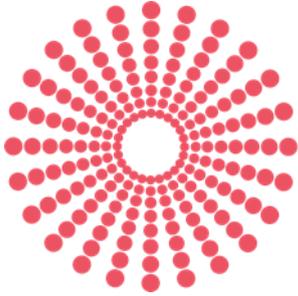


**Working Group on
Unification Referendums
on the Island of Ireland**

INTERIM REPORT

November 2020



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Arthur Aughey, Emeritus Professor of Politics at Ulster University, was also originally a member of the Working Group, but was forced to withdraw on health grounds. The members of the group would like to express our great gratitude to him for his insight and advice during the early stages of our work, and to extend to him our very best wishes.

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We thank all of those people across the UK and Ireland who have spoken with us, sent us their thoughts in writing, and offered us their expertise. As a group, we have found hearing those views a tremendously rewarding intellectual experience. Many of these people are listed as contributors at the end of this report. We extend our gratitude equally to those beyond this list who have talked with us anonymously.

We would also like to thank all those members of the general public who responded to our public consultation. We have read all 1377 submissions with care, and they are reflected in our report. A number of people and organisations helped us in spreading the word of the consultation, and we are very grateful for their assistance.

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Any errors, omissions, or other weaknesses in this report remain, of course, entirely our own responsibility.

Executive Summary

THE WORKING GROUP (CHAPTER 1)

1. The Working Group is examining how any future referendums on whether Northern Ireland should stay in the United Kingdom or become part of a united Ireland would best be designed and conducted. Our approach is focused on technical and procedural questions. As a group, we take no view on whether holding such referendums would be desirable or not, or what the outcome should be if referendums were to be held.
2. The Working Group comprises 12 experts based at universities in Northern Ireland, the Republic of Ireland, Great Britain, and the United States. It is based at the Constitution Unit at University College London, which has a long history of research into referendums, and which has no direct stake in the question of Northern Ireland's future. We have examined the issues in depth over the past year and have gathered evidence from numerous sources. We have received 24 written submissions, spoken with 63 individuals through interviews and witness sessions, and received 1377 responses to our public consultation.
3. Our starting point is the Belfast/Good Friday Agreement 1998. The Agreement states:

it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.
4. The 1998 Agreement sets out the principle of a unification referendum, but only some of the mechanics. That is why we embarked on this exercise: to think through the procedures underpinning potential referendums well in advance. We do not believe referendums to be imminent. The evidence is that a majority in Northern Ireland would currently support maintaining the Union, not unification with Ireland, though some recent surveys indicate a shift towards greater support for unification, particularly since the 2016 referendum on the UK's withdrawal from the EU.
5. **Three key principles** have underpinned our approach:
 - The Agreement provides the framework for decision-making on Northern Ireland's constitutional future. It offers the possibility of a binary choice: for Northern Ireland to remain part of the United Kingdom or become part of a united Ireland.
 - Processes of decision-making on this issue must be neutral, treating unification and the status quo equally and respectfully.

- Progress is best made in Northern Ireland when those belonging to both traditions and to none are included. That should be maintained so far as possible in any process of decision-making on the unification question. But the basic question of sovereignty is decided by simple majority.

POLITICAL AND HISTORICAL CONTEXT (CHAPTER 2)

6. There has been a previous referendum, or ‘border poll’, in 1973, asking people in Northern Ireland if they wanted to remain part of the UK, or to be joined with the Republic of Ireland. The nationalist community boycotted the vote. As a result, on a turnout of 58% of the electorate, 99% voted to remain part of the UK. The poll did not succeed in taking the border out of politics or bringing greater stability.
7. The 1998 Agreement subsequently re-affirmed the ‘constitutional guarantee’: that Northern Ireland would not cease to be part of the UK without the consent of a majority of the people of Northern Ireland voting in a referendum. It set out the legal framework in which such a vote would take place.
8. The 1998 Agreement also established the institutions through which Northern Ireland is now governed. Politics in these islands has seen considerable flux in recent years, not least because of the UK’s decision to leave the European Union. The Withdrawal Agreement and the Protocol on Ireland/Northern Ireland will have profound effects in the years to come. There are also wider constitutional tensions in the UK, particularly in Scotland.

LEGAL CONTEXT (CHAPTER 4)

9. The 1998 Agreement provides that unification cannot happen without consent both north and south. Consent in Northern Ireland can be given only through a referendum. The form of consent in the South is not specified, but our conclusion is that a referendum would be needed. That is principally because constitutional amendment or replacement would be required to allow a united Ireland to respect the continuing obligations in the 1998 Agreement on identity, citizenship, and rigorous impartiality.
10. In Northern Ireland, the Secretary of State has *discretion* to hold a unification referendum at any point. The Secretary of State *must* hold a referendum if ‘at any time it appears likely to him [or her] that a majority of those voting would express a wish’ for a united Ireland. Our conclusion is that the Irish government would be *required* under Irish constitutional law to hold a unification referendum in the South if a referendum in the North was passed.
11. The approval threshold for the unification referendum in the North is ‘a majority of the people of Northern Ireland voting in a poll’. It would breach the Agreement to require a higher threshold than 50% + 1. In the South, approval of constitutional referendums likewise requires a simple majority.

12. One referendum vote in favour of unification in each jurisdiction would provide the full mandate for unification to take place. If referendums approved the principle of unification before the details of a united Ireland had been worked out, it would not be permissible under the 1998 Agreement to make unification conditional on subsequent approval of those details: unification would be required to proceed.
13. The referendums north and south could be held simultaneously; or the referendum in the North could precede that in the South. But ‘concurrence’ means that the referendum in the South could not be on terms unknown at the time of that in the North. If the Irish government wished to propose the terms of a united Ireland before a referendum in the South, it would have to do so before any referendum in the North.
14. Legislation would be required at Westminster and in the Oireachtas to give effect to referendum votes in favour of unification. This legislation would fix the date of unification, and the transfer of sovereignty from London to Dublin. This need not be immediate: an implementation period could allow final preparations to be made. But delays for reasons unrelated to the implementation of the unification votes would not be permitted. We interpret the Agreement to mean that transfer of sovereignty must be direct.
15. If the Oireachtas legislated for unification while Westminster did not, Northern Ireland would become disputed territory: under Irish law, it would become part of Ireland; in British law, it would remain part of the United Kingdom. It would be highly desirable to avoid this eventuality.

CRITERIA FOR EVALUATING REFERENDUM PROCESSES (CHAPTER 5)

16. Beyond the basic principles underpinning our work, we identify five key criteria for evaluating potential referendum processes:
 - procedural legitimacy
 - stability
 - simplicity
 - informed choice
 - inclusivity.
17. All these criteria point towards the importance of *advance planning*: of the referendum processes; and about the shape of a united Ireland, or a continued Union.

PROCESSES OF DECISION-MAKING (CHAPTER 6)

18. Decision-making would need to involve processes for determining the following:

- whether and when referendums north and south would be called
 - the design of those referendums and the processes preceding and following them
 - the timing and terms on which sovereignty would transfer if that were the option chosen by voters
 - the form that a united Ireland would take
 - any changes to the Union if the vote was for the status quo.
19. Coordination and planning of the referendums and the processes surrounding them would be essential, particularly between the British and Irish governments. Lack of preparation ahead of the 2016 referendum on the UK's EU membership was clearly detrimental to the referendum process, and subsequent developments. Such planning would need to cover such matters as: when referendums would take place relative to each other and to other steps in the decision-making process; the conduct rules for the referendums; what matters would be discussed or negotiated by whom, at what stages, in what fora; what the process and timetable would be for implementing the results; and what would happen in the event of divergent outcomes between North and South.
 20. Coordinated planning should be organised through existing machinery such as the British–Irish Intergovernmental Conference (BIIGC), or through a new bilateral structure. As in the past, if thought helpful, there could be an external chair to oversee the process. A plan for the referendum process would need to be agreed before any referendum was called.
 21. The terms of the transfer of sovereignty, if that was what voters chose, and of future British–Irish relations would be for negotiation between the UK and Irish governments. The constitutional form of a united Ireland would be for the Irish government to propose: the UK could have no veto. But the UK could be seen as a guarantor of the interests of British citizens in Northern Ireland, reflecting the role currently played by the Irish government, working through the same Strand Three institutions, the BIIGC and British–Irish Council.
 22. Discussions should also involve politicians from Northern Ireland, and engage with civil society and the general public. Citizens' assemblies could help to identify the considered views of voters on important elements of the process and the choice on offer at any referendum.
 23. Reforms to the status quo could be proposed by unionists, similar to those proposed ahead of the independence referendum in Scotland in 2014. If voters opted to maintain the Union, decisions about implementing such reforms would need to be made as consensually as possible.
 24. One objection to preparatory work is that talking about the processes of unification might make unification more likely. Preparation could take the form of open-ended discussions on the future of the island and the islands, without prejudice as to whether

that future was in the UK or a united Ireland, backed up by an equally broad range of research.

DELINEATING THE TWO REFERENDUM OPTIONS (CHAPTER 7)

25. There would be two options on the ballot papers in any referendums: for Northern Ireland to become part of a united Ireland, or stay in the United Kingdom.
26. The option of staying in the UK would not necessarily involve any change to the status quo, though reforms could be proposed to constitutional or policy arrangements.
27. The option of a united Ireland would need to be delineated at some stage if unification was to occur. Matters needing to be addressed would include:
 - **The terms of the transfer of sovereignty.** Northern Ireland currently receives a substantial subvention from the UK Exchequer. Ireland is richer than it used to be, with higher per capita income than Great Britain; but a united Ireland would have a much smaller population to bear the costs of those policies and programmes supported by the subvention, if it continued. The division of UK assets and liabilities would need to be decided.
 - **The shape of a united Ireland.** Would a united Ireland
 - retain devolved institutions in the North
 - be a unitary state, with a single central legislature and government
 - be a federal state, with the North perhaps being one of the elements
 - or be a confederation, with Northern Ireland as an independent sovereign state?

There is scope for variation within each option.

- **Public policy issues.** Polls suggest these matters could be more important to citizens than constitutional architecture. They include:
 - Health provision: the National Health Service in the North is publicly funded and free at the point of use, while the South has charging and extensive private health insurance
 - Welfare provision: changes might involve both winners and losers
 - Education: structures, curricula, and narratives of history all differ markedly between North and South
 - Human rights and equality: what guarantees would protect minorities and safeguard civil and political rights in a unified Ireland?
 - Law and the courts: under devolution, the current law might carry over, and the separate Northern Ireland courts system

- Policing: amalgamating the Police Service of Northern Ireland with the Garda Síochána, or keeping the PSNI under a devolved Northern government
- Armed forces, with options for personnel to transfer
- Civil service: the terms on which NI and UK civil servants would assimilate
- Public services such as broadcasting, and the postal service.
- **Symbolic issues.** These would include the Irish language; the flag, national anthem, and other symbols of the new state; neutrality (Northern Ireland shares UK membership of NATO); possible roles for the Commonwealth, and the monarchy.

CALLING A REFERENDUM (CHAPTER 8)

28. The Secretary of State has a broad *discretionary power* to call a referendum in Northern Ireland, provided no such vote has taken place in the past seven years; if a majority for unification appears likely to the Secretary of State, they are under a *mandatory duty* to call a referendum. They must act fairly, honestly and with rigorous impartiality. The Irish government has no formal role, but coordination between the two governments would be highly desirable.
29. The Secretary of State might opt to call a discretionary referendum if the state of public opinion was uncertain, or the Northern Ireland Assembly had voted for one, or it was judged in the public interest. But calling a referendum in order to defeat or delay the possibility of unification would be problematic.
30. In assessing public opinion, the Secretary of State might draw on six possible sources of evidence: votes cast in elections; the results of surveys and opinion polls; qualitative evidence; a vote within the Assembly; the seats won at elections; or demographic data. The Secretary of State must take all relevant evidence into account. We do not think it possible to define in the abstract the weight that should be attached to each type of evidence, except that demographic data could provide only contextual information.
31. An expert review panel might form a useful part of this assessment, but only if it was impartial and independent. A referendum should be called if a vote for unification appears likely, even if by a slender margin.
32. A consistent body of evidence would need to build before calling a referendum became mandatory. But long periods of reflection might shake public faith. If opinion seemed finely balanced for long, the Secretary of State might think the better course was to call a discretionary vote. In exercising their power in relation to calling a referendum, the Secretary of State plays a crucial role in enabling the Irish people north and south to exercise without external impediment their right to self-determination. They must therefore exercise their powers conscientiously and not for any partisan political advantage.

POSSIBLE REFERENDUM CONFIGURATIONS (CHAPTER 9)

33. There are many conceivable referendum configurations. We eliminated those which did not fit the legal constraints, and then applied our evaluative criteria of procedural legitimacy, stability, simplicity, informed choice and inclusivity. That winnowed the most plausible referendum configurations down to five options, summarised in the table below.

Table 1. Possible Referendum Configurations

	What is it?	Should it be considered?
1. No plan, no guaranteed process	Referendums in NI and ROI on the principle of unification happen; no guaranteed plan or process after unification.	No
2. Maximum model	Aspects of the form of a united Ireland worked out <i>before</i> referendums in NI and ROI so far as possible.	Yes
3. Preliminary vote before maximum model	Prior referendum in NI on whether the UK government should enter negotiations. <i>Then</i> aspects of the form of a united Ireland worked out <i>before</i> referendums in NI and ROI so far as possible.	No
4. Design process before sovereignty transfer, with default plan	Referendums in NI and ROI on the principle of unification and on the process to agree its form. That process would come <i>before</i> unification.	Yes
5. Design process after sovereignty transfer, with interim/default plan	Referendums in NI and ROI on principle of unification and on the process to agree its form. That process would come <i>after</i> unification.	Yes

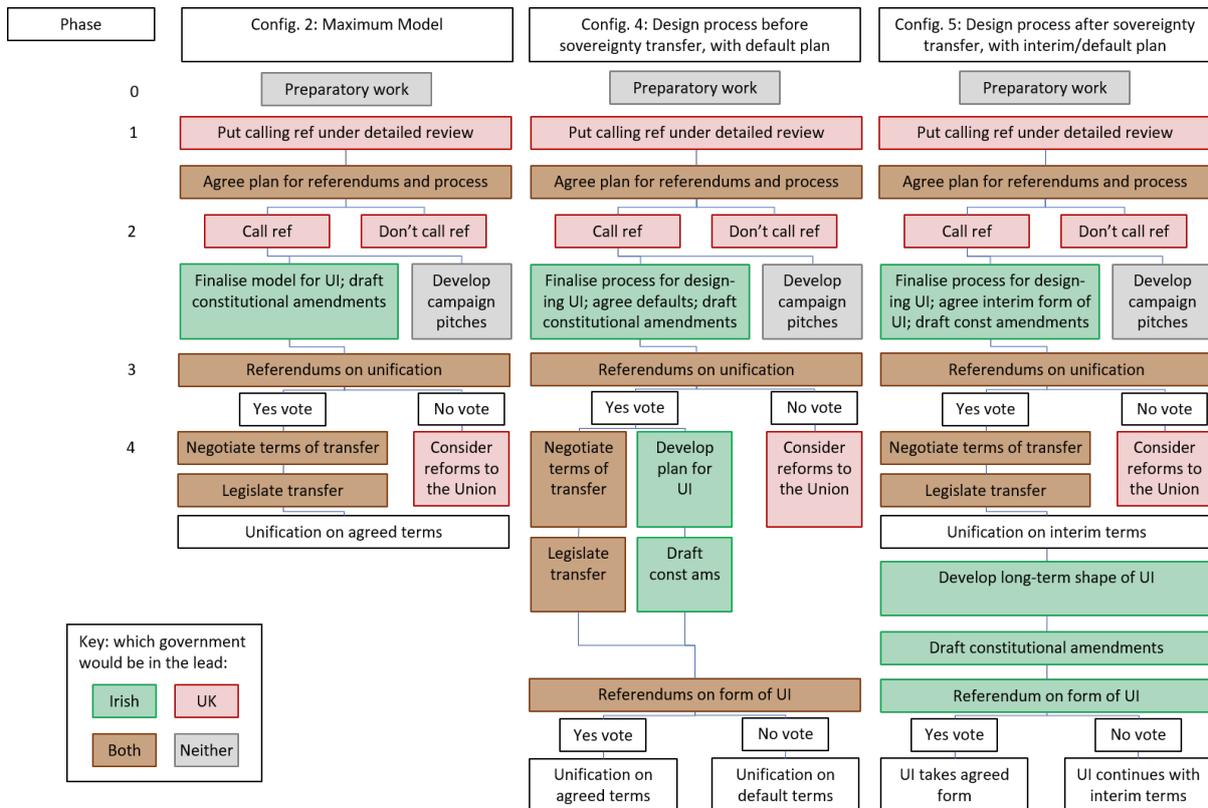
34. None of the options is clearly better than all the others. Further analysis against our five criteria led us to exclude the first and third configurations. Under the first, referendums would be held north and south on the principle of unification without detailed prior planning. But such an approach would be a leap in the dark: advance planning is essential to maximise legitimacy and stability. Despite its advantages in terms of detailed planning, we also excluded the third configuration. The preliminary referendum that it envisages in Northern Ireland could too easily be interpreted as violating the spirit of the 1998 Agreement, or misinterpreted as a vote on the substantive issue of unification.

35. Of the remainder, configuration 2 would offer voters a detailed *model* for a united Ireland. Configurations 4 and 5 would present voters with a proposed *process* for agreeing the shape of a united Ireland. Because unification would have to proceed even if new terms for a united Ireland were not agreed and approved, the initial unification referendums under configurations 4 and 5 would also—explicitly or implicitly—approve default and/or interim plans for a united Ireland.

PROCESSES FROM START TO FINISH (CHAPTER 10)

36. Figure 1 summarises the overall processes for the three configurations, and divides them into five phases. Phase 0 would come at a time when holding referendums was not an immediate prospect, but preparatory work would be done, perhaps mainly outside government. Phase 1 would involve decision-making on whether to call referendums. Phase 2 would encompass the period between a decision to call referendums and the votes. Phase 3 would constitute those votes, with referendums north and south. Phase 4 would cover the period after the referendums.

Figure 1. Summary of referendum processes



37. Several of these phases might take a year or more. More time before the referendum would be required under configuration 2 than under configuration 4 or 5, to allow detailed plans for a united Ireland to be determined. The default arrangements under configuration 4 might—and the interim arrangements under configuration 5 would—constitute the actual system for governing a united Ireland at its inception; they therefore deserve careful prior consideration.

REGULATING REFERENDUMS, AND THRESHOLDS (CHAPTER 11)

38. In the UK, the Political Parties, Elections and Referendums Act 2000 (PPERA) regulates many aspects of referendum conduct, and would apply to a referendum on Northern

Ireland's constitutional future. The Electoral Commission has developed standard practices for assessing proposed referendum questions, as well as extensive guidance relating to campaign conduct.

39. In Ireland the Referendum Commissions, which provide impartial information for voters on referendum proposals, are now thoroughly normalised. Practices governing broadcast coverage of campaigns have become stricter. And the recent practice of holding citizens' assemblies before referendums on contentious issues has emerged and increasingly become standardised.
40. The 1998 Agreement requires referendums to be decided by simple majorities of those voting, north and south. Proposals to change the threshold are often made. But the simple majority threshold is not just a product of the 1998 Agreement; it reflects the underlying principle of equal treatment. Any qualified majority threshold would favour the status quo. On the basic, binary question of sovereignty, that could not be justified.

THE FRANCHISE (CHAPTER 12)

41. Unification in the South would require a referendum to amend the 1937 Constitution; or enactment of a new constitution. The franchise for the first is those citizens who can vote at an election for members of Dáil Éireann. The franchise for a referendum on a new constitution is not fixed, but would likely be the same. The franchise could not be extended to non-citizens without a referendum.
42. In the UK the franchise for a referendum is typically that for elections taking place over the same area. UK-wide referendums use the UK parliamentary franchise, while Scottish and Welsh referendums use the franchise for the Scottish Parliament and the Senedd. If this practice were followed, the existing Northern Ireland Assembly franchise would be used for any unification referendum in the North.

DETERMINING THE REFERENDUM QUESTIONS (CHAPTER 13)

43. Differences in question wording between North and South are unavoidable. In the South, referendum questions to amend the Constitution take a standard form, 'Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?'. In the UK, there is no standard question wording. The legislation enabling each referendum stipulates the question, whose impartiality is scrutinised by the Electoral Commission.
44. The 1998 referendums suggest that differently worded questions between North and South would not necessarily cause difficulties. Voters in Northern Ireland were asked 'Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?' Those in the South were asked to approve the proposed change to the Constitution.

45. Discussion between the UK and Irish governments, consulting with the Northern Ireland Executive, political parties and civil society, and the UK Electoral Commission, ought to be able to prevent differences in question wording that could lead to confusion for voters, or difficulty for campaigners.

CAMPAIGN CONDUCT RULES (CHAPTER 14)

46. These rules relate to four key matters: campaigners and campaign finance; the role of governments during the campaign; information, misinformation, and the media; and the duration of the campaign.
47. The regulatory frameworks in both countries urgently need updating, for referendums and elections in general. Greater transparency in the identity of campaigners, and of the sources and scale of campaign spending, are imperative, as is greater accountability of campaigners through stronger regulatory enforcement powers.
48. Public information provision also needs to be addressed. UK practice provides little such information, while provision in Ireland is narrowly focused on the constitutional implications of the vote. On a matter of such import as the unification question, voters would deserve better.
49. The UK's rules on government campaigning could be aligned more closely with those in Ireland, so that state-financed campaigning would be prohibited throughout the referendum period, not just during the final weeks. On the duration of the campaign, Irish practice could permit the longer campaign period that has become the UK norm.
50. Some of the necessary changes would require primary legislation: in Ireland, through changes to the Referendum Acts; in the UK, by amending the Political Parties, Elections and Referendums Act 2000. It would be beneficial to initiate these changes as soon as possible.

CONCLUSIONS (CHAPTER 15)

51. We have sought to examine how referendums on the unification question would be designed and conducted from a procedural, not a political, perspective. We have done so not because we think referendums are imminent—we do not—but because the whole process needs to be thought through well in advance. The years of acrimony following the UK's vote on EU membership in 2016 illustrate the dangers of a vote called without adequate planning.
52. Unification could come about only through referendums in both Northern Ireland and the Republic of Ireland. The framework for holding referendums is set down in the 1998 Belfast/Good Friday Agreement. It stipulates that majorities of 50% + 1 would be required. But the ethos of consensual politics should be upheld as far as possible.
53. Our core interim conclusions are:

- It would be highly unwise for referendums to be called without a clear plan for the processes of decision-making that would follow. Such a plan would need to be agreed by the governments, working closely with the full range of actors in Northern Ireland, across the island of Ireland, and in the UK. When planning should begin is a political rather than a procedural matter, on which we do not take collective view. But it should be completed by the time any referendum was called.
- There are several plausible configurations of referendums north and south. Referendums could come relatively early in the process, before the details of a united Ireland had been worked out; or later, once a plan had been developed. Each configuration has advantages and disadvantages, and multiple variants.
- The conduct rules for any referendums would be crucial. The rules for referendum and election campaigns are badly out of date in both the UK and Ireland, and urgently need to be strengthened. This would be particularly important for referendums on the momentous unification question, where voters must be protected from misinformation, and have access to high-quality information. The process as a whole must be fair, and its administration rigorously impartial.

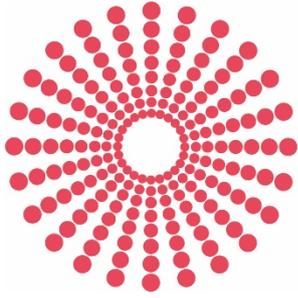
54. We welcome responses to any aspect of this interim report. In particular, we ask:

- Do you think we have missed out any important matters?
- Do you agree or disagree with any of our interim conclusions?
- Do you prefer one of our referendum configurations to the others? Are there other configurations we should consider?
- Are there any points where you think our reasoning requires further development or clarification?

SUBMITTING EVIDENCE TO THE WORKING GROUP

The Working Group is keen to hear your views on the matters covered in this report. In order to submit a response, please write to our Project Manager and Research Assistant, Conor J. Kelly, at conor.kelly@ucl.ac.uk.

To ensure that your response can be considered by the Working Group before it completes its final report, please send it to us by **18 January 2021**.



Working Group on
Unification Referendums
on the **Island of Ireland**

Part 1

Starting Points

1. INTRODUCTION

- 1.1. This interim report sets out the preliminary conclusions of the Working Group on Unification Referendums on the Island of Ireland. The Working Group has sought to examine how any future referendums on whether Northern Ireland should stay in the United Kingdom or become part of a united Ireland should best be designed and conducted. Our approach is focused on technical and procedural questions: we do not have a collective view on whether referendums should take place, or on what, if they do come about, their outcome should be. Rather, we examine what in practice any such referendums would involve.
- 1.2. Though we have focused solely on procedural matters, we are addressing issues that could profoundly affect the lives of people in Northern Ireland, and throughout the island of Ireland. They have repercussions also for the future of the Union and Great Britain. It is vitally important to think through the processes involved and understand the processes that would be involved in any future referendums, because the consequences of not doing so could be severe.
- 1.3. We begin this introductory chapter by outlining the nature of the Working Group: its remit, composition, origins, and working methods. Then we consider the challenging task that the Working Group has undertaken, and set out some key principles that have guided our work. Finally, we outline the plan for the remainder of the report, and provide some notes on terminology.
- 1.4. This is an *interim* version of our report, setting out our initial analysis and conclusions in draft form. We are very keen to receive feedback on all aspects. A series of webinars will discuss the interim report, and written comments are welcome. Details of how to respond are available on our website. We will analyse all of the responses that we receive. We aim to publish a final version of the report, taking account of the feedback we receive, in spring 2021. But our report is only the beginning of a debate on the subject, many aspects of which have not previously been addressed in depth.

THE WORKING GROUP: REMIT, COMPOSITION, ORIGINS, AND METHODS

- 1.5. The Working Group was established to examine how any future referendum—or set of referendums—would best be designed and conducted to decide whether Northern Ireland should remain part of the United Kingdom, or become part of a united Ireland. The focus is on the procedural mechanics of any such referendums. We therefore stand back from taking any collective view on whether such a vote would be desirable, or what the outcome should be in the event of a referendum being held.

- 1.6. Our starting point is the Belfast/Good Friday Agreement of 10 April 1998, agreed to by the UK and Irish governments and most of Northern Ireland’s political parties. The Agreement is today supported by both governments, and all major parties in Northern Ireland operate according to its provisions. It articulates the institutions through which Northern Ireland is governed. It also makes provision for a unification referendum in Northern Ireland.
- 1.7. We base our analysis on the need to uphold the 1998 Agreement for two reasons. First, the Agreement is central to efforts to maintain peace and power-sharing, and to encourage reconciliation on the island of Ireland—and between Ireland and Great Britain. Second, it is embedded in a treaty, protected by international law. As we drafted this interim report, the British government proposed legislation—the United Kingdom Internal Market Bill—that it publicly accepted would breach international law. We regard that as irresponsible. It could render more difficult all the complex matters considered here. We hope that, in future, the British government and others will accept the need to proceed by agreement, and act according to the rule of law, which includes complying with international treaties.
- 1.8. The 1998 Agreement has a distinct ethos. The signatories stated, ‘we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all’. They continued:
 3. We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands.
 4. We reaffirm our total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and our opposition to any use or threat of force by others for any political purpose, whether in regard to this agreement or otherwise. (Belfast/Good Friday Agreement 1998, Declaration of Support section, paras 2–4)This ethos should be respected in any referendum process.
- 1.9. On the specific matter of unification, the Agreement states:

it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland (Constitutional Issues section, para 1(ii)).
- 1.10. The Agreement is thus unequivocal: the Union or unification question is decided by simple majority votes in referendums. There may seem to be a tension between this provision and the ethos of consensualism, as present in the power-sharing institutions. We explore this below. The commitment to ‘exclusively democratic and peaceful means of resolving differences’ also holds fast regardless of the outcome of any referendum.

- 1.11. The Agreement provides that the UK government's Secretary of State for Northern Ireland *may* call a referendum on the question of Northern Ireland's constitutional future at any time (provided there has been no such vote in the preceding seven years). The Secretary of State *must* call such a vote if a majority for a united Ireland 'appears likely' (Constitutional Issues section, Annex A).
- 1.12. The 1998 Agreement thereby sets out some general principles to govern any unification referendums, as well as some specific provisions. But it leaves important questions unanswered, both about the process for deciding for or against Irish unity, and about the design of a unified state. Little work has been done since 1998 to clarify and fill the gaps. How, for example, would the Secretary of State judge whether a majority of voters in Northern Ireland would be likely to support a united Ireland? Who would be allowed to take part in the referendum, and what would be the rules of the campaign? What would the franchise be? Would a referendum take place before or after detailed proposals for the form of a united Ireland were developed and published? Would a referendum be required in the Republic of Ireland, and, if so, at what stage would this take place?
- 1.13. These questions matter. If decision-makers answer them poorly, the progress made in Northern Ireland towards peace and closer social cohesion over the past quarter century could stall or even reverse. If they answer satisfactorily, these dangers could be significantly mitigated.
- 1.14. We do not believe a referendum vote to be imminent. The evidence from opinion polls and surveys (paras 3.33–41) is that the majority in Northern Ireland would currently support maintaining the Union, not unification with Ireland. The UK's withdrawal from the European Union has created additional uncertainties, and recent surveys indicate a shift towards greater support for unification (see Figures 3.2 and 3.3). There has also been an increase in those thinking that Irish unification is likely at some point (see para 3.40). But no one can know how opinion might evolve over the coming years. Our project is based not on an assessment of the likelihood of a referendum in the coming years, but on the view that a technical analysis of how any referendums might best be run is itself best conducted when the possibility of calling a referendum is not under immediate consideration.
- 1.15. Given the possibility that a referendum or referendums might be called on this issue at some point in the future, and given the need for any such referendum processes to be carefully designed, we consider a thorough analysis of what this eventuality would involve to be essential. We fully recognise that some people have legitimate reservations about this view. But we hope most will agree that it is useful for a group of academics with relevant expertise who are independent from any government or party to think the matter through.
- 1.16. In taking on the task of examining the processes of any future unification referendums, we do not suppose that they constitute the only possible way forward for Northern Ireland and the island of Ireland. Indeed, several members of the

Working Group are actively involved in work that explores other possible futures too. Some readers may see the priority as being to pursue those other avenues. That does not detract from our view, however, that one of the possible future paths involves referendums on the question of unification, and one of the important steps that are needed is therefore to analyse what this would involve. Some will see our work as providing a valuable roadmap for how referendums will happen, others as offering a warning of what to avoid. Again, we are collectively neutral between these views.

- 1.17. The Working Group comprises 12 individuals based at universities in Northern Ireland, the Republic of Ireland, Great Britain, and the United States, with relevant expertise in political science, law, sociology, and history. The group was convened by the Constitution Unit at University College London. The Unit has a long history of research into referendums. One of its first reports, published in 1996, was that of the Commission on the Conduct of Referendums, whose recommendations for new legislation on referendums helped pave the way for reforms in 2000. The Unit's more recent work on referendums has included the Independent Commission on Referendums in 2018, and a detailed research study into ways of improving information and discourse during election and referendum campaigns (Renwick and Palese 2019). The Constitution Unit's interest in unification referendums on the island of Ireland thus stems from a desire to see referendums done well. The Unit has no direct stake in the question of Northern Ireland's future. We see this impartial standpoint as an important starting point for our work.
- 1.18. The Unit's work on a referendum in Northern Ireland began with a report by its Honorary Senior Research Associate Alan Whysall (*A Northern Ireland Border Poll*, March 2019). The Unit then engaged with scholars in Northern Ireland and in the Republic of Ireland to build up a working group. Each group member brought particular expertise and scholarly perspective to the table. Keeping the group small was thought essential for its effective operation. This decision inevitably meant that some distinguished and relevant scholars could not be included. But we have sought to engage with as many scholars and experts as possible over the course of our work.
- 1.19. The Working Group has been funded by the British Academy, as part of its *Humanities and Social Sciences Tackling the UK's International Challenges* programme, and by the Joseph Rowntree Charitable Trust. We are very grateful to both organisations for their support. Both organisations are independent bodies. The British Academy is a registered charity and funds research in social science and the humanities. The Joseph Rowntree Charitable Trust is an independent Quaker trust that supports people who address the root causes of conflict and injustice. Neither funding body has influence over the Working Group's composition or conclusions.
- 1.20. As members of the Working Group, we have pooled our expertise in examining the issues within our remit. In addition, we have consulted as widely as possible through three main channels. First, in November and December 2019, we invited a wide range of people and organisations with relevant expertise and interests—including scholars, politicians, retired officials, journalists, political parties, and others—to

respond to a call for written evidence. Second, starting in January 2020, we invited many from the same categories to discuss the issues with the group, initially at face-to-face meetings in Dublin and Belfast and subsequently, after the introduction of coronavirus restrictions, through conversations held remotely. We received 24 written submissions and spoke with 63 individuals (see the lists at the end of the report). Third, in July 2020, we launched an open public consultation through our website to ensure that all those who wished to express their views to us were able to do so. We received 1377 responses, which are analysed in Chapter 3. We are deeply grateful to all those who have engaged with us over the course of our work: their contributions have assisted us immeasurably.

- 1.21. When we embarked, we identified five steps that it might be possible for us to take in clarifying how a referendum process might be designed and conducted. The first was identifying the aspects of the process that need to be thought about; second, identifying the options regarding these aspects; third, identifying criteria for assessing these options; fourth, examining the implications, strengths, and weaknesses of the options in terms of the criteria; finally, coming to recommendations as to which options would be better or worse on this basis. We had an open mind as to how far we would get in taking these steps.
- 1.22. At this interim stage, we are confident that we have gone far in completing the first four steps. Regarding the aspects of the process that need attention, we look at how a decision on whether to hold a referendum might be made, how the overall process of deciding the constitutional future might be configured—including wider processes of discussion and negotiation—and how the referendums themselves would be designed and conducted. By contrast, we do *not* seek to evaluate alternative options for Northern Ireland’s future government, whether as part of a united Ireland or within the United Kingdom, though we identify the questions that a process leading to unification would need to address. We look at referendum processes in both Northern Ireland and the Republic of Ireland. For all of these aspects of the process, we explore a range of options, and we assess their strengths and weaknesses against specified criteria.
- 1.23. On some subjects, we have also been able to take the final step, of recommending specific options as clearly superior to the others. In other cases, however, we have refrained from doing so. That is because many of the issues involved are deeply contentious, about which reasonable people will disagree; in some cases, that disagreement may partly rest on competing constitutional aspirations. It is for us to offer technical assessment and advice, and to highlight the implications of particular choices, but not to make what are fundamentally political judgments.

THE CHALLENGE

- 1.24. The challenging nature of the task that we have undertaken should not be underestimated. Three challenges merit particular attention.

- 1.25. First, and most obviously, the question of the future of Northern Ireland and of Ireland remains deeply contested. Voting over which sovereign authority one wishes to be under would be of momentous and galvanising significance. There are many strong proponents of both the current Union and a united Ireland, as well as many whose views are more mixed, but often equally ardently held. Differing perspectives on the Union and on a united Ireland naturally lead to different preferences as to whether or when a referendum might take place and the processes around it. It is inevitable that the work and analyses offered by the Working Group will be interpreted, in various ways, through these lenses. We have sought always to be sensitive to these different perspectives in our work.
- 1.26. Second, the basic character of the possible vote that we seek to examine is itself contested. For some, there would be two intertwined but nevertheless distinct processes by which the people of Northern Ireland and the people of the Republic of Ireland would decide whether they wanted to form a united Ireland. For others, a referendum held both north and south of the current border would be a potential refoundation moment for a new Ireland and an expression of shared will by the people of the island as a whole. Both of these perspectives are reflected in the 1998 Agreement, which refers repeatedly both to ‘the people of Northern Ireland’ and to ‘the people of the island of Ireland’. How a referendum is thought of has significant implications for ideas about how the process might best be designed.
- 1.27. Third, merely to discuss the topic of referendums on Irish unification is seen by some to encourage momentum towards it. We do not believe that scholarly analysis of the processes and conditions for a referendum is likely in itself to make them more or less likely to occur. We do, however, acknowledge and respect the concerns of those who disagree with this assessment. We remain strictly neutral on the question of whether and/or when a referendum should take place. This is compatible with the objective of analysing the strengths and weaknesses of potential approaches to a referendum in light of evidence and expertise.

KEY PRINCIPLES

- 1.28. There are three key principles that any process of decision-making about the constitutional future of Northern Ireland and Ireland would need to respect.
- 1.29. First, that process would need to be designed so that it was neutral, treating each of its possible outcomes—the maintenance of the Union, or the unification of Ireland—equally and respectfully. We may call this the requirement of rigorous impartiality. This principle holds true even though the provision for a referendum in the 1998 Agreement exists principally to allow for Irish unification, rather than to secure the Union. The Secretary of State is obliged to initiate a referendum process only if that particular outcome appears likely. Moreover, the calling of a referendum may initiate or follow much work in designing a possible new, united Ireland, and this may increase the perception that a referendum is directed towards achieving this

particular outcome. But it must be clear throughout the design of any referendum process that both possible outcomes are equally legitimate objectives. Every effort should be made to ensure that the choice between them is made on a level playing field. And all participants in the discussion should be encouraged to respect the legitimacy of viewpoints that differ from their own.

- 1.30. Second, the making of the 1998 Agreement and its subsequent implementation show that progress is best made in Northern Ireland when those belonging to both traditions and to none are included in decision-making to the greatest possible degree. As we noted at paras 1.8–10, above, there is a basic distinction within the 1998 Agreement. On the one hand, the overall ethos is one of consensual power-sharing, especially within functions devolved to Northern Ireland. Key decisions within Northern Ireland’s Assembly and Executive are made by agreement across the communities. The Agreement itself was achieved on the basis of ‘sufficient consensus’, as set out in its rules, requiring majority support (by voting strength) of representatives of both the unionist and nationalist traditions. That is widely acknowledged as necessary to secure government by consent. On the other hand, the basic question of sovereignty—of whether Northern Ireland is part of the United Kingdom or of a united Ireland—is decided by simple majority. While every effort should be made to protect the consensual principle, it cannot ultimately override the simple majority principle on the question of sovereignty. Yet deciding on the constitutional future would also involve discussion and decision-making on matters extending well beyond the fundamental question of sovereignty. Notwithstanding the majoritarian (and therefore binary) nature of the basic choice, serious problems could arise if the full ethos of the 1998 Agreement is not adhered to and maintained. As noted above, that ethos includes the achievement of reconciliation, tolerance, and mutual trust; the protection and vindication of the human rights of all; partnership, equality, and mutual respect as the basis of relationships within and across these islands; and opposition to the threat or the use of force for any political purpose.
- 1.31. Third, we have presumed throughout our work that the 1998 Agreement determines the basis on which Irish unification could occur. That Agreement was reached only through painstaking negotiations, and each of its elements was essential to its success. Seeking to alter any one part could destabilise the whole, and it is not our role to suggest that this should be done. Thus, we assume that the referendum question would be one that, at least at the decisive point, offered a binary choice: Northern Ireland would remain part of the United Kingdom or become part of a sovereign united Ireland.

PLAN OF THE REPORT

- 1.32. The remainder of this report is divided into three parts. Part 1 sets out starting points for our analysis. Chapter 2 outlines aspects of the broad political and historical context, including the origins of the current arrangements, the nature of politics in

Northern Ireland, Ireland, and Great Britain, and the nature of relations between them. It also provides comparative perspective on the nature of the decisions to be made. We provide the material in Chapter 2 by way of background, particularly for those unfamiliar with it. Readers who already know this context may prefer to skip ahead. Chapter 3 focuses specifically on debate about a referendum on Northern Ireland's future, examining public statements made by political parties and other prominent organisations and individuals, setting out evidence on public opinion, and providing the results of our public consultation. Chapter 4 elaborates on the legal context specifically relating to unification referendums, including the 1998 Agreement and its place in UK and Irish law. Finally, Chapter 5 paves the way for our subsequent analysis by setting out criteria by which we will seek to assess the options regarding the design of the referendum process.

- 1.33. Part 2 then examines how any overall process of decision-making regarding future arrangements might be configured. Chapter 6 surveys the elements of that process and the actors involved in it. Chapter 7 examines the content of the two options that would appear on the ballot paper. Chapter 8 focuses on how the Secretary of State might make the decision on whether to call a referendum in Northern Ireland. Chapter 9 addresses the central question of what referendum or referendums might take place both north and south at different stages in this overall process. Chapter 10 puts these building blocks together and outlines what each of the possible processes might look like.
- 1.34. Part 3 considers the design and conduct of any referendums. Chapter 11 sets out some general points, building on the discussion of key principles in this chapter and of evaluative criteria in Chapter 5. It also elaborates on our thinking regarding the referendum threshold. Chapter 12 then focuses on the franchise, Chapter 13 on how the referendum question would be set, and Chapter 14 on the conduct of the referendum campaign.
- 1.35. Finally, Chapter 15 offers final reflections and sums up our interim conclusions.

NOTES ON TERMINOLOGY

- 1.36. Before concluding this opening chapter, we wish to add some notes on terminology. As anyone familiar with politics in Northern Ireland—or the north of Ireland—knows, it is impossible to get far in discussion of these matters without using contested language. Even the agreement that forms the basis of Northern Ireland's current system of government does not have an agreed name.
- 1.37. Where possible, we seek to employ neutral language. As attentive readers will already have noticed, for example, we generally refer to the agreement variously known either as the Belfast Agreement or Good Friday Agreement simply as the Agreement or the 1998 Agreement (which term we take to encompass the adjustments to the Agreement made in subsequent years). Where neutral language

is not readily available, we employ a variety of usages, taking the text of the 1998 Agreement as our lead. We refer to the six counties of the island of Ireland currently in the United Kingdom as Northern Ireland, reflecting the accepted legal status quo. But we also sometimes refer to the North, because this term was also used in the 1998 text. We refer to the remaining twenty-six counties variously as Ireland, the Republic of Ireland, the Republic, and the South—also used in the 1998 Agreement. Where clarity is needed that we are referring to the whole of the island of Ireland, we tend to use this phrase.

- 1.38. We realise that the name of our Working Group may itself raise questions. We discussed the matter at length during our formation and considered many possible permutations. The title of the report that preceded the creation of the group was *A Northern Ireland Border Poll*. It became clear, however, that the term ‘border poll’ was contested: intriguingly, some saw it as biased in a unionist direction, others as favouring a nationalist perspective. In addition, the 1998 Agreement envisages decision-making processes in both jurisdictions on the island of Ireland, and it was therefore important for the name of the group to reflect that. In adopting the phrase ‘unification referendums’ we followed the common practice of referring to a referendum by the change option that appears on the ballot paper. Other notable examples include the Scottish independence referendum of 2014 and the Brexit referendum of 2016—these labels are used by people on all sides of these debates, irrespective of whether they supported the change or not. The body of our report allows more nuanced and expansive use of language; but the title of our group needed to be short while also clearly identifying the subject of its work. We also considered whether to use ‘reunification’ rather than ‘unification’, but concluded that the latter was the more common and less contested term.
- 1.39. Finally, beyond words, there are also questions about capitalisation. We have opted not to capitalise ‘unionist’ or ‘nationalist’. We refer to the ‘United Kingdom’ and the current ‘Union’, because these are proper nouns identifying specific legal entities. We refer to a ‘united Ireland’ because this is a concept, not (at present) a legal entity. These usages are again consistent with those in the 1998 Agreement.

CONCLUSION

- 1.40. Our objective in all of our work is to be useful. An important process of decision-making about the future of Northern Ireland and the island of Ireland may take place in the coming years. If it happens, this process will be challenging, and we therefore think it essential that it be thought through carefully in advance. We recognise that there are considerable sensitivities in such analysis, and we acknowledge it would therefore be difficult for the governments of the UK and Ireland at present to do it. That is why we believe it is appropriate for us, as independent academics, to take on this task.

- 1.41. Given the complexities and sensitivities of these issues, we accept that we are very unlikely to have got everything right. But we hope our interim report will be received with the same goodwill as we seek to express in writing it. We hope all those involved in the politics and future decision-making in Northern Ireland and the island of Ireland will find our work helpful for thinking through their own approach to these vitally important issues—especially if, as is their right, they disagree with our analyses. We look forward to receiving feedback in the coming months, and this feedback will shape the final version of our report.

2. POLITICAL AND HISTORICAL CONTEXT

- 2.1. This chapter lays out various aspects of political and historical context that are relevant to our later analyses. First, we provide a very brief historical outline, focusing primarily on the processes leading up to the 1998 Agreement, and concluding with a sketch of the Agreement itself. Second, we set out how the Agreement's key components have operated since 1998. Third, we highlight relevant features of the political context, beginning with the UK's exit from the European Union, which affects many features of the political context deeply, then looking in turn at Northern Ireland, Ireland, and Great Britain, as well as noting broader international factors. Finally, we set out experience and practice relating to referendums, in Ireland, the UK, and internationally.
- 2.2. We cover these matters to give background and context to the issues that we focus on in later chapters. Our treatment of them is necessarily brief, which may be unsatisfactory to some readers who are familiar with them at a deeper level. But we want our report to be accessible to as wide a range of readers as possible, and we hope this material will help that. Readers who know the context well already may wish to skip forward to Chapter 4.

HISTORICAL CONTEXT: THE ROAD TO THE 1998 AGREEMENT

HOME RULE, PARTITION, AND CONFLICT

- 2.3. The primary antagonism of the last two centuries may be simply stated. Unionists have wanted Ireland and later Northern Ireland to remain part of the Union with Great Britain. Irish nationalists, by contrast, have wanted an autonomous or an independent Ireland—and since the formation of Northern Ireland most have sought the reunification of Ireland.
- 2.4. The Union of Great Britain and Ireland took effect in 1801. It was William Pitt's strategic response to the insurrection in Ireland of 1798, led by republicans in alliance with revolutionary France. Pitt hoped to combine the new Union with Catholic Emancipation—enabling Irish Catholics to hold high public office, including membership of parliament. He failed. The Union's early history was dominated by Daniel O'Connell's campaign for Catholic Emancipation, which did not succeed until 1829. O'Connell moved on almost immediately to campaign for the 'Repeal of the Union'—namely, the restoration of an Irish parliament, under the British Crown, but with Catholics and Protestants now to be full legal and political equals. That object, however, was resisted, especially in Ulster, where a majority were largely descendants of the settler planters of the seventeenth century—mostly lowland

- Scots Presbyterians and English Churchmen (of the Anglican Church of Ireland), whose ancestors had been sent to secure Ireland for the British Crown.
- 2.5. Ireland was a predominantly Catholic country, with the exception of historic Ulster, which was quite evenly comprised of Catholics and Protestants. Until the Great Famine, Irish speakers were strongly present in the countryside, especially in the west. Most Irish Protestants fully supported the Union although not without internal differences. Members of the Church of Ireland tended to be Conservatives or Tories, while Presbyterians were more inclined to be Whigs or Liberals. Indeed, numerous Presbyterians had been revolutionary republicans in the late eighteenth century, but most abandoned that position after the Union.
 - 2.6. After the Great Famine, Ireland's population was halved, and its Irish-speaking population was particularly devastated. Especially after the widening of the franchise, the demand for Home Rule to achieve more successful development, became vigorous, and dominated late 19th-century politics. The intensity with which the Irish nationalist majority favoured home rule was matched by the unionist minority's determination to preserve the Union—they claimed that home rule would mean Rome rule. The Liberals under Prime Minister William Gladstone converted to the idea of Home Rule for Ireland, but a bill was defeated in the House of Commons in 1886, and split the British party system. Liberal unionists and Conservatives combined to oppose the Liberals and Irish nationalists. Home Rule passed the Commons in 1892 but was defeated in the Lords. Home Rule did not pass through Parliament until 1914, just after the powers of the House of Lords had been reduced.
 - 2.7. Northern Ireland was created in the Government of Ireland Act of 1920 from the six contiguous counties in north-east Ulster with the highest concentration of Protestants: four had Protestant majorities; two did not. This partition was Great Britain's solution to Ireland's bid for self-determination—expressed peacefully in a home rule movement between the 1860s and 1914, and in a revolutionary form in the 1916 Easter Rising and after. The UK's Government of Ireland Act of 1920 envisaged home rule for two jurisdictions in Ireland, permitted their reunification in one unit, and created a Council of Ireland to link them. Partition was rejected, however, by Irish nationalists. In 1918 in the first universal suffrage elections, the Sinn Féin (Our Selves) party won a clear majority of Ireland's delegation to Westminster (73 of 105 seats), but, as promised, did not take its seats, and instead proclaimed Ireland a democratic and sovereign republic.
 - 2.8. Partition was rejected both by constitutional Irish nationalists as well as by militant Irish republicans who were intent on consolidating the republic through a war of independence. That war ended in a negotiated treaty between the UK government and a Sinn Féin delegation in 1921. Under that treaty, the Irish Free State was recognised as an all-island state with the same external powers as Canada, and was subject to limitations on its domestic sovereignty (that were steadily removed or circumvented over the following 15 years). Under Article 12, however, the

Parliament of Northern Ireland was given the right to secede from the Irish Free State within one month, back into the Union. As expected, it chose to exercise that option.

- 2.9. Between 1921 and 1972 Northern Ireland was governed by one party, the Ulster Unionist Party (UUP); it won all the elections. In 1922 the Stormont parliament replaced the original electoral system of proportional representation for local government with the winner-takes-all system used in Westminster elections; it did the same for elections to the Stormont parliament in 1929. The electoral system was one element which served to ensure that the Catholic and nationalist minority was excluded from power. Elsewhere there was systematic discrimination in favour of the majority. Nationalists believe that, in his speech accepting the Nobel peace prize with John Hume, David Trimble of the Ulster Unionist Party recognised their mistreatment: ‘Ulster Unionists, fearful of being isolated on the island, built a solid house, but it was a cold house for Catholics. And northern nationalists, although they had a roof over their heads, seemed to us as if they meant to burn the house down. None of us are entirely innocent’ (Trimble 1998).
- 2.10. Controversy and tension were not the preserve of the new jurisdiction north and east of the border. The terms of the 1921 treaty and the exercise of a British veto in the drafting and the text of the Constitution of the Irish Free State led to a civil war among Irish republicans. That civil war was won by the pro-treaty side, under the Cumann na nGaedhael party—to which today’s Fine Gael party is the successor. It governed the Free State between 1922 and 1932. That year, Fianna Fáil, a party formed in 1926 from the anti-treaty side in the civil war, came to power, determined to repeal the treaty. The Crown was excised from domestic Irish politics in 1936, the day after the abdication of Edward VIII. In 1937, *Bunreacht na hÉireann*, a new Constitution of Ireland, was ratified by referendum. The State was renamed: Ireland in English, Éire in Irish. Articles 2 and 3 claimed jurisdiction over the whole island, though the application of legislation was confined to the territory of what had been the Free State. Unionists called it an irredentist claim which violated the treaty of 1921. Ireland officially styled itself a Republic in 1949 and left the Commonwealth. The Ireland Act 1949, passed by Westminster in recognition of these changes, guaranteed Irish citizens in the UK the same status as Commonwealth citizens. It also guaranteed that Northern Ireland would not cease to be a part of the Union without the consent of its own parliament.
- 2.11. The IRA sought to end British rule in Ireland by armed force, in 1939–45, and again during 1956–61. It was wholly unsuccessful, north and south, and isolated. In the 1960s, a peaceful civil rights movement, the Northern Ireland Civil Rights Association, modelled on its American counterpart, sought to redress grievances, demanding equal rights for all, including in relation to employment, allocation of public housing, and universal adult franchise in local government, as well as an end to the ‘B-Specials’ and the repressive Special Powers Act. A revived loyalist militia, the Ulster Volunteer Force, killed civilians in 1966—fearing a revival of Irish republicanism. In 1968–9, the inability of the Ulster Unionist government to reform and the attempted

repression of the civil rights movement, reignited conflict. The British Army was deployed in August 1969 when the government of Northern Ireland and its police force, the Royal Ulster Constabulary (and the ‘B Specials’), were judged to have lost control, after the police had killed civilians. The IRA split into two factions, Provisional and Official; the former began armed conflict, joined by the latter until 1972. Numerous loyalist militia mushroomed, the largest being the Ulster Defence Association. Initially welcomed as impartial protectors, the British Army’s standing with northern Catholics was lost after counter-insurgency techniques applied in Aden and elsewhere were applied locally. Internment without trial began in August 1971, soon judged both ineffective and biased. In January 1972 British paratroopers shot dead civilians in a civil rights demonstration that had been declared unlawful in Londonderry/Derry. After these crucial events, the British government prorogued the Northern Ireland Parliament.

- 2.12. The settlement of 1920–21 had failed—though debate continues over the appropriate apportionment of responsibility. The question now was whether a better, more inclusive, and enduring settlement could be negotiated—and stabilised.

THE 1973 BORDER POLL AND SUNNINGDALE AGREEMENT

- 2.13. In imposing direct rule, Westminster also legislated for a ‘border poll’ on the question of Irish unity (The Northern Ireland [Border Poll] Act 1972). The declared hope of Prime Minister Edward Heath was to take ‘the border out of the day-to-day political scene’, and to bring ‘a greater measure of stability’, ‘while leaving open the possibility of a change in the status of the Province if the majority so wish(ed)’ (HC Deb 24 March 1972). His strategy was to calm unionist and Protestant fears about the security of the Union before turning to see if he could build a new political settlement that would accommodate Catholics and northern nationalists.
- 2.14. The poll took place on 8 March 1973. The nationalist community, led by its new largest party, the Social Democratic and Labour Party (SDLP), boycotted the vote, arguing that the ‘illegitimate’ majoritarian basis of Northern Ireland’s creation meant that the result of the poll was ‘pre-ordained’. The party also argued that the poll gave voters insufficient opportunity to express their preferences about future forms of government (about which negotiations were about to begin).
- 2.15. The ballot paper asked voters to make a binary choice: ‘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?’. Table 2.1 sets out the results.

Table 2.1. Results of the 1973 referendum in Northern Ireland

	Number of votes	% of those voting	% of eligible electorate
Remain part of the United Kingdom	591,820	98.9	57.5
Join with the Republic of Ireland	6,463	1.1	0.6
Total	598,283	100.0	58.1

Source: CAIN (2020).

- 2.16. Unionist parties succeeded in achieving sufficiently high turnout to secure their immediate objective: avoiding the risk that voter complacency would push recorded support for the Union below 50% of the eligible electorate. Nationalist parties secured close to a maximum boycott in their own constituency, sending a message about how they perceived the poll and the Union. The poll did not achieve its immediate objective of taking the border out of politics or bringing greater stability. Unionists continued to feel insecure, nationalists dissatisfied.
- 2.17. A white paper from the UK government, *The Future of Northern Ireland*, outlined steps to establish a government that would command widespread support throughout Northern Ireland. The British and Irish governments sought to develop a model of ‘power-sharing’, in which representatives of both major political traditions, unionist and nationalist, could participate. The Northern Ireland Constitution Act 1973 set out the arrangements, including the ‘constitutional guarantee’: an undertaking that Northern Ireland would not cease to be part of the UK without the consent of a majority of the people of Northern Ireland voting in a referendum. This guarantee replaced that once granted to the Northern Ireland Parliament. The Secretary of State was given a discretionary power to hold such polls at any time, subject to a minimum interval of 10 years. However, no referendum was ever called under the 1973 Act; after the 1973 vote, the result was seen as a foregone conclusion.
- 2.18. In June 1973, elections were held for a new Northern Ireland Assembly, under a system of proportional representation. In December that year, at the UK civil service college at Sunningdale, the UK and Irish governments and the power-sharing executive-designate of the new assembly reached an agreement. The UK government accepted that ‘if in the future the majority of people in Northern Ireland should indicate a wish to become part of the United Ireland, the British Government would support that wish’. The Irish government, in turn, declared that it ‘fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status’.
- 2.19. The power-sharing executive collapsed in May 1974 after a loyalist-organised general strike among the Protestant community. Unionists were unhappy with the Sunningdale Agreement, notably the role for the Irish government in an all-island Council of Ireland, to be run with the Northern Ireland government, and the

maintenance of Ireland's constitutional claim to Northern Ireland. Direct rule resumed and lasted for 25 years—with numerous failed initiatives to build stable institutions. Violence also persisted, and, despite initiatives and efforts, the constitutional parties and the two sovereign governments failed to reach accommodation.

THE PEACE PROCESS

2.20. The British government continued, with little success, to seek a solution with the constitutional political parties in 1975–6, and in 1980, and 1982, believing that 'the Irish dimension' in the Sunningdale Agreement had inhibited unionists from sharing power. But in the Anglo-Irish Agreement of 1985 new arrangements were made. The Agreement was between the two sovereign governments. It was opposed by unionist parties and harder-line nationalist parties, but supported by the SDLP. The two governments made similar commitments to those at Sunningdale, including supporting a power-sharing devolved government within Northern Ireland. But they also created a novel standing Intergovernmental Conference. Many unionists were particularly hostile to this Conference, seeing it either as joint sovereignty, or as the start of joint sovereignty. In the Conference, the Irish government had the right to make representations about domestic policy in Northern Ireland on matters including security, the administration of justice, fair employment, equality and human rights, and appointments to public positions. Unlike the Sunningdale Agreement, the Anglo-Irish Agreement was an international treaty and both governments emphasised that it could be revoked only with the consent of both governments. Fianna Fáil, then the main opposition party in Ireland, and Sinn Féin both rejected the Anglo-Irish Agreement because they claimed that it 'copper-fastened' partition and continued the unionist veto.

2.21. In the Anglo-Irish Agreement, the governments agreed that:

if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective parliaments legislation to give effect to that wish.

But these conditional commitments about unification were not reflected in domestic law in either jurisdiction. UK domestic law, while maintaining the constitutional guarantee, did not incorporate the Anglo-Irish Agreement. Ireland did not alter Articles 2 or 3 of the Constitution of 1937. Rather, Ireland declared that the Agreement was a means toward unification—described in the Irish Supreme Court as a constitutional imperative when a case was brought against the Agreement.

2.22. Attempts then resumed to find the basis of a political settlement that would command wider support within Northern Ireland. Following much reflection and debate, including exchanges by various actors with paramilitaries, the Joint Declaration or 'Downing Street Declaration' by the UK and Irish governments of 1993 fused the (unionist) principle of the northern veto with the (nationalist) principle of

Irish self-determination (Joint Declaration on Peace 1993). The lead up to the declaration was more inclusive in intent than that preceding the Anglo-Irish Agreement, but like the 1980s process, it was led by British and Irish governments working on an intergovernmental basis. The Irish government engaged in extensive dialogue with the loyalist Ulster Defence Association (UDA) and the Ulster Volunteer Force (UVF) through third parties. The British government had engaged unofficially with the IRA, again through third parties. Many within the UUP and the Democratic Unionist Party (DUP), led by the Reverend Ian Paisley, nevertheless viewed the Declaration as 'treachery' (HC Deb 15 Dec 1993).

2.23. In the Declaration, the UK government affirmed that

it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South.

2.24. The Irish government, for its part, stated that

it would be wrong to attempt to impose a united Ireland, in the absence of the freely given consent of the majority of the people of Northern Ireland.

2.25. The Irish government also stated that the Irish Constitution might be amended in the event of a 'just and lasting' settlement. The UK government reiterated an earlier declaration that it had 'no selfish strategic or economic interest in Northern Ireland'. The Declaration did not, however, address how unity might in practical terms be brought about should a majority desire it.

2.26. Political dialogue followed, and in 1994, the main militant organisations of both republicanism and loyalism declared ceasefires: the Provisional IRA in August, the two main loyalist organisations in October. Formal political negotiations started in 1996 – but without Sinn Féin, because the Provisional IRA had suspended its ceasefire in February with bombing attacks in London. That was resumed in 1997. Sinn Féin subsequently entered the negotiations, and the DUP and the smaller UK Unionist Party, led by Robert McCartney, left in protest. The main work of negotiation, coordinated by international chairs, began in late 1997; the Belfast or Good Friday Agreement was concluded on 10 April 1998.

THE 1998 AGREEMENT

2.27. The Agreement comprises two elements: a political text, which was signed by the main political parties in Northern Ireland except the DUP and by the UK and Irish governments; and a treaty carrying the force of international law, ratified by the two states after the Agreement was endorsed in referendums north and south. It committed the Irish government to amending the Irish Constitution and the UK government to changing UK law. Both sets of changes were subsequently enacted.

2.28. As noted in Chapter 1, the Agreement makes provisions for how any future decisions about the constitutional status of Northern Ireland would be made. These provisions

are central to our analysis throughout this report, and we therefore examine them separately and in detail in Chapter 4.

- 2.29. Beyond its provisions on constitutional status, the Agreement included three ‘strands’ of new political arrangements, providing for power-sharing government in Northern Ireland (‘Strand One’), North–South institutions operating across the border (‘Strand Two’), and East–West institutions involving the two governments (‘Strand Three’). The Agreement also guaranteed ‘parity of esteem’ for the ‘identity and ethos of both communities’. As well as protections for rights (based on the European Convention on Human Rights), the Agreement also provided for additional measures to further equality of opportunity, policing and justice reform, decommissioning, and prisoner releases.
- 2.30. Upon completion, the Agreement was endorsed by the UK and Irish parliaments and then by referendums in both parts of Ireland (albeit on questions differently formulated because Ireland was modifying its constitution). Support in the South was overwhelming, at 94%. The 71% approval vote in the North comprised an overwhelming majority of Catholic voters, and a slim majority of Protestants. Since 1998, the Agreement has been accepted across the spectrum of Irish nationalism (with the exception of so-called ‘dissident’ republicans) as the essential foundation for progress. Unionist opinion has been more divided, but since the St Andrews Agreement (2006) the DUP has worked within all the institutions of the Agreement—leaving no significant unionist party opposed.
- 2.31. The Agreement package was concluded on the basis that nothing was agreed until everything was agreed. The three strands were stated to be interdependent. Thus, extracting any element or defaulting on key provisions could unbalance the underlying political equation. This is not to say that the Agreement cannot develop – indeed, it has done so through several subsequent, separate political agreements. But, given the thresholds by which the Agreement was originally concluded, such change requires a measure of consensus. Fundamental change (falling short of unity) would arguably require a further referendum in the North. A referendum would only be required in the South if constitutional amendment were involved.

OPERATION OF THE AGREEMENT SINCE 1998

- 2.32. The 1998 Agreement set the basic framework for politics in Northern Ireland, including its relationships with both the rest of the United Kingdom and the Republic of Ireland, though with differences of understanding among its signatories as to the finer detail of how it should operate. We briefly examine how each of its three strands has functioned since 1998.

