12.30. However, direct public funding is often only a small proportion of a lead campaigner's total spending limit; in the case of the EU referendum it was less than 10% of that limit. Relative support for each lead campaigner is therefore likely to be reflected in the amount of money that it can spend, irrespective of public funding. Public funding provides each side with the minimum resources with which to establish its campaign whilst still allowing different levels of support to be reflected in divergent overall financial resources.

### Should spending limits be adjusted?

- 12.31. At present lead campaigners can spend ten times as much as other non-party permitted participants. The Commission has heard arguments both for reducing this disparity and for increasing it.
- 12.32. The argument for reducing the disparity is that doing so would help ensure a plurality of voices in a referendum campaign. This could give smaller citizen or civil society groups a greater chance to influence the debate. In addition, as seen in chapter 11, the political theorist Simone Chambers argues that encouraging a plurality of voices is important to limit the polarising effect of a binary vote.
- 12.33. Conversely, as also seen in chapter 11, lead campaigners play a key role in informing voters. Particularly if a referendum is pre-legislative, it is vital that a core campaign group should set out a clear prospectus for what it wants change to look like. Reducing this group's spending limit could hamper its ability to reach as many voters and harm the quality of debate.
- 12.34. Furthermore, lowering spending limits for lead campaigners could increase incentives for campaigns to set up front groups or seek to manipulate the 'working together' rules. It may also be doubted whether reducing spending limits for lead campaigners would elevate the voices of smaller citizen-led

<sup>27</sup> Gallagher, M., 1996, 'Conclusion' in Gallagher, M. and Uleri, P.V. (eds.), *The Referendum Experience in Europe*, Basingstoke, McMillan Press, p.248.

groups. Established political parties or groups are likely to continue to dominate debate regardless, due to their profile, experience and ability to raise campaign funds.

- 12.35. The argument for increasing the disparity between lead and other campaigners by reducing the spending limits for non-designated referendum participants is that doing so would level the campaign playing field. Elections expert Justin Fisher recommended in his evidence to the Commission that 'the spending limits for registered participants should be reduced significantly to ensure that the designated campaigns are paramount in any referendum contest.'<sup>28</sup> This, he argued, would enhance balance between the two sides of the debate. Current arrangements allow campaign groups on one side to collectively outspend campaign groups on the other side significantly. Fisher analysed spending of registered campaign groups for the EU referendum and found that:

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*'In total, non-designated participants spent £12,542,044 on the Remain side and £6,590,103 on the Leave side. There was, additionally, no limit or effective deadline on the registration of campaigns. Thus, registered campaigns (including the designated lead) could have spent up to £31,000,000 on the Remain side and £21,500,000 on the Leave side.'*<sup>29</sup>

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He suggested that this framework violates the principle of equal balance between the outcomes in the referendum debate on which UK regulation is based.

- 12.36. Each of these arguments has merit. There is a balance to be struck between encouraging campaigners on each side to coalesce behind a shared message while also enabling a range of voices to be heard. As argued in relation to public funding, a certain level of imbalance between the two sides in a referendum campaign is acceptable if this reflects their relative support levels; at the same time, each side should also be able to make its case.

## Conclusions/Recommendations

45. **The Commission considered alternative ways of distributing spending limits amongst lead and other campaigners and concluded that the current balance should not be altered.** Lead campaigners play a central role in the referendum debate and therefore it is right that they enjoy higher spending limits than other permitted participants and benefit from public funding. The Commission notes that, if there are more registered campaigners on one side of the argument than the other, current arrangements may permit an imbalance in collective spending. Nonetheless, as long as there are two well-financed lead campaign groups that are well represented in the debate, the Commission does not consider this to be a problem.

<sup>28</sup> Justin Fisher, 2017, Written Evidence to the Independent Commission on Referendums.

<sup>29</sup> Justin Fisher, 2017, Written Evidence to the Independent Commission on Referendums.

## Improving financial regulation

12.37. By international standards, the UK's system of financial regulation of referendum campaigns is comprehensive and generally works well. Nonetheless there are a number of improvements that could be made to ensure that this framework operates as effectively as possible.

### Clarifying 'working together'

12.38. As outlined in paragraph 12.12, rules on joint spending by referendum campaign groups were introduced to prevent campaigners from circumventing spending limits by splitting spending between a number of groups. However, after the EU referendum, the Electoral Commission found that the ambiguity and complexity of these rules discouraged campaigns from legitimate coordination, particularly among smaller campaign groups which may lack compliance or legal teams.<sup>30</sup> At the time of writing, the Electoral Commission was investigating allegations that some groups in the EU referendum campaign had sought to circumvent the spending limits by failing to declare joint working, though the groups concerned denied that they had broken any rules.<sup>31</sup>

12.39. The Commission supports the principle of 'working together' rules, but in order to have the desired effect, they must be sufficiently clear. Once clarified, these rules should be put in standing legislation so that they apply to all future referendums.

### Conclusions/Recommendations

46. The Commission supports the Electoral Commission's recommendation that joint spending controls should be clarified by the government and parliament and incorporated into PPERA. It also agrees that the Electoral Commission should be given statutory Code-making power to clarify any future matters.

## Capturing an accurate picture of campaign expenditure

12.40. At present, Electoral Commission guidance says that referendum spending includes 'items or services used during the referendum period including those bought before the period begins'.<sup>32</sup> However, this definition is not set out as clearly as it could be in statute.

12.41. Campaign groups could try to purchase resources to be used during the referendum campaign prior to the start of the regulated period. This could allow them effectively to exceed their spending limits. One pertinent example of this is the gathering and analysis of personal data. Increasingly, data are

<sup>30</sup> Electoral Commission, 2016, *The 2016 EU referendum*, p.39.

<sup>31</sup> Electoral Commission, 2017, *Electoral Commission Statement Regarding Vote Leave Limited, Mr Darren Grimes and Veterans for Britain Limited* [press release], 20 November, (accessed 3 June 2018).

<sup>32</sup> Electoral Commission, 2016, *Spending for EU referendum campaigners*, p.5 (accessed 20/05/18).

used to micro-target voters and were considered integral to the strategies of the campaigners in the EU referendum. Data are of increasing importance and so must be included in expenses returns if these are to be a true reflection of referendum campaign costs.

- 12.42. The purpose of the spending regulations is to include all costs associated with referendum campaigning, which includes any costs associated with the collection or purchase of data to be used to target voters with campaign messages or data analytics. It also includes gifts-in-kind related to the collection, organisation, analysis or delivery of personal data.
- 12.43. Making explicit in law that any costs directly associated with referendum campaign activities should be declared as referendum expenses would help to ensure that campaigns complied. It would also remove any ambiguity or potential for legal challenge. Finally, it would allow the Electoral Commission to take punitive action if campaigns sought to evade regulation or spending limits by incurring expenses prior to the regulated period.
- 12.44. In ensuring that the cost of data used during referendum campaigns is reflected in spending returns, the Electoral Commission also faces additional challenges. At present, the way campaigns collect, use and analyse data is somewhat opaque, making it difficult to enforce spending rules. Furthermore, data used during the course of a referendum campaign may have been collected for other purposes. For example, if a political party registers as a permitted participant in a referendum, it may be able to use data previously collected on voters for the purposes of political party campaigning during elections in order to campaign for a particular referendum outcome. Despite the value added to the referendum campaign, these data may not count towards the party's spending return.
- 12.45. At present, the Electoral Commission regulates campaign spending while the Information Commissioner regulates data usage. The increasing convergence of these areas has the potential to create regulatory confusion. We note that the Information Commissioner is currently undertaking an investigation of data analytics for political purposes, the outcome of which will be valuable in developing an understanding of how political campaigners use data. Beyond this, greater coordination between the Electoral Commission and the Information Commissioner, both in terms of regulation and the development of policy solutions, could improve oversight of referendum spending.

## Conclusions/Recommendations

47. In order to ascertain the true cost of a referendum campaign, and to ensure that campaign groups do not exceed their spending limits, it is imperative that the costs of goods and services procured prior to the start of the regulated period but used during the regulated period should be included in referendum spending returns. To minimise any uncertainty, **it should be clarified in law that 'referendum expenses' include spending on goods and services purchased prior to the regulated period but used during the regulated period.** This point is of particular importance as it relates to the collection, analysis and use of data, which play an increasingly important role in political campaigning.

48. The increasing usage of personal data in political campaigns means that the regulatory ambits of the Information Commissioner's Office (in respect of personal data) and the Electoral Commission (in respect of campaign spending) are converging. On the conclusion of the ICO's investigation into data analytics for political purposes, the Electoral Commission and the ICO should consider **how they can work together to ensure the best possible regulation in the future**. This should include an examination of how the financial value of data can be assessed to reflect the true costs of campaigns and a review of the appropriateness of the use in referendum campaigning of data already collected for other purposes.

## Financial disclosure at the point of registration

- 12.46. As noted in paragraph 12.14, although registered campaign groups must declare any donations above £7,500 received after registration, they do not need to declare the existing sources of funding at the point of registration. There is therefore a risk that campaigners, before registration, might gather donations that would be impermissible after registration, such as those from foreign donors.
- 12.47. It could be argued that those applying for lead campaigner status should be required to open their bank accounts to the Electoral Commission at the point of registration, so that it is possible to see the sources of existing funds. The argument is that transparency will act as a deterrent against campaigns using inappropriate sources to fund their campaigns. However, there is no guarantee that this would be effective: if a campaign were intent on receiving inappropriate donations it would go to great efforts to conceal the source of its funds. Without significant additional resources, it would be difficult for the Electoral Commission to detect this. Such an approach may deserve further consideration, but we are also aware of the difficulties it may pose.

## Strengthening the accountability of campaigners

- 12.48. A more effective deterrent to breaches of electoral law may be to strengthen the accountability of campaigners. Unlike political parties, referendum campaigns are usually temporary. Hence there is less accountability for campaigners who have contravened electoral law following referendums than following elections.
- 12.49. This problem is exacerbated by the fact that, at present, large campaign groups are only required to submit their audited accounts six months after the poll has taken place. The Electoral Commission cannot begin detailed

scrutiny of spending until the accounts are submitted, and so investigations into potential breaches are often not even opened until after the six-month deadline. As a result, such investigations may conclude long after the referendum took place, by which time those responsible for the campaign breaches may no longer be associated with the organisation; indeed, the campaign groups could have ceased to exist altogether.

- 12.50. Six months is a generous timescale for submitting referendum expense returns. Furthermore, if the designation were to take place much earlier in the referendum process, as proposed in recommendation 42, then campaigners would have more time prior to the referendum to set up processes for ensuring that they can comply with financial regulation. Therefore, faster returns should be possible. Campaign groups currently have sixty days after a referendum to make payments; it would seem feasible that large campaigns would be able to compile their accounts and have those accounts audited within thirty days of this. The appropriate timescale may need further investigation; however, the Commission suggests that audited accounts could be submitted within three months of the referendum campaign. This is also consistent with the deadline for campaign groups spending under £250,000, allowing the Electoral Commission to examine both concurrently. It could find this helpful in assessing whether the working together rules have been complied with.

### Conclusions/Recommendations

49. At present, Electoral Commission investigations into the financial conduct of campaigners during referendum campaigns conclude long after the referendum takes place. **In order to improve accountability of campaigners, the time within which large campaign groups must submit their audited accounts should be shortened to three months.**

## Donation caps: a special case?

- 12.51. Caps on donations to referendum campaigns are a feature of financial regulation in some democracies, but not in the UK. This is consistent with the absence of caps on donations to political parties in the UK.
- 12.52. It could be argued that there is a special case for donation caps in referendum campaigns. Voters' preferences are often less fixed at referendums than during elections and so voters are more likely to change their minds.<sup>33</sup> Referendum campaigns, and the money spent on them, could therefore be more influential than election campaigns, with a greater chance that a few large donors could influence the outcome.

<sup>33</sup> Leduc, L., 2002, 'Opinion change and voting behaviour in referendums', *European Journal of Political Research*, 41(6), pp.711–32 at p.716.

12.53. But there are also counterarguments to this. Donations to political parties could facilitate long-term influence within the party, unlike donations to temporary referendum campaigns. More broadly, there is great merit in having consistency between regulatory frameworks across all voting processes. It is not within the Commission's remit to consider whether caps should be introduced in relation to political donations in general, and a strong case would need to be made for treating elections and referendums differently in this regard.

### Conclusions/Recommendations

50. The Commission considered whether donations to registered referendum campaigners should be capped. The general issue of political donations is the subject of longstanding debate, which the Commission is not best placed to resolve. **The Commission does not consider there to be a case for treating donations to referendum campaigners differently from donations to political parties during election campaigns.**

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# 13. Quality of Discourse

- 13.1. On the occasions when they are held, which are generally on issues of fundamental importance, referendums should empower citizens to debate, deliberate and decide. However, evidence from recent UK referendums demonstrates that citizens feel let down by the quality of discourse during referendum campaigns and many feel unable to access the information that they want when making their decision.
- 13.2. Calls for improvements to discourse during referendum campaigns are sometimes seen as elitist or patronising towards voters. But many of these calls come from voters themselves. To advocate better quality information during referendums is not to suggest that there is a 'right' answer to a referendum question that voters would reach on closer examination of the evidence. Rather, the point is that voters should be able to access the information that they themselves want, from sources they trust, so that they can feel confident in their own decision.
- 13.3. Drawing on evidence from international experience, this chapter considers whether the quality of information and discourse during referendum campaigns could be improved. It explores three basic approaches:
- measures to assess the accuracy of campaigners' claims and either publicise the findings or intervene where inaccuracies are identified
  - provision of high-quality, neutral information to voters
  - mechanisms to promote inclusive, informed, and considered discussion among voters themselves.
- 13.4. Having outlined current practice in the UK, the chapter examines how well certain interventions work in other countries and considers whether these could be worth adopting. It acknowledges both the importance of providing quality information and fostering discussion, and the difficulties associated with many of the possible ways of doing so.

## UK experience

### Assessment of campaigners' claims

- 13.5. In the UK, discourse during referendum campaigns is primarily driven by campaigners and the media. The main mechanism through which campaign claims are assessed has therefore long been that, if someone makes a questionable statement, their opponents or the media challenge it. It has then been left up to voters to decide what they make of the competing arguments.
- 13.6. This approach has been supplemented in recent years by the rise of 'fact-checking', through which campaigners' claims are subjected to rigorous independent assessment. The BBC established its Reality Check strand for

the 2015 general election and repeated it during the 2016 referendum campaign; Reality Check has subsequently been made a permanent feature of BBC news reporting.<sup>1</sup> Channel 4 also has a well-established FactCheck strand.<sup>2</sup> The principal independent fact-checking body is Full Fact, which was founded in 2010.<sup>3</sup> The 2016 EU referendum campaign was, at the time, the most fact-checked referendum anywhere in the world.<sup>4</sup>

- 13.7. Fact-checking can provide a powerful disincentive to misleading campaigning, particularly where it receives wide media attention. In contrast to some of the international examples examined below, however, the UK has no mechanism for directly stopping inaccurate claims during referendum (or election) campaigns. The advertising industry's self-regulation body, the Advertising Standards Authority (ASA), formerly regulated election advertisements in respect of offensiveness, harm, social responsibility and adverse portrayal of public figures. But it never applied rules on misleading claims to election advertising as it does to other forms of advertising, and it abandoned even this limited involvement in 1999. There is no official process for adjudicating on the truthfulness of campaigners' claims (except, in elections, for those about a 'candidate's personal character or conduct'<sup>5</sup>).

## Provision of high-quality information

- 13.8. Provision of high-quality information about the options in referendum campaigns – that is, information that is accurate, impartial, readily accessible and relevant to people's concerns – has long primarily been the responsibility of broadcasters. In addition, universities and other research institutes have increasingly sought to disseminate their relevant research findings to the public at large: in 2016, for example, the UK in a Changing Europe project, based at King's College London, published a range of short briefing papers and longer research papers ahead of the EU referendum. In addition, a range of smaller independent organisations have in recent years sought to develop online tools such as 'voter advice applications' (VAAs) for assisting voters in finding information relevant to election and referendum choices. These often particularly target younger or minority voters, who are less likely to engage with traditional media.
- 13.9. Public information provision in the UK focuses primarily on promoting awareness of the referendum itself and encouraging voter registration. The Electoral Commission distributes a guide to each household containing information on the referendum question and how to vote. This sometimes also includes statements from the lead campaigners. It does not normally include other information on the subject matter of the vote.
- 13.10. For some referendums, however, supplementary information on the subject matter has been provided. The enabling legislation for the 2011 AV referendum empowered the Electoral Commission to provide information on the two voting systems.<sup>6</sup> The Electoral Commission utilised this power by including descriptions of the systems in the voter guide sent to all households.<sup>7</sup> This information was developed in consultation with experts on electoral systems, plain language experts, campaigners and members of the public to ensure neutrality, accuracy and accessibility.<sup>8</sup>

<sup>1</sup> BBC, 'Reality Check', BBC News, [website] (accessed 30 May 2018).

<sup>2</sup> Channel 4, 'FactCheck', Channel 4 News, [website] (accessed 30 May 2018).

<sup>3</sup> Full Fact, 'Full Fact', [website], (accessed 30 May 2018).

<sup>4</sup> Goss, Z., and Renwick, A., 2016, 'Fact-checking and the EU referendum', Constitution Unit blog,

[blog] 23 August (accessed 31 May 2018).

<sup>5</sup> Representation of the People Act 1983, section 106(1).

<sup>6</sup> Parliamentary Voting System and Constituencies Act 2011, schedule 1, section 9(2).

<sup>7</sup> Electoral Commission, 2011, *Local elections and Referendum on the Voting System Used to Elect MPs to the House of Commons*, [pamphlet],

London, Electoral Commission (accessed 14 June 2018).

<sup>8</sup> Electoral Commission, 2011, *Referendum on the Voting System for UK Parliamentary Elections: Report on the May 2011 Referendum*, London, Electoral Commission, p.44 (accessed 14 June 2018).

- 13.11. The UK government has also sometimes taken on the role of providing information: it sent out leaflets to every household for the 1975, 1997 and 2016 referendums. But such interventions have been widely criticised for lacking neutrality, and for using the government's advantageous position to interfere unduly in the campaign (see chapter 10).
- 13.12. Levels of voter satisfaction with the available information have varied considerably between referendums, as demonstrated by survey evidence collected by the Electoral Commission. After the 2014 Scottish independence referendum, 78% agreed that they had enough information to make an informed decision.<sup>9</sup> This compares to 49% who said the same in the 2011 Welsh Assembly referendum.<sup>10</sup> After the 2016 EU referendum, 62% of voters said that they had had enough information.<sup>11</sup>
- 13.13. Following the EU referendum, the Electoral Commission asked additional survey questions relating to respondents' perceptions of the campaign. As shown in Table 13.1, only 34% of respondents agreed that the campaign had been conducted in a fair and balanced way, while 52% disagreed – 34% of them strongly.<sup>12</sup> Among respondents who disagreed, the most common reasons for doing so were linked to the quality of information provided, particularly that the campaign had been 'one-sided/unbalanced/biased/partial' and that the information provided was 'inaccurate and misleading'.

**Table 13.1. Public opinion on the conduct of the EU referendum campaign**

To what extent do you agree or disagree with the following statements? – The conduct of the campaigns was fair and balanced		Why do you disagree that the conduct of the campaign was fair and balanced?	
Agree strongly	12%	One-sided/unbalanced/biased/partial	31%
Tend to agree	22%	Inaccurate/misleading information	31%
Neither agree nor disagree	12%	Lack of information available/didn't have the full facts	17%
Tend to disagree	19%	Too much scaremongering/'spin' involved	9%
Disagree strongly	34%	Too personal	5%
		Too much propaganda	2%

**Note:** The second question was put to those who had said they tended to disagree or disagreed strongly with the statement in the first question.

**Source:** The Electoral Commission, 2016, *Post Referendum Public Opinion Polling*, BMG Research, pp.1217 and 1261 (accessed 26 April 2018).

<sup>9</sup> Electoral Commission, 2014, *Scottish Independence Referendum, Report on the referendum held on 18 September 2014*, London, Electoral Commission, pp. 56–7 (accessed 14 June 2018).

<sup>10</sup> Electoral Commission, 2011, *Report on the referendum on the law-making powers of the National Assembly for Wales 3 March 2011*, London, Electoral Commission, p.13 (accessed 14 June 2018).

<sup>11</sup> Electoral Commission, 2016, *Post Referendum Public Opinion Polling*, BMG Research, p.880 (accessed 26 April 2018).

<sup>12</sup> Electoral Commission, 2016, *Post Referendum Public Opinion Polling*, p.1217.

## Fostering high-quality discussion

- 13.14. Broadcasters work hard during election and referendum campaigns to foster inclusive, balanced and informed discussion of the options. They are under a statutory obligation to maintain 'due impartiality' in their coverage.<sup>13</sup> They seek to include the voices of campaigners, experts and members of the public in a variety of formats, including interviews, debates and discussions.
- 13.15. The UK's current referendum practices include one element of officially sponsored discussion among voters. The Electoral Commission's question testing process involves extensive interviews and focus groups with members of the public. The main purpose of this research is to assess the intelligibility of a proposed referendum question. For recent referendums, however, the Electoral Commission has also asked about the information that research participants would like to receive before the vote. The research for the Scottish independence referendum found that there were 'frequent calls for a relatively short (e.g. one page) summary of the pros and cons of independence'.<sup>14</sup> The research for the Brexit referendum identified a substantial number of specific questions to which participants wanted answers.<sup>15</sup> In the case of the Brexit referendum, the Electoral Commission summarised these questions in its report and added:

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*'It is likely that the Government will give its views on these questions ahead of the poll. In addition, we recommend that all campaigners' websites include a section with their answers to these questions, highlighting any wider sources that they have relied upon in formulating their response. We will highlight these questions to campaigners as they register with us so that they are aware of this recommendation.'*<sup>16</sup>

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- 13.16. As explored below, some democracies have recently sought to go much further than this in developing more deliberative approaches to political discussion during referendum campaigns. Such efforts in the UK have to date been unofficial and modest in their ambitions. Many clubs, societies and other organisations seek to enable discussion among their members through debates and other similar events. Such gatherings are clearly valuable, but they often take place among like-minded people and they do not necessarily enable careful, open-minded deliberation. During the 2016 EU referendum campaign, the Electoral Reform Society sought to develop a more in-depth approach through providing an online toolkit that guided individuals or groups through a deliberative process.<sup>17</sup> Such tools have the potential to engage large numbers of people. But the quality of the deliberation they engender is always likely to be limited: the people who take part are self-selected; their time is likely to be tightly constrained; their discussions cannot be facilitated to ensure that everyone is heard and their perspective fairly considered.

<sup>13</sup> Communications Act 2003, section 320.

<sup>14</sup> Murray, L., Treanor, S., Chan, V., and Martin, C., 2013, *Referendum on Scottish Independence: Question Testing*, London, Ipsos MORI Scotland and the Electoral Commission, 24 January, p. 25 (accessed 12 June 2018).

<sup>15</sup> Hollings, P., and Roper C., 2015, *Referendum on Membership of the European Union: Question*

*Testing: Report for the Electoral Commission Exploring the Intelligibility of the Proposed European Union Referendum Bill (2015) Question*, London, GfK, pp.51–3 (accessed 12 June 2018).

<sup>16</sup> Electoral Commission, 2015, *Referendum on Membership of the European Union: Assessment of the Electoral Commission on the Proposed Referendum Question*, London, Electoral Commission, p.45 (accessed 13 June 2018).

<sup>17</sup> See Brett, W., 2016, *It's Good to Talk: Doing Referendums differently after the EU Vote*, London, Electoral Reform Society, pp.33–9 (accessed 26 April 2018).

## International practice

13.17. Each of the three approaches set out above has been taken further in some countries around the world than has been the case so far in the UK.

### Assessment of campaigners' claims

13.18. Assessment of campaigners' claims by fellow campaigners and in the media is common to all democracies. Neutral, independent fact-checking is also developing in a range of countries. In addition, some democracies go further and regulate campaigners' claims by empowering a body to intervene when misleading or inaccurate statements are made. This approach has at least three versions. The most direct is to outlaw false or misleading claims, as is done in relation to elections in South Australia (see Box 13.1).

#### Box 13.1. Regulating truth in South Australia

It is an offence in South Australia for an electoral advertisement to contain 'a statement purporting to be a statement of fact' that is 'inaccurate and misleading to a material extent'. Anyone in breach of this rule can be fined. More important than the prospect of post-election court action, however, is a provision allowing the Electoral Commission of South Australia to intervene during campaigns and require campaigners to withdraw and/or retract such statements.<sup>18</sup>

In the 2014 election, the Electoral Commission received ninety complaints under this provision and it requested eleven withdrawals or retractions. The requirement for retraction can in itself constitute a severe penalty. For example, where a party has been found to have made a misleading statement in a leaflet delivered to households, the Commission has required the party to deliver a further leaflet to all of those households containing nothing but a retraction. This is costly to the party both financially and reputationally.

The previous Electoral Commissioner recommended that consideration be given to abolishing this mechanism, saying:

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*'Enforcement of this provision compromises the role of Electoral Commissioner and often requires the Commissioner to determine who is 'right' or 'wrong' in terms of the two major parties. These decisions can then be used during political campaigning and can offend against the independence of the Electoral Commissioner.'*<sup>19</sup>

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(Box 13.1 continued on the next page)

<sup>18</sup> South Australia Electoral Act 1985 (as amended), article 113.

<sup>19</sup> Electoral Commission South Australia, Election Report: State Election 2014. Adelaide, nd, p.79.

(Box 13.1 continued from the previous page)

But neither of the main parties supports this position. In evidence from interviews, Constitution Unit researchers found strong support in the current Electoral Commission, and among politicians and journalists, for maintaining the provision. Most interviewees took it for granted that truth in politics matters and that a mechanism to enforce it is therefore needed. The only criticisms of the provision found in the South Australian media suggest it is too weak, rather than too strong.<sup>20</sup>

The mechanism's weakness is, however, a significant concern. The Electoral Commission is allowed to intervene only when statements are both inaccurate and misleading: one of these alone is insufficient. This leaves wide scope for campaigners to exaggerate and dissemble. There is no evidence that the general tenor of campaigning is much affected or that voters in South Australia are any less dissatisfied with the character of political discourse than are voters elsewhere.

- 13.19. The second version is to enforce truthfulness in political advertising in the same way as in other advertising: through an independent advertising standards body rather than through statutory provisions. While the UK Advertising Standards Authority, as seen above, does not moderate election or referendum advertising, some of its counterparts elsewhere do. In New Zealand, for example, political advertising is covered, but treated with special care. The New Zealand Advertising Standards Authority's Code of Ethics contains a provision intended to protect 'advocacy advertising', which states:

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*'Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore, such opinions may be robust. However, opinion should be clearly distinguishable from factual information.'*<sup>21</sup>

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In practice, this means that the NZASA intervenes only against egregiously false statements. In interview, the head of the NZASA told Constitution Unit researchers that she welcomed having this role, which she saw as important for the quality of democratic debate.<sup>22</sup>

- 13.20. A third, more limited form of intervention against false or misleading claims, finally, is found in California. Here, as sometimes happens in the UK, campaigners can submit material for inclusion in the official public information booklet that is sent to all voters. Californian law requires the voter information guide to be made publicly available at least 20 days before it is printed and distributed, during which time any voter can seek judicial review requiring parts to be amended or removed if it can be proven that they are false or misleading.<sup>23</sup> In a 1988 case, for example, the Californian Court of Appeal upheld a lower court's decision to delete campaigners' arguments from the voter guide on a local initiative measure on the basis that they were false and misleading.<sup>24</sup>

<sup>20</sup> Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*, London, Constitution Unit, forthcoming, to be available once published at the above hyperlink.

<sup>21</sup> New Zealand Advertising Standards Authority, *Advertising Codes of Practice 2014*, p.14.

<sup>22</sup> Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*.

<sup>23</sup> Cal. Elect. Code §9092.

<sup>24</sup> *Patterson v. Board of Supervisors* (1988) 202 Cal. App. 3d 22 (accessed 31 May 2018).

## Provision of high-quality information

- 13.21. Some democracies have provision to produce or promote neutral public information during referendum campaigns.
- 13.22. Sometimes the government itself is responsible for the dissemination of official public information, which is often required to be neutral and impartial. In France, the government can use public funds to run an official information campaign, which must be neutral.<sup>25</sup> In Spain, similarly, public authorities provide information about the referendum but must not seek to influence voters' orientations.<sup>26</sup>
- 13.23. Despite these restrictions, concerns have often been raised about the neutrality of the information provided by governments whose members are simultaneously campaigning for a particular outcome. For example, the French government's campaign for the 2005 referendum on the proposed European Constitution was considered biased towards a 'Yes' vote.<sup>27</sup> Similarly, the Spanish Central Electoral Commission ruled in 2005 that the government's public information campaign for that country's referendum on the same topic lacked neutrality due to its use of the slogan 'the first in Europe', which suggested that Spain should be the first country to ratify the treaty.<sup>28</sup>
- 13.24. Because of these concerns, the task of providing neutral information is in other countries often given to one or more independent bodies. In some of these cases, public funding is given to non-governmental organisations to provide such information. In the Netherlands, for example, the Referendum Commission allocates funding to campaign organisations and reserves around one third of this money for organisations that plan to carry out neutral activities.<sup>29</sup> Elsewhere, an independent public body is entrusted with conducting an official information campaign. Box 13.2 sets out examples of this approach from Ireland and New Zealand.

### Box 13.2. Information provision in Ireland and New Zealand

#### Ireland

In Ireland, a Referendum Commission is established each time a referendum is due to be held. Its role is to disseminate explanations of the subject matter of the referendum, promote awareness of the referendum, and encourage voting.<sup>30</sup> Prior to 2001, such Commissions were also tasked with preparing and publishing arguments for and against the referendum proposal, and with fostering a fair debate.<sup>31</sup>

Research undertaken by the Constitution Unit shows that the Irish Referendum Commissions have a positive impact on referendum discussions and can inhibit campaigners from making false claims. But they do not have a very high profile and the information that they provide is limited. They face a tension between, on the one hand, protecting their actual and perceived impartiality by sticking to the provision of relatively

(Box 13.2 continued on the next page)

<sup>25</sup> Richard, A., and Pabst, R., 2013, *Evaluation of the French Referendum on the EU Constitution*, May 2005, Democracy International, (accessed 26 April 2018).

<sup>26</sup> Montero, C.C., Bellolio, F.C., 2010, 'Financing Referendum Campaigns in Spain' in Lutz, K. G., and Hug, S. (eds.), *Financing Referendum Campaigns*, Basingstoke: Palgrave MacMillan.

<sup>27</sup> Richard, and Pabst, 2013, *Evaluation of the French Referendum on the EU Constitution*, May 2005.

<sup>28</sup> Montero and Bellolio, 2010, *Financing Referendum Campaigns*, p. 158.

<sup>29</sup> *Subsidieregeling raadgevend referendum 2014* (Netherlands), article 5.

<sup>30</sup> Referendum Act 2001 (Ireland),

<sup>31</sup> Referendum Commission, 2001, *Reports of the Referendum Commission on the: Twenty-First Amendment of the Constitution (Abolition of the Death Penalty); Twenty-Third Amendment of the Constitution (Acceptance of the Jurisdiction of the International Criminal Court); Twenty-Fourth Amendment of the Constitution (The Treaty of Nice)*, Dublin, Referendum Commission.

(Box 13.2 continued from the previous page)

legalistic information and, on the other, seeking to maximise their impact by commenting on the issues that matter most to voters. Thus, while they have been useful, public debate is primarily driven by campaigners on both sides.<sup>32</sup>

### **New Zealand**

During its 2011 referendum on the voting system, New Zealand took a more ambitious approach to referendum information provision than the Irish model. Information provided by the Electoral Commission not only set out the alternatives, but also supported voters through each step of the decision-making process. It indicated criteria that voters might employ in order to evaluate the options, and set out what the evidence suggested about how the options measured up against each of these criteria. It did not advise voters on how much weight they ought to apply to the various criteria, and did not attempt to tell them what they ought to think of the options overall. Basic information was disseminated through leaflets and advertisements, while further information was provided online, through local meetings and on DVDs that were sent out on request.

The Constitution Unit's research has found that this information campaign was very successful. It helped to frame public debates and foster informed discussion. But various contextual factors – including the nature of the referendum topic, the role of politicians in the campaign, and the nature of the New Zealand media – helped facilitate this effectiveness.<sup>33</sup>

## **Fostering high-quality discussion**

- 13.25. The efforts in the UK to promote high-quality discussion during referendum campaigns through the development of online deliberation toolkits were mentioned above. Recognising the limits of such approaches that we described, some jurisdictions have started to go further. The approach that they take is the same as for the citizens' assemblies and citizens' juries discussed in chapters 4 and 7: they engage small groups of citizens in high-quality, sustained deliberation and then disseminate the groups' findings to the public at large. This can allow voters to see what people like themselves think about the issues once they have had a chance to think about them in depth and hear a wide range of perspectives. Whereas the applications of this approach discussed in chapter 7 related to preparation for a possible referendum, here we focus on applications designed to engender discussion and provide trustworthy information during the referendum campaign itself.
- 13.26. The leading application of this approach is provided by Citizen Initiative Reviews in the US state of Oregon, as set out in Box 13.3. The Oregon experience is very positive, and a number of other US states have in recent years begun to experiment with it.