STRAND ONE: THE SYSTEM OF GOVERNMENT WITHIN NORTHERN IRELAND

- 2.33. The Agreement's first strand established power-sharing government based on the Northern Ireland Assembly, elected by proportional representation in multi-seat constituencies. Members are required to designate themselves as 'unionist', 'nationalist', or 'other'. Voting procedures in the Assembly require a 'cross-community vote' to pass certain key measures. A 'petition of concern' allows any group of 30 members to request that a vote be taken on a qualified majority basis.
- 2.34. The Northern Ireland Executive is nominated by party leaders in the Assembly in proportion to party strengths, following the D'Hondt rule, facilitating coalition government (O'Leary et al. 2005). It is led by the First Minister and deputy First Minister, nominated, respectively by the largest party in the Assembly overall, and by the largest party in the other of the two largest designations (Northern Ireland Act 1998, as modified by the St Andrews Agreement). The powers of the two postholders are equal, and exercised jointly, giving each officeholder an effective veto. They preside jointly over the Executive.
- 2.35. In his Nobel acceptance speech, David Trimble expressed a unionist perspective on the Assembly: 'the Northern Ireland Assembly is the primary institutional instrument for the development of a normal society in Northern Ireland. Like any parliament it needs to be more than a cockpit for competing victimisations.' For many nationalists, by contrast, the North–South institutions and the East–West institutions, have had more significance (see para 2.43).
- 2.36. The Assembly and Executive have ceased operation multiple times since 1998, sometimes through suspension by the Westminster government, sometimes through the initiative of either the First Minister or the deputy First Minister. There have been several subsequent political agreements on implementing the 1998 Agreement, most recently, *New Decade, New Approach* (2020). Notwithstanding these difficulties, self-government in Northern Ireland between parties that have been bitterly at odds is the Agreement's key political success.
- 2.37. As well as an Assembly and Executive, the Agreement provided for a 'consultative Civic Forum' comprising representatives of the business, trade union and voluntary sectors, to 'act as a consultative mechanism on social, economic and cultural issues' ('Strand One: Democratic Institutions in Northern Ireland, para 34). The Civic Forum was established in 2000 but was suspended with the Assembly in 2002. The *New Decade, New Approach* document notably makes no mention of the Forum despite recognising the value of 'structured civic engagement'.

STRAND TWO: RELATIONS NORTH AND SOUTH

- 2.38. The 1998 Agreement established a North South Ministerial Council (NSMC) comprising the Irish government and the Northern Ireland Executive. Some Council

meetings are held in plenary, involving the Northern Ireland Executive led by the First Minister and deputy First Minister and the Irish government led by the Taoiseach. But most meetings are ‘sectoral’, comprising the ministers with responsibility for a specific function. Strand Two provides for six implementation bodies, exercising executive functions on both sides of the border, in specific policy areas, and also identifies six further areas for looser cooperation. These include aspects of agriculture, transport, tourism, environment, and EU programmes. In healthcare, some hospitals provide cross-border services, and the NSMC has discussed responses to COVID-19. There has also been significant cooperation to develop an integrated electricity grid, and extensive collegiality between civil servants in Northern Ireland and Ireland has developed.

- 2.39. Strand Two has not developed as fully as envisaged by some, however. The Council has been stalled several times, and wariness of cross-border cooperation among unionists has continued. The NSMC cannot convene unless the Executive is in operation: here the mutual interdependence of the three strands (guaranteed in para 5 of the Declaration of Support at the beginning of the Agreement) is a formal rule. The Agreement also mentioned two other North–South bodies: a North South Interparliamentary Association and a North South Consultative Forum representing civil society. The former met for the first time in 2012, while the latter has never been initiated despite support for it having been reaffirmed in the St Andrews Agreement.

STRAND THREE: RELATIONS EAST AND WEST

- 2.40. Strand Three has three principal components:
- the British–Irish Council (BIC), obliged to meet every six months, with representatives of the Irish and British governments, the devolved institutions in Northern Ireland, Scotland and Wales, and the Isle of Man, Guernsey and Jersey
 - the British–Irish Intergovernmental Conference (BIIGC) composed of the UK and Irish governments, the successor to the Intergovernmental Conference of the Anglo-Irish Agreement, and with a remit that includes matters not exclusively devolved to the Northern Ireland Assembly
 - a proposed (but not mandated) British–Irish Parliamentary Assembly, comprising parliamentarians from the same jurisdictions.
- 2.41. The British–Irish Council (BIC) has met regularly as required by the Agreement, but, while a convivial forum for communication, it has been regarded by many as a little lacklustre. The 2020 Programme for Government in Ireland aims to enhance its role, alongside that of the BIIGC, though it is not clear that the UK government shares this perspective. The COVID-19 pandemic has increased the significance of the BIC. Its two meetings since the pandemic began have dealt with managing responses to

COVID-19 on the island and also with the Common Travel Area between the UK and Ireland.

- 2.42. How the BIIGC has operated, and how it has been viewed by different actors, has varied over time. The 1998 Agreement states:

... there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals.

Although the BIIGC met frequently between 2002 and 2006, when the Northern Assembly was not functioning, it did not meet at all from 2007 to 2017. Spurred on in part by the crisis in power-sharing in Northern Ireland, and the growing pressures on British–Irish relations arising from the Brexit process, it met three times in 2018–19, but it has not met since May 2019.

- 2.43. There are different views of the importance of the BIIGC, perhaps reflecting diverging perspectives on the role of formalised British–Irish cooperation in preserving stability in Northern Ireland. Many unionists prefer that it not meet at all, arguing that it dilutes British sovereignty. Many nationalists prefer that it meet regularly so that the full Agreement is maintained and scrutinised. Others have seen the BIIGC as relatively unimportant, so long as cooperation takes place somewhere. The Taoiseach and the UK Prime Minister agreed in August 2020 to establish additional structures for the bilateral relationship before the post-Brexit period begins.
- 2.44. Any future referendums would require close cooperation between the two governments, which we examine in Chapter 6. The BIIGC is the forum for such cooperation established by the 1998 Agreement, and would be suitable to manage these matters. It is also emphasised in the current Irish government’s Programme for Government. But new bilateral institutions could also fulfil equivalent functions. Any decision on the appropriate forum is a political one to be made by both governments.

THE EUROPEAN UNION AND THE IMPACT OF BREXIT

- 2.45. The UK and Ireland joined the EEC together in 1973, and common membership of the European project is acknowledged to have facilitated greater intergovernmental cooperation between them. Both parts of Ireland were widely seen to have benefited from the Common Agricultural Policy and later from the Structural and Regional Funds for infrastructure. The EU also invested significant funds in the border region to support the peace process. Shared membership of the single market combined with the cessation of security checks on the border at the end of the Troubles to facilitate cross-border movement and increased North–South trade.
- 2.46. Northern Ireland’s electorate voted to remain in the EU in 2016 by a margin of 56% to 44%. Survey research indicates that support was very strong among nationalists

(88% Remain) and the non-aligned (70% Remain), while unionist opinion leaned the other way (64% Leave) (Garry 2016: 2).

- 2.47. Irish unification would entail Northern Ireland's return to the EU, and this fact would likely be a significant factor in the debate around any unification referendums. Regardless of future constitutional changes, the UK's withdrawal from the EU will have a profound impact on the government of Northern Ireland, and relationships across the three strands, through the new Protocol on Ireland/Northern Ireland contained in the Withdrawal Agreement.

THE WITHDRAWAL AGREEMENT AND NORTHERN IRELAND PROTOCOL

- 2.48. The Withdrawal Agreement paved the way for the UK's departure from the EU on 31 January 2020. It provided for a transition period (to the end on 31 December 2020), during which the future relationship between the UK and EU would be agreed. And it contained a Protocol on Ireland/Northern Ireland, which sought to avoid the introduction of a 'hard border' on the island of Ireland regardless of the outcome of negotiations on UK–EU trade. The Protocol, which is legally binding in international law and (under the Withdrawal Act 2020) in UK domestic law, underwrites the 1998 agreement 'in all its parts', including on issues of North–South relations, citizenship and human rights.
- 2.49. The Protocol affirms that free movement of goods will continue on the island of Ireland. Northern Ireland will remain legally part of the customs territory of the UK, but it will continue to align with certain EU single market standards, and the EU's customs code will continue to apply in Northern Ireland. Goods going from Great Britain to Northern Ireland will be subject to tariffs if they are 'at risk' of being moved into the EU. The UK–EU Joint Committee, advised by the UK–EU Specialised Committee on the NI/IRL Protocol will make the final decision about the implementation of the Protocol. Compliance with the legal implications of the text will be adjudicated by a new international arbitration panel, with input from the Court of Justice of the European Union on matters of EU law.
- 2.50. Much of the significance of the Withdrawal Agreement and Protocol rests on the outcome of the UK–EU trade negotiations, which were ongoing as this interim report was being composed. A 'no-deal' outcome on trade could lead to significant economic barriers between Northern Ireland and the rest of the UK if Great Britain increasingly departs from EU standards, whilst Northern Ireland remains committed to them as required by the Protocol.

IMPACTS ON THE THREE STRANDS

- 2.51. The Protocol gives new powers to the Northern Ireland Assembly, which will have a vote at the end of 2024 as to whether it consents to the continued application of the articles in the Protocol regarding market-alignment for goods, and customs

administration. This decision will be by simple majority vote. If the vote is for Northern Ireland to align to UK rules, the UK–EU Joint Committee will come up with alternative arrangements for the future regulatory, customs and trade rules to be followed in Northern Ireland. If the vote is to continue with those aspects of the Protocol, there will be another vote on the same topic four years later or (if the first vote obtains sufficient cross-community support from nationalist and unionist MLAs) eight years later. The requirement for continued consent to the Protocol ensures that the issue of EU alignment will remain at the forefront of debate between the parties. The subject is fraught with administrative complexity. The Assembly withheld its consent to the Withdrawal Act (2020), which empowers the UK government to legislate in areas within devolved competence by statutory instrument, but was overridden by the UK Parliament.

- 2.52. Regarding Strand Two arrangements, EU matters were among the areas of ‘mutual interest’ that the North South Ministerial Council was intended to address—a provision that presupposed joint membership of the European Union. Article 11 of the Protocol states that it should be ‘applied so as to maintain the necessary conditions for continued North-South cooperation’. It is significant that, according to Article 11.2 of the Protocol, it is now the responsibility of the UK–EU Joint Committee to ‘keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation’.
- 2.53. In Strand Three, the wider political context of relations across the two islands has been altered. Official Ireland, without exception, preferred that the UK would remain in the European Union, not least for the smooth running of the 1998 Agreement; it now wishes to see the Protocol implemented in good faith. The functioning of the Protocol will affect relations between the Republic and the UK, as well as both with the EU.

POLITICAL CONTEXT

- 2.54. Since 1998, there have been significant changes to the political context in which any future referendum would take place. This section gives a brief overview of changes in Northern Ireland, Ireland, and Great Britain, with an eye to the international dimension.

NORTHERN IRELAND

- 2.55. Within Northern Ireland, politics was transformed by the power-sharing structures of the 1998 Agreement. Since then, the major political parties have had varying fortunes. The leading parties of unionism and nationalism at the time, the UUP and SDLP, have lost significant electoral ground to the DUP and Sinn Féin. There has more

recently been growth in the fortunes of the cross-community parties, notably the Alliance Party.

- 2.56. Northern Ireland has seen a remarkable change over the course of a generation, including the decommissioning of weapons, the reform of policing and the administration of justice, and the realisation of a measurable ‘peace dividend’ in economic and social development (Besley and Mueller 2012). However unstable, most support the 1998 Agreement as the basis for government in Northern Ireland (NILT 2020). Political violence has declined radically, but paramilitary organisations from both traditions still operate.
- 2.57. Brexit has profoundly affected the political climate, not least by aggravating the European cleavage in politics (Hayward and Rosher 2020). All major parties except the DUP backed Remain in the referendum, but UUP supporters are now in the main pro-Leave as well (Garry 2016: 6). Brexit played a part in the tensions leading to the collapse of the devolved institutions in 2017, and exacerbated the difficulties in restoring them. Tensions around the course of London policy, and the Conservatives’ 2017 confidence and supply arrangement with the DUP, fractured the UK government’s relations with some Northern Ireland parties, as well as with the Irish government. The conclusion of the EU–UK Withdrawal Agreement and the ending of the confidence and supply arrangement in late 2019 contributed to the conditions that enabled a return to talks which resulted in the *New Decade, New Approach* document and the restoration of power-sharing in early 2020.

IRELAND

- 2.58. Until the 1950s, all major Irish parties regarded partition as an injustice to be rectified, and Irish unity as a goal to be accomplished, by diplomatic means rather than through popular consent in Northern Ireland. That changed under De Valera’s successor, Sean Lemass, and that change has persisted under subsequent Irish governments, even if Fianna Fáil have often been seen to be more nationalist than Fine Gael (Lyne 1990). Unity with the consent of a majority in Northern Ireland became the norm after 1973, and all major parties supported its insertion into the Constitution in 1998. Since then, these parties have sought to ensure the Agreement is implemented, with particular attention to the stability of Strand One, though from 2016 there was increasing awareness of a need to invigorate Strands Two and Three.
- 2.59. Coalition government has been normal in Ireland since 1989. Fianna Fáil no longer dominates the electoral landscape. Brexit and the growing strength of Sinn Féin have disrupted the post-1998 consensus on Northern Ireland. The general election in February 2020 may have reset the Irish party system. Sinn Féin became the second largest party in the Dáil, with the greatest number of first-preference votes. It sees Irish unity as deliverable, and as made more likely by the UK’s withdrawal from the EU. The party campaigned on a left-wing programme for change, especially for improved health services, housing, and social care. It makes no secret of its

preference for a referendum to deliver Irish unity, but the desire to become the leading party in the South is another key objective for its leadership. Fianna Fáil and Fine Gael, which came second and third in vote shares in 2020, refused to negotiate with Sinn Féin. Instead, they entered coalition together for the first time, joined by the Green Party.

- 2.60. The new coalition government's programme addresses the topics of Brexit, British–Irish and North–South relations under the 'mission' of a 'A Shared Island'. To that end, the programme committed the government to establishing a unit in the Taoiseach's department 'to work towards a consensus on a shared island', which would seek to strengthen existing North–South and East–West institutions and promote investments in cross-border projects (Programme for Government 2020). It also promised a 'strategic review' of British–Irish relations in 2020/21, and examination of 'the political, social, economic and cultural considerations underpinning a future in which all traditions are mutually respected'. Speaking at Dublin Castle in October 2020, the Taoiseach set out further details, including a €500m infrastructure fund and work to enable cross-border dialogue across all communities. He emphasised the need to probe identity on both sides of the border and to avoid simplistic historical narratives. He also referred to the need for strong British–Irish intergovernmental cooperation.

GREAT BRITAIN

- 2.61. Both major parties in Great Britain—Conservative and Labour—have intermittently sought to maintain a bipartisan approach to Northern Ireland. In the 1990s, Labour under Tony Blair built on negotiations initiated by the Conservatives under John Major, and both parties backed the 1998 Agreement.
- 2.62. That is not to say that both parties have the same stance on the unification question. The Conservatives (officially called the Conservative and Unionist Party) have traditionally been the more pro-Union. Their 2019 election manifesto stated:

Northern Ireland enjoys huge benefits from membership of the United Kingdom and our country is stronger and richer for Northern Ireland being part of it. That is why we will never be neutral on the Union and why we stand for a proud, confident, inclusive and modern unionism that affords equal respect to all traditions and parts of the community. (Conservative and Unionist Party 2019: 44)

This pro-Union position has been reflected in official government documentation. The command paper of May 2020 stated that the government's approach to implementing the Protocol would 'be guided at all times by our overall aims of preserving and strengthening Northern Ireland's place in our United Kingdom' (UK Cabinet Office 2020a). The governments of both Theresa May and Boris Johnson insisted that their approach to negotiating the UK's withdrawal from the EU was shaped by a determination to maintain the Union (e.g., HC Deb 14 Jan 2019). But Johnson's decision to accept a deal aligning Northern Ireland with the EU single

market with no concomitant commitment for the rest of the UK was criticised by unionists in Northern Ireland.

- 2.63. The Labour Party contains supporters of Irish unification. From 1981 until 1994, the party expressly supported Irish unity by consent (National Executive Committee 1981): the same position as the SDLP, its sister party in the Socialist International and in the European Parliament. That changed shortly after Tony Blair became party leader: he dropped the policy, declaring it outmoded by events. Since then, Labour's official position has been neutral on the future of the Union, with individual Labour ministers and MPs having diverse preferences. Blair argued that he was a unionist during the peace process. The pro-unification views of Jeremy Corbyn, the party's leader from 2015 to 2020, were well known. The current leader, Sir Keir Starmer, has not expressed a view but knows the issues well, having served between 2003 and 2008 as human rights adviser to the Northern Ireland Policing Board.
- 2.64. A recurring theme in our evidence sessions has been that Northern Ireland sits low down the priority lists of most politicians and voters in Great Britain. One politician commented that interest in Ireland and Northern Ireland 'is a minority sport at Westminster', and that it does not feature 'in the constituency postbag'. The evidence from surveys and polls, confirms this view—see para 3.42.
- 2.65. That does not mean, however, that the prospect of Northern Ireland's departure from the UK would be met with indifference. The issue has to a degree already become entangled with the question of Scottish independence. In mid-2020 opinion polls in Scotland showed persistent majorities for independence for the first time (What Scotland Thinks 2020). Scottish historian Professor Sir Tom Devine has said the Union is in its most fragile condition since 1745 (BBC Newsnight 2020).
- 2.66. Scotland could affect developments in Northern Ireland in at least four ways:
- UK government ministers may be reluctant to take actions in Northern Ireland that could add to momentum for Scottish independence. Conservative ministers in particular are likely to take the Scottish situation into account when considering a referendum in Northern Ireland—though such issues could not lawfully affect the Secretary of State's assessment as to whether a majority is likely to vote in favour of unification, which is the only permissible criterion for a mandatory unification referendum.
 - Decision-making on a referendum in Scotland may likewise affect thinking in relation to Northern Ireland. If the Scottish Parliament elections in May 2021 yield a majority for the Scottish National Party (SNP) with a manifesto commitment to a referendum, the UK Parliament may find it difficult to resist the pressure for a vote there. That could in turn increase the weight of a similar election result in Northern Ireland—though again without altering the Secretary of State's legal obligations.

- The UK government and pro-Union parties in Westminster may seek to reform the Union to dampen pressure for Scottish independence. The Conservative Party did not propose reforms in its 2019 election manifesto, but some Conservatives have advocated change, including a new Act of Union (Constitution Reform Group 2015). Labour has proposed a constitutional convention to examine the distribution of power in the UK (Labour Party 2019: 81) and, during the Labour leadership election in early 2020, Sir Keir Starmer proposed that the UK's constitution should 'be built on the principle of federalism' (Langford 2020). If such proposals gained momentum, they could significantly change the Union and Northern Ireland's place within it.
- Should a referendum be held in Scotland and voters opt for independence, that too would have major ramifications. The Union would be fundamentally different without Scotland, as could be attitudes towards it. The referendum and subsequent negotiations over Scotland's future might be seen as foreshadowing what could happen in Northern Ireland—though the process of creating a new independent state in Scotland would be very different from that of transferring territory from one existing sovereign state to another.

2.67. These factors in current play make the UK's path over the coming years unpredictable. Northern Ireland may remain marginal to political debate within Great Britain, or it may again be caught up in wider contestation over the future of the Union. The future of the UK's Union would likely be a key factor in arguments for and against Irish unification in any future referendums, irrespective of whether Northern Ireland unionists forge close links with unionists elsewhere or remain relatively isolated from them. Northern Ireland voters could be faced with a choice between a Union needing or making reforms and unification with an Ireland arguably equally in need of change to accommodate them.

AN AMERICAN DIMENSION?

2.68. The international context matters too. We examined the role of the EU and Brexit above. The American dimension needs also to be considered. The Irish-American population, or the population in the United States with Irish ancestry, numbers over 30 million people according to the latest census figures (United States Census Bureau 2020). There is a practice of engaging North Americans to facilitate political developments in Northern Ireland. US Senator George Mitchell led the talks that produced the 1998 Agreement. General John de Chastelain of Canada chaired the Independent International Commission on Decommissioning paramilitary weapons. Former US diplomat Dr Richard Haass chaired talks preceding the 2014 Stormont House Agreement. In future, should disputes arise in relation to the process of unification referendums, it is possible that they could be mediated by another such person.

- 2.69. There is also a more general interest among many Americans with Irish descent in the politics of Northern Ireland, which has historically resulted in a significant political lobby. The President-Elect of the United States, Joe Biden, describes himself as Irish-American. Irish Americans, especially then Congressman Bruce Morrison, were influential in persuading Irish republicans to end violence, and in convincing the UK government to find political accommodation with nationalists.
- 2.70. An American economic dimension could interact with the European dimension, as the UK seeks a new trading relationship with the US. In April 2019, US House Speaker Nancy Pelosi pledged that any breach of the 1998 Agreement on free movement across the border would create a barrier to a US–UK post-Brexit trade deal (Carswell 2019). Both Pelosi and Joe Biden made similar commitments in September 2020 following the publication of the Internal Market Bill (Landler 2020; Lynch 2020). Historically, Irish nationalists and republicans have used the American diaspora to fundraise for constitutional and revolutionary causes. The diaspora was, however, overwhelmingly supportive of the peace process. Sinn Féin has raised considerable sums of money in recent years. Unionists too have cultural links with North America, with the Scots-Irish of the USA, and in many Canadian provinces. They are likely, however, to benefit rather less from external support during a referendum.

REFERENDUM RULES AND PRACTICES

REFERENDUMS IN THE UK AND IRELAND

- 2.71. Referendums have become a relatively routine part of politics in the Republic of Ireland. The Constitution of Ireland can be amended only through a public vote, and such amendments have been common over recent decades. The Constitution was adopted by referendum in 1937, since when 41 amendments have been put to referendum on 30 separate occasions—almost half of them (on both counts) since 2000.
- 2.72. As we explore in detail in Part 3 of the report, many of the rules around referendums in the Republic of Ireland are well established. Referendum questions, for example, follow a standard wording, and a Referendum Commission is formed before each vote to provide neutral information on the choice being put to voters. Recent years have seen the emergence of the innovative practice of holding citizens’ assemblies to deliberate on options in detail when a referendum on a contested topic is being considered—most notably, in relation to same-sex marriage and abortion.
- 2.73. Referendums are much less strongly institutionalised within the UK constitution. The requirement in the Northern Ireland Act 1998 for a referendum on unification if a majority for unity appears likely (see Chapter 4) is the only such stipulation in UK law, and there are very few other decisions (abolition of the Scottish Parliament or the Senedd being the most notable) that cannot take place without a referendum. Nevertheless, ad hoc referendums have increasingly been used to resolve contested

questions or to confer added legitimacy and weight upon major decisions. The 1973 ‘border poll’ in Northern Ireland was the first non-local referendum to be held on UK soil. Since then, twelve further decisions have been put to public vote. Most have been about devolution, in Scotland, Wales, Northern Ireland, London and the North East of England; two have been on membership of the EEC/EU; and one was on the voting system.

- 2.74. Early referendums in the UK were conducted according to one-off rules. But general rules—notably in relation to campaign finance and the determination of referendum questions—were set down in 2000. This means that the regulatory environment for any future vote in Northern Ireland would be very different from that of either the 1973 or the 1998 poll.

A FUTURE REFERENDUM ON NORTHERN IRELAND’S STATUS IN COMPARATIVE PERSPECTIVE

- 2.75. Referendums on the question of Irish unification would be very different from most past referendums in the UK. It is useful therefore to consider also whether past experience in other countries offers valuable lessons. To do so, one member of the Working Group—Brendan O’Leary—has conducted a detailed survey of the evidence. That survey will be published shortly. Here we provide a short summary of key points relevant to our analysis.
- 2.76. Referendums are most often used to resolve specific policy controversies, or to ratify or amend constitutions. But they are also used to address the status of territories and their peoples. Since 1789, the number of these so-called ‘sovereignty referendums’ has been variously estimated at between 150 and over 600, depending on the definitions used (Laponce 2001; Şen 2015; Mendez and Germann 2016; Germann 2019).
- 2.77. Among such referendums, unification referendums on the island of Ireland would be unusual: referendums in which the proposed change would involve the transfer of territory from one sovereign entity to another are relatively rare. An authoritative list of such referendums around the world does not exist. By scouring diverse sources (Wambaugh 1920, 1933, 1940; Laponce 2001, 2004, 2010; Qvortrup 2012, 2014a, 2014b, 2016; Altman et al. 2014; Morel and Qvortrup 2017; Şen 2015, 2017; Mendez and Germann 2016; and numerous encyclopaedias), however, we have identified 27 such votes. Though that is not an inconsiderable number, nine of these had taken place by the end of the nineteenth century, and a further eight by 1939. Only two have taken place in the last half century: the referendum in Northern Ireland in 1973 is one of these; the other is a vote in 1975 in which the Indian protectorate of Sikkim opted to join the Indian Union. Given developments in democratic practice, including practice around referendums, in recent decades, these precedents may offer only limited insights for many of the questions that we examine in later chapters. Another case is pending: the region of Abyei has been due since 2011 to vote on whether to

transfer from Sudan to South Sudan. Both sides agree that a referendum would be the appropriate means to settle the dispute over sovereignty, but disagreements over process have prevented the vote from happening.

- 2.78. Indeed, even within this subset of sovereignty referendums, Irish unification referendums would be unique. When taking account of additional provisions set out in the 1998 Agreement—including guarantees of enduring citizenship rights, commitments to impartial government under either outcome, provision for a recurrence of the same referendum after a minimum of seven years, and the possibility of a matching but perhaps sequentially later referendum in the South—the particular bundle of elements would be unprecedented. Furthermore, Ireland, alongside South Korea, is one of only two countries whose constitutions expressly enable the peaceful and democratic reunification of a previously unified entity.
- 2.79. Nevertheless, across the diverse set of 27 referendums that have taken place, we can observe three instructive general patterns:
- First, in the overwhelming majority of these cases, there has been *one question with two options*. There have been just three exceptions—in Newfoundland in 1948, Saarland in 1955, and Singapore in 1962—in each of which three options were provided.
 - Second, *a simple majority* was the decision rule in every case. The Newfoundland vote of 1948 was the only case offering a twist on that principle: there were two rounds of voting, with three options at the first and a run-off by simple majority at the second.
 - Third, in most cases, *the results have endured*. There has only been one secession after lawful incorporation by referendum, and even that classification may be questioned. In 1965 Singapore arguably was expelled from—rather than seceded from—the Federation of Malaysia.
- 2.80. Such precedents clearly need not bind the future. But the two norms—of binary choice and simple majority rule—are powerful.
- 2.81. The preceding analysis relates to referendums that have happened. We can also look at referendums that are provided for in state constitutions. Here again, the unusual nature of the situation in Northern Ireland is apparent: we have identified only ten countries whose constitutions make express provision for territorial change *and* stipulate that, to decide upon such change, referendums should be held among the affected population(s). As above, simple majority rule is the general norm across these cases, though a minority of cases specify additional requirements. It is notable, as we examine in further detail in Chapter 4, that the same provisions are implicit in the provisions of the Belfast/Good Friday Agreement.

CONCLUSION

- 2.82. The island of Ireland has had a contested and, at times, difficult history. That history has left deep divisions that continue profoundly to affect politics both north and south. The concerted efforts of recent decades have restored peace, and all major political parties across these islands are committed to pursuing their constitutional objectives by democratic means, within the framework set out in the 1998 Agreement. Yet the need to tread carefully, respecting the concerns and priorities of people belonging to the different traditions, remains great.
- 2.83. The processes by which the UK has sought to extricate itself from the EU have strained some relationships in these islands, and Brexit itself will increase the salience of borders after a period during which their significance had waned. Within the UK, developments in Scotland may lead either to the break-up of the Union or to a fundamental restructuring, either of which could shift dynamics in Northern Ireland. The contexts of any future unification referendums are thus unpredictable. But these and other ongoing political developments in Ireland and the UK, as well as relationships with the EU and the USA, will shape whether referendums on the unification question ever take place, and what the outcomes might be.

3. THE STATE OF OPINION ON REFERENDUMS ON THE UNIFICATION QUESTION

- 3.1. This chapter sets out the range of opinion on possible referendums on Irish unification. Unsurprisingly, there are very different perspectives. Some are enthusiastic advocates of a referendum, while others are hostile; some are open to the possibility but are cautious and regard careful planning as a pre-requisite. The salience of public discussion of a possible referendum has intensified since the UK's referendum of EU membership in June 2016.
- 3.2. The chapter begins by presenting recent contributions on the topic from unionists, nationalists and others in Northern Ireland, as well as setting out views from Great Britain and (in necessarily more detail given the greater prevalence of comment on the matter) the Republic of Ireland.
- 3.3. The chapter also explores public attitudes as captured in surveys and polling in Northern Ireland, the Republic of Ireland, and Great Britain. The current evidence is that, in Northern Ireland, support remains higher for maintaining the Union than for unification, despite some recent shifts in thinking. It seems that a significant proportion of people have views that are conditional upon how the Brexit issue concludes and what its effects on Northern Ireland are. These dynamics could become key in determining whether a poll is held, and what the outcome would be, but are unknowable at present.
- 3.4. The chapter concludes by analysing responses to a public consultation conducted by the Working Group in Northern Ireland in the summer of 2020. This material provides a rich flavour of hopes and fears of people across different communities about what a referendum on the unification question might bring.

VIEWS IN POLITICAL PARTIES AND CIVIL SOCIETY GROUPS

UNIONIST VOICES IN NORTHERN IRELAND

- 3.5. Although by definition opposed to Irish unification, unionist leaders have at times called for a 'border poll' for strategic reasons. In March 2002, the Ulster Unionist Party (UUP) First Minister, David Trimble, generated headlines by proposing that a 'border poll' be held at the next Assembly elections, in order to 'call the republicans' bluff' (Murray 2002). A similar rationale was given by Arlene Foster in 2013, when she said that senior Democratic Unionist Party (DUP) politicians had considered not standing in the way of the UK government agreeing to Sinn Féin's demand for a

referendum (BBC 2013). She said that the DUP was confident that a majority vote against unity would ‘consolidate Northern Ireland’s position within the UK’.

3.6. In November 2019, Foster repeated her prediction that a referendum would yield a pro-union outcome. But she argued against holding a referendum on the grounds that, under her interpretation of the Northern Ireland Act 1998, it would trigger ‘a seven-year cycle of uncertainty’ (Young 2019). Pressed to address the topic again in February 2020, after Sinn Féin’s success in the Irish election, she stated that there would be neither a referendum nor a united Ireland in her lifetime. She explained, ‘As you know the test for a border poll is that people would vote for it in a majority—but there’s no tangible evidence [of that] if you look right across Northern Ireland’ (Gordon 2020).

3.7. In a recent comment on the topic, the Grand Secretary of the Orange Order, Rev. Mervyn Gibson, similarly said that, whilst he would accept the democratic result of a vote for unification, he simply did not believe a referendum on the subject was likely in the short term (Belfast Telegraph 2019c). In contrast, Alex Kane, a former UUP Communications Director and now a prominent columnist, warned unionists in early 2019 that, whilst a poll on Irish unity is not inevitable, the Brexit impasse had contributed to it becoming more likely than not:

the solidly pro-Remain ‘small-n’ nationalists and ‘small-u’ unionists now seem much more willing to listen to a well-made case for Irish unity – Panic isn’t required; preparation for all eventualities is. (Kane 2019)

More recently, Kane has written in a similar vein arguing that unionism risks being ‘outmanoeuvred’ due to its reluctance ‘to prepare for all eventualities’ (Kane 2020).

3.8. Similar considerations have led former First Minister Peter Robinson to raise in public the possibility of a referendum on several occasions in recent years. With the Brexit experience in mind, he argued for a legal assessment of how a referendum might be handled (BBC 2018). More recently, writing in the *Belfast News Letter*, he has called for a unionist ‘think tank or working group’ to be established which would ‘carry out research and provide material proclaiming the benefits of the Union’ in preparation for a possible border poll (Robinson 2020). Some other figures in unionism have agreed with this assessment. One said to us: ‘I would urge preparation of “the case for the Union” now. You need to think about how you will lay out your stall’ (anonymous oral evidence 2020).

3.9. Despite these thoughts and interventions, political and civic unionism is currently strongly resistant to engaging in a debate on the topic of a referendum. Indeed, in many cases, unionist figures have warned against discussing a referendum even in the abstract, in case it could contribute to expectations that one is imminent. Reflecting this disposition, some unionists, including from the main parties, have declined our invitation to submit evidence to this project. The sense that discussions of constitutional futures outside the Union only serve to legitimise pro-referendum and pro-Irish unity arguments is widely held across the varying strands of unionism

and loyalism. For example, Steve Aiken, leader of the UUP, announced that his party would be ‘countering at every opportunity “civic nationalism’s” narrative that we are all headed for an “agreed Ireland”’ (Moriarty 2019b). *The depth of feeling on this topic is illustrated by Arlene Foster’s comment that she would ‘probably have to move’ were Irish unification to occur (Irish News 2018).*

NATIONALIST VOICES IN NORTHERN IRELAND

- 3.10. Sinn Féin has consistently called on both governments to begin what the party regards as the necessary planning for unification. In a submission made to this Working Group, Sinn Féin reiterated its position that ‘planning is essential’ and that forums and other mechanisms to facilitate a discussion of the process towards unity should be set in train (Sinn Féin written evidence 2020). The party has argued that the uncertainty resulting from the 2016 referendum on the UK’s EU membership has reshaped people’s thinking on their constitutional future and that unity is now ‘increasingly likely’ (Haverty 2020). It has called for a forum to be established by the Irish government to discuss the political shape of a ‘new Ireland’, a new Irish constitution, with protections to assuage unionist concerns, and a timeframe for a transition period. Brexit has also shaped Sinn Féin’s approach. Its party grouping in the European Parliament (GUE/NGL) commissioned a report which called for the EU institutions to take a role in planning and preparing for a process of constitutional change in Ireland (Harvey and Bassett 2019).
- 3.11. The Social Democratic & Labour Party (SDLP) also favours Irish unification but has, like most parties in the Republic of Ireland, been more cautious in raising the question of a referendum. The UK’s departure from the EU appeared to dent that caution: in 2017, party leader Colum Eastwood said that a border poll on unification should take place once the Brexit negotiations had concluded (Moriarty 2017). Nevertheless, speaking two years later at the Fianna Fáil Ard Fheis in Dublin, following the two parties’ new ‘policy pact’, Eastwood appeared again to emphasise caution, saying there was a ‘special place reserved in hell’ for those calling for a border poll with no plan as to how a united Ireland would work (Bell 2019). More recently, the party announced it intends to form a New Ireland Commission. This body will have ‘multiple levels of dialogue’ (conducted locally, regionally and nationally) and seek to listen and ‘understand the full diversity of views’ on Ireland’s constitutional future (SDLP written evidence 2020). In November 2020, Eastwood asked the Secretary of State in the House of Commons what exact criteria he would use to determine whether to hold a poll (HC Deb 4 November 2020).
- 3.12. The late Seamus Mallon, formerly deputy leader of the SDLP and the first deputy First Minister under the 1998 Agreement, provoked a debate within Irish nationalism by arguing in his memoirs, written with Andy Pollak, that unification should not be sought on the basis of a narrow 50% + 1 majority. The authors argued that such an outcome ‘could lead to a major resumption of violence’ (Mallon with Pollak 2019: 152) and that a united Ireland born in such circumstances would be ‘unworkable’

(165) and ‘ungovernable’ (172). They advocated a review of the relevant provisions in the 1998 Agreement, potentially leading to a ‘parallel consent’ provision, with unification requiring ‘a majority – or at least 40% support – within the unionist community’ (168). They also argued that nationalists should not push for a vote ‘until there is wider and deeper acceptance for it among the unionist community’ (176), and that the governments ‘should not agree to the holding of a Border Poll unless they were absolutely certain it would lead to a peaceful and stable outcome for the island of Ireland’ (181).

- 3.13. The northern nationalist commentator, Brian Feeney, a former SDLP councillor, highlighted difficulties in Mallon and Pollak’s proposals, emphasising that they would make Irish unification impossible, as unionists would effectively hold a veto (Feeney 2019). Sinn Féin Vice President, Michelle O’Neill, the current deputy First Minister, also criticised the proposals, saying, ‘Increasing the threshold needed for constitutional change would be to turn democracy on its head and would undermine the principles of the Good Friday Agreement’ (Manley 2019). Similarly, former Sinn Féin leader Gerry Adams said it would undermine the ‘equal and democratic value that should be given to every vote’ (Cross 2019). While Colum Eastwood has defended his predecessor as leader from this public criticism (Walker 2019) the SDLP has not accepted the specific point on a threshold change:

This cannot be the threshold for one legitimate aspiration but not the other. Parallel consent is a sometimes applicable test in Assembly decisions based on counting MLA votes with reference to their registered designations. To truly extend those terms and conditions to the electorate would be pregnant with profoundly negative implications and a nightmare of complications (SDLP written evidence 2020).

- 3.14. The impression of Irish unification becoming more of a ‘live’ issue among nationalists in the past few years has been seen in the growth of grassroots movements under the broad heading of ‘civic nationalism’. In January 2019, a ‘Beyond Brexit’ conference, with around 2000 delegates, was held at the Waterfront Hall in Belfast, primarily organised by Ireland’s Future, which seeks to ‘promote discussion and debate about a new constitutional vision for our island’ (Belfast Telegraph 2019a). In late 2019, the group organised an open letter to 400 of Ireland’s general election candidates, asking them to support the formation of a citizens’ assembly on Irish unity within the lifetime of the next Dáil (Irish News 2019). Another group is #Think32, which describes itself as a ‘grassroots, cross-community, non-party political movement to promote and encourage debate on the reunification of Ireland’ (twitter.com/Think32_). Also notable in the digital sphere is the Shared Ireland podcast, which seeks ‘to begin a dialogue and debate on how to achieve’ a shared Ireland (Shared Ireland Podcast 2019).
- 3.15. Other pro-unity movements take more traditional forms. The Constitutional Conversations group has held public events around the island, aiming to foster a wider civic ‘dialogue around Irish unity’ (Féile an Phobail 2019: 66). They have also recently produced material that seeks to address many of the unanswered questions

regarding how a referendum on unification would operate, including many of the issues this report deals with (see Shared Ireland 2020). These events have hosted prominent authors and academics who have written on the subject (@Think32_2019) (see also paras 3.30–32). Trade Unionists for a New and United Ireland, originally launched in early 2018, has also organised public events in Dublin and Belfast. Another group is Yes for Unity. This is a Eurosceptic ‘socialist broad front campaign for Irish unity’, which has employed door-to-door canvassing and public meetings ‘to mobilise the left for an Irish unity referendum’ (Yes For Unity 2020). It organised the ‘March for Irish Unity’ across the River Foyle in November 2019, with around a thousand participants. The march incorporated republican political organisations, such as the 32 County Sovereignty Movement, but was carefully presented as ‘non-party, non-political, non-sectarian, peaceful’ (O’Neill 2019).

‘THE OTHERS’ IN NORTHERN IRELAND

- 3.16. The Alliance Party emphasises a cross-community, anti-sectarian approach to Northern Ireland’s constitutional status and does not adopt either a pro-union or pro-Irish unity position. In oral evidence to us, the party’s MP, Stephen Farry, said, ‘as a cross-community party, we are happy to have these sorts of conversations on mechanics of a referendum, but also the future of the UK’. However, the party seems unlikely to actively support a referendum in the near future. Current party leader Naomi Long has said that (regardless of the outcome) it would be ‘destabilising’ to have a border poll ‘without clear intention and shaping as to what any post-border poll Northern Ireland might look like’ (Madden 2019).
- 3.17. Some ‘civic’ conversations have focused on this very question—many online and seeking to engage a younger generation, as seen by those writing for the ‘Future Ireland’ series of Sluggie O’Toole (Future Ireland 2020). A notable intervention was made by Northern Ireland-born actor James Nesbitt, who launched the Connected Citizens initiative to start ‘an inclusive, non-sectarian conversation’ about the future of Northern Ireland (Belfast Telegraph 2019b). Nesbitt explained that he wanted people from the Protestant and unionist tradition to ‘be proud to be from the north of Ireland in a new union of Ireland’ (Belfast Telegraph 2019b).
- 3.18. There have also been some contributions on the subject from non-aligned civic groups. The President of the longstanding all-island Irish Association, Bob Collins, for example, argued at a public event that ‘there needs to be clarity about what that change [arising from a referendum] would look like’. He continued, ‘I don’t detect the slightest sense in the Republic that the emergence of a United Ireland would alter people’s lives in the slightest respect, and that worries me deeply’ (Meban 2019).

VIEWS IN GREAT BRITAIN

- 3.19. The main parties in Great Britain—most notably, the Conservatives and Labour, as well as the Liberal Democrats, Scottish National Party, and Plaid Cymru—support the

1998 Agreement and adhere to the principle that Northern Ireland's future constitutional status is a matter for the people of Northern Ireland and Ireland. As several witnesses pointed out to us, few Westminster politicians take much interest in Northern Ireland itself. Nevertheless, as we noted in Chapter 2, support for the Union more broadly is widespread, particularly in the Conservative Party. In July 2020, a new group of backbench MPs 'committed to strengthening the Union'—the Conservative Union Research Group—was convened under the leadership of Robin Millar, a Welsh Conservative MP. Their aim was to put 'the future of the UK' to the fore in Number 10 and the Houses of Parliament (Andrews 2020). They work in a context in which there is no great enthusiasm among MPs for a referendum on Irish unification any time soon; as a consequence, references to the subject are rare. Speaking in October 2019, the then Secretary of State for Northern Ireland, Julian Smith, said that he was not at all considering the question of a referendum and that 'the Union was strong' (BBC The View 2019). His successor Brandon Lewis has also refused to be drawn on the details of when a UK government would trigger a referendum both at the time of his appointment and since, in response to a question in the Commons (McClements 2020; HC Deb 4 November 2020).

- 3.20. Perceived threats to the Union amid Brexit have sparked a range of interventions. Briefings for Britain is one of the leading pro-Union websites. It was set up by Graham Gudgin and Robert Tombs in 2017 'in order to provide reasoned factual material to help to inform the national debate on Brexit' (Briefings for Britain 2020). Another pro-Union web-based platform for encouraging discussion in light of Brexit is These Islands, which works from the principle that 'good relations between the various communities of Northern Ireland, Great Britain, and Ireland are all the more important to work for in the wake of Brexit'. It describes itself as 'Enthusiastic about the Union [...] enthusiastic as well about local identities and loyalties'. It recognises, it says, 'that the plural nature of the United Kingdom, far from constituting a weakness, is its greatest strength' (These Islands 2020).
- 3.21. Brexit has also stimulated comments on the Union and the prospects of Irish unity from the 1998 Agreement era of British political figures. Former Prime Minister Tony Blair is concerned the 'destructive force' of Brexit in Northern Ireland could create 'a feeling towards a border poll that just wasn't present during the years that I was in office' (Institute for Government 2019). Tony Blair's former Chief of Staff, Jonathan Powell, similarly argued in early 2020 that the Brexit process had increased the likelihood of a referendum. He said pressure for a vote 'would be very difficult to resist' if 'a sustained number of opinion polls' suggested there was majority support for unification (BBC World at One 2020). Another former Prime Minister John Major, speaking at Middle Temple in November 2020, highlighted Northern Ireland's support for the EU, the terms of the Withdrawal Agreement, and demographic change and said:

The conjunction of these events is to increase the future possibility of a border poll—already sought by Sinn Féin—to vote upon a united Ireland. I doubt that such a poll would be won at present. ... The time for a poll is not yet come. But it will. (Major 2020)

VIEWS IN IRELAND

- 3.22. No political party represented in the Oireachtas opposes unification. Since the signing of the 1998 Agreement, Irish political debate has largely been conducted on the basis that a unity referendum should not become an issue in domestic politics until there is a realistic prospect that a majority north of the border would likely vote for unification. But the UK's decision to leave the EU in 2016 reignited conversation on Northern Ireland's constitutional status. Sinn Féin has repeatedly criticised its rivals' caution and argued for a much more proactive approach in the South.
- 3.23. In the face of such calls, the last Fine Gael-led government maintained that a unity referendum would be 'disruptive and destructive' and would constitute a deliberate provocation of the unionist community (Halpin 2018). When campaigning for the Fine Gael leadership in 2017, Leo Varadkar said, 'The demand for a border poll is alarming. It is a return to a mindset in which a simple sectarian majority of 50% plus one is enough to cause a change in the constitutional status of the North.' He continued, 'Bouncing Ulster Protestants into a unitary Irish state against their will would be as grievous a wrong as was abandoning a large Catholic minority in the North on partition' (Corcoran 2017). At the 2019 summer Féile an Phobail debate in Belfast, as Taoiseach, Varadkar suggested that, were unification ever to happen, there would need to be a new Irish state with a new constitution (Moriarty 2019a). The Minister for Foreign Affairs, Simon Coveney, explicitly said that the aim should be to work with both communities on Brexit and that 'there is enough polarisation between nationalists and unionists without adding calls for Border polls to be pulled into the middle of all that' (Roche 2019).
- 3.24. Fianna Fáil entered an official policy partnership with the SDLP to explore cross-border cooperation in early 2019. Its 2020 manifesto stressed that the issue of Northern Ireland's future status should not be dominated by a single party's agenda. It has called for deeper economic and political ties between North and South, and for 'a neutral and factual discussion of the impact of various approaches to Northern Ireland's future' (Fianna Fáil 2020: 134). Within the party, Senator Mark Daly has taken a proactive interest in unification and has been the rapporteur for an Oireachtas Joint Committee report on Brexit and the Future of Ireland: Uniting Ireland and its People in Peace & Prosperity (Houses of the Oireachtas 2017).
- 3.25. As noted in Chapter 2, the Programme for Government that underpins the governing coalition formed after the 2020 election argues for a 'shared island' approach. It does not propose direct preparations for unification, but instead focuses on fully implementing the 1998 Agreement. It includes consideration of changes to how Ireland manages all-island institutions and initiatives, through shifting some authority from the Department of Foreign Affairs to the Department of the Taoiseach. It pledges to 'enhance' North–South cooperation on a range of issues, including the all-Ireland economy and all-Ireland infrastructure projects (Programme for Government 2020: 121). A new Shared Island Unit is located in the Department of the Taoiseach,

with senior officials seconded from the Department of Foreign Affairs. Its creation signifies strong prime ministerial leadership of policy towards Northern Ireland. Speaking in Dublin Castle in October 2020, the Taoiseach, Micheál Martin, reiterated that the Unit's focus would be on 'build(ing) a shared island underpinned by the Good Friday Agreement' (Martin 2020). In response to a question, he added that, 'for the next five years, a border poll is not on our agenda' (Kula 2020). He also implicitly recognised the existence of negative perceptions and labelling of Britishness in some Irish narratives, saying that he 'would like to see more reflection and engagement in the South, so that we look at preconceptions, mutual understandings ... for our shared future' and calling for examination of 'some of the simplistic narratives about what we have all come through' (Martin 2020).

- 3.26. By contrast, Sinn Féin, in its 2020 election manifesto, said 'a referendum on Irish Unity will be held in the next few years'. It proposed a Joint Oireachtas Committee and white paper on Irish unity, along with an all-Ireland representative citizens' assembly (Sinn Féin 2020: 12). In the early weeks of the coalition government's term, the new Fianna Fáil Taoiseach, Micheál Martin, clashed with Sinn Féin's leader Mary Lou McDonald on the subject of holding a border poll in the short term, calling the idea 'divisive' and 'partisan' (O'Halloran 2020; BBC Andrew Marr interview 2020).
- 3.27. Elsewhere, former President of Ireland Mary McAleese has warned that if Ireland does move towards unification it must 'learn from the mistakes of Brexit' (DCU Brexit Institute 2019). McAleese has also spoken of the strain the Brexit process has placed on the 1998 Agreement and the lingering threat of violence (McGarry 2020). More recently, she said she firmly believes the 'full potential of this island will not be realised while we are divided' but that the Irish government's decision not to push for a border poll in the next five years was 'a very good idea' (Staines 2020)
- 3.28. An emerging idea which has gained support within nationalism is to create a 'New Ireland Forum' modelled on that of the 1980s (Irish Labour Party 2020; Humphreys 2018: 197). This would discuss a 'potential unitary Irish state while [being] open to other political views including British Unionist perspectives' (Irish Labour Party 2020).
- 3.29. Civil society actors advocating for constitutional change are less prevalent in the Republic than they are in the North. Many of the grassroots organisations operating in Northern Ireland have also focused attention on engaging the public in the South on these issues. The aforementioned Ireland's Future is registered in Dublin and has many active members from the South. This group has also written to the office of the Taoiseach on multiple occasions stressing the need for institutions and society in the South to prepare for constitutional change (Ireland's Future 2020).

ACADEMIC, LEGAL, AND OTHER VOICES

- 3.30. There have been noteworthy contributions to the discussion on this topic in recent years from prominent lawyers, social scientists, and economists. Many have pressed the need for Ireland to prepare for constitutional change in the wake of Brexit and

have written from a pro-unification standpoint. For example, Paul Gosling (2020) sets out how unification could, in his analysis, come about within a 10-year timeline. Colin Harvey and Mark Bassett have argued that preparatory work for a transition to unity should begin, and the EU should play a proactive role in that process (Harvey and Bassett 2019; Shared Ireland 2020). Eilish Rooney and others have formed the Constitutional Conversations Group ‘with a view to encouraging participation and engagement’ on the topic of unification (Ulster University 2019). In a paper for that group, Bassett and Harvey (2019) explored many of the procedural questions that we examine here, notably including the franchise in any referendums, the wording of the referendum question, and the referendum threshold.

- 3.31. The senior Irish judge Richard Humphreys, writing extra-judicially, has published two prominent books on Irish unification (Humphreys 2009, 2018). Several economists have explored the opportunities and problems that unification might bring for the Irish and Northern Irish economies (FitzGerald and Morgenroth 2019; McGuinness and Bergin 2020). We discuss key points from these analyses in Chapter 7.
- 3.32. Some members of this Working Group are also examining a range of possible constitutional futures on the island of Ireland and in the UK’s Union in other projects (Doyle et al. 2021; Gillespie 2019; Gillespie 2020; O’Leary 2019). Several members of the group are part of the *Analysing and Researching Ireland, North and South* project—institutionally sponsored by the Royal Irish Academy and the University of Notre Dame (Royal Irish Academy 2020a; 2020b). It expects to begin publications in December and January. Similarly, some members have contributed to the *Constitutional Futures after Brexit* project at the UCD Institute for British-Irish Studies, as well as the *Constitutional Dimensions of Irish Unification* blog symposium from the International Association of Constitutional Law (IBIS 2020; IACL 2020). They also contributed to a workshop on *Deliberating Constitutional Futures* organised in February 2020 by the Transitional Justice Institute at Ulster University, presentations at which were later published as a report (Rooney et al. 2020).

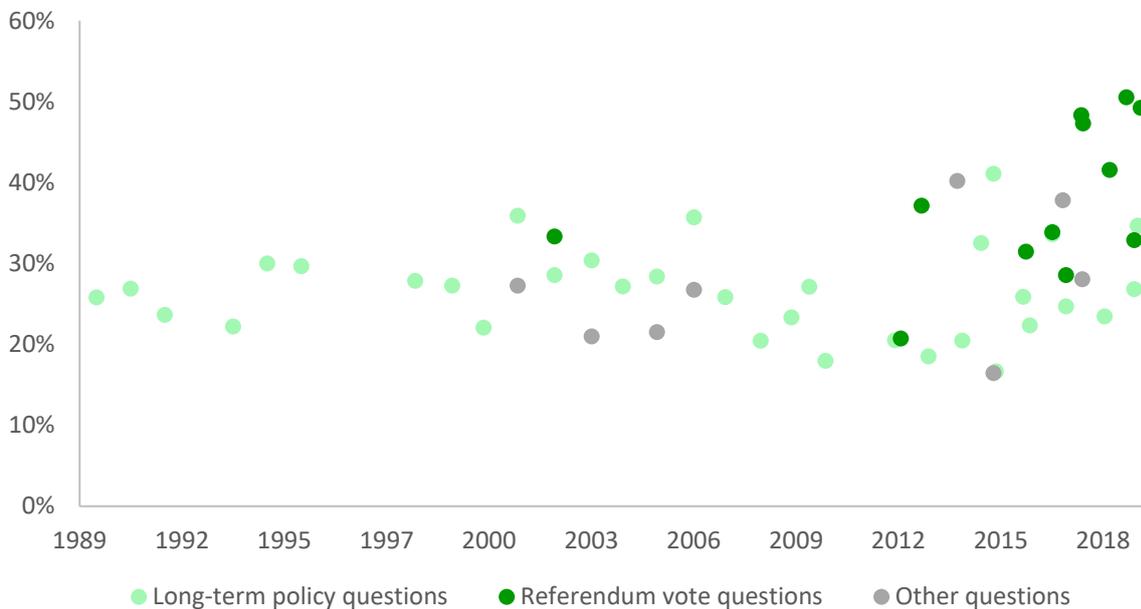
PUBLIC OPINION: SURVEY AND POLLING EVIDENCE

- 3.33. Since 1968, public opinion within Northern Ireland on the subject of unification with the rest of Ireland has been measured in surveys and opinion polls. This section outlines the results over time, as well as the reasons behind some variance in the results. It also explores attitudes towards Irish unification amongst the general public in the Republic of Ireland and in Great Britain. As we emphasised in Chapter 1, our work in this report is not based on assumptions about what the state of opinion is or how likely a majority in favour of unification might be in the future. We provide the material here has background that some readers may find useful.

NORTHERN IRELAND

3.34. Figure 3.1 shows the level of support for a united Ireland as recorded in surveys and polls conducted in Northern Ireland since the late 1980s (excluding ‘Don’t know’ responses). Until around 2013, almost all studies found support for unification to be below 30%. Since then, results have become much more varied. While some studies continue to suggest little or no change, a small number since 2017 have placed support for unification at or close to 50%. Figure 3.1 includes surveys and polls asking a variety of different questions, which we group into two main categories. Some ask about what respondents ‘think the long-term policy for Northern Ireland should be’. Others ask how people would vote in a referendum. Further details of these questions are given in the notes below the figure.

Figure 3.1. Support for a united Ireland in Northern Ireland, since 1989



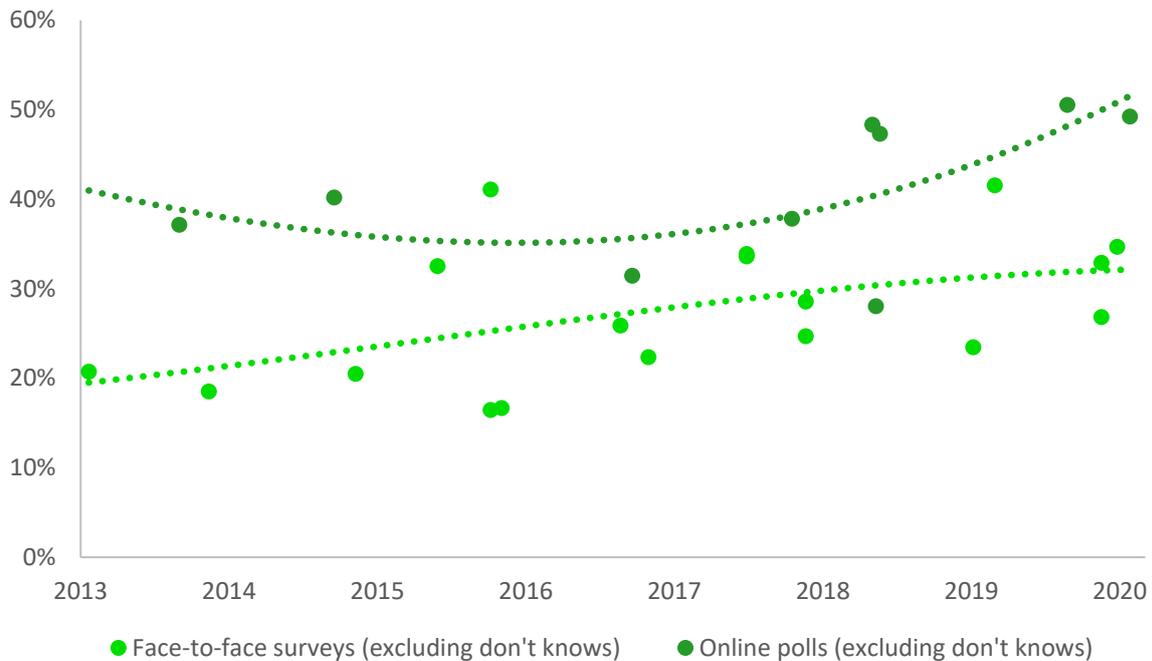
Notes:

1. Respondents answering ‘Don’t know’ are excluded. If they are included, all results drop somewhat. For instance, the highest recorded support for unification, in August 2019, drops from 50.5% to 46%.
2. ‘Long-term policy’ questions were asked by the Northern Ireland Social Attitudes Survey (NISA), the Northern Ireland Life and Times Survey (NILT), the Northern Ireland General Election Survey (NIGE), and a cross-border survey carried out for the BBC and RTÉ by B&A Research. NISA asked ‘What do you think the long-term policy for Northern Ireland should be?’. NILT asks ‘Do you think the long-term policy for Northern Ireland should be for it...’. Exact NIGE wording has changed over time, but closely tracks that of NISA and NILT. B&A Research asked ‘Thinking of the long-term policy for Northern Ireland, would you like to see a united Ireland in your lifetime?’.
3. ‘Referendum vote’ questions, using variable wording, were asked by NILT, NIGE, Ipsos MORI, LucidTalk, and Lord Ashcroft. For example, the most recent LucidTalk poll asked ‘If there was a referendum (i.e. a Border Poll) on the constitutional position of Northern Ireland would you vote for Northern Ireland to be...’.

Sources: NISA 1989–95; NILT 1998–2019; NIGE 2010–19; Ipsos MORI for *BBC Spotlight* (Jan 2013); LucidTalk for *The Belfast Telegraph* (Sept 2013); LucidTalk for the *Belfast Telegraph* (Sept 2014); Ipsos MORI for BBC Northern Ireland’s *The View* (Aug–Sept 2016); LucidTalk tracker poll (Sept 2016); LucidTalk tracker poll (Oct 2017); LucidTalk tracker polls for the BBC and YouGov (May 2018); Deltapoll for Policy Exchange (May 2018); Lord Ashcroft (May 2018); Ipsos MORI for *The Irish Times* (March 2019); Lord Ashcroft poll (Aug–Sept 2019); LucidTalk for *The Detail* (Jan–Feb 2020).

3.35. At least part of the reason for this divergence appears to be a shift in methodology. Since 2013, traditional methods of surveying using face-to-face (or telephone, or, now, video-based) interviews have been supplemented by online polling. As Figure 3.2 shows, there is a consistent gap between these methods in the results that they obtain: online polls show higher support for unification.

Figure 3.2. Support for a united Ireland in Northern Ireland, since 2013, by method



Notes:

1. Question wording varies across polls. See notes on Figure 3.1.

2. Trendlines are second order polynomial functions. They give a broad indication of changing patterns, but weight should not be given to their exact shape.

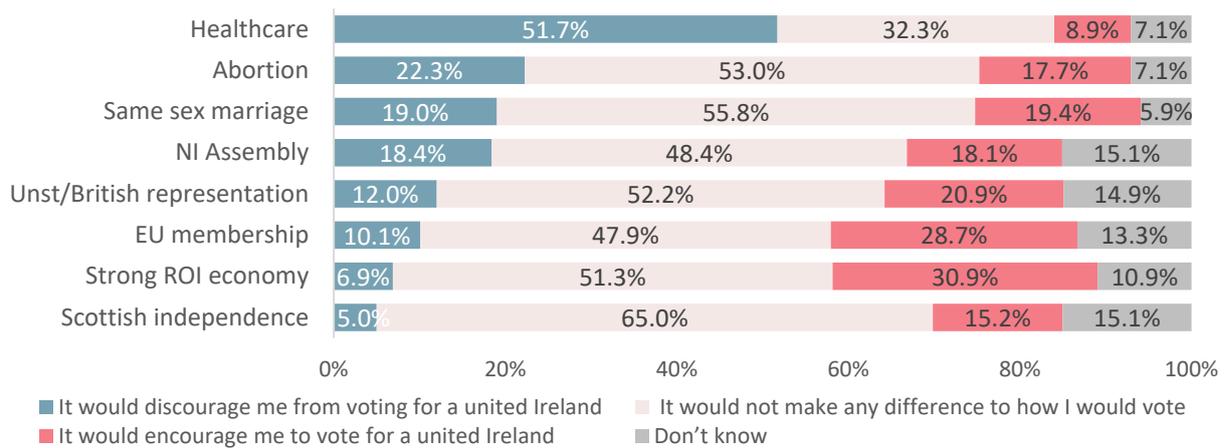
Sources for online polls: LucidTalk for the *Belfast Telegraph* (Sept 2013); LucidTalk for the *Belfast Telegraph* (Sept 2014); LucidTalk tracker poll (Sept 2016); LucidTalk tracker poll (Oct 2017); LucidTalk tracker polls for the BBC and YouGov (May 2018); Deltapoll for Policy Exchange (May 2018); Lord Ashcroft (May 2018); LucidTalk tracker poll (Nov–Dec 2018); LucidTalk tracker poll (Oct 2019); Lord Ashcroft poll (Aug–Sept 2019); LucidTalk for *The Detail* (Jan–Feb 2020).

Sources for face-to-face surveys: NILT 2013–19; Ipsos MORI for *BBC Spotlight* (Jan 2013); NIGE 2015, 2017, 2019; B&A Research for RTÉ/BBC cross-border survey (Oct 2015); Ipsos MORI for BBC Northern Ireland’s *The View* (Aug–Sept 2016); Ipsos MORI for the *Irish Times* (March 2019).

3.36. There has been much speculation as to the reasons for this divergence. One view is that traditional surveys may underestimate support for unification because of what is sometimes called as a ‘shy nationalist’ effect. On this view, some people are reluctant to ‘admit’ to a stranger in person that they would like to see Irish unification (Donaghy 2020; White 2020a). It is indeed true that interview-based surveys yield many more ‘Don’t know’ responses than do online polls. On the other hand, people do seem willing, in the same surveys, to acknowledge that they support nationalist parties or hold strong views on other contentious matters. It is not obvious why there should be a particular effect in relation to questions specifically on unification.