<sup>32</sup> Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*.

<sup>33</sup> Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*.

### Box 13.3. Citizen Initiative Reviews in Oregon

In many US states, citizens can, by petition, initiate referendums every two years, at the same time as federal, state and local elections take place. In Oregon, Citizen Initiative Reviews have been held at each vote since 2010. A panel of eighteen to twenty-four citizens, broadly representative of the electorate, is convened by a non-governmental organisation called Healthy Democracy to deliberate on a ballot measure. The panel meets for three to five days, hearing from proponents and opponents of the measure, and independent experts. It prepares a statement that presents key findings on the ballot measure on which a majority of panellists agree, and then sets out the panellists' views of the arguments for and against the proposal. This statement is included in the official voter pamphlet, which is posted to every voter alongside their ballot papers.<sup>34</sup>

These reviews have been subject to extensive research, and the evidence gathered suggests that they have been very effective. The discussions among the panel members are inclusive and informed.<sup>35</sup> The panel statements are judged to have been accurate, clear, and comprehensive.<sup>36</sup> Around a quarter of voters say that they have read the statements in recent election years, and around three-fifths of these have indicated that they found them helpful.<sup>37</sup> Given that the statement is embedded within a booklet over a hundred pages long and is presented as a densely typed black-and-white text, these numbers are surprisingly high. Those who have studied the process suggest that better formatting and marketing could further extend the impact of the exercise.<sup>38</sup>

The review process is widely praised for fostering balance, accuracy and trustworthiness, and often contrasted with regular campaigns. Commentators have noted, for example, that the reviews provide voters with 'straightforward, unbiased information from a source they can trust: their fellow Oregonian',<sup>39</sup> that they are 'intended as an antidote to the attack ad, the viral video, the sound bite',<sup>40</sup> and that they 'push back on so much of the white noise engulfing modern life'.<sup>41</sup> The review statements help 'voters make heads or tails of the spin'.<sup>42</sup>

## Improving the quality of discourse

13.27. The quality of information and discourse during referendum campaigns in the UK is a matter of widespread and serious concern. Campaigners have frequently been accused of making false or misleading claims. During the

<sup>34</sup> Gastil, J., and Richards R., 2013, 'Making Direct Democracy Deliberative through Random Assemblies', *Politics & Society*, 41(2) pp.253–281, (accessed 14 June 2018). For an overview of this case, see Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*.

<sup>35</sup> Gastil, J., and Knobloch, K., 2010, *Evaluation Report to the Oregon State Legislature on the 2010 Oregon Citizens' Initiative Review*, p.8 (accessed 12 April 2018); Knobloch, K.R., Gastil, J., and Feller, T., 2013, *Evaluation Report on the 2012 Citizens' Initiative Reviews for the Oregon CIR Commission*, State College, PA, Pennsylvania State University, p.5 (accessed 15 June 2018); Gastil, J., Knobloch, K.R., and Richards, R., 2015, *Building a More Informed Electorate: Analysis of the Citizens' Initiative Review, 2010–2014*, State

College, PA, Pennsylvania State University, p.73 (accessed 15 June 2018).

<sup>36</sup> Gastil et al., 2015, *Building a More Informed Electorate*, pp.25–9.

<sup>37</sup> Gastil and Knobloch, 2010, *Evaluation Report to the Oregon State Legislature on the 2010 Oregon Citizens' Initiative Review*, p.34; Knobloch et al., 2013, *Evaluation Report on the 2012 Citizens' Initiative Reviews*, pp.20–1; Gastil et al., 2015, *Building a More Informed Electorate*, pp.35–8; Gastil, J., Fuji Johnson, G., Han, S., and Rountree, J., 2017, *Assessment of the 2016 Oregon Citizens' Initiative Review on Measure 97*, State College, PA, Pennsylvania State University, pp.17–20, (accessed 15 June 2018).

<sup>38</sup> Gastil et al., 2015, *Building a More Informed Electorate*, pp.66; Citizens' Initiative Review Commission, 2014, *Panelist Report to the Oregon Citizens' Initiative Review Commission*.

<sup>39</sup> *Statesman Journal*, 2009, 'Pilot project could improve state elections', 17 June.

<sup>40</sup> Nielsen, S., 2010, 'Ballot Watchdogs: Welcome to Oregon's new political force', *The Oregonian*, 22 August.

<sup>41</sup> *The Oregonian*, 2010, 'Don't lock up more tax dollars', 29 October.

<sup>42</sup> *Statesman Journal*, 2008, 'Group focuses on bill to limit bilingual ed', 20 September.

2011 AV referendum, the No2AV campaign's claim that introducing the Alternative Vote system would cost £250 million was widely criticised,<sup>43</sup> and David Blunkett, a prominent No campaigner, later acknowledged that it had been made up.<sup>44</sup> Meanwhile, Yes campaigners were accused of exaggerating the impact that AV might have, and of misrepresenting MPs as workshy. Following the 2014 Scottish referendum campaign, Scottish unionists called for an independent 'truth commission' to fact-check claims made by campaigns in the event of a further referendum on independence.<sup>45</sup> As seen in chapter 4, both sides were heavily criticised during the EU referendum campaign. The UK Statistics Authority upbraided Vote Leave for its claim that the UK was contributing £350 million a week to the EU,<sup>46</sup> while the independent fact-checker Full Fact said the Treasury's claim that families would be £4,300 worse off if the UK left the EU was '[a]t best ... a red herring'.<sup>47</sup>

- 13.28. Given how important it is for democracy that voters should be able to access the information they want from sources they trust, it is troubling that such concerns are so widespread. At the same time, the Commission is also aware that referendums often address unavoidably contested matters. Amidst the rough and tumble of an intense referendum campaign, a single purported purveyor of truth may struggle to secure credibility or trust. Any measures designed to improve discourse during referendum campaigns should be designed to empower citizens to find information and participate in discussions and make judgements as they themselves want.

### Conclusions/Recommendations

51. The quality of discourse during referendum campaigns matters greatly. Referendums are opportunities for voters to take decisions of great importance into their own hands. It should be possible for voters to find the information that they want from sources that they trust. Mechanisms for promoting high-quality discussion must, however, be designed with great care. **So far as possible, mechanisms should be designed to be 'bottom-up' – giving greater voice and choice to citizens – rather than 'top-down'.**

## A neutral arbiter of truth?

- 13.29. It is important that false or misleading claims made by campaigners are publicly challenged, and not just by those with a stake in the outcome of the referendum. Fact-checking by organisations such as Full Fact, the BBC and Channel 4 already plays a valuable role in discouraging the spread of inaccurate claims and encouraging campaigners to ensure that any claims they make are backed up by evidence. Their work contributes to improvements in discourse during referendum campaigns and, where possible, should be supported. The

<sup>43</sup> For example, Wintour, P., 2011, 'Front: Lib Dems Vent Fury at Cameron as Party Suffers Election Rout: Ashdown Turns on PM for 'Breach of Faith' in AV campaign', *The Guardian*, 6 May.

<sup>44</sup> Shackle, S., 2011, 'No Campaign Used Made-up Figures', says David Blunkett'. *New Statesman*, 5 May (accessed 14 June 2018).

<sup>45</sup> Allardyce, J., 2016, 'Unionists Call for Referendum 'Fact Checkers'', *Sunday Times*, Edition 1 Scotland, 27 November.

<sup>46</sup> UK Statistics Authority, 2016, 'Statement on the Use of Official Statistics on Contributions to the European Union', UK Statistics Authority, [website], 27th May (accessed 26 April 18).

<sup>47</sup> Full Fact, 2016, 'The £4,300 question: Would Leaving the EU Really Make every Household Worse Off?', Full Fact, [website], 18 April, (accessed 30 May 2018).

BBC, for example, could continue to develop its Reality Check strand further and integrate it more fully into general news reporting. Print and online news providers could outsource fact-checking to quality, independent providers and place greater emphasis on accuracy in their reporting.

- 13.30. Beyond such measures, the idea of improving discourse by empowering an official body to intervene when statements or claims made by referendum campaigners are false or misleading has gained some recent support in the UK. An early day motion signed by fifty MPs in the wake of the 2016 referendum called for the establishment of an 'Office of Electoral Integrity' to 'verify the truthfulness of claims made during political campaigns, with powers to issue clarifications and fines where appropriate'.<sup>48</sup> This approach was also advocated by several respondents in their written evidence to the Commission.<sup>49</sup> Should such a role be created, consideration would need to be given to who would be best placed to fulfil it; there are three apparent options.
- 13.31. In evidence to the Commission, several respondents suggested that the Electoral Commission was best placed to make corrective interventions in the debate. This would be consistent with South Australia's approach, which, as Box 13.1 shows, is viewed positively in South Australia itself. However, the UK Electoral Commission has said that it does not want a role in determining 'truth' due to the risk that this could undermine its credibility in carrying out its other functions. In evidence to us, it said:

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*'The Electoral Commission's independent role in overseeing the administration of referendum polls and regulating the political finance rules for referendum campaigners means we do not think that it would be appropriate for the Commission to be drawn into political debate by also regulating the truthfulness of referendum campaign arguments.'*<sup>50</sup>

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- 13.32. The second option would be to extend the remit of the Advertising Standards Authority (ASA) to cover misleading claims in referendum advertising, as in New Zealand. In evidence to the Commission, the ASA also rejected a role in regulating election and referendum advertising, saying that the objections articulated in 1999 when it ended its involvement in such regulation still apply.<sup>51</sup>
- 13.33. The third option would be to create a new body to regulate claims made by campaigners during referendum campaigns. Given the sensitive nature of adjudicating on political claims, any such body would clearly need to command high levels of public trust. Yet if there are concerns about whether well-regarded existing bodies command sufficient trust to perform such a role, it seems even more doubtful that a new body could do so.
- 13.34. Even if the problem of trust could be overcome, the South Australian evidence suggests that the efficacy of measures to ban falsehoods would be limited. Campaigners can often make statements that are strictly true, but likely to be

<sup>48</sup> Early Day Motion 278: Office of Electoral Integrity, session 2016–17 (accessed 26 April 2018).

<sup>49</sup> Electoral Reform Society, 2017, Written Evidence to the Independent Commission on Referendums; Liberal Democrats, 2017, Written Evidence to the Independent Commission on Referendums; Reidy, T., and Suiter, J., 2017, Written Evidence to the Independent Commission on Referendums.

<sup>50</sup> Bassett, C., Electoral Commission, 2017, Written Evidence to the Independent Commission on Referendums.

<sup>51</sup> Jones, C., Advertising Standards Authority, 2017, Written Evidence to the Independent Commission on Referendums.

misleading. Many of the arguments put forward in referendum campaigns are based on future projections that cannot necessarily be proved or disproved. As explained above, the provisions in both South Australia and New Zealand are drawn narrowly, leaving considerable scope for campaigners to make highly contestable claims. That is necessary because a more interventionist approach that sought to prevent all misleading or tendentious claims could enter subjective terrain and risk restricting legitimate free speech. But a minimalist approach that challenges only manifest falsehoods can also easily lose public confidence, if voters see that heavily spun claims are allowed to pass. Furthermore, the experience of South Australia and New Zealand suggests there is a risk that this approach could give unjustified validity to claims that have not been ruled against, as campaigners may use the absence of interventions as evidence of their veracity.<sup>52</sup> Thus, either approach – interventionist or minimalist – is highly problematic.

### Conclusions/Recommendations

52. The Commission commends the role of independent fact-checking organisations and broadcasters in challenging the statements and claims made during the course of referendum campaigns. The Commission encourages news providers across all media to consider how they could raise the profile of quality, independent fact-checking and ensure that accuracy is among their highest priorities in all reporting and commentary.

53. While truth is vital, it is also contested. **The Commission does not believe it would be desirable for any official body to make an authoritative and definitive judgement on the objective 'truth' of political claims and statements.**

## The content of publicly funded materials

13.35. Whilst it is impractical to regulate all campaign materials, there may be a special case for specific reforms in relation to publicly funded materials. The main publicly funded materials at present are the free referendum address sent to all households by the lead campaigns and the allocation of referendum broadcasts. These are intended to provide each campaign with an equal opportunity to convey its messages to the general public. In addition, the Electoral Commission has often provided space in its official information booklet for campaigners to set out their case. This booklet is intended to provide information that is useful for voters. There is a strong case for treating these two sets of materials in different ways.

<sup>52</sup> Renwick, A., and Palese, M., 2018, *Improving Discourse in Election and Referendum Campaigns*.

## REFERENDUM ADDRESS AND BROADCASTS

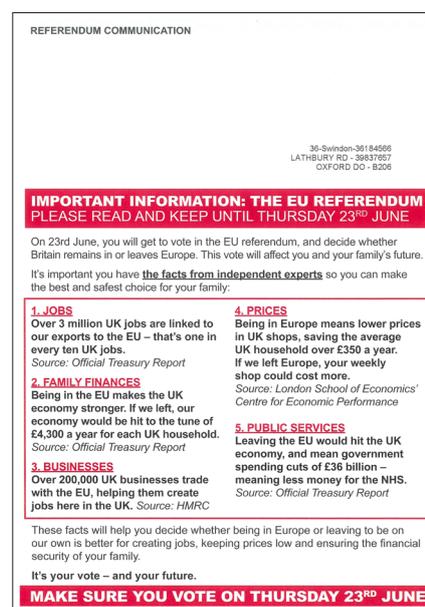
- 13.36. Campaigners' free referendum address and broadcasts are not intended to be neutral or to give a balanced assessment of the arguments: rather, they provide an opportunity for such groups to communicate their arguments to voters. This purpose should be patently clear. This is the case at present for referendum broadcasts, as the purpose of the broadcast is clearly stated before it is shown. However, the source of postal referendum addresses is not always so clear.
- 13.37. In previous referendums, lead campaigners have been accused of using their free mailings to give the impression of an official government communication. In the EU referendum, the front page of the Vote Leave leaflet was headed 'Official Information about the Referendum on 23 June 2016', while the Britain Stronger In Europe leaflet was headed 'Important information: The EU referendum'; each had only a small imprint stating the source of the material on the back page (see Figures 13.1. and 13.2.). It would be possible to make the source of the free mailing much clearer, so that the material cannot readily be misinterpreted as officially sanctioned information.

**Figure 13.1.**  
Referendum Communication from  
Vote Leave



**Source:** Vote Leave, 2016, 'The European Union and Your Family', [leaflet], London.

**Figure 13.2.**  
Referendum Communication  
from Stronger In



**Source:** Britain Stronger in Europe, 2016, 'Important Information: The EU Referendum', [leaflet], London.

**MATERIAL IN THE ELECTORAL COMMISSION BOOKLET**

- 13.38. The Electoral Commission sometimes gives each lead campaigner a page in the official referendum booklet posted to all households (see paragraphs 13.9 and 13.10). This is not a statutory requirement, but, in the absence of information on the substantive issues of the referendum from the Electoral Commission itself, it provides voters with information about arguments related to the referendum. Despite the informational purpose of the booklet as a whole, lead campaigners have approached the page in the same way as they have other campaign materials. Instead, the official booklet could be used as an opportunity to give voters a different kind of information to that which they are already receiving in campaign leaflets.
- 13.39. There is a strong case for saying that the content of this booklet should be reviewed to ensure that it does fulfil its informational purpose. Several approaches are possible.
- 13.40. One is to ensure that material provided by campaigners in the Electoral Commission booklet is not factually inaccurate or misleading. While the Commission recommended above against such truth-checking in general, it may be justified in the context of the Electoral Commission booklet because of that booklet's official and informational function. It is noteworthy that, in California, the courts ruled that the state's similar provision for reviewing the content of the voter information booklet did not violate the constitutional protection of free speech, as the content was in 'a specific instrument funded by [government] in order to convey information to the voters about an upcoming election'.<sup>53</sup>
- 13.41. While in California such truth-checking takes place through judicial review, other mechanisms may be preferable in the UK. In the 2016 referendum, the UK Statistics Authority intervened several times to criticise how campaigners were using official statistics, and it could be asked to review material submitted for the official booklet. In the context of a post-legislative referendum, statements about what the new law says might also be subject to review.
- 13.42. The Electoral Commission has said that it will look into this option if it offers space to campaigners in a future referendum information booklet. In a letter to the then Minister for the Constitution, Chris Skidmore, in September 2017, Claire Bassett, Chief Executive of the Electoral Commission, wrote:

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*'In the event of a future referendum, the Commission will consider whether to offer a campaigner page in its booklet in the context and circumstances of that specific event. If a page were to be offered to campaigners again, the Commission will consider whether it is possible to address issues of truthfulness and accuracy when setting the conditions for accepting campaigner content for publication.'*<sup>54</sup>

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- 13.43. An alternative approach could be to allow campaign groups to see their rivals' submitted materials before publication and provide rebuttals. The information

<sup>53</sup> Patterson v. Board of Supervisors (1988) 202 Cal. App. 3d 22, p.29.

<sup>54</sup> Bassett, C., 2017, [Letter from Claire Bassett, Chief Executive of the Electoral Commission, to Chris Skidmore MP, Minister for the Constitution regarding 'Accuracy and Truthfulness of Referendum Campaign Material'](#), 8 September, (accessed 14 June 2018).

booklet in California, for example, contains statements for or against the proposed measure of up to 500 words and rebuttals of up to 250 words.<sup>55</sup> We also explore further ideas below (paragraphs 13.54 and 13.55) regarding how the Electoral Commission booklet could interact with any future exercises in citizen deliberation.

- 13.44. In the letter quoted above, the Chief Executive of the Electoral Commission indicates that a review will be conducted in the event that a future referendum is called. As the Electoral Commission itself has repeatedly argued, however, the procedures for referendums should be fixed well in advance and, so far as possible, should not be tailored to any individual vote. A general review outside the context of a specific referendum would therefore be preferable.

### Conclusions/Recommendations

54. **Publicly funded materials that are intended to fulfil campaign purposes should be clearly labelled as such.** The free referendum address should be required to carry a very visible heading stating, 'This is a communication from the X campaign'.

55. The Electoral Commission's referendum booklet is a service to voters, intended to provide them with information about a forthcoming referendum. **The Electoral Commission should review the content of the booklet so that it best fulfils this purpose**, and in doing so, it should consult widely. It should consider mechanisms for checking the accuracy of claims, as well as other ways of ensuring that the booklet helps voters find the information they want. The Electoral Commission should conduct this review for referendums in general, and should not wait until another referendum is called.

## Should there be an independent body responsible for providing information?

- 13.45. High-quality information can improve the quality of discourse during referendum campaigns. Provision for disseminating such information can ensure that voters are able to access the information they want and help them assess the accuracy of claims made by campaigners themselves. However, UK and international experience (see paragraphs 13.11 and 13.23) demonstrates that, if public information is provided directly by the government itself, it is often perceived as biased towards the government's favoured outcome.

<sup>55</sup> Cal. Elect. Code §9084-6.

- 13.46. To overcome this problem, an independent body responsible for providing information, similar to those in Ireland and New Zealand (see Box 13.2), could be established. There is evidence of support for this among members of the public in the UK. In its question-testing research for the 2014 Scottish referendum, for example, the Electoral Commission found that, alongside information from campaigners and the media, 'many [research participants] also wanted information from an "objective", "independent" body or person that they could trust to give them an un-biased, accurate assessment of what would happen in different circumstances'.<sup>56</sup>
- 13.47. This approach has been successful in the countries in which it has been applied, and the information provided has become a valuable resource for voters. In written evidence to the Commission, Irish referendum experts Jane Suiter and Theresa Reidy said:

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*'The evidence from Ireland demonstrates that voters trust the Referendum Commission, they find its communications useful and the information provided by the Referendum Commission is the most influential they receive over the course of a campaign.'*<sup>57</sup>

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- 13.48. However, there may be a number of contextual factors that contribute to the success of such efforts in relation to particular referendums in some democracies, and there remains a question as to whether this approach would work for referendums in the UK.
- 13.49. First, information provision cannot be effective unless it is generally accepted as neutral and unbiased, and achieving this is challenging in the context of a highly polarised referendum campaign. A trade-off may exist between providing engaging material that voters find interesting and ensuring that information is unobjectionable to either side of the debate. In New Zealand in 2011, the Electoral Commission was bold in conducting an information campaign that did extend deep into potential contested territory. But this was in the context of a relatively low-salience referendum in which politicians played little campaigning role: whether a similar approach would be possible in a more sharply contested referendum is unclear. We have recommended that, in the UK, referendums should be held only on major issues that do attract strong public interest. If this is followed, a low-salience referendum such as New Zealand's is unlikely. Ireland's Referendum Commissions, by contrast, take a very cautious approach in order to protect their reputation for impartiality. As a result, the information they provide is legalistic and sometimes fails to address the issues at the heart of the referendum campaign. Their information campaign for the very high-salience abortion referendum in May 2018 was especially limited and did not engage with any of the contentious issues at the heart of the referendum debate.
- 13.50. Second, the media environment is also crucially important. In countries such as New Zealand and Ireland, major news outlets have tended not to take strong positions during referendum campaigns and have supported the work of neutral information providers. In the UK, by contrast, most newspapers

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<sup>56</sup> Murray et al., 2013, 'Referendum on Scottish Independence: Question Testing', p.25.

<sup>57</sup> Reidy, J., and Suiter, T., 2017, Written Evidence to the Independent Commission on Referendums.

effectively campaign for one side or the other and could seek to undermine confidence in neutral bodies that made statements that they found inconvenient. It would be very difficult in this environment for an official information provider both to be noticed and to be accepted on all sides as legitimate and impartial.

- 13.51. To devise a new system of information provision for referendums in the UK therefore looks very challenging. There are, however, a number of existing institutions that are well established, command public trust, and produce or disseminate information that may be valuable to voters during referendum campaigns. These include universities, research institutions, fact-checkers and broadcasters, as well as public bodies such as the House of Commons Library and the Office for National Statistics. Polling during the EU referendum campaign found that the BBC was consistently considered the most important source of information in informing voters' decisions.<sup>58</sup> Technical and academic experts, meanwhile, are the only spokespeople whom survey respondents say they trust more than people like themselves.<sup>59</sup> 'Voter advice applications' (VAAs) and other online tools have gained increasing numbers of hits.
- 13.52. While elevating information from such bodies to some form of 'official' status may not be advisable, all such efforts are important and could be developed further so that high-quality information is readily accessible to voters. Broadcasters, universities, research funders, charitable trusts and others have important responsibilities to consider what they can do to enrich the informational environment in which referendums – and the democratic process as a whole – take place.

### Conclusions/Recommendations

56. The Commission welcomes the work of independent bodies such as universities, research institutes, fact-checkers, broadcasters and neutral democracy organisations in providing impartial information during referendum campaigns. Such bodies and those who can support them should consider what they can do to enrich the information environment for referendums as far as possible.

57. In a number of other democracies, publicly funded independent bodies – such as Ireland's Referendum Commission and New Zealand's Electoral Commission – are specifically tasked with producing and disseminating such information. Whilst this approach may be suitable in some contexts, **the Commission is sceptical that creating a publicly funded information body would be effective at present in the UK:** it is doubtful that anybody would be capable of commanding the necessary levels of public trust and perceived independence.

<sup>58</sup> Brett, 2016, *It's Good to Talk*, p.17.

<sup>59</sup> Edelman Trust Barometer, 2018, 'Edelman Trust Barometer 2018 – UK Results', Edleman UK (accessed 31 May 2018).

## Public deliberation

- 13.53. Rather than top-down approaches, the best way to ensure that voters can access the information they want could be to give citizens themselves a central role in providing information to their peers. One approach to this would be to build upon the Electoral Commission's existing work in testing proposed referendum questions. As noted above, the Electoral Commission asks participants in this research about the information that they would like to receive during the campaign, including the questions that they would like answers to. In 2016, it encouraged campaigners to provide answers to these questions. The Commission could consider how it might build on this approach and encourage campaigners and the media to pay greater heed to it than they have done to date. More ambitiously, and following the model used in Oregon (see Box 13.3), deliberative exercises such as citizens' assemblies or citizens' juries could produce a better insight into considered public opinion as to the issues that matter. Such an exercise could deliver not only questions, but also a statement of the participants' conclusions on the referendum topic, which could then be disseminated among voters.
- 13.54. Careful attention would need to be given to how such deliberative exercises could best be designed and delivered to suit the context of a UK referendum campaign. We set out basic principles for the design of deliberative exercises in chapter 7. In addition to these, specific attention would need to be given to what materials a citizens' assembly would generate in the context of a referendum campaign and how these would be disseminated. In Oregon, for example, the citizens' review panel sets out its understanding of the key arguments. An alternative or additional approach could be to ask a citizens' assembly to set out the issues that it thinks most need to be debated in the referendum campaign and to pose questions that campaign groups should be required to answer. In Oregon, the statements produced by citizens' review panels are included in the information booklet that is sent to all voters. That booklet is, however, rather different in character from the one produced by the Electoral Commission in the UK, so a different approach may be considered preferable.
- 13.55. There is good reason to expect that information produced by citizens would be more trusted than information produced by the campaigns, experts, or official bodies on their own.<sup>60</sup> Deliberative exercises could be a useful way of providing valuable information and also empowering citizens and encouraging public deliberation. Nevertheless, given the multiple options for applying this approach to referendums in the UK, it may be desirable in the first instance to pilot a variety of alternatives.

<sup>60</sup> For evidence on this, see Fournier, P., van der Kolk, H., Carty, R. K., Blais, A., and Rose, J., 2011, *When Citizens Decide: Lessons from Citizens Assemblies on Electoral Reform*, Oxford, Oxford University Press.

## Conclusions/Recommendations

58. The Commission believes that information provision is best delivered with citizen involvement. A minimal step would be for the Electoral Commission to consider what it could do to publicise further the findings of its research regarding the questions that people want answers to and encourage campaigners and the media to respond to these.

But it is possible to go further. In Oregon, citizens' assemblies produce statements setting out the issues as members see them, to be included in the official information booklet. Following this model, **the Commission recommends that citizens' assemblies should be piloted during future referendum campaigns, with an assembly held before the regulated referendum period begins.** If the parliament or assembly that calls the referendum agrees to a pilot, this could be sponsored by the Electoral Commission. A pilot citizens' assembly could produce a statement of issues, as in Oregon, and/or set out questions that citizens would like campaigners to answer.

# 14. Regulation of Online Campaigning

- 14.1. The UK's current legislation regulating the conduct of referendums, PPERA, was introduced eighteen years ago. Since then, technological innovations have led to new ways of campaigning and communicating. Increasingly, campaigns are choosing to reach voters online, and during the most recent referendums, in 2014 and 2016, campaigners focused much of their effort on social media.
- 14.2. However, referendum regulation has not been updated to reflect this shift. As a result, there are gaps in regulation that allow campaigns to violate the principles of transparency and openness on which it is premised. This chapter explores the new challenges to regulating referendums created by the changing nature of campaigning, and then goes on to consider solutions to these problems. The problems are not unique to referendums: most apply equally to elections. Nonetheless, the Commission thinks it right that they should be considered in this report.

## Challenges posed in UK referendum campaigns

### Disinformation

- 14.3. Concerns have been raised about the spread of disinformation during referendum campaigns. Disinformation can be defined as intentionally false information posing as news or other factual information, deployed for political purposes or financial gain.<sup>1</sup> It is usually spread online, particularly through social networks, and has been associated with foreign interference for malign purposes, amplified and spread by automated social media accounts, known as 'bots'. In November 2017, Theresa May accused the Russian government of 'seeking to weaponise information' and '[d]eploying its state-run media organisations to plant fake stories and photo-shopped images in an attempt to sow discord in the West and undermine our institutions'.<sup>2</sup> Research from the University of Edinburgh found that 419 accounts operated from the Russian Internet Research Agency were attempting to influence British politics.<sup>3</sup>
- 14.4. It is important that the effects of such interventions, particularly on the result of the EU referendum, should not be overstated. A study by the Oxford Internet Institute concluded that:

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*'(1) Russian Twitter accounts shared to the public, contributed relatively little to the overall Brexit conversation, (2) Russian news content was not widely shared among Twitter users, and (3) only a tiny portion of the YouTube content was of a clear Russian origin.'*<sup>4</sup>

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<sup>1</sup> Wardle, C., and Derakhshan, H., 2017, *Information disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Council of Europe report DGI(2017)09, p.5.

<sup>2</sup> May, T. 2017, 'PM speech to the Lord Mayor's Banquet 2017', 13 November, London (accessed 2 May 2018).

<sup>3</sup> Booth, R., Weaver, M., Hern, A., and Walker, S., 2017, 'Russia used hundreds of fake accounts to tweet about Brexit, data shows.' *The Guardian*, 14 November (accessed 2 May 2018).

<sup>4</sup> Narayanan V., Howard, P. N., Kollanyi, B., and Elswah, M., 2017, 'Russian Involvement and Junk News during Brexit' Data Memo 2017.10, Oxford, Project

on Computational Propaganda (accessed 14 June 2018).

- 14.5. Likewise, analysis of the most shared Facebook articles during the EU referendum has found that 'hyperpartisan' articles – that is, articles that are highly biased in favour of one political perspective – from traditional news sources, such as newspapers, were shared online far more widely than 'fake news'.<sup>5</sup>
- 14.6. Nonetheless, there is concern about malign interference in electoral events, and the spread of disinformation. Politicians and members of the public have expressed fears about the potentially harmful impact of this phenomenon on democracy.<sup>6</sup>

## Micro-targeting and transparency of online advertisements

- 14.7. Concerns have been raised about the use of big data to profile UK voters and target them with highly tailored messaging. This targeting extends beyond basic demographic information: there were accusations during the 2016 EU referendum that voters were being psychologically profiled.<sup>7</sup> Political parties were also accused of using demographic information to deliver specific campaign content through Facebook's targeted ad platform in the 2017 election.<sup>8</sup>
- 14.8. Some concerns relate to how data used to target individuals are collected. As discussed in chapter 12, the Information Commissioner (ICO) opened an investigation into the use of data analytics for political purposes in May 2017.<sup>9</sup> The investigation is ongoing and will make public policy recommendations as well as investigating breaches of data protection rules. We recommended greater coordination between the ICO and the Electoral Commission.
- 14.9. Nonetheless a further potential problem is the lack of transparency around micro-targeted campaign advertisements. Concerns were raised after the EU referendum about the use of so-called 'dark ads'. These advertisements were not public, so no one but the individuals targeted could see the content of any claims or promises made by campaigners. This made it difficult to hold campaigners to account for any false or misleading information or offensive material in such ads.
- 14.10. Social media companies have promised measures to end 'dark ads' and improve the transparency of political advertising. Testing has begun in certain countries, but it is not clear when these will be implemented worldwide. Facebook applied new transparency measures to an electoral event for the first time during Ireland's abortion referendum in May 2018, allowing users to 'View Ads' that were currently running on its pages. The measures were commended for allowing Facebook users to check the source of seemingly neutral ads claiming to tell 'the facts', which in many cases were promoted by campaigners.<sup>10</sup> However, they were also widely criticised for being difficult to use, lacking information, and only showing live ads.<sup>11</sup>

<sup>5</sup> Waterson, J., 2017, 'Britain Has No Fake News Industry Because Our Partisan Newspapers Already Do That Job', *Buzzfeed News*, 24 January (accessed 2 May 2018).

<sup>6</sup> On launching the DCMS Committee's inquiry on Fake News, Chair Damian Collins MP called fake news 'a threat to democracy': Digital, Culture, Media and Sport Committee, 2017, 'Fake News Inquiry Launched', UK Parliament [website] (accessed 30 May 2018); A poll for BBC World Service found that 62% of UK agreed with the Statement 'I worry about what is real and what is fake on the internet: Globescan, 2017, 'Fake

Internet Content a Huge Concern but Appetite for Regulation Weakens', Globescan [website] (accessed 14 June 2018).

<sup>7</sup> Cadwalladr, C., 2017, 'The Great British Brexit Robbery: How our Democracy was Hijacked', *The Observer*, 7 May (accessed 31 May 2018).

<sup>8</sup> Booth, R., 2017, 'Facebook Employs Ex-Political Aides to Help Campaigns Target Voters', *The Guardian*, 8 May (accessed 2 May 2018).

<sup>9</sup> Denham, E., 2017, 'The Information Commissioner Opens a Formal Investigation into the Use of Data Analytics for Political Purposes', *The Information Commissioner's Office blog*, [blog] (accessed 02 May 2018)

<sup>10</sup> Murtagh, P., 2018, 'Referendum Advertising Rules Hit Strategies for Final Fortnight', *Irish Times*, 12 May (accessed 31 May 2018).

<sup>11</sup> Ryan, P., 2018, 'Early Analysis Shows Facebook's 'View Ads' Tool Has Some Key Limitations', *Storyful*, 30 April, (accessed 31 May 2018).