- 3.37. Conversely, others are concerned that respondents to online polls may be unrepresentative of the wider population. Such polls draw from ‘panels’ of people who sign up to complete surveys by particular companies. The people choosing to do this may be unusually engaged citizens: that may be a reason for their lower ‘Don’t know’ response rates. Particular groups may also be over- or under-represented on the panels. On the other hand, online polling companies weight their results to compensate for any over- or under-representation, and have methods to protect against large-scale ‘gaming’ of the process.
- 3.38. We examine the weight that should be attached to different polls and surveys further in Chapter 8, when gauging how the Secretary of State for Northern Ireland would decide whether a referendum must be called. We note there the wide consensus among opinion research experts in seeing traditional interview-based methods using what is known as ‘probability sampling’ as the ‘gold standard’. On the other hand, we have seen no evidence that online polls have a worse track record than interview-based surveys in predicting election or referendum results in Northern Ireland.
- 3.39. Regardless of methodology, the evidence from opinion polls and surveys is currently that a clear majority of voters would likely opt to remain in the Union. There is some evidence of a narrowing of the gap in recent years, though this is much clearer in online polls than it is in interview-based surveys.
- 3.40. Beyond the headline results, it is worth noting that a consistent finding across polls and surveys conducted in Northern Ireland since the 2016 referendum on the UK’s EU membership has been to show an increase in the proportion of those thinking that Irish unification is likely at some point (NILT 2016–19). Polling conducted during the period of Brexit impasse in 2018 and 2019 also found that support for unity fluctuated depending on the hypothetical EU–UK relationship which was put to respondents (LucidTalk November–December 2018; Garry et al. 2020b).
- 3.41. The NILT 2019 survey included a set of questions under the following premise, posed to the interviewee: ‘When people are deciding how to vote in an election or referendum, they often take many factors into consideration. Please tell me in what way, if at all, the following issues would affect your decision on how to vote in a referendum on a united Ireland.’ The responses, shown in Figure 3.3, suggested that a strong economy in the Republic of Ireland (compared to Northern Ireland) would be the factor that most persuaded people to vote in favour of Irish unification, while the difference between the healthcare systems would most dissuaded people from doing so. There were very significant differences between Catholic and Protestant respondents, with the former consistently more likely to say that a factor would encourage them to vote in favour of Irish unification. Even Scottish independence or British representation in Dáil Éireann was far more likely to persuade Catholics than Protestants to vote for Irish unification. Age also made a difference, with younger people much more readily swayed in their vote across all factors, but especially the prospect of more liberal laws, despite the fact that they were not significantly more likely to favour Irish unification than older people.

Figure 3.3. Factors affecting decision on how to vote in a unification referendum

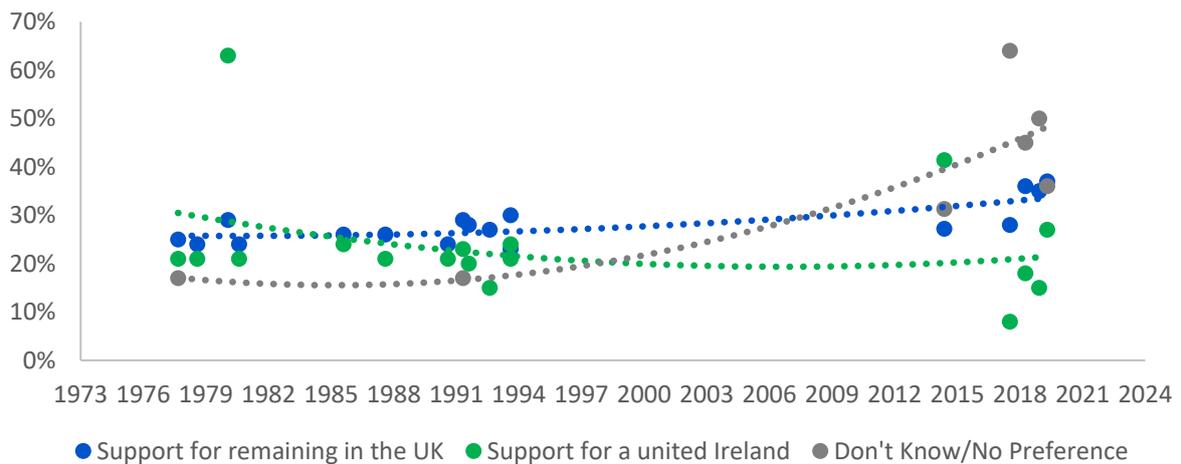


Source: NILT 2019.

POLLING IN BRITAIN AND THE REPUBLIC OF IRELAND

3.42. There are few polls in Great Britain on the topic of Irish unification: indeed, we have found none between 1994 and 2015 (but would welcome information on any we may have missed). Polls in recent years find little active desire for Northern Ireland to leave the UK, but suggest that many would feel relaxed if it happened. In February 2019, for example, polling by Ipsos MORI found twice as many would personally prefer Northern Ireland to vote to remain in the UK rather than for Irish unification in a border poll (36% to 18%); but 36% said that they ‘would not mind either way’ (Ipsos MORI 2019). Figure 3.4 shows that this result fits an overall pattern.

Figure 3.4. Attitudes in Great Britain towards Northern Ireland’s constitutional future

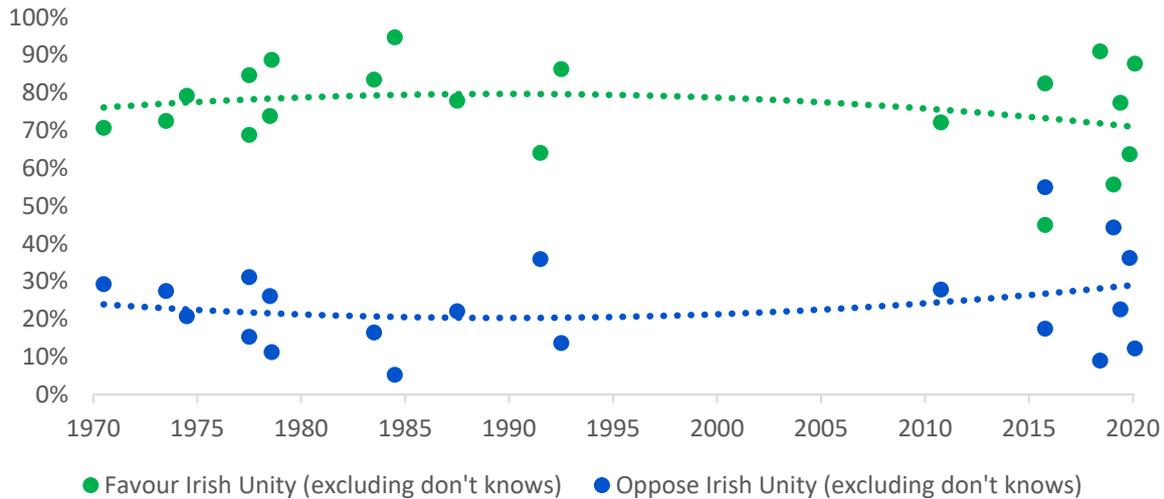


Notes: Some polls, particularly in the early period, included the option of independence for Northern Ireland, which is not represented in this graph. Trendlines are second order polynomial functions. They give a broad indication of changing patterns, but weight should not be given to their exact shape.

Sources: McAllister and Rose (1982); Hayes and McAllister (2007); *The Times* (22 Dec 1980); Guelke and Wright (1991–92); Ipsos MORI for *The Irish Times* (March 1992); Surtation for The Connolly Association (April 2015); Lord Ashcroft (May 2018); Ipsos MORI for King’s College London Polling Club (Feb 2019); YouGov (Oct 2019); YouGov (March 2020).

3.43. Since the 1970s, attitudes in the Republic of Ireland have consistently shown support for Irish unification over 70%, when those answering ‘don’t know’ are excluded. As Figure 3.5 shows, there is very little evidence of any change in this position over time. Most recently, an exit poll conducted during the 2020 Irish general election found that 57% would support holding unification referendums north and south within the next five years (Carswell et al. 2020).

Figure 3.5. Attitudes towards unification in the Republic of Ireland since 1970



Notes: Those answering ‘don’t know’ are excluded because the sources for most data points do not provide them. Trendlines are second order polynomial functions. They give a broad indication of changing patterns, but weight should not be given to their exact shape.

Sources: Hayes and McAllister (2007); Davis and Sinnott (1979); Red C Poll for the *Sunday and Business Post* (Oct 2010); B&A Research for RTÉ/BBC cross-border survey (Oct 2015); Lord Ashcroft (May–June 2018); Aramach (Jan 2019); Red C for RTÉ/TG4 (May 2019); Amarach for *Claire Byrne Live* (Nov 2019); UCD/Ipsos MRBI for *The Irish Times*/RTÉ/TG4 (Feb 2020).

EVIDENCE FROM OUR PUBLIC CONSULTATION

3.44. Given the importance of the matters examined in this report to people in Northern Ireland and across these islands, we wanted anyone to be able to contribute to our emerging thinking. That is one reason that we have published this interim version of our report, so that we can receive feedback before drawing final conclusions. But we wanted opportunities for extensive input at an earlier stage too. Early in our work, we sought responses from organisations and individuals with particular perspectives on the matters in our remit. But we also wanted to hear from members of the public.

3.45. Over the summer of 2020, we therefore ran an online public consultation. Our purpose was not to measure the views of a representative sample of the population: polls and surveys do that, and we thought it too early in the research process to run a representative deliberative exercise. Rather, we wanted to know what people who were interested enough to respond wanted to say on the topic. We hoped that this would give us a deeper understanding of the issues that matter to people.

CONSULTATION METHODS

3.46. We developed an online consultation form, giving information about the project and consultation, and asking questions. The first questions were very broad, designed to enable respondents to express their thoughts freely:

- What do you feel when you hear talk about such a referendum? What are your hopes? What are your fears?
- What (if anything) do you think might help to overcome your fears? Or, what would help to fulfil your hopes?
- Would you want answers to any questions ahead of a referendum, to help you decide how to vote? If so, what questions would you want answers to?

The form then set out some of the particular issues being examined by the Working Group and asked several questions relating to these:

- Do you have views on how any of these issues should be resolved? If you do, please indicate clearly in your response which aspect or aspects you are referring to.
- You may feel you do not have enough information on these questions in order to express a view on them. If so, what further information would you want?

Finally, to enable us to understand who had completed the survey, we asked questions about demographics and identity.

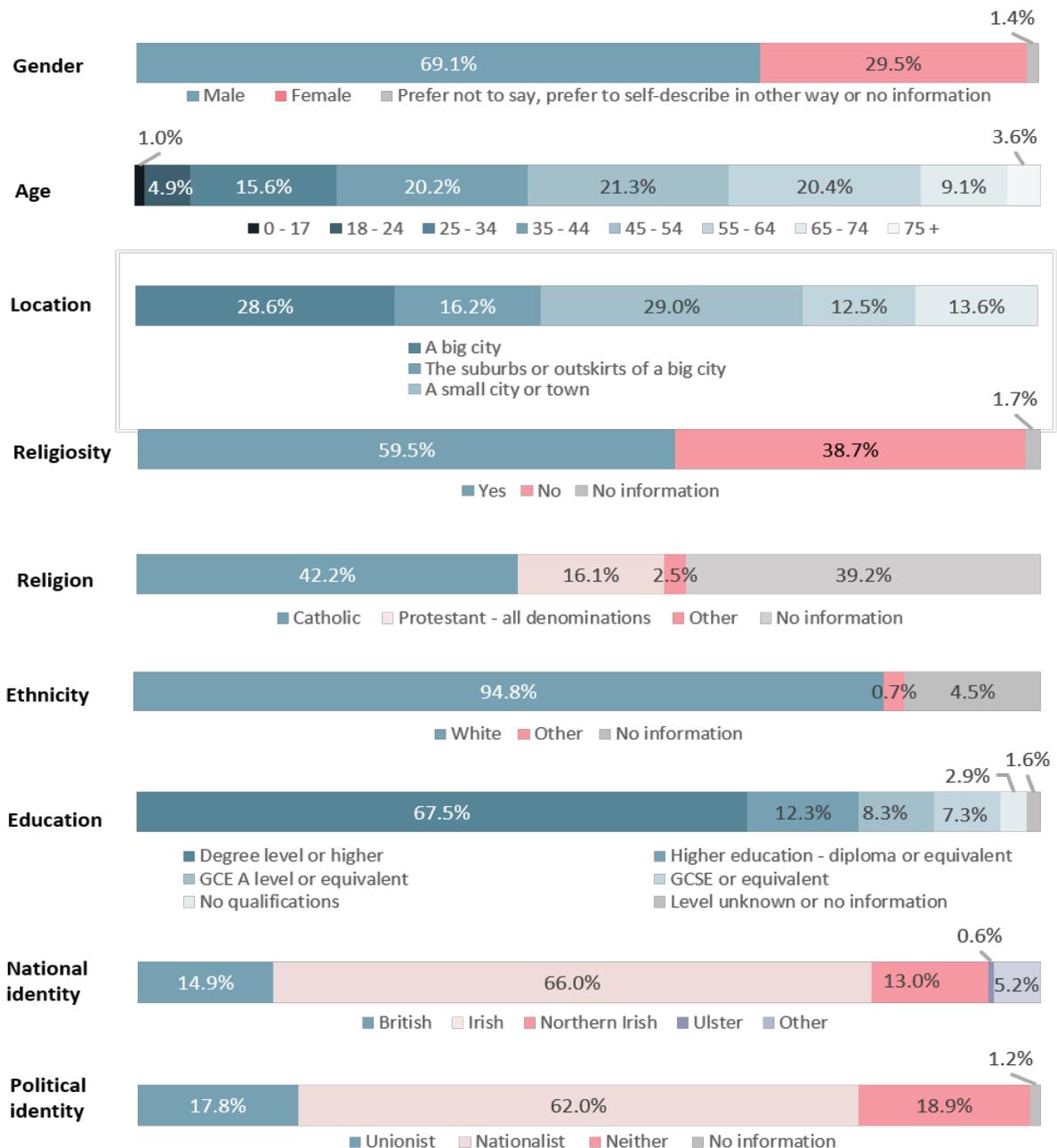
3.47. The consultation ran for six weeks, from July to September 2020. We sought publicity through the media: the consultation was covered by outlets including BBC Radio Ulster's Good Morning Show (BBC Radio Ulster 2020). We also placed advertisements in voluntary and community sector newsletters: NICVA's eNews, the Centre for Effective Services' Knowledge Exchange, and the Women's Regional Consortium e-news. We directly contacted 55 voluntary and community groups in Northern Ireland to ask if they would share the consultation with their networks, members, and users.

3.48. In total, we received 1377 responses. Of these respondents, 803 said they lived in Northern Ireland. Because of the terms of our funding, Northern Ireland residents were our primary focus in the consultation, and the analysis that follows therefore covers these responses. We did, however, also receive responses from the Republic of Ireland, Great Britain, and elsewhere; we hope to produce a longer analysis in the coming months including them too. A small number of respondents rejected the categories 'Northern Ireland' or 'Republic of Ireland'; some wrote in that they lived in 'the North' or simply 'Ireland'. Almost all of these identified as nationalists. We have examined these respondents separately and intend to include them in our longer analysis. We note here that adding them to the tally of nationalists in Northern Ireland would not significantly alter the findings that we present below.

3.49. Figure 3.6 breaks down the Northern Ireland respondents across demographic categories and groups within society. As is evident, they skew strongly towards some

groups more than others. Most notably, and unsurprisingly given the subject, many more nationalists and people identifying as Irish responded than did unionists and people identifying as British. That is, in itself, an important indication of the state of debate on these matters within Northern Ireland: while many nationalists are keen to consider the prospect of a referendum on the unification question, most unionists are very wary. Despite this, significant numbers identifying as British and/or unionist, or identifying as neither nationalist nor unionist, did respond, and so the consultation does give valuable insights into thinking in these communities too.

Figure 3.6. Demographic breakdown of consultation responses



Note: Only responses from people resident in Northern Ireland are included. 803 responses, gathered between 22 July and 2 September 2020.

- 3.50. There is also a marked gender imbalance in the responses. We noticed this pattern early in the consultation period and sought to address it by contacting civic organisations working specifically with women. That a strong imbalance remained may reflect wider patterns of political discourse. Respondents also skewed strongly towards those with more formal education. How far this reflects patterns in society and how far simply the fact that we promoted the survey in part through our own university channels is impossible to say.

METHODS OF ANALYSIS

- 3.51. To analyse the large number of responses received, we developed a ‘coding’ framework for each of the main questions asked. Every response was read and then categorised, highlighting the themes and issues that respondents raised. Three people coded the responses. For each question they began by coding separately. They then examined each other’s work, and gradually developed a common set of categories.
- 3.52. We looked at patterns in the responses both overall and within particular demographic and identity groups. Given that the respondents to the consultation are not representative of the wider population of Northern Ireland, the precise frequencies of different kinds of answers have limited meaning. In presenting our analysis, we therefore offer few statistics, and do so only to indicate broad tendencies. We identify views that were commonly expressed, and we flesh these out by quoting the respondents’ own words. On many matters, there were, understandably, marked differences between respondents identifying as unionist, nationalist, or neither, and we therefore look at patterns across these groups. Where we saw notable differences across demographic categories, we highlight these as well.

WHAT RESPONDENTS SAID WHEN WE ASKED ABOUT HOPES AND FEARS

- 3.53. The first consultation question asked respondents to share their hopes and fears about a referendum. While some respondents did refer to hopes and fears, many also shared a wider range of attitudes and opinions. Given that our intention was to hear what respondents wanted to say, we draw on all of this material. We present here themes that were mentioned by around a tenth or more of respondents, plus some themes that, though mentioned by fewer respondents overall, were particularly prominent in the relatively small group of unionist respondents.
- 3.54. Of all respondents, 29% reported that they felt hopeful overall about a referendum, including 36% of nationalist respondents, 5% of unionists, and 26% of those identifying as neither. Most of these responses favoured a referendum and unification. Nationalists and some respondents who identified as neither were

looking forward to a referendum and hoped to see it either as soon as possible or within 5–10 years. Nationalists overwhelmingly pronounced their hopes for a new, prosperous and fairer united Ireland after the referendum. One wrote: ‘I have a hope and aspiration of a new inclusive and prosperous Ireland of equals. A country that is welcoming and representative of everyone.’ One respondent identifying as neither nationalist nor unionist said: ‘I hope that both NI and ROI can reimagine the sectarian States that were created in a mirror image of each other and create an agreed and shared country for the benefit of everyone.’

- 3.55. Meanwhile, 11% of respondents pronounced their fears of a referendum, including 4% of nationalists, 32% of unionists and 13% of respondents who identified as neither unionist nor nationalist. Beyond these numbers, a majority of unionist respondents and some respondents who identified as neither said that they were either completely opposed to a referendum or stated that it was premature to discuss it. Some voiced fears of ‘ethnic cleansing’, loss of British identity, or discrimination in a united Ireland. One unionist said:

(I am) extremely fearful for the future if this takes place and scared for my life due to high level of support between Republican political parties and paramilitary groups. [...] I would be fearful that certain cultural groups could only commemorate behind closed doors and secretly as they would be fearful of physical and emotional attacks. I would be forced to live in a state I have no wish to be a part of and feel I would not be welcome in.

- 3.56. This respondent was not alone in expressing such deep concerns. Indeed, fears that violence could break out due to a referendum were actively voiced across all groups, especially among younger respondents, including by 15% of nationalist respondents, 21% of unionists, and 27% of those who identify as neither. One identifying as neither said: ‘I feel anxious when I hear it discussed, because I know it’ll cause violence, but I also feel hopeful for a brighter future.’ Nationalists tended to fear loyalist violence. One wrote: ‘My fear is that hardline unionism and loyalism would not accept the outcome and react violently.’ Unionists and respondents identifying as neither specifically shared fears of republican violence, though some expressed concerns about loyalist violence too. One unionist said: ‘We will have to live in fear of the IRA.’ Respondents across all communities shared their fears that those on the losing side could fail to accept the results, which, among other things, could lead to violence.
- 3.57. Fears that minorities would be intimidated during the referendum were raised across all groups, but much more pronounced among unionist respondents and respondents identifying as neither. One in the latter category said: ‘I worry that violence and intimidation could rise (from one or both “sides”) in the lead-up to a referendum, and that this could affect the vote. Intimidation at voting stations could also present itself.’
- 3.58. Overall, 16% of respondents across all communities were concerned that a referendum would be divisive and polarising. A nationalist said: ‘I fear that some

parties will use the referendum campaign to stoke fear, division and sectarianism in order to influence the electorate.’

- 3.59. Beyond these various concerns about community cohesion and violence, worries about economic downturn and loss of free healthcare through unification were shared across all three communities, but unionists voiced them more prominently. One said: ‘Fear my current standard of living dropping.’
- 3.60. Turning to referendum processes in themselves, many nationalist respondents were worried that the Secretary of State would be reluctant to call a referendum and that the British and Irish governments would be reluctant to engage with it. Meanwhile, unionists and respondents identifying as neither worried about repeated referendums if the first did not return a pro-unification majority. A unionist said: ‘That a referendum, even if it doesn’t result in a UI, will open the Pandoras box of more referenda every 7 years & that this will continue until Sinn Féin in particular create as much division & hatred as possible to make NI unworkable.’
- 3.61. Respondents from each community expressed concerns that divisive political campaigning and fake claims would be used to manipulate public opinion. Many opposed a premature referendum and hoped that a clear roadmap for potential unification would be presented at the referendum. A respondent identifying as neither nationalist nor unionist said: ‘Also very concerned that like Brexit, unity will be offered as all things to everyone and will be very different in reality.’ There were concerns in all communities that unionists might not participate in the debate or that their views would not be heard. One unionist said: ‘I’d fear as well that any referendum taking place in the near future would get such a hostile react from the Loyalist and Unionist communities, such as a boycott, which would make the whole exercise pointless.’ Aspirations for inclusive debate before a referendum that would produce an agreed form of a united Ireland were raised by many nationalists, a small number of unionists, and many identifying as neither. One nationalist said: ‘I would hope that everyone, from all communities/political persuasions could talk rationally about what the shape of a new united Ireland would be.’

FULFILLING HOPES AND OVERCOMING FEARS

- 3.62. Our second question asked what respondents thought might help to fulfil their hopes or overcome their fears. Many nationalists, a small number of unionists, and some of those identifying as neither stressed that their hopes and fears could be addressed if a clear roadmap for unification were produced before a referendum. For example, a nationalist said: ‘A clear, cross-party plan showing all parts of the economy, infrastructure, healthcare and personal status have been properly considered and budgeted for.’ A unionist said: ‘There must be a detailed economic and constitutional proposal which is independently validated. No Brexit lies. A website could allow people to enter their current wages and expenditures to see how they would be affected financially by changes in taxes and cost of living.’ A respondent identifying as

neither unionist nor nationalist said: ‘A coherent plan of action for post referendum. The referendum must clearly state what the people are being asked to vote for.’

- 3.63. Nationalists and respondents identifying as neither nationalist nor unionist also called for inclusive and open discussion ahead of a referendum and unification. One wrote: ‘A sense of openness. Evidence that leaders listen and accept the viewpoints of others.’ Nationalist respondents particularly called for engagement with unionists or between the governments. One wrote: ‘accepting unionist views so they feel they belong as without their vote this will not be possible’. Another said: ‘A commitment from both British and Irish governments to discuss openly all alternatives—i.e. the British government to engage constructively with the potential for a United Ireland.’
- 3.64. Some unionists and respondents identifying as neither stated that their fears could not be addressed in the event of a referendum: they simply opposed such a vote. Others said that, to address their fears of loss of British identity or citizenship, and fears of discrimination in a united Ireland, they would need reassurances of equality and protection from discrimination in a united Ireland. One said: ‘A guarantee that the British Identity in Northern Ireland and our way of life would stay the same’. Some also mentioned healthcare, education, and other provisions.

QUESTIONS IN NEED OF ANSWERS

- 3.65. We asked whether respondents would want answers to any questions ahead of a referendum, to help them decide how to vote. Some respondents stated they had already made their minds up about their vote, so they did not need any additional information. But others reported that they would want answers about the shape of a united Ireland. Points mentioned included: healthcare (noted by 41% of all respondents); finance and economics (26%); general constitutional arrangements (17%); education (15%); pensions (13%); protection of minorities (13%); relations with the UK (8%); and funding the costs of reunification itself (8%). One nationalist said: ‘I would like answers to what the healthcare system would look like and the economic viability of reunification.’ Unionists most often expressed concerns about issues such as finance/economics and healthcare. One said: ‘I would like information on the impact it would have on public spending, especially considering how the UK government subsidises Northern Ireland.’ A respondent identifying as neither unionist nor nationalist said: ‘What will happen to current and future pensions, and existing balances of government contributions, such as national insurance and student loan debts?’

SPECIFIC FEATURES OF THE REFERENDUM PROCESS

- 3.66. Next we asked respondents to provide their views on particular questions being explored by the Working Group. Answers were often rich, and we examine them in relevant sections elsewhere in the report. These include the mechanisms for enabling public dialogue about the issues (para 6.30), how the Secretary of State should

decide whether to call a referendum (para 8.47), the sequencing of referendums north and south (para 10.28), the referendum threshold (para 11.16), and aspects of the content of the referendum campaign (paras 14.6, 14.26, 14.39–40).

- 3.67. We asked a follow-up question about whether respondents would want more information before replying to such specific questions. There were relatively few responses, which tended to overlap with those outlined above. These included requests for more information on what the process of unification referendums would look like, for comparative information about policies in Northern Ireland and the Republic of Ireland, and for more information and clarity on the economic consequences of unification. Such requests were made by respondents across all communities
- 3.68. We finally asked whether there were any further issues that the Working Group should examine. Most respondents left this blank. But the question was used by some to highlight issues they thought were particularly important. Respondents from all three groups reiterated the need to protect unionist identity in a united Ireland. Nationalist respondents, especially younger ones, stressed that the Irish government should take an active role in the process. A small number of unionists stated that the Working Group, by looking at a referendum, was biased in favour of unification.

CONCLUSIONS ON THE PUBLIC CONSULTATION

- 3.69. We see the public consultation as providing a valuable flavour of how people are thinking and talking about the possibility of unification referendums across Northern Ireland at present. As we noted at the start, nationalists are evidently much more willing to participate in discussion of this matter—at least discussion as we have structured it here—than are unionists, while those identifying with neither community occupy an intermediate position. Beyond that, what is perhaps most striking is the extent and depth of both hopes and fears. Many nationalist respondents expressed an ardent desire for referendums to be held and unification to take place. But there were also concerns, and sometimes genuine and deep fears, across all communities.
- 3.70. These responses illustrate the challenges that would be faced if referendums were held—or, equally, if referendums were not held if it appeared they were required under the terms of the 1998 Agreement. That underlines the importance of ensuring that any such processes be conducted well. The public consultation responses starkly illustrate what is at stake.

4. LEGAL CONTEXT

- 4.1. The Belfast/Good Friday Agreement of 1998 lays out the framework by which any decisions about whether Northern Ireland should remain within the United Kingdom or become part of a united Ireland would be made. As explained in Chapter 1, we take that framework as our starting point: we take the terms of the Agreement as given. It would be possible to change those terms through fresh agreement among all the relevant parties, including the two governments. But that appears highly unlikely, at least as regards fundamentals.
- 4.2. We set out the origins of the 1998 Agreement and provided a broad overview of its provisions in Chapter 2. This chapter focuses in on the legal framework that the 1998 Agreement provides for referendums on the unification question. We begin by explaining what the Agreement is in legal terms and how it sits within the constitutional orders of the UK and Ireland. Then we examine the specific features of the Agreement that impinge upon our analysis in later chapters. The Agreement, of course, is more than a legal document. It articulates core political values that guide the ways in which people on these islands can collaborate with one another. We approach its interpretation in that spirit.

THE BASIC LEGAL FRAMEWORK

THE POLITICAL AND LEGAL SIGNIFICANCE OF THE 1998 AGREEMENT

- 4.3. The 1998 Agreement involves two connected and cross-referring agreements: an international agreement between the British and Irish governments and a multi-party agreement between the parties in Northern Ireland and the two governments. In focusing on referendums on the constitutional question, our primary concern is with the ‘Constitutional Issues’ section of the multi-party agreement, much of which is replicated in the agreement between the two governments.
- 4.4. The Agreement imposes political obligations on the parties in Northern Ireland and the two governments, both because they agreed to it—whether in 1998 or subsequently—and because it was approved, in slightly different ways north and south, by the people of Ireland in referendums in 1998.
- 4.5. The Agreement is binding as a matter of international law on both the UK and Ireland. Any breach of the obligations in the Agreement by the UK or Ireland would be unlawful. The Agreement does not impose any obligations directly on the UK Parliament or the Oireachtas. Nevertheless, many of the obligations on Ireland and the UK can only be met, as we shall see below, if domestic institutions—particularly the Westminster Parliament and the Oireachtas—take certain steps if there are votes in favour of unification north and south. Maintaining the rule of law is a basic

- principle. Any failure by the UK or by Ireland to meet its obligations under the Agreement could cause great damage to trust and stability.
- 4.6. Under the Vienna Convention on the Law of Treaties, states must adhere to their treaty obligations unless this would compromise unanticipated vital national interests. In this report, we operate on the assumption that there would not be unanticipated vital national interests that would relieve either Ireland or the United Kingdom of their obligations under the 1998 Agreement.
 - 4.7. The justiciability of the international law obligations is, however, limited. Ireland does not recognise the compulsory jurisdiction of the International Court of Justice in relation to any legal dispute with the UK relating to Northern Ireland. Moreover, both Ireland and the United Kingdom have dualist legal systems. This means that, as neither has enacted the full Agreement directly into domestic law, courts in Ireland and the United Kingdom cannot adjudicate directly on any dispute as to whether either government is complying with the Agreement.
 - 4.8. One, significant, exception to this picture arises from the Ireland/Northern Ireland Protocol to the EU–UK Withdrawal Agreement. The Protocol provides that the United Kingdom agrees there shall be no diminution of the human rights and equality commitments in the 1998 Agreement resulting from the UK’s exit from the EU. Disputes as to whether any diminution has occurred may now be decided by the international arbitration body established to adjudicate disputes under the Protocol, and by UK courts under the legislation implementing the Withdrawal Agreement. Such disputes could, therefore, involve interpretations of the 1998 Agreement.
 - 4.9. The British–Irish Inter-Governmental Conference (BIIGC), under Strand 3 of the Agreement, is the appropriate forum for the discussion of any differences between the governments on the interpretation of the Agreement. Its remit includes non-devolved functions (including potential unification referendums) but this does not allow for any arbitration of disputes.
 - 4.10. The Agreement prescribed text that is now included in section 1 and schedule 1 of the Northern Ireland Act 1998 (UK), and Articles 2 and 3 (as amended) of the Constitution of Ireland. The meaning and effect of these legal provisions can be adjudicated on by the courts in the United Kingdom and Ireland respectively.

THE UNITED KINGDOM CONSTITUTIONAL ORDER

- 4.11. The constitution of the United Kingdom is only partially based in codified law. Parliament can change the constitution in the UK or any of its parts. Statutes enacted by Parliament bind the executive, including the Secretary of State for Northern Ireland. But there is no single constitutional document that binds Parliament and is interpreted by the courts.
- 4.12. The constitution of Northern Ireland is made up of a range of constitutional norms which apply across the United Kingdom generally and those which are more

specifically related to Northern Ireland (either regulating the exercise of public power within Northern Ireland or as between Northern Ireland and Westminster). The primary statutory source of constitutional norms for Northern Ireland is the Northern Ireland Act 1998. The courts have treated the principles laid down in the Agreement as part of the background against which the Northern Ireland Act 1998 must be interpreted.

THE IRISH CONSTITUTIONAL ORDER

- 4.13. The Constitution of Ireland 1937 is the supreme law of the Irish state. The courts have the power to review the constitutionality of legislation, as well as executive and administrative action. The Oireachtas and the government are therefore both legally constrained by the text of the Constitution, as interpreted by the courts. The government is also legally constrained by the text of statutes passed by the Oireachtas, as interpreted by the courts.
- 4.14. The Oireachtas can enact any legislation consistent with the Constitution. To achieve a legal change that would otherwise be unconstitutional, the Constitution must first be amended. A constitutional amendment must be approved by a majority in each House of the Oireachtas and a simple majority (i.e. 50% + 1) of the people voting in a referendum. An amendment alters the text of the Constitution, changing the law to which the Oireachtas and the government are subject. We take the view, based on past decisions of the Irish courts, that any provision of the Constitution can be amended in any way whatsoever once this process is followed. Conditional constitutional amendments—that take effect only if certain future conditions are satisfied—have been upheld by the courts (notably, the 1998 referendum on the Agreement).
- 4.15. Replacing the entire Constitution could also alter constitutional constraints. The Constitution does not prescribe a procedure for its replacement. Any new Constitution in Ireland would likely be treated as legitimate and legally effective if its method of enactment involved at least as much democratic participation as is currently required for a constitutional amendment: i.e. approval by the existing Houses of the Oireachtas followed by approval at referendum.
- 4.16. Apart from constitutional referendums, referendums are generally only permissible as consultative exercises. However, in paras 4.24–25 below we consider whether the unification context might allow for a binding referendum that is not a referendum to amend the Constitution.

THE APPROACH OF THIS REPORT IN LIGHT OF THE BASIC LEGAL FRAMEWORK

- 4.17. Here we analyse the parameters that the Agreement, the Northern Ireland Act 1998, and the Constitution of Ireland impose on any processes for the unification of Ireland. Our aim is to achieve an interpretation that is faithful to each instrument

while harmonising their requirements. Little would be served by a unification process that was valid in the United Kingdom but not in Ireland, or *vice versa*.

- 4.18. The precise wording of the Northern Ireland Act 1998 and the Irish Constitution *may* carry greater importance than the precise wording of the Agreement for the simple reason that the former texts are subject to binding judicial interpretation while the latter is not. However, the most relevant provisions of the Act and the Constitution were prescribed by the Agreement. We therefore interpret both the Act and the Constitution in light of the Agreement insofar as is possible, respecting the principles of statutory and constitutional interpretation that pertain in the UK and Ireland respectively.

CENTRAL ISSUES

- 4.19. Here we consider a number of central legal issues that arise from the Agreement, the Constitution of Ireland, and the Northern Ireland Act 1998. This analysis frames much of the policy discussion that follows, but for certain topics detailed legal analysis is deferred until later chapters where the nuances can be explored in context.

THE CORE UNIFICATION PRINCIPLE

- 4.20. The Agreement requires that a united Ireland will come about if North and South freely and concurrently give their consent: that is the core unification principle. The other provisions of the Agreement, the Constitution of Ireland, and the Northern Ireland Act 1998 are important because they provide guidance on:

1. when and how such consent(s) could or must be expressed if they are to carry legal consequences; and
2. what the consequences are if such consents are expressed in the prescribed way.

Nevertheless, the core unification principle remains that if North and South freely and concurrently give their consent to unification, unification must then occur in both Irish and UK law. The corollary of the unification principle, of course, is that if either the North or the South does not consent to unification, then Northern Ireland remains part of the United Kingdom. Indeed, no change can be made to the status of Northern Ireland as part of the United Kingdom without the consent of a majority of its people.

EXPRESSING CONSENT TO UNIFICATION (NORTH)

- 4.21. Consent for unification in the North can only be expressed through a referendum. Section 1(1) of the Northern Ireland Act 1998, the text of which was prescribed by the Agreement, provides that Northern Ireland shall not cease to be part of the

United Kingdom without the consent of a majority of the people of Northern Ireland voting in a poll.

- 4.22. Schedule 1 to the 1998 Act, also prescribed by the Agreement, gives the Secretary of State for Northern Ireland the discretion to hold a unification referendum at any point. Furthermore, the Secretary of State is under an obligation to hold a unification referendum if ‘at any time it appears likely to him that a majority of those voting would express’ consent to unification. This obligation is a critical ancillary provision to the core unification principle. In the specified circumstances, the people in the North *must* be afforded the opportunity to give or refuse consent to unification. If a referendum is held but it does not lead to unification, at least seven years must elapse before another such referendum is held. The issues raised by these provisions receive detailed consideration in Chapter 8.

EXPRESSING CONSENT TO UNIFICATION (SOUTH)

- 4.23. Article 3 of the Constitution—the text of which was prescribed by the Agreement—establishes unification as a national aim while specifying that it can only be brought about ‘by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island’. The expression of consent in the South must therefore be a democratic one, but the Constitution does not specify the form it must take. Given that unification is already a national aim, it might be argued that the Oireachtas could *legislate* for unification. This would be a *democratic* expression of consent. Conversely, ‘the consent of a majority of the people’ might require a referendum. We take the view that it is doubtful whether the Oireachtas can legislate for Irish unification; a referendum is probably required for the reasons we set out in the following paragraphs. Henceforth, we operate on the assumption that the consent process in the South requires a unification referendum, and it is referred to in those terms.
- 4.24. Article 3 allows the Oireachtas to legislate for a legally binding non-constitutional referendum that would, if passed, amount to a majority of the people in the South democratically expressing their consent to unification. Such a referendum would closely mirror the unification referendum in the North, as discussed below, but could not authorise any changes to be made to the constitutional structure of a united Ireland: the territory of the existing Irish state would simply expand to include Northern Ireland.
- 4.25. It is arguable, however, that the continuing obligations under the 1998 Agreement require at least some constitutional amendment in the context of unification. Article 1(vi) of the constitutional issues section requires, in our view, that the Irish government not impose Irish citizenship on British citizens of the former Northern Ireland who wish to be accepted solely as British. Article 1(v) requires full respect for political rights in the former Northern Ireland. However, at present the Irish Constitution only allows Irish citizens to vote at referendums and in presidential

elections. In our view, therefore, unification would have to be accompanied by constitutional change to allow British citizens—at least in Northern Ireland although this could be applied across the state—to vote in referendums and presidential elections. This being the case, unification necessitates a constitutional referendum in the South, whether for amendment or replacement. Of course, a range of other constitutional amendments might also be thought desirable in the context of unification: we consider this point in Chapter 7. Our point at this stage is simply that, in our view, unification cannot happen without a constitutional referendum in the South. The rest of the report therefore proceeds on the basis that consent to unification in the South would require a constitutional referendum.

- 4.26. The Agreement does not explicitly impose any obligation on the Irish government to conduct a unification referendum in the South: there is no mirror of the duty on the Secretary of State for Northern Ireland. It would defeat the core unification principle, however, if the Irish government could prevent unification by refusing to hold a unification referendum. Given that Article 3 of the Constitution establishes unification as a national aim, our view is that the Irish government is *required* as a matter of Irish constitutional law to hold a unification referendum in the South if a unification referendum in the North is passed. This does not mean that the Irish government must wait until after a unification referendum in the North before holding a unification referendum in the South.

APPROVAL THRESHOLDS AND THE FINALITY OF THE UNIFICATION REFERENDUMS

- 4.27. The approval threshold for the unification referendum in the North is stipulated by the text of the Northern Ireland Act required by the Agreement: ‘a majority of the people of Northern Ireland voting in a poll’. It would therefore breach the Agreement to make unification dependent on a super-majority or cross-community approval, or to impose requirements for the level of turnout or the proportion of the eligible electorate (as distinct from actual voters) backing the change. In the South, approval of constitutional referendums likewise requires a majority of the votes cast.
- 4.28. The Agreement envisages concurrent unification referendums north and south. Although it may be possible to configure a unification referendum process that involves more than one referendum in the North and/or South—a possibility explored in Chapter 9—one referendum in each jurisdiction provides the full mandate for unification. If North and South both consent to unification, the core unification principle in the Agreement requires that unification occur. It would therefore not be possible to make unification require approval at two successive referendums in the North and/or the South. For example, it would not be possible to require approval first of the principle of unification and subsequently of the details. In such a scenario, if the principle were approved first—in concurrent referendums North and South—unification would be required to proceed even if the details were not subsequently approved.

CONCURRENCE

- 4.29. The core unification principle requires that North and South freely and *concurrently* give their consent. If consent is not concurrently given, then Northern Ireland remains in the United Kingdom. ‘Concurrently’ connotes going on side by side, acting in conjunction with each other, acting consistently. Unification referendums held on the same day would satisfy this requirement; but in our view the Agreement does not require simultaneity. Each unification referendum is the culmination of a process. The two processes must occur close in time, operating consistently and in conjunction with each other. Even though the immediate legal consequences of a referendum in the North may be different from those in the South, concurrence requires that the two referendums must provide parallel and consistent mandates for unification. North and South may vote simply on the principle of unification. Or the North may vote on the principle of unification while the South votes in one question both on the principle of unification and on constitutional amendments to accompany unification, *provided that* the content of those constitutional amendments is known to the electorate in the North at the time when they consider whether to consent to unification. It follows that there cannot be negotiation on the form of a united Ireland during the time between the referendums north and south, as the later jurisdiction would then be considering a different proposition from that approved by the earlier jurisdiction.
- 4.30. This logic leaves three realistic possibilities: (a) North and South vote on the same day; (b) the North votes first and then a vote is held in the South only if the North consents to unification; (c) the South votes first and then a vote is held in the North only if the South consents to unification.
- 4.31. Chapter 10 considers the implications of staggered votes for the fairness and robustness of the referendums. If the South were voting on the same day or in advance of the North, it would be permissible to approve constitutional amendments contingent on the North also voting in favour of unification. Essentially this approach was followed with the constitutional amendments to give effect to the Agreement itself in 1998. If the referendums were staggered with the South voting first, the referendum in the North would—if the Secretary of State thought it likely that a majority would vote in favour—have to proceed irrespective of the outcome of the vote in the South. If the referendums were staggered with the North voting first, the referendum in the South could not, if the formal referendum process had been initiated, be cancelled in the event of the North rejecting unification. The most straightforward approaches, we suggest, are *either* for the two referendums to be held simultaneously or the referendum in the North to precede that in the South, with the latter only being formally initiated in the event of the North voting in favour of unification.
- 4.32. As noted in para 4.26, above, the Irish government is under an obligation to hold a unification referendum in the South if a unification referendum is passed in the North. The ‘concurrence’ obligation means that the unification referendum in the

South cannot be on terms that were unknown at the time of the referendum in the North. There is a vital implication: if the Irish government wishes to specify the terms of a united Ireland before a unification referendum is held in the South, it must do so before any unification referendum campaign formally commences in the North.

DELAY BETWEEN CALLING AND HOLDING UNIFICATION REFERENDUMS

- 4.33. The Agreement and the Northern Ireland Act 1998 are both silent as to how much time may elapse between the calling and holding of a unification referendum in the North. The UK Electoral Commission (2016b: 20) argues that referendum rules should be set at least six months before they are applied. It is consistent with the Agreement for a six-month delay to be required between calling and holding a unification referendum. The law in Ireland currently stipulates a period of between 30 and 90 days for formal referendum campaigns.
- 4.34. In our view, it would be legally permissible for the Secretary of State to schedule a unification referendum to be held a number of years in the future in order to allow discussions and negotiations on the form of a united Ireland to take place before the vote. Nevertheless, given that it is envisaged that unification referendums must happen at intervals of seven years if it repeatedly appears likely that a majority would consent to unification, the Secretary of State could not delay a unification referendum for longer than seven years. Does any stricter limit apply? We consider that any delay of greater than half the minimum seven-year period between referendums would be vulnerable to legal challenge. It could be argued that such a delay would unduly impede the ability of the people of Northern Ireland to have their say on unification. While it is not possible to be precise and while future circumstances might provide justifications that are not apparent at present, we shall tentatively work on the basis that a unification referendum would have to be held within around three years of being ordered by the Secretary of State. The question of whether any such delay would be desirable is addressed in Chapter 10 of this report and issues of timings for campaign processes are explored further in Chapter 14.

WITHOUT EXTERNAL IMPEDIMENT

- 4.35. The core unification principle provides that it is for ‘the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right to self-determination’. This sentence—and in particular the phrase ‘without external impediment’—reinforces the core unification principle by emphasising that the UK government should not impede a decision of the people of the island of Ireland, made in accordance with the Agreement, to unify. By the same token, the Irish government must respect any decision of the majority of people, north or south, to reject unification.
- 4.36. Does this phrase have any further implications for the conduct of the unification referendums? The word ‘impediment’ speaks to an attempt to frustrate, delay, or

impede the process rather than simply an intervention in debate. It is the exercise of the right of self-determination that must not be impeded, so attempted persuasion as to how to exercise that right may not be problematic. Who or what might be considered ‘external’ in this case? Perhaps Irish citizens living abroad, or Northern Ireland-born citizens living in Great Britain? In our view, the phrase ‘without external impediment’ is not sufficiently clear to impose any restrictions on the way in which the unification referendums north and south must be conducted. But we would be interested to hear readers’ views on whether ‘without external impediment’ imposes *any* constraints on either the referendum processes discussed in Chapter 14 or the referendum configurations discussed in Chapters 9 and 10. Whether restrictions on external involvement in the referendum campaigns can be justified on other grounds is considered in Chapter 14.

THE NEED FOR LEGISLATION TO GIVE EFFECT TO UNIFICATION

- 4.37. Referendum votes on their own would not be sufficient to give effect to unification: legislation would also be required at Westminster and in the Oireachtas to give effect to referendum votes north and south in favour of unification. Article 3 of the Constitution of Ireland speaks of unification occurring *with* the consent of the people, rather than *by* the consent of the people. The Agreement does, however, impose a binding obligation on both governments to introduce and support legislation in their respective parliaments. Section 1 of the Northern Ireland Act 1998, prescribed by the Agreement, only requires the Secretary of State to lay before the Westminster Parliament such proposals to give effect to the North’s unification wish as may be agreed between the UK and Irish governments. If the South refused consent to unification, however, the Irish government could not negotiate unification with the UK government and there would be no proposals to lay before the Westminster Parliament.
- 4.38. Ideally, the legislation in the two parliaments would reflect an agreed position between the two governments as to the terms on which unification should take place. It would fix the date on which unification would occur and sovereignty over Northern Ireland transfer from London to Dublin. The transfer of sovereignty need not be immediate: an implementation period could allow final preparations to be made. However, the Agreement does not permit a transitional period whereby Northern Ireland would be subject to some different form of political authority. If voters opt for unification, we interpret the Agreement to mean that there must be a direct transfer of sovereignty from the UK to Ireland—though this is a point on which we are aware of different views, and we would particularly welcome feedback on it.
- 4.39. Many practical measures would need to be taken subsequent to legislation in both parliaments but prior to the transfer of sovereignty in order to ensure that unification could proceed as smoothly as possible. The two governments, given their envisaged role in the Agreement as implementers of the unification votes, their democratic accountability, and their unique capacity to implement the measures

necessary for unification, have considerable leeway to determine the appropriate date for the ultimate transfer of sovereignty—to be ratified by both parliaments. It is not possible to specify a time limit. The only constraint is that the two governments must genuinely be involved in a good faith effort to implement the unification votes. Delays for reasons unrelated to the implementation of the unification votes are not permitted. If it were desired to impose a lower or upper limit on the length of an implementation period, this could—consistently with the Agreement—be specified before the referendums. As we set out in Chapter 9, the unification proposal put to voters would necessarily take a particular shape: either a model for the form of a united Ireland; or a process for working that out. An indication of timing could be part of the proposal.

- 4.40. No further treaty is necessary to transfer sovereignty: the Agreement itself provides the basis for the transfer of sovereignty which is implemented by each state in legislation.

DECISIONS ON THE FORM OF UNIFICATION

- 4.41. The issues that would be raised by unification can be grouped in four broad categories: (a) the financial, territorial, citizenship, and other issues associated with the transfer of sovereignty over Northern Ireland from London to Dublin; (b) the constitutional structure of a united Ireland; (c) the organisation of public services in a united Ireland; and (d) the post-unification relationship between the UK and Ireland. One implication of the phrase ‘without external impediment’ is that categories (b) and (c) are matters for the Irish people, north and south, to decide, with the UK government playing only a consultative role. In contrast, category (a) is for negotiation between the UK and Irish governments, being the ‘proposals to give effect to that [unification] wish as may be agreed between the British and Irish Governments’, referred to in both the Agreement and the Northern Ireland Act 1998. Category (d) is also a matter for negotiation between the governments. There are connections between the four categories, which are addressed in detail in Part 2 of this report. As we also detail there, while legal authority lies with the governments and parliaments, it would clearly be highly desirable for discussions of these matters to be as inclusive as possible.
- 4.42. The 1998 Agreement explicitly identifies two obligations that would apply to the Irish government if unification occurred. First, its jurisdiction ‘shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities’. Second, the people of Northern Ireland would continue to have the right ‘to identify themselves, and be accepted, as Irish or British or both’, and would continue to have the right to hold British or Irish citizenship. These foundational principles must underpin any constitutional structure

for a united Ireland. In particular, they would necessitate constitutional changes to grant full political rights to British citizens in Northern Ireland.

CONSEQUENCES OF ANY UK–IRISH DIVERGENCE AFTER THE REFERENDUMS

- 4.43. There is a tension in the Agreement between the obligation on Ireland and the United Kingdom to respect votes in favour of unification and the need for legislation in both parliaments to effect unification. There are at least two ways in which these could potentially pull apart. First, what happens if the people north and south give their respective consents to unification, but the governments cannot agree legislation to present to their respective parliaments? Second, what happens if one of the parliaments rejects legislation agreed by the two governments while the other parliament passes the legislation?
- 4.44. The Agreement explicitly imposes an obligation on both governments ‘to introduce and support in their respective parliaments legislation to give effect to that wish’. The Northern Ireland Act—in text prescribed by the Agreement—imposes a less onerous obligation on the UK government than does the Agreement itself, merely to ‘lay before parliament such proposals to give effect to that wish as may be agreed’ between the two governments. The practical effect of this wording is to reduce further the slim likelihood of intervention by the UK courts to compel the UK government to give effect to the unification referendums. The obligation to propose legislation arises in UK law only if there is agreement between the two governments. It leaves open the technical possibility that no proposals might be agreed between the two governments.
- 4.45. Divergence between the UK and Ireland could arise at governmental level, but it could also arise at parliamentary level. The Agreement does not explicitly impose any obligation on either parliament to give effect to the unification consents. If Westminster or the Oireachtas were to reject an agreement reached by the two governments, we would be faced with the same situation of divergence between Ireland and the UK. What does the law require if divergence emerges in either of these two ways?
- 4.46. The Agreement applies to each state, irrespective of what the other state does. In other words, if both North and South consent to unification, Ireland must give effect to that wish—which requires legislation by the Oireachtas—even if the UK does not give effect to that wish. Conversely, the UK must give effect to unification even if Ireland does not. The Agreement envisages—and it would be highly desirable—that the two governments would agree the terms for the transfer of sovereignty and both parliaments would implement those terms in mutually consistent legislation. Our point here is that a failure by either government or parliament to take the necessary steps to give effect to the unification votes, thereby putting their respective state in breach of international law, would not relieve the other state of the obligation to give effect to unification. To the extent that these obligations arise solely from the

- Agreement, however, they cannot be adjudicated in any international tribunal or domestic court.
- 4.47. As we saw above, UK law does not impose any obligation on Westminster to give effect to the unification vote. In contrast, Article 3 of the Irish Constitution provides that a united Ireland *shall* (not ‘may’) be brought about if consents to unification are expressed both north and south. This wording implies a positive obligation on the Oireachtas to legislate for Irish unity in those circumstances, independent of any action taken at Westminster.
- 4.48. The Irish courts are extremely reluctant to recognise—let alone enforce—positive obligations on the Oireachtas to legislate. Moreover, the question of whether the Oireachtas should unilaterally legislate for Irish unification or allow the Irish government further time to continue negotiations with the UK government involves delicate political judgments with significant implications for Ireland’s external relations. The courts have always been highly deferential to executive and legislative judgment in those contexts. For these reasons we conclude that, although there is a positive constitutional obligation on the Oireachtas to legislate to give effect to unity where North and South have given their respective consents, this obligation is close to unenforceable in the courts.
- 4.49. Nevertheless, the existence of this constitutional obligation increases the likelihood of unilateral Irish legislation to give effect to unification if terms cannot be agreed with the UK government or passed at Westminster. If the Oireachtas legislated for unification while Westminster did not, Northern Ireland would once again become disputed territory: as a matter of Irish law, it would become part of Ireland; as a matter of United Kingdom law, it would remain part of the United Kingdom.
- 4.50. What would be the consequences in international law? On the one hand, the UK would be in breach of international law—not only the 1998 Agreement but also, in our view, Article 1 of the International Covenant on Civil and Political Rights, and Article 1 of the International Covenant on Economic, Social and Cultural Rights, both of which uphold the right to self-determination of peoples. On the other hand, any such breaches of international law would not—in themselves—alter the territorial status of Northern Ireland as a constituent part of the United Kingdom as a matter of international law. The territorial status of Northern Ireland in international law would only change if there were widespread acceptance by other states that Northern Ireland should be recognised as part of Ireland’s territory.
- 4.51. The UK’s breach of international law might lead some states to accept Irish sovereignty over Northern Ireland. But if other states continued to recognise the UK as sovereign, then Northern Ireland’s status would be disputed in international law, reflecting rather than resolving any dispute between Ireland and the UK. In our view, should such a situation arise, it is more likely to be resolved by international political pressure on the UK to meet its obligations under the 1998 Agreement than by any conclusion that the legal status of Northern Ireland in international law had already been altered.

MATTERS NOT CONTROLLED BY THE AGREEMENT

4.52. The Agreement is silent, or close to silent, on many issues surrounding the unification referendums. These include the timing and sequencing of referendums, other than the requirement of concurrence; processes for deciding the form that a united Ireland would take; how the Secretary of State would determine whether it was necessary to call a unification referendum in the North; the referendum franchises; the wording of the question on the ballot paper, at least in the North; and processes and procedures for conducting the referendums themselves in order to ensure that they are fair. We explore each of these issues in later chapters.

CONCLUSION

4.53. In summary, the legal requirements governing potential unification are as follows:

- Unification would require referendum approval, north and south.
- The Secretary of State has a discretion to call a unification referendum in Northern Ireland, and must do so if it appears likely to them that a majority would vote in favour.
- If the North votes in favour of unification, there must be a unification referendum in the South.
- Any such referendums must be concurrent. They need not be simultaneous, but the voters in each referendum must vote on effectively the same proposals.
- The threshold for approval in each referendum would be a simple majority of those voting on the day.
- If voters in Northern Ireland and the Republic of Ireland approved unification at concurrent referendums, that would provide a complete mandate for unification.
- The 1998 Agreement imposes an obligation on Ireland and the UK each to respect the outcome of the referendums, irrespective of what the other state does.

5. CRITERIA FOR ASSESSING POSSIBLE PROCESSES

- 5.1. The preceding chapters have set out the historical, political, and legal context. The following chapters examine the process of decision-making about Northern Ireland's constitutional future. They identify different options and the arguments for and against them. This chapter sets out the general criteria that we apply in making such an assessment.
- 5.2. As we indicated in Chapter 1, all of our work has been grounded in three key principles:
1. Any referendum process would need to be designed so that it was rigorously impartial, treating each of its possible outcomes equally and respectfully. Neutrality is embedded in the simple majority principle, which would advantage neither the status quo option nor the option of a united Ireland. But neutrality requirements would go beyond this.
 2. While the choice about the basic question of sovereignty is binary and majoritarian, broader processes of policy development and decision-making before and after the referendum(s) should conform to the ethos of the Agreement set out in para 1.8. That includes the achievement of reconciliation, tolerance, and mutual trust; the protection and vindication of the human rights of all; partnership, equality, and mutual respect as the basis of relationships within and across these islands; and an absolute commitment to exclusively democratic and peaceful means of resolving differences.
 3. We consider how referendums in Northern Ireland and the Republic of Ireland could be conducted within the letter and spirit of the 1998 Agreement. The Agreement's terms were painstakingly negotiated, and democratically ratified through referendums in both jurisdictions on the island of Ireland, and it is not for us to propose any deviation from them.
- 5.3. Within this context, and drawing on both international experience and evidence relating to Northern Ireland and Ireland, we have identified five key criteria for evaluating referendum processes. These criteria, which may overlap, are as follows:
- **Procedural legitimacy** should be maximised, in the eyes of both the public and the law.
 - **Stability** throughout the island of Ireland should be protected by the referendum processes, in both the short and long terms.
 - **Simplicity** in the referendum processes should be sought to limit the risk of confusion among voters north and south.

- Voters should be able to make an **informed choice** among the options that are available.
 - **Inclusivity** should be sought. The options put to voters should be generated through a process that is inclusive, and that facilitates and encourages the participation of unionists, nationalists, and others. Inclusivity should also be sought in the relevant preparations leading up to any referendum. Inclusivity is a vital principle of genuine engagement, but it allocates no veto to any party and cannot be invoked to override the majoritarian procedure of the referendums themselves.
- 5.4. All of these criteria point towards the importance of *planning* before any referendums are held: planning of the referendum processes; and the development of proposals regarding the shape of a united Ireland and the form of a continued Union. The need for such planning is a recurring theme throughout this report. Later chapters examine in detail when and how it might occur.
- 5.5. The remainder of this chapter explores these criteria in further detail.

PROCEDURAL LEGITIMACY

- 5.6. We focus here on the legitimacy of procedure, not of outcome. We are interested in legitimacy in two common senses of that term: legitimacy in the eyes of the public and in the eyes of the law. Given Northern Ireland's history, achieving broad agreement on the legitimacy of any process might be challenging. But the making of the 1998 Agreement shows what can be achieved when great care is taken to build some mutual trust and respect. This experience highlights the value of careful preparation well in advance of any vote if legitimacy is to be secured.
- 5.7. In the context of elections and referendums, public legitimacy is normally said to be achieved if participants on all sides are willing to accept the result, even if it is not their preferred outcome. On the island of Ireland, a process that failed to secure such acceptance could create grave dangers. Participants are more likely to accept the outcome if they see the process as a whole as broadly fair and occurring on a level playing field. That implies, for example, campaign rules which protect balance, as well as efficient, impartial, and transparent administration of the vote and the count. It would also be important for the decision to hold the vote itself to be seen as based on solid grounds.
- 5.8. In the eyes of the law, meanwhile, legitimacy requires that the processes respect the principle of legality. In this case, they should comply with three different but overlapping sets of legal requirements: UK, Irish, and international (including the 1998 Agreement). The referendum rules should themselves not be tailored to suit any particular interests. On this final point, the recommendations of the Venice Commission are notable. The Venice Commission is the arm of the Council of Europe (whose 47 members include both the UK and Ireland) that advises on matters of

constitutional law. In its *Code of Good Practice on Referendums*, the Commission recommends that ‘fundamental aspects of referendum law’ should not be changed in the year preceding a vote (Venice Commission 2007: 9). This covers matters such as the franchise and the body responsible for organising the vote. It does not preclude changes to, for example, campaign conduct rules, but any changes that might be made should preferably be for reasons that are clear to all and agreed on a cross-party basis.

STABILITY

- 5.9. Our criterion of stability relates to both the short term and the long term.
- 5.10. For the short term, any referendum(s) should be designed to minimise the danger that the process itself may give rise to potentially destabilising tensions. Procedural legitimacy in the run up to the vote would help stability but could not alone guarantee it. Badly designed processes, even if procedurally legitimate, could create difficulties. For example, there is the potential that circumstances could arise in which Northern Ireland is seen as part of the United Kingdom in UK law, but as part of Ireland in Irish law (see paras 4.49–51). Such risks should be minimised in the interests of stability.
- 5.11. For the longer term, referendum processes should, so far as possible, deliver an outcome that is likely to stand the test of time: that commands ‘output legitimacy’, in the sense of widely being acknowledged as fair and effective. This is distinct from the procedural legitimacy criterion set out at paras 5.6–8, which focuses on the (perceived) fairness of the *process* leading to the outcome. The outcome is more likely to stand the test of time if the options put to voters are considered carefully in advance, and with transparent adherence to all the principles we set out here.

SIMPLICITY

- 5.12. Simplicity is not an absolute requirement: complex choices sometimes require complex processes of decision-making. However, any referendum processes should be as simple as is reasonable to limit the risk of confusion among those who participate in them. We have said that referendums would need to be held in both Northern Ireland and Ireland for unification to take place. Differences in the conduct of the referendums should, unless there is good reason, be reduced to limit possible confusion: see Chapter 14.

INFORMED CHOICE

- 5.13. Voters should be able to make an informed choice among the options. The Venice Commission views voters’ freedom to form their own opinion as they see fit as one of

the four key values that are core to the integrity of any democratic election or referendum. This freedom requires that campaigns be run to ensure a balanced airing of different views, and that public authorities should ‘provide a certain amount of necessary information in order to enable voters [in a referendum] to arrive at an informed opinion’ (Venice Commission 2007: 17). In 2019, the Parliamentary Assembly of the Council of Europe proposed revisions to the Venice Commission’s guidance. It identified three core general principles, one of which was that ‘the conduct of the campaign should ensure balance between the sides and allow voters to have access to balanced and quality information on the options in order to be able to make an informed choice’ (Parliamentary Assembly of the Council of Europe 2019: 3). The Independent Commission on Referendums (2018: 9), which was established by the Constitution Unit to consider the role and conduct of referendums in the UK, recommended that referendums should be designed to ‘empower voters to find the information they want from sources they trust, so that voters feel confident in the decisions they reach’.

- 5.14. The criterion of informed choice means that voters should be able to know so far as possible what each option entails before choosing. It does not mean that voters should be expected to take all or any particular information into account before deciding how to vote. In the context of a referendum on Northern Ireland’s future, the choice for many voters would likely be a matter of basic principle and identity, and they would not need or seek detailed information to make that choice. Equally, however, for many other voters, both north and south of the border, their decision would depend on the specifics of the options before them. In democracy, voters should be able to make up their minds as they see fit, and if they want information they should, so far as possible, be able to find it.
- 5.15. The principle of informed choice raises important questions about two matters. The first is the nature of the options that are put to voters in the referendums—particularly, the degree to which the detail of those options is worked out in advance of the vote. The second concerns the information environment during a referendum campaign: whether there are adequate measures to constrain misinformation and manipulation, and whether high-quality information is widely available. We consider the first issue in Part 2 of our report, and the second in paras 14.39–66.