- 14.11. Since then, Facebook has launched further transparency measures, including a searchable archive of US election-related advertisements on Facebook and Instagram.<sup>12</sup> These measures are still in development and so it is too early to tell how effective they will be.
- 14.12. There are, however, significant concerns as to whether measures such as those introduced by internet companies can adequately address the underlying problems on their own. While major platforms are beginning to respond to concerns about transparency, new platforms may emerge, or increase in popularity, and may not introduce similar measures. If each platform follows its own approach and develops its own transparency tools, the resulting information provision may be confusing and disjointed. As discussed below, there is also wide agreement that it should be for democratically elected governments and parliaments to decide the regulatory framework and the level of transparency, not for private companies.

### Reduced costs for intervention in foreign politics

- 14.13. Related to concerns about micro-targeting and the opacity of online advertisements are concerns about attempts from foreign organisations to influence domestic political or electoral events. The internet has made cross-border communications easier, reducing the costs of participating in campaigning on a political issue outside the country in which one is based.
- 14.14. Targeting of voters by foreign groups was a key concern during the 2018 Irish abortion referendum, when evidence was found that anti-abortion groups based outside Ireland were paying for Facebook advertisements targeting Irish voters.<sup>13</sup> In response, Facebook barred foreign groups from paying for referendum-related advertisements, and Google banned referendum advertising altogether.<sup>14</sup> Despite this, some online advertisements continued to appear.<sup>15</sup>
- 14.15. At present, UK legislation on the conduct of campaigning only applies to 'permitted participants' registered with the Electoral Commission, who must be UK citizens or UK-based legal entities. As such, the Electoral Commission has no power to regulate referendum campaigning by actors based outside the UK, despite the fact that outside actors can still target UK voters with political messages, and potentially spend unlimited funds to do so.

### Lack of financial transparency

- 14.16. A further problem around advertising on social media is the lack of financial transparency. Financial transparency requirements apply equally to expenses incurred for online and for offline campaigning. However, the way in which spending is reported makes scrutiny of online spending difficult. The categories of spending that must be reported are listed in PPERA (schedule 13), and the Electoral Commission asks campaigners to specify the category into which each item of spending falls. But there is no separate category for spending on social media: such spending is reported as either 'advertising' or 'unsolicited material sent to voters'. Furthermore, this spending is identifiable only if spent directly with the platform, such as Facebook, Twitter, or YouTube.

<sup>12</sup> Leathern, R., 2018, 'Shining a Light on Ads with Political Content', *Facebook Newsroom*, 24 May (accessed 30 May 18).

<sup>13</sup> Graham-Harrison, E., 2018, 'Revealed: the Overseas Anti-Abortion Activists Using Facebook to Target Irish Voters', *The Observer*, 12 May (accessed 31 May 2018).

<sup>14</sup> Graham-Harrison, E. (2018), 'As Polls Narrow Before the Abortion Vote, is Rural Ireland Setting Up a Brexit Moment?' *The Observer*, 20 May 2018 (31 May 2018).

<sup>15</sup> Goodbody, W., 2018, 'Referendum Ads Still Appearing Online Despite Ban – TRI', *RTÉ*, 18 May (accessed 31 May 2018).

Spending through agencies remains opaque, with no breakdown of how money is used. In this area, it could be argued that current transparency requirements are rendered meaningless.

## Difficulties in identifying the source of campaign materials

- 14.17. Imprint rules require all printed election and referendum material to include the names and addresses of the printer and promoter. The purpose of these rules is to ensure that voters can identify the source of any campaign materials they receive.
- 14.18. At present, however, these rules apply only to printed materials, not to online advertising. On the recommendation of the Electoral Commission, the Scottish government required imprints on non-printed referendum material during the 2014 Scottish independence referendum. But the standing legislative framework for elections and referendums in general has not been changed, and nor was any requirement introduced for the EU referendum. It may hence be difficult for voters to identify content as political advertising or to identify the source of an advertisement seen online.

### Conclusions/Recommendations

59. The Commission believes that existing referendum regulation is ineffective in regulating online campaigning. At present, gaps in the regulatory framework mean that there is a lack of openness and transparency of advertising by referendum campaigners on social media.

## Solutions

- 14.19. This section assesses a variety of potential solutions to the problems just identified. Before considering specific issues and solutions, it is useful to address a general question relating to internet rules across the board: to what degree should internet companies themselves be responsible for setting and enforcing standards; and to what extent should government be involved? For many years, internet companies were largely left to govern online space themselves. Some saw this as embodying a libertarian spirit of freedom from state control.<sup>16</sup> Recent months and years, however, have seen increasing concern that this approach is inadequate: critics point out, first, that internet companies cannot always be relied upon to do what is best for society as a whole; and second, that it should in any case be for the democratic process of policy-making, not for powerful multinational companies, to set the rules.<sup>17</sup>

<sup>16</sup> Gray, R., 2012, 'The Pauls' New Crusade: "Internet Freedom"', *BuzzFeed News*, 5 July (accessed 1 June 2018).

14.20. The thinking of the UK government reflects this shift in tone. In January 2018, the Department for Digital, Culture, Media and Sport published a *Digital Charter* that advocated an intermediate approach based on cooperation between government and internet companies. It proposed ‘a rolling programme of work to agree norms and rules for the online world and put them into practice’.<sup>18</sup> It indicated that:

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*‘The Charter will not be developed by government alone. We will look to the tech sector, businesses and civil society to own these challenges with us, using our convening power to bring them together with other interested parties to find solutions.’<sup>19</sup>*

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14.21. Since then, the government’s tone appears to have toughened further, and ministers have been more willing to embrace legislative solutions. Speaking in March 2018 in the immediate aftermath of the Cambridge Analytica scandal, the Culture Secretary, Matt Hancock, said:

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*‘This week has crystalized a turning point from the big internet giants being seen as the guardians of their own fate to them needing to exist within a structure and a set of rules that society polices, not them themselves. Is it right that the important balance between privacy and the ability to use data should be struck by Mark Zuckerberg? No of course it isn’t. It should be struck by legitimate authority, which in the UK is parliament.’<sup>20</sup>*

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14.22. The Commission has considered this debate, and taken account of the recent shift in approach from the UK government, when examining specific options. The following section explores possible general approaches to regulating online content, before going on to explore specific changes that could be made under the existing regulatory framework. As this report went to press, the Electoral Commission published its own proposals for how the regulation of digital campaigning should be strengthened. We could not take these into account in our own deliberations, but we are glad to find that many of the Electoral Commission’s recommendations accord closely with our own.

## Tackling disinformation

14.23. The Commission shares the concerns about disinformation raised in paragraphs 14.3–6. The possible remedies to this problem reflect the wider debate about internet regulation just set out. Several approaches to such regulation have been suggested, which may be used individually or in combination:

<sup>17</sup> See, for example recent debate in Ireland, Kenny, C., 2018, ‘What if Ban on Ads Alters Result of Referendum?; Google and Facebook Not Accountable to Electorate But Exert Influence with Ban’, *Irish Times*, 11 May; RTE, 2018, ‘Calls for Government to Police Digital Advertising’, 10 May.

<sup>18</sup> HM Government, 2018, ‘*Digital Charter*’, Policy Paper, 25 January, p.1, (accessed 3 May 2018).

<sup>19</sup> HM Government, 2018, ‘*Digital Charter*’, p.2.

<sup>20</sup> Robinson, N., 2018, ‘*The Matt Hancock One*’, *Political Thinking with Nick Robinson*, BBC Radio 4 [podcast], 23 March (accessed 1 June 2018).

- make platforms directly liable for the content on their sites and oblige them to remove inappropriate content
- empower state bodies to intervene directly to block or remove content
- work with platforms to develop best practices and codes of conduct to improve the moderation of content.

- 14.24. The EU E-Commerce Directive 2003 states that online platforms are hosts of content, and so are generally exempt from liability over that content. If made aware of illegal activity or information, they have an obligation to remove it; but they are not required to monitor their platforms for such activity.<sup>21</sup> The first proposal to tackle the spread of disinformation would be to increase the liability of social media platforms, giving them a statutory obligation to monitor their platforms and take down content in certain circumstances, such as where libellous material is posted. The strongest version of this approach would be to treat social media platforms as publishers.<sup>22</sup>
- 14.25. Making platforms liable for their content was a recommendation of the Committee on Standards in Public Life's 2017 *Intimidation in Public Life* Report.<sup>23</sup> It was proposed as a way of responding to the threats and online abuse directed at MPs and parliamentary candidates. This approach has been applied in Germany: the Network Enforcement Law came into effect there in October 2017, requiring social media sites to remove 'clearly unlawful' content from their platforms within 24 hours or face fines of up to €50 million.<sup>24</sup>
- 14.26. However, making social media platforms liable for content requires them to make judgements on material created not by staff or journalists but by private actors and political organisations, and in some circumstances to remove it. Requiring platforms to make a judgement on what is illegal or impermissible content could have dangerous consequences for freedom of expression. It would mean 'outsourcing' to private companies delicate decisions about how best to balance important freedoms. In addition, imposing a timescale and/or financial penalty could encourage platforms to err on the side of caution and remove any dubious or questionable content rather than make a careful judgement that balances harm against freedom of expression, which could lead to undue censorship.<sup>25</sup> This has proved to be the case in Germany, where, after widespread criticism, the government is now looking at revising the Network Enforcement Law.<sup>26</sup>
- 14.27. The second approach to regulation would be to create powers for the state to directly block content that it considers to be disinformation. In January 2018, French President Emmanuel Macron proposed a new law to tackle disinformation online. He said the law would give judges special powers to delete social media profiles or block websites producing 'fake news' during election times.<sup>27</sup> Unsurprisingly, however, there are concerns that this approach could amount to state censorship and infringe on legitimate free speech.<sup>28</sup>
- 14.28. A third approach would be to create mechanisms for coordination between government and internet companies in a so-called 'co-regulatory'

<sup>21</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

<sup>22</sup> For an overview, see Brown, T., 2018, 'Social Media and Online Platforms as Publishers Debate on 11 January 2018', House of Lords Library Briefing, London, House of Lords (accessed 3 May 2018).

<sup>23</sup> Committee on Standards in Public Life, 2017, *Intimidation in Public Life*, Cm 9543, London, HM Government (accessed 20 June 2018).

<sup>24</sup> Bundesministerium der Justiz und für Verbraucherschutz, 2017, 'Startschuss für die Rechtsdurchsetzung in sozialen Netzwerken' 18 September (accessed 5 May 2018).

<sup>25</sup> Rohleder, B., 2018, 'Germany Set Out to Delete Hate Speech Online. Instead, it Made Things Worse', *Washington Post*, 20 February (accessed 11 June 2018); Human Rights Watch, 2018, 'Germany: Flawed Social Media Law', Human Rights Watch, [website], 14 February (accessed 11 June 2018).

<sup>26</sup> Thomasson, E., 2018, 'Germany Looks to Revise Social Media Law as European Watches',

*Reuters*, 8 March, (accessed 7 June 2018).

<sup>27</sup> *Reuters*, 2018, 'Macron Plans Law to Fight 'Fake News' in 2018', 3 January, (accessed 2 May 2018).

<sup>28</sup> Alouane, R-S., 2018, 'Macron's Fake News Solution Is a Problem', *Foreign Policy*, 29 May (accessed 30 May 2018).

arrangement. Social media platforms themselves already have rules for moderating the content posted on their platforms, and mechanisms for enforcing these. In a reformed system, parliament and government could set the standard for such rules, or the principles that should guide them: for example, they could establish certain criteria that any company or industry code of practice would need to adhere to. Within these parameters, government and internet companies could create joint working mechanisms to develop guidelines for best practice and ensure that the internet industry can enforce its own rules effectively. The focus here would be on procedural accountability rather than accountability of outcome.

- 14.29. This approach does, however, rely on the cooperation of internet companies. If they refuse to play their role effectively, it may be that a more interventionist approach by government becomes necessary.
- 14.30. It is not the Commission's role to make detailed policy recommendations in relation to social media regulation: the issues that are being raised in current debates are complex and rapidly evolving, and they extend far beyond referendums. As well as the UK government's work on the Digital Charter, other inquiries have been established specifically to consider the issue of disinformation, such as the House of Commons Digital, Culture, Media and Sport Committee's inquiry into 'Fake News'<sup>29</sup> and the LSE's Truth, Trust, and Technology Commission.<sup>30</sup> The House of Lords Communications Committee is conducting a wide-ranging inquiry on 'The Internet: To Regulate or not to Regulate?'<sup>31</sup>

### Conclusions/Recommendations

60. The Commission is concerned about the potentially distorting effects of disinformation in referendum campaigns. It welcomes other inquiries set up to deal specifically with the issue of disinformation, including the Digital, Culture, Media & Sport Committee's inquiry into 'Fake News' and the LSE's Truth, Trust and Technology Commission. It believes that **an effective solution to this problem requires cooperation between the government and technology companies. At the same time, solutions should not oblige or encourage technology companies to make judgements on the boundaries of democratic speech: that is a matter for democratically elected governments and parliaments.** The Commission welcomes existing efforts to this end, including the UK government's Digital Charter.

<sup>29</sup> Digital, Culture, Media and Sport Committee, 'Fake News', UK Parliament [website] (accessed 30 May 2018).

<sup>30</sup> LSE Department of Media and Communications, 'LSE Truth, Trust & Technology Commission', LSE [website] (accessed 30 May 2018).

<sup>31</sup> House of Lords Communications Committee, 'The Internet: To Regulate or Not to Regulate? inquiry', www.parliament.uk [website] (accessed 11 June 2018).

## Restricting paid political advertising online?

- 14.31. One solution to the concerns raised above about paid political advertising online could be to ban it entirely, or severely restrict its use. While that might appear radical, it would be consistent with the UK's longstanding restrictions on political advertising in the broadcast media (see Box 14.1). Such an approach would allay some of the concerns raised above by preventing paid micro-targeting and making it harder for foreign entities to target UK voters during electoral events.
- 14.32. Campaign groups would still be able to reach voters through 'organic' content – that is, posts that spread through being shared by other users. This would mean that their reach online would be determined by their level of public support on the platform, rather than by how much was spent in promoting them.
- 14.33. However, restricting online paid political advertising so tightly would create a marked difference in the treatment of such advertising between print and online media. In an oral evidence session with the Commission, Nick Pickles, Head of Public Policy and Government at Twitter UK, opposed a ban on online paid political advertising on the basis of this disparity.

### Box 14.1. Current restrictions on political advertising in the broadcast media

When the BBC first began broadcasting, it was conceived of as a public service to educate and inform the masses. Providing space for politicians to make their arguments was seen as part of this remit. The first Party Election Broadcasts were made in the form of twenty-minute speeches by the three main party leaders on BBC radio in 1924.<sup>32</sup> When the 1954 Television Act allowed the creation of an Independent Television Network supported by advertising, it explicitly banned advertisements of a political or religious nature.<sup>33</sup>

In the subsequent decades, the role and nature of television evolved and changed, but the issue of political advertising was not revisited until the 1990s. In its 1998 review of political finance, the Committee on Standards in Public Life (CSPL) recommended that the restrictions on political advertising be maintained. It argued that they prevented a financial 'arms race' and ensured that listeners and viewers were not subjected to 'a continuous barrage of party political propaganda'. In combination with free party political broadcasts, the restrictions also ensured that the richest political parties did not dominate, and that all significant parties could share their views.<sup>34</sup> The major parties agreed with these conclusions, and the restrictions had wide support. The restrictions were affirmed in the 2003 Communications Act, despite concerns that they could be struck down by the European Court of Human Rights (ECtHR).

In 2013, the restrictions were challenged in the ECtHR by the campaign group Animal Defenders International (ADI), which claimed that the restrictions

(Box 14.1 continued on the next page)

<sup>32</sup> Broadcaster Liaison Group, *The History of Political Broadcasts*, Broadcaster Liaison Group [website] (accessed 2 May 2018)

<sup>33</sup> ITV 1963, *The ITV System*, *ITV Retropedia* [website] (accessed 2 May 18).

<sup>34</sup> Committee on Standards in Public Life, 1998, *The Funding of Political Parties in the United Kingdom* (Fifth Report of the Committee on Standards in Public Life), Vol. 1, Cm 4057-I, London: HM Government, p.172 (accessed 12 June 2018).

(Box 14.1 continued from the previous page)

contravened Article 10 of the European Convention on Human Rights, on the right to freedom of expression. The court ruled that the 2003 Communications Act did not breach the Convention and so the restrictions stood. Central to this judgement was the proportionality of the restrictions: the fact that they applied only to what was considered the most influential form of media, the broadcast media, and not to all political advertising.