INCLUSIVITY

- 5.16. So far as possible, the options put to voters in any referendums on Northern Ireland’s and Ireland’s future should be generated through processes that uphold the principle of inclusivity. The same criterion applies to the preparations leading up to any referendum, the referendum campaigns, oversight of the counts, and implementation of the results.
- 5.17. The decisions to be made would have major implications for the lives of people throughout the island of Ireland. It would therefore be important for these decisions

to be shaped by a broad and diverse range of people. Elected representatives would be central at every stage. Enfranchised persons from multiple perspectives (such as different localities, ages, religion, ethnicity, sectors of employment, and education levels) should also have opportunities to contribute. A range of mechanisms of wide and substantial public engagement could be used. Citizens' assemblies, for example, have become useful forums for enabling deeper public discussion of major constitutional or policy decisions before they are made. Other mechanisms could focus on bringing in the voices of disadvantaged or marginalised groups.

- 5.18. Second, more specifically, the process should be designed to facilitate and encourage participation from Northern Ireland's unionist and nationalist communities, as well as from those who are not aligned on the constitutional question. The diversity of opinion within these communities should also be accommodated. As set out in Chapter 2, Northern Ireland's current governing arrangements are the product of such processes, which culminated in the 1998 Agreement and have subsequently been reaffirmed at key times, most recently in the *New Decade, New Approach* accord of January 2020. Broadly accepted arrangements would not have been possible without inclusive processes of this kind.
- 5.19. As stated in Chapter 4, the 1998 Agreement clearly requires that the sovereignty question be decided by simple majorities north and south. The cross-community decision rules in the Northern Ireland Assembly would not apply to the design of any referendum process. There would, however, be great political value in a process that was shaped by and included unionists, nationalists, and others at all stages.

WEIGHING UP THE CRITERIA

- 5.20. Table 5.1 summarises the five criteria that we have set out in the preceding sections, along with their subcategories.

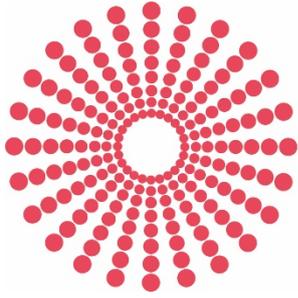
Table 5.1. Summary of Criteria

Criterion		Description
Procedural Legitimacy	Public	People on all sides accept the result as fair
	Legal	The process respects the principle of legality
Stability	Short-Term	The process itself does not generate destabilising tensions
	Long-Term	The outcome is likely to stand the test of time
Simplicity		The process is as simple and clear as is reasonable
Informed Choice		Voters have access to full and reliable information on the options
Inclusivity	General	The process of designing the options allows for inclusion of diverse groups from across all parts of society, north and south
	Specific	That process facilitates and encourages unionist, nationalist, and non-aligned engagement

- 5.21. Many of these criteria would be difficult to meet in full, or with equal intensity. Not least, securing procedural public legitimacy across all communities in Northern Ireland and Ireland would not be easy. There may also be tensions between some criteria. Any evaluation therefore requires a holistic and contextual assessment against all of the criteria. Abiding by both national and international legal obligations is, however, non-negotiable and so cannot be traded off against other criteria.
- 5.22. A particular challenge arises if fulfilling one criterion makes it harder to secure another. In much of our work, we have confronted a potential trade-off between two criteria: informed choice and inclusivity. The criterion of informed choice values a process in which voters are asked to choose only after the detail of the options has been worked out. The criterion of inclusivity values a process in which all communities are involved in working those options out. While we cannot predict future behaviours, it is not difficult to imagine that fulfilling both of these criteria would prove impossible. Opponents of a sovereign united Ireland would have every right not to engage in discussions over the form of a united Ireland until the option of Northern Ireland remaining in the UK was no longer available; indeed, they might think such an approach was strategically rational. So, too, nationalists might choose not to engage in discussions of what a reformed union of the United Kingdom including Northern Ireland might be like. If so, the two criteria would point in opposing directions: the criterion of informed choice would suggest that the form of a united Ireland should be determined *before* the key choice about sovereignty was made, while the criterion of inclusivity would suggest that it happen *afterwards*. Whether this tension could be resolved or even eased is one of the crucial questions for the following chapters.

CONCLUSION

- 5.23. We began this chapter by reiterating three basic principles underpinning our work, which we first set out in Chapter 1: that any referendum processes should be rigorously impartial; that, while the sovereignty question itself would be decided by simple majorities north and south, the consensual spirit of the 1998 Agreement should be upheld so far as possible; and that, in our own work, we take the legal framework provided by the Agreement as given. Going beyond these, we then identified five specific criteria by which we will assess the options on Parts 2 and 3 of the report: procedural legitimacy; stability; simplicity; informed choice; and inclusivity. We have also noted that there are tensions between these criteria, such that some trade-offs among them may be unavoidable. These trade-offs underpin key parts of our analysis in the chapters that follow.
- 5.24. With this we conclude Part 1 of the report, establishing starting points for our analysis. Part 2 turns to processes of decision-making about the unification question in themselves. It starts in Chapter 6 with an overview of those processes.



Working Group on
Unification Referendums
on the **Island of Ireland**

Part 2

Decision-Making Processes

6. PROCESSES OF DECISION-MAKING: OVERVIEW

- 6.1. The core decision to be made through the processes considered in this report would be the decision on whether Northern Ireland should remain part of the United Kingdom or become part of a united Ireland. As explained in Chapter 4, the 1998 Agreement sets out key elements in the procedure for making this decision in relatively clear terms: in particular, it requires concurrent, simple-majority votes both north and south on functionally equivalent sets of proposals.
- 6.2. But decision-making on the unification question and implementation of the result would involve significantly more, including processes for determining the following:
- whether and when referendums north and south would be called
 - the design of those referendums and the processes preceding and following them
 - the timing and terms on which sovereignty over Northern Ireland would transfer from the UK to a united Ireland, if that were the option chosen by voters
 - the form that a united Ireland would take
 - any changes that might be made to the status quo in Northern Ireland if the outcome of the referendums was that Northern Ireland would remain part of the UK.
- 6.3. Given the complexity and contentiousness of many of these elements, it would also be important for the process as a whole to include substantial preparatory work.
- 6.4. This chapter provides an overview of these various elements. In some respects, they have a natural sequence: for example, a referendum would (self-evidently) have to be called before it was held, and it would have to be held before its result could be declared and implemented. In other respects, however, choices would have to be made about sequencing: for example, the development of detailed proposals on a future united Ireland could begin before or after a referendum was called and before or after it was held. So too could the development of proposals to reform the Union, if supporters of the Union wanted to make them. We examine options for sequencing in Chapters 9 and 10, after exploring the building blocks individually. In this chapter, we begin with the decision to call a referendum.

DECIDING WHETHER TO CALL REFERENDUMS

- 6.5. The 1998 Agreement states that the decision to call a referendum in Northern Ireland lies in the hands of the UK government's Secretary of State for Northern Ireland, and the Northern Ireland Act so provides. The Secretary of State *may* call a referendum at any time (provided such a vote has not taken place within the preceding seven years). However, the Secretary of State *must* do so if at any time a majority in favour of unification appears likely. A Secretary of State could consult with others before deciding how to exercise these powers, but legally the decision is the Secretary of State's alone. We discuss the bases on which a Secretary of State might make a decision on calling a referendum in Chapter 8.
- 6.6. There is no equivalent provision relating to the calling of a referendum in the Republic of Ireland. As we indicated in Chapter 4, the Irish government would be obliged to call a referendum in the South if a unification vote in Northern Ireland produced a majority for unification. It would also be open to the Irish government to hold a vote in the South simultaneously with a vote in the North. We discuss such sequencing decisions in Chapter 10. In either case, such a referendum would consider a Bill first passed by both Houses of the Oireachtas. This legislation would take the form either of a proposed constitutional amendment or of a replacement constitution.

DECIDING ON PROCESS

- 6.7. It would be highly undesirable—and potentially very damaging—to reach a point where a united Ireland might be voted for without any planning. To avoid that, all of the matters of process that are mentioned in this chapter would themselves need to be decided upon. The rules for the referendums themselves, which we consider in Part 3, would also need to be determined. These are complex matters, involving referendums in two sovereign states, as well as negotiations and other forms of discussion of a wide range of matters among a wide range of actors. Coordination and planning would therefore be essential. Both supporters and opponents of the UK's departure from the EU agree that the lack of preparation ahead of the UK's 2016 referendum was detrimental to both the referendum process and the subsequent developments, undermining confidence in the result and perhaps leading to a suboptimal outcome. Such procedural failings could have damaging consequences if repeated on the question of Irish unification.
- 6.8. Agreeing a coordinated plan for the referendum processes north and south would therefore be important. Calling and holding these referendums are in law matters for the British and Irish governments and parliaments: the Northern Ireland Assembly and Executive are not formally involved. It would therefore be essential for the two governments to reach the greatest possible degree of agreement on the process. A mechanism for coordination between the governments already exists in the form of

the British–Irish Intergovernmental Conference (BIIGC). As was noted in Chapter 2, the BIIGC has met with varying frequency over the years, and there have at times been differences of view between Dublin and London as to how central it should be. For agreeing and then implementing a referendum plan, however, it is clear that a regularised structure of engagement would be required. As the Agreement provides the framework for the referendum process, the BIIGC is an obvious forum for the conduct of intergovernmental discussions. But a new bilateral institution could also be used for the purpose.

- 6.9. Notwithstanding the formal authority of the governments, developing a plan for the process would clearly benefit from close consultation and, so far as possible, agreement with a much wider range of affected actors. Decision-making about Northern Ireland should involve the people of Northern Ireland and their representatives. By the same token, while the Irish government represents voters in the Republic, people in the Republic should equally be involved in decision-making. Such wider discussions would be most important in relation to planning for a united Ireland, if that were the option chosen by voters, and we therefore discuss the form they might take in the following section.
- 6.10. A detailed plan for the processes to be followed would best be agreed at a time when the possibility of calling a referendum came under immediate consideration, should that arise. The question of when preparation of such plans should begin is a political rather than a procedural one, on which we do not take a collective view. But a plan should be agreed before a referendum is called.
- 6.11. That plan would set out the following:
1. when referendums would take place north and south
 2. what the conduct rules would be for these referendums and how breaches would be addressed (or how and when these rules would be determined)
 3. how the governments would conduct themselves during the process
 4. whether the process would have an external chair
 5. what matters would be discussed or negotiated by whom, at what stages, in what fora (contingent upon the referendum result)
 6. what the process and timetable would be for implementing the result of the referendum and any consequential changes
 7. what would happen in the event of divergent outcomes between North and South.

Most of these elements are considered in depth elsewhere in this report. Brief reflections on points 4 and 6 are useful here.

- 6.12. On the question of external chairing, the governments have traditionally played a ‘ringmaster’ role during political negotiations, maintaining some distance from the dust of battle in order better to act as honest brokers and drafters of compromises.

But the need to provide assurances on independence and impartiality has repeatedly seen the engagement of an external chair to oversee matters, both in the making of the 1998 Agreement, and in its extended implementation. The processes discussed here would be different in many ways from previous negotiations. Nevertheless, there may well be merit in appointing such a figure, or a trio of such figures, again. Finding someone of sufficient standing, acceptability among the participants, and willingness to take part might not, however, be easy.

- 6.13. Turning to implementation of the result, we set out the relevant provisions of the 1998 Agreement at para 4.37–40. If voters opted for unification, it would be necessary to implement that decision, and undue delay would not be permissible. But a precise timetable is not specified. In fact, some interim period would be required between referendum votes in favour of unification and the transfer of sovereignty itself. That would be necessary to allow the governments to bring forward the required legislation and for the parliaments to scrutinise it. In addition, some transfer matters would likely need to be negotiated between the governments before that legislation could be introduced.
- 6.14. Under some possible configurations of the referendums—discussed in Chapter 9—other matters would be discussed and agreed during this interim period. A lack of advance clarity as to the expected length of this period and the measures to be taken during it could be very destabilising. There should be clarity also on what would follow a vote in favour of maintaining the Union, and also for a split outcome in which the referendums north and south yielded different results. We consider such split outcomes in Chapter 10.
- 6.15. Finally, while planning of the processes would mostly be led by the governments, the political parties and other campaigners would also have important responsibilities over the course of the referendum period. Any attempt to undermine the legitimacy of the process could be destabilising. If a referendum were called, it would be desirable for all parties to declare their intention to abide by the rules set out in the 1998 Agreement, and to respect the result as determined by majorities of voters in, respectively, Northern Ireland and the Republic.

DETERMINING THE DETAIL OF A UNITED IRELAND

- 6.16. If voters north and south opted for unification, numerous aspects of this change would need to be resolved. These can be divided into four basic categories:
- the terms of Northern Ireland’s transfer from the UK to the Republic of Ireland
 - the constitutional form of a united Ireland
 - arrangements for public services and other policy matters in a united Ireland
 - post-unification relations between Ireland and the remaining UK, with special reference to Northern Ireland.

6.17. The content of these three categories of issues merits detailed examination, and we consider it in more depth in Chapter 7. Here we focus on the processes by which it would be decided.

THE CORE PROCESS

6.18. In formal terms, the various aspects of the detail of a united Ireland would be decided by different actors:

- The terms of the transfer of sovereignty over Northern Ireland from the UK to the Republic of Ireland would be matters for negotiation between the UK and Irish governments. These terms would then be ratified by the respective parliaments.
- The terms on which the UK would trade with a united Ireland would, however, be governed by the arrangements agreed between the EU and UK following the UK's withdrawal: a united Ireland would be within the EU's single market and customs union. Any change to those arrangements would formally be matters for negotiation between the UK government and the EU, although in practice the Irish government would play a significant role in shaping the EU's position.
- The constitutional form of a united Ireland would be proposed by the Irish government. Constitutional amendments—or a wholly new constitution—would require the approval of the Houses of the Oireachtas before being ratified by the people in a referendum.
- It would be the responsibility of the Irish government to ensure that all necessary arrangements for public services and other policy matters were made, and that those arrangements were feasible. Depending on the future constitutional structures that were envisaged for a united Ireland, the government in Dublin might delegate more or less authority to decide initial arrangements to the authorities in the North.
- Post-unification relations would be matters for negotiation between the governments. This would include the question of how the Strand Three institutions under the 1998 Agreement—the BIIGC and BIC—would operate post-unification, and whether any new arrangements might be established. As discussed in Chapter 7, other forms of cooperation might also be developed.

6.19. In principle, therefore, decision-making authority would lie either with the Irish government and the Oireachtas, or with both governments and their respective parliaments, or with the UK government and the EU. The only further legal constraints would be those imposed by the 1998 Agreement. First, 'The power of the sovereign government with jurisdiction' in Northern Ireland must be exercised impartially, enshrining parity of esteem and just and equal treatment for all identities, traditions, and communities, and respect for their rights. Second, the birthright of all the people of Northern Ireland to identify themselves and be

accepted as Irish or British, or both, as well as their right to hold both British and Irish citizenship must continue to be respected.

- 6.20. Notwithstanding these formal arrangements, however, for the reasons discussed in the preceding chapters, it would be far preferable for the governments to take a consensual approach in relation to the matters set out in para 6.18, drawing in voices from all communities and all parts of society. That approach would reflect the ethos of the 1998 Agreement. It would also reflect the approach of the current Irish government to building discussion of a shared future for the island of Ireland. The Taoiseach has said, ‘we must always work to accommodate and understand each other on this island. Because as Seamus Mallon perfectly described it, this is our shared home place’ (Martin 2020). By contrast, failure to adopt a consensual approach could cause serious tensions, leading to concerns for legitimacy and stability.
- 6.21. That raises three questions, dealt with in the next subsections. First, how would discussions of all these matters best be structured to ensure that they were inclusive and widely seen as fair? Second, specifically, how could inclusivity be facilitated and encouraged among unionists and ‘others’, as well as nationalists? Third, what role, if any, would be played by the UK government beyond those matters that would formally be decided through intergovernmental agreement?

STRUCTURES OF DISCUSSION

- 6.22. Beyond discussions within each of the two governments and the two parliaments themselves, it is useful to think in terms of three further layers of discussion in the process of designing a united Ireland: intergovernmental negotiations (on some matters); discussions including a wider range of elected representatives; and discussions directly engaging civil society and the public at large.
- 6.23. Intergovernmental negotiations would be needed to resolve matters related to the transfer of sovereignty and the terms of the future relationship between these two countries, as well as matters of process that are examined later in this chapter. As in the case of planning for the referendum process, discussed above, negotiating such potentially contentious matters would require a regularised structure of engagement between the governments. That could use the existing institutions—in particular, the BIIGC. Alternatively, a new bilateral institution could be established.
- 6.24. The second layer of discussions would take place among elected representatives, primarily through cross-party discussions. Such cross-party negotiations have long been part of discussions of future arrangements in Northern Ireland and Ireland, taking a variety of structures. The New Ireland Forum of 1983–4 was open ‘to all democratic parties which reject violence and which have members elected or appointed to either House of the Oireachtas or the Northern Ireland Assembly’ (New Ireland Forum 1984: para 1.2)—though unionists opted not to participate. The Forum for Peace and Reconciliation of 1994–6, convened by the Irish government under the

1993 Joint Declaration, contained a wider range of parties from North and South. The 1998 Agreement and the subsequent supplements to it were negotiated with Northern Ireland's political parties, which owed their place to an elective process. We do not seek to recommend any specific model for party involvement here.

- 6.25. In the event of a decision in favour of unification, parties would likely become involved in a number of ways. The 1998 Agreement envisages no formal role for the Northern Ireland Assembly or Executive in the unification process, and decision-making about the shape of a united Ireland would not be subject to the cross-community consent provisions within the Assembly. Nevertheless, the Assembly and Executive would likely be heavily involved in discussions, particularly over initial arrangements for public services in a united Ireland. Such discussions could take place through the forum of the North South Ministerial Council. But it appears unlikely that the Executive would speak as one on these matters, and so discussion may be sought in a new forum, including the governments and political parties. Such a forum might include non-governmental parties from the Republic of Ireland and Great Britain, as well as from Northern Ireland.
- 6.26. Organised civil society has rarely been directly involved in past Northern Ireland negotiations, which have generally been conducted between governments and political representatives. Many policy matters, whether related to a united Ireland or to a reformed Union, would need to be examined in depth with the groups most directly affected by them, including business organisations, trade unions, the churches, and others. Such an approach might build, for example, on the Irish government's All-Ireland Civic Dialogue on Brexit. Such discussions would also engage relevant officials within the Northern Ireland Executive.
- 6.27. Efforts to engage members of the public directly in discussion could take several forms. Ireland and the UK have both recently developed the practice of employing citizens' assemblies to provide considered public input into major policy decisions. Such assemblies comprise randomly selected citizens who gather over a period of several weekends to learn about and discuss specific policy questions in depth before making recommendations. They have been most prominent in Ireland, where they were instrumental in developing the proposals put to voters in the high-profile referendums on same-sex marriage in 2015 and abortion in 2018. They have also been adopted in the UK: the UK parliament has commissioned two, on social care in 2018 and climate change in 2020; the Scottish government, Scottish Parliament, and Welsh Parliament have convened one apiece. In Northern Ireland, a group of civil society organisations ran the Citizens' Assembly of Northern Ireland, tackling issues to do with social care, in 2018. And academics (including two members of this Working Group) convened a one-day citizens' assembly in 2019 to examine attitudes to the border in light of the UK's decision to leave the EU (Garry et al. 2020a; 2020b). The 2020 *New Decade, New Approach* document proposed that one citizens' assembly would be held per year (*New Decade, New Approach* 2020: 23). Some

proposals have been made to hold a citizens' assembly in connection with the question of Irish unification (e.g., Sinn Féin 2020).

- 6.28. Citizens' assemblies offer a very structured form of deliberative discussion. Other approaches seek to engage members of the public in more open-ended forms of conversation. The SDLP, for example has announced a 'New Ireland Commission' to 'take forward the work of engaging with people and communities on future constitutional arrangements on the island of Ireland' (SDLP 2020). In evidence to us, the party explained that this would involve "multiple levels of dialogue" (conducted locally, regionally and nationally) to develop and deepen respectful relations, listen and understand the full diversity of views, to help best shape "this time between times." It would also include three focused panels to gather the views of young people, experts, and elders (SDLP written submission).
- 6.29. There is clear scope for valuable use of citizens' assemblies as part of a process of Irish unification. Such assemblies could be used to help develop proposals on a united Ireland: that would be comparable to the work of citizens' assemblies in Ireland that led to the referendums in 2015 and 2018 on same-sex marriage and abortion. Alternatively, assemblies could be convened during a referendum campaign to help structure and inform debate, as has occurred in parts of the United States (Renwick and Palese 2019: Chapters 9 and 10).
- 6.30. Great care would, however, be needed to ensure that citizens' assemblies could play a constructive role. They generally work best when they focus on relatively narrow topics that members can get properly to grips with, suggesting they may be better suited to examining particular issues relating to a united Ireland, including its form, rather than the central question itself. Given the desire for inclusivity, sensitivity would be needed regarding the perceptions, concerns, and priorities of various sectors of society vis-à-vis such assemblies. In the responses to our public consultation, it was striking that, while many nationalists and people identifying as neither nationalist nor unionist argued for the use of citizens' assemblies in relation to the unification question, almost no unionists did so. An approach that respected different levels of willingness in different groups to engage in conversations would be needed from the start, for example by initially offering different forms of civic engagement. Care would also be needed in deciding whether such conversations best took place on an all-island basis or separately north and south. And participation by members of the public from any given tradition would clearly not on its own signify buy-in to the outcome from that tradition as a whole: a citizens' assembly could not substitute for the full involvement at some stage of political representatives. Indeed, one of the strengths of citizens' assemblies in Ireland has been their close connections with parliamentarians and government.

ENABLING ENGAGEMENT FROM DIVERSE COMMUNITIES

- 6.31. That leads on to the second question: how could active engagement be facilitated and encouraged among unionists and others, as well as nationalists? Questions of timing and topics are crucial here: what would be the purpose of such discussions, who would be involved, and when would they occur? As we noted in Chapter 3, some (especially nationalists and younger people who would describe themselves as ‘other’), are actively engaging in conversations about the future society they wish to see. It may be that the practice of dialogue and conversation, as well as the skill of identifying priorities and common interests, should be fostered in order to enable inclusivity in any wider engagement prior to a referendum.
- 6.32. But it would be remiss of us not to acknowledge that responses to the work of this group have shown that many unionists in Northern Ireland are unwilling to engage in discussion about a united Ireland. This is a legitimate strategic choice that must be understood and respected. Equally, we have been told that nationalists may well be reluctant to engage in discussions about changes to the Union that would be intended to enhance or secure it in popular opinion. In both cases, some assume that only by the removal of uncertainty (one way or another) will those opposed to such discussion come to engage with it. If this were so, fully inclusive negotiations on the future of Northern Ireland could not in practice happen until after referendums had been held, north and south. That would be to the detriment of some of the other criteria we identified in Chapter 5. We examine these matters in further detail in Chapters 9 and 10.

THE ROLE OF THE UK GOVERNMENT

- 6.33. Finally, our third question concerns what role would be played by the UK government. It is clear from the above that it would be an equal partner with the Irish government in agreeing terms for the transfer of sovereignty and post-unification relations. But would it also have a place in the process of designing a united Ireland?
- 6.34. We have heard general agreement on two points regarding this:
- First, the UK could have no veto over the form of a united Ireland. That the future of Ireland is a matter for the people of the island of Ireland is very clear in the 1998 Agreement: the decision, north and south, is to be made by ‘the people of the island of Ireland alone ... without external impediment’.
 - Second, however, the UK government has an existing voice in any processes affecting all these islands through Strand Three of the 1998 Agreement: the BIIGC and BIC.
- 6.35. Beyond these points, some witnesses have expressed the strong view that the UK government would see itself as a guarantor of the interests of those in Northern

Ireland who profess a British identity, which might include a role in monitoring whether the 1998 Agreement requirements quoted above were being respected. A clear vehicle already exists here: through the BIIGC and BIC, the UK could have a voice in how a united Ireland respected human rights, especially the rights of its British and Protestant minorities.

DETERMINING THE DETAIL OF A UNITED IRELAND: CONCLUSIONS

- 6.36. While in formal terms determining the proposed detail of a united Ireland would be a matter ultimately for the Irish government (in relation to the constitutional form of a united Ireland and provision of public services) or the two governments working together (for the terms of the transfer of sovereignty and post-unification British–Irish relations), there is wide agreement that a more inclusive approach would be desirable, involving diverse conversations across the island of Ireland. That raises large questions about when such work would begin and who would initiate it. The answers to these questions would depend in part on how the referendums north and south were configured, and we therefore return to them in Chapter 10.
- 6.37. There is also a question, noted in para 6.12, as to whether the governments might choose to delegate some functions to others—notably, to one or more international chairs—in order to enhance confidence in the integrity and neutrality of the process.

CONSIDERING CHANGES TO THE UNION

- 6.38. A binary referendum offers a choice between a change proposal and the status quo. While a very few examples can be found where voters have been asked to choose between two reform proposals, with the status quo excluded, that is highly unusual, and democratically problematic. Thus, the alternative to unification on the referendum ballot paper would be the continuation of the Union as it existed at the time of the vote.
- 6.39. That does not mean, however, that reforms to the Union would necessarily be off the table. Reforms might be agreed and implemented ahead of a referendum—though, with nationalists focused on securing unification, it may be as unlikely that they would participate in discussions of such reforms as that unionists would participate in discussion of the form of a united Ireland. More likely, therefore, is that reforms could be proposed by unionists ahead of a referendum. In that case, unionists would argue during the referendum campaign that a reformed union would be better than the proposed united Ireland. They could seek then to implement these proposals if voters opted to maintain the Union.
- 6.40. Such proposals were made by unionists in Scotland ahead of the independence referendum in 2014: only days before polling day, the leaders of the three main union-supporting parties—the Conservatives, Labour, and the Liberal Democrats—made what came to be known as ‘the Vow’, in which they promised further

devolution of powers to Scotland (Clegg 2014). Following the referendum, the cross-party Smith Commission was established to recommend detailed changes, and its proposals were later implemented, to the satisfaction of all parties, in the Scotland Act 2016.

- 6.41. Reform proposals for Northern Ireland would not necessarily take the form of further devolution. We explore some of the matters that might be considered in para 7.76–87. Unionists might prefer to develop such proposals early in the referendum process, rather than, as in Scotland, in the closing days of the campaign in response to adverse opinion polls.
- 6.42. Whatever the content of such proposals, their implementation following a referendum vote against unification would not be automatic. If unification were defeated because of a vote against it in the South while the North had voted in favour, it seems unlikely that reforms of the Union would go ahead. Particularly if the vote in the South had been close, momentum towards unification would remain strong. We consider this scenario further in Chapter 10.
- 6.43. If, meanwhile, the North had voted against unification, then, just as in the case of agreeing the detail of a united Ireland, it would be important for any reforms to the Union to be decided as consensually as possible. A majority vote in a referendum in favour of maintaining the Union would not in itself provide a mandate for any reforms to the Union that had been proposed in advance. To interpret it as doing so would breach the spirit of the 1998 Agreement. There would be no warrant for jettisoning consensual politics and returning to a majoritarian basis for making decisions about Northern Ireland's governance.

PREPARATORY WORK

- 6.44. We have indicated that it would be important to plan out the decision-making process, allowing for all possible outcomes, before any referendums were called. Beyond that, there are several reasons for thinking that referendums would, if called, proceed more smoothly if wider preparatory work had also taken place first.
- 6.45. First, if referendums did at some point come to pass, our criteria of legitimacy and stability would be best served if people understood the processes around these referendums: misunderstandings or unrealistic expectations in relation to process could lead to contention. Yet many of those we have spoken with, including people with extensive relevant experience, acknowledge that they have yet to think through systematically what this referendum process would involve. As a result, some unrealistic expectations exist regarding how it would unfold. For example, some in Great Britain think very largely of the referendum in Northern Ireland, without the need for parallel processes in the Republic of Ireland, while those in Ireland sometimes see the process as one simply for the island of Ireland, without recognising the key roles for the UK government at various points. If that is true

among seasoned politicians, officials, and commentators, it may be even more true in the wider public. Without a period of reflection on the process, unsettling or unsatisfying outcomes may be expected.

- 6.46. Second, our criterion of informed choice implies that people should be able to find information on how each of the options would affect their lives. Yet, while some research, by academics and think tanks, is now being carried out into these matters (see paras 3.30–32), that remains limited. Debate would ultimately be better informed if a substantial body of such studies were built up over time, coming from different scholarly disciplines as well as from outside academia, employing a range of methods, and reflecting a range of perspectives.
- 6.47. Discussions in the media might also raise public awareness of the issues. Civil society organisations—particularly those that are neutral on the constitutional question—might examine how the options would affect those they represent. Members of the public might come together to talk through their own ideas and preferences. In addition, public funding—channelled through independent research bodies—might be needed to enable academics and other researchers to conduct detailed research. Over time, policymakers might canvass options and begin to consider their strengths and weaknesses.
- 6.48. At the same time, there is a legitimate objection to such preparatory work, at least if done by the governments: it could not be conducted impartially because simply talking about the processes of unification would in itself make unification more likely. This is the same ‘conditioning’ objection as has been made by some against our own work. We responded to the point in Chapter 1 by saying that it is important that the issues be thought through in advance from an impartial perspective, and that a group of independent academics with relevant expertise are well placed to do so. But the objection has more force when applied to a wider process of preparation across society: it is conceivable that such preparations could shift perceptions on the substantive issue.
- 6.49. We acknowledge and respect this view. Nevertheless, our considered conclusion is that referendums could not be conducted well without extensive prior preparatory work; and this preparatory work could not be completed in the time between calling a referendum and polling day. Whatever the political debates around what preparations should take place when, our purpose is simply to examine what would be needed to enable a referendum, were one called, to be conducted well. We have found the conclusion that preparation is needed for this purpose to be unavoidable.
- 6.50. To address the concern that preparatory work could facilitate a particular outcome, it should take the form of open-ended discussion of the future of the island and the islands, without prejudice as to whether that future was in the United Kingdom or in a united Ireland, backed up by research across an equally broad range of relevant issues. We do not express a view as to when, if at all, the government’s should

become involved. Much preparatory work would best be conducted, at least initially, independently of either government.

CONCLUSIONS

- 6.51. Decision-making processes relating to constitutional futures would be multi-faceted and contentious. If the possibility of calling a referendum came under immediate consideration, it would be highly desirable for the two governments to set out at an early stage a plan for how these processes would unfold. Most elements would formally be the responsibility of the two governments jointly or of one or other government individually. At all stages, however, it would be far best for them to seek as inclusive an approach as possible, while retaining key decision-making power.
- 6.52. A decision to call a referendum is not under immediate consideration by either government today. Nevertheless, work to prepare for the possibility of such referendums would be desirable, both to avoid potentially destabilising surprises, and to build an extensive body of research evidence on the options. This work would best not be done solely by the governments. It would benefit from input from political parties, academics and other independent bodies, civil society, and the wider public. We do not take a view on when such work should be carried out.
- 6.53. At all stages, it would be essential to ensure that the referendum process was fair between the two options on the ballot paper. Both governments would have a responsibility in that regard. In addition, we have suggested that consideration should be given to the appointment of an external chair.

7. DELINEATING THE TWO REFERENDUM OPTIONS

- 7.1. This chapter examines the two options that voters would choose between in any unification referendums: for Northern Ireland to become part of a united Ireland; or for Northern Ireland to stay in the United Kingdom.
- 7.2. The first option would require elaboration: a united Ireland would necessarily take a particular shape, which would have to be defined. As discussed in Chapters 9 and 10, such elaboration could take place before a referendum, after a referendum vote for unification but before the transfer of sovereignty, or after the transfer of sovereignty. Whatever the timing, this chapter sets out what matters would need to be decided. We emphasise that our purpose is limited to identifying the sorts of issues that would need to be addressed, so as better to gauge the breadth of work required. It is beyond the scope of this report to explore the substance of the issues in detail. We do not argue for any particular outcomes, beyond indicating what appears to be within the scope of the 1998 Agreement. As in Chapter 6, we divide these matters into four areas:
- the terms of Northern Ireland’s transfer from the UK to the Republic of Ireland
 - the constitutional form of a united Ireland
 - arrangements for public services and other policy matters in a united Ireland
 - post-unification relations between Ireland and the remaining UK, with special reference to Northern Ireland.
- 7.3. The second option available to voters—continuing the Union—would not necessarily require any further elaboration: its proponents might simply defend the status quo. But they may wish to propose reforms to the way Northern Ireland operates. There is much less that can readily be said by way of outlining the issues that may arise here, but we address the possibilities briefly at the end of the chapter.
- 7.4. The list of matters requiring decision in relation to a united Ireland may look daunting. But we intend no implication that they are so difficult, or so numerous, as to be incapable of resolution. As compared with actual or proposed unifications elsewhere, there are many factors that might facilitate the process of unification of the island into a single political jurisdiction.
- 7.5. For example, there are many cultural similarities between the two parts of the island, in their approach to government and in wider society. They have traditionally shared the same approach to the rule of law, the separation of powers, and constitutionalism (although the Republic of Ireland is governed by a written

constitution that is interpreted authoritatively by the courts). They have a common legal and administrative heritage, bolstered more recently by shared membership of the EU, which has left identical regulation in many areas. And many principles embodied in the 1998 Agreement have been subscribed to across mainstream politics in Belfast, Dublin and London.

- 7.6. Moreover, there are well-established formal and informal links between the governments, and in many other areas of public life, as well as developed patterns of economic and social exchange across borders. The language used every day by the great majority of inhabitants is the same. Both parts of the island were formerly rather conservative societies, but public attitudes are now shifting, perhaps faster in the South than the North.
- 7.7. These factors are significant. But the issues to be dealt with are numerous, and often difficult: it cannot be assumed that they could all be resolved quickly or satisfactorily simply through the application of sufficient political will.

THE OPTION OF A UNITED IRELAND: SKETCHES WITHOUT BLUEPRINTS

- 7.8. Before examining in turn the four dimensions of a united Ireland just listed, we consider what thinking has already been done. In fact, the shape of a united Ireland has received strikingly little attention. There have been few published proposals with any degree of detail. The New Ireland Forum reporting in 1984 put forward a number of models, a unitary state, a ‘federal/confederal’ state, and joint sovereignty (New Ireland Forum 1984). But they offered no more than a summary treatment of each option. More detailed plans had been put forward by contributors to the Forum. We hope to outline these further when we produce our final report.
- 7.9. In its Éire Nua proposals of the 1970s and early 1980s, Sinn Féin outlined a plan for a federal Ireland, based on making the four historic provinces into federal regions (Éire Nua 1971). In 2016 the party produced a discussion paper, canvassing without commitment or detail models involving continued devolution, federal or confederal arrangements or a unitary state (Sinn Féin 2016). As we were completing this interim report, Sinn Féin published a report outlining their views on the economics of unification (Doherty 2020). We will reflect its content in our final report. The SDLP in 2005 produced a brief vision of a united Ireland, involving continuation of a devolved system in the North (SDLP 2005). Richard Humphreys, writing extra-judicially in his book *Beyond the Border* (2018), puts forward suggestions, based on the continuing validity of the Agreement (see below). In 2017, an Oireachtas Joint Committee on the Implementation of the Good Friday Agreement produced a report on *Brexit and the Future of Ireland: Uniting Ireland and Its People in Peace and Prosperity*, which touches on many issues related to unity; but it does not claim to offer any worked-out plan.

- 7.10. So discussion on the substance of a united Ireland has been very limited. The need for a process to work up plans in advance of votes has been more widely acknowledged, however. The Oireachtas Joint Committee recommended a further Forum to consider the issues. Others on the nationalist side have called for greater planning of a united Ireland. Gerry Adams wrote in 2019 that ‘it is stupid to hold a referendum without a plan’, and Sinn Féin’s manifesto for the 2020 Irish election proposed a Joint Oireachtas Committee on Irish unity, an ‘all-island representative Citizens’ Assembly or appropriate forum to discuss and plan for Irish unity’, and a government White Paper (Adams 2019; Sinn Féin 2020). Fianna Fáil committed in that election to ‘establish within the Department of the Taoiseach a unit to lead a formal study and cross-community consultation on a Green Paper to outline how the Irish government should approach the handling of any unity referendum should circumstances arise where it can be called’ (Fianna Fáil 2020: 134). In summer 2020, the SDLP announced plans for a New Ireland Commission to engage with people and communities on future constitutional arrangements on the island of Ireland (SDLP 2020).
- 7.11. As set out in Chapter 2, the Irish government formed in the summer of 2020 has in its Programme for Government (page 103) a long section on a ‘shared island’. Building on the foundations of the 1998 Agreement, it undertakes ‘to achieve a consensus on a shared future’. It does not allude to a referendum, however. In an interview, the new Taoiseach said ‘a border poll is far too divisive at this stage and doesn’t deal with the more fundamental issue of how we continue to live and work together’ (Marr 2020). The Programme sets out a substantial list of actions in support of its undertaking, including the establishment of ‘a Unit within the Department of An Taoiseach to work towards a consensus on a shared island’ (Programme for Government 2020). This Unit plans to launch a programme of ‘dialogue’ across the island’s different communities, promote increased cross-border economic cooperation, and provide funding for major infrastructure projects in the border regions (Martin 2020).
- 7.12. There has equally been little discussion of the substance of counter offers that might be made by those wishing to persuade voters that unity was not the best course. Some unionists, such as Peter Robinson speaking at Queen’s University and the McGill Summer School, and in recent writing (Robinson 2020), have impressed on colleagues the necessity of planning for the possibility of a poll (Gorman 2018; Robinson 2018).
- 7.13. In drawing attention to the limited thinking so far undertaken about plans for unification, or any pro-Union offering in a referendum, we are making no criticism of those who have not carried out such planning. They may believe that the prospect is a distant one or that there are more pressing challenges to engage with. But the consequence is that we are a very long way even from having a full list of issues that would need to be addressed in the context of Irish unification; nor are there any developed alternatives involving a reformed UK Union.

THE OPTION OF A UNITED IRELAND: MATTERS RELATING TO THE TRANSFER OF SOVEREIGNTY

7.14. We deal here with the issues immediately associated with the transfer of sovereignty over Northern Ireland from the UK to Ireland. These issues are small in number, mainly around finance, but they could be crucial to the delivery of unification and would feature prominently in debate. As discussed in Chapter 6, they are principally matters for intergovernmental negotiation, but many in politics and civil society would wish to put forward views on them. There would be a significant EU dimension too: Northern Ireland would, as confirmed by the European Council Statement of 23 June 2017, on becoming part of the Irish state also become a part of the EU (European Council 2017).

FINANCE

7.15. Financial issues may loom very large in the debate running up to a referendum. Voters might reasonably expect definitive information, and clear plans, about these issues in advance, but plans might not be easy to furnish.

NORTHERN IRELAND'S PUBLIC FINANCES

7.16. There are diverse views on how unification would affect the public finances. One view emphasises that the Northern Ireland Exchequer receives substantial transfers from London. The UK government contribution, calculated as the amount by which public expenditure in Northern Ireland exceeds the amount raised there in taxes, is about £9 billion annually in a normal year (FactCheckNI 2016; McGuinness 2019). That is roughly a third of Northern Ireland's public spending. The need to plug this gap leads some to say that the costs of early Irish unification would be extremely high for the Irish state (Fitzgerald and Morgenroth 2019): a united Ireland would have a much smaller population (one tenth that of the UK) to bear the cost of the shortfall, if it continued. If unification were achievable only by substantial reductions in public services in the North, or substantially increased taxation across the whole island, as Fitzgerald and Morgenroth argue, there might be a significant impact on public perceptions of unification, north and south.

7.17. On the other hand, proponents of unification point to Ireland's economic success, especially in the last 30 years, and the dynamic benefits for the North of being integrated with an economy which has, as an EU member state, been very successful in attracting foreign direct investment, developing a highly skilled workforce, and knowledge-based industries. Hübner and van Nieuwkoop (2015) argue that devaluation and a surge in trade on an all-island basis would have a lasting positive effect on growth in the North, and more foreign direct investment could produce convergence in productivity levels within the island of Ireland within 15 years. The difference between these views is in part a difference between static and dynamic

modelling. The shock of either withdrawing the subvention or raising taxes to pay for it is certain: there would be a substantial funding deficit for a period of years; the potential benefits would depend on further developments. In part it also results from analysis conducted pre- and post-Brexit. What it points to is a need for more research in applied economics about these matters, so that, come the time of any referendum, both governments and voters could be better informed about the likely costs and benefits of unification.

- 7.18. The governments might negotiate over whether the UK would be willing to continue its financial support to the Northern Ireland Exchequer, on a tapering basis. Some would see this as highly desirable, not least as a gesture of good faith by the UK government. But embarking on such a negotiation would be a politically charged step for a British government, perhaps one facing other challenges to the Union: some who spoke to us were doubtful it would be willing in current circumstances to take such a step, at least before referendum.
- 7.19. We have heard that a move to Irish unity might attract international support. Past initiatives have included the International Fund for Ireland, latterly sustained by US public funds; and the European Union PEACE programmes. With Northern Ireland returned to the EU, applications would again be possible from there to the European Regional Development Fund. But international contributions in the past were relatively small. The EU PEACE IV programme, for example, provided an average of €39 million a year, compared to annual public spending in Northern Ireland of almost £22 billion per year (Special EU Programmes Body 2020; HM Treasury 2019: 5).

ASSETS AND LIABILITIES

- 7.20. Also part of the calculation about the cost of Irish unification is the potential transfer of assets and liabilities of the UK government in respect of Northern Ireland. Under the 1921 Treaty Ireland accepted responsibility for a share of UK national debt, but this was written off in 1925. Normal practice following the break-up of a Union is for the breakaway part to take its share of net liabilities. That is what happened following the collapse of the Soviet Union, in the Alma-Ata Protocol of 1991; and the separation of Czechoslovakia in 1992. The 2019 Withdrawal Agreement between the EU and UK includes the UK accepting liabilities (e.g. the pensions of EU staff) and being returned assets (e.g. capital paid to the European Investment Bank). The UK's Office for Budget Responsibility estimates the UK's net payment to the EU will be £33bn (Keep 2020).
- 7.21. If, following these precedents, Northern Ireland's share of the UK's assets and liabilities transferred to Ireland, the sums involved would be very large. The UK compiled a National Asset Register in 2007, which valued the total assets of the UK government at £337bn in 2005 (HM Treasury 2007). Uprated to 2019 prices, those assets would be worth £507bn. On the liabilities side, at the end of July 2020, UK national debt was £2tn (just exceeding 100% of GDP: Giles and Samson 2020). So the UK's net liabilities (debt minus assets) are around £1.5tn. If Ireland assumed

Northern Ireland's share of the UK's net liabilities, then *pro rata* to Northern Ireland's 2.9% share of the UK population that would be about £43bn. Liabilities could also be apportioned by GDP per capita, or—depending on the negotiations—they might be waived altogether.

TRADE, BOUNDARIES AND THE EUROPEAN UNION

- 7.22. Maritime boundaries between the rest of the UK and Ireland would have to be clarified.
- 7.23. Opportunities for trade would also bear on Northern Ireland's future economic performance. Unification might well lead to more productive economic interaction between North and South, to the benefit of both parts of the island economy. But many parts of the Northern Ireland economy are closely integrated with that of Great Britain. Ceasing to be part of the United Kingdom may put some of that at risk: it would be part of the European Union, while Great Britain would not be. Unification would be likely to require a renegotiation of the UK/EU Withdrawal Agreement and its Ireland/Northern Ireland Protocol. Aspects of what at the time of writing is called the 'future relationship', most notably fishing rights in response to changing sea borders, might also require renegotiation.
- 7.24. Other consequences of Northern Ireland rejoining the EU would be that the euro would become the official currency, as it is in the South; and Northern Ireland would again be eligible to apply to the European Regional Development Fund.

CITIZENSHIP

- 7.25. There are potential tensions between Agreement guarantees on identity, and current Irish voting entitlements. As we suggested in Chapter 4, these would need to be addressed through constitutional amendment in the South before unification could take place.
- 7.26. The Agreement, in our view, provides for equal respect for the British identity, even after unification. Most residents of Northern Ireland, if born there, are already under Irish law entitled to Irish citizenship. But, under existing Irish constitutional arrangements, certain rights are only available to citizens. Some in the unionist tradition may not wish to take up Irish citizenship, and certainly not wish to have it foisted upon them. The 1998 Agreement (see Chapter 4) provides that British citizens in Northern Ireland cannot be compelled to become Irish citizens but must nevertheless be permitted to exercise full political rights without becoming Irish citizens.
- 7.27. The matter is further complicated by EU citizenship questions. The status of EU citizenship, and the rights associated with it such as freedom of movement and voting in European elections, depend on citizenship of an EU Member State. How

might it be possible for British citizens resident in Ireland to acquire EU citizenship without first becoming Irish citizens? Negotiation would be needed on this.

- 7.28. In addition, British citizens resident in Northern Ireland may wish to have guarantees of continuing entitlement to British citizenship for their descendants born there (or across the island of Ireland). There is also an issue that residents of Northern Ireland, even long-term ones, born in Great Britain or elsewhere have no entitlement to Irish citizenship under current Irish law. The extension of Ireland's national territory would automatically extend the same naturalisation entitlements as currently apply in the South, but there would be questions whether to reckon residency periods accrued prior to unification. The approach most consistent with the 1998 Agreement might be to extend an entitlement to Irish citizenship to all British citizens resident in Northern Ireland at the moment of unification.

THE NATURE AND LENGTH OF A TRANSITION TO IRISH UNITY

- 7.29. In practical terms there would likely be a need for some interval between the referendums and the completion of unification. Depending on the configuration of the referendum process chosen (see Chapters 9 and 10), at least some—and perhaps most—questions relating to the shape of a united Ireland and the formal transfer of sovereignty would remain to be resolved after the unification referendums. In practical terms, the transition to new arrangements could involve a great deal of work.
- 7.30. Section 1 of the UK Northern Ireland Act 1998, which appeared in the Agreement, envisages the two governments after the referendum stage working on proposals to give effect to the wish for unification, which the Secretary of State must then present to the UK Parliament. The Agreement commits both governments to supporting such proposals in their legislatures. But beyond that, there is little further guidance in the text.
- 7.31. Some have suggested a long transition period for economic reasons. McGuinness and Bergin, for example, say:

In all likelihood, any re-unification will require a transition period during which both operational and fiscal responsibilities will be gradually transferred from the UK to the RoI. It is unclear how long any transition period should last as there are few insights available from a historical perspective. (McGuinness and Bergin 2019: 23)

- 7.32. Others make the case for a long transition on political grounds, saying that it would soften the shock for opponents of unification. Richard Humphreys in *Beyond the Border* suggests that nationalist Ireland might itself volunteer that there should be:

a lengthy transitional period of joint authority (that is, joint management), over the initial few decades of the transition. Such a managed transition—initially within UK sovereignty and subsequently within Irish jurisdiction—might provide a less fraught and, in the end, more flexible transitional mechanism to avoid the abrupt discontinuities of the 50 per cent + 1 approach of the Good Friday Agreement.

- 7.33. Such proposals raise questions about sovereignty in the interim: would Northern Ireland be under continuing British sovereignty, under Irish sovereignty, or some hybrid state?
- 7.34. As we explained in Chapter 4, however, our interpretation of the legal text of the 1998 Agreement is that sovereignty must transfer directly from London to Dublin. If that interpretation is correct (and this is a point on which we would particularly welcome feedback), this requirement would rule out any period of transitional joint sovereignty over Northern Ireland. The two governments have considerable leeway in determining what measures are necessary to be implemented in order to ensure that the transfer of sovereignty goes as smoothly as possible. By extension, it is also for the governments to determine what period of time is necessary to implement those measures. The only constraint—but a critical one—is that they genuinely be involved in a good faith effort to implement the unification votes. As also noted in Chapter 4, the unification votes themselves could stipulate a lower and/or upper limit to any implementation period.
- 7.35. Quite apart from these issues, the possibility of a long transition, though, raises two particular difficulties. The first is the indeterminacy of joint arrangements for governance. What they would mean in concrete terms is unclear. The devolved institutions would presumably go on exercising legislative and executive powers as before. The key issue would be the responsibilities of the British government and Parliament; and sharing those might raise substantial difficulties. At the least, there might be a need for formal guarantees of the final transfer of sovereignty to be written clearly into Irish and UK constitutional law.
- 7.36. The second difficulty of a long transition is that it would bring no early finality, which could be destabilising politically and economically. It would enable people to make choices but leave the difficult decisions and painful consequences they would entail until later. And it would increase the possibility that attempts could be made, through political or violent means, to prevent unification from happening.
- 7.37. Even if there were a short period of transition, careful thought would need to be given to the transitional arrangements: in particular, the arrangements for how Northern Ireland would be governed pending unification. At the least, the British–Irish Intergovernmental Conference might need a change of gear, with regular meetings, to enable more effective Irish contribution to decision-making and reassurance to unionists that their interests were protected by the British government in tandem with Irish involvement.

THE OPTION OF A UNITED IRELAND: CONSTITUTIONAL MATTERS

- 7.38. This analysis starts with matters concerning the broad architecture of a united Ireland. Many of the changes would have profound implications for the existing Irish

Constitution. Some, including former Taoiseach Leo Varadkar, have suggested that an entirely new constitution would be desirable.

HOW FAR DOES, OR SHOULD, THE 1998 AGREEMENT GOVERN A UNITED IRELAND?

- 7.39. A first question concerns how far the shape of a new Ireland would be predetermined by the 1998 Agreement, either as a matter of formal commitment, or by reason of the wider political acceptance of the principles of the Agreement settlement.
- 7.40. Paragraphs 1(v) and (vi) of the Agreement's 'Constitutional Issues' section contains provisions that apply whatever choice is made as to constitutional status. The governments affirm there that the power of the sovereign government 'shall be exercised with rigorous impartiality ... founded on the principles of full respect for and equality of civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities'. Moreover, various citizenship and identity protections are deemed unaffected by any future change in the status of Northern Ireland.
- 7.41. The Agreement established some institutions in fulfilment of these commitments, for example the Equality Commission for Northern Ireland. It might be argued that in the context of a united Ireland, on whatever model, those institutions should be preserved.
- 7.42. Paragraphs 1(v) and (vi) are the only parts of the Agreement making express provision for the situation after unification. But some argue that other aspects of the Agreement were intended to be of enduring effect. Richard Humphreys in *Beyond the Border* argues that, as a matter of international law, 'The Good Friday Agreement Is Intended to Endure after Unity' (section title, pages 106–16). Hence, he argues, 'Northern Ireland will continue to exist after a united Ireland as a separate administrative entity with a devolved legislative assembly ... [and] a devolved executive ... [that] will exercise executive power for Northern Ireland on a cross-party basis'. And 'the border is permanent ... as an internal boundary beyond which devolved powers will continue to apply'.
- 7.43. This interpretation of the Agreement may be contested. If the entire Agreement was intended to persist, then there would have been no need for the specific references in paragraphs 1(v) and 1(vi). Several parts of the Agreement would be difficult to operate in the context of a united Ireland, most notably the Strand Two provisions on North–South bodies. There is no evidence that the participants in the 1996–98 talks envisaged that they were mapping out in binding detail the shape of a united Ireland. In the (Strand One) discussions about the structure of the internal institutions, the Irish government was not represented. But the continuation of such institutions

would have significant repercussions for the functioning of the national institutions of a unified Ireland (Doyle et al. 2021). And, as Humphreys acknowledges, the obligation he asserts to maintain the institutions could be varied by a new agreement between the British and Irish governments. In our view, there is no requirement that the Strand One institutions must continue in the context of a united Ireland, as a matter of law.

- 7.44. Whatever the legal obligation, however, many might argue that the participants saw the *principles* embodied in the Agreement being of enduring validity, coming in the wake of efforts over 30 years to establish a viable form of government in Northern Ireland. And that since the Agreement institutions have delivered partnership government there, while imperfectly, more successfully than anything before, they should be at least the starting point for structures following unification. The SDLP's 2005 plan for a united Ireland involved a large element of replicating the Northern Ireland devolution model.
- 7.45. It may be added that the British and Irish governments in preparing for the talks that led to the 1998 Agreement seem to have envisaged continued power-sharing government in the North in the event of unification (New Framework for Agreement 1995: para 19). This idea, however, did not feature in the Agreement, so is of very limited authority. But it is evidence that the governments at least saw the Agreement principles about 'equitable and effective political participation' holding sway indefinitely.
- 7.46. One manifestation of the question how far the Agreement would endure is whether it mandates an ongoing role for the British government in the way the new state, or at least the northern part of it, would operate. It is not obvious that it should have any enduring role: sovereignty would have transferred. But the Irish government currently has a right to make representations about aspects of government in Northern Ireland that are not devolved under the 1998 Agreement, through the formal mechanism of the British–Irish Intergovernmental Conference. In effect, it is granted a special position as protector of nationalist interests in Northern Ireland. Mirror image replication of these aspects of the Agreement would in effect confer a role on the British government as protector of the interests of those who consider themselves British.
- 7.47. Taking to the extreme the argument that the Agreement principles would endure, could it be suggested that Northern Ireland's position within a united Ireland was dependent on the continuing consent of a majority there—given that the Agreement says that the exercise of the right of self-determination is on the basis of consent in both parts of the island? No one has suggested this to us, however (and Humphreys does not do so); the Agreement does not support such a position; and there is no evidence it was discussed in the Agreement talks. If the drafters of the Agreement had envisaged any such arrangement, they would surely have established a mechanism to give effect to it, a counterpart to the duty of the Secretary of State to call a border poll in the current constitutional context. In doing so they might have

resolved the critical consequential issue of whether Northern Ireland would have an absolute right to reintegrate into the United Kingdom, or whether the consent of the British Parliament, or people in Great Britain, would be needed too.

- 7.48. A number of provisions and aspirations of the Agreement have never reached fulfilment, and some might argue that in the context of unification those that are not overtaken should be acted on further. One key area is rights. Besides incorporation into domestic law of the European Convention on Human Rights, which has now been achieved in both parts of the island, the Agreement envisaged a Bill of Rights for Northern Ireland. There has not so far been cross-community agreement on this: the issue is now being looked at again by an Assembly committee (Northern Ireland Assembly 2020). Ireland has a Bill of Rights in its Constitution, with significant jurisprudence attached. But if devolved government continues in the North, should there be a separate Bill of Rights for Northern Ireland? A text focused on issues of identity and parity of esteem might take on new significance in the context of unity. The Agreement also envisaged a charter of agreed measures for protecting fundamental rights across the island, not so far carried into effect.
- 7.49. The Agreement also sought to resolve some of the issues related to the legacy of the past and the rights of victims; and to promote reconciliation. Intense debates about the issues continue. The issues have proved intractable, but continuing to address these issues and their legacy might be seen as important to the success of new arrangements.
- 7.50. A Civic Forum, also prescribed by the Agreement, was initially established in Northern Ireland but not then sustained by the Executive (though it has returned in reduced form as a plan for a Civic Advisory Panel in subsequent political agreements). The Agreement also envisaged a so-far unestablished independent consultative forum representative of civil society across the island. Given the importance of sounding out civil society advice around unification these bodies could have an important role before, during and after it takes place.

ADAPTING THE ARCHITECTURE OF IRISH GOVERNMENT TO ACCOMMODATE NORTHERN IRELAND

- 7.51. A fundamental issue is whether and how the governmental architecture of a united Ireland makes special provision regarding Northern Ireland. There are several possible models.

THE CORE MODELS

- 7.52. *A state with devolved institutions in the North*—as far as possible a mirror image replication of the current arrangements within Northern Ireland under the Agreement, but with sovereignty transferring from London to Dublin—would involve the least departure from the Agreement structures (Garry et al. 2018; see also Garry

et al. 2020a, 2020b). This model would lessen the shock to those in Northern Ireland who oppose unity, since the same institutions would continue; and under the various minority protection arrangements written into the Northern Ireland structures, would provide safeguards for their interests. But it would introduce complications into the government of the Irish state, discussed in paras 7.59–61 below.

- 7.53. Conceptually the most straightforward model is a simple *unitary state*, with a single central legislature and government. This model though would involve significant adaptation of northern institutions and practices to southern ones, which might involve substantial delays, and potentially great friction. This model has been the historic preference of many Irish republicans, constitutional or otherwise. But some would see this approach (as came across in our evidence sessions) as being at odds with the consensus-building aspect of the 1998 Agreement; it might be widely seen by opponents as the takeover of Northern Ireland, reducing their sense of belonging in the new state.
- 7.54. A *federal Ireland*, with the northern institutions constituting one element, is a further model. There would be several options as to the constituent units of such a federation: Northern Ireland on the one hand and the South on the other; the four historic provinces of Connacht, Leinster, Munster and Ulster as in *Éire Nua* (1972); or some other configuration, more in tune with current patterns of population and economic activity, such as grouping around city regions. A federal model would avoid some of the governance complications of lopsided devolution. But a two-unit federation would be imbalanced, and the record of two-unit federations is not encouraging (Vile 1982). And there would be significant cost and disruption in establishing federal structures.
- 7.55. A *confederal Ireland*, also considered by the New Ireland Forum, would less clearly meet the prescription of unity laid down by the 1998 Agreement, since it would involve the creation of an independent Northern Ireland state, albeit under the aegis of the confederation. There would be uncertainty over the EU status of the northern entity, and a need for substantial amendment to the Irish Constitution.
- 7.56. It is very difficult, if not impossible, to make the case that *joint sovereignty*, as an end state rather than a transitional arrangement—which was a further New Ireland Forum candidate—amounts to unity. The other models occasionally floated (if rarely in more than theoretical terms) of an *independent Northern Ireland*, or *repartition* so as to exclude from Northern Ireland nationalist-leaning areas nearest the border, clearly do not meet the prescriptions of the Belfast or Good Friday Agreement.

VARIANCE WITHIN THE CORE MODELS

- 7.57. Within the core models, there is substantial room for variance. For example, within a unitary Ireland with a single legislature, there might nevertheless be Northern Ireland executive institutions distinct from those elsewhere in the state—as was the case in Scotland and Wales before devolution. So existing institutions for education or health

service provision might continue, at least for a time. Some new all-Ireland institutions could follow the northern, rather than the southern, model.

- 7.58. Within the devolved model, the range of responsibilities devolved might be varied. Rigidly adhering to the model of mirror image devolution would be straightforward in principle, and might reduce the scope for argument. But some might favour Northern Ireland also taking on some responsibilities that have hitherto been handled by London—such as elections. On the other hand Stormont holds some of its responsibilities by virtue of being on a different island from Great Britain: there might be arguments for ceding some of these to all-Ireland control—for example, energy.
- 7.59. There would be questions about the basis on which a devolved Northern Ireland would return members to the Irish Parliament. The main question is, to adopt the UK terminology, how the ‘West Lothian’ question would be addressed. Why should Northern Ireland members have a vote on decisions on, for example, housing policy in the South when that policy does not directly impact on their constituencies, since the subject is devolved?
- 7.60. Would the answer, as at Westminster currently, be to provide for Northern Ireland members not to vote at certain stages on questions that are devolved in the North—‘Southern Votes for Southern Laws’? Embodied in such a restriction would be a risk of an Irish government being selected on the basis of its majority across the island of Ireland, but then finding itself unable to enact its agenda in the South, having no majority amongst southern TDs. The numbers involved would mean that the risks were much greater than at Westminster, where Northern Ireland has 18 members out of 650; if the current Dáil were enlarged to accommodate Northern Ireland members on the same population basis, as provided for in the Constitution, it would have about 62 seats in addition to the present 160.
- 7.61. Until 1979, Westminster had a different approach to these issues as regards Northern Ireland. In recognition of its devolved arrangements (then the only ones in the UK), its representation at Westminster was less generous than for other parts of the UK: it had 12 seats, increased when the principle was abandoned to 17 (now 18). But such a principle applied to a new all-Ireland Parliament would clearly be open to challenge as a flawed approach to nation-building. It would also require constitutional amendment.
- 7.62. Other aspects of government would need to be considered. Under a devolved model there might be an Irish government minister responsible for the North, as the Secretary of State for Northern Ireland currently is, though the role might be different in various respects in the new context.
- 7.63. The mechanism for allocating funding to a devolved Northern Ireland administration, if that continued in the new state, would likely come under close scrutiny. The UK Barnett formula (see House of Commons Library 2020) may not easily transfer to the new situation, where Northern Ireland would form so large part of the Irish spending picture.

- 7.64. The North–South arrangements in Strand Two of the Agreement could have a continuing or enhanced role in a devolved context. The Agreement established a range of North–South structures and bodies. The North South Ministerial Council brings together ministers from Belfast and Dublin, in a range of formats. There are also a number of executive bodies operating across the island. In the case of a unitary Irish state, it is difficult to see the Council continuing in the present form, but if there were devolution it would have a rationale, though a very different one from at present. Indeed it might take on, or be augmented by, formal liaison mechanisms between the northern and the central authorities about the impact on Northern Ireland of the responsibilities of the central government (just as in the UK, the central government and devolved administrations liaise—with varying degrees of effectiveness—through the Joint Ministerial Committee).
- 7.65. Some may wish to revise the internal machinery of devolution in Northern Ireland to reflect new patterns of electoral support and identity. The current system makes provision for members of the Assembly to designate themselves as unionist, nationalist or other, and gives certain special recognition to unionists and nationalists—a proportion of the concurring votes of each is necessary to carry key votes, under the cross-community support rules. Even today, this may be seen as anomalous given changing patterns of voting behaviour, with the unionist and nationalist traditions currently less dominant than in the past.

IDENTITY ISSUES AND OTHER CHARACTERISTICS OF THE IRISH STATE

- 7.66. Some will argue that a new agreed Ireland should review the approaches taken to certain issues in the current Irish Constitution and by long-standing Irish governmental practice. Examples can be briefly stated, but they are potentially of great political sensitivity:
- *Language*: There would be particular focus on Irish constitutional and other provisions that accord the Irish language special and sometimes primary status, whereas in Northern Ireland for most purposes it has no similar legal recognition and English has primacy. The treatment of Irish and Ulster Scots in Northern Ireland is yet to be settled.
 - *Flag, national anthem, other symbols*: Regarding the flag, some would argue for continuation of traditional Irish practice, and point out that the Irish tricolour of green, white and orange was itself designed as a symbol of the uniting of identities within Ireland. Others might favour a comprehensive revision to reflect the creation of a fundamentally new state. Similar debates will occur over the anthem and other symbols, though the harp may be less controversial.
 - *The Commonwealth*: Might Ireland rejoin the Commonwealth? This idea is often discussed, but would raise significant sensitivities.

- *Monarchy*: Should there be some recognition of the British monarchy, even if falling short of any material role, as an institution valued by some of the new state's people (who may retain British citizenship)?
- *Neutrality*: Northern Ireland by virtue of its membership of the UK shares in full membership of NATO; the Irish state has a history of neutrality, and is not a member of NATO, though it is a member of its Partnership for Peace programme.
- *Capital*: Should Dublin be the capital of the unified state; or Belfast; or would it be appropriate to choose a new location? If Ireland federalises, or if there is devolution, would the institutions of government and law be shared among Belfast, Dublin, and other locations?

CONSTITUTIONAL AMENDMENT PROCESS

7.67. At present, changing the Irish Constitution requires that a Bill to amend the Constitution be approved by both Houses of the Oireachtas and then by a simple majority of the people voting in a referendum. By way of reassurance to northern opinion or parts of it, there may be arguments for entrenching certain features of the state against change, permanently or for a certain period, or subjecting them to a more onerous amendment procedure, such as a requirement for majorities both in the North and in the South.

A NEW IRISH CONSTITUTION?

- 7.68. A significant question is whether the existing Irish Constitution, Bunreacht na hÉireann of 1937, would become the Constitution of the enlarged state, with necessary amendments to accommodate the accession of Northern Ireland; or whether there would be a new Constitution.
- 7.69. Historically, that Constitution was a product of a nationalist outlook, and, although adopted in the name of 'the people of Éire', defined to include the entire island of Ireland, was approved only by voters in the South (by 57% to 43%) in 1937. It has been amended many times since, often reflecting markedly different values from those of the initial drafters. Some, notably Leo Varadkar as Taoiseach, have suggested that a wholly new Constitution would be necessary in the context of a new Ireland (Moriarty 2019a). The hope would presumably be that citizens from the North would be involved in making the new constitution, and hence could feel as much part of the new structure as those in the South.

THE OPTION OF A UNITED IRELAND: POLICY QUESTIONS

7.70. There are many cases where Northern Ireland has institutions very different from those in the South, whether because they were created to respond to its particular

problems, or because they reflect UK-wide approaches. In the context of unification, there would be difficult questions about how to deal with these two differing sets of institutions.

- 7.71. Some questions would only arise, or would be more significant, if unification were brought about on a unitary model. But many carry significant political weight.
- *Taxation and finance:* There would be significant questions about the transition of Northern Ireland to an all-Ireland tax system (the Northern Ireland Assembly and Executive at present raises little taxation of its own). It might be found necessary to institute a plan for radical economic change in Northern Ireland, and the Dublin government would likely control the issuance of debt and the setting of all-island taxation rates—with room for marginal changes under devolution, and perhaps for more significant fiscal autonomy for federal units under a federation. There would be other areas in which similar questions would arise.
 - *Public administration:* Principles might be established to govern the integration of public services: some fused services might follow the southern pattern, others the northern; or the general rule might be that where services were fused, for example, they would take on a completely a new identity, rather than one of the former ones.
 - *Health provision:* The different parts of the island have fundamentally different systems of health provision: the North through the National Health Service, largely funded through taxation and free at the point of use, the South through a model involving greater charging and widespread private insurance of those in work. There are plans for substantial reform of health provision in the South. But change from either model might be a serious upheaval, practically, but also totemically, with enormous political resonance—the NHS is highly valued by many, and for some is an emblem of the British state. Funding the NHS in Northern Ireland within a united Ireland might raise major difficulties and questions of equity, however.
 - *Welfare provision:* Again, different systems apply in each part of the island, the North largely observing parity within a UK-wide system, directly funded from the British Treasury; and changes might mean both winners and losers.
 - *Education:* Primary and secondary education in the North remains in large measure voluntarily segregated along community lines, under a variety of models of governance and funding, despite energetic attempts to advance integration. Much, however, is conducted under state auspices. The Irish Constitution currently mandates an educational system through which the state largely supports private providers (mostly churches) to deliver education. There are also substantial differences between the jurisdictions in curricula and narratives of history. Arrangements would also be needed for universities.

- *The civil and criminal law:* Under devolution, at least, the current law might carry over, and perhaps also under a unitary system—at least for a period of time after unification. Its interaction with the Irish Constitution would, however, need to be looked at; and new rules on internal conflict of laws might be required. A move to full harmonisation of the law across the two parts of the island would require prolonged effort.
- *Rights and equality:* The North currently has substantial provision of its own for upholding, for example, equality of opportunity in employment, different from that in the South, some of it embodied in the Agreement.
- *The courts:* Under devolution, a separate Northern Ireland court system might remain, but with an appeal to a central Irish supreme court—either the existing one or, if a blank sheet plan of constitutional design were adopted, a new institution. There might need to be provision for a fixed number of Northern Ireland judges on the Court. Under a unitary plan there would presumably be new courts in the North, on an island-wide model.
- *Policing:* This has been an issue of great sensitivity in Northern Ireland: the creation of a Police Service of Northern Ireland with cross-community acceptance was a major achievement of the 1998 Agreement. It is overseen by a Policing Board composed of a careful mix of representatives of the main political parties and independents. Its assimilation into the Garda Síochána, especially if accompanied by the removal or weakening of northern political oversight, might provoke very strong feeling (even though the Garda is currently headed by a former senior officer of the PSNI). Various policing and national security functions are also carried out in Northern Ireland by UK institutions: these would need to transfer to the PSNI, Garda or another new or existing institution.
- *Armed Forces:* The British armed forces recruit in significant numbers in both parts of Ireland. And there are military installations in Northern Ireland, though those working in them are generally part of the wider army capability, rather than having functions relating to Northern Ireland. Given existing recruitment patterns, the British forces might presumably continue to recruit in both parts of Ireland; though there might be options for personnel to transfer if they wished.
- *The civil service:* Currently, most central administration in Northern Ireland is carried out by members of the Northern Ireland Civil Service, a body completely separate from the Home Civil Service, which carries out central government functions in Great Britain. There would be questions about how it carried over into either a devolved or unitary model. Some central government functions in Northern Ireland that are the responsibility of London, notably taxation, are carried out by members of the Home Civil Service. An issue would be on what terms those services, and civil servants, were assimilated into Irish unitary bodies.

- *Other state-owned or regulated services:* Multiple additional bodies would need to be considered. The publicly owned BBC, for example, is the principal public service broadcaster in Northern Ireland, funded through the television licence. Would it continue, would its Northern Ireland operations be assimilated within the Irish public broadcaster RTÉ—or might it continue on a cross-border basis (see below)? And how in that event would it be funded? Postal services in Northern Ireland are provided by the Royal Mail and Post Office, the former a privately owned company. Government policy and regulation is a matter for London. An Post in the South is a state-owned provider. Would these arrangements in any way be fused?

EAST–WEST RELATIONS UNDER A UNITED IRELAND

- 7.72. Arrangements for what are in the Agreement called Strand Three issues might loom large. The term encompasses a range of East–West relationships: between London and Dublin bilaterally; and between institutions (executive and parliamentary) in the different parts of Ireland, the UK institutions, and those of Scotland, Wales, the Channel Islands, and Isle of Man. Some people may see in the context of Irish unification a significant case for doing more across the two principal islands (and perhaps the more so if Scotland were to move towards independence).
- 7.73. There would be arguments of utility for more cross-border arrangements, as regards services being broken up that might more effectively be provided together. There would also be arguments about symbolism and identity: in successive Northern Ireland political negotiations, including those leading up to the 1998 Agreement, Unionists have set great store by enhancements in East–West joint activity. The Prime Minister and Taoiseach agreed on 13 August 2020 that there was in any event a need for a new framework for relations between the British and Irish governments in the context of Brexit (Moriarty 2020).
- 7.74. A prominent example of an organisation providing shared services across the UK, and to some degree in the rest of Ireland, is the BBC, discussed above. It is currently the principal public service broadcaster in the UK, including Northern Ireland and Scotland—and it has been widely viewed in the South. In the event of unification (and potentially Scottish independence), is it possible to envisage there being a demand for it to have a cross-border role?
- 7.75. There may be questions here about the potential strengthening of the Strand Three supervisory and oversight institutions for such work. Currently the main institutions are the British–Irish Council and the British–Irish Parliamentary Assembly.

THE OPTION OF REMAINING IN THE UK

7.76. If voters opted against unification, then Northern Ireland would remain in the United Kingdom. Much less can be said about this eventuality than about votes for unification. Legally and procedurally, a decision not to proceed with unification need in principle have no immediate consequences. Administratively no changes would be needed if the outcome of the referendums was retention of the Union: there is a status quo which already functions, within the framework set out in the 1998 Agreement. The Agreement and the political settlement that it embodies would in principle remain in place.

PROPOSALS FOR A REFORMED UNION

- 7.77. However, it is possible that proponents of the Union, in arguing for its retention, might put forward a programme of reforms to the way that it operates. In the referendum campaign, proponents of the Union would be seeking to win support among nationalists, as well as the non-aligned. It might therefore be rational for them to address points of concern to these groups. Indeed, they might feel obliged to do so in order to win the vote.
- 7.78. In recent years nationalist concerns have focused on respect for the Irish identity; the need for more effective cooperation and interaction with the South; concern over the implications of Brexit; copper-fastening the protection of human rights; and aspects of Stormont's governance arrangements. Some of these issues were addressed in the *New Decade New Approach* agreement by which devolved government was resumed in early 2020, although much of that remains to be implemented.
- 7.79. There may be scope for developing aspects of the Agreement further. On a wider plane, there might be scope for reforms to the structure of the Union as a whole, such as the introduction of federalism; and reforms to East–West arrangements under the 1998 Agreement.
- 7.80. It would be preferable if these propositions were put forward at an early stage in any referendum campaign, or before, when they could be subject to scrutiny and debate. But it is possible that they might be offered in response to developments during the campaign. A precedent for this is the 'Vow': a set of commitments to grant further autonomy to Scotland, put forward at a late stage in the Scottish independence referendum in 2014, and subsequently implemented in the Scotland Act 2016.

REFERENDUM COMMITMENTS AND THE PRINCIPLE OF CONSENSUS

- 7.81. If such propositions were put forward, would a vote to remain be a mandate for them? As we stated at paras 6.42–43, it would not be sufficient on its own. It is the established practice in Northern Ireland—exemplified in the rules by which the 1998

Agreement was reached and by which it has developed—that changes in governance are to be agreed by consensus. There would be no warrant for jettisoning that understanding and returning to a majoritarian basis for decisions on Northern Ireland governance in the context of a referendum.

- 7.82. Hence a vote for remaining in the Union in a referendum which was accompanied by a set of proposals for reform by the proponents of the Union might certainly lead to the proposals being put on the table in a political negotiation. But it ought not to do more than that: there should not be changes that displace any provisions of the Agreement without consensus.

POLITICAL CONTEXT AFTER A VOTE AGAINST UNIFICATION

- 7.83. While in principle there would be no need for any changes to be made if the unity proposition was defeated in either jurisdiction, in reality, there could be many political consequences that would need attention. Referendums on this issue would have the potential to polarise political discourse over a period of years. Keeping constructive politics and the Agreement machinery in operation during this period might require much care and attention.
- 7.84. If the vote was narrowly against unification, this might become the focus of politics in the ensuing years, with proponents of unity looking to further referendums after the statutory interval of seven years.
- 7.85. Particularly difficult though unpredictable political consequences might arise if unification were defeated on a split vote: a vote for unification in the North but not the South, or vice versa. This scenario would seriously threaten political stability. If a vote for unification was won in the North, but lost in the South, nationalism would be left orphaned, with the long cherished united Ireland ideal being abandoned by Irish voters in the South. Meanwhile, the legitimacy of the institutions in the North, which its electors had voted to end in favour of unity, might feel undermined. If the vote was lost in the North, but won in the South, Irish governments thereafter might become more proactive in seeking unity. Sustaining cooperative relationships between the two parts of Ireland, and between the two main traditions, might become harder.
- 7.86. The challenge to stability would be greater if the vote was lost in one part of the island, but nevertheless a majority of those voting across the island as a whole expressed themselves in favour of unity. The clear principle of the 1998 Agreement is that unification cannot take place without consent, even if by the smallest margin, in both parts of the island. Before the Agreement, many in nationalism for long disputed that principle, holding the island to be a single unit for purposes of self-determination. The dual consent principle might come under renewed challenge. It would be particularly important for the governments to work in partnership to seek to ensure that politics remained constructive.

7.87. We examine split votes further at paras 10.53–64.

CONCLUSION

- 7.88. We have minimally scoped out the matters that would need to be resolved to determine the shape of a united Ireland. We emphasise that we have sought no more than to identify these issues in order to understand what any decision-making process would need to encompass. We have made no attempt to evaluate options. We have highlighted that the range of matters would be very broad, and some of these would be complex and difficult. But we have also emphasised that there are some favourable circumstances, and we make no suggestion that the difficulties would be insurmountable.
- 7.89. We have also, necessarily more briefly, considered the option of remaining in the Union. This choice could simply involve the maintenance of the status quo, without formal change. But reforms to current arrangements could be proposed. And the dynamics of politics would inevitably be altered by unification referendums, whatever the outcomes, in ways that would need to be carefully managed.

8. DECIDING TO CALL A UNIFICATION REFERENDUM IN NORTHERN IRELAND

- 8.1. This chapter examines how decisions on whether to call a referendum on the unification question in Northern Ireland should be made. Under the 1998 Agreement and the (UK) Northern Ireland Act 1998, that decision lies solely with the Secretary of State for Northern Ireland.¹ There are two crucial elements. First, the Secretary of State *may* call a referendum at any time, provided no such poll has already taken place within the preceding seven years. Second, the Secretary of State *must* call a referendum, again subject to the seven-year rule, if a majority for unification appears to the Secretary of State to be likely. We refer to these elements as the *discretionary power* and the *mandatory duty*.
- 8.2. In what follows, we set out the relevant legal provisions, including their interpretation in a recent court case. We consider what these provisions mean for the Secretary of State and for other actors, notably the Irish government. Then we examine the two elements in turn.
- 8.3. Regarding the discretionary power, we consider whether there are circumstances under which a Secretary of State might ever choose to exercise it. There are some, though the matter is highly political.
- 8.4. As to the mandatory duty, we analyse the various types of evidence that might be used to assess the likelihood of a majority for unification and the weight that should be attached to them. We consider the processes that might be adopted in doing so, including a proposal that a formal review process should be established if the Secretary of State ever saw a significant chance that they would call a vote.
- 8.5. How the Secretary of State exercises these powers is of fundamental political importance. The provisions on constitutional status are a keystone of the settlement embodied in the 1998 Agreement. Profound consequences would follow from any decision to call a referendum: even before the vote, and irrespective of the outcome, the nature of politics in Northern Ireland, and perhaps in the South, would change fundamentally. The Secretary of State is thus entrusted with a great responsibility. Judgments made in this context must be made with care and command the greatest possible trust across the community.

¹ The text of the Northern Ireland Act simply says ‘the Secretary of State’, without specifying which Secretary of State. That reflects a legal convention in all statutes. In practice, the decision lies with the Secretary of State with responsibility for Northern Ireland affairs.

CALLING A REFERENDUM: LEGAL PROVISIONS

WHAT THE LAW SAYS

- 8.6. Section 1 of the (UK) Northern Ireland Act 1998 provides for the possibility of a referendum—or ‘poll’—in Northern Ireland on whether Northern Ireland should remain part of the United Kingdom or become part of a united Ireland. Schedule 1 of the Act sets out how any such vote would come about:
- (1) The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.
 - (2) Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.
 - (3) The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.
- 8.7. This text was contained in full in the 1998 Agreement. It was thus agreed by the two governments and the other parties to the Agreement.
- 8.8. The first paragraph gives the Secretary of State (for Northern Ireland) a discretionary power to call a referendum at any time, subject to the seven-year provision in paragraph 3. The second paragraph establishes a mandatory power to call a referendum, which must be exercised if a majority for unification appears to the Secretary of State to be likely. The Secretary of State would clearly exercise this function in consultation with government colleagues. Any referendum would be called by ministerial order, which (under section 96(2) of the Northern Ireland Act) would need to be approved in both houses of the UK Parliament.

LEGAL INTERPRETATION: THE *MCCORD* CASE

- 8.9. A recent legal case—the case of *McCord*—provides some interpretation of the 1998 Act provisions. The applicant, Mr McCord, sought to oblige the Secretary of State to set out a policy as to the circumstances in which a referendum would be ordered under the 1998 Act. The Secretary of State resisted. The case was heard by the Northern Ireland High Court, and subsequently the Court of Appeal (*McCord* High Court Judgment 2018; *McCord* Court of Appeals Judgment 2020). The Court of Appeal upheld the High Court’s conclusion that the Secretary of State was under no such obligation.
- 8.10. The *McCord* judgments not only clarify the law, but also provide useful evidence on the thinking that has already taken place within government on this matter. So too does an affidavit submitted in the case on behalf of the then Secretary of State, which has reached the public domain via a report published by the Irish Senator Mark Daly. We examine key parts of the judgments and the affidavit in the relevant

sections below: in relation to use of the discretionary power at paras 8.16–19; on the sources of evidence that might be used to assess the state of public opinion at paras 8.38–44, and on the heart of the case—whether the Secretary of State might set out a policy on the matter—at paras 8.93–94.

- 8.11. The judgments also made broader statements about the Secretary of State’s duties under the law. In particular, the Court of Appeal repeatedly made clear that, in the discharge of functions under the Act, the Secretary of State must not only act honestly; drawing on paragraphs (ii) and (v) of the Constitutional Issues section of the 1998 Agreement, the judges stressed particularly the need to ‘act with rigorous impartiality in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination’ (*McCord* Court of Appeal Judgment: para 82; also paras 50, 67, and 72).

THE ROLE OF THE IRISH GOVERNMENT

- 8.12. Neither the Northern Ireland Act nor the Agreement expressly accords the Irish government any role in decision-making on whether or when to call a referendum in Northern Ireland. Nevertheless, the Agreement provides that unification could happen only with ‘consent ... concurrently given, North and South’. As we explained in Chapter 4, our view is that a vote in favour of unification in Northern Ireland would require that a referendum be held in the Republic. Similarly, in the High Court in *McCord*, Sir Paul Girvan said that ‘in effect, if not de jure, there would have to be an agreement between the UK and the Republic to have parallel polls in each jurisdiction’ (*McCord* High Court Judgment: para 5). The Court of Appeal quoted this paragraph, and agreed ‘that there is such an inter-relationship which must involve both governments’ (*McCord* Court of Appeal Judgment: para 57).
- 8.13. Does this mean that the decision on whether to hold a referendum in Northern Ireland must in effect be one for both governments? The judgments need to be read in the context that, as a matter of law, the Secretary of State cannot bind themselves to proceed only with the consent of the Irish government.
- 8.14. In our view, it would be highly unwise in any foreseeable circumstances for the Secretary of State to call a poll in the exercise of the discretionary power without the endorsement and close cooperation of the government in the South. Discussion and agreement of the matter could take place through the British–Irish Intergovernmental Conference (BIIGC) or through a new bilateral institution. We elaborate on this further in the next section.
- 8.15. As regards the mandatory duty, the law casts a duty on the Secretary of State alone to act if they believe there would be a majority for unity, and the reaching of that judgment cannot be shared with the Irish government. But it may be expected and hoped that the two governments would share their assessments of the state of opinion as of many other things, and seek to remain in step. Consistently with the general approach of the Agreement, the Secretary of State could properly take into

account any views of the Irish government—and, indeed, those of other actors, such as the political parties in Northern Ireland—as to the likely outcome of a vote on the question of unification in the North. If there were a difference between the governments on this question, the issue might be raised by the Irish government formally through the BIIGC, attracting the requirement for determined efforts to resolve disagreements.

THE DISCRETIONARY POWER

8.16. As set out above, the Secretary of State has a wide discretionary power to call a referendum. This point is sometimes skated over by commentators and political figures, but it is clear in the text of the Agreement and the Northern Ireland Act. In the High Court judgment on the *McCord* case, the judge, Sir Paul Girvan, expressed the discretion in very broad terms:

The discretionary power as opposed to the mandatory duty to call a poll could be exercised by the Secretary of State for a number of different reasons and in different circumstances. For example, the Secretary of State could call a poll in order to give a quietus to the controversial question of a united Ireland for a period of time if she thinks that a majority would vote in favour of remaining in the United Kingdom. She could direct such a poll if there was a doubt in her mind as to whether a majority was to be found on one side or the other. She could decide to call such a poll if persuaded by political representatives that it would be desirable to sound the people out on the issue or to close the issue for a number of years. The precise circumstances and the political context of a decision are variable and highly political. ... In essence it must be for the Secretary of State to decide on what matters should be taken into account on the political question of the appropriateness of a poll. (*McCord* High Court Judgment: para 18)

8.17. The Court of Appeal similarly noted that ‘The discretion to direct the holding of a border poll is unqualified’ (*McCord* Court of Appeal Judgment: para 68). But it added, ‘The discretion must be exercised honestly’ (para 70) and ‘The exercise of the discretion is based upon the respondent’s [i.e., the Secretary of State’s] assessment of whether directing the holding of a border poll is in the public interest which assessment involves political judgment’ (para 71). Furthermore, it said that the text of the Agreement constituted an ‘aid to the interpretation of what is in the public interest’ (para 72). It said that, in combination, paragraphs (ii) and (v) of the Agreement’s Constitutional Issues section meant ‘that not only must the respondent act honestly in the exercise of discretion to direct a border poll but he must also act with rigorous impartiality in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination’ (para 72). Notably, it also said:

the respondent would not be acting with rigorous impartiality if in the face of diminishing support for Northern Ireland remaining in the United Kingdom he directed the holding of a border poll with the sole purpose of achieving a

majority to remain and thereby to delay a united Ireland for a period of 7 years.
(para 66)

- 8.18. The courts have thus viewed the exercise of the discretionary power as a matter for political judgment, but not as entirely unconstrained by legal considerations. In addition to the points above, it should be noted that, the discretion having been granted by Parliament, the Secretary of State could not lawfully close their mind to the possibility of using it. To do so would be to ‘fetter’ the discretion.
- 8.19. So are there any circumstances in which the Secretary of State might choose to exercise the discretionary power and call a referendum—or might at least be wise to do so? We think that the three circumstances envisaged by Sir Paul Girvan in his judgment in the *McCord* case in fact provide a helpful summary. These are: calling a referendum in expectation of a majority for maintaining the Union; calling a referendum when the balance of evidence on public opinion is unclear; and calling a referendum in response specifically to a vote in favour of doing so in the Assembly.

CALLING A VOTE IN EXPECTATION OF A MAJORITY FOR MAINTAINING THE UNION

- 8.20. Under the first circumstance, the Secretary of State would call a referendum in expectation that the majority would favour maintaining Northern Ireland’s place in the Union. As we noted in Chapter 3 (para 3.5), some prominent unionists have since 1998 called for a vote on this basis. There are also parallels to the original introduction of the discretionary power in 1972, when the UK government made provision for the following year’s border poll in order to ‘take the border out of politics’ (Torrance 2019).
- 8.21. But a number of considerations push against exercising the discretionary power in this way. First, recent opinion polling, and experience with the evolution of opinion during recent referendum campaigns in the UK, may suggest that a Secretary of State could not be wholly confident of the outcome. Even if the majority was for maintaining the Union, if the margin was relatively narrow or if it appeared that momentum had been generated in favour of unification, it might become hard to resist a further vote after the minimum seven-year interval had elapsed. It is perhaps instructive that we have seen no senior unionists make the case for calling a referendum on this basis since the Scottish independence referendum of 2014. Far from taking the border out of politics, such a vote could leave the prospect of the next poll constantly hanging over day-to-day business.
- 8.22. Second, the experience of both the 1973 border poll and the 2016 vote on the UK’s EU membership leads to doubts about whether calling a referendum in the expectation that the proposal for change will be defeated leads to healthy politics. In 1973, the ballot was boycotted by nationalists, who saw the tactic that was being deployed. In 2016, the lack of detailed planning for a Leave victory contributed to the

acrimony and confusion that ensued. In its report on the referendum, the House of Commons Public Administration and Constitutional Affairs Committee—chaired, it should be noted, by a prominent Brexit-supporting MP—concluded: ‘Using a referendum as a “bluff call” in order to close down unwelcome debate on an issue is a questionable use of referendums’ (House of Commons Public Administration and Constitutional Affairs Committee 2017: 55).

- 8.23. Finally, any use of the discretionary power on this basis would be constrained by the 1998 Agreement, as set out by the Court of Appeal in *McCord*. It would be within the scope of the power for the Secretary of State to call a vote in the expectation simply that a majority would favour maintaining the Union. But calling a vote in order to delay a majority for unification by triggering the seven-year rule would go against the requirement for rigorous impartiality, and it may be seen as the use of a power for an improper purpose.

CALLING A VOTE WHEN EVIDENCE ON PUBLIC OPINION IS BALANCED

- 8.24. It is possible to envisage circumstances in which substantial evidence suggested there might be a majority for Irish unification, but this left room for reasonable argument on whether it was ‘likely’ that a referendum would so conclude. In this scenario, it is likely that tensions and polarisation would only increase, leading to possible paralysis of the devolution arrangements in the meantime. A Secretary of State (and an Irish government) might then feel that a poll needed to be called, in order to relieve the tension and move matters on.
- 8.25. We think this an imaginable scenario, though its likelihood may depend in part on the complexion of the government in London. In any case, it would be vital if this course were to be followed for the two governments to agree their approach, and develop a plan for how the referendums north and south would be conducted.

AN ASSEMBLY VOTE FOR A REFERENDUM

- 8.26. The final circumstance in which we envisage the Secretary of State might consider exercising the discretionary power is one in which the Northern Ireland Assembly voted in favour of unification, or voted that it believed a poll should be called, or that it believed a majority in a poll would favour unification.
- 8.27. Any formal resolution to this effect would probably be blocked under the Assembly’s cross-community voting rules. But the Agreement is clear in making the decision on constitutional status, unlike other important decisions, a matter for simple majorities. So whether or not such a vote formally became a decision of the Assembly or not, it would be hard to ignore.
- 8.28. Indeed, the degree to which such a vote would be politically transformative must be emphasised. For the majority in the Northern Ireland Assembly to express its view that a referendum should be held that could lead to the break-up of the UK and

establishment of a united Ireland would be a momentous step. The Secretary of State would need to take it very seriously.

8.29. There are at least two ways in which the Secretary of State might respond. First, they might announce a process of formally considering whether the state of public opinion meant that the mandatory duty to call a referendum was engaged. We look at this in paras 8.99–103, below. Second, they might exercise the discretionary power to call a vote.

8.30. A comparison with Scotland may be useful here, though a direct analogy is not possible given the different context set by the Agreement. The SNP was returned with a majority of seats in the Scottish Parliament in 2011, having campaigned on a manifesto commitment to a referendum. The wish of the parliamentary majority being clear, the then UK government conceded an independence referendum. It said:

In May 2011, the Scottish National Party won a majority in the Scottish Parliament; this was a significant electoral victory, which the UK Government has openly acknowledged.

The Scottish National Party entered the May 2011 election with a manifesto pledge for a referendum on independence. They have campaigned consistently for independence, and 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. (Secretary of State for Scotland 2012: 5)

8.31. Some may suggest that, in the event of a majority Assembly vote for a referendum, the Secretary of State ought to call a discretionary poll on the strength of this precedent. But the politics of this are clearly very sensitive. The position of the current UK government regarding Scotland is hostile to any further referendum. A London government resisting calls for a referendum in Scotland might be loath to call one in Northern Ireland as a matter of discretion.

8.32. We do not offer further comment on this matter, except to note that political contention around it may well increase after the Scottish Parliament elections in May 2021.

THE MANDATORY DUTY TO CALL A REFERENDUM

8.33. As stated in para 8.6, the Secretary of State must call a referendum 'if at any time it appears likely to him [or her] that a majority of those voting would' support unification. 'Likely' is not a term with a specific legal meaning. In this context, it can be presumed to mean simply 'more probable than not'. Two main questions arise. First, what sources of evidence would the Secretary of State use in order to make this judgment, and what weight should they attach to each? Second, how much evidence ought the Secretary of State to gather before making a decision?

8.34. Neither question is straightforward: making a judgment about the likely result of an as-yet hypothetical future referendum presents a number of conceptual difficulties.

- 8.35. One such difficulty is that any referendum would likely take place a period of months, perhaps years, after the decision to call it (see para 10.24–25). During the intervening period, proposals for unification and perhaps for reforms to the Union would be developed, factual analyses of the possible impact of different options would emerge, and a campaign would be held. Through all of this, public opinion might evolve substantially and unpredictably—as it often does in the course of referendum campaigns (LeDuc 2002). The Secretary of State could base their judgment only on evidence available at the time, which could not predict subsequent developments with any confidence. Yet the most likely interpretation of the law is that it requires the Secretary of State to focus on the state of opinion at the conclusion of the referendum period, on polling day. The judgment would be all the harder if there had been little informed debate in advance. The head of Northern Ireland’s most prominent opinion polling organisation, LucidTalk, has stressed the difficulty of forecasting outcomes in advance of informed debate and campaigning (White 2020b).
- 8.36. A second factor complicating the Secretary of State’s decision is that the Act does not specify the franchise for the referendum—it would be set out in the Order calling the poll (see Chapter 12)—and therefore does not define the group within which the likelihood of a majority for Irish unification is to be judged. No Secretary of State has so far indicated any intentions as to the franchise, but it could affect the likely result. In the *McCord* case, the courts specifically dismissed the suggestion that the Secretary of State was obliged to decide on the franchise ahead of making a decision to call a referendum.
- 8.37. A third complication is that the Act does not set out the question or questions to be asked in the poll: again, the formulation would appear in the Order (see Chapter 13). No indications have so far been given. Potentially, again, these may impact on the likely result of the vote.

POSSIBLE SOURCES OF EVIDENCE

- 8.38. So what evidence should the Secretary of State take into account in making a judgment as to the likelihood of a majority vote for unification? Some information about existing thinking on this matter is in the public domain. An affidavit written in January 2018 for the *McCord* case on behalf of the then Secretary of State, Karen Bradley, has been published in a report by Irish Senator Mark Daly. It first states:
- In order to make an assessment about both public opinion within Northern Ireland and whether a poll is in the public interest, the Secretary of State has the benefit of a constitutional position which places her very close to all areas of political life in Northern Ireland.’ (Sloan 2018: para 13)
- 8.39. It elaborates on this point, saying that the Secretary of State has ‘continuing and regular contact with electoral political representatives within Northern Ireland, across all political parties’ (para 13), and adding, ‘the Secretary of State also enjoys

the benefit of frequent engagement with members of the public, community groups and business organizations etc., all of which help to inform her judgment about public opinion in Northern Ireland and her understanding of the public interest’ (para 14). The affidavit then continues, more specifically:

In relation to making an assessment about the likely outcome of a border poll, the Secretary of State may decide to take account of opinion poll evidence or may even decide to commission such evidence. To date, no Secretary of State has ever done so. The Secretary of State is also likely to be informed by the results of any elections and opinion evidence, where available and reliable. (para 14)

- 8.40. The affidavit also reproduces a letter dated 7 July 2017 from the previous Secretary of State, James Brokenshire, to Sinn Féin’s Michelle O’Neill, saying:

In considering whether it appears that a majority of those voting would express a wish that Northern Ireland should leave the UK and become part of a united Ireland, I must have regard to relevant factors. Relevant factors may include appropriate polling data or other reliable evidence that might indicate the likely outcome of any referendum. (Letter from James Brokenshire to Michelle O’Neill, 7 July 2017; reproduced in Sloan 2018)

- 8.41. Finally, the affidavit includes the advice given to the Secretary of State in relation to that letter by officials, which says, ‘In considering the draft reply, you have already decided not to indicate that the views of a majority of Northern Ireland politicians should be cited as a relevant factor’ (Sloan 2018).
- 8.42. We should not presume that the affidavit necessarily reflects extensive thinking on the issue by ministers. There is also no guarantee that a future Secretary of State would take the same view: the affidavit is explicit that ‘no fixed set of criteria or sources of evidence has ever been prepared’ (para 14). Nevertheless, the affidavit provides a snapshot of thinking within the UK government. It suggests that a Secretary of State might take account of polling or survey evidence, election results, and less formal evidence from contacts among political representatives and in civil society. It hints that they might give less weight to election results in terms of seats won than in terms of votes cast. It should be noted that it was written at a time when the Assembly was not sitting, which may explain why it does not mention the possibility of an Assembly vote on the referendum question.
- 8.43. In the High Court, the judge, Sir Paul Girvan, voiced similar conclusions. He said that holding a border poll ‘involves extremely complex political considerations and if not carefully handled taking account of prevailing circumstances it could give rise to great instability’ (*McCord* High Court Judgment: para 5). He set out what must be the general approach of the Secretary of State (para 20):

If the evidence leads the Secretary of State to believe that the majority would so vote then she has no choice but to call a border poll. It is necessarily implied in this provision that the Secretary of State must honestly reflect on the evidence available to her to see whether it leads her to the conclusion that the majority would be likely to vote in favour of a united Ireland. Evidence of election results and opinion polls may form part of the

evidential context in which to exercise the judgment whether it appears to the Secretary of State that there is likely to be a majority for a united Ireland. The overall evidential context on how it should be analysed and viewed is a matter for the Secretary of State. The conclusion will have to take account of a wide range of factors and considerations dependent on prevailing circumstances.

- 8.44. In the Court of Appeal, the judges noted that the Northern Ireland Act ‘does not specify any matter which should be taken into account or any matter which should be left out of account in the assessment’ and ‘is silent as to the sources of information which the respondent might rely upon’. They added that the assessment of whether a majority for unification is likely ‘is essentially a political judgment’ (*McCord* Court of Appeals Judgment: paras 78–80).
- 8.45. In the absence of clear existing guidance, and given the multiplicity of sources of evidence that might be thought relevant, it is useful to consider what kinds of evidence the Secretary of State should be looking for. In the abstract, the following might be criteria for weighing whether and how far a particular measure for assessing opinion should be considered:
- To what degree does the source give direct evidence of people’s views on the question of unification itself?
 - To what degree is the source likely to anticipate the attitudes that would pertain on polling day, as distinct from current views that might well change in one direction or another?
 - To what degree can the source be relied upon to give an unbiased guide to the views of the people who would be able and likely to vote in a referendum?
 - To what degree is the source open to manipulation by those interested in securing a particular decision from the Secretary of State?
 - To what degree is the source free of measurement error?
- 8.46. In the affidavit on behalf the Secretary of State, the court judgments, and the written and oral evidence that we have received, we can discern six primary sources of evidence that might be taken into account:
- votes cast in elections
 - seats won in elections
 - votes held in the Northern Ireland Assembly
 - results of opinion polls and surveys
 - demographic data
 - qualitative evidence of views in different parts of the community.

In the following subsections, we examine each of these in turn against the criteria just set out.

VOTES CAST IN ELECTIONS

- 8.47. If in a future election a majority of votes were cast for parties that had campaigned on manifestos clearly favouring early Irish unification, that would be significant evidence for the Secretary of State to weigh in deciding whether the statutory duty was engaged. In particular, some witnesses have strongly argued to us that votes cast in elections should receive more weight than opinions expressed in polls and surveys, on the basis that the views expressed through such votes are more likely to have been carefully considered, and therefore more likely to reflect enduring attitudes. The people who participate in an election may also be thought to approximate those who would likely turn out at a referendum. In our public consultation, we asked specifically about the evidence that the Secretary of State should draw on in deciding whether to call a referendum, and evidence from election results was the most frequently mentioned source of information, among unionists, nationalists, and those identifying with neither group.
- 8.48. Nevertheless, electoral majorities by themselves would be less than a definitive indication for the purpose of the statutory test. The primary reason is that electors choose which party to vote for on the basis of a wide variety of considerations—for example, as a matter of community allegiance, or because of policy commitments on a particular issue or range of issues, or because of tactical voting. They do not necessarily subscribe to their preferred party's every policy. Voting for a certain party therefore does not necessarily mean that a person would also support that party's stance in a referendum. In terms of providing direct evidence of people's views on the unification question itself, votes in elections are therefore far from perfect. Extrapolations from past election results are problematic, as parties in those elections were not calling for an early referendum. But it is worth noting that, according to the Northern Ireland General Election Survey 2019, 20% of SDLP voters and 10% of Sinn Féin voters would have opted to remain part of the UK, while 2% of DUP voters would have opted for a united Ireland (Northern Ireland General Election Survey 2019: 14).
- 8.49. The assumption that election voting offers a good guide to turnout in a referendum also cannot be taken for granted. In international experience, turnout in referendums is on average lower than turnout in elections. But referendums on highly salient issues such as Scottish independence, Brexit, or Quebec independence, have attracted very high turnouts (Renwick 2017: 438–43). Turnout in the Scottish independence referendum of 2014 was 85%, far above the 56% in the Scottish Parliament elections four months earlier.
- 8.50. In so far as election results did receive weight in the Secretary of State's assessment, several further factors would need to be taken into account. What would matter would be whether nationalist parties won an *overall* majority of votes cast. A significant proportion of voters support parties that do not register as either nationalist or unionist in the Assembly. So the fact that there were more nationalist

than unionist voters, but falling short of an overall majority, would have little persuasive force. The detail of party policies would also matter: did they in fact seek unification in the short term? If the pro-unification majority comprised parties advocating very different timetables or forms of unification, that might also create doubt.

- 8.51. Which election the votes were cast in would deserve consideration too. First preference vote counts in Assembly elections would arguably give a rather more authentic view of the public mood than would those cast in elections to the UK Parliament under First Past the Post: a greater range of parties stand in Assembly elections, and there is less incentive for strategic voting. Local government elections might also give some evidence. But local government elections are in principle about local government issues, and the turnout is often low, so they may legitimately count for less in assessing the state of opinion.
- 8.52. A majority of votes cast for nationalist parties does not appear imminent. In the 2019 Westminster election, nationalist parties won about 39% of the votes, as opposed to just over 42% for unionists. Their vote share has not been rising: the nationalist vote share has been approximately stable across the last decade, while the unionist share has fallen, and the vote of parties that fall into neither camp has grown (Donaghy 2019).

SEATS WON IN ELECTIONS

- 8.53. Nationalist parties now hold a plurality of Northern Ireland's seats at Westminster—nine out of 18—while unionists hold eight. A nationalist majority in the Assembly is a more distant prospect, however: nationalists held 39 of the 90 seats there following the 2017 Assembly elections.
- 8.54. But counting seats is clearly further from the statutory test than counting votes: it gives even less direct evidence on voters' preferences. Given the vagaries of electoral systems, even proportional ones, a majority of seats held by parties favouring early unification would not necessarily mean a majority of votes even for those parties, still less for unification itself. It is thus appropriate that, as noted above, the then Secretary of State apparently chose to de-emphasise this source of evidence when writing to Michelle O'Neill in 2017. Of course, as implied by our preceding discussion of votes cast in elections, it would be a different matter if a seat majority were based on a majority of votes cast.

VOTES HELD IN THE NORTHERN IRELAND ASSEMBLY

- 8.55. It is possible that a newly returned Assembly would itself vote on the unification question. As discussed above, a vote by a majority in the Assembly in favour of unification would need to be given considerable weight by the Secretary of State in deciding whether to call a referendum under the discretionary power. That would be

especially so if the parties supporting the vote had pledged to work for a referendum during the Assembly's term in their manifestos for the preceding elections. But what weight would such a vote carry in the Secretary of State's assessment of the statutory duty?

- 8.56. Some caution would be required. The Secretary of State is obliged to assess the state of *public* opinion, not opinion among Assembly members. Just as the majority of seats won in an election may not necessarily reflect the views of a majority of voters, the same applies to a vote by a majority of Assembly members.
- 8.57. Nevertheless, if elected representatives offered their informed view as to the state of public opinion, that would properly carry significant weight with the Secretary of State. One reason for that is the Secretary of State's obligation to consider how people would vote in a future referendum. If a referendum were called, the path taken by public opinion ahead of polling day would partly be shaped by the actions and arguments of political representatives, who would likely play a central role in the course of the campaign. The views of those political representatives as to the nature of public opinion would therefore deserve close attention. We noted above that an Assembly vote in favour of a referendum—or in favour of the proposition that a majority would likely vote for unification—would be politically transformative, and would have to be taken into account by the Secretary of State.
- 8.58. If the Assembly is sitting, and a majority does not vote in this sense, does that mean that the duty to call a poll is not engaged? Again, there cannot be an absolute rule: if there were a weight of other trustworthy evidence pointing strongly towards a majority for unification, the Secretary of State should clearly weigh that in the balance. But the absence of an Assembly vote of this sort is something the Secretary of State might legitimately have regard to.

RESULTS OF OPINION POLLS AND SURVEYS

- 8.59. As we showed in Chapter 3, there are frequent opinion polls and surveys in Northern Ireland that ask about support for Irish unification. In terms of our first criterion for assessing sources of evidence—the degree to which it is direct evidence of people's views on the specific issue—such polls and surveys offer the best evidence available: a poll or survey can ask respondents essentially the same kind of question on the same issue as would a referendum. For this reason, some of those we have heard evidence from have argued that opinion poll evidence should be given the greatest weight. In our public consultation, such evidence was the second most frequently mentioned source of information that the Secretary of State should use, after election results.
- 8.60. Others we have spoken with, by contrast, have argued that opinion polls should receive little or no weight. There have been three main reasons for this. First, opinion polls are seen as offering evidence only on ephemeral opinions – attitudes expressed in a moment that are not necessarily based on deep reflection. A vote in an election,

by contrast, is taken as a deeper and more meaningful expression of views. Second, experience of apparent polling errors at recent elections and referendums in the UK and elsewhere has dented faith in polling evidence. Third, more specifically, opinion polls and surveys in Northern Ireland have suggested widely varying levels of support for unification, ranging within the past decade, as shown in Chapter 3, between just 16% and 51% of respondents once those saying that they don't know or would not vote are excluded. At least on the surface, these polls therefore give unclear and seemingly unreliable evidence as to how people would vote in a referendum. The existence of such wide variation implies that at least some polls and surveys are subject to substantial measurement error.

- 8.61. Regarding the first of these concerns, it is true that opinion polls often capture unconsidered responses to the questions posed. Opinion as expressed in polls and surveys in the early stages of a referendum campaign often differs markedly from that manifested in the final result, when people have presumably thought matters through rather more. But that may be true of election results too: that is, people may vote in an election without giving specific thought to how they would vote in a subsequent referendum were one called. It is not clear why, on this ground, polling or survey data should be thought less reliable than election results as a source of evidence on future referendum voting patterns.
- 8.62. As to the second concern, it is true that all opinion polls and surveys have a margin of error. For a standard survey with 1000 respondents, this is around 2.5–3%, depending on the level of confidence that is desired. As the number of respondents increases, the margin of error falls. But the concern is that polls sometimes exhibit biases beyond these margins.
- 8.63. In considering this, it is appropriate, given the context in which this interim report is published, for us to focus on evidence from the recent presidential election in the United States, where the perception quickly emerged that polls had seriously overestimated support for Joe Biden. There was indeed an overestimate, but it should not be exaggerated. The final polling average as calculated by the respected analysis organisation FiveThirtyEight (2020) over-predicted Biden's national vote share, and under-predicted Donald Trump's, by 2.5 percentage points, when other candidates and undecided voters are excluded. This is an appreciable amount in a tight contest, but no other source of evidence could come closer. The final state-by-state polling averages correctly predicted the winner in 48 states out of 50.
- 8.64. The third objection requires more detailed attention. Given the wide variation in findings, opinion polls and surveys could provide useful guidance as to the likely outcome of a referendum only if (1) there was a clear general pattern across the polls as to whether the majority of respondents favoured a united Ireland or not, notwithstanding differences in the absolute numbers, or (2) it was clear that some polls were reliable while others were not. The first of these conditions is currently met: the general pattern is that the majority of voters in Northern Ireland do not support a united Ireland; only one poll (besides polls asking about hypothetical

scenarios) has produced a (very narrow) contrary result. But it would take only a relatively small shift in the numbers for this pattern to change.

- 8.65. Can we, then, establish that some of the polls are clearly more reliable than others? This is undeniably a matter of some contention, and there is a natural tendency for people who support a particular answer to the unification question to cleave towards the polls that favour that answer. It is the task of this Working Group, however, to assess the reliability of different polls objectively.
- 8.66. As we showed in Chapter 3 (Figure 3.2 and paras 3.35–39), a marked divergence appears to have opened up depending on polling methodology: polls conducted online find much higher support for unification than surveys conducted through (typically face-to-face) interviews. So it is useful to consider whether we can judge one of these methodologies to be better than the other.
- 8.67. One way of doing so could be by comparing poll and survey findings with actual past election or referendum results. If either online polls or interview-based surveys were repeatedly closer to actual results, that would give us some reason to favour that approach.
- 8.68. Such comparison is difficult, however: online polls are often conducted just days before polling day, for the purpose of predicting the results, whereas most interview-based surveys are carried out well away from any actual vote, for very different purposes. What we can say is that those polls that are conducted in order to predict election results perform well. Northern Ireland’s main online polling company, LucidTalk, has achieved high levels of accuracy on this measure. For example, its pre-election poll for the 2019 Westminster general election predicted the actual vote shares of all the main parties to within the stated margin of error, of 2.6% (LucidTalk 2019). In the 2016 referendum on EU membership, LucidTalk estimated Remain at 57% and Leave at 43%, just one percentage point from the actual Northern Ireland result (Remain 56%, Leave 44%) (British Polling Council 2016).
- 8.69. An alternative way of comparing the approaches looks at the polling methodologies themselves. Online and face-to-face polls typically differ from each other in two main respects: how respondents are sampled; and how questionnaires are administered.
- 8.70. In terms of sampling, there are two approaches, which are known as ‘quota sampling’ and ‘probability sampling’. Online polls use the former. They are conducted using an existing panel of people who have signed up to answer surveys from the particular polling company. When it fields a survey, the company randomly invites people from the panel to complete that survey. It does so with the aim of meeting ‘quotas’ for different kinds of people—women and men, people from different age groups, and so on—to ensure that those answering are, in a sense, representative of the wider population. Interview-based surveys, by contrast, use probability sampling. That means that they sample from the whole population, giving everyone the same probability of being included. In the case of the Northern Ireland Life and Times survey (outside the current context of social distancing), for example, a database of

postcodes is used to select addresses. Commercial and vacant properties are excluded. Interviewers then visit the selected addresses and seek a randomly selected member of each household. For most interview-based surveys, if there is no response, the same property is repeatedly visited until a response is obtained, to ensure that respondents are as close as possible to a random selection of the whole population.

- 8.71. As to how questionnaires are administered, online polls always ask respondents to fill in an online form. Modern interview-based surveys generally use one of two approaches: the interviewer either asks the interviewee questions and inputs the answers into a laptop, or gives the interviewee the laptop to fill out the form themselves. The Northern Ireland Life and Times survey, for example, combines both of these methods, using the latter for particularly sensitive topics. Under the current social distancing measures, new methods have also been developed, with interviews conducted through online video platforms such as Teams and Zoom.
- 8.72. So what should we make of these different approaches? There is wide agreement that the ‘gold standard’ of survey methodology is random probability sampling from the whole population with multiple attempts at contact (see, e.g., Sturgis et al. 2016: 48). Major academic studies, such as the British Election Study, British Social Attitudes survey, Irish Election Study, and Northern Ireland Life and Times survey use this approach. So do official government surveys. In the UK, for example, the Office for National Statistics uses it for, among others, the Labour Force Survey and the Crime Survey for England and Wales. The Northern Ireland Statistics and Research Agency (NISRA) uses it, for example, for the Northern Ireland Safe Community Survey (formerly the Northern Ireland Crime Survey), the Continuous Household Survey, and the Northern Ireland Travel Survey. The Irish Central Statistics Office uses it, similarly, for, among others, the Labour Force Survey, National Travel Survey, and Household Survey.
- 8.73. Ipsos MORI, a survey company that offers a full range of face-to-face, telephone, and online options, says:
- Where clients need a very high degree of accuracy or the assurance that all possible steps have been taken to remove any biases or distortions, only the purest forms of random probability sampling with face-to-face interviewing may be suitable, as is the case with many of the major government surveys that Ipsos MORI conducts. Less rigorous methodologies would simply not be fit for purpose. (Ipsos MORI 2006)
- 8.74. Official guidance from the UK’s Government Statistical Service states a clear preference for probability sampling over any form of quota-based sampling:
- quota sampling should only be used in government if there are compelling reasons for not using a probability sampling approach – which should be the default choice for survey research (Brown et al. 2017: 6).
- 8.75. The guidance continues that quota sampling should not be used ‘[i]f your research is about informing important policies, government forecasts, important/controversial/

high profile debate or is relied on as evidence for a select committee’ (Brown et al. 2017: 6).

- 8.76. The reason for this consensus view is essentially that a genuinely random sample from the population will on average mirror the make-up of the population very closely, whereas a sample from a panel might be skewed one way or another. Problems could arise if a genuinely random sample is impossible to obtain—which could occur if some kinds of people are more likely to refuse to take part than others. But evidence suggests this rarely actually affects the results (see, e.g., Groves 2006: 667–8), and corrective steps can be taken if necessary. A recent survey of the substantial scholarly literature on the subject finds that most studies show probability sampling to be more accurate. Its authors conclude: ‘Based on the accumulated empirical evidence, our key recommendation is to continue to rely on probability sample surveys’ (Cornesse et al. 2020: 22).
- 8.77. For the present case, a further consideration is the need to choose an approach that minimises any danger that the results could be manipulated by those with an interest in the results. A survey that is based on a random sample of the entire population makes manipulation very hard. Where a survey is based on a panel of volunteers, by contrast, it is at least in theory possible that groups with an interest in the issue could attempt to manipulate the results by seeking to flood the panel with people sharing their perspective. We emphasise that we have seen no evidence that this has happened in Northern Ireland, and online polling companies perform checks intended to prevent it. But it could be attempted, particularly if it became known that the Secretary of State would take such polls into account when assessing the likely outcome of a referendum.
- 8.78. These considerations lead to the conclusion that high-quality interview-based probability samples are likely to be more reliable in giving evidence of attitudes across the population than samples from online panels. They could therefore be particularly useful for the purposes of assessing likely voting in a referendum. But the strong track record of online polls means that they would need to be accorded some weight as well.
- 8.79. The second feature of survey methodology identified above was the manner in which the questionnaire is administered: whether through an interviewer asking questions and recording answers or the respondent completing a form themselves. This difference has led some to suggest that face-to-face surveys may be less reliable than online polls, because respondents may be wary of expressing their true thoughts to an interviewer. Specifically, it is suggested that some people are ‘shy nationalists’: ‘people who are in favour of Irish unity when the question is between them and their web browser, but are more reticent when the question is asked in person’ (Donaghy 2020; see also White 2020a).
- 8.80. There is no doubt that such effects can skew survey results (Tourangeau et al. 2000: 295). Whether such a mechanism operates in the case of surveys asking how people

would vote in a unification referendum is unknowable on the basis of existing evidence—though it would be extraordinary if it could explain the size of the differences that we saw in Chapter 3. It would, however, be possible to remove any such effect by asking interviewees to complete the relevant questions themselves. As we saw above, the Northern Ireland Life and Times survey already does this for some sensitive topics, and the principle could readily be extended.

- 8.81. This analysis points towards the following conclusions. The overwhelming weight of expert scholarly opinion regards interview-based surveys based on probability sampling as the ‘gold standard’ for social research. Importantly for the current case, this approach is least susceptible to the risk of manipulation by anyone who might wish to skew the result. Furthermore, the danger of a ‘shy nationalist’ effect under interview-based surveys can be addressed. All of this suggests that a Secretary of State would be well advised to give greater weight to rigorously conducted interview-based surveys than to online polls when judging whether a referendum under the Northern Ireland Act might be required. Nevertheless, other types of polling (such as online polls) that have been proven to accurately predict voting behaviour should also be given serious consideration as a means of assessing voting intention.
- 8.82. Beyond the methodological considerations, we should also reflect on the survey questions that the Secretary of State might draw on in making a judgment. Questions asking whether people favour unification or how they would vote in a referendum would offer the most direct evidence on the referendum question itself. Questions relating to likelihood of participating in a referendum could also help in estimating possible referendum turnout. In order to dig into the susceptibility of opinion to change over time, additional questions might also be asked. To assess whether opinion would be robust to different possible ways of wording the referendum question, a range of such wordings could be used. Consideration would also need to be given to the timeframe offered by the question: if detailed proposals for a united Ireland had not yet been developed, responses might vary depending on whether the question asked how people would vote in a referendum held ‘tomorrow’ or, say, ‘in two years’ time, once proposals for a united Ireland have been drawn up’. Questions could also be asked about different versions of unification, including different constitutional structures and different arrangements for key public services. As noted in Chapter 3, the 2019 Northern Ireland Life and Times survey already began to pose some such questions.
- 8.83. Thus, if the Secretary of State chose to commission surveys, as the affidavit quoted above suggested might be done, a detailed set of questions could be developed to drill deeply into opinion.

DEMOGRAPHIC DATA

- 8.84. Some have suggested that a Catholic majority in a census, which may be reached in 2021 (Gordon 2018), would be a sign of a likely majority in favour of Irish unification.

One respondent to our public consultation, for example, said, ‘Decision to hold referendum could be decided after the Census in 2021, perhaps....depending on the demographic of the population.’

- 8.85. But a Catholic majority in the census would clearly not be in any way determinative of the statutory question whether a poll would be likely to lead to a majority for unity. The correlation between (notional) religion and views on the constitutional issue is very far from absolute. In the most recent Northern Ireland Life and Times survey, only 56% of Catholic respondents said they would vote for unification, while 23% said they would vote against. By contrast 79% of Protestants said they would vote against unification, and 4% in favour (Northern Ireland Life and Times 2019).² The general loosening of identities—in the same survey 22% of respondents said they saw themselves as part of neither the Catholic nor the Protestant community³—makes the link between the religion a person was born into and their constitutional outlook still less clear-cut.
- 8.86. Thus, a Catholic majority population would be but one element of wider demographic change in Northern Ireland, not least through trends of migration and ageing. Whilst demographic change can affect changes in political behaviour and attitudes over time, it would be an error to read one cultural marker as a sure indication of constitutional preference.
- 8.87. Mitchel McLaughlin, the former Speaker of the Northern Ireland Assembly and former Chair of Sinn Féin, has suggested that a census question be asked specifically on the unification issue (Belfast Telegraph 2018). He cited the objectivity of the census process as an advantage. Several of our public consultation respondents made similar points. But this would not be a typical census question. Asking such a political question would be controversial if accompanied by the usual legal obligation to answer questions (which was however recently lifted by statute in respect of a forthcoming question on sexual orientation). The proposition would also risk politicising the census, reducing public cooperation with it, and therefore its value in establishing a sound factual basis for planning public policy and services. At worst, it might expose census staff to hostility—for which there is tragic precedent in the Troubles years. No such question features in the Northern Ireland census scheduled for March 2021 (NISRA 2020).

QUALITATIVE EVIDENCE

- 8.88. The affidavit written on behalf of the Secretary of State for the *McCord* case, quoted above, noted that the Secretary of State could draw on her ‘contact with electoral

² The question asked: ‘Suppose there was a referendum tomorrow on the future of Northern Ireland and you were being asked to vote on whether Northern Ireland should unify with the Republic of Ireland. Would you vote ‘yes’ to unify with the Republic or ‘no’?’

³ The question was, ‘Do you see yourself as: Part of the Protestant community; Part of the Catholic community; or Neither?’

political representatives’ and ‘frequent engagement with members of the public, community groups and business organizations etc.’ when judging the state of public opinion. Such qualitative evidence could be thought valuable for getting beyond the headline numbers to understand the detail of how people were thinking about the issue, and therefore how opinion might be expected to change between calling a referendum and the day of the vote. If such evidence suggested, for example, that some support for unification was fragile and vulnerable to change as people thought the issue through more deeply, that could give the Secretary of State reason to pause. Such evidence might come not only from representatives of political parties or civil society, but also from focus groups or deliberative discussions. Indeed, studies have already been conducted, by members of this Working Group, using deliberative events to explore attitudes towards different versions of a united Ireland (Garry et al. 2020a, 2020b).

- 8.89. Yet it must be asked how much weight a Secretary of State could place on such evidence in judging the likely overall balance of public opinion. If election and survey results consistently showed majorities for parties supporting early unification and for unification itself, or if the Assembly expressed the view that a majority would vote for unification, it would be difficult for the Secretary of State to justify not calling a referendum on the basis of qualitative evidence alone. As we noted above, high-quality survey work could also dig into public opinion in some detail. While qualitative evidence could be valuable, therefore, it could only reasonably be used to supplement other, more quantitative sources. This is in no way to question the value of deliberative public engagement for other purposes, such as exploring different options for the design of a united Ireland or for reforms to the Union.

WEIGHING UP THE EVIDENCE SOURCES

- 8.90. We have examined six possible types of evidence that the Secretary of State might take into account in assessing the likelihood that a majority would vote in favour of unification. From a legal point of view, it would not be proper for the Secretary of State to close their mind to any particular source of evidence: all evidence must be fairly considered. From a practical perspective too, multiple sources of evidence are needed, as none can satisfy fully all of the criteria set out at para 8.45. High-quality survey and polling work could offer the most robust evidence as to current attitudes on the unification question. Voting in elections, a vote in the Assembly, and qualitative sources such as deliberative fora could all provide additional insights into the state of people’s attitudes and how those attitudes might change over time. We would urge caution solely in respect of demographic data, which, alone, can offer only weak and contextual information.
- 8.91. Thus, we do not think it possible to specify in the abstract the weight that should be attached to each source of evidence. A balanced and contextual overall judgment needs to be reached.

SHOULD THE SECRETARY OF STATE SPECIFY THE CIRCUMSTANCES IN WHICH A REFERENDUM WOULD BE CALLED?

- 8.92. Some of those who offered us their views have suggested that the Secretary of State ought to set out their criteria for reaching a judgment that a referendum had to be called. Others have disagreed. We begin with the issue of whether the Secretary is *obliged* to offer such transparency, and then consider whether it would be desirable.
- 8.93. Whether the Secretary of State *must* offer such transparency was the subject of the *McCord* case. Both the High Court and the Court of Appeal concluded that there was no such obligation. In the High Court, Sir Paul Girvan said:
- The Secretary of State concluded that a published policy predetermining how public opinion should be assessed could be unnecessarily restrictive and not in the public interest. That represents a tenable and rational conclusion which the Secretary of State is entitled to reach. A policy worded in undefined flexible terms would add nothing to the statutory powers and duties already arising under the legislation. (*McCord* High Court Judgment: para 20)
- 8.94. The Court of Appeal said, similarly, that an obligation to set out criteria would be inconsistent with the necessity of permitting a flexible response to events, which they considered to be a ‘value’ in the context of the Agreement to which the law would have regard. Exercise of powers under the 1998 Act would involve political judgment in the context of differing and unpredictable events; any policy in relation to directing the holding of a border poll which was not flexible would be inconsistent with that general consideration. They noted, too, that the production of such criteria could be itself controversial, and endanger the participation of unionist and nationalist communities in shared political institutions, which they identified as another Agreement ‘value’ to be respected (*McCord* Court of Appeal Judgment: paras 48–51).
- 8.95. Even if the Secretary of State is under no obligation to set out a policy, and notwithstanding the points raised by the courts, there are several reasonable arguments for thinking that some degree of transparency would be desirable. One consideration is that the difficulty of the issues means that it would be valuable to tease them out as far as possible before they came to be tested: the Secretary of State’s criteria would therefore benefit from being subject to debate, so that the public could be confident they were fair and rational. In addition, publication would permit the government more effectively to be held to account, and would be a safeguard against decisions made on the basis of poor evidence, improper political considerations or motives falling short of rigorous impartiality. For these reasons, transparency might be expected to increase public confidence that the Secretary of State would reach a decision properly.
- 8.96. Against this, the value of flexibility highlighted by the courts carries weight. The evidential basis on which the Secretary of State proceeds may change over time, and

some of the variables could be hard to pin down at present. Furthermore, the effect of publishing and debating criteria now might be to move the political debate on to the unification question, away from other issues that many would see as more urgent. Debate can in any event proceed, whether the British government offers its own contributions or not. With or without prior announcement of a policy framework, the Secretary of State must act honestly on the basis of proper evidence and motivations as a matter of law, and can if necessary be challenged in the courts.

- 8.97. Whether the Secretary of State should provide advance guidance on the approach they would take is not an either/or matter. In the documents quoted at paras 8.38–41 above, past Secretaries of State have in fact already given some, if limited, information about the kinds of information that they would take into account. Further identification of relevant factors, while allowing that this could be changed by successors in office, or in the light of events, could have value. We are not convinced, however, of the value of the government spelling out its criteria for decision comprehensively in the abstract.
- 8.98. If the likelihood of the statutory threshold being reached appeared to be increasing, there would be pressure for the Secretary of State to be clearer about the basis on which a decision would be made. We now consider how the Secretary of State would best approach this circumstance.

A PROCESS FOR REVIEWING THE EVIDENCE

- 8.99. None of the evidence—whether from election voting, from the polls and surveys that we summarised in Chapter 3, or from other sources—suggests that a majority of unification is currently likely. While the Secretary of State is obliged to keep the matter under steady review, therefore, detailed evidence assessment is not required.
- 8.100. But how would the Secretary of State best react if this circumstance changed? Two considerations are particularly important. First, it would be vital for the Secretary of State both to act and to be seen to be acting with rigorous impartiality. Any perception that they were offering a skewed interpretation of the evidence could be very damaging for both legitimacy and stability. Second, we concluded in Chapter 6 that a referendum should not be called without a plan for the process of decision-making as a whole. This plan would need to be agreed by the British and Irish governments, drawing on the widest possible consultations with the parties and other actors in Northern Ireland, Ireland, and Great Britain. We said that the time for agreeing such a plan, should it ever occur, would be when the possibility of calling a referendum was under immediate consideration.
- 8.101. Given these two points, we suggest that, if evidence began to emerge suggesting that a majority for a united Ireland *might* be likely, the Secretary of State should announce a period of detailed review. During that period, two things would happen. First, the two governments would work together, in close consultation with other actors, to agree a plan for the decision-making process, including referendums north

and south and other steps. We set out those steps in Chapter 6 and examine further how they might be configured in Chapters 9 and 10.