The Court's judgement drew a direct comparison with online advertising:

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*'the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home ... In addition, the choices inherent in the use of the internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter.'*<sup>35</sup>

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- 14.34. There is a question as to whether such variation in the restrictions on political advertising across different forms of media continues to be justified. In its 1998 report, CSPL justified the broadcast advertising restrictions in part as a way to limit spending. Frequent comparisons are drawn with the US where huge sums are spent on television advertising, increasing dependence on corporate sponsorship and wealthy donors.<sup>36</sup> Following the introduction of campaign spending limits in 2000, however, this argument is less powerful than it was.
- 14.35. There is also a strong case that the arguments made about the exceptional nature of broadcast advertising that have been used to justify divergence in restrictions (see Box 14.1) no longer stand, or at least that they will cease to hold in the near future. For many citizens, social media have surpassed broadcasting as the most influential form of media. Social media today are pervasive in society and play an increasing role in many people's everyday lives. It is far from clear that social media lack 'intimacy' or that exposure to advertising online is a matter of consumer choice.
- 14.36. These considerations suggest a need for a wholesale review of political advertising across all forms of media – print, broadcast, and online. Concerns about political advertising do not relate solely to referendums, so it is not the Commission's role to conduct such a review itself. A review would reflect on all the key concerns that exist about online paid political advertising, as well as on its potential benefits. It would consider whether the boundaries between the media in how political advertising is regulated are set correctly or whether they should be changed.

<sup>35</sup> *Animal Defenders International v UK* [GC] [2013] 362, (2013) 57 EHRR 21, (accessed 02 May 2018).

<sup>36</sup> Kurtzleben, D., 2015, 'Campaigns Will Spend \$4.4 Billion On TV Ads, But Why?', *It's All Politics, Political News from NPR*, 19 August (accessed 31 May 2018).

## Conclusions/Recommendations

61. The Commission notes the variation in restrictions on political advertising across different types of media. Taking into consideration the changing nature of political campaigning, it is not convinced that such variation continues to be justified in its current form. **The Commission recommends that a parliamentary committee, or committees working together, should conduct a comprehensive inquiry into the future of political advertising across print, broadcasting and online media.**

## Repository of online advertisements

14.37. In advance of any conclusion regarding the future of political advertising arising from the inquiry recommended above, a number of specific issues can be addressed. One proposal to ensure that online political advertising is transparent and subject to scrutiny is to create a public repository of online advertisements to allow public and regulatory scrutiny of all online advertising.

14.38. The database would serve two purposes:

- First, it would enable the Electoral Commission to assess online spending by campaign groups and identify any discrepancies with spending returns.
- Second, it would provide transparency over the content of the advertisements, allowing the public, civil society and the media to judge the content of online advertisements and see, for example, whether different messages are being targeted at different groups or whether advertisements are using language or themes that could be considered inappropriate or harmful.

14.39. In order to provide adequate transparency, such a database would need to be publicly available. It would also need to be comprehensive, have an easy-to-use interface and be easily searchable. It would need to contain significant information on each advertisement, including when and by whom it was placed, at whom it was targeted, how long it ran and how much was spent on it.

14.40. A central question regarding this approach concerns who would be responsible for providing the data on political advertisements necessary for the database. One option would be to require referendum campaigners themselves to submit any election advertisements they post in real time for immediate online publication in a repository held by the Electoral Commission. This would be consistent with the Electoral Commission's remit of regulating referendum campaigners. On the other hand, campaigners may produce thousands of online advertisements with small variations in either content or target audience, and submitting real-time data could require significant resources. More fundamentally, relying on campaigners to submit their own advertisements could make it possible that some are omitted, either

deliberately or through error. Omissions and errors are common in spending returns and therefore would be likely with this approach. Furthermore, internet companies already hold detailed data on advertising, and requiring campaigners to submit returns would duplicate this.

14.41. An alternative option would be to require the internet companies themselves to provide the data for a central database. The database that Facebook is now developing suggests that the internet companies would certainly be capable of fulfilling an obligation such as this. Indeed, Facebook recently committed to making its archive of political advertisements accessible to 'outside experts, researchers, and academics' in a format that would allow a central database to be built.<sup>37</sup>

14.42. The UK government is already considering possible action in this area. When asked in March 2018 about measures to ensure transparency of election advertising, Culture Secretary Matt Hancock said:

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*'The Electoral Commission's looking at this, and clearly we need to make sure that there's transparency about how people are campaigning. ... I'm open to thinking about how we make this work in the digital age. It's another area of our national life that's been massively changed by technology, and we need to make sure that the rules keep up with that.'*<sup>38</sup>

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14.43. It is not this Commission's place to make detailed recommendations as to the design and working of an online advertising database. Nonetheless, it believes the principle is a good one. To succeed, any approach to political advertising would require cooperation between the government, parliament, the regulators and the online advertising platforms.

## Conclusions/Recommendations

62. The Commission welcomes commitments by social media companies to increase the transparency of political advertisements on their platforms. Nevertheless, transparency requires that full information on political advertisements on social media should be available to both citizens and the regulator in an open and accessible format. **The Commission recommends the creation of a publicly available and searchable online repository of political advertisements**, which should include the advertisement itself and information on when it was posted, which groups were targeted, and how much was spent. The Commission urges the UK government to build on its existing work with the Electoral Commission to establish the best means of operating such a repository.

<sup>37</sup> Leathern, R., 2018, 'Shining a light on Ads with Political Content', *Facebook Newsroom*, 24 May (accessed 30 May 18).

<sup>38</sup> Robinson, N., 2018, 'The Matt Hancock One'.

## Create categories for digital spending in spending return

- 14.44. In order to improve transparency around digital spending by referendum campaigners, the way in which campaigners are required to report expenses could be reformed. At present, there are two difficulties. First, spending categories do not clearly identify digital spending. Second, while campaigners are asked to report their spending in terms of the categories, there is no requirement for them to do so. Clearer returns would provide voters with more information about how campaigners are using digital technology. They would also allow better scrutiny of spending, as more and more activity moves online. In its spending report for the 2015 general election, the Electoral Commission said it would be 'reviewing all of the expenditure reporting categories to ensure that they remain proportionate and relevant to future trends in campaigning'.<sup>39</sup> But changing the spending categories needs action by the government minister, and requiring campaigners to present their spending in terms of these categories can be done only through primary legislation<sup>40</sup>
- 14.45. Short of these changes, there are measures that the Electoral Commission could take to improve transparency of digital spending. For example, at present invoices submitted by campaigners are heavily redacted and so it can be hard to see details of the services or goods that the spending relates to. The Electoral Commission could change the level of redaction to allow for greater scrutiny. This could achieve only so much, however, without changes in the categories themselves.

### Conclusions/Recommendations

63. In order to improve the transparency of online campaigning, **the Electoral Commission should do all it can within the existing legislative framework to maximise transparency of spending returns around digital spending. It should also review the spending categories listed in PPERA with a view to advising the minister on changes that would maximise transparency without imposing an undue burden on campaigners. In addition, PPERA should be amended to require more information in spending returns regarding what money has been spent on.**

<sup>39</sup> Electoral Commission, 2016, *UK Parliamentary General Election 2015: Campaign Spending Report*, London, Electoral Commission, p.56 (accessed 2 May 2018).

<sup>40</sup> Political Parties, Elections and Referendums Act 2000, schedule 13.

## Require that imprints law applies to online campaign materials

- 14.46. Another change which would bring online campaigning into line with existing principles of regulation would be to extend imprint requirements so that they apply to online, as well as offline, campaigning. In evidence to the Commission, the Electoral Commission recommended requiring imprints for non-printed campaign materials; CSPL also made this recommendation in its 2017 Review of Intimidation in Public Life.<sup>41</sup> In response to that review, the government agreed that it would consult on the extension of imprints to electronic communications.<sup>42</sup> Additionally, the digital tags (or 'metadata') that describe the campaign material— such as when it was created, the size of the file etc. — could also contain the information that is required by imprints, making it easier to search for and find.
- 14.47. Requiring imprints for online campaign materials would allow the public to identify easily the source of campaign materials. This could improve scrutiny of campaign groups and would also provide voters with a way of assessing whether a political advertisement is from a legitimate campaign group registered with the Electoral Commission or an actor from outside the regulatory framework. It would also make online and offline regulation consistent.

### Conclusions/Recommendations

64. **Imprint laws that apply to printed campaign materials should also be extended to apply to online campaign materials.** This would allow voters to identify the source and legitimacy of political advertisements.

<sup>41</sup> Bassett, C, Electoral Commission, 2017, Written Evidence to the Independent Commission on Referendums, p.6; Committee on Standards in Public Life, 2017, *Intimidation in Public Life*, p.61.

<sup>42</sup> Cabinet Office, 2018, *The government's response to the Committee on Standards in Public Life Review of Intimidation in Public Life*, Cm 9578, London, HM Government.

# Part 4: Implementation

# 15. Implementing the Commission's Recommendations

- 15.1. The preceding chapters have made recommendations about numerous aspects of the role and conduct of referendums. The Commission is very keen that these recommendations should be implemented, and this chapter sets out how that can be done. The recommendations require action by a wide variety of bodies and people. This chapter clarifies who should have responsibility for what.
- 15.2. The recommendations fall into three broad categories: those that involve the norms and expectations that underpin thinking about referendums in the UK; those relating to the legislative framework for referendums; and those that do not have direct legislative implications, but do involve specific actions by certain bodies, such as parliamentary committees or the Electoral Commission. The sections of this chapter examine each of these three categories in turn. The chapter touches upon all of the recommendations made in the preceding chapters. For full details of these recommendations, however, readers should turn to the list of conclusions and recommendations at the end of the report.

## Norms and expectations relating to referendums

- 15.3. Some of the Commission's most wide-ranging and important recommendations relate not to any specific referendum rules, but rather to the broad norms and expectations that exist in UK politics as to when referendums should be held and how they should operate. These fall into two main groups.
- 15.4. First, the Commission makes recommendations on when referendums should be held:
- referendums have both advantages and disadvantages for democracy; as such, they should be used with caution (recommendation 9)
  - they are best suited to resolving major constitutional issues, such as those relating to sovereignty, and work best when they are held at the end of a decision-making process and used to choose between developed alternatives (recommendation 10)
  - they should not be held on issues that are unlikely to generate wide public interest (recommendation 30).
- 15.5. In order to come to fruition, these recommendations need to be borne in mind not only by the governments and legislative bodies that have the power to call referendums, but also by any other body or person – e.g. political party, campaigner, or commentator – who might want to advocate
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a referendum on some issue. It is important for all of these actors to consider whether a referendum would be the best way to resolve that issue and whether such a referendum would generate lively, engaged discussion.

**15.6.** Second, the Commission recommends a shift in our collective understanding of how referendums should fit into the democratic system as a whole.

In particular:

- referendums should be seen as part of the wider process of decision-making, not as 'quick fix' solutions (recommendation 21)
- the rules around referendums should be designed so that they can coexist as effectively as possible with the broader system of representative democracy (recommendation 7)
- referendum processes should be designed to give space for careful deliberation among both elected representatives and the wider public (recommendation 8); in pursuit of this, governments, parliaments and independent bodies should pilot ways of strengthening the role of parliamentary deliberation, developing methods of deliberative public engagement such as citizens' assemblies, and enhancing connections between the two (recommendation 11)
- such deliberation should happen before a referendum is called, to consider the issues and options and decide whether a referendum is the best way to make a choice (recommendation 23)
- deliberation should also be embedded in referendum campaigns to contribute to lively, inclusive, informed discussion (recommendations 58)
- if a government wishes to hold a referendum, it should demonstrate to the relevant parliament or assembly that it is able to present a viable alternative to the status quo; it should enable civil servants to undertake the preparation necessary to implement a vote for change (recommendation 22)
- referendum processes should be designed to provide the greatest possible clarity as to what the options mean; standalone pre-legislative referendums are problematic (recommendation 17); wherever possible, referendums should be post-legislative (recommendation 18)
- in the limited cases where a pre-legislative referendum is absolutely necessary, it should be preceded by a detailed White Paper (recommendation 19) and provision should be made from the outset for a second referendum if plans diverge from those that it sets out (recommendation 20)
- the possibility of presenting voters with multiple options in a referendum should be borne in mind (recommendation 25).

**15.7.** Two recommendations relate to norms and expectations on other matters:

- referendums should not normally be held on the same day as other electoral events (recommendation 31)
- legislation relating to the conduct of a poll should be clear at least six months before it is due to be complied with (recommendation 43).

- 15.8. Some of the specific points set out in the recommendations above should be secured through legislation, as outlined in the following section. But many are broader than that and will be realised only if norms and expectations develop around them. The Commission again urges anyone who talks about referendums – not just those in positions of power – to reflect carefully on these points. To summarise them, it has developed a checklist for consideration by politicians, campaigners and commentators when considering whether to advocate a future referendum (see Box 15.1).

*(Box 15.1 continued on the next page)*

### **Box 15.1. Checklist for those considering calling for a referendum**

Many of the recommendations made by the Commission demand a cultural change in terms of how referendums are used and the circumstances in which they are proposed. This checklist is provided as a quick summary of key points that should be considered by those who may wish to call for a future referendum:

- Is the subject matter suitable for a referendum? Can it be considered a major constitutional issue?
- Is a referendum the best way of involving citizens in the decision in question, or might some other means of public consultation serve at least as well, or better?
- Is interest in the subject adequate to ensure a high level of turnout?
- Has the topic concerned previously been subject to considerable public debate and deliberation?
- Has it been carefully considered by bodies such as parliamentary committees?
- Have there been opportunities for civil society groups to comment and help develop proposals?
- Have there been opportunities for citizens to contribute to the development of the proposals through bodies such as citizens' assemblies?
- Are the alternatives clear, or do they need further consideration and elaboration?
- If there are more than two options for change, has the possibility of holding a multi-option referendum been seriously considered?
- Will it be possible, in advance of a referendum, for detailed proposals for change to be set out in the enabling legislation?
- Will it be clear to legislators after the referendum what to enact, or is there any risk of uncertainty and conflict with the public vote?

If the answer to any of the questions above is no, then the referendum should not be held at that point.

(Box 15.1 continued from the previous page)

Additionally, when planning for the referendum itself and the preceding referendum campaign, the following questions should be addressed:

- What can be done to reduce the risk of polarisation and lasting political divisions after the referendum?
- What can be done to maximise the availability of high-quality information, and minimise the risk of misrepresentation and confusion?
- Should a deliberative exercise for citizens be provided during the referendum campaign itself?

### Conclusions/Recommendations

65. The Commission believes that significant changes in the UK's collective political norms and expectations are needed, to ensure that referendums are embedded in decision-making processes that promote careful development and discussion of options, and take place only when they are likely to enhance that decision-making. This will require action from all participants in the democratic process, including governments, legislatures, political parties, campaigners, and commentators.

66. The Commission encourages all those inclined to call for future referendums to be guided by its recommendations and the checklist that it has provided (see Box 15.1)

## Legislation on referendums

15.9. The Commission agrees with both the Electoral Commission and the Venice Commission that, so far as possible, the legal framework for referendums should be set down in standing legislation and not created for each individual referendum: this makes planning much easier and reduces the danger of manipulation for political gain. Hence, with limited exceptions, the Commission's recommendations should be implemented through such legislation.

15.10. The legislative framework for referendums initiated by the UK parliament is provided by the Political Parties, Elections and Referendums Act 2000 (PPERA). Many of the Commission's recommendations should be

implemented by amending PPERA. Other recommendations propose that certain provisions (or omissions) in PPERA should remain as they are.

15.11. Areas in which the Commission's recommendations relate in whole or in part to the standing legislative framework for referendums include the following:

- the franchise for referendums should be specified in standing legislation and be linked to the appropriate electoral franchise (recommendation 12)
- legislation should not seek to limit the circumstances in which referendums can be called (recommendation 13)
- beyond the requirements that are already in place, legislation should not stipulate the topics on which referendums are required (recommendation 14)
- legislation should not make provision for citizen-initiated referendums (recommendation 15) or extend the right to call referendums to minority groups of parliamentarians (recommendation 16)
- standing legislation should require that, if a pre-legislative referendum is called, a detailed White Paper should be published setting out how the government would proceed in the event of a vote for the proposal (recommendation 19); it should also state that the enabling legislation for the referendum should set out the circumstances in which a second, post-legislative referendum would be required (recommendation 20)
- the Electoral Commission should retain its current role in the process of determining the wording of a referendum question (recommendation 24); its remit should be clarified to specify that it can recommend a multi-option referendum if question testing suggests that this would be desirable (recommendation 26); in the case of a multi-option referendum, it should also advise on the structure of the question (recommendation 27)
- special thresholds beyond a simple majority of the votes cast should not be introduced (recommendations 28, 29, 32 and 33)
- restrictions on the use of state resources should be extended to the whole campaign period and limited only to campaigning activity (recommendations 35 and 36); the Electoral Commission should be given a clear mandate to seek an injunction for breaches (recommendation 38)
- the practice of designating one lead campaigner on each side in a referendum should be maintained (recommendation 40), but the process should take place earlier than PPERA currently stipulates (recommendation 42); it should be possible to designate a lead campaigner on only one side if there is no suitable application from the other side (recommendation 41); a 'fit and proper' person test should be introduced as part of the designation process (recommendation 44)
- the current distribution of spending limits among different categories of campaigners should not be changed (recommendation 45), but the rules on joint spending should be clarified (recommendation 46); in

addition, it should be made clearer which expenses count, and the time permitted for submission of expense returns should be shortened (recommendations 47 and 49)

- donations to referendum campaigns should continue to be treated in the same way as those to political parties (recommendation 50)
- no official body should be charged with judging the truthfulness of campaigners' statements (recommendation 53), but the publicly funded referendum addresses that are mailed to all households should be prominently labelled as coming from the respective campaign groups (recommendation 54)
- PPERA should be amended to require more information in spending returns regarding what money has been spent on (recommendation 63)
- imprint laws that apply to printed campaign materials should also be extended to apply to online campaign materials (recommendation 64).

15.12. The Commission's recommendations also clearly imply that the enabling legislation for any specific referendum should not deviate from any of these provisions without compelling reason. In addition, recommendation 43 relates to enabling legislation, though to its timing rather than its content: it should be in place at least six months before it is due to be complied with.

15.13. There is no standing legislation for referendums called by the devolved legislatures. To date, none of the devolved legislatures have called a referendum on a matter within their areas of competence. There is legal disagreement as to whether a devolved administration has the power to call an advisory referendum on a reserved subject.<sup>1</sup> Nonetheless, the Scottish independence referendum was given an unquestionable legal footing when a specific and time-limited power to hold it was delegated by the UK authorities to the Scottish Parliament. Referendums on devolved matters are, however, possible in the future, particularly in light of recent extensions to the powers of the Scottish Parliament and the Welsh Assembly. The principle that the legislative framework for referendums should be permanent implies a need for standing legislation in each of the devolved jurisdictions. The Commission recognises, however, that it has not been able to examine the specific circumstances of each of these areas. It is therefore for participants in the democratic process in Scotland, Wales and Northern Ireland to consider further how the Commission's recommendations should best apply in their areas.

<sup>1</sup> Scottish Government, 2012, *Your Scotland, Your Referendum: Consultation*, Edinburgh, The Scottish Government, p.9 (accessed 11 June 2016); Constitution Committee, 2012, *Referendum on Scottish Independence (24<sup>th</sup> Report of Session 2010-12)*, HL Paper 263, London, House of Lords, pp.11-12.

### Conclusions/Recommendations

67. The Commission has made various recommendations that require amendment to the legislative framework for referendums called by the UK parliament. It hence recommends new legislation to amend the Political Parties, Elections and Referendums Act (PPERA) 2000 and bring these changes into effect.

68. The Commission encourages participants in the democratic process in Scotland, Wales and Northern Ireland to consider how its recommendations regarding the standing legislative framework for referendums should best be reflected in their jurisdictions.

## Actions by specific bodies

15.14. A number of recommendations can be implemented only through action (other than legislation) by specific bodies. These fall into several categories.

15.15. First, three recommendations relate to administrative actions:

- government should revise the Civil Service Code to clarify the appropriate role and conduct of civil servants during referendum campaigns (recommendation 39)
- the Electoral Commission and the Information Commissioner's Office should consider how they can work together to ensure the best possible future regulation of campaign spending and data usage (recommendation 48)
- the UK government and the Electoral Commission should build on their existing work on the transparency of online advertising in order to establish the best means of creating a public, searchable repository of political advertisements (recommendation 62)

15.16. Second, the Commission considers that further, specialist investigation is needed on a number of points. It welcomes several ongoing investigations relating to online disinformation (recommendation 60). It recommends that further inquiries should be conducted by a number of bodies:

- a parliamentary committee should consider which additional public bodies, if any, should be exempted from the limits on the use of state resources during a referendum campaign (recommendation 37)
- a parliamentary committee, or committees working together, should conduct a comprehensive inquiry into the future of political advertising across print, broadcasting and online media (recommendation 61)
- the Electoral Commission should review the approach it takes to any material provided by campaigners for inclusion in its referendum information booklet (recommendation 55)
- the Electoral Commission should review the spending categories set out in PPERA and make recommendations for change designed to enhance transparency, particularly in relation to digital campaigning (recommendation 63).

15.17. Finally, the quality of discourse during referendum campaigns matters greatly (recommendation 51), and a range of actors should consider carefully what they could do to strengthen this:

- news providers across all media should consider how they can raise the profile of quality, independent fact-checking and ensure that accuracy is among their highest priorities (recommendation 52)
- while the Commission does not propose the creation of a publicly funded body specifically tasked with providing information for voters during referendum campaigns (recommendation 57), universities, research institutes, the media, fact-checkers, neutral democracy organisations and those who fund such bodies should consider what they can do to enrich the information environment for referendums as far as possible (recommendation 56)
- beyond simple information provision, such bodies should consider how best they might engage citizens in policy development and decision making, including by developing deliberative exercises such as citizens' assemblies (recommendation 11).

## Conclusions/Recommendations

69. The Commission calls on all participants in democratic politics in the UK to reflect on what concrete steps can be taken to improve practice around referendums in the UK. Our recommendations include the need for further inquiry into specific issues by bodies such as the Electoral Commission and parliamentary committees. There is also considerable scope for these and other actors to encourage and help pilot new forms of information provision and deliberative engagement in order to enhance the democratic quality of the decision-making process.

# Conclusions and Recommendations

# Conclusions and Recommendations

## The Use of Referendums Worldwide

1. Referendums now constitute an important part of how democracy functions in numerous countries around the world. They are used with increasing frequency, including to address some of the most fundamental political and constitutional questions. It is essential, therefore, that careful consideration be given to how they operate and how they fit within the rest of the democratic system.

## The Use of Referendums in the UK

2. The circumstances in which referendums have been used in the UK have developed over time. Conventions have become established about the use of referendums to decide certain categories of constitutional matters, and, where a referendum has been used once, it often becomes established that this same mechanism should be used again. There are certain decisions, such as Scottish independence, that could not foreseeably be taken without reference to the people. In some instances, the requirement for a referendum has been codified in statute. As such, the use of referendums has by now become established as part of the UK's uncodified constitution. However, it should be recognised that the use of referendums in UK politics has often been driven by political pragmatism, not constitutional principle.
3. When referendums have been used most successfully in UK politics, it has been to legitimise and provide a degree of entrenchment for key decisions, in the absence of a codified constitution. Where a government clearly supports a major constitutional change, and believes that it has widespread public support, it is appropriate to test this through a referendum in order to bring maximum stability and certainty to the new arrangements. This is most clearly seen in the 1998 referendum endorsing the Good Friday Agreement, and the 1997 devolution referendum in Scotland.

4. While referendums have at times been successfully used to entrench constitutional decisions, and to avoid over-hasty or partisan decision-making on these matters by parliament, the lack of a codified constitution in the UK means that decision-making through referendum is itself far less regulated and protected than in many other democracies. This opens up risks, which should be carefully considered and addressed.
5. Evidence on the UK public's attitudes towards referendums is relatively limited. That which exists suggests that at first sight there is broad public support for holding referendums on some topics, particularly those relating to constitutional (and perhaps moral) questions. But there is no consistent majority for increasing the use of referendums. There appears to have been a drop in support for holding referendums following the EU referendum of 2016, particularly among those who voted Remain.

## Regulating Referendums: History and Recent Debates

6. Although referendums have become an increasingly common feature of UK democracy, it is a long time since the framework governing them was last comprehensively reviewed. Since legislation was first introduced in 2000, successive referendums and inquiries have raised important issues that remain unaddressed. In addition, international thinking about best practice in referendums has moved on considerably. The need for a wholesale review examining all aspects of the use and conduct of referendums in the UK is evident.

## Referendums and Democracy

7. The UK has a long and well-developed history of representative democracy. While demands on democracy are increasing, including pressures for greater citizen participation, representative democracy (through the UK parliament, devolved legislatures and other elected bodies) is likely to remain the primary means of taking most political decisions. **In thinking about the role of referen-**

**dums we should therefore consider how these can best coexist with our system of representative democracy, and be mindful of the risks of undermining it. We should also explore other mechanisms of citizen participation that can meet these goals.**

8. Democracy involves not just voting, but also deliberation, bargaining, and compromise. Practice around referendums should build upon this basis. Referendums in themselves provide a vote, but this alone is not enough. **Decisions about when to hold referendums and how to conduct them should be taken with a view to ensuring that extensive opportunities for careful deliberation exist:** regarding whether a referendum is the best way forward, what the options should be, and what the strengths and weaknesses of each option are from different perspectives.
9. Referendums can both strengthen and weaken the health of the democratic system as a whole. The recommendations in this report are intended to maximise the benefits that referendums can bring, while minimising the dangers. **Until effective ways of ensuring the democratic quality of referendums have been found, they should be used with caution.**
10. **Referendums are best suited to resolving major constitutional issues, such as those relating to sovereignty. They work best when they are held at the end of a decision-making process to choose between developed alternatives.**
11. There are many ways other than referendums to engage citizens in policy development and decision making. These may often be preferable to referendums, which can be a particularly blunt mechanism of citizen input. **Governments, parliaments, and independent bodies should pilot ways of further strengthening the role of parliamentary deliberation, developing methods of deliberative public engagement, and enhancing connections between the two.**
12. **The franchise for future referendums should be specified in standing legislation.** For UK-wide referendums, the franchise should be the same as for elections to the House of Commons (with the addition of members of the House of Lords who are entitled to vote in local elections). For referendums in Scotland, Wales, or Northern Ireland, the franchise should be the same as for,

respectively, the Scottish Parliament, Welsh Assembly, or Northern Ireland Assembly. For regional or local referendums, the franchise should be the same as for local elections in the corresponding area. The Commission recognises that deviations may exceptionally be necessary, as in the case of the inclusion of Gibraltarians in the 2016 EU referendum.

In stating this recommendation, the Commission does not take a view on what the boundaries of the various election franchises should be. It notes that there are several ongoing debates, for example regarding the voting rights of 16- and 17-year-olds and EU nationals resident in the UK after Brexit.

## Calling referendums

13. In the absence of a codified constitution **it would not be possible definitively to limit the circumstances in which referendums are held or to require a supermajority before a referendum can be called.** Parliament would remain free to repeal any restrictions by simple majority or hold ad hoc referendums enabled by new primary legislation.
14. Referendums are already required by law in certain circumstances. However, beyond these specific circumstances, **the Commission does not consider it appropriate to attempt to legislate for all the topics on which referendums should be required.** Although there is broad consensus that referendums should be held on 'constitutional issues', there is a lack of cross-party agreement on what should be considered a 'constitutional issue' and whether all 'constitutional issues' are appropriate to be put to referendum.
15. The Commission understands the importance of public input into policy-making. Recognising the complex process issues around referendums raised in this report, **the Commission recommends that citizen-initiated referendums should not be introduced in the UK at present.** Instead of this mechanism, attention should be directed towards strengthening and improving existing mechanisms for public involvement in decision-making and piloting new methods of public engagement.

16. The Commission does not recommend the extension of the power to call referendums to minority groups of parliamentarian

## Legislating for a Referendum?

17. It is of utmost importance for the proposals put to a referendum to be clear and for voters to know what will happen in the event of a vote for change. Hence, **the Commission considers standalone pre-legislative referendums to be highly problematic.**
18. Referendums should be held on proposals that are clear and immediately actionable. This means that, **wherever possible, referendums should be held post-legislatively**: the relevant parliament or assembly should legislate in detail for the change, subject to approval by voters in a referendum. Should the result favour the change, the provisions would then be implemented.
19. The Commission recognises that there are examples of changes for which it is widely agreed approval by a referendum is needed, but for which a standalone post-legislative referendum would be impossible – for example, where implementing the result of a vote for change would require negotiations with other bodies. **Where a pre-legislative referendum is necessary, a detailed White Paper setting out how the government calling the referendum would proceed in the event of a vote for that proposal should be produced.**
20. **Any legislation enabling a pre-legislative referendum should set out a process to be followed in the event of a vote for change.**

**If a government does not produce a detailed White Paper on the proposals for change, a second referendum would be triggered when the legislation or treaty implementing the result of the first referendum has passed through the relevant parliament or assembly.**

**In cases where a government does produce a White Paper detailing what form of change it expects to secure, the second referendum would be triggered only in the event that there is a 'material adverse change' in circumstances:** that is, if the expectations set out in the government's paper are not fulfilled. It would be for the parliament or assembly that called the referendum to determine whether such a 'material adverse change' had occurred.

The process to be followed should be specified in the legislation enabling the first referendum, so that the requirement for or possibility of a second referendum, and the reason for it, is clear to the electorate before the first vote takes place. The Commission's recommendation hence applies to future processes of change requiring a referendum, and is not intended to apply retrospectively. **The Commission does not take a view on whether there should be a further referendum on Brexit.**

## Preparation for a Referendum

21. Referendums are mechanisms through which final decisions on matters of great importance can be made. They are not in themselves appropriate mechanisms for working out what options should be considered in order to address the widest possible range of concerns and perspectives. Thus, **a referendum should always be seen as part of a wider process of decision-making rather than as a 'quick fix' solution.** In the UK, referendums that were preceded by significant preparation and consideration have proved more likely to settle an issue. The failure to undertake the necessary preparation for a referendum risks significant problems later in the policy process.
22. If a government wishes to hold a referendum, it should demonstrate to the relevant parliament or assembly that it is able to present a viable alternative to the status quo; it should enable civil servants to undertake the preparation necessary to implement a vote for change.
23. **Governments and political parties should avoid making commitments to hold referendums without first undertaking significant preparatory work.** Preparation could be in the form of traditional processes including government consultations, cross-party talks, parliamentary select committee inquiries or the establishment of extra-parliamentary bodies to explore the policy alternatives. Where deeper public involvement would be desirable, deliberative processes such as citizens' assemblies may be appropriate.

## The Referendum Question

24. **The Commission believes that the UK's process for assessing referendum questions generally works well.** The impartial analysis of the proposed question by the Electoral Commission

is essential to this. It is right that the Electoral Commission's recommendation should not be binding, as this means the final decision is taken by elected representatives. But it is also right that governments and parliaments normally accept that recommendation.

25. Although they are not appropriate in all circumstances, referendums where voters can choose among multiple options may sometimes be preferable to those which offer a binary choice. Allowing voters to choose between a number of different options can indicate where the broadest possible agreement on change lies and thereby help to promote unity rather than polarisation. **When a referendum is proposed, the possibility of presenting voters with multiple options should be borne in mind.**
26. **The Electoral Commission's remit should be clarified to specify that, if, during the testing of a proposed question, voters express confusion about the omission of a specific option or options, the Commission can recommend to parliament and government that a multi-option referendum be held.** Final decision-making on the number and content of the options to include should remain, however, with elected representatives.
27. The Commission notes that there are a number of models for holding multi-option referendums. If there are only three options, a single referendum using preferential voting may prove most suitable. If there are more than three options, decision-making becomes more complex, and may require other models such as run-off processes. In such cases the Electoral Commission should be fully involved in testing and advising upon the structure of the question process, as most appropriate for the subject matter of the referendum.

## Thresholds and Other Safeguards

28. For UK referendums, the default threshold is 50% of total votes cast. It is often argued that this is insufficient to mandate major change, especially if turnout is poor, and that supplementary or varied thresholds should therefore be required. However, a simple majority is considered sufficient for electing MPs and for almost all parliamentary decisions, even those of major constitutional importance. Therefore, the Commission believes it would be inconsistent to require supplementary thresholds for referendums only.
29. The Commission recognises that a significant turnout in a referendum is desirable to ensure that the result has legitimacy. However, **there are a number of problems with the use of turnout and electorate thresholds that mean they are not recommended.** Turnout thresholds can encourage opponents of change to undertake disengagement campaigns, as it is easier to promote abstention than to convince voters to vote against the proposal. This is harmful to democratic culture and debate. Both turnout and electorate thresholds could potentially be compromised by small inaccuracies in the electoral register.
30. The Commission notes that at the last two referendums – the 2014 Scottish independence referendum and the 2016 EU referendum – turnout was higher than at the preceding general elections. An issue that is suitable for a referendum should inspire significant public engagement, rendering turnout thresholds unnecessary. **Parliaments and assemblies should avoid putting issues to a referendum that are unlikely to generate sufficient interest.**
31. Holding referendums on the same day as other elections should not be used as a method of ensuring higher turnout. This practice draws attention away from the referendum issues and inhibits cross-party campaigning on the referendum. The Commission agrees with the Electoral Commission's recommendation that referendums **should not normally be held on the same day as other electoral events**
32. The Commission is sympathetic to the argument that there should be support for major constitutional changes in all parts of the UK. However, the UK is not a federal state and the UK's present constitutional arrangements do not afford the devolved administrations veto powers over decisions on reserved matters. As such, to apply this principle to referendums through **the application of multiple majority thresholds would represent a fundamental shift from the constitutional status quo. It is not the place of the Commission to recommend this.**
33. Supermajority requirements are extremely rare in other mechanisms for political decision making in the UK. To impose them for popular but not parliamentary decisions would challenge legitimacy. **It would therefore be inappropriate to require a supermajority for a referendum.**

34. While it does not recommend the use of special thresholds, the Commission does acknowledge the case for ensuring that the result of a referendum, especially on a decision that would be difficult to reverse, reflects the settled will of a clear majority of voters. The Commission believes this will be best achieved by locating referendums firmly within broader processes of careful policy development and discussion, as set out elsewhere in this report.