- 8.102. Second, the evidence on public opinion would be subject to detailed scrutiny. This would include existing evidence from elections, surveys, and other sources. In addition, as mentioned above, the tailored evidence gathering might be commissioned, for example through surveys, focus groups, and deliberative exercises. There is a strong case for saying that, at the point of announcing a review, the Secretary of State should set out details of the criteria that would be applied in assessing such information.
- 8.103. There is also a question as to the advice that the Secretary of State should seek in conducting such a review. Both to ensure a depth and diversity of expertise and to enhance the legitimacy of the process as a whole, there is a strong case for saying that they should be advised by a balanced, independent, and international panel. It would be essential for any such advice to be seen to be impartial and well-informed. A panel would therefore need to be independently constituted, rather than appointed by the Secretary of State. A panel that was not both independent and seen to be independent could be worse than having no panel at all.

HOW MUCH EVIDENCE WOULD BE NEEDED?

- 8.104. A final question concerns how much evidence the Secretary of State could legitimately require before concluding that a referendum was necessary. One point here concerns the level of support for unification that the evidence would need to suggest. The other concerns the time period over which evidence would be gathered.
- 8.105. We have heard three arguments for the view that the Secretary of State should wait to see evidence pointed to a majority for unification substantially exceeding 50%. One is the argument of Seamus Mallon and Andy Pollak that we noted in Chapter 3, that nationalists should not push for a vote ‘until there is wider and deeper acceptance for it among the unionist community’ (Mallon with Pollak 2019: 176), and that the governments ‘should not agree to the holding of a Border Poll unless they were absolutely certain it would lead to a peaceful and stable outcome for the island of Ireland’ (181). The 1998 Agreement, however, simply stipulates the test as being that a majority in favour of unification appears likely.
- 8.106. The second argument says that, given the margin of error in polling (see para 8.62), support for unification around 52–53% would be needed to be confident that the 50% threshold had really been met. But this reasoning is wrong. The Secretary of State is required simply to consider what is ‘likely’: what is more probable than not. For this, it is the central estimate that matters.
- 8.107. The third argument observes that opinion often shifts towards the status quo in the course of referendum campaigns and that a majority for unification at the end of the campaign period would therefore be likely only if the majority was substantial at the

start. It is true that, on average, opinion tends to shift towards the status quo during referendum campaigns: analysis of data from 291 state-wide referendums in stable democracies between 1990 and 2018 found an average change in that direction of 3.9 percentage points (Renwick 2019a). But the same study found many exceptions to this pattern—opinion moved towards the status quo in a third of cases. There are few referendums on basic sovereignty questions for which multiple reliable polls are available. But it is notable that the Scottish independence referendum in 2014, the Brexit referendum in 2016, and the Quebec sovereignty referendum of 1995 (though not that of 1980—LeDuc 2002: 153) all bucked the trend. This body of evidence does not justify any specific expectation as to the direction in which opinion might shift over the course of a referendum campaign in Northern Ireland. There is again, therefore, no justification for saying that the Secretary of State should seek evidence of a majority for unification substantially above 50%.

- 8.108. Turning to the time period over which evidence would need to be gathered, very few people would argue that a single survey, for example, would be sufficient to conclude that the statutory test had been met. All would accept that a body of evidence, from a variety of sources, would need to build up over a period of time. But how much such evidence would be required, over how long a period?
- 8.109. Some witnesses have gone far in suggesting to us that the Secretary of State should allow evidence to accrue over an extended period: for example, that the Secretary of State would properly assess opinion in several successive Assemblies. The justification would be that only such extended evidence would give confidence that opinion was settled, and unlikely to shift substantially over the course of a campaign.
- 8.110. But there are clearly limits on how long the Secretary of State could legitimately delay if different sources of evidence consistently pointed in the same direction. If the next Assembly election were in prospect before long, or if evidence were unclear, the Secretary of State might legitimately defer the judgment pending that vote. But if clear and consistent evidence of a pro-unification majority began to emerge early in an Assembly's five-year term, it would be difficult to justify delaying for such an extended period.
- 8.111. It is impossible to specify precise time periods with any certainty in the abstract. A shorter period would be appropriate if the evidence pointed clearly and consistently the same way—unless a major event had taken place that there was good reason to think may have temporarily shifted attitudes. The Secretary of State would risk breaching the statutory requirement with a lengthy delay— certainly a delay that lasted into a period of years. By contrast, if evidence was less clear or consistent, it could be legitimate for the Secretary of State to continue the review process for longer. In that circumstance, the Secretary of State might also, as discussed at para 8.24–25, above, choose for good policy reasons to call a referendum under the discretionary power.

CONCLUSION

- 8.112. The Secretary of State has a broad *discretionary* power to call a referendum on the unification question in Northern Ireland, provided no such vote has taken place in the last seven years. They have a *mandatory* duty to do so if a majority in favour of unification appears to them likely. In exercising these responsibilities, the Secretary of State must as a matter of law act fairly, honestly and, as the Court of Appeal emphasised, with rigorous impartiality in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination. If this is not the case, there may be legal consequences. The Irish government has no formal role in calling a northern vote. Given the strong desirability for any referendums to be coordinated north and south, however, it would be highly preferable for the two governments to work together.
- 8.113. We have identified circumstances in which a Secretary of State might opt to call a referendum under the discretionary power. That could be because evidence on the state of public opinion was uncertain and the Secretary of State judged that a vote was in the public interest, or because the Northern Ireland Assembly had voted for a referendum to be held. Calling a referendum in the expectation of defeating the unification proposal would, however, be problematic.
- 8.114. In regard to the mandatory duty, which requires an assessment of the state of public opinion, we have identified six possible sources of evidence that the Secretary of State might draw on. The Secretary of State must take all relevant evidence into account. We do not think it possible to define in the abstract the weight that should be attached to each type of evidence, except that demographic data could provide only contextual information.
- 8.115. The Secretary of State is under no duty to explain in advance how they would make this assessment. If evidence began to emerge that a majority for unification might be likely, however, it would be desirable for the Secretary of State to announce a detailed review process. An expert review panel might form a useful part of this process, but only if it was impartial and genuinely independent of the Secretary of State. During this period, the governments would also agree plans for referendums north and south, in the event that they were called, as discussed in Chapters 6, 9, and 10.
- 8.116. The decision would have to be made reflecting the principle that the threshold in a referendum is 50% + 1. Significantly greater support for unification might enable the Secretary of State to reach a decision more quickly, but a referendum should be called if a vote for unity appears likely, even if by a slender margin.
- 8.117. A consistent body of evidence would need to build before calling a referendum became mandatory. But long periods of reflection might fail to yield clarity on the likely outcome, and they might shake public faith in the government's commitment to the principles of the Agreement, which itself could have a serious impact on

political stability. If for a significant period opinion seemed finely balanced, resulting in political hiatus and potential instability, whatever the Secretary of State's judgment about the likely results of a poll, he or she might, after consultation with the Irish government, political parties, and others, think the better course was to call a vote as a matter of discretion.

- 8.118. Of their nature, the decisions that may have to be made around the calling of a referendum could be extremely difficult. If the Secretary of State is not perceived as acting in good faith, there is great scope for incurring mistrust in parts, or all, of the community and undermining faith in the constitutional path established in 1998. To avoid that, it is essential that the Secretary of State act properly, and that decisions made fully reflect the letter and the spirit of the Agreement.

9. POSSIBLE REFERENDUM CONFIGURATIONS

- 9.1. The preceding chapters have analysed many of the building blocks of any referendum process, including basic principles (Chapter 1), key legal constraints (Chapter 4), specific criteria for judging possible referendum processes (Chapter 5), and the various elements of the overall decision-making process (Chapter 6). With these building blocks in place, we now turn to the core issue itself: the design of any referendums. Our purpose in this chapter is to survey possible referendum configurations, examine the strengths and weaknesses of each, and draw conclusions regarding the choice among them.
- 9.2. In Chapter 1 (paras 1.27–30), we identified three basic principles underpinning any referendum processes. First, referendum processes would need to be rigorously impartial, treating each of the possible outcomes equally and with respect. Second, progress is best made in Northern Ireland when decision-making is consensual; this principle mostly underpins the 1998 Agreement and its successors. Nevertheless, there is a distinction at the heart of the 1998 Agreement (which is necessitated by the principle of neutrality): while devolved matters are to be addressed consensually, the basic question of sovereignty is decided by simple majority. Third, we have presumed in all of our work that the 1998 Agreement determines the basis on which Irish unification could occur. It is not our role to propose deviations from that framework.
- 9.3. Building on these principles, Chapter 4 identified the following legal constraints in the Agreement:
- Irish unification cannot happen unless there is a referendum in Northern Ireland in which the majority of voters opt for unification rather than for remaining in the United Kingdom.
 - Unification would require at least some changes to the Constitution of Ireland in order to ensure that the specific commitments in the 1998 Agreement would be upheld. These would have to be authorised at the same time as unification to eliminate any risk of Ireland placing itself in breach of the 1998 Agreement. We therefore take the view that approval of unification in the South would involve a referendum. Further constitutional amendments or even constitutional replacement could occur either simultaneously with unification or afterwards.
 - Under the 1998 Agreement, if North and South each voted in favour of unification, then that would determine the matter. It would not be permissible to establish a procedure that required further referendum approval to allow unification be accomplished.
 - The referendums north and south must be ‘concurrent’ as set out at paras 4.29–32. That is, they must occur at the same stage in overall decision-making, with

public knowledge of the same set of proposals, but they do not have to take place simultaneously. The wording of the question posed need not be identical in both jurisdictions, but the substantive consequences have to be seen to be the same.

- 9.4. Finally, Chapter 5 established five evaluative criteria: procedural legitimacy (both public and legal); stability (both short-term and long-term); simplicity; informed choice; and inclusivity (both of the public in general and, specifically, of unionist, nationalist, and other voices).
- 9.5. Our task in this chapter is to consider *when* referendums would take place in relation both to each other and to the broader processes indicated in Chapter 6. We have found through our discussions with people across the island of Ireland and in Great Britain that expectations on the possible processes vary widely. Some assume that referendums would take place before detailed work had been done on the form of a united Ireland, and that such work would follow only in the event of a vote for unification. Others assume that most of the detailed work would come before the referendums. Some assume that proposed constitutional amendments would be voted on at the same time as the unification question, whilst others are of the view that these steps would be separated.
- 9.6. The diversity of assumptions reflects the fact that there is a wide variety of conceivable referendum configurations—at one stage in our deliberations, we were working with a list of 64. Many of the configurations that we initially considered were then ruled out by the legal constraints set out above. For example, we do not consider further any configurations that involve a referendum only in Northern Ireland.
- 9.7. After detailed consideration, we were able to rule out certain two-stage processes:
- In one approach, Northern Ireland would vote first, on the principle of unification. In the event of a majority for unification, proposals for the form of unification would then be developed, and a referendum would subsequently be held in the Republic of Ireland, on both the principle and the form of unification. This arrangement is not possible because it would violate the concurrence requirement, as voters would be voting on different propositions.
 - Nor would it be possible to hold a two-stage process in which voters north and south voted first in concurrent referendums on the principle of unification and then, after proposals for the form of unification had been worked out, voted again on whether to go ahead with unification in light of those proposals. If North and South voted in favour of unification at the first referendums, this result could not be undone by subsequent referendums.
- 9.8. The second of these exclusions is particularly notable. Researchers at the Constitution Unit have on several occasions recommended two-stage referendum processes in different contexts (Murkens, Jones and Keating 2002; Renwick 2019b), and the Independent Commission on Referendums (2018: 120–1) made similar

recommendations for certain circumstances as well. Whatever the possible merits of these approaches, however, the terms of the 1998 Agreement make them difficult to implement in respect of unification referendums on the island of Ireland. Not all two-stage processes are excluded—we do consider one variation below, as configuration 3. We ultimately conclude, however, that even it cannot be recommended.

- 9.9. The referendums north and south could be staggered, so long as the proposals being voted on were unaltered between the two votes. One reason for staggering would be to avoid the Republic voting for potentially numerous contingent amendments that would not go into effect if the North voted against unification. One reason for not staggering, would be to allow people north and south to discuss what might transpire to be their shared future at the same time. We pick this issue up in Chapter 10.
- 9.10. It would also be possible for the referendum on unification itself to be preceded or followed by a referendum on changes to the 1937 Constitution or adopting a new Constitution, so long as that referendum did not ask the question of whether unification should happen. Configurations 3 and 4 below are variants of this approach.
- 9.11. We have identified five possible referendum configurations that fit within the legal constraints. These come after consideration of all the evidence gathered by the Working Group and detailed internal deliberation. We do not exclude the possibility that other configurations might be proposed. The remainder of the chapter sets each of these out in detail and assesses how they meet the evaluative criteria set out in Chapter 5. Table 9.1 provides an overview.
- 9.12. Configuration 1 represents what would happen in the absence of any political decision to opt for a different configuration, and closely resembles the UK's 2016 referendum on EU membership. North and South would vote on the principle of unification, without approving either the form of a united Ireland or a later process for designing the form of a united Ireland. In broad terms, the other configurations deviate from configuration 1 by stipulating, before the unification referendums, either a model for a united Ireland or a process for developing such a model. Under configurations 2 and 3, a maximally developed model for a united Ireland would be developed prior to the unification referendums. These two configurations differ from each other in how this point would be reached and how much of the detail it might be possible to develop in advance. Under configurations 4 and 5, default or interim plans would be made for a united Ireland before the unification referendums, but the referendums would also authorise a process to agree and approve replacements for those default or interim plans. These two configurations differ from each other in respect of when the replacement proposals would be developed, before or after the transfer of sovereignty.
- 9.13. We find that no perfect configuration is possible: each would raise particular concerns and challenges. We conclude that two of them—configurations 1 and 3—should clearly not be followed. That leaves configurations 2, 4, and 5 as deserving

further consideration. There are legitimate differences of view as to their relative merits, and the choice among them would necessarily be a political matter.

Table 9.1. Possible Referendum Configurations

	What is it?	Should it be considered?
6. No model, no guaranteed process	Referendums in NI and ROI on the principle of unification happen; no guaranteed model or process after unification.	No. Voters are asked to vote without clarity, and the processes after a vote, if unification were favoured, could be very destabilising.
7. Maximum model	Aspects of the form of a united Ireland worked out <i>before</i> referendums in NI and ROI so far as possible.	Yes.
8. Preliminary vote before maximum model	Prior referendum in NI on whether the UK government should enter negotiations. <i>Then</i> aspects of the form of a united Ireland worked out <i>before</i> referendums in NI and ROI so far as possible.	No. Preliminary referendum would likely be seen as breaking the spirit of the 1998 Agreement.
9. Design process before sovereignty transfer, with default plan	Referendums in NI and ROI on the principle of unification and on the process to agree its form. That process would come <i>before</i> unification.	Yes.
10. Design process after sovereignty transfer, with interim/ default plan	Referendums in NI and ROI on principle of unification and on the process to agree its form. That process would come <i>after</i> unification.	Yes.

CONFIGURATION 1: NO MODEL, NO GUARANTEED PROCESS

9.14. Under the first configuration, the referendums, north and south, would take place before detailed work to agree a proposed model for the form of a united Ireland or, indeed, on any reforms to the Union that might be advocated. The referendums would also take place without an agreed plan for the processes that would follow them, whatever their outcomes. Voters would be asked for their view on the basic principle of sovereignty. In Northern Ireland, the question, at its simplest, could be ‘Should Northern Ireland leave the United Kingdom and become part of a united Ireland?’, with response options ‘Yes’ and ‘No’ (but see Chapter 13 for further discussion of question wordings). In the Republic of Ireland, the vote would be a constitutional referendum to make the minimum changes that the 1998 Agreement requires of a united Ireland (see paragraph 4.25), most likely combined with amendments to the constitutional text to reflect the democratic consent to unification itself. Campaigners on each side would put forward their competing

visions. Supporters of a united Ireland would set out their prospectus for what the new Ireland would look like, as did supporters of independence in Scotland in 2014. Supporters of the Union might well propose enhancements to the status quo—again as occurred in Scotland in 2014. If the majority of voters both north and south opted for unification, planning would then ensue for how to implement this result. If a majority of northern voters opted for the Union, then any changes within this status quo that had been promised would be the subject of further discussion.

- 9.15. This configuration has a number of arguments to recommend it. First, it clearly falls within the terms of the 1998 Agreement, which appears to envisage a simple process whereby the Secretary of State would call a poll, which, in the event of a vote for unification, would be followed by negotiations and implementation. Second, it meets our criterion of simplicity—at least on the surface.
- 9.16. Third, it might do well in terms of the criterion of enabling, specifically, unionist participation in the process of developing the form of a united Ireland. As we said in Chapter 5, one key desideratum regarding future governing arrangements is that, so far as possible, they be developed through an inclusive process, as the current arrangements were in the lead-up to the 1998 Agreement. But unionists, quite reasonably, might well choose not to engage in discussion of the form of a united Ireland for so long as the option to remain within the UK remains in contention. Their participation in the design process might therefore be more likely if that process took place after the basic question of sovereignty had been settled in favour of unification. Under this configuration, however, there would be no guarantee of a design process after unification. Northern Ireland might simply be subsumed into a united Ireland in a way that had not been sufficiently thought through.
- 9.17. This configuration has several serious weaknesses. First, it is, in itself, incomplete, which could lead to instability. It offers no model for the form of a united Ireland, nor any plan for the processes to develop such a model if voters opted for unification. If the post-referendum processes of implementing the transfer of sovereignty proved protracted and contentious—as did those following the 2016 referendum in the UK’s withdrawal from the EU—that could create a difficult situation.
- 9.18. In particular, as explained in Chapter 4, if referendums both north and south produced majority votes for unification, both Ireland and the UK would be under an obligation in international law to give effect to unification. This obligation would apply irrespective of whether the terms of the transfer of sovereignty were agreed between Ireland and the UK, and irrespective of whether amendments were made to the Irish Constitution to accommodate unification, beyond the bare minimum actually required by the 1998 Agreement. Each of these processes would have risks attached. If the UK Parliament refused to pass legislation giving effect to unification, Northern Ireland could find itself part of the United Kingdom in UK law and part of Ireland in Irish law. If constitutional amendments or legislation were subsequently not passed in Ireland to accommodate unification, then unification could take place on terms that few considered appropriate or desirable. Indeed, both risks could

materialise simultaneously. These risks make this configuration a recipe for severe instability.

- 9.19. Second, because further stages in the process would in all likelihood occur after the referendum—including, potentially, referendums on amendments to the Constitution of Ireland—this approach would not be nearly as simple as it might at first appear.
- 9.20. Third, this configuration falls badly short on the criterion of informed choice. Voters would be asked to decide the basic question of sovereignty without detailed information as to the form that one of the options on the ballot paper—the unification option—would take. One of the most frequently recurring refrains in the evidence that we have heard is that the process of the UK leaving the EU must not be repeated on the island of Ireland, and that voters must not be asked to cast their ballots without clarity.
- 9.21. Fourth, whether this process would in fact lead, in the event of a vote for unification, to participation from the unionist tradition in the process of designing the form of the united Ireland is not obvious. The UK’s 2016 referendum on exiting the EU was universally billed in advance as decisive, but that did not stop many who disagreed with the majority choice from pressing to reverse the outcome until the UK’s legal departure was complete—few engaged constructively in discussion of the form that Brexit should take. As in that case, so in the case of Irish unification, legislation would still be required after the referendum vote in order to give effect in UK law to unification. So unionists in Northern Ireland and Great Britain might well act as their Remain counterparts did, particularly if they suffered a narrow referendum loss.
- 9.22. Fifth, an unplanned process would make it difficult to design the form of a united Ireland through mechanisms that were inclusive in the broad sense: there would be considerable pressure to move quickly to a united Ireland after a vote in favour of unification, militating against broad-based and gradual discussions. In turn, this could undermine the long-term stability of the arrangements adopted: arrangements adopted in haste may be less likely to stand the test of time than would more carefully developed alternatives.
- 9.23. Finally, these several points combine to raise doubts about the public legitimacy of the outcome of a referendum that was conducted on these terms. The UK’s 2016 EU vote commanded no more than weak consent among those on the losing side: over 4 million signed a petition shortly after the vote asking for it to be rerun (UK Government and Parliament 2016); more than three years later, millions more voted for parties pledging another referendum in the 2019 general election. A similar perceived legitimacy deficit in Northern Ireland could have graver consequences.
- 9.24. Table 9.2 sums up this analysis against our evaluative criteria set out in Chapter 5. We emphasise that a table like this is necessarily a sketch: it summarises our overall assessment, but cannot capture all the nuances that we have noted.

- 9.25. As Table 9.2 shows, this first possible configuration performs poorly against most criteria, two in particular. First, asking voters to make a decisive choice before detailed plans had been worked out would hinder informed choice and public legitimacy. Second, launching upon a referendum without thinking through the process as a whole could be detrimental to both short- and long-term stability, as well as to public legitimacy and inclusivity.
- 9.26. While we recommend against the adoption of configuration 1, it is important to note that it is—in a sense—the default configuration, i.e. the configuration that would be followed in the absence of a conscious and deliberate political decision to adopt a different configuration. It is possible that a court could direct the Secretary of State to call a unification referendum in Northern Ireland. If no detailed proposals for the form of a united Ireland were put in place before that referendum and the North voted in favour of unification, then there would have to be a referendum in the South before any such proposals could be developed. (To introduce proposals between the two referendums would breach the concurrence requirement.) If the South voted in favour, unification would have to proceed irrespective of whether any legal or constitutional changes were made to address issues that would arise.

Table 9.2. Performance of Configuration 1 against the Criteria in Chapter 5

Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
Legal	Public	Short-Term	Long-Term			General	Specific
✓	✗	✗	✗	*	✗	✗	?

Key: ✓ performs well; ✗ performs poorly; * intermediate performance; ? performance unclear

CONFIGURATION 2: MAXIMUM MODEL

- 9.27. The second configuration is the diametric opposite of the first: referendums north and south would take place after proposals for a united Ireland had been worked out. The Irish government could initiate research and consultations to begin working out such proposals well in advance of any decision to call a referendum. So long as the process remained hypothetical, however, engagement might be limited. We therefore envisage that, under this configuration, if the Secretary of State announced plans for a referendum in Northern Ireland, the vote would be delayed for perhaps up to three years to allow wide-ranging deliberations to take place first (see para 4.27). The Irish government would announce plans for a referendum on a similar timetable. During the intervening period, proposals would be developed for the model of unification, including the form of a united Ireland to be put to the vote. We discussed how this process might occur in Chapter 6, including the widest possible discussions at all levels of society. The choice put to voters, north and south, in concurrent referendums would then include these proposals. Voters in Northern Ireland might be asked ‘Should Northern Ireland leave the United Kingdom and become part of a united Ireland on the terms set out in [*specified document*]?’ (see

further discussion of referendum questions in Chapter 13). Voters in the Republic of Ireland would be asked whether they approved unification together with a set of any constitutional amendments necessitated by the model for a united Ireland, contingent on the North voting in favour.

- 9.28. This approach would overcome several of the weaknesses seen in the first configuration. First, it would enable voters to make a much more informed choice: voters would know much more about the future arrangements they were choosing between. Second, by providing for agreement on many matters ahead of the referendum, it would reduce the danger of any destabilising breakdown thereafter. Third, the planned nature of the process would allow the development of procedures for designing the form of a united Ireland that could be inclusive in the general sense and that would yield proposals that might be expected to stand the test of time. Fourth, this approach would be simple, with a single referendum in each jurisdiction on a clear set of proposals.
- 9.29. Some of those we have spoken with have challenged the legitimacy of this approach. One view is that the Agreement does not envisage a long gap between calling and holding the vote, as this approach would likely involve. But the Agreement says nothing to rule such a gap out. As we said in para 4.27, while a gap approaching seven years (the minimum time between referendums) would be questionable in law, a gap of around three years, say, would not. Another view is that the Agreement implies a choice about the basic principle of sovereignty, not about detailed designs. But it is not possible to have a purely abstract choice about the basic principle of sovereignty: unification, if approved, would necessarily take place on certain terms. Nothing in the Agreement precludes changes being made to those terms through the unification referendums themselves. We therefore see this approach to the referendum as compatible with the 1998 Agreement. Nevertheless, the lengthy delay that is envisaged between calling and holding a referendum could raise concerns about stability in the short term.
- 9.30. Just how this configuration would look in practice would depend on how much could be settled in advance of the referendum. We suggested in Chapter 6 that the Irish government would coordinate a process for formulating proposals on the future government and initial policy regimes in a united Ireland, which may well lead to proposed constitutional amendments. It is likely that it would also lead to discussion of key policy matters, so that voters would have some sense of what was proposed on matters such as policing, healthcare, and education.
- 9.31. On the other hand, it is uncertain whether the terms of the transfer of sovereignty could be agreed between the two governments ahead of a referendum. Most of the witnesses whom we have spoken with on the matter have thought it highly unlikely that a UK government would be willing to engage on this subject before a referendum vote in favour of unification, particularly if it were a Conservative-led government.

- 9.32. If this assessment is correct, then voters could not be fully informed about arrangements under a united Ireland ahead of the referendum. How much this mattered would depend on how important the unresolved issues were in voters’ overall assessments of the options. We have heard differing views on this subject. Some have suggested that the absence of clarity on the transfer of assets and liabilities and possible transitional subventions from the UK Treasury would preclude concrete proposals in a range of other policy domains. Others have pointed out that the Irish government could offer a baseline ‘worst case scenario’, a central forecast, as well as a more optimistic plan.
- 9.33. Postponing intergovernmental matters so that they were decided after the referendum would leave scope for a breakdown in negotiations, with potentially destabilising effects as under the first three configurations. The risk of UK–Irish divergence post-referendum would be far lower than in configuration 1, however, as many more matters would have been resolved in advance.
- 9.34. A further difficulty is that, even if a model for a united Ireland were determined in advance, the ordinary rules for amending the Constitution of Ireland would allow this model to be altered immediately after unification, which might jeopardise the securities that had been promised. This risk could be addressed by imposing some restrictions on the amendment power (Doyle et al. 2021).
- 9.35. Finally, it would likely be harder to include all parts of the community in the process of designing a united Ireland or a reformed Union if that process took place before rather than after the sovereignty question had been decided. Such design work would, under configuration 2, happen before the referendums. On that basis, fulfilling the criterion of enabling participation in the development of the options among unionists as well as nationalists and others would therefore be difficult. That could, in turn, undermine the public legitimacy and long-term stability of the outcome.
- 9.36. Table 9.3 summarises our assessment of this configuration. In particular, compared with the first configuration, this approach performs better in terms of informed choice (though it would not be perfect on this front) and in terms of short-term stability. But it struggles in terms of the participation specifically of those with a unionist or British identity in the design of a united Ireland option. That could undermine support for the new governing arrangements if voters chose that option.

Table 9.3. Performance of Configuration 2 against the Criteria in Chapter 5

Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
Legal	Public	Short-Term	Long-Term			General	Specific
✓	?	*	?	✓	✓	✓	✗

Key: ✓ performs well; ✗ performs poorly; * intermediate performance; ? performance unclear

CONFIGURATION 3: PRELIMINARY VOTE BEFORE MAXIMUM MODEL

- 9.37. The third configuration is similar in basic form to configuration 2: here too, the decisive referendum on the unification question would take place after a detailed model for a united Ireland had been developed. But it seeks to address the fact that, under configuration 2, those plans could be incomplete, as the UK government might be wary of even tentative negotiations over the terms of sovereignty transfer without a prior referendum vote in its favour. In order to address this, configuration 3 would introduce an earlier, preliminary referendum in Northern Ireland on whether the UK government should participate in detailed negotiations, with a view to preparing proposals for unification, which would then be voted on. (We presume that there would be little call for an equivalent vote in the South, given that Ireland is already constitutionally committed to unification as a national goal.) This vote would be designed to establish early on whether sufficient political support existed for entering what could be a complex and difficult process.
- 9.38. In principle, this configuration might share the benefits of configuration 2, with the added advantages that pre-referendum agreement on terms of transfer would allow voters to make a fully informed choice and reduce the danger that disagreements between the governments after the referendum could destabilise the process.
- 9.39. This configuration would seem to conform to the letter of the 1998 Agreement by omission: the preliminary referendum would lie outside the scope of the Agreement. But it could be seen by many as violating the spirit. In particular, it could create the appearance that two referendum votes for unification were being required, rather than just one, as the Agreement prescribes. That could undermine the public legitimacy of the process and potentially therefore also its stability. Such a two-referendum process would also lack simplicity. Furthermore, there is no guarantee that negotiations would proceed smoothly just because authority for them had been granted in a preliminary vote. Thus, the risks posed by this approach are great, while any potential gain appears likely to be slight.
- 9.40. Table 9.4 summarises this assessment. Notwithstanding the theoretical attraction of this configuration, it scores poorly in terms of public legitimacy, short-term stability, simplicity and inclusivity; and it appears that it would be untenable in Northern Ireland and Ireland in light of the expectations created by the 1998 Agreement.

Table 9.4. Performance of Configuration 3 against the Criteria in Chapter 5

Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
Legal	Public	Short-Term	Long-Term			General	Specific
✓	✗	✗	?	✗	✓	✓	✗

Key: ✓ performs well; ✗ performs poorly; * intermediate performance; ? performance unclear

CONFIGURATION 4: DESIGN PROCESS BEFORE SOVEREIGNTY TRANSFER, WITH DEFAULT PLAN

- 9.41. The fourth and fifth configurations are similar to the first in one respect: they would again start with concurrent referendums on the principle of unification and the bare minimum constitutional amendments required in the South to ensure that a united Ireland complied with the enduring commitments of the 1998 Agreement. These referendums would be held before a detailed model for a united Ireland was worked out. These configurations differ significantly from the first, however, in that they also stipulate a process for agreeing the terms of unification and the form of a united Ireland in the event of a vote for unification. They differ from each other in the sequencing of that process. Under configuration 4, a vote for unification would be followed by detailed work on the terms of unification and form of a united Ireland, with sovereignty being transferred after the completion of that process. Under configuration 5 (considered below), sovereignty would transfer more quickly, with much of the detailed work coming afterwards.
- 9.42. Under configuration 4, the two governments would agree ahead of the referendums the processes that would follow either a vote for unification or a vote to maintain the Union. This agreement would set a deadline by which time sovereignty would transfer in the case of a vote for unification. It would also set out the processes through which the terms of unification would be agreed and approved during the intervening period (see paras 6.13–14). The objective would be to achieve as much agreement by consensus as possible, including among those who had opposed unification, followed by ratification north and south in separate referendums. That would involve the widest possible political discussions, alongside programmes to engage civil society and the wider public—potentially including citizens’ assemblies and other deliberative processes.
- 9.43. However, because unification would have to proceed even if new terms for a united Ireland were not agreed and approved, the initial unification referendums would also—explicitly or implicitly—approve default plans for a united Ireland. In the absence of any intervention, the default would be the existing terms of the current Constitution of Ireland, subject to the amendments necessary to ensure compliance with the continuing obligations of the 1998 Agreement. However, the Irish government could also propose amendments to the default terms—such as the maintenance of the Executive in Northern Ireland—that would be approved at the time of the concurrent unification referendums. While perhaps attractive in some ways, this would dilute one of the principal advantages of configuration 4, namely encouraging participation of unionists in the design of a united Ireland. There would now be active consideration of the default design for a united Ireland at a stage when unionists were unlikely to participate.
- 9.44. Supposing voters north and south opted for unification and the subsequent processes produced proposals for constitutional amendments, both governments

would commit to holding referendums on these by a specified date. If voters both north and south accepted the proposed amendments in these referendums, unification would then take place on this basis. If proposals were not accepted north and south before the specified unification date, unification would have to proceed on the default terms.

- 9.45. This configuration would involve a two-stage referendum process: voters would decide on the principle first (with the default terms) and the detail later, with a period for developing detailed plans in between. This would be compatible with the 1998 Agreement because the first concurrent referendums north and south would provide full and irreversible authorisation for unification, irrespective of whether changes were approved at subsequent referendums. The subsequent referendums would determine the form that unification would take.
- 9.46. The principal argument in favour of this configuration is that, by delaying the development of a detailed model for a united Ireland until after a decisive vote in favour of unification, it would increase the chances that people from all parts of society—including those opposed to unification—would take part in developing those plans. The process could be designed to be inclusive in the broader sense too. If such increased inclusivity were achieved, this configuration might deliver outcomes that would stand the test of time.
- 9.47. In addition, compared to the first configuration, this approach would offer greater clarity as to the processes following a referendum, enhancing stability. The fact that unification would not immediately follow a vote in its favour might also reduce the potential for a sense of jeopardy during the campaign, thereby also bolstering stability. Unionists may also feel that the fact that detailed plans were being forged while Northern Ireland remained within the UK offered some protection to their interests and concerns. This may be seen as the approach that, symbolically as much as materially, could maximise unionist involvement in developing the structures of the new state. It would offer a chance for their names to be on its title deeds. Furthermore, the fact of agreement between the governments on process might reduce the risk of destabilising disagreement on substance after a vote for unification.
- 9.48. But this approach would also open up significant dangers. While delaying unification for an extended period after a vote in its favour might ease concerns among unionists, it might equally strengthen them among republicans, who could fear that a move might be made to reverse the initial decision. They might also object that Ireland's new or modified constitution was being negotiated under British sovereignty. We do not wish to exaggerate this point: there is general recognition that any unification process should not be unduly rushed. Nevertheless, under this configuration, the period between a referendum vote for unification and transfer of sovereignty would necessarily last several years. If this period proved fraught, the inclusivity and stability of the process could be impaired.

- 9.49. A further point of severe tension could arise if either (a) no agreement was reached on proposed constitutional amendments so no referendums were proposed, or (b) a second set of referendums north and south rejected the detailed proposals: for unification to go ahead when voters had just rejected the proposed terms of unification could, depending on the trajectory of the referendum campaigns, be seen as undemocratic. Thus, while this configuration might offer unionists the comfort that unification would not ensue immediately after a vote in its favour, that would to a degree be a false comfort: the die would already have been cast.
- 9.50. Furthermore, this latter point illustrates the importance of the default unification terms: these would significantly affect the negotiation strategy and willingness to compromise of all parties in the negotiations. But these default terms would need to be determined before the first set of referendums north and south, meaning that unionists would likely have played little or no role in shaping them.
- 9.51. In common with other configurations where a decisive referendum would be held before the form of unification had been worked out, this configuration would not allow voters to make a fully informed choice: they would be voting for an indeterminate process, albeit with a default. In addition, as our summary of the configuration above illustrates, it would be far from simple.
- 9.52. Finally, it is not clear that this configuration would deliver its intended core strengths in terms of inclusivity. The necessity of not having an overly-extended interim period might be difficult to balance with the need to satisfy as many as possible that the process of public deliberation had been full and inclusive. Furthermore, just as under configuration 1, there is no guarantee that a vote in favour of unification would motivate unionist representatives to engage in the process of designing a united Ireland, just as there is no guarantee that a vote to maintain the union would motivate nationalist representatives to engage in any process of strengthening the Union.
- 9.53. The performance of this configuration relative to our criteria is summarised in Table 9.5. It presents difficulties on several fronts: in particular, it scores badly on the criterion of informed choice, and it raises concerns about public legitimacy and stability. Still it offers enough improvement compared to configuration 1 on these matters for us to consider it worthy of further consideration.

Table 9.5. Performance of Configuration 4 against the Criteria in Chapter 5

Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
Legal	Public	Short-Term	Long-Term			General	Specific
✓	?	?	?	✘	*	?	?

Key: ✓ performs well; ✘ performs poorly; * intermediate performance; ? performance unclear

CONFIGURATION 5: DESIGN PROCESS AFTER SOVEREIGNTY TRANSFER, WITH INTERIM/DEFAULT PLAN

- 9.54. Configuration 5 is the other configuration in which a decisive referendum would be held without first developing a detailed model for a united Ireland. As in configuration 4, the governments would agree in advance the process that would follow the referendum. In this case, however, if voters opted for unification, then unification would follow relatively quickly, with much of the detail being worked out afterwards.
- 9.55. Specifically, the governments would agree a deadline by which unification would occur if voters chose it. This deadline would be earlier than under configuration 4. During that interim period, the governments would, in consultation with others, negotiate the terms of the transfer of sovereignty.
- 9.56. Ahead of the concurrent referendums, the Irish government would set out a process that would be followed *after unification* to determine the future permanent form of the Irish state. We see three main approaches that such a process could take. First, the Irish government could apply the existing constitutional amendment procedure. Second, the constitutional amendment procedure could be changed through the unification referendum, so that proposals for the form of a united Ireland would be subject to safeguards to protect northern or specifically unionist concerns. These could protect some constitutional guarantees from subsequent amendment and/or could require dual referendum approval, north and south, for the proposed amendments. Such an approach would involve Northern Ireland continuing as a discrete entity with power to veto the first set of proposed constitutional amendments after unification. Third, the government could commit to holding an inclusive constitutional convention to replace the existing Constitution. Critical questions here would be whether the new constitution should require unitary approval at an all-island referendum or dual approval north and south, and whether the unification referendums themselves should mandate any particular guarantees for inclusion in that new Constitution. Citizens' assemblies and other forms of engagement could be deployed in relation to any of these options.
- 9.57. This approach would be compatible with the 1998 Agreement and would offer the advantage of a planned process. As with configuration 4, it could be designed to ensure that the proposed model for a united Ireland could be developed by the people of Ireland as a whole, in a process that was designed both to be inclusive in general and to encourage and facilitate the participation of unionists in the design of a united Ireland. Unlike in configuration 4, those proposals would be developed when unification was not merely a legal obligation, but an established fact. With no theoretical possibility of a reversal, the scope for participation among those who had opposed unification might be maximised. In addition, with fewer matters to be agreed between the referendum and the transfer of sovereignty, the dangers of a

destabilising breakdown between the governments would be reduced. The process, at least up to the point of unification, would be relatively simple.

- 9.58. Nevertheless, this approach would carry disadvantages too. As in other configurations where the decisive referendum would take place at an early stage, voters, north and south, would have to choose without information on the form of a united Ireland—though there would be information on the process through which that form would be developed and agreed.
- 9.59. It would also be necessary under this approach to define the interim and default structures that would operate in Ireland after unification but before replacement arrangements had been agreed and approved, and in the event of replacement arrangements not being agreed and approved. One option would be for Northern Ireland to be absorbed into the Republic under the existing Constitution. The safest way to do this would include a constitutional amendment to remove any doubts over the constitutionality of the Oireachtas devolving executive power. Such an amendment is quite possible, although we note—as with configuration 4—that the greater the changes to the interim and default structures, the less unionists would be involved in designing the form of a united Ireland. If subsequent constitutional changes were not approved, the interim constitutional arrangements would, by default, become the permanent arrangements. This consideration heightens the importance of getting the interim constitutional arrangements ‘right’, which again blurs the distinction between this configuration and configuration 2.
- 9.60. Effects on public legitimacy and short-term stability could be mixed. While some may welcome a swift transfer of sovereignty after a referendum, others (from all communities) might find the prospect of such rapid change alarming. Meanwhile, while the reduction in the range of matters to be agreed between a vote for unification and unification itself would reduce scope for a breakdown in intergovernmental negotiations, it would not eliminate it. In the absence of a referendum mandate for a specific model a united Ireland, the UK and Irish governments might find it more difficult to agree terms for the transfer of sovereignty.
- 9.61. Table 9.6 sums up this analysis. This configuration performs strongly on a range of dimensions. Nevertheless, it still raises significant concerns, particularly about the lack of informed choice. It also prompts questions about public legitimacy and stability.

Table 9.6. Performance of Configuration 5 against the Criteria in Chapter 5

Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
Legal	Public	Short-Term	Long-Term			General	Specific
✓	?	?	✓	✓	*	✓	✓

Key: ✓ performs well; ✗ performs poorly; * intermediate performance; ? performance unclear

CONCLUSION

9.62. This has been one of the most difficult chapters in our report. From dozens of possible options, discussion at successive meetings of the Working Group winnowed the most plausible configurations down to the five discussed in this chapter. None of them are ideal. That is why we have carefully explained the pros and cons of each, and analysed them against the criteria set out in Chapter 5. Table 9.7 summarises our conclusions, drawing together the material in Tables 9.2–9.6. As we have already emphasised, these tables cannot capture every nuance, and our judgments are not intended to be the final word. But they provide a broad overall sketch.

Table 9.7. Summary of the Performance of Configurations against the Criteria in Chapter 5

Configuration	Legitimacy		Stability		Simplicity	Informed Choice	Inclusivity	
	Legal	Public	Short-Term	Long-Term			General	Specific
1. No plan, no guaranteed process	✓	✗	✗	✗	*	✗	✗	?
2. Maximum model	✓	?	*	?	✓	✓	✓	✗
3. Preliminary vote before maximum model	✓	✗	✗	?	✗	✓	✓	✗
4. Design process before sovereignty transfer, with default plan	✓	?	?	?	✗	*	?	?
5. Design process after sovereignty transfer, with interim/default plan	✓	?	?	✓	✓	*	✓	✓

Key: ✓ performs well; ✗ performs poorly; * intermediate performance; ? performance unclear

9.63. As Table 9.7 shows, all five configurations meet the criterion of legal legitimacy: all fit the requirements of the 1998 Agreement, the UK’s Northern Ireland Act 1998, and the Constitution of Ireland. The following criteria, relating to public legitimacy and stability, highlight the fact that any referendum process on this highly sensitive topic would pose challenges: resolving questions of contested sovereignty is never likely to be easy. Concerns in different quarters about the perceived legitimacy of the process could arise for the various reasons we set out in preceding paragraphs, which could undermine stability. Of course, while any referendum process would raise challenges, *not* holding a referendum in a situation where it appeared likely that a majority would vote for unification would be more problematic, and would violate the 1998 Agreement. The different configurations achieve simplicity to varying degrees. There are notable differences between the configurations in terms of informed choice and inclusivity. Holding referendums once a detailed model for a united Ireland had been

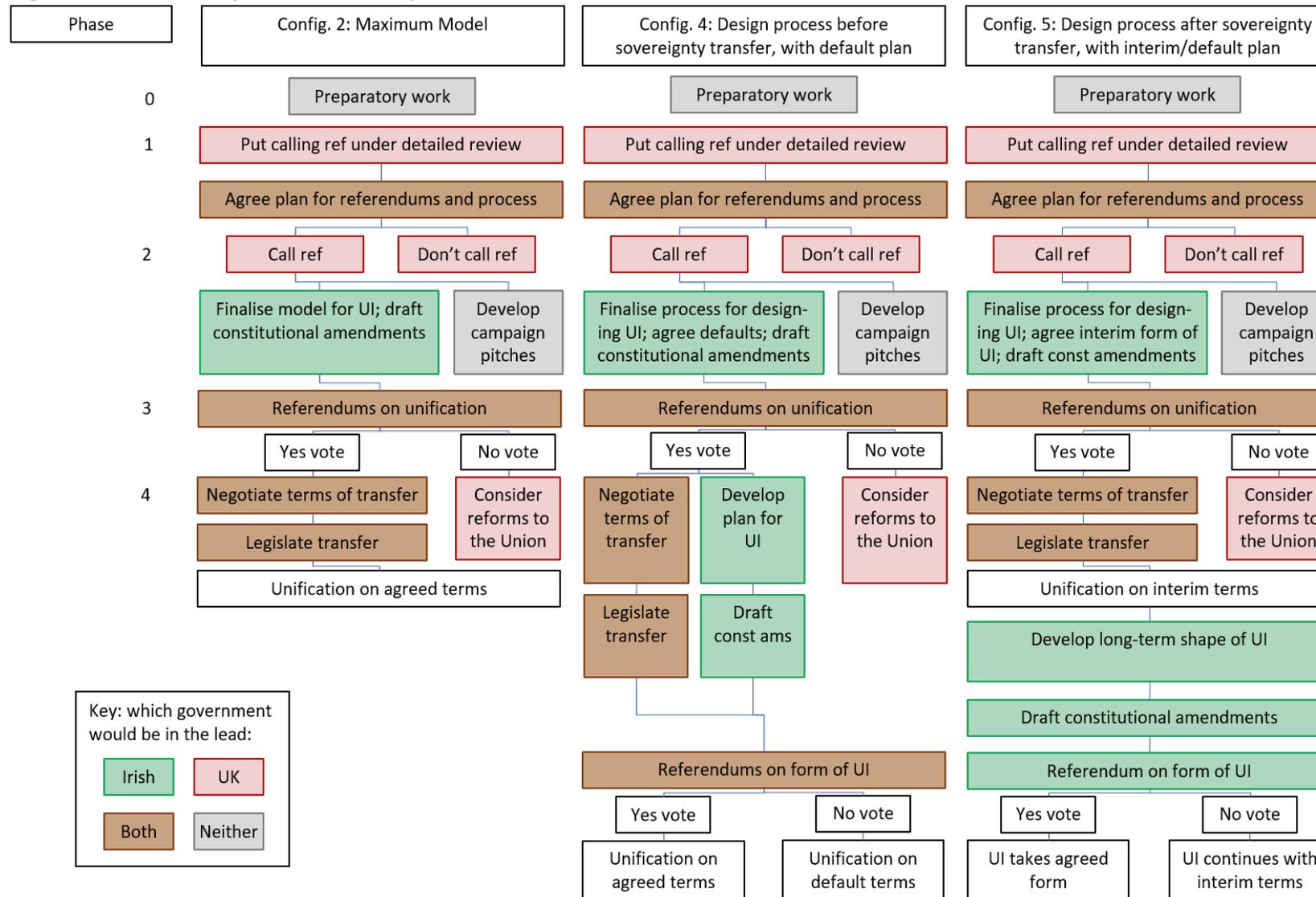
worked out, as under configurations 2 and 3, would maximise informed choice, but would likely make it harder to include all parts of the community in the process of developing that model. Working out the detail after any vote for unification, as under configurations 4 and 5, would entail less information about the options when voters were making their choice, but might enable broader participation in the design process. The benefit of participation would not be fully realised, however, due to the need for the unification votes to approve default arrangements for a united Ireland that would apply if replacement arrangements were not later agreed and approved.

- 9.64. The relative merits of the configurations cannot be assessed just by counting ticks and crosses in Table 9.7: there are many nuances that the table cannot capture. Our analysis leads us, however, to exclude the first and third configurations.
- 9.65. Under the first configuration, referendums would be held north and south on the principle of unification without detailed prior planning as to what would happen—in terms of form or process—if voters opted for a united Ireland. But, as we have emphasised throughout this report, agreeing a plan before calling a referendum, setting out the processes to be followed before and after the votes, would be essential to maximise legitimacy and stability. Configuration 1 would constitute a leap in the dark, and should not be pursued.
- 9.66. We have also concluded that the third configuration, notwithstanding its theoretical merits, would be untenable. The additional, preliminary referendum that it envisages in Northern Ireland could too easily be interpreted as violating the spirit of the 1998 Agreement, or misinterpreted as a vote on the substantive issue of unification. If campaigners treated it as such, that could harm the cause of legitimacy and stability, as well as simplicity.
- 9.67. Under two of the remaining configurations—4 and 5—voters would vote knowing the *process* through which the detailed form of a united Ireland would be determined. Under configuration 4, that process would be conducted in large part before the transfer of sovereignty. In configuration 5, the period before the transfer of sovereignty would be shorter, with the detailed form of a united Ireland to be determined after the transfer of sovereignty. We have suggested that there are competing arguments for and against these different versions and that they merit further consideration.
- 9.68. Finally, configuration 2 provides for a referendum held after a detailed model for a united Ireland had been developed. While not perfect, this configuration also performs relatively well and deserves to be considered further.
- 9.69. Accordingly, while there is no perfect configuration against our criteria, we suggest that three configurations are most plausible and meritorious: configurations 2, 4, and 5. Configurations 4 and 5 would present voters with a proposed *process* for agreeing the shape of a united Ireland. Configuration 2 would offer voters a detailed *model* for a united Ireland. Chapter 10 examines in further detail how each of these would operate in practice.

10. PROCESSES FROM START TO FINISH

- 10.1. Chapters 6–8 set out the elements of processes of decision-making regarding whether Northern Ireland should remain part of the United Kingdom or become part of a united Ireland. Chapter 9 then examined various ways in which these might be configured, with referendums taking place at different stages in the overall process. In this chapter, we sum up how the processes as a whole might look. We keep the detail relatively brief: readers wanting more should consult the preceding chapters. We go into depth here only where the earlier chapters have not already done so.
- 10.2. Figure 10.1, on the following page, summarises the overall processes. It takes the three possible referendum configurations that we concluded in Chapter 9 merited further consideration, which were numbered configurations 2, 4, and 5. Configuration 2 envisages referendums at a relatively late in the overall process, once a detailed model for a united Ireland had been proposed. Voters would decide on the principle of unification knowing what those detailed plans were. Configurations 4 and 5 envisage referendums north and south at an earlier stage, before the arrangements proposed for a united Ireland had been worked out. Voters would vote on the principle of unification knowing the process that would be followed to determine the detailed arrangements if voters north and south opted for unification. Under configuration 4, that process would be conducted before transfer of sovereignty, whereas under configuration 5 it would come afterwards.
- 10.3. Figure 10.1 indicates five rough phases into which these processes can be divided. We refer to the first as phase 0, because it would come at a time when holding referendums was not (yet) an immediate prospect. During this period, preparatory work would be done, but no concrete decisions would be made. Some actors see this phase as having begun already, while others see it as remaining very distant. As we suggested at para 6.44–50, much such work might happen outside the governments, though one or both governments could take part too. Phase 1 would involve decision-making on whether to hold referendums. Phase 2 would span the period between a decision to hold referendums and the votes themselves. Phase 3 would constitute those votes: referendums in both Northern Ireland and Ireland on the question of unification. Phase 4 would cover the period after the referendums. The remainder of the chapter sets out each of these phases in turn.
- 10.4. In phase 1, a decision might be taken to call referendums, or it might not be. We consider both possibilities, but phases 2–4 would clearly ensue only if a decision to call referendums had been made. At phase 3, again, the votes could go either way. We divide our treatment of phase 4 in two: scenarios in which unification has passed both north and south; and in which it has not. The latter scenario itself has three variants: in which both North and South have rejected unification, and in which one has voted for it, the other against. Again, we examine each of these possibilities.

Figure 10.1. Summary of referendum processes



PHASE 0: PREPARATION

- 10.5. We suggested in Chapter 6 that work preparing for the contingency of future referendums would be desirable for two main reasons. First, referendums and, if it were chosen by voters, unification would require decision-making on a wide array of different matters. Thinking these through in advance would help to ensure that decisions could be well grounded. We noted, for example, that further investigations into the economics of unification—and of alternative models of unification—would be desirable, as would studies mapping out and assessing the policy options in different areas. Second, public awareness of what would be involved in referendums and any subsequent processes of unification is low in both Northern Ireland and the Republic of Ireland, creating a danger of clashing expectations. A gradual process of building understanding of what might be involved would therefore be helpful.
- 10.6. While arguing that preparatory work would be desirable, we have not taken a view on the timetable that it should follow. This is a politically sensitive matter on which perspectives differ markedly; given our focus on procedural rather than political matters, it is therefore for others to resolve. Some—particularly, but not exclusively, in the nationalist community—see the preparatory phase as having begun already, and have begun to initiate public and private conversations of various kinds. Others are more cautious on beginning preparations, or are opposed to doing so. The Irish government seeks to focus conversation on a ‘shared island’ rather than on the unification question. Many unionists in Northern Ireland, as well as the UK government, wish to avoid discussion of unification entirely.
- 10.7. Our perspective is therefore simply that it would be desirable for preparatory work to have taken place before any decision to hold referendums on the unification question was made. Given legitimate sensitivities over appearing to drive policy in a particular direction, we suggested in Chapter 6 that such work is likely, at least initially, to take place largely independently of the governments—though the Irish government may wish to become more involved over time. Public funding would, however, be an important source for projects involving, for example, scholarly research or community outreach.

PHASE 1: DECIDING WHETHER TO CALL REFERENDUMS

- 10.8. The first phase in a concrete referendum process would involve decisions on whether or not to call referendums in Northern Ireland and the Republic. We argued in Chapter 6 that, before calling any referendums, it would be highly desirable to have a clear plan in place for the configuration of the referendums north and south and for the processes surrounding them. Thus, two strands of decision-making—on whether

to call referendum north and south and on the procedures for any such referendums—would need to be closely entwined.

WHETHER TO CALL REFERENDUMS

- 10.9. As explained in Chapter 8, the main decision on calling referendums lies in the hands of the UK's Secretary of State for Northern Ireland, who has sole authority over whether to call a vote in Northern Ireland. A decision on whether to call a referendum in the Republic of Ireland would be conditional on the decision made by the UK government.
- 10.10. The Secretary of State *may* call a referendum at any time (provided no such vote has taken place in the preceding seven years). Were a Secretary of State minded to use this power, it would be highly desirable for them to do so in close consultation with representatives in Northern Ireland and with the Irish government: the decision would clearly have enormous impacts on both.
- 10.11. The Secretary of State *must* call a referendum if it appears likely that a majority would vote for unification. That means that a Secretary of State must always keep an open mind to the possibility that this condition could be met. As we suggested in Chapter 8, if evidence that a majority for unification might be likely began to emerge, the Secretary of State would be best advised to announce a detailed process for reviewing the evidence and reaching a conclusion. Chapter 8 also examined the sources of evidence that might be used, the weights that might be attached to them, and the period over which evidence might be expected to endure. The Secretary of State would consult widely, but only evidence on the likelihood of a majority vote for unification could be considered.
- 10.12. Phase 1 would have one of three outcomes. First, the Secretary of State might call a referendum, either by exercising the discretionary power or because they had concluded the evidence pointed to the likelihood of a pro-unification majority. In that case, the Irish government would make its own decision on the timing of a referendum in the South (which we consider further in relation to phase 3, below). Second, evidence might emerge suggesting that a majority for unification was unlikely, leading the Secretary of State to end the period of detailed review. Third, there might be a lasting period when the evidence was not clear either way, causing phase 1 to continue indefinitely.

PLANNING THE REFERENDUM PROCESS

- 10.13. Detailed planning of the referendum processes—both for the referendums themselves and for associated design work and decision-making—would require coordination and agreement between the two governments, in close contact with the parties and other actors in Northern Ireland, the Republic, and Great Britain. This

coordination would best begin once an announcement had been made that the question of whether to call a referendum was under detailed review. It would, of course, be open to the Irish government and other actors to begin their own preparations for agreeing such a plan at an earlier stage. But it appears unlikely that a UK government would wish to engage in detailed planning of the process until it had begun to engage in detailed examination of whether to call a vote at all. In any case, planning for a hypothetical referendum scenario could never be complete.

- 10.14. We set out the matters that would need to be planned at this stage in Chapter 6. Above all, it would be essential to agree which referendum configuration was to be followed. The two governments would need also to agree their approach to the process and whether, for example, they would appoint an independent chair to oversee it. They would need to take a view—so far as possible, a shared one—on the referendum conduct rules. Planning all these matters would require time, care, and wide discussion. A period of a year for this process might be appropriate, but it is difficult to be prescriptive in the abstract.

PHASE 2: FROM CALLING REFERENDUMS TO THE VOTES

- 10.15. Phase 1 would take essentially the same form irrespective of the referendum configuration to be followed. In phase 2, however, the configurations would begin to diverge. One point of commonality across the configurations would be that legislation would be required to bring about the referendums in each jurisdiction. But the configurations differ from each other in what matters would need to be decided before the referendums took place.

LEGISLATING FOR THE REFERENDUMS

- 10.16. In Northern Ireland, the Secretary of State could call a referendum by secondary legislation (a ministerial order requiring parliamentary approval). This could set the referendum date, the question, and the franchise. As we explore in Chapter 14, however, some changes to the UK's standing rules for the conduct of referendum campaigns would be essential, and this would require primary legislation (an Act of Parliament).
- 10.17. In the Republic of Ireland, the referendum would be on either a proposed constitutional amendment (or set of amendments) or a proposal for a wholly new constitution. In either case, this would need to pass through the Houses of the Oireachtas before being put to a public vote.

MATTERS TO BE AGREED: CONFIGURATION 2

10.18. The matters requiring resolution ahead of the referendums would vary across the configurations. Under configuration 2, voters in the unification referendums would be offered a detailed model for a united Ireland. It would ultimately be for the Irish government and the Oireachtas to propose such a model to voters north and south. But it would be highly desirable for them to develop these proposals through processes that were as inclusive as possible. As explained in Chapter 6, we think it very possible that a British government would decline to negotiate terms for transferring sovereignty if no referendum vote in favour of Irish unification had yet taken place. The proposals put to voters would, however, encompass the proposed constitutional structures and policy arrangements with which a united Ireland would begin its existence, to the extent that the latter could be specified without knowledge of the terms for the transfer of sovereignty.

MATTERS TO BE AGREED: CONFIGURATIONS 4 AND 5

- 10.19. Whereas voters in the unification referendums under configuration 2 be offered a detailed *model* for a united Ireland itself, those in configurations 4 or 5 would be offered a *process* for deciding the form of a united Ireland. Two sets of issues would need to be agreed. First, processes would be set out by which the details of a united Ireland would be established in the event that voters supported unification in the referendums. Some of these processes—particularly those relating to the terms on which sovereignty over Northern Ireland would transfer from the UK to Ireland—would require agreement between the two governments. Others—for deciding constitutional and policy arrangements in a united Ireland—would be the responsibility of the Irish government and the Oireachtas. If the Irish government wished to propose new or temporary constitutional amendment procedures, these would require approval by the Houses of the Oireachtas before being put to voters. Some aspects of these processes might be established before referendums were called, during the initial planning under phase 1.
- 10.20. Second, it would be necessary under configurations 4 and 5 to establish default or interim arrangements for a united Ireland, which would likely be developed mainly by the Irish government. Under configuration 4, unification would occur on default terms if, following votes in favour of unification in referendums north and south, new arrangements for a united Ireland were not agreed or were rejected by voters in a second set of referendums. Under configuration 5, unification on interim terms would, by design, follow referendum votes in favour of unification. Only after unification had taken place would permanent arrangements for a united Ireland be developed and decided on. Again, if alternative permanent arrangements were not approved, the interim arrangements would presumably also serve as the default arrangements and continue indefinitely.

- 10.21. We stress the vital importance of these default or interim arrangements under these two configurations. First, the default arrangements under configuration 4 could, and the interim arrangements under configuration 5 would, constitute the actual system for governing a united Ireland at its inception. This would be a vitally important period for consolidating support for the new entity. Second, these arrangements might endure for an extended time if permanent systems proved difficult to agree. There are other examples around the world—including, the German Basic law and Israel’s system of basic laws and rights—of temporary arrangements that have never been replaced. Third, the character of the default or interim arrangements would strongly shape discussion and decision-making about their permanent replacements. The choice at the second referendum would be between these arrangements and the proposed reforms.
- 10.22. Given their importance, the default or interim arrangements should be defined with great care. As discussed in Chapter 6, while they would ultimately be matters for the Irish government and the Oireachtas, they would best be worked out through wide, inclusive discussions. At the same time, the very reason for adopting configuration 4 or 5 rather than configuration 2 would be the expectation that fully inclusive discussions embracing all communities on the island of Ireland may be possible only after a conclusive decision in favour of unification had been made. This is an irresolvable tension at the heart of these configurations.

PLANNING THE CAMPAIGNS

- 10.23. Besides the development of proposals for a united Ireland set out above, phase 2 would also be a period during which campaigners on all sides would develop their referendum campaign strategies. Campaigners for unification would likely base those strategies in part on the plans for what would follow votes in favour of unification. Campaigners for maintaining the Union, meanwhile, might develop proposals for reforming Northern Ireland’s place within the Union and Northern Ireland’s internal system of government. We set out some of the matters that such proposals might address in Chapter 7.

THE LENGTH OF PHASE 2

- 10.24. Given the various matters that would need to be addressed in phase 2, it is clear that some time would have to elapse between calling referendums on unification and holding them. The sequencing might be that the matters set out in paras 10.18–22 would be worked out first, allowing the content of constitutional amendments in Ireland to be determined. The necessary legislation might then pass through the two parliaments in parallel. Under norms in the UK (see para 4.33), that would preferably take place at least six months before polling day. The campaign periods would then ensue.

10.25. It appears very unlikely that all of this could be accomplished satisfactorily in under a year. More time might well be valuable in order to allow detailed and inclusive consideration of key matters to take place. Much more time would be required under configuration 2 than under configurations 4 or 5, as detailed proposals for a future united Ireland would require determination under that configuration. We suggested at para 4.34 that the maximum allowable period between calling and holding a referendum in Northern Ireland would be around three years.

PHASE 3: REFERENDUMS ON THE UNIFICATION QUESTION

10.26. Phase 3 would be constituted by the referendums on the unification question themselves. We examine many aspects of these referendums in detail in Part 3 of this report, including the referendum threshold (Chapter 11), the franchise (Chapter 12), the questions on the ballot papers north and south (Chapter 13), and the conduct of the campaigns (Chapter 14). We do not therefore go into these matters here.

10.27. One point that we should address here, however, concerns the precise timing of the referendums north and south relative to each other. The 1998 Agreement requires that these votes should be ‘concurrent’. As explained at para 4.29–32, we do not interpret ‘concurrent’ as meaning that the votes should necessarily be simultaneous. Concurrence requires only that the referendums should take place at the same stage in the overall process, on the same proposals. In principle, there are therefore three ways in which the referendums could be sequenced: they could indeed take place on the same day; or the vote in Northern Ireland could come first; or the vote in the Republic of Ireland could come first.

10.28. As we set out further in Chapter 11, there are arguments relating to both symbolism and practical effect that might affect decision-making on the design of the referendums, including the question of how votes north and south would be sequenced. Many respondents to our public consultation identifying as nationalist argued that the referendums north and south should take place on the same day. From the perspective of others, by contrast, the decisions in Northern Ireland and the Republic of Ireland would be separate from each other, and there would be no symbolic value in holding the votes simultaneously. Such views are entirely legitimate. They are, however, intrinsically political as opposed to procedural, and we therefore do not make any further comment on them here.

10.29. In terms of practical effects, an argument might be made in favour of holding the vote in the South first in order that voters in Northern Ireland could make a fully informed choice. The Republic could confirm its ‘offer’ to the North, either in terms of a worked out model for a united Ireland (under configuration 2) or in terms of a process for agreeing the form of a united Ireland (under configurations 4 or 5), and voters in Northern Ireland could make their choice on that basis. Under the terms of

the 1998 Agreement, however, it would not be necessary to hold the southern vote first in order to achieve this effect. Concurrence requires that North and South would vote on the same proposals, so the proposals being put to voters in the South would need to be known to voters in the North whatever the precise timings. And a vote for unification in the North would lead to a united Ireland only if voters in the South also backed the proposals. In addition, holding the referendum in the South first could lead to a requirement to hold a legally pointless referendum in the North. If the Secretary of State had deemed a referendum in Northern Ireland to be required, it would still be required, even if the result in the South had ruled out unification. We can see no other benefit to holding the vote in the South first, so we think this sequencing can be ruled out.

- 10.30. A practical argument for holding the referendum in Northern Ireland first is that it would allow the vote in the South to proceed only if Northern Ireland's voters had backed unification: it would save voters in the Republic from taking part in what could effectively be a void referendum. The gain here would be relatively slight: given the concurrence rule, the terms on which unification would be put to voters in the South would need to be known before the vote in Northern Ireland was held, so the work set out above in relation to phases 1 and 2 would still need to be done. But a further advantage is that this approach would avoid the potentially destabilising outcome of it being clear that there was an all-island majority in favour of unification but a majority opposed in Northern Ireland. A disadvantage, meanwhile, is that voters in the South might not fully focus on the issues unless or until the North voted in favour of unification. This would be particularly problematic under configuration 2 where detailed proposals for a united Ireland are worked out before the referendums.
- 10.31. If, finally, the votes were held simultaneously, then voters in the South would be deciding on constitutional amendments or a new constitution whose implementation would be conditional upon the result in the North. This would be the same approach as was taken in 1998, when southern voters voted on constitutional amendments that would not have come into effect had northern voters rejected the Agreement. The advantages and disadvantages identified in the previous paragraph apply in reverse here.
- 10.32. There are thus two plausible approaches to the sequencing of the votes on the question of unification. Northern Ireland and the Republic of Ireland might both vote on the same day. Or Northern Ireland might vote first, with voters in the Republic going to the polls only if those in the North had backed unification. We do not see large practical benefits to either approach over the other.

PHASE 4: AFTER THE REFERENDUMS—IF UNIFICATION PASSED

10.33. The events that would follow referendums on unification would clearly depend on the referendum results. In this section, we examine what would happen if North and South both voted for unification. The processes would differ substantially between the three referendum configurations, and so we set out each in turn. In the following section, we look at what would happen if either North or South—or both—voted against.

CONFIGURATION 2

10.34. Under configuration 2, a great deal would have been worked out before the referendums, during phase 2, leaving less to be decided in the course of phase 3. Voters would have voted for unification with a detailed plan attached as to the form that a united Ireland would take.

10.35. It is likely, however, that the terms of the transfer of sovereignty would still remain to be negotiated between the governments. While it is possible that the UK government would enter such negotiations before a referendum, it appears more likely that it would not. These negotiations would therefore need to take place during phase 3, and they would then need to be legislated for in both parliaments. The transfer of sovereignty would subsequently take place on the agreed date.

CONFIGURATION 4

10.36. Under configuration 4—and also under configuration 5—voters would have adopted the principle of unification at the referendums in Northern Ireland and the Republic, but much of the detail would remain to be worked out. In configuration 4, the actual transfer of sovereignty would be delayed to allow as much as possible of that work to be done first.

10.37. This work would involve two interlinked processes, the form of which should have been agreed in advance of the referendums. First, the two governments would negotiate the terms of the transfer of sovereignty over Northern Ireland, as well as the future structure of relations between the UK and Ireland. In doing so, they would engage closely with the parties in Northern Ireland and a wide range of other actors. Second, the Irish government would lead a process for developing proposals for constitutional structures and policy arrangements in the united Ireland. This process would be as inclusive as possible—of elected representatives, civil society, and the general public, and of all communities north and south. In Northern Ireland, these processes would take place under continuing British sovereignty, and so the cooperation of the UK government would also be required. We set out more details on these processes in Chapter 6.

- 10.38. Once the terms for the transfer of sovereignty had been agreed, these would be legislated for in both parliaments. The terms would include the date on which the transfer would take place.
- 10.39. Before that date, the processes for developing proposals for the united Ireland would be concluded, and referendums would be held in both Northern Ireland and the Republic. It should be remembered that these referendums could not overturn the result of the first referendums, in which voters had opted for unification: to allow that would violate the 1998 Agreement. Thus, the choice in the second set of referendums would be between unification according to the proposals that had been developed, and unification on the default terms that had been set out in advance of the first referendums.
- 10.40. The rules for this second set of referendums would need to have been determined during phase 2, before the first referendums. The natural approach may be to require separate majorities both north and south in order for the proposals developed through the processes just set out to be adopted. That would protect voters in Northern Ireland from the adoption of proposals that they did not think adequately reflected their interests or identities. On the other hand, if the proposals were defeated, the outcome would, as just noted, be unification on the default terms set out in advance, which northern voters would not have had a direct say on.
- 10.41. There is no easy solution here. The difficulty arises from the clash between the principle that sovereignty must be decided by simple majority and the principle that governing arrangements in Northern Ireland should be agreed consensually. If the majority opts for unification, then the transfer of sovereignty must occur, whether governing arrangements can be agreed consensually or not. But the dangers of not proceeding by consensus would be great. It would be imperative for great efforts to be made to find a solution that could achieve the broadest possible acceptance.
- 10.42. Following the second set of referendums, the transfer of sovereignty would occur on the designated date, according to the terms that voters had chosen.

CONFIGURATION 5

- 10.43. The processes after votes in favour of unification under configuration 5 would be broadly similar to those under configuration 4. The key difference would be that the transfer of sovereignty would take place before proposals for permanent constitutional and policy arrangements in the united Ireland were developed. The united Ireland would initially operate under the interim arrangements set out during phase 2.
- 10.44. More specifically, following the referendum votes in favour of unification, the two governments, in wide consultation with other actors as above, would negotiate the terms for the transfer of sovereignty over Northern Ireland. These terms would then be legislated for in the two parliaments, including the date on which the transfer of

sovereignty would take place. Following the transfer of sovereignty, while the united Ireland was operating under interim arrangements, proposals for permanent arrangements would be developed. These processes would resemble those under configuration 4, except that they would take place in a united Ireland. A key goal would be to maximise inclusivity and to seek broad agreement. A referendum on whether to accept the agreed arrangements would then be held, with the default if voters rejected them being that the interim arrangements would continue.

- 10.45. The same quandary regarding the decision rule in this second referendum arises here as under configuration 4: on the one hand, requiring separate majorities north and south to adopt the proposals would seem to offer protection to northern interests; on the other hand, the default would be a set of interim arrangements that would likely not have been agreed consensually. As under configuration 4, great sensitivity in the pursuit of broad agreement would be highly desirable.

TIMINGS FOR PHASE 4

- 10.46. The process of moving from referendum votes in favour of unification to the transfer of sovereignty could be faster under configuration 2, where much would already have been settled before the votes. By way of broad indication, negotiation of terms between the governments might take a year, with legislation taking another six months. The governments might then want an interim period in order to make practical arrangements relating, for example, to administration and the provision of public services. The transfer of sovereignty might, therefore take something in the order of two years following the referendum votes under this configuration. Longer would be needed under configurations 4 or 5.
- 10.47. We also discussed in Chapter 7 the possibility that the governments might adopt a more gradual timetable. Our view, as stated in Chapter 2, is that a considerable delay before the transfer of sovereignty would go beyond the terms of the 1998 Agreement. Processes of transition—for example, in the operation of public services—could, however, very well continue for some years beyond the moment of transfer itself.

PHASE 4: AFTER THE REFERENDUMS—IF UNIFICATION DID NOT PASS

- 10.48. There are four possible ways in which unification might not pass in the referendums north and south. First, it might be defeated in both jurisdictions. Second, it might pass in Northern Ireland, but be defeated in the Republic. Third, it might pass in the South, but be defeated in the North. Fourth, if the referendums were staggered with that in the North coming first, it might be defeated there, leading to the cancellation

of plans for a vote in the South. We examine each of these in the following subsections. The first and second require most attention.

VOTES AGAINST UNIFICATION BOTH NORTH AND SOUTH

- 10.49. If both jurisdictions voted against unification, the legal position would be that the status quo arrangements would continue. No further referendum on the issue could be held in Northern Ireland for at least seven years.
- 10.50. We have noted that supporters of the Union might propose reforms to the status quo in the course of the referendum campaign. As we emphasised in Chapters 6 and 7, however, the fact that a majority has supported maintaining the Union in the vote in Northern Ireland would not in itself constitute a mandate for those reforms. First, there would be no evidence that the majority supported specifically the reformed version of the status quo. Second—and much more importantly—a majoritarian vote in the referendum could not override the norm, embodied in the 1998 Agreement (and subject only to the majoritarian principle that determines Northern Ireland’s status in the United Kingdom), that changes to governing arrangements within Northern Ireland should be agreed consensually. Thus, whether any changes were implemented would be a matter for post-referendum discussion and negotiation.
- 10.51. In practice the dynamics of such discussions might well be affected by the margins in the referendums, particularly in the North, though the nature of these effects are not necessarily clear. If the majority for maintaining the Union was slight, supporters of the Union might think that they needed to propose reforms in order to preserve it in the long term. Conversely, they might feel that concessions would only hasten the end. It is clearly not our role to judge among such alternative approaches. It appears clearer, however, that a narrow loss would encourage supporters of unification to work on their proposals for a united Ireland in hopes of achieving a different result seven years later.
- 10.52. It is sometimes said that, once a unification referendum has taken place, votes would subsequently take place every seven years until a result in favour of unification was achieved. That is not the case. The stipulation in the 1998 Agreement is that a further referendum could not take place within seven years, not that another vote would have to take place after seven years. If the vote had been called because it appeared likely to the Secretary of State that a majority would vote for unification, but a majority in fact did not vote for unification, then the evidence of support for unification would need to be at least as strong seven years later to require a repeat vote. Such evidence might exist—and demographic trends might be thought to make it likelier than not. Equally, however, opinion can ebb and flow. Strong assumptions about what would happen therefore cannot be justified.

VOTES FOR UNIFICATION IN THE NORTH, AGAINST IN THE SOUTH

- 10.53. The second scenario is one in which voters in Northern Ireland back unification, but those in the Republic reject it. We have heard vastly different assessments of the likelihood of this outcome. Some see it as vanishingly unlikely: if voters in the South thought the majority in the North wanted unification, they would embrace it; no major party in the South could conceivably campaign against it. Others take the opposite view: once voters in the South saw the complexities and financial cost of achieving unification and the difficulties of reconciling many in the unionist community to it, they would balk at the prospect. Again, we make no judgment on these matters.
- 10.54. It may be tempting to think that in this scenario, at least if the vote margin in the South was tight, the solution might be for adjustments to be made to the proposed form of a united Ireland and for the vote in the South to be rerun within a year or two. Something like this happened, after all, in 2001–2 in relation to Ireland’s ratification of the Nice Treaty, and in 2008–9 on the Lisbon Treaty. In both cases, the proposals were initially defeated. But small adjustments were subsequently made, more effective referendum campaigns were conducted by the Yes side, and the initial results were overturned on substantially higher turnouts.
- 10.55. But that course would not be available in this case. Under the concurrence requirement, if adjustments were made to the proposals on which voters in the Republic voted, then a repeat referendum would have to be held in Northern Ireland as well: otherwise, voters north and south would have voted in different propositions. This would be true irrespective of the referendum configuration. And, under both the 1998 Agreement and the Northern Ireland Act, a repeat referendum could not be held in Northern Ireland within seven years of the first vote.
- 10.56. Thus, two options would be legally available: to rerun the referendum in the South, but on exactly the same proposition as in the first vote; or to wait at least seven years before holding any repeat votes, during which period work could be done to address southern voters’ concerns.
- 10.57. The first of these might be feasible if the margin had been close. It may especially be so if the referendums had revealed that majorities for unification existed both in Northern Ireland and across the island as a whole. Political pressure in some quarters for an early resolution could well be great.
- 10.58. On the other hand, the campaign in the original referendum would likely have been intense and the turnout high, so justifications for a rerun that had existed in the cases of Nice and Lisbon would not be available. Questions might well be asked about why southern voters were being asked to vote again on the very proposition that they had just rejected. Furthermore, the 1998 Agreement does not stipulate majorities in Northern Ireland and across the island as a whole; it stipulates majorities in Northern Ireland and in the Republic.

- 10.59. These factors may make the second option more likely—particularly if the margin in the South had been wide and/or the island-wide majority was against unification. It is notable that, except in the particular circumstances of the Nice and Lisbon treaties, where Irish voters have rejected a proposition in a referendum, second attempts have not been made for some years. This pattern has applied to the attempts to change the voting system (1959 and 1968), to introduce divorce (1986 and 1995), and to remove risk of suicide as a ground for abortion (1992 and 2002). Thus, besides being baked into the Agreement, a delay of seven or more years before repeating a referendum has precedents in Ireland.
- 10.60. In Northern Ireland, meanwhile, the Secretary of State would have an obligation to call another referendum after seven years if it appeared likely at that time that a majority would vote again for unification. In the absence of evidence that opinion had shifted against unification, that test would be met. This obligation would hold irrespective of the evolution of opinion in the South during the intervening period.
- 10.61. In the scenario we are considering here, the majority of voters in Northern Ireland would have opted to leave the Union. In light of that outcome, supporters of maintaining the Union might put forward proposals to reform the Union or arrangements within Northern Ireland, and hope thereby to secure a different result at a subsequent vote. But supporters of unification would likely concentrate their efforts on developing proposals for a united Ireland that would convince sceptical voters in the South. Following a split vote of this kind, therefore, it could be difficult to achieve general agreement on any path forward.

VOTES FOR UNIFICATION IN THE SOUTH, AGAINST IN THE NORTH

- 10.62. The alternative form of split vote would be one in which voters in the Republic had supported unification, but the majority in Northern Ireland had rejected it. In legal terms, the effect would be the same as in the two scenarios above: unification would not have passed, and the status quo would be maintained.
- 10.63. In political terms, the dynamics could be affected by the details of the voting. If the all-island majority was against unification, this scenario would likely function in much the same way as if unification had been rejected by majorities both north and south. On the other hand, if the all-island majority was in favour of unification, some would see that as carrying significant weight. Nevertheless, the 1998 Agreement is unambiguous: unification cannot take place without the consent of the people of Northern Ireland. It would be essential to maintain this principle.
- 10.64. We pointed out above that the danger posed by this scenario, particularly in the case of an all-island majority for unification, would be one reason for staggering referendums in the North and the South, such that voters in the Republic would go to the polls only if voters in Northern Ireland had backed unification. If that course were not adopted, it would be desirable for all parties at the start of the referendum

campaign period to make a declaration that they would abide by the rules set out in the 1998 Agreement, including that they would respect the result as determined by majorities of voters in, respectively, Northern Ireland and the Republic.

VOTE AGAINST IN THE NORTH, NO REFERENDUM IN THE SOUTH

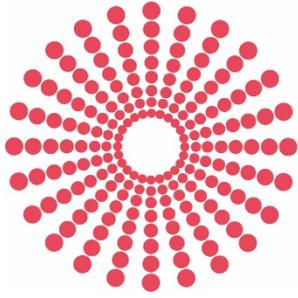
10.65. In light of the preceding comments, we can treat the final scenario quickly. If the referendums were staggered, with a vote in the South being initiated only if the majority in Northern Ireland had backed unification, then unification would be rejected by a vote against it in the North alone, with no referendum taking place in the South. The legal effect would be the same as above: unification would not go ahead, and no further referendum on the matter could take place for at least seven years. In political terms, the dynamics would likely be much as if there had been majorities against unification both north and south.

CONCLUSIONS

- 10.66. This chapter has set out the processes that any unification referendums would involve. We have divided these into five broad phases. The initial phase is labelled phase 0, as it would take place at a time when holding referendums was not (yet) an immediate prospect. It would involve preparatory work, including research into what different forms of unification—or different reforms to the Union—would entail, and the encouragement of broad public discussion around the issues. Phase 1 would be a period when the possibility of calling referendums was placed under active consideration. It would be important during this period also for the governments, in wide discussion with political parties and others, to agree a plan for such referendums and the processes surrounding them.
- 10.67. If referendums were called, phase 2 would then take in the period from that moment until the votes themselves. The decisions to be taken during this period would depend of which of the referendum configurations was followed. Under configuration 2, the Irish government would lead a process of developing proposals for the form of a united Ireland. Under configurations 4 or 5, the Irish government would lead the development of processes through which such proposals would be drawn up after the referendums, in the event that voters north and south opted for unification. In addition, it would be necessary under configuration 4 to develop default arrangements for the form that a united Ireland would take if replacement arrangements could not be agreed. Under configuration 5, interim arrangements would be required, to operate after the transfer of sovereignty while replacement provisions were settled.
- 10.68. Phase 3 would encompass the referendums themselves. We examine most aspects of referendum regulation and conduct in Part 3 of the report. But here we looked at the

sequencing of referendums north and south, noting arguments in favour both of holding the votes simultaneously and of staggering them, with Northern Ireland voting first. Finally, phase 4 covers the period after the referendums. Activity during this period would clearly depend in very large part on the results of the votes north and south. In the event of votes for unification, the steps to be taken would depend on the referendum configuration that had been followed. If unification were not chosen, subsequent steps would be strongly shaped by whether there had been votes against both north and south, or only in the North, or only in the South.

- 10.69. The configurations would thus differ from each other principally from phase 2 onwards: there would be variation in what would be decided when, and therefore in how long some phases would take. At the same time, the differences should not be exaggerated. Under all configurations, in order to enable an informed choice among voters and to provide clarity as to the paths ahead under different outcomes, much work would be needed before the votes were held. And, if voters opted for unification, some further work would be required between polling day and the transfer of sovereignty as well. It would be highly desirable to plan all of this out during phase 1.



Working Group on
Unification Referendums
on the **Island of Ireland**

Part 3

Referendum and Campaign Regulation

11. REGULATING REFERENDUMS: GENERAL CONSIDERATIONS, AND THRESHOLDS

- 11.1. This final part of our report examines the rules that would govern the conduct of any referendum or referendums on the constitutional question. The following chapters cover three issues: the franchise; the referendum question; the campaign conduct rules. There are other aspects of referendum conduct that would also need to be considered carefully, such as the administration of the vote and the count. But we consider the points that we address to be the most important.
- 11.2. Before we turn to the three specific issues, this chapter briefly highlights two general points that run across them. First, we explain the approach that we take in the three following chapters to evaluating the options in relation to referendum conduct. Second, we highlight the fact that both the UK and Ireland already have rules for many aspects of referendum conduct in existing law. Particularly in the UK's case, the situation is in this sense very different from that of 1998, when the last referendum on Northern Ireland's future took place.
- 11.3. This chapter also briefly addresses one aspect of referendum regulation to which we do not devote a full chapter, but that does often receive considerable attention: namely, the referendum threshold. We do not devote a chapter to this topic because the thresholds for referendum both north and south are stipulated in the 1998 Agreement: what is required is a simple majority of those voting. Given this fact, and given our approach of sticking within the Agreement's terms, there is little more to be said. Nevertheless, proposals to change the threshold are often made. We therefore consider it helpful to explain why, even without the Agreement, only a simple majority threshold would be defensible.

EVALUATING THE OPTIONS FOR REFERENDUM REGULATION

- 11.4. We set out in Chapter 5 the evaluative criteria by which we have sought to judge any referendum process. Those criteria hold here as much as they did in Part 2. By way of reminder, they are: procedural legitimacy in the eyes of the public and the law; short-term and long-term stability; simplicity; opportunity for informed choice; and inclusivity across society, and specifically across unionist, nationalist, and non-aligned perspectives.

- 11.5. Besides these criteria, one further question arises at this point: If referendums are held both north and south of the border, should they be conducted according to common rules, or would it be reasonable to allow different rules in the two jurisdictions? This is an important question, and we therefore wish to set out our approach to it clearly.
- 11.6. People responding to this question are likely to base their answers on two different kinds of considerations: their conception of the referendum; and practicalities. As regards conceptions of the referendum, different people, as we noted at para 1.25, are likely to take very different approaches. Some will see a referendum (or set of referendums) as an opportunity for the people of the island of Ireland as a whole to come to a collective decision about their future. They may see votes north and south of the border as together forming a potential foundational moment for a new Ireland. Others, by contrast, will see those votes as two separate political communities making their own distinct decisions. From their perspective, a shared entity might be created through the referendums, but could not be presumed beforehand. The former perspective is likely to view common rules as desirable in themselves, while the latter may not.
- 11.7. The weight attached to these two perspectives is a fundamentally political matter, not a procedural matter, and therefore not one on which we take a collective view. Our only observation is that any approach to the referendum, if it is to have any chance of commanding legitimacy across the different communities on the island, must show respect for both perspectives, as the 1998 Agreement does.
- 11.8. The second set of considerations relate to practicalities. In some cases, deviations between the rules used north and south may cause confusion, loopholes, or other practical difficulties, which would make adherence to the general criteria that we set out above difficult. Conversely, it may be that in some cases it would cause difficulties to impose common rules, as that would disturb practices that have become familiar and understood or that are best not interfered with in an ad hoc manner. We can and do make recommendations on such matters in the chapters that follow.

CONTEXT: THE EXISTING REGULATORY FRAMEWORK

- 11.9. We outlined the broad legal framework relating to decision-making about Northern Ireland's constitutional future in Chapter 4. It is set out in the 1998 Agreement and translated into domestic law in each jurisdiction through the Constitution of Ireland and the UK's Northern Ireland Act 1998. Beyond these broad frameworks, further legislation regulates the conduct of referendums in both countries: in the UK, the Political Parties, Elections, and Referendums Act (PPERA) of 2000; in Ireland, the Referendum Acts of 1994 and 1998.

- 11.10. The following chapters provide details of these legal provisions as they pertain to specific matters. At this point we wish to highlight that, especially in the UK, the situation is very different from in 1998, when the referendum on the Belfast/Good Friday Agreement was held. At that time, there were no standing legal provisions relating to referendums in the UK, and very few precedents to draw on. There were no established practices, for example, relating to how a referendum question should be written, and no standard rules regarding referendum campaign finance.
- 11.11. Today, by contrast, PPERA regulates many aspects of referendum conduct (though it is notably silent on the franchise), and has been put into effect in a series of high-profile votes. In the absence of legislation to the contrary, it would apply to a referendum on Northern Ireland's constitutional future. Building on the PPERA rules, the Electoral Commission has developed standard practices for assessing proposed referendum questions, as well as extensive guidance relating to campaign conduct. As we explore especially in Chapter 14, these existing rules are widely acknowledged as being inadequate in many respects, and updating is badly needed. But the regulatory starting point is nevertheless very different from that of 1998.
- 11.12. Much of Ireland's current legislative framework already existed in 1998, but it too has developed its practices around referendums much more fully since then. Notably, the Referendum Commissions, which provide impartial information for voters on referendum proposals, and which were in their infancy in 1998, are now thoroughly normalised. Practices governing broadcast coverage of campaigns have become stricter. And the recent practice of holding citizens' assemblies before referendums on contentious issues has emerged and increasingly become standardised.
- 11.13. The foregoing means that any future referendums on the constitutional question would be designed in a context that is much more constraining in respect of conduct rules and expectations than was the case in 1998: existing rules and expectations would now need to be taken into account to a much greater degree. That is most strongly the case in relation to question setting (Chapter 13) and the conduct of campaigns (Chapter 14). It holds less true in the case of the franchise in Northern Ireland (Chapter 12), where PPERA is silent—though, even here, precedents have developed.

REFERENDUM THRESHOLDS

- 11.14. The 'threshold' in a referendum is the line that the result must reach in order for the proposal to pass. As we indicated in Chapter 1 (paras 1.9–10) and Chapter 4 (para 4.27), the 1998 Agreement is unequivocal that the threshold in a referendum on the unification question in Northern Ireland would be a simple majority—50% + 1—of those casting a valid ballot. A simple majority would be required in a referendum in

the South as well. Given that we take the 1998 framework as our starting point, we have not proposed any deviations from these stipulations.

- 11.15. Nevertheless, the appropriate referendum threshold remains contentious, and some who gave evidence to us raised it as an issue. In written evidence, for example, the leading Irish political scientist Professor Michael Gallagher suggested that a supermajority threshold might be adopted ‘in order to ensure that, within Northern Ireland, a proposal cannot be passed with the support of just one community even if it is almost unanimously opposed by the other community’. He continued:

A simple majoritarian approach would run counter to the consociational principles that underlay the 1998 Good Friday/Belfast Agreement. There would thus be a case for prescribing ... more than 50 per cent support, perhaps 60 per cent, for the proposal in order for this to have any effect; anything less than that, in either jurisdiction, would be taken as rejection of the proposal due to insufficient support.

- 11.16. Many respondents to our public consultation also spontaneously raised the issue. Some were adamant that a 50% + 1 threshold should be applied. One said that any higher threshold would amount to ‘juggling the books and could lead to tangible problems’. Another said, ‘a weighted majority is unavoidably undemocratic and means that some votes weigh more than others. A slim majority either way would be damaging, but this should be avoided by using good data to decide when to call a referendum.’ A third said, ‘Regarding the referendum voting procedure, in line with the Belfast Agreement/Good Friday Agreement a majority vote of 50% plus 1 vote will decide the outcome.’ Conversely, other respondents argued for a higher threshold. One said this was needed ‘to avoid a split country’. Another wrote, ‘50% plus one vote, is too contentious and problematic - we’ve seen this with brexit. The parameters need to be redefined to support more clarity, say at 60% or so.’ A third said, ‘Brexit has shown the danger of narrow margins . Polls must show an absolute majority of those polled would vote for unification not just a majority of those voting and should need a 60/40 majority to avoid reopening troubles. A 1 or 2% majority would lead to civil war.’

- 11.17. In light of this controversy, we have considered whether a case for a different threshold could have been made had we not taken the 1998 Agreement as our starting point. We have concluded that it could not. That is so for two reasons.

- 11.18. First, the 50% + 1 threshold was not incidental to the 1998 Agreement, but fundamental to it. For example, former Tánaiste and Attorney General Michael McDowell has said:

there never would—or could—have been a Good Friday Agreement at all if parallel consent [for a transfer of sovereignty] had been a part of it. Of that, I am absolutely satisfied based on my involvement in the political dialogue between 1999 and 2007.

If it had been suggested in 1998, the Stormont talks would have collapsed. If it had been suggested in 2006 at St Andrews, those talks too would have failed. There would have

been no de-commissioning and no Paisley/McGuinness joint First Ministership. (Written Evidence Received from Michael McDowell)

- 11.19. Second, the simple majority threshold for deciding sovereignty is not a contingency of the 1998 Agreement, but a requirement of the underlying principle of equal treatment of the options on the ballot paper. Any qualified majority threshold would make it harder to change the status quo and would therefore favour the status quo. On the basic, binary question of sovereignty, that could not be justified.
- 11.20. Thus, in the event that voters were asked to choose between Irish unification and maintaining the Union, simple majority would be the only defensible decision rule. As we found at paras 2.79–2.81, insofar as there have been comparable referendums in other parts of the world, they have generally applied the same principle.

CONCLUSION

- 11.21. This short chapter has introduced some general considerations that apply across the various aspects of referendum regulation, and also briefly elaborated upon our conclusions in relation to referendum thresholds. The following three chapters examine three key aspects of referendum regulation—relating to the franchise, the referendum question, and the conduct of the campaign—in further detail.

12. THE REFERENDUM FRANCHISE

- 12.1. Who should be allowed to vote in any referendums held to consider whether Northern Ireland should leave the United Kingdom and unify with Ireland? Given our conclusion (paras 4.23–26) that referendums would be required both north and south, this question must be answered for both jurisdictions. The 1998 Agreement states that the matter is to be decided ‘by a majority of the people of Northern Ireland’ and by ‘the people of the island of Ireland alone, by agreement between the two parts respectively’. But who are ‘the people’? This is a vital issue, going to the heart of the idea of consent. As the constitutional scholar Sir Ivor Jennings once remarked, the apparently sensible rallying call of ‘Let the people decide’ is problematic ‘because the people cannot decide until someone decides who are the people’ (Jennings 1956: 55–56). In practical terms, this boils down to the question of who should be entitled to vote in a unity referendum.
- 12.2. The Agreement offers no further guidance regarding the franchise for referendums in the South. Ireland does, however, have existing franchise rules for constitutional amendment referendums, which we set out below. Unification could alternatively involve a referendum to enact a new constitution, for which no franchise is fixed; but the normal constitutional amendment franchise would likely again be applied.
- 12.3. For a referendum in Northern Ireland, the Northern Ireland Act, in compliance with the Agreement, specifies that ‘Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so *without the consent of a majority of the people of Northern Ireland voting in a poll ...*’ (section 1; emphasis added). Paragraph 4(1) of schedule 1 requires that an order directing the holding of a poll ‘shall specify ... the persons entitled to vote.’ Again, however, no further guidance regarding the franchise is set out. No other existing legislation defines the franchise for a referendum on Northern Ireland’s constitutional status.
- 12.4. This chapter is divided into three main parts. First, we examine the existing provisions in further detail. We set out the rules in Ireland, and we examine—but reject—an argument that the Agreement does in fact specify the franchise for a referendum in Northern Ireland. Second, given the absence of existing rules in Northern Ireland, we assess possible sources of guidance for filling this gap: in the evolution of the concept of the ‘people of Northern Ireland’; in international human rights law; in ‘soft law’ guidance prepared by European and international organisations; and in past UK practice on the referendum franchise. Finally, we set out arguments for and against two possible options for determining who should be able to vote in a Northern Ireland unification referendum.

EXISTING PROVISIONS

THE FRANCHISE FOR UNIFICATION REFERENDUMS IN IRELAND

- 12.5. As we have seen, there are two plausible processes for unification in the South: a referendum to amend the 1937 Constitution; and a referendum to enact a new constitution. The franchise for the first would be governed by the provisions of the existing Irish Constitution. The franchise for the second is not fixed, but would likely adopt the same franchise as applies for a referendum to amend the Constitution.
- 12.6. Article 47 of the Irish Constitution provides that the franchise for a referendum to amend the Constitution consists of those citizens who have the right to vote at an election for members of Dáil Éireann. The franchise cannot be extended to non-citizens without a referendum (*Re Article 26 of the Constitution and the Electoral [Amendment] Bill 1983*). Article 16 provides that all citizens who have reached the age of 18 shall have the right to vote. The current legislative provisions governing Dáil elections are found in the Electoral Acts 1992–2017. The Oireachtas could amend these provisions, within the parameters of Articles 16 and 47, which would in turn alter the franchise for any referendum to amend the Constitution. For present purposes, however, we assume that no relevant amendments would be made.
- 12.7. Section 8 of the Electoral Act 1992 provides that a person must be ordinarily resident in a Dáil constituency in order to vote. Section 11(3) provides that a person shall be deemed not to have given up ordinary residence if they intend to resume residence within 18 months. Being registered to vote in another country does not affect one's registration status in Ireland. Voting must be in person, save for certain prescribed and limited groups.
- 12.8. If a new constitution were to be enacted, it would prescribe the franchise for its own enactment. The franchise could be constructed to reflect the franchise in Northern Ireland and to respect the standards in the Venice Commission's *Code of Good Practice on Referendums*, which we address in para 12.22–23. As we shall see, one condition in the Code is that the franchise for referendums should not be altered less than 12 months before the referendum takes place. For the last replacement referendum—the plebiscite to enact the 1937 Constitution—the electorate was the same as for Dáil elections in the Irish Free State (Constitution of Ireland 1937, Article 62[1]; Plebiscite [Draft Constitution] Act 1937). The plebiscite took place on the same day as the Dáil general election. We argued in Chapter 4 that the process for adopting a new Irish constitution should be at least as inclusive as that for a constitutional amendment. It seems likely that, were there a replacement referendum, the existing franchise for amendment referendums would be adopted.
- 12.9. These provisions impose significant limitations on the franchise, most particularly the non-inclusion of British citizens. These would be easier to address for a referendum to enact a new Constitution than for one amending the existing Constitution. If it

were desired to include British citizens (or other resident non-Irish citizens) in a unification referendum via amendment, a prior referendum changing the franchise would be needed.

THE ‘PEOPLE OF NORTHERN IRELAND’ IN THE 1998 AGREEMENT

- 12.10. We now turn to existing provisions for the franchise in Northern Ireland. The Agreement’s provisions dealing with consent and a referendum on Irish unity refer to ‘the people of Northern Ireland’. Some have argued that the Agreement sets out with more particularity than this who should be allowed to vote in a unity referendum. Annex 2 of the British–Irish Agreement (part of the 1998 Agreement) states that the ‘people of Northern Ireland’ covers ‘all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence’. Murray and O’Donoghue argue that this clause governs the franchise for any unity referendum. On this basis, they conclude that the franchise issue is already determined, and that this interpretation is binding in international law (Murray and O’Donoghue 2019: 38). They are not alone in adopting this position (see Doyle and Connolly 2019: 80; Doyle and Connolly 2017: 157).
- 12.11. The argument that Annex 2 applies to the referendum franchise is not legally well-founded, in our view. In brief, the provision defining ‘the people of Northern Ireland’ in Annex 2 refers to the criteria that should be used to determine citizenship, not the franchise. The text of Annex 2 needs to be considered. It explicitly provides that it applies to paragraph (vi) of Article 1 of the Agreement, which states that the two Governments:
- (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments ...
- 12.12. The specification that the Declaration refers to paragraph (vi) means, by ordinary canons of interpretation, that it does not relate to paragraphs (i), (ii), and (iv) of Article 1, which deal with unification.
- 12.13. Further, Annex 2 of the British–Irish Agreement states that it is a ‘Declaration on the Provisions of Paragraph (vi) of Article 1 in Relationship to Citizenship’. It thus relates explicitly (and only) to citizenship, not to the franchise.
- 12.14. That the rationale for Annex 2 is clearly a citizenship-related rationale (only) and does not govern the franchise for a unity referendum is further supported by the fact that the wording in Annex 2 approximates closely to the UK and Irish citizenship provisions that applied in 1998, when the Agreement was concluded. The purpose of the Annex thus appears to be to attempt to foreclose arguments that there could be an international law obligation on either the UK or Ireland to extend citizenship to

people in Northern Ireland more widely than each state already had, rather than setting out the franchise for a unity referendum.

- 12.15. Finally, as indicated above, the Northern Ireland Act, in accordance with the Agreement, provides that the Secretary of State is to specify the franchise in any order calling a referendum. There is nothing to indicate this specification is to be done in line with paragraph (vi).
- 12.16. We thus reaffirm our conclusion that there is no existing legal provision specifying the franchise for a unification referendum in Northern Ireland. The next section examines possible sources of guidance on filling this gap.

POSSIBLE SOURCES OF GUIDANCE FOR THE FRANCHISE IN NORTHERN IRELAND

- 12.17. We consider four possible sources of further guidance for the franchise in a unification referendum in Northern Ireland: the history of the constitutional guarantee provisions in successive legislation; international and European human rights law; ‘soft law’ guidance; and existing referendum practice in the UK.

ANTECEDENTS OF ‘THE PEOPLE OF NORTHERN IRELAND’

- 12.18. If the provisions of the Agreement do not assist, does the history of the constitutional guarantee provisions help in attempts to understand what ‘the people of Northern Ireland’ means? The guarantee on the constitutional status of Northern Ireland was originally introduced in the Ireland Act 1949. This guarantee affirmed that Northern Ireland would not cease to be part of the United Kingdom without the consent of the *Parliament of Northern Ireland*, which existed from 1921 to 1972. Following the collapse of the Northern Ireland Government in 1972, it was decided that consent to constitutional change should henceforth be a matter for the public, voting in a poll, rather than the Northern Ireland Parliament (and, reflecting this principle, a border poll was held in 1973—see paras 2.13–16).
- 12.19. The Northern Ireland Constitution Act 1973 repeated the 1949 Act provision word for word, but at the end omitted ‘the consent of the Parliament of Northern Ireland’ and substituted the formulation ‘the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with schedule 1 to this Act’. The Northern Ireland Act 1998 is to the same effect (except that it refers to ‘a majority’ rather than ‘the majority’ of the people of Northern Ireland, perhaps in order to head off the close association between ‘the majority’ and unionism in the minds of many at that time). At no point has ‘the people of Northern Ireland’ been specified for these purposes, and so this previous practice is of relatively little direct assistance.

INTERNATIONAL AND EUROPEAN HUMAN RIGHTS OBLIGATIONS

- 12.20. Does the principle in international human rights law that ‘peoples’ have the right of ‘self-determination’ help towards identifying who the ‘people’ of Ireland or of Northern Ireland’ are? In general, the answer is ‘no’. In the main, international law has consistently avoided articulating broad, general principles as to who ‘the people’ are that have the right to self-determination.
- 12.21. Reticence in laying down firm principles on the meaning of who the people are in the context of self-determination extends also to a general propensity for international human rights law not to interfere with national decisions as to who should be allowed to vote in elections. This reticence is clearly demonstrated by the European Court of Human Rights (‘ECtHR’) in numerous decisions concerning the interpretation of Article 3 of Protocol 1 of the European Convention on Human Rights (‘ECHR’). Whilst, in general, supporting the right to universal suffrage, the Court accords a broad ‘margin of appreciation’ (subject to supervision by the ECtHR) to states as to what proportionate restrictions they may place on this right.

SOFT-LAW RECOMMENDATIONS

- 12.22. The right to vote has, however, been supported by extensive guidelines on electoral monitoring produced by a variety of regional bodies. The Venice Commission’s *Code of Good Practice on Referendums* is particularly relevant. The Code recognises that the right to vote ‘may ... and indeed should, be subject to certain conditions’: regarding nationality, a ‘nationality requirement may apply ...’; regarding residence, ‘a [habitual] residence requirement may be imposed’ (Venice Commission 2007: para 1.1).
- 12.23. The Venice Commission also recommends that the franchise be set well in advance of any referendum. These remain recommendations and do not create legal obligations. Nevertheless, we would expect that greater legitimacy would derive from the adoption of franchise rules that were consistent with these principles.

FRANCHISES IN PREVIOUS UK REFERENDUMS

- 12.24. The governing legislation for referendums in the UK—the Political Parties, Elections and Referendums Act 2000—makes no provision for who is entitled to vote in any individual referendum. Further legislation is always required for the holding of any particular referendum within that framework.
- 12.25. The legislation passed to establish previous referendums does show considerable consistency, however, in specifying who may vote in these referendums. Nearly all simply specify that those eligible to vote in the referendum are those who are eligible to vote in Westminster parliamentary elections, devolved assembly/parliament elections, and/or local authority elections. In other words, the bulk of referendums in

the UK have been conducted in the past under one or other existing election suffrage requirement, rather than by constructing different franchise requirements for the referendum. The Scottish independence referendum of 2014 offers a limited exception, in that 16- and 17-year-olds were given the vote. But this was with the intention, later realised, of extending the Scottish Parliament franchise too. A greater exception is the 1998 Northern Ireland referendum, which we look at below.

- 12.26. These requirements all share two elements, in addition to residence: first, they exclude from the franchise those who have not yet reached the age of 18, except in Scotland (and, now, Wales), where those aged 16 and 17 are also permitted to vote; second, they include in the franchise those who are resident Irish citizens and Commonwealth citizens, as is the practice generally—all Irish citizens resident in the United Kingdom and qualifying Commonwealth citizens are eligible to vote in UK parliamentary elections.

OPTIONS FOR THE FRANCHISE IN NORTHERN IRELAND

ADOPTING THE EXISTING ASSEMBLY FRANCHISE

- 12.27. Reflecting on the practice across the UK described above, a general practice may be identified: that the franchise for a referendum is typically the same as the franchise for elections taking place over the same area. So, UK-wide referendums use the UK parliamentary franchise, while Scottish and Welsh referendums use the franchise for the Scottish Parliament and the Senedd. The London referendum of 1998 and the North East referendum of 2004 used the local government franchise on the same principle.
- 12.28. If this established UK practice were followed, questions about the voting age, enfranchisement of foreign nationals, etc. would not arise, since the question of whether a particular category of electors should be able to vote would be answered by referring to the existing Northern Ireland Assembly franchise.
- 12.29. The use of this franchise would also reflect the historical evolution of the constitutional-status referendum in Northern Ireland. We have seen that the use in statute of the formulation the ‘people of Northern Ireland’ has a history before 1998. The switch from ‘the Parliament of Northern Ireland’ in the Ireland Act 1949 to ‘the people of Northern Ireland’ in the 1973 and 1998 Acts strengthens an argument that the referendum franchise should reflect the Assembly franchise, as being closest to the old Northern Ireland Parliamentary franchise.
- 12.30. This approach would fit with the Venice Commission’s view that the referendum franchise should not be altered within a year of a vote (Venice Commission 2007: section II.2; see para 12.38). It would also be consistent with the report of the Independent Commission on Referendums. This report explores the main competing views on referendum franchise setting, and concludes:

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 ... 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...' (Independent Commission on Referendums 2018: 69–70).

POTENTIAL ARGUMENTS AGAINST USING THE ASSEMBLY FRANCHISE

- 12.31. The general principle suggested above has one significant counterexample. The 1998 Agreement referendum adopted the *Westminster* franchise, whereas the general principle, mirroring its application in 1997 in Scotland and Wales, implied that the appropriate franchise would have been that used for elections to Northern Ireland local authorities. It is unclear why the 1998 referendum took this different approach. The main difference between the Westminster franchise and the franchise used for local elections and Assembly elections relates to EU citizens. The Westminster franchise includes qualifying British, Irish, and Commonwealth citizens. The local and Assembly franchise also includes qualifying citizens of other EU countries.
- 12.32. That complication aside, are there specific factors relating to a unification referendum that argue for more flexibility in the construction of the franchise? Sticking to the Northern Ireland Assembly franchise would have certain consequences, which some would see as an advantage, and others as a disadvantage. For example, the voting age would remain at 18, and the existing limited ability of prisoners to vote would be replicated in any referendum.
- 12.33. Another counterargument to simply accepting the application of the (almost) general principle arises from the requirement in the Agreement that 'it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination ...'. It is arguable that this phrasing requires the determination of who should be included within the category of 'the people of Northern Ireland' to be in the hands of the 'people of Northern Ireland', currently represented in the Northern Ireland Assembly, and that the Assembly should be able to construct its own tailor-made franchise. Under the Northern Ireland Act 1998 the Assembly does not control the franchise for Northern Ireland elections—the franchise is an 'excepted' matter, meaning that the Northern Ireland Assembly may not legislate on it (Northern Ireland Act 1998, schedule 2, para 12[1]). If the Assembly expressed its collective but non-binding preference by a Resolution supported by a simple majority of its members, however, it would seem advisable that the Secretary of State should take this into account in exercising the legal responsibility to determine the referendum franchise.
- 12.34. If the Northern Ireland Assembly franchise were adopted in the North and the franchise for constitutional amendment referendums in the South remained unaltered, there would be two differences in entitlement to vote between the jurisdictions. First, Irish citizens resident in Northern Ireland would be able to vote in

a referendum in Northern Ireland, but British citizens resident in Ireland would not be permitted to vote in a constitutional amendment referendum in Ireland (unless they also held Irish citizenship). Second, prisoners could vote without restriction in Ireland, but not in Northern Ireland. If it were considered desirable to level up, the first difference could only be addressed by a prior amendment referendum in the South. The second difference could be addressed by ordinary legislation applying to the North.

- 12.35. Separate from these issues, it might—depending on one’s broader perspective on unification itself—be thought undesirable that some voters would be entitled to participate in both unification referendums. This could, if desired, be prevented by ordinary legislation in the North (precluding a person from voting in the North if they also voted in the South). A parallel prohibition in the South would probably require a constitutional referendum.

DEVELOPING A FRANCHISE SPECIFIC TO A UNIFICATION REFERENDUM

- 12.36. If the existing Northern Ireland Assembly franchise were not adopted, there would be at least six issues about the franchise in a Northern Ireland unification referendum which the Secretary of State would be required to decide upon: (a) minimum age; (b) residence; (c) EU citizens; (d) Irish citizens; (e) prisoners; (f) Commonwealth citizens.
- 12.37. Existing practice elsewhere could support the inclusion of the widest view of each of these categories, but equally could support a much narrower franchise. Neither approach would be likely to fall foul of existing international law or international and European human rights law. Ultimately, in theory, it should come down to a political judgment as to what ‘the people of Northern Ireland’ could best be described as including and excluding.
- 12.38. If the existing Northern Ireland Assembly franchise were not to be adopted, there would be a further complication. As we saw above, the Venice Commission *Code of Good Practice on Referendums* considers that the franchise for referendums should be established in general, not ad hoc, terms. It states: ‘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’ (Venice Commission 2007: section II.2). This recommendation is intended to prevent tinkering with the franchise to suit a particular vote. This argument is made more explicit in the recent Parliamentary Assembly of the Council of Europe report on referendums (Parliamentary Assembly of the Council of Europe 2019: see paras 6, 27, 51, and 52). If the Secretary of State were to follow best practice, therefore, any changes in the franchise would have to be brought in more than one year before any referendum.

CONCLUSION

12.39. A franchise already exists for constitutional amendment referendums in Ireland.

Were a constitutional replacement referendum to be held, it is likely that the same franchise would be used. One potential point of debate, however, is that this franchise does not include British citizens resident in Ireland.

12.40. There is no existing referendum franchise in Northern Ireland. The most sensible approach, we suggest, would be to adopt a Venice-informed presumption against departure from the existing franchise used for Assembly elections, tempered with a willingness to depart for strong reasons, provided any changes were introduced well ahead of any referendum. In practical terms, there seems a clear choice which the Secretary of State would have to make: whether to regard a unification referendum as *sui generis*, or not. If not, then the 'ordinary' franchise rules should apply. In our view, that would be a perfectly defensible position. If it were regarded as *sui generis*, then the Secretary of State would have difficult choices to make as to how to tweak the ordinary rules, with differences between North and South emerging as issues of particular sensitivity.

13. DETERMINING THE REFERENDUM QUESTIONS

- 13.1. The process of setting a referendum question requires the options being put to voters to be decided; and then the precise wording to appear on the ballot paper needs to be settled. The former is a matter for political judgment, to be determined through the processes discussed in earlier chapters. The latter is more technical but still important: the question must be unambiguous, easily understandable, and unbiased.
- 13.2. Three issues might arise in relation to question-setting for a referendum on Irish unification. First, the UK and Ireland have developed very different practices regarding question wording. If these were applied as normal, then, even if the options put to voters north and south of the border were substantively the same, the questions might well be asked in different ways. Such differences could become confusing to voters and, in extremis, impede effective campaigning.
- 13.3. Second, even aside from differences between North and South, it may be difficult to ascertain which precise question wording would give the greatest clarity for voters and minimise perceptions of bias. In Ireland, questions for constitutional amendment referendums take a standard form, which would likely also be followed if there were a referendum to enact a new constitution. But there is no standard question wording for referendums taking place in the UK.
- 13.4. Third, a debate may develop as to the languages in which the referendum question should be put. In Ireland, ballot papers are always bilingual, in Irish and English, and a referendum on the unification question would presumably maintain this practice. In Northern Ireland, ballot papers are always in English only, but pressure might arise for this to change. The signatories to the *New Decade, New Approach* document in January 2020 agreed to the introduction of legislation ‘to provide official recognition of the status’ of both the Irish and Ulster Scots languages (*New Decade, New Approach* 2020: 15). There is the potential, therefore, of trilingual ballot papers in Northern Ireland.
- 13.5. This chapter examines these issues in turn. We begin by setting out existing rules and practices in relation to question-setting in Ireland and in the UK. Then we consider difficulties that could arise if the questions put to voters north and south of the border were different from each other, and examine potential responses to them. We conclude that there is the potential for difficulties here, though cooperation between the governments ought to be able to resolve them. Then we highlight a range of possible question wordings in Northern Ireland. On the language or

languages on the ballot paper, we examine the UK's existing experience of bilingual referendums and seek to draw out relevant lessons for Northern Ireland.

QUESTION-SETTING IN IRELAND

- 13.6. The Constitution of Ireland (Article 46) stipulates that the Constitution cannot be amended without a referendum. The referendum question takes a standard form, set out in section 24 and schedule 2 of the Referendum Act 1994. This question is asked in both the Irish and English languages. The English-language version asks 'Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?'. The name of the Bill that is the subject of the ballot is then provided, and there are 'Yes' and 'No' boxes, one of which voters must mark to cast a valid ballot. In addition, the ballot paper can include 'a heading indicative of the proposal which is the subject of the referendum' (Referendum Act 1994, section 24(4)(a)). The Amendments that gave effect to the 1998 Agreement in the South were passed in this way.
- 13.7. This approach was also applied to the enactment of the 1937 Constitution by the Plebiscite (Draft Constitution) Act 1937 and would almost certainly be followed for the enactment of any new constitution. Where the purpose of a referendum is to give legal effect (or not) to proposed text, a Yes/No question is desirable in the interests of legal certainty. This distinguishes Ireland from the UK, where referendums have generally been held to establish a political mandate for other constitutional actors to take certain steps.

QUESTION-SETTING IN THE UK

- 13.8. In the UK, there is no standard question wording. Rather, the legislation enabling each referendum stipulates the question. The impartiality of that question is safeguarded by subjecting the proposed wording to scrutiny by the Electoral Commission (Political Parties, Elections, and Referendums Act [PPERA] 2000, section 104). In this regard, the exact process depends on the legal basis of the referendum—whether it is called by primary legislation or by ministerial order.
- 13.9. Most referendums in the UK (other than local referendums) are called through primary legislation. In this case, there is a three-step process: the bill is published containing proposed question wording; the Electoral Commission reviews the proposed wording and publishes a report, in which it may recommend changes to the question; and lastly Parliament may amend the proposed question to reflect the Commission's recommendations. The Commission's recommendations are not binding, but government and Parliament have to date, with only one minor exception, accepted them in full (Independent Commission on Referendums 2018: 102).

- 13.10. The Northern Ireland Act allows for a referendum on the question of Irish unification to be called by ministerial order, subject to parliamentary approval. Under PPERA section 104(4), the minister must consult the Electoral Commission on question wording before laying the draft of the order before Parliament. Then, when laying the draft order, the minister must 'lay before each House a report stating any views as to the intelligibility of that question which the Commission have expressed in response to that consultation' (PPERA, section 104(4)). This procedure has been followed once before. The 2011 Welsh devolution referendum was called by ministerial order under powers granted by the Government of Wales Act 2006. The Electoral Commission recommended changes to the wording initially proposed by the minister, and the wording in the draft order as laid before Parliament fully reflected these recommendations (Electoral Commission 2011: 8–9).
- 13.11. The Electoral Commission has an established procedure for question testing. It assesses a question according to five criteria: it should be 'easy to understand', 'to the point', and 'unambiguous', and it should 'avoid encouraging voters to consider one response more favourably than another' and 'avoid misleading voters' (Electoral Commission 2009a). The assessment process involves focus groups and interviews with members of the public and consultations with, for example, plain language experts, political parties, campaigners, and 'other key groups or individuals who have an interest in the referendum and its outcome' (Electoral Commission 2009b). This procedure normally takes ten weeks, with two additional weeks' notice (*ibid.*). It is the same whether the referendum is called by primary legislation or by ministerial order.
- 13.12. Two features of the Electoral Commission's recent recommendations deserve attention. First, the Commission has generally recommended against questions starting 'Do you...?'. The first question wording to be proposed in Parliament for a referendum on the UK's membership of the European Union (in a private member's Bill in 2013) was 'Do you think that the United Kingdom should be a member of the European Union?'. The Commission found that some focus group participants thought this too informal, and it recommended that the question be shortened to 'Should the United Kingdom...?' (Electoral Commission 2013b: 12–13, 24). More strikingly, the wording originally proposed by the Scottish government for the 2014 independence referendum was 'Do you agree that Scotland should be an independent country?'. But the Commission was concerned that this wording could introduce bias: 'based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase "Do you agree ...?" could lead people towards voting "yes".' It recommended that the question be simplified to 'Should Scotland be an independent country?' (Electoral Commission 2013a: 13–14, 33).
- 13.13. Second, in its most recent question assessment, on the question used for the 2016 EU membership referendum, the Commission went further, recommending against

using a ‘Yes/No’ question. The UK government in 2015 had proposed the question ‘Should the United Kingdom remain a member of the European Union?’, with the response options ‘Yes’ and ‘No’. The Commission found that some respondents thought this question could be biased, for two reasons: it mentioned only the ‘Remain’ option in the question; and, in contrast to most referendums, it made the status quo the ‘Yes’ option. The Commission therefore recommended that the question should be changed to ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ with the response options ‘Remain a member of the European Union’ or ‘Leave the European Union’ (Electoral Commission 2015: 39, 40). The Commission did *not* conclude that ‘Yes/No’ questions are inherently biased: it was responding to feedback on particular question wording on a particular issue, and one aspect of its concern was that the status quo was the Yes option. Nevertheless, similar concerns might arise if a question such as ‘Should Northern Ireland become part of a united Ireland?’ were ever to be proposed.

DIVERGING QUESTION FORMATS NORTH AND SOUTH

- 13.14. Could the differences in process and practice set out above lead to problematic divergences in question wording north and south of the border?
- 13.15. Were the standard practices applied in each country without reference to practice in the other country, then differences in question structures would appear likely. The starting point in Ireland would still be a question of the form ‘Do you approve?’, whereas the UK Electoral Commission, following its past practice, could well recommend against this.
- 13.16. It is possible that there could also be a divergence in the response options available to voters. The question in the Republic of Ireland would allow voters to answer ‘Yes’ or ‘No’. But would the UK Electoral Commission recommend against this as it did for the 2016 referendum? It would seem likely to face competing pressures. On the one hand, we have emphasised throughout this report that, in any referendum on Northern Ireland’s constitutional future, it would be essential that the two options put to voters be treated equally. A ‘Yes/No’ question mentioning only one of the options might be thought to violate that. The Democratic Unionist Party was one of the firmest critics of the proposed ‘Yes/No’ wording in relation to Brexit in submissions it made in 2015 (Electoral Commission 2015: 28). Following the same logic, the Electoral Commission might suggest a question with the response options ‘Become part of a united Ireland’ and ‘Remain part of the United Kingdom’. On the other hand, ‘Yes’ and ‘No’ are both slogans with history and potency, not least in Northern Ireland, and all sides might prefer to retain them.
- 13.17. If divergences in question wording are possible, the next question is whether they would be problematic. The experience of the 1998 referendums suggests that asking differently worded questions on either side of the border on the same day would not

necessarily cause difficulties. On that occasion, voters in Northern Ireland were asked ‘Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?’ Those in the Republic of Ireland were asked, as usual, ‘Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?’, and the ballot paper named the Nineteenth Amendment of the Constitution Bill 1998. We are not aware of any difficulties caused by these different wordings. It was clear that voting ‘Yes’ or ‘No’ meant substantively the same thing in both cases.

- 13.18. The divergence in practice on question-setting reflects, to some degree, a difference in the functions that referendums serve in the two jurisdictions, which would also pertain to unification referendums. In the South, the referendum would, irrespective of which of the possible configurations set out in Chapters 9 and 10 were followed, make specific textual changes to the Irish Constitution or enact a new constitution. In Northern Ireland, the referendum would provide a political mandate to the UK Parliament and express a self-determination outcome. Given this divergence, the best approach might be to allow for divergence in practice while ensuring that it avoids confusion as far as possible.
- 13.19. Nevertheless, there are scenarios in which divergent wording could become problematic. First, it could clearly cause considerable confusion if ‘Yes’ and ‘No’ meant different things on either side of the border. It is possible to imagine a situation in which the question in the Republic of Ireland took the usual form, while that in Northern Ireland took the form proposed in 2015 by the UK government for the Brexit referendum: ‘Should Northern Ireland remain part of the United Kingdom?’. A ‘Yes’ vote in the North would then oppose unification, while it would support unification in the South. Such a situation would be highly problematic, particularly given the extent to which political discourse and media consumption cross the border in both directions.
- 13.20. Second, the question in Ireland might take the usual ‘Yes/No’ form, but that in Northern Ireland could offer response options akin to the ‘Remain/Leave’ options of 2016. This scenario would be less confusing than the first, but could still cause difficulties, particularly for campaigners seeking to articulate a clear message in both jurisdictions.
- 13.21. Thus, while not all divergences in question wording would pose practical challenges, it is clear that some would. It is important, therefore, to consider ways of avoiding them. That might be done by adapting Irish practice or UK practice or a combination of both.
- 13.22. Irish practice is relatively inflexible, but UK practice is more flexible. Indeed, the UK Electoral Commission assesses each proposed question in its own context and does not apply standardised assumptions as to what works best. Following its normal procedures, the Commission would therefore likely take into account the expected

wording of any question in the Republic of Ireland and seek to avoid confusing divergences.

- 13.23. This is an issue where discussion between the UK and Irish governments, consulting with the Northern Ireland Executive, political parties represented in the Northern Ireland Assembly, and civil society organisations, and the UK Electoral Commission, ought to be able to find a sensible solution. By contrast, proceeding without consultation and cross-border/intergovernmental collaboration could cause significant difficulties. The aim should be to ensure that there are no differences in question wording between North and South that could lead to confusion for voters or difficulty for campaigners in articulating their messages clearly.

THE CONTENT OF THE QUESTIONS

- 13.24. We now turn away from question formats and move to the content of the questions north and south of the border. As we have explained, the wording for a constitutional referendum in the Republic of Ireland is fixed. Given our conclusion that any unification referendum in the South would involve constitutional amendments, we assume there would be no deviation from that model.
- 13.25. In Northern Ireland, the question wording would depend on how far detailed proposals on the form of a united Ireland had been worked out in advance. Two main issues arise. First, if the referendum were simply on the principle of staying in the UK or becoming part of a united Ireland, how would that principle be defined? Second, if the referendum offered a choice between two developed options, how would these details be captured? Of the three configurations that we identified for further examination in Chapter 9, configuration 2 clearly falls into the latter category: it would offer voters a *model* for a united Ireland. Configurations 3 and 4, if followed fully, would fall into the latter category too: alongside the principle, they would set out a *process* by which the form of a united Ireland would be determined. Nevertheless, given that scenarios are imaginable in which configuration 1—a referendum with no such plan—could come to pass, we do also consider here the first category of referendum question, providing only for the principle.
- 13.26. Regarding this first category, where the referendum would simply be about whether Northern Ireland should stay in the UK or become part of a united Ireland, the simplest approach would focus solely on the question of sovereignty. There would then be several options for the wording, such as:
- Should Northern Ireland become part of a united Ireland?
 - Should Northern Ireland leave the United Kingdom and become part of a united Ireland?
 - Should Northern Ireland remain part of the United Kingdom, or should it become part of a united Ireland?

Should Northern Ireland remain part of the United Kingdom, or should it become part of a united Ireland outside the United Kingdom?

The first of these would be shortest and would be analogous to the Scottish independence referendum in 2014, but would mention only one of the options. The second would mention both sides of the process, but would still define only one of the options. The third would define both options and would be analogous to the 2016 Brexit referendum; but it would prevent a campaign around ‘Yes’ and ‘No’ options. The last would be similar to the third and would be analogous to the 1973 ‘border poll’; but it would be asymmetrical in its treatment of the two options.

13.27. The second issue concerns how, if the referendum in Northern Ireland were on detailed proposals (either for the form of a united Ireland or for processes of working that form out), those details would best be reflected in the question. There are three main options.

1. The details might not be explicitly mentioned in the question at all. This was the approach taken for the 2011 UK referendum on the voting system. The detail did exist: the proposed new voting system had been set out in law passed by Parliament, and the referendum was about whether to bring this into effect. But this detail was mentioned nowhere on the ballot paper, which simply stated, ‘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?’.
2. The details might be mentioned by reference to a separate text in which they were contained. The 1998 referendum in Northern Ireland asked, ‘Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?’. This question style would follow the approach of referendums in the Republic of Ireland.
3. Some of the details might be mentioned in a preamble to the question that appeared on the ballot paper. In the Welsh devolution referendum in 2011, the question was preceded by a 145-word explanation of the status quo and what would happen if a majority of voters voted ‘Yes’ or ‘No’.

13.28. The Electoral Commission argued for a preamble for the 2011 Welsh referendum because the topic was relatively obscure, and research suggested that an explanation was needed for voters to understand what they were being asked (Electoral Commission 2010d: 14). But the same body found no equivalent need in relation to the voting system referendum the same year (Electoral Commission 2010c: 18). A unification referendum would be a high-profile event, and we expect that a large volume of information would be available to voters ahead of the poll (see Chapter 14). We therefore think that a preamble would be unnecessary.

13.29. To establish beyond doubt that voters north and south had been voting on the same set of proposals, it would, however, be desirable to refer to detailed proposals if they existed. That was done in 1998 by referring to an official UK command paper that

contained the full text of the Belfast/Good Friday Agreement. In the case of a unification referendum, however, there might be no official UK document to refer to, and so an Irish document may need to be cited instead. The question might be:

Should Northern Ireland become part of a united Ireland as set out in [document]?

Should Northern Ireland leave the United Kingdom and become part of a united Ireland as set out in [document]?

Should Northern Ireland remain part of the United Kingdom as at present, or should it become part of a united Ireland as set out in [document]?

Should Northern Ireland remain part of the United Kingdom as at present, or should it become part of a united Ireland outside the United Kingdom as set out in [document]?

13.30. As discussed in Chapter 6 (paras 6.38–43), it may be that reforms to the Union would also be proposed. These would not, however, be specified on the ballot paper, which would present a choice between unification and the status quo. It would be highly unusual to hold a referendum in which the status quo was not an option. Moreover, while proponents of retaining the Union might put forward proposals for changing Northern Ireland’s arrangements within that context, adopting them simply on the strength of a bare majority would cut across the principle of seeking consensus about the Northern Ireland political framework, through which the 1998 Agreement was secured. A process would be needed after the referendum in which such consensus could be pursued.

LANGUAGE(S) ON THE BALLOT PAPER

13.31. Ballot papers in Ireland are always bilingual, in Irish and English, whereas those in Northern Ireland have always used English only. It is possible that proposals might arise for a multilingual ballot paper in Northern Ireland too. Following the spirit of the 1998 Agreement, and especially of the *New Decade, New Approach* document of January 2020, any such ballot paper would need to include three languages: English, Irish, and Ulster Scots.

13.32. We take no view on whether a multilingual ballot paper would be desirable: that is a matter for political decision. We simply examine what the practical implications of such a move would be.

13.33. We begin by considering existing UK experience. While Northern Ireland has no experience of multilingual ballot papers, one part of the UK—Wales—does. Referendum ballot papers in Wales are printed in both English and Welsh, including for referendums in Wales only and in Wales for UK-wide referendums. Most relevant are Wales’s three referendums since 2000, when the UK’s current system of question testing was introduced: the UK-wide referendums on the parliamentary voting system in 2011 and membership of the European Union in 2016, and the Welsh devolution referendum of 2011.