## The Role of Government in Referendum Campaigns

35. The Commission is concerned that the current restrictions on government during referendum campaigns permit potentially unlimited spending of public money in favour of one side of the debate before the final four weeks of the campaign. To address this problem, the Commission recommends extending section 125 restrictions so that they come into force at the beginning of the regulated referendum period.
36. Prior to the EU referendum, the government argued that the section 125 restrictions, which apply to all publications relating to the referendum topic, were too broad and could hamper the government's ability to conduct day-to-day business. **The Commission recommends that section 125 restrictions be revised so that they apply only to 'campaigning' activity which promotes one side of the debate.** This is the activity which is of concern during referendum campaigns. The Commission notes the Electoral Commission's suggestion that an amended version of schedule 13 of PPERA, which defines a list of regulated activities for which campaigners in a referendum incur expenses, may be a useful way of defining such activities.
37. At present, section 125 restrictions apply to 'any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority.' This has caused concern in some public bodies that have public communication functions. Restricting section 125 to campaigning activities would clarify this somewhat, but some bodies may need a specific exemption to make it clear that certain activity is necessary and/or legitimate during the course of the referendum campaign. **A parliamentary committee should conduct a review of the kinds of public statements by public bodies that may either be necessary, or that could usefully provide information helpful to voters, during the course of referendum**

**campaigns. Where general exemptions from section 125 are found to be desirable, these should be made explicit in the standing legislation. Others, relevant to specific referendums, may be appropriate for inclusion in the enabling legislation.**

38. The Electoral Commission should be given a clear mandate to seek an injunction for breaches of section 125 to ensure that the restrictions are properly enforced.
39. As is the case during election campaigns, it is important that the civil service should be perceived to act in accordance with the principle of strict neutrality during referendum campaigns. **The Commission supports the recommendations made by PACAC and its predecessor PASC that there should be a new paragraph of the Civil Service Code which clarifies the appropriate role and conduct of civil servants during referendum campaigns.**

## Lead Campaigners

40. The Commission considered alternative options for designating lead campaigners, including designating multiple lead campaigners on each side and removing the requirement to designate entirely. It concluded that the current practice of designating one lead campaigner for each outcome in a referendum leads to fewer problems than the alternatives, and should be retained.
41. The Commission recommends that **PPERA be amended so that the Electoral Commission can designate a lead campaigner for one side if no suitable application has been submitted to the other side. In this circumstance, the single lead campaigner should have reduced entitlements to public benefits, as was provided for in the legislation enabling the EU referendum.**
42. If there are multiple credible applications to be lead campaigner for one outcome, but only one for the other outcome, designation too close to the campaign period potentially disadvantages the former. To avoid this, **the Commission recommends that the designation process begin as soon as possible after legislation enabling the referendum is passed and the question is known.**
43. The Commission supports the recommendation made by the Electoral Commission and the Association of Electoral Administrators, on the basis of Ron Gould's 2007 review, that **legislation**

**relating to the conduct of a poll be clear at least six months before it is due to be complied with.**

The Commission recognises that in some exceptional circumstances this may not be possible.

44. **As lead campaigners receive public money it is important that key individuals associated with them meet certain standards. A 'fit and proper' person test should be required for the board members and the responsible person of groups applying to be lead campaigner.**

Each organisation that applies for designation would have to certify that all its board members are 'fit and proper' according to criteria specified by the Electoral Commission. If the Electoral Commission has reason to believe prior to or during the campaign that a person is not 'fit and proper', it should be required to conduct validity checks. If it is concluded that any member is not a 'fit and proper' person, that person should be removed from the board. If the person is not removed, the organisation should be barred from designation if designation has not yet occurred. If designation has occurred, the Electoral Commission should have the power to withdraw some or all of the public money and public benefits available to the organisation in virtue of designation.

## Campaign Finance

45. **The Commission considered alternative ways of distributing spending limits amongst lead and other campaigners and concluded that the current balance should not be altered.**

Lead campaigners play a central role in the referendum debate and therefore it is right that they enjoy higher spending limits than other permitted participants and benefit from public funding. The Commission notes that, if there are more registered campaigners on one side of the argument than the other, current arrangements may permit an imbalance in collective spending. Nonetheless, as long as there are two well-financed lead campaign groups that are well represented in the debate, the Commission does not consider this to be a problem.

46. The Commission supports the Electoral Commission's recommendation that joint spending controls should be clarified by the government and parliament and incorporated into

PPERA. It also agrees that the Electoral Commission should be given statutory Code-making power to clarify any future matters.

47. In order to ascertain the true cost of a referendum campaign, and to ensure that campaign groups do not exceed their spending limits, it is imperative that the costs of goods and services procured prior to the start of the regulated period but used during the regulated period should be included in referendum spending returns. To minimise any uncertainty, **it should be clarified in law that 'referendum expenses' include spending on goods and services purchased prior to the regulated period but used during the regulated period.** This point is of particular importance as it relates to the collection, analysis and use of data, which play an increasingly important role in political campaigning.
48. The increasing usage of personal data in political campaigns means that the regulatory ambitions of the Information Commissioner's Office (in respect of personal data) and the Electoral Commission (in respect of campaign spending) are converging. On the conclusion of the ICO's investigation into data analytics for political purposes, the Electoral Commission and the ICO should consider **how they can work together to ensure the best possible regulation in the future.** This should include an examination of how the financial value of data can be assessed to reflect the true costs of campaigns and a review of the appropriateness of the use in referendum campaigning of data already collected for other purposes.
49. At present, Electoral Commission investigations into the financial conduct of campaigners during referendum campaigns conclude long after the referendum takes place. **In order to improve accountability of campaigners, the time within which large campaign groups must submit their audited accounts should be shortened to three months.**
50. The Commission considered whether donations to registered referendum campaigners should be capped. The general issue of political donations is the subject of longstanding debate, which the Commission is not best placed to resolve. **The Commission does not consider there to be a case for treating donations to referendum campaigners differently from donations to political parties during election campaigns.**

## Quality of Discourse

51. The quality of discourse during referendum campaigns matters greatly. Referendums are opportunities for voters to take decisions of great importance into their own hands. It should be possible for voters to find the information that they want from sources that they trust. Mechanisms for promoting high-quality discussion must, however, be designed with great care. **So far as possible, mechanisms should be designed to be 'bottom-up' – giving greater voice and choice to citizens – rather than 'top-down'.**
52. The Commission commends the role of independent fact-checking organisations and broadcasters in challenging the statements and claims made during the course of referendum campaigns. The Commission encourages news providers across all media to consider how they could raise the profile of quality, independent fact-checking and ensure that accuracy is among their highest priorities in all reporting and commentary.
53. While truth is vital, it is also contested. **The Commission does not believe it would be desirable for any official body to make an authoritative and definitive judgement on the objective 'truth' of political claims and statements.**
54. **Publicly funded materials that are intended to fulfil campaign purposes should be clearly labelled as such.** The free referendum address should be required to carry a very visible heading stating, 'This is a communication from the X campaign'.
55. The Electoral Commission's referendum booklet is a service to voters, intended to provide them with information about a forthcoming referendum. **The Electoral Commission should review the content of the booklet so that it best fulfils this purpose,** and in doing so, it should consult widely. It should consider mechanisms for checking the accuracy of claims, as well as other ways of ensuring that the booklet helps voters find the information they want. The Electoral Commission should conduct this review for referendums in general, and should not wait until another referendum is called.
56. The Commission welcomes the work of independent bodies such as universities, research institutes, fact-checkers, broadcasters and neutral democracy organisations in providing impartial information during referendum campaigns. Such bodies and those who can support them should consider what they can do to enrich the information environment for referendums as far as possible.
57. In a number of other democracies, publicly funded independent bodies – such as Ireland's Referendum Commission and New Zealand's Electoral Commission – are specifically tasked with producing and disseminating such information. Whilst this approach may be suitable in some contexts, **the Commission is sceptical that creating a publicly funded information body would be effective at present in the UK:** it is doubtful that anybody would be capable of commanding the necessary levels of public trust and perceived independence.
58. The Commission believes that information provision is best delivered with citizen involvement. A minimal step would be for the Electoral Commission to consider what it could do to publicise further the findings of its research regarding the questions that people want answers to and encourage campaigners and the media to respond to these.  
  
But it is possible to go further. In Oregon, citizens' assemblies produce statements setting out the issues as members see them, to be included in the official information booklet. Following this model, **the Commission recommends that citizens' assemblies should be piloted during future referendum campaigns, with an assembly held before the regulated referendum period begins.** If the parliament or assembly that calls the referendum agrees to a pilot, this could be sponsored by the Electoral Commission. A pilot citizens' assembly could produce a statement of issues, as in Oregon, and/or set out questions that citizens would like campaigners to answer.

## Regulation of Online Campaigning

59. The Commission believes that existing referendum regulation is ineffective in regulating online campaigning. At present, gaps in the regulatory framework mean that there is a lack of openness and transparency of advertising by referendum campaigners on social media.
60. The Commission is concerned about the potentially distorting effects of disinformation in referendum campaigns. It welcomes other inquiries set up to deal specifically with the issue of disinformation, including the Digital, Culture, Media & Sport Committee's inquiry into 'Fake News' and the LSE's Truth, Trust and Technology Commission. It believes that **an effective solution to this problem requires cooperation between the government and technology companies. At the same time, solutions should not oblige or encourage technology companies to make judgements on the boundaries of democratic speech: that is a matter for democratically elected governments and parliaments.** The Commission welcomes existing efforts to this end, including the UK government's Digital Charter.
61. The Commission notes the variation in restrictions on political advertising across different types on media. Taking into consideration the changing nature of political campaigning, it is not convinced that such variation continues to be justified in its current form. **The Commission recommends that a parliamentary committee, or committees working together, should conduct a comprehensive inquiry into the future of political advertising across print, broadcasting and online media.**
62. The Commission welcomes commitments by social media companies to increase the transparency of political advertisements on their platforms. Nevertheless, transparency requires that full information on political advertisements on social media should be available to both citizens and the regulator in an open and accessible format. **The Commission recommends the creation of a publicly available and searchable online repository of political advertisements,** which should include the advertisement itself and information on when it was posted, which groups were targeted, and how much was spent. The Commission urges the

UK government to build on its existing work with the Electoral Commission to establish the best means of operating such a repository.

63. In order to improve the transparency of online campaigning, **the Electoral Commission should do all it can within the existing legislative framework to maximise transparency of spending returns around digital spending. It should also review the spending categories listed in PPERA with a view to advising the minister on changes that would maximise transparency without imposing an undue burden on campaigners. In addition, PPERA should be amended to require more information in spending returns regarding what money has been spent on.**
64. **Imprint laws that apply to printed campaign materials should also be extended to apply to online campaign materials.** This would allow voters to identify the source and legitimacy of political advertisements.

## Implementing the Commission's Recommendations

65. The Commission believes that significant changes in the UK's collective political norms and expectations are needed, to ensure that referendums are embedded in decision-making processes that promote careful development and discussion of options, and take place only when they are likely to enhance that decision-making. This will require action from all participants in the democratic process, including governments, legislatures, political parties, campaigners, and commentators.
66. The Commission encourages all those inclined to call for future referendums to be guided by its recommendations and the checklist that it has provided (see Box 15.1)
67. The Commission has made various recommendations that require amendment to the legislative framework for referendums called by the UK parliament. It hence recommends new legislation to amend the Political Parties, Elections and Referendums Act (PPERA) 2000 and bring these changes into effect.

68. The Commission encourages participants in the democratic process in Scotland, Wales and Northern Ireland to consider how its recommendations regarding the standing legislative framework for referendums should best be reflected in their jurisdictions.
69. The Commission calls on all participants in democratic politics in the UK to reflect on what concrete steps can be taken to improve practice around referendums in the UK. Our recommendations include the need for further inquiry into specific issues by bodies such as the Electoral Commission and parliamentary committees. There is also considerable scope for these and other actors to encourage and help pilot new forms of information provision and deliberative engagement in order to enhance the democratic quality of the decision-making process.

## Appendix: List of Responses to Expert Consultation

In response to the Independent Commission on Referendums' call for evidence, submissions were received from the following:

1. **Advertising Standards Authority**, Craig Jones, Director of Communications
2. **Dr Andrew Blick**, Senior Lecturer in Political and Contemporary History, King's College London
3. **Committee on Standards in Public Life**
4. **The Constitution Society**
5. **Derek MacKay MSP, Cabinet Secretary for Finance and the Constitution**, Scottish Government.
6. **Jonathan Cooper OBE**, Doughty Street Chambers, and **Kapil Gupta**
7. **Democracy Club**
8. **Peter Emerson, the de Borda Institute**
9. **Electoral Commission**, Claire Bassett, Chief Executive
10. **Electoral Reform Society**
11. **Professor Justin Fisher**, Professor of Political Science, Brunel University
12. **Independent Press Standards Organisation (IPSO)**
13. **Dr Leah Trueblood**, Lecturer in Law, Hertford College, University of Oxford
14. **Liberal Democrats**
15. **Dr Theresa Reidy**, University College Cork, and **Dr Jane Suiter**, Dublin City University
16. **Vicky Seddon, Sheffield for Democracy**
17. **Nigel Smith**, Chair of the Yes campaign during the 1997 Scottish referendum and advisor to subsequent UK referendum campaigns
18. **David Torrance**, journalist, author and contemporary historian
19. **True Wales**, campaigner in the 2011 referendum on the powers of the Welsh Assembly
20. **Tom Brooks**, campaigner in the 2011 referendum on the powers of the Welsh Assembly
21. **Unlock Democracy**

### Other materials submitted to the Commission

Some respondents asked for the following materials to be presented to the Commission for consideration in addition to, or in lieu of, written evidence:

- **Ric Bailey, Chief Political Advisor, BBC** – chapter by Ric Bailey and David Jordan from the Media Society's publication 'Brexit, Trump and the Media', 'Impartiality and the BBC – "broad balance" in a two-horse race.'
- **Jonathan Cooper** – article by Jonathan Cooper in Commonwealth Lawyer's Association and Contributors journal entitled 'David Cameron's Three Big Mistakes'.
- **The Electoral Commission** – letter from Claire Bassett, Chief Executive of the Electoral Commission, to Chris Skidmore MP, Minister for the Constitution, regarding 'accuracy and truthfulness of referendum campaign material'.
- **Will Straw, Chief Executive of Britain Stronger in Europe** – written evidence from Britain Stronger in Europe to the Public Administration and Constitutional Affairs Committee's *Lessons Learned from the EU Referendum inquiry*.

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The Independent Commission on Referendums is the first comprehensive review of the role and conduct of referendums in the UK since legislation governing referendums was first introduced in 2000. The Commission on Referendums was established in October 2017 by the Constitution Unit, UCL. Its twelve distinguished members were selected to represent a range of political opinions and expertise, with experience of all major UK referendums of recent years.

Over nine months, the Commission has taken evidence, held public seminars in Belfast, Cardiff, Edinburgh and London, and deliberated in depth at monthly meetings. It has been supported by detailed research conducted by the Constitution Unit. Drawing on evidence from past UK referendums as well as referendum practice in other democracies, this report makes detailed recommendations as to how future referendums in the UK could be improved. Its major recommendations stem from three core points:

- First, referendums have an important role to play within the democratic system, but how they interact with other parts of that system is crucial. They must be viewed as co-existing alongside, rather than replacing, representative institutions. They can be useful tools for promoting citizen participation in decision-making, but they are not the only, or necessarily the best, way of doing so.
- Second, referendums should be conducted in a way that is fair and effective. The rules should enable a level playing field between the competing alternatives. Those rules should also empower voters to find the information they want from sources they trust, so that voters feel confident in the decisions they reach.
- Third, the regulation of referendums must keep up with the changing nature of political campaigning, particularly campaigning through social media.

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The Constitution Unit

**INDEPENDENT  
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