- 13.34. The Electoral Commission follows essentially the same process of question testing in Welsh as in English, though on a somewhat smaller scale. In the 2011 UK-wide referendum, nine out of 41 ‘depth interviews’ were conducted in Wales—four in English and five in Welsh (Electoral Commission 2010b). During assessment of the 2016 question, four ‘extended mini-depth interviews’ were conducted in Welsh (Gfk-NOP Social Research 2015). For the 2011 Welsh powers referendum question, eight focus groups and 20 depth interviews were conducted, of which four focus groups and three interviews were conducted in Welsh (Gfk-NOP Social Research 2010). This work is conducted in consultation with the Welsh Language Commissioner (formerly, the Welsh Language Board). The Electoral Commission also has a Welsh Language Advisory Group, which meets twice a year to discuss aspects of the Welsh language and Wales that have impacts on elections in Wales (Electoral Commission n.d.).
- 13.35. In conducting question testing in Welsh, the Electoral Commission has regard to two sets of considerations: whether the question is clear and unbiased (as for the English-language question); and whether it will ‘mirror’ the question in English (Electoral Commission 2010a: 9).
- 13.36. The need to balance these two sets of considerations has led to two kinds of difficulty. First, words that are widely understood in one language can be less so in the other. In 2011, for example, some Welsh speakers were unfamiliar with the Welsh-language abbreviations for ‘UK’ and ‘MP’ (Electoral Commission 2010c: 16). Second, differences of grammatical structure can cause problems in maintaining equivalence. The Electoral Commission has tended to favour questions in English starting ‘Should...?’. In the 2011 voting system referendum and the 2014 Scottish independence referendum, this question had the response options ‘Yes’ or ‘No’. In Welsh, however, a ‘Should...?’ question cannot be answered ‘Yes’ or ‘No’, but only ‘It should’ or ‘It should not’. For this reason, and to ensure comparability, both the English and Welsh questions for the 2011 Assembly powers referendum took the form ‘Do you want...?’ (Electoral Commission 2010d: 24–25, 28). For the 2011 voting system referendum, the Welsh-language question was changed (at the last minute) to the same format (though the English-language question was not, creating a discrepancy between the two) (Parliamentary Voting System and Constituencies Act 2011, section 1(8); Referendum on the Voting System (Welsh Forms) Order 2011, schedule 2).
- 13.37. There is no reason in principle why similar procedures could not be followed for a multilingual ballot paper in Northern Ireland. The Electoral Commission has a well-established presence in Northern Ireland. Equivalents of the Welsh Language Commissioner also exist. The Irish Language Agency (Foras na Gailge) and the Ulster-Scots Agency (tha Boord o Ulstèr-Scotch) were established in 1999 under the auspices of the North/South Language Body, itself an implementation body of the North South Ministerial Council.

- 13.38. On the other hand, the wealth of experience that the Electoral Commission has of operating in a bilingual setting in Wales is not mirrored in Northern Ireland. Introducing the principle of multilingualism for a referendum—which would presumably apply not just to the ballot paper, but also, as noted at para 14.66, to all other official referendum-related materials—would be a major task, unless multilingual operations had become routine in Northern Ireland before the referendum was held.
- 13.39. Adding Irish to the ballot paper would create a similar difficulty to that in Welsh. Namely, a question in the Irish language starting ‘Should...?’ cannot formally be answered ‘Yes’ or ‘No’. Indeed, there are no direct equivalents to ‘Yes’ and ‘No’ in Irish. That has been accommodated for ballot papers in the Republic of Ireland through something of a grammatical compromise. Whether a similar approach would be effective in Northern Ireland would need to be investigated by the Electoral Commission.

CONCLUSION

- 13.40. Referendum question wording is essentially fixed in Ireland, but flexible in the UK. We have examined three issues that could arise in relation to question wording: difficulties that could be created by some kinds of differences in question wording between North and South; the matter of how to word the question in Northern Ireland to maximise clarity, allow campaigners to project their messages effectively, and avoid any bias; and the issue of the languages on the ballot paper. All of these considerations matter for the public legitimacy of the vote and voters’ ability to make an informed choice.
- 13.41. In the event that referendums were called, some differences in question wording between North and South would be unavoidable given differences in legal frameworks and established practices. That would not be problematic in itself. But differences that would be confusing or inhibit consistent campaigning should be avoided. We have set out a range of possible question wordings in Northern Ireland under different scenarios. The UK Electoral Commission would need to test these both for their clarity and fairness in themselves and for whether they might create confusion with the concurrent referendum in the Republic. The question of what languages should appear on the ballot paper is a political one. If a multilingual ballot paper were under consideration in Northern Ireland, it would be advisable to ask the Electoral Commission, working with the Irish Language Agency and the Ulster-Scots Agency, to examine carefully what the options would be and what impacts they might have. These matters would best be resolved through processes involving close cooperation between the UK and Irish governments.

14. CAMPAIGN CONDUCT RULES

- 14.1. This chapter examines the rules by which referendum campaigns north and south would be regulated. These rules relate to four key matters:
- campaigners and campaign finance
 - the role of governments during the campaign
 - information, misinformation, and the media
 - the duration of the campaign.
- 14.2. The chapter works through these four matters in sequence. In each case, we lay out existing rules and practices in the UK and Ireland and then examine the practical implications of these for the kinds of referendums that we are examining. We identify three important challenges: those that are common to all referendums; those that may be particularly acute in the context of unification referendums; and those arising from differences in practice between the jurisdictions.
- 14.3. Before turning to the details, Table 14.1 provides a brief overview of existing rules and practices. Both the UK and Ireland have standing legislative provisions relating to referendums. These are mainly provided by the Political Parties, Elections, and Referendums Act (PPERA) 2000 in the UK and by the Referendum Acts of 1994 and 1998 in Ireland. As Table 14.1 illustrates, while there is some overlap between these sets of rules, notably in the regulation of the media, there are also marked divergences. The two jurisdictions have adopted very different approaches to the regulation of campaign finance, and Ireland has developed a system of public information provision that the UK largely lacks. We examine the implications of these divergences below.
- 14.4. The robustness of election and campaign processes in the face of the rise of online and social media is a matter of grave and urgent concern to democrats across the world. Algorithms can aggregate the innocent behaviour of millions of online users into highly skewed discourses. Campaigners can exploit new opportunities for targeted messaging and circumvent the quality filters provided by traditional journalism. Malign actors can sow disruption to suit their own purposes.
- 14.5. In consequence, referendum campaign rules are subject to ongoing reform discussions in both Ireland and the UK. In Ireland, one of the topics that the Citizens' Assembly of 2016–18 was asked by the Houses of the Oireachtas to examine was 'the manner in which referenda are held' (see Citizens' Assembly 2018a for full details). The report on the Assembly's conclusions set out various recommendations for reform, which we note below (Citizens' Assembly 2018b). In the UK, the Independent Commission on Referendums (convened by the Constitution Unit) reviewed

referendum practice comprehensively and recommended a wide range of changes (Independent Commission on Referendums 2018). Multiple other reports have advocated more specific changes, particularly in relation to the regulation of online campaigning (e.g., Electoral Commission 2018; House of Commons Digital, Culture, Media, and Sport Committee 2019; House of Lords Select Committee on Democracy and Digital Technologies 2020; Intelligence and Security Committee of Parliament 2020).

Table 14.1. Comparison of referendum campaign regulations in the UK and Ireland

	UK	Ireland
Campaigners and campaign finance	Campaigners: designation of lead campaigners registration of all significant campaigners Spending by campaigners: caps for all organisations ban on spending by overseas individuals or bodies Donations to campaigners: transparency, but no caps foreign donations banned Public funding: for designated lead campaigners	Campaigners: no provisions Spending by campaigners: no limits Donations to campaigners: transparency and caps foreign donations banned Public funding: none for campaigners
Role of government	No public spending on campaigning in final 4 weeks	No public spending on campaigning
Information, misinformation, and the media	Public information provision: almost none Misinformation: almost no regulation Media: broadcast impartiality required few restrictions in print or online	Public information provision: some provided by Referendum Commissions Misinformation: almost no regulation Media: broadcast impartiality required few restrictions in print or online
Campaign duration	At least 70 days	30–90 days

14.6. These concerns were reflected in our public consultation: numerous respondents highlighted concerns about referendum campaign finance, and about information and misinformation during campaigns. Strikingly, whereas unionists, nationalists, and those identifying as neither expressed markedly different views on many issues, responses in relation to campaign conduct were largely shared. In relation to campaign finance, common themes included a wish for equality between the two

sides, transparency, spending or donation limits, and restrictions on spending by the governments. Many respondents spoke of the importance of factual information. One nationalist said, 'Any information on the matter should be factual and unbiased'. A unionist said, 'All information must be reliable, verifiable and provided to all citizens in a paper format, as not everyone has access to on-line materials.' A respondent identifying as neither nationalist nor unionist said, 'I think the more information that is available (factual) on both sides of the argument would enable people to make an informed decision.' Fears were variously expressed of 'media bias', 'bot manipulation', 'misinformation', and campaigners' 'use social media to manipulate public opinion'. The Brexit referendum was often invoked by respondents from all three groups as an example of how not to run a referendum campaign. One identifying as neither nationalist nor unionist said:

The referendum on the Good Friday Agreement was well-handled, with every household getting a booklet which gave clear detail on what voters would be voting for or against. As I recall, while the debate was robust, it did not become too toxic. By contrast, the UK Brexit referendum was very sloppy and vague, with very little in writing about what a 'Leave' vote would actually mean. A badly run referendum is worse than no referendum.

- 14.7. These various sources of evidence are thus unanimous in seeing the need to improve referendum conduct rules as a high priority.

THE REGULATION OF CAMPAIGNERS AND CAMPAIGN FINANCE

- 14.8. The UK and Ireland have developed very different approaches to the regulation of campaign finance. The UK system focuses primarily on controlling spending by campaign groups, whereas Ireland's rules (except those relating to spending by government) focus on donations to such groups. In addition, the UK system requires all but the smallest campaign groups to register with the Electoral Commission, and it provides public support for one lead campaign group on each side of the debate. Ireland does not have such a registration system, nor such public funding for campaigners, but rather, as discussed below, provides for a publicly funded neutral information campaign.
- 14.9. We begin by setting out practice in the two jurisdictions before examining potential difficulties in relation to referendums on the question of unification.

UK: PERMITTED PARTICIPANTS AND LEAD CAMPAIGNERS

- 14.10. The regulation of referendum campaigns in the UK is structured around two basic principles.
- 14.11. First, significant campaign expenses can be incurred or donations made only by 'permitted participants', who, broadly, are individuals resident or registered to vote

in the UK or organisations based in the UK (PPERA, section 105). Any person or organisation spending more than £10,000 on campaigning must register with the Electoral Commission (PPERA, section 117).

- 14.12. Second, there is one lead campaign organisation for each option on the ballot paper. Campaign organisations can apply for designation as a lead campaign group. The Electoral Commission determines whether they are eligible and do in fact represent those campaigning for the given option. If more than one applicant meets these tests in relation to one option on the ballot paper, the Commission ‘shall designate whichever of the applicants appears to them to represent to the greatest extent those campaigning for that outcome’ (PPERA, section 109). This circumstance arose in relation to the Leave option in the 2016 referendum on withdrawal from the EU, where both Vote Leave and Leave.EU applied for designation.⁴ The Commission assessed these applications in terms of prespecified criteria: the range of support for each applicant among Leave supporters; the applicants’ organisational capacities and capacities to deliver their campaign; and how the applicants intended to engage with other Leave campaigners outside the organisation. On this basis, it concluded that Vote Leave represented Leave campaigners to the greater extent (Electoral Commission 2016a).
- 14.13. Designated lead campaigners have higher spending limits than others and gain certain other benefits. The system of lead campaigners is intended to ensure that voters can hear the arguments on both sides of the debate and that lack of resources on one or other side does not prevent the meaningful presence of those arguments during the campaign period. As we discuss below, it does suppose that a single organisation can reasonably represent the broad range of perspectives on each side of the referendum debate.
- 14.14. PPERA states that the Electoral Commission can designate lead campaigners either for each option on the ballot paper or for none (section 108). Thus, if no suitable organisation is available on one side, no designation can be made on the other side either. This situation occurred in the 2011 Welsh devolution referendum, and was widely seen as having harmed the breadth of information available to voters (see Independent Commission on Referendums 2018: 138). For the 2014 Scottish and 2016 EU withdrawal referendums, therefore, the enabling legislation contained deviations from PPERA allowing designation on only one side. If it were felt desirable to repeat this in Northern Ireland, legislation would be required. That might be important if it were feared that one or other side might boycott the vote.

⁴ As did a third group, the Trade Unionist and Socialist Coalition, which the Commission determined did not meet the minimal test of adequately representing those campaigning for the Leave option.

UK: CAMPAIGN SPENDING

14.15. Spending by campaigners in referendums in the UK is capped. Any individual or organisation spending more than £10,000 on campaigning must register with the Electoral Commission. PPERA (schedule 14) sets out spending limits for various kinds of permitted participant in UK-wide referendums. The limits for referendums held in particular parts of the UK are, however, determined by the Secretary of State, through an order, after consultation with the Electoral Commission. If the Secretary of State wishes to propose limits different from those recommended by the Commission, she or he must provide an explanation to Parliament. Table 14.2 sets out the limits as they were applied for the Scottish independence referendum in 2014⁵ and the (UK-wide) Brexit referendum in 2016.

Table 14.2. Spending limits in recent referendums in the UK

Scottish independence, 2014		EU withdrawal, 2016	
Designated lead campaigners	£1.5 million	Designated lead campaigners	£7 million
Political parties	£3 million multiplied by the party's vote share in the 2011 Scottish Parliament election, or £150,000 if greater	Political parties: > 30% vote share 20–30% vote share 10–20% vote share 5–10% vote share < 5% vote share	£7 million £5.5 million £4 million £3 million £700,000
Others	£150,000		£700,000

Sources: Scottish Independence Referendum Act 2013, schedule 4, para. 19; European Union Referendum Act 2015, schedule 1, para. 25.

14.16. In addition to their higher spending limits, designated lead campaign organisations receive four forms of support from the public purse (PPERA, section 110):

1. a direct grant, of up to £600,000 for UK-wide referendums
2. free postage on one referendum leaflet sent to all households
3. free use of public rooms to hold public meetings
4. free airing of referendum campaign broadcasts (see below).

14.17. The original PPERA rules made little provision in relation to joint campaign activity across groups, which made it possible for groups effectively to circumvent the spending caps. The legislation for subsequent referendums has sought to fill these gaps (e.g., European Union Referendum Act 2015, schedule 1, paras 22–3). The rules

⁵ Strictly speaking, the 2014 referendum was not held under the PPERA rules, as it was called by the Scottish Parliament rather than the UK Parliament. But the legislation enabling that referendum largely replicated the PPERA framework.

have not always been clear, however, leading to several court cases. And they are widely perceived as too weak, allowing the spending limits to be overridden with impunity (Geoghegan 2020).

UK: CAMPAIGN DONATIONS

- 14.18. At the UK level, only individuals who are on an electoral register in the UK or organisations based in the UK can donate to campaigns (PPERA, section 54 and schedule 15, para 6). There are also special provisions for Northern Ireland: in addition to the UK-wide provision, any Irish citizen (resident anywhere in the world) can donate to a political party that is registered in Northern Ireland (PPERA, section 71B). This special provision applies only, however, to donations to political parties, not to donations to other referendum campaign groups. There are no limits on how much permitted donors can donate, but donations of more than £7,500 must be reported to the Electoral Commission (PPERA, schedule 15, para 10).
- 14.19. PPERA itself does not make full provisions regarding donation transparency, so subsequent legislation enabling referendums has supplemented it. In 2016, for example, donations had to be reported three times during the campaign (European Union Referendum Act 2015, schedule 1, para 39; European Union Referendum (Date of Referendum etc.) Regulations 2016, schedule) and the Electoral Commission had to publish these ‘as soon as is reasonably practicable’ (European Union Referendum Act 2015, schedule 1, para 41). Applying similar provisions in a referendum in Northern Ireland would require fresh legislation.
- 14.20. Serious questions have been raised about whether the existing rules, and mechanisms for their enforcement, are robust enough to prevent significant interference from malign actors at home and abroad. The UK government has acknowledged this danger and said it will seek to protect UK democracy from ‘foreign interference’ (HC Deb 22 July 2019).

IRELAND: CAMPAIGN SPENDING

- 14.21. In contrast to the UK, there is little control on spending by non-governmental entities in referendum campaigns in Ireland (O’Mahony 2018). Ireland does, however, have limits on donations to campaigns that are relatively strict by international standards (Reidy and Suiter 2015). In particular:
- no more than €100 in one calendar year can be given by an individual or corporation to a campaign anonymously
 - no more than €200 may be given per individual or corporation unless they are specially registered

- registered donors are limited to €2500 (Electoral Act 1997, section 23A as amended).⁶

14.22. In addition, foreign donations from non-citizens are not permitted (resident non-citizens may donate within the allowed limits). Related to these rules, there are also disclosure requirements for campaigns and political parties (Electoral Act, 1997, section 23 as amended 3–4).

POTENTIAL DIFFICULTIES IN RELATION TO RULES ON CAMPAIGNERS AND CAMPAIGN FINANCE

14.23. At the beginning of this chapter, we noted three kinds of potential challenges: those that could apply to any referendum; those that may be particularly acute in the context of unification referendums; and those arising from differences in practice between the jurisdictions. Each of these may be encountered in relation to campaign finance.

14.24. As we have noted, general concerns about the state of regulation of referendum campaign finance are widespread in both countries. In Ireland, the Standards in Public Office Commission has argued for limits on campaign spending and better controls on overseas spending, as well as for improved transparency of donations (Standards in Public Office Commission 2017: 18, 31). The Citizens' Assembly of 2016–18 similarly recommended that there should be regulation of spending, with 98% of members supporting overall spending limits in campaigns. It added that anonymous donations should be banned and that there should be public funding of each side of a referendum to an equal degree (Citizens' Assembly 2018b: 22–4).

14.25. In the UK, concerns have focused mainly on the ease with which the constraints can be subverted, notably through cooperation between nominally separate campaign groups, and through overseas interventions that are difficult to trace or prevent. Reform proposals have included measures to tighten up reporting requirements, strengthen the investigatory powers and capacities of the Electoral Commission, and increase penalties for those found guilty of wrongdoing (e.g., Electoral Commission 2017: 8–10; Independent Commission on Referendums 2018: 153–8). In evidence provided to us in response to an information request, the Electoral Commission highlighted some of the key recommendations they have made in this area: 'that approaches for enhanced due diligence and risk assessment should be adapted from money laundering regulations; and that rules should be introduced to ensure campaigners cannot accept money from companies that have not made enough money in the UK to fund their donation or loan.' It added, 'In our view making such

⁶ These are in fact annual donation limits, but since a referendum campaign will in practice always fall within a calendar year, they function as overall caps in practice.

changes to the law would better protect elections and referendums in the UK from any potential foreign interference.’ (Electoral Commission written evidence 2020).

- 14.26. Such matters require urgent attention in both jurisdictions in relation to referendums and elections in general. The dangers are especially great for votes on a matter as consequential as the constitutional question, where malign overseas actors may see benefit in causing major disruption. As noted at para 14.6, they were frequently raised in responses to our public consultation.
- 14.27. In relation particularly to referendums on Northern Ireland’s constitutional future, the designation of lead campaigners for a vote in Northern Ireland could prove contentious. As we noted above, the system supposes that a single organisation can reasonably represent the broad range of perspectives on each side of the referendum debate. That might be difficult in the case of a unification referendum in Northern Ireland, and it might therefore be desirable to modify the system or set it aside for such a vote. It would be advisable to make such a change, however, only through wide consultation and seeking consensus. If the system of designation were to be set aside, that would enhance the need for effective arrangements for public information, which we examine at paras 14.55–59, below.
- 14.28. Looking beyond designation of lead campaigners, important questions would arise in both jurisdictions about who would—and who should—be able to donate to or participate in the campaign. In Ireland, any Irish citizen can donate. In the UK, anyone on any UK electoral register can do so (PPERA, section 54(2)), and any Irish citizen anywhere in the world can donate to a political party in Northern Ireland (PPERA, section 71B). At present, UK citizens resident abroad can remain on the electoral register for only fifteen years after leaving the UK (though the current UK government proposes to remove this restriction). These provisions may give rise to three concerns.
- 14.29. First, there are anomalies in the UK rules. One such anomaly is that political parties and non-party campaign groups are treated differently: Irish citizens anywhere in the world can donate to the former; but only Irish citizens who are on the UK electoral register can donate to the latter. This may make sense for elections, but it makes little sense for referendums, where non-party campaigners have a key role to play. Another anomaly is that, for donations to political parties, the rules are more generous to Irish than to UK citizens: Irish citizens can donate even if they have never been resident in these islands; UK citizens can donate only if they have been resident in the UK within the last fifteen years. In both cases, there would be a strong case for resolving these anomalies one way or the other.
- 14.30. Second, given that the 1998 Agreement defines the question of sovereignty as a matter ‘for the people of the island of Ireland alone’, it may be asked why UK citizens with no direct connection to the island of Ireland should be able to donate to the campaign. On the other hand, if donations to a referendum in Northern Ireland were permitted from the Republic but not from Great Britain, that would create concerns

about unbalancing the contest. By way of comparison, the Scottish Parliament, though it saw the question of independence as a matter for the people of Scotland alone, explicitly allowed donations from anywhere in the UK in the 2014 independence referendum (Scottish Independence Referendum Act 2013, schedule 4, para 1). As stated in Chapter 4 (para 4.35–36), we do not think the requirement in the 1998 Agreement that the people of the island of Ireland should be able to make their choice ‘without external impediment’ implies any legal constraint on the rules that can be applied. We acknowledge that there may be different interpretations of the Agreement on this point, and we would welcome feedback.

- 14.31. Third, and turning to the issue of differences between the rules north and south, there is some inconsistency, in that Irish citizens would be able to donate to campaigns in Northern Ireland, but UK citizens could not donate to campaigns in the Republic of Ireland unless they were resident there. In one sense, this divergence would be unproblematic: it would remain the case that, in each referendum, the two sides would be conducting their campaigns within the same rules. On the other hand, with concurrent referendums and considerable cross-border communication and activity, the two votes would not be entirely separate from each, and concerns about imbalance could therefore arise.

THE ROLE OF THE GOVERNMENTS DURING THE CAMPAIGN

- 14.32. We turn now to the role of the governments during the campaigns. Provisions in Ireland and the UK here follow the same basic principles, but with some differences in application.

IRELAND

- 14.33. The rule in Ireland is in essence very simple: the government is not allowed to spend any public money to campaign for or against a referendum (Hogan et al. 2018: 8.1.39–8.1.52). This rule was created by the Supreme Court in 1995. The government had spent money supporting a Yes vote in the referendum to legalise divorce. The Court found that this was unconstitutional as ‘an interference with the democratic process and the constitutional process... that infringes the concept of equality which is fundamental to the democratic nature of the State’ (*McKenna v An Taoiseach*). This principle was reaffirmed in 2012 in *McCrystal v Minister for Children and Youth Affairs*. The government had run its own information campaign in the Children’s Rights referendum of 2012. Though this did not overtly lobby for a Yes vote, the Supreme Court held that the material was not impartial, and favoured a Yes vote. In the wake of this case, the safest approach for the government is always to leave the

provision of information to the neutral Referendum Commission (see below).⁷ However, the Supreme Court has clarified that this rule does not prevent ministers from campaigning or from using ancillary government resources such as a car to go to campaigning events.⁸ The recent Citizens' Assembly voted by large majority in favour of the retention of this rule preventing government spending.

UK

- 14.34. PPERA applies the principle that public funds should not be used to pay for referendum campaigning. The restriction is broad: with only a few exceptions (such as materials produced by the Electoral Commission or the BBC), it applies not just to material arguing for or against one of the referendum options, but also to any material that 'provides general information about a referendum' or 'deals with any of the issues raised by any question on which such a referendum is being held' or 'is designed to encourage voting at such a referendum' (PPERA, section 125). But the restriction is short, covering only the final four weeks of the campaign (*ibid.*).
- 14.35. These provisions have been widely criticised, both for their breadth—potentially inhibiting the normal work of government, and preventing public bodies from providing information that may be relevant to voters' decision-making—and for their short duration: intense campaigning has been under way well before the final four-week period in recent referendums (e.g., Independent Commission on Referendums 2018: 129–31).

POTENTIAL DIFFICULTIES IN RELATION TO THE ROLE OF GOVERNMENT

- 14.36. The general prohibitions on spending public money on campaigning for one or the other side in a referendum would need to apply to referendums on the question of Irish unification as well. As we emphasised in Chapter 6, the vital role of the governments if such referendums were called would be not in joining the campaign, but in designing and implementing a process that was fair and considered.
- 14.37. Such restrictions would not prevent politicians or parties in the governments from campaigning in their own capacities, as already happens routinely in referendums in both jurisdictions. Nor would they stop the governments from setting out plans for what would happen if the vote went one or other way. In Ireland, for example, the referendum would be on a set of constitutional amendments, which would necessarily already have passed through both Houses of the Oireachtas.

⁷ It is arguable that even while explaining why a referendum was called, neutrality is impossible; to explain a perceived problem and a possible solution to it will seem to be advocacy. The Referendum Commission avoids this largely by avoiding providing such information (Hogan et al. 2018: 8.1.50–8.1.51).

⁸ The *McCrystal* Supreme Court stated this *obiter*, and it was affirmed by the Court of Appeal in *Jordan v Ireland* [2018] IECA 291.

14.38. As explained in Chapter 4, we do not think the ‘without external impediment’ clause in the 1998 Agreement implies any specific legal constraints on the conduct of the campaigns in either jurisdiction (para 4.35–36). There would be a strong case, however, for ensuring that the rules on government involvement in the campaigns are broadly comparable across the two jurisdictions. In the UK, as we have noted, it would be desirable in relation to all referendums to extend the prohibition on publicly funded campaigning to the whole campaign period, and that change would bring the arrangements in the two countries in line with each other. More broadly, it would be essential for the two governments to coordinate their approaches.

INFORMATION, MISINFORMATION, AND THE MEDIA

14.39. Questions about how to ensure that voters have access to high-quality information and are not unduly exposed to misinformation are very live in all democracies, not least because the rise of digital technologies has generated considerable new dangers that governments and legislatures have not yet adequately addressed. Ireland and the UK share some strengths in their approaches to information during referendum campaigns, notably in relation to broadcast media. But they also share serious weaknesses, particularly around the lack of regulation of online/social media, the lack of capacity to tackle malign interference from actors outside these islands, and the consequent difficulties in tackling misinformation and other forms of disruption. These weaknesses pose a significant threat to the integrity of the democratic process. As illustrated at para 14.6, they were a common concern among respondents to our public consultation.

14.40. As in the case of campaign finance discussed above, such problems could be particularly acute in high-profile and high-impact referendum votes on the constitutional future. Some respondents to our public consultation pressed the case for ensuring high-quality information. The nature of such information would be different depending on the particular referendum configuration followed. But the principle that voters should have access to high-quality information and not be unduly exposed to misinformation would apply across all.

14.41. While both jurisdictions share many regulatory features in common and face the same threats, there is also one important area of divergence in practice between the two in respect of information: Ireland has a system of public information provision in referendums, which the UK largely lacks.

IRELAND: REGULATION OF MEDIA AND ADVERTISING

14.42. Broadcast media in Ireland are subject to fairly strict regulation. No political advertising is permitted on broadcast media.⁹ Section 39(1) of the Broadcasting Act 2009 provides for a duty of impartiality and fairness in current affairs and news broadcasts:

Every broadcaster shall ensure that—

- (a) all news broadcast by the broadcaster is reported and presented in an objective and impartial manner and without any expression of the broadcaster's own views,
- (b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned ...

14.43. In 2000, the Supreme Court handed down an influential ruling on the duty on broadcasters during referendum campaigns. In relation to the 1995 divorce referendum, public service broadcaster RTÉ had allowed party-political messages on the topic from all major parties, which happened in practice overwhelmingly to favour the Yes side. The Supreme Court held that this violated the duty on the broadcaster to be objective and impartial during referendum campaigns (*Coughlan v. Broadcasting Complaints Commission*; see Hogan et al. 2018: 8.1.44).¹⁰ The broadcasters now apply this principle very strictly, probably substantially exceeding what was required by the limited court ruling and statutory duty. They are highly cautious in any broadcast about even potential referendum issues, even though the Supreme Court's judgment was limited to the circumstance of an active campaign. They also tend to try to achieve 50/50 air time in any referendum broadcast, even though this does not necessarily flow from either the statute or the ruling.¹¹

14.44. There are no equivalent rules for either print or digital media, which are unregulated as to both advertising and editorial content. There is no regulation of social media advertising: no restrictions, disclosure requirements, attribution requirements, or ban on foreign advertising. These regulatory omissions generated significant public controversy before the abortion referendum of 2018, with concerns about social media advertising from abroad, as well as a substantial YouTube ad campaign apparently planned by the No side. Ultimately, Facebook banned advertising from non-Irish groups, and Google simply declined to allow any advertising related to the campaign on its platforms (Satariano 2018). No formal regulation of social media has

⁹ S 41(3) of the Broadcasting Act 2009 provides: 'A broadcaster shall not broadcast an advertisement which is directed towards a political end or which has any relation to an industrial dispute.'

¹⁰ The Yes and No side were given dedicated time, but since all parties featured were supporting Yes, the resultant programme features 40 mins of Yes advocacy and only 10 mins of No.

¹¹ Almost all broadcasters seem to operate something like a 50/50 airtime rule on any topic that is coming to referendum even long before the campaign period. It is famously rumoured that a Minister was not allowed to go on a cookery show during a referendum campaign. Similarly, broadcasters have insisted on balance in non-campaign discussions of possible referendum issues, even when somewhat remote (Brennock 2018).

been forthcoming since, though further self-regulation has taken place, including increased transparency from Facebook in respect of political advertising. An interdepartmental working group was established within government to examine the issue and made proposals including for transparency of online advertising (Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation 2018). The Programme for Government agreed between Fianna Fáil, Fine Gael, and the Green Party in June 2020 proposes to 'introduce a consistent regime relating to political advertising across all media' and to empower a new Electoral Commission 'to regulate online political advertising in the public interest' (Programme for Government 2020: 120).

14.45. There is very little formal regulation of what is actually said or argued in campaigns. Posters—which are a major part of Irish political campaigning, being seen on almost every lamppost in major towns and cities during elections and major, contentious referendums—are regulated as to form, but not as to substance.¹² There is no mechanism to fact-check statements made in literature sent out by campaigns or otherwise distributed through the media. The content of referendum arguments is, essentially, unregulated. Fact-checking is often undertaken by the media, particularly print media, during contentious referendum campaigns (Kenny 2021).

IRELAND: REFERENDUM COMMISSION

14.46. Partly because of the 1995 Supreme Court ruling against campaigning on one side of a referendum by government, an independent, statutory Referendum Commission was established. It has a role in informing the public in a referendum campaign. It prepares a booklet, which is sent to all households, outlining what the referendum is about and what the impact of voting either way would be. For some referendums, it has provided more extensive materials on its website. It also engages with the media: for example, its recent chairs have generally given broadcast interviews and some have also written newspaper op-eds. It increasingly engages on social media too.

14.47. The role of the Referendum Commission is, however, rather constrained. First, it is an ad hoc body, established each time a referendum is called, rather than a standing body. This can leave the Commission rushed to establish itself anew with each referendum to fulfil its functions. A member of the senior judiciary chairs the Commission for each referendum.

14.48. Second, the powers of the Commission are limited. It has no power to regulate or control information in the campaign. It does not have any formal role in fact-checking claims made in the campaign, though certain chairs have been more active in this

¹² For example, posters must contain attribution, the name and address of the printer and publisher.

respect than others.¹³ In its initial conception, the Commission was designed with a mandate to provide voters with non-biased information about the referendum, which took the form of a list of pro/con arguments about the proposal. However, this method was seen to have problems: it led to voters being sent a document outlining diametrically opposed positions, which could have had the effect of foregrounding questionable arguments.¹⁴ This power was later removed (Referendum Act 2001: section 1), and the Commission is now limited to fairly generic statements about a referendum. In particular, it has developed the practice of setting out the specifically constitutional effects of the referendum proposal without examining broader legal effects, let alone deeper societal effects, even when it is those wider effects that may be more important to voters in deciding how to cast their ballots (see Renwick and Palese 2019: 135–7). For instance, in Ireland’s abortion referendum of 2018, the Commission limited itself to explaining the legal effect of the referendum, i.e. removing the right to life of the unborn from the Constitution and allowing the Oireachtas to pass laws regulating the termination of pregnancy. The Commission provided no information in relation to the proposed laws that the government had committed to introduce if the referendum were passed. If this practice were followed in relation to unification referendums, the Commission would not provide any information in relation to the government’s proposals for a united Ireland, other than those actually to be approved as amendments to the Constitution by the referendum itself.

14.49. The Citizens’ Assembly was overwhelmingly in favour (94%) of the Commission taking a role in regulating campaign information. The Assembly by the same margin recommended—following criticism from the Supreme Court and former Commission members—that the ad hoc Commissions be replaced by a standing Electoral Commission (*McCrystal v Minister for Children and Youth Affairs*; Ruane 2013: 239–42). The 2020 Programme for Government pledges to establish such an Electoral Commission ‘by the end of 2021’ (Programme for Government 2020: 120).

UK: REGULATION OF MEDIA AND ADVERTISING

14.50. The rules relating to media and advertising in the UK closely resemble those in Ireland. Broadcast media are tightly regulated, while print and online media are subject only to very limited regulation. All broadcast political advertising is banned, except for a regulated number of campaign broadcasts. In the case of referendums,

¹³ Notably Mr Justice Kevin Cross, during the 2015 same-sex marriage referendum, was comparatively interventionist, weighing in on radio and television to dispel what he saw as misinformation. But he was not under any obligation to do this, and it is not an official role of the Chair of the Commission, and other chairs have chosen not to intervene in this way. (see [Primetime 2015](#)). However, this did not attract any great adverse public comment, perhaps suggesting this is a role that people are happy for the Commission to take on.

¹⁴ The first Nice Treaty vote was seen to suffer from this effect (Hogan et al. 2018: 8.1.60).

campaign broadcasts are available only to designated lead campaigners, ensuring equality between the sides in the debate (PPERA, section 127).

- 14.51. All broadcasters are under a general duty to maintain ‘due impartiality’ (Ofcom 2019: 28). In the context of referendums, that means that they must be strictly impartial between the two sides. As in Ireland, while this does not mean that broadcasters must maintain stop-clock equality, ensuring such equality can in practice be part of the simplest approach to upholding the requirement, and is often what broadcasters appear to pursue.
- 14.52. Though unofficial fact-checking has become an important part of politics in the UK—indeed, the 2016 referendum was the most fact-checked referendum ever (Goss and Renwick 2016)—there is no regulation of the content of campaign materials. The Electoral Commission has argued repeatedly that it should not be given a fact-checking role (see Electoral Commission 2016b: 50–3 for a summary), and the UK government has agreed (UK government 2012: 12).
- 14.53. All printed campaign materials must include an ‘imprint’ providing the name and address of their printer and promoter (PPERA, section 126). This allows voters, journalists, and regulators to see the source of any campaign materials, allowing them to see who is trying to influence the debate and, potentially, who may be engaged in questionable campaign practices. As yet, however, there is no equivalent provision for online campaign materials across the UK, though the Electoral Commission has been calling for it since 2004 (Electoral Commission 2018: 8–9), and such a provision was introduced in Scotland in 2020 (Referendums (Scotland) Act 2020, schedule 3, para 28). In autumn 2020, the UK government was consulting on measures to plug the gap (Cabinet Office 2020b).
- 14.54. This is symptomatic of wider weakness in the regulation of online campaigning. Online advertising is largely unregulated. Digital ad libraries have, as in Ireland, been established by social media companies and others, but are likewise subject to no democratic oversight. The spending returns that campaigners must submit to the Electoral Commission are not required to provide granular detail, meaning that how money is spent online remains opaque (Electoral Commission 2018).

UK: PUBLIC INFORMATION

- 14.55. Every household in Northern Ireland’s 1998 referendum on the Belfast/Good Friday Agreement received full copies of the Agreement text. The 30-page booklet contained the text alone, with no commentary to help explain its meaning.
- 14.56. But such extensive information provision was an exception to the general practice of referendums in the UK. Under PPERA, in force since 2000, referendums are conceived as contests between campaigners: there is no notion of any significant role for a public information campaign and therefore no equivalent to Ireland’s

Referendum Commission. The legislation for some referendums has allowed very limited information provision.

14.57. The law enabling the 2011 referendum on the voting system contained two such elements:

The Electoral Commission must take whatever steps they think appropriate to promote public awareness about the referendum and how to vote in it.

The Electoral Commission may take whatever steps they think appropriate to provide, for persons entitled to vote in the referendum, information about each of the two voting systems referred to in the referendum question. (Parliamentary Voting System and Constituencies Act 2011, schedule 1, para 9)

The Commission therefore sent a leaflet to all households that set out the referendum question, explained how it would be possible to vote, and provided brief descriptions of the two electoral systems that voters were asked to choose between.

14.58. In the 2016 Brexit referendum, however, the second of the 2011 provisions was not repeated: the Electoral Commission was required simply ‘to promote public awareness about the referendum and how to vote in it’ (European Union Referendum Act 2015, schedule 3, para 11). In place of impartial information about the options, the Commission’s leaflet included one page from each of the designated lead campaigners.

14.59. There has been considerable recent interest in the UK both in improving information provision and in strengthening measures to tackle misinformation. A report co-authored by one member of the Working Group analysed a range of options in depth (Renwick and Palese 2019). This report emphasised that, while measures to tackle misinformation through transparency and unofficial fact-checking are valuable, any attempt at official fact-checking or banning claims deemed to be false is fraught with danger, particularly in a polarised context where the authority of the adjudicating body may not be universally accepted. Attention should therefore be given to positive efforts to promote high-quality information and to media literacy. The core of this argument has been endorsed by a cross-party committee in the House of Lords (House of Lords Select Committee on Democracy and Digital Technologies 2020: 82–3).

INFORMATION, MISINFORMATION, AND THE MEDIA IN ANY UNIFICATION REFERENDUMS

14.60. Two main issues arise from the preceding discussion in relation to information, misinformation, and the media in any future referendums on the question of unification.

14.61. First, the general weaknesses of current regulations and practices, particularly arising from the rise of online media, urgently need to be addressed for referendums and

elections in general. Greater transparency in the identity of campaigners, and of the sources and scale of campaign spending, are imperative, as is greater accountability of campaigners through stronger regulatory enforcement powers. The UK Parliament's Intelligence and Security Committee highlighted the dangers in a report on potential Russian interference in elections and referendums in 2020 (Intelligence and Security Committee of Parliament 2020). Experts in Ireland highlighted similar dangers there too (Gallagher 2020).

- 14.62. Second, in relation specifically to referendums on Irish unification, the question of the appropriate form of public information provision north and south would need to be addressed. In the South, it would be important to consider whether the normal pattern of information provision by the Referendum Commissions would be adequate. As noted above, that provision typically addresses only the constitutional implications of a vote one way or the other. But the implications of a unification vote would clearly run much wider than that. There is a strong case for saying that, on a decision so momentous as that on unification, more broad-ranging information would be needed.
- 14.63. The same question would arise in Northern Ireland. If a specific set of proposals for the form of a united Ireland had been published, it would be important for voters to receive information on them. Similarly, if the proposals that had been developed ahead of a referendum focused on a process for working out the form of a united Ireland, voters would need information on this. As Irish experience illustrates, such information would need to be presented accessibly: it would be undesirable for voters to receive a dense legal text without further impartial guidance. But that raises two important questions.
- 14.64. First, who would be responsible for providing such information? The UK Electoral Commission may be thought an obvious option, particularly if, by the time of a referendum, Ireland had established an Electoral Commission incorporating the functions of the current Referendum Commissions. But the UK Electoral Commission may be reluctant, and with good cause: both the regulatory tasks that it has already and the information function could give rise to contention, and it would be undesirable if controversy arising in one of these domains detracted from public confidence in the other. An ad hoc body as under the current Irish model (and as has also been used successfully in New Zealand—see Renwick and Palese 2019: 144–60) may therefore be preferable. In those cases, the body comprises individuals of unimpeachable impartiality, such as judges, senior parliamentary clerks, and heads of regulatory bodies. In Northern Ireland, an element of balanced political representation may also be needed.
- 14.65. Second, what information would be provided? In part, that involves the same question as in the South: what are the issues on which voters ought to be able to access impartial information in order to be able to make an informed choice? But it also raises the more technical question of the basis on which information would be

provided. In at least some versions of the referendum process, as discussed in Part 2, proposals for the form of a united Ireland would be available and would have been agreed by the Houses of the Oireachtas, but would not have been through any formal mechanisms within the UK. As noted at para 13.29 that raises a question of the status of these proposals within the UK and how, therefore, an information campaign within the UK could refer to them. Some cooperation between the governments would appear to be essential to clarify this.

- 14.66. A last question concerns how the information provision north and south would compare. One option could be to make shared provision across both jurisdictions. But whether this was felt desirable would likely depend on the different conceptions of the referendums north and south that we discussed in Chapter 11: whether two separate decisions or one shared choice. There may also be practical barriers to a joint approach: materials would need to be tailored to the different circumstances of the electorates. But inconsistency between the two sets of materials could clearly cause confusion and distrust. The question of languages would also need to be resolved. In Ireland, all information is provided in both English and Irish. In Northern Ireland, elections have always been conducted solely in English, but we noted the possibility in Chapter 13 that a trilingual approach—using English, Irish, and Ulster Scots—might be adopted. If so, public information would need also to be available in the three languages. A high degree of coordination between the two governments would be important in resolving these matters.

CAMPAIGN DURATION

- 14.67. Lastly, we turn to the duration of the referendum campaign. The 1998 referendums took place just six weeks after the Belfast/Good Friday Agreement was signed. Such speed would still be possible in Ireland, where referendum campaigns last between 30 and 90 days. After an amendment Bill is passed, the relevant Minister may make an order setting a polling date for the referendum not less than 30 days and not more than 90 days from the date of the order (Referendum Act 1994: section 10).¹⁵ This constitutes the official campaign period. In the UK, however, such a quick referendum is no longer possible under the PPERA rules. Campaign groups have four weeks to apply for designated status, and the Electoral Commission has two weeks to vet and, if necessary, select applicants (PPERA, section 109). This process must be completed at least four weeks before polling day (section 103). Thus, the minimum referendum period in the UK is now ten weeks. But even this is widely seen in the UK as too short a period, and more time has therefore generally been allowed. Allowing just four weeks between the decision on designation and polling day would give designated campaign groups very little time to take advantage of their status, and

¹⁵ The Minister is obliged to set a polling date, but there is no specification in the Act as to how long may elapse between the passing of the Act and the making of the order setting the polling date.

the Electoral Commission (2016b: 15) has therefore recommended that designation take place earlier. For the 2016 Brexit referendum, for example, designation occurred ten weeks before polling day, giving a sixteen-week effective campaign period in total.

- 14.68. We noted above that the system of designating lead campaigners might not be appropriate in Northern Ireland. Irrespective of that, however, there would be good reasons for favouring a longer campaign. If high-quality information were to be provided to voters, that would take time to prepare. In light of the sensitivity of the issue, and particularly if information provision went beyond setting out the basic legal facts, it would need to go through very careful processes of drafting and vetting. Ireland's Referendum Commissions have repeatedly complained of being given insufficient time to complete their tasks satisfactorily (e.g., Referendum Commission 2004: 15; 2008: 32; 2015: 16).
- 14.69. In addition, the UK Electoral Commission (2016b: 33) also recommends that referendum legislation should be clear 'at least six months before it is required to be implemented or complied with', to ensure that administrators have time to prepare guidance for campaigners and campaigners can plan accordingly. And the Venice Commission advises that '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' (Venice Commission 2007: 9). These recommendations would not come into play if referendums on the unification question were conducted entirely according to existing rules. But substantive deviations from those rules could raise concerns unless they were agreed well ahead of time.
- 14.70. Especially if referendums were held simultaneously both north and south, it would be desirable for the campaigns to be similar in duration. Yet the maximum formal duration of campaigns in Ireland is shorter than the minimum period generally thought appropriate in the UK. This could be resolved in practice by 'informal' campaigning taking place outside the formal campaign period in the South, which is in practice common in Irish constitutional referendums. Coordination between the governments on this matter would be advisable.

CONCLUSIONS

- 14.71. We identified three kinds of potential challenge at the beginning of this chapter: those that are not specific to unification referendums, but rather could arise in other contexts too; those that may be particularly acute in the context of unification referendums; and those arising from differences in practice between the two jurisdictions. Looking at key aspects of campaigns—campaign finance; the role of governments; information, misinformation, and the media; and campaign duration—we have found examples of each challenge.

- 14.72. As regards matters not specific to unification referendums, the regulatory frameworks in both countries are in urgent need of updating. In their present state, they fail to protect against serious threats to the democratic process. To hold referendums on a matter so momentous as the unification question without first addressing them would be reckless.
- 14.73. We have noted, for example, the absence of campaign spending limits and lack of spending transparency in Ireland, the poor enforceability of existing rules in the UK, and the need in both countries for tighter regulation of online campaigning. Some updates to the standing rules—on, for example, joint campaigning rules and transparency of donations—have been made on an ad hoc basis at recent referendums in the UK, but would need to be repeated and strengthened in order to apply again in the future. Governments in both the UK and Ireland have signalled their intention to address some of these points. It will be important to examine whether such changes go far enough to address all the challenges.
- 14.74. As to matters specific to referendums on the question of unification, we suggested that the issue of information provision particularly needs to be considered. Voters in unification referendums would be making decisions of great import, and they would reasonably expect to have ready access to a wide range of information on this choice. But UK practice typically provides little such information, while provision in Ireland is generally narrowly focused on the constitutional implications of the vote. A more ambitious approach may be needed, but would raise significant challenges in terms of competence and public trust. Designing mechanisms for delivering high-quality information that was widely acknowledged as fair and balanced would therefore require great care. This would apply irrespective of the particular referendum configuration followed.
- 14.75. We also noted several anomalies in the campaign finance rules in Northern Ireland, as well as discrepancies in the roles between North and South, which could give rise to imbalances, or at least the perception of such imbalances. Consistency in who can donate to whom across different types of campaign group and different jurisdictions would be important.
- 14.76. Finally, in respect of differences in practices between the two jurisdictions, the main issues relate to the rules on government campaigning and the duration of the campaign. On the former, there is a strong case for aligning the rules in the UK more closely with those in Ireland, so that state-financed campaigning on one side of the debate would be prohibited throughout the referendum period, not just during the final weeks before the vote. On the latter, aligning campaign durations would best be achieved by augmenting Irish practice to permit the longer campaign period that has become the UK norm.
- 14.77. Effecting these changes would require primary legislation in both countries. In Ireland, it would most likely take the form of amendments to the Referendum Acts. In the UK, most elements would best be achieved by amending PPERA; this would

mean that they applied to future referendums throughout the UK, not just to a unification referendum in Northern Ireland. Some elements might, however, better be enacted on a one-off basis. That would require primary legislation in addition to the ministerial order under the Northern Ireland Act 1998 through which the referendum itself would be called and the referendum question set.

- 14.78. In setting out criteria for assessing possible referendum processes in Chapter 5, we highlighted the importance of securing public legitimacy and of enabling voters to make an informed choice. Existing debates in both countries emphasise the importance of campaign regulations for protecting these principles in practice, as well as the challenges involved in doing so in the modern world. These matters require close attention and action in and of themselves. If such referendums were called, they would become especially pressing, so they are better addressed now.

15. CONCLUSION

- 15.1. We have sought throughout this interim report to examine how any future referendums on whether Northern Ireland should remain part of the United Kingdom or become part of a united Ireland would best be designed and conducted. We have done so not because we think referendums are imminent—we do not—but because the whole process needs to be thought through well in advance. The years of acrimony following the UK's vote on EU membership in 2016 illustrate the dangers of calling a vote without adequate advance planning.
- 15.2. The questions that we address are narrow and technical ones. We have no collective view on whether referendums, or unification itself, would be desirable. We have simply sought to map out what would be involved in the process of making a decision on this vital question, and we have pursued this task from a procedural, not a political, perspective. Thus, we began the report by taking the existing political and legal framework provided by the 1998 Belfast/Good Friday Agreement as our starting point (Chapters 2–4). Then, within that framework, we set out key criteria against which options for the different parts of the decision-making process could be assessed (Chapter 5). In the remainder of the report, we examined each of those steps in terms of the criteria.
- 15.3. Our legal analysis in Chapter 4 identified certain key provisions that are either explicit or implicit in the 1998 Agreement. Unification could come about only through referendums in both Northern Ireland and the Republic of Ireland. Such votes must be 'concurrent'—on effectively the same proposals—but need not necessarily be simultaneous. Unification would be required if simple majorities of 50% + 1 of voters in each jurisdiction supported it. Unification would not come about if the majority of voters either north or south opposed it.
- 15.4. Throughout our analysis we have also emphasised the broader ethos of the 1998 Agreement, which stresses the value of proceeding as consensually as possible on many matters. That consensual principle does not apply to the basic question of sovereignty, which must be decided by simple majorities north and south. Subject to that constraint, however, an inclusive and consensual approach should be sought in the development of plans for the referendum process and the development of proposals for the form of a united Ireland or for any reforms to the Union.
- 15.5. Certain parameters for any future referendum processes are thus provided by the 1998 Agreement. But many other aspects of these processes are unspecified. Our detailed analysis in Parts 2 and 3 of the report amply illustrates just how much would need to be worked out before any referendums could be held. This includes the question of how referendums would be called (Chapter 8), the overall configuration of referendums north and south relative to each other and relative to other stages in

the broader decision-making process (Chapters 9 and 10), processes for developing proposals for the form of a united Ireland and perhaps for reforms to the Union (Chapters 6 and 7), and rules and procedures for the conduct of the referendums themselves, including the franchise (Chapter 12), the question on the ballot paper (Chapter 13), and the campaign (Chapter 14).

15.6. We have set out detailed analysis of all of these points in the preceding chapters. But our core interim conclusions can be summed up in three overarching points.

15.7. *First*, it would be highly unwise for referendums to be called without a clear plan for the processes of decision-making that would follow. Such a plan would need to be agreed by the governments, working closely with the full range of actors in Northern Ireland, across the island of Ireland, and in the UK. As we set out in Chapter 6, such a plan would provide for:

1. when referendums would take place north and south
2. what the conduct rules would be for these referendums and how breaches would be addressed (or how and when these rules would be determined)
3. how the governments would conduct themselves during the process
4. whether the process would have an external chair
5. what matters would need to be discussed or negotiated by whom, at what stages, in what fora
6. what the process and timetable would be for implementing the result of the referendum and any consequential changes
7. what would happen in the event of divergent outcomes between North and South.

When planning of this type should begin is a political rather than a procedural matter, on which we do not take collective view. But it should be completed by the time any referendum was called. We proposed in Chapter 8 that, if evidence began to emerge suggesting that a majority for a united Ireland *might* be likely, the Secretary of State should announce a period of detailed review. A plan for the referendum process would best be agreed during that period, to be activated in the event that referendums were in fact called.

15.8. *Second*, there are several plausible and meritorious configurations of referendums north and south. Referendums could come relatively early in the process, before the details of a united Ireland had been worked out; or later, once proposals for a united Ireland had been developed. We examined five configurations in detail in Chapter 9 and concluded that three of them would deserve further attention:

- Under *configuration 2*, a detailed *model* for a united Ireland would be worked out in advance of the referendums. This would be done on the initiative of the Irish government, but with the widest possible consultation throughout the

island. If majorities in the referendums north and south opted for unification on the proposed model, the two governments would then work together on agreeing the terms of the transfer of sovereignty.

- Under *configuration 4*, the referendums would be held before detailed proposals for a united Ireland had been established. But two key matters would be agreed in advance, so that voters would know what to expect. First, a *process* for working out detailed proposals for a united Ireland would be set out. Second, *default arrangements* for a united Ireland would be established, which would apply if voters opted for unification but revised arrangements for a united Ireland could not be agreed and approved. If majorities opted for unification, the transfer of sovereignty would not be immediate: detailed arrangements for the form of the united Ireland would be worked on first. Unification would occur either on the basis of an agreed model if one could be approved, or on the default arrangements if there were no agreement on a new model or that model were not approved.
- Under *configuration 5*, the referendums would again be held before detailed proposals for a united Ireland had been established. But, unlike in configuration 4, the transfer of sovereignty would follow relatively soon after majority votes for unification, and processes for developing the permanent form of a united Ireland would follow after that. In advance of the referendums, three matters would be agreed: the *process* for agreeing those detailed future arrangements; the *interim arrangements* that would apply after transfer of sovereignty, until any replacement arrangements were agreed and approved; and the *default arrangements* that would apply in the event that detailed future arrangements were not agreed and approved. The interim and default arrangements might well be the same.

Each of these configurations would have advantages and disadvantages, as well as multiple variants. We assessed them in Chapter 9 against all of our criteria. In particular, we found that there would likely be a rough trade-off between enabling informed choice on the one hand and facilitating inclusive development of the detailed form of a united Ireland on the other. Configuration 2 would tend to perform better on the former criterion, whereas configuration 4 or 5 would do better on the latter—though in no case would any configuration be perfect.

- 15.9. *Third*, the conduct rules for any referendums would be crucial. The rules for referendum and election campaigns are badly out of date in both the UK and Ireland, and urgently need to be strengthened. This would be particularly important for referendums on a question as momentous as the question of unification. Voters must be protected from misinformation and have access to high-quality information. Campaign finance regulations must be robust enough to ensure fairness between the two sides across the two referendums. The process as a whole must be fair, and its administration rigorously impartial.

15.10. This is an interim version of our report. We are publishing it now because we would like to hear others' thoughts on our draft analysis and draft conclusions. We claim no monopoly of wisdom, and we look forward to feedback on our interim findings.

15.11. We will not present a list of specific consultation questions. We rather ask a series of broad questions about all the parts of the report:

- Do you agree or disagree with any aspects of our interim analysis or interim conclusions?
- Do you agree or disagree with our analysis of the legal implications of the 1998 Agreement, presented in Chapter 4? We highlighted in that chapter certain aspects of our analysis on which we would particularly welcome feedback.
- Do you think that our list of criteria for assessing different options for the design of the referendum and decision-making process, set out in Chapter 5, could be improved in any way?
- Have we accurately identified in Chapter 6 the matters that would need to be addressed as part of any process of decision-making beyond the unification question itself, and have we adequately assessed the possible processes for doing so? Do you agree or disagree with our view that a plan for the decision-making process should be agreed before any referendum is called?
- Would you add anything to the list we provide in Chapter 7 of matters to be resolved in the event of unification, relating to the terms on which sovereignty would transfer and arrangements in a united Ireland? Could we say anything more at this stage about possible reforms to the Union?
- Do you agree or disagree with our assessment, in Chapter 8, of how the Secretary of State should decide whether to call a referendum?
- Do you prefer one of the referendum configurations set out in Chapter 9 to the others? Are there other configurations we should consider?
- Do you agree or disagree with our overview of the processes that the different possible referendum configurations would entail, as set out in Chapter 10?
- Do you agree or disagree with our analysis of the options regarding the referendum franchise, in Chapter 12?
- Do you agree or disagree with our analysis of the options regarding the question on the referendum ballot paper, in Chapter 13?
- Do you agree or disagree with our analysis of the need for reforms to campaign conduct rules, in Chapter 14?
- Are there any points where you think our reasoning requires further development or clarification?
- Do you think we have missed out any important matters?

SUBMITTING EVIDENCE TO THE WORKING GROUP

The Working Group is keen to hear your views on the matters covered in this report. In order to submit a response, please write to our Project Manager and Research Assistant, Conor J. Kelly, at **conor.kelly@ucl.ac.uk**.

To ensure that your response can be considered by the Working Group before it completes its final report, please send it to us by **18 January 2021**.

List of Oral and Written Evidence

As part of our research, the Working Group invited individuals and organisations with expertise in the areas we are examining to submit written evidence and/or speak with us in person. These included, among others, politicians, academics, economists, former civil servants, civic actors, and the major political parties across Ireland, Northern Ireland, and Great Britain. We are very grateful to those who took time to assist us with our research. Their expertise and wide-ranging perspectives have been invaluable to us in developing our thinking and in drafting this interim report.

We invited contributions from across the political spectrum and across the range of views on Northern Ireland's constitutional future. Some individuals and organisations declined our invitations, however, and wished not to comment on our work. That particularly applied to some in the unionist community. We appreciate that the topic we are examining is sensitive, and we respect those decisions.

We would also like to acknowledge the lack of gender balance across our consultees. We would very much welcome the views of more women in response to this interim report.

ORAL EVIDENCE

The following people and organisations took part in evidence sessions with the Working Group, through either group panels or interviews.

Bertie Ahern, former Taoiseach of Ireland

Lord Alderdice, Liberal Democrat Peer and Former Leader of the Alliance Party

Barry Andrews MEP, Fianna Fáil

Senator Ivana Bacik, Irish Labour Party

Kate Barry, Chair of the Green Party (Northern Ireland)

Dr Esmond Birnie, Ulster University

Dr Nicola Brady, Irish Council of Churches

Paul Braithwaite, Community Foundation for Northern Ireland

John Bruton, former Taoiseach of Ireland

John Patrick Clayton

David Cooke, formerly of the Northern Ireland Office

Sarah Creighton

Senator Mark Daly, Fianna Fáil

Professor David Farrell, University College Dublin

Pearse Doherty TD, Sinn Féin

Sammy Douglas, former DUP MLA

Mark Durkan, former SDLP leader and deputy First Minister of Northern Ireland

Dr Stephen Farry MP, Alliance Party

Mick Fealty, Slugger O'Toole

John Finucane MP, Sinn Féin

John Fitzgerald, Research Affiliate at the Economic and Social Research Institute

Paul Gallagher, Attorney General of Ireland

Peter Geoghegan, author of *Democracy for Sale*

Dominic Grieve, former Attorney General, Conservative Party and Independent MP

Dr Sean Haughey, University of Liverpool

Aron Hughes

Richard Humphreys, Irish High Court Judge and author of *Beyond the Border*

Cllr Ted Leddy, Fine Gael

Sir David Lidington, former Conservative MP and Chancellor of the Duchy of Lancaster

Ben Lowry, *News Letter*

Chris MacCabe, formerly of the Patten Commission

Rev Dr Gary Mason, Rethinking Conflict

Dr David McCann

Professor Ronan McCrea, University College London

Hugo MacNeill, Chair of the British-Irish Association

Sam McBride, *News Letter*

John McGrane, British-Irish Chamber of Commerce

John McGuinness, Economic and Social Research Institute

Rory Montgomery, formerly of the Irish Department of Foreign Affairs

Professor Duncan Morrow, Ulster University

Professor Edgar Morgenroth, Dublin City University

Dr Mary Murphy, University College Cork

Martin O'Brien, Social Change Initiative

Dáithí O'Ceallaigh, formerly of the Irish Department of Foreign Affairs

Professor Aoife O'Donoghue, Durham University

Professor Niall Ó Dochartaigh, the National University of Ireland, Galway

Quintin Oliver, Stratagem

Sean O'hUiginn, formerly of the Irish Department of Foreign Affairs

Akash Paun, Institute for Government
Jonathan Powell, former Downing Street Chief of Staff and Chief Negotiator in Northern Ireland
Dr Jamie Pow, Queen's University Belfast
Dr Clare Rice, Newcastle University
Clare Salters, formerly of the Northern Ireland Office
Professor Peter Shirlow, University of Liverpool
Peter Smith QC
Sir Jonathan Stephens, formerly of the Northern Ireland Office
Dr Jane Suiter, Dublin City University
Professor Jennifer Todd, University College Dublin
Professor Jonathan Tonge, University of Liverpool
Quentin Thomas, formerly of the Northern Ireland Office
Grainne Walsh, Statagem
Ann Watt, former Head of the Northern Irish Electoral Commission
Bill White, Managing Director of Lucid Talk

WRITTEN EVIDENCE

The following people and organisation sent submissions to our call for evidence or sent us previously published material for our consideration.

Dr Mike Burke, Associate Professor Emeritus, Ryerson University
Senator Mark Daly, Fianna Fáil, former rapporteur for the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement
Peter Emerson, The De Borda Institute
Neil Farris
Professor Jim Gallagher, University of Oxford
Professor Michael Gallagher, Trinity College Dublin
Kieran Harrahill, University College Dublin
Jarlath Kearney
Dr Martin Mansergh
Dr David McCann
Senator Michael McDowell
Austen Morgan, Barrister and Author
Dr Colin Murray, Newcastle University (with Professor Aoife O'Donoghue, Durham University)

Andy Pollak

Bob Posner, Chief Executive of the Electoral Commission (in response to a letter requesting specific information)

Dr Jamie Pow, Queens University Belfast

Sinn Féin

Peter Smith QC

Social Democratic and Labour Party (SDLP)

@Think32_

Quentin Thomas, formerly of the Northern Ireland Office

Professor Jonathan Tonge, University of Liverpool

Brian Walker

Joseph Ward, University of Birmingham

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The Belfast/Good Friday Agreement of 1998 provides for the possibility of future referendums on the question of whether Northern Ireland should remain in the United Kingdom or become part of a united Ireland. It sets out some of the principles that such votes would need to follow, but it leaves many aspects of the process unclear or unspecified. How would the Secretary of State for Northern Ireland decide whether to call a referendum? Would a vote also be needed in the Republic of Ireland? Would referendums north and south need to be simultaneous? Would they best take place before or after detailed proposals for the form of a united Ireland had been worked out? Who should be able to vote? What should the question on the ballot paper be? How would the referendum campaigns be conducted?

This interim report explores possible answers to these and other questions, and sets out the provisional conclusions of the Working Group on Unification Referendums on the Island of Ireland. The Working Group has no collective view on whether such referendums should take place or what the outcome should be if a vote is called. The Group does not see referendums on this subject as imminent. But they could happen in the future. And thinking through in advance what that would involve is vitally important.

About the Constitution Unit

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit's research had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world.

About the Working Group

The Working Group on Unification Referendums on the Island of Ireland is a group of researchers based at universities in Northern Ireland, Ireland, Great Britain and the United States. The members are experts in politics, law, sociology, and history. The Group is independent of all political parties and governments and is funded by the British Academy and Joseph Rowntree Charitable Trust. The Group takes no view on whether such referendums should take place or what the outcome should be if they happen.



**Working Group on
Unification Referendums
on the Island of Ireland**