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The Constitution Unit
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25 August 2020

Dear Alan

Working Group on Unification Referendums on the Island of Ireland

Thank you for your letter of 20 May seeking our views as part of the deliberations of the Working Group on Unification Referendums on the island of Ireland. I was interested to hear of the establishment of the Group and am aware that you are keen to gather a broad range of opinions to inform your findings.

As you are aware, the Northern Ireland Act 1998 provides no detail on the practicalities of a referendum on the constitutional arrangements for Northern Ireland. Rather it provides that this would be addressed under an Order by the Secretary of State. Helpfully, the Political Parties, Elections and Referendum Act 2000 (PPERA) provides some clarity relating to the conduct of referendums as well as the role of the Electoral Commission and the Chief Electoral Officer for Northern Ireland. Such could be applied to a referendum pursuant to the Northern Ireland Act 1998.

As you recognise it would not be appropriate for the Commission to speculate on the likelihood or not of any future referendum in Northern Ireland or anywhere else in the UK. We have not devoted time or resource into exploring the specific circumstances or practicalities of a referendum such as that you are exploring. Nevertheless, we have a clear set of principles for the delivery of referendums. Our response to the questions posed by the working group is based on these, and in the absence of undertaking specific work on unification referendums in Ireland we are unable to address some of the specific issues you have raised.

Should the UK Government indicate that it might consider holding such a referendum, we would at that point be able to undertake a detailed assessment and provide specific advice on the basis of our expertise and experience. Indeed, in such circumstances we would expect to be consulted on a range of matters relating to the referendum.

Deviations from PPERA

[Our report on the EU referendum](#) sets out in detail our recommendations, based on our experience of conducting recent referendums, of changes that should be made to improve the management and delivery of referendums in the UK.

Following that referendum in 2016, we called on the UK Government to establish a clear standard legal framework for the conduct and regulation of future referendums. This should include making necessary amendments to PPERA, together with a generic Order for the conduct of referendums. Whilst a number of changes and improvements were made to the regulatory controls in advance of the referendum, these were included in the specific referendum legislation and associated Regulations, rather than by an updating of the standard PPERA rules. Introducing a standard legal framework would remove any ambiguity over the detailed rules for the conduct of referendums, be they in Northern Ireland or across the UK. You will know of course that the Referendums (Scotland) Act 2020 represents a welcome example of a more comprehensive legislative vehicle governing referendums.

As you will be aware the Law Commission published its final report on Electoral Law in March 2020. It made comprehensive recommendations on the reforms needed to create a single, consistent legislative framework for electoral law in the UK. We support these recommendations and have called on the UK's governments and parliaments to prioritise the time and resources needed to deliver these meaningful improvements. Although the Northern Ireland Law Commission has not been operational since 2015 and did not, therefore, participate in the final stages of the report, the recommendations on referendums at chapter 14 of that report should also be extended to referendums across the UK.

Your question in relation to the susceptibility of referendums in the UK to foreign interference is obviously timely following announcements by the UK Government and the recent publication of a report by the Intelligence and Security Committee of the UK Parliament.

Voters deserve to know that elections and referendums in the UK are free and fair, and that the necessary rules are in place to safeguard them from unlawful influence. It is for government (and parliament) to monitor and respond to foreign state interference and provide an appropriate legislative framework for our elections and referendums. Within the confines of that framework, the integrity of elections and referendums, and the public's confidence in these, are central to our work, and of course our legal powers and remit stop at the UK's borders. We seek to work with the UK's security services, the National Cyber Security Centre and other parts of government in support of their work in these matters.

We have highlighted the risks of foreign interference to successive governments and have made recommendations to further safeguard the UK's electoral system. For example, we have recommended that greater transparency is provided for voters around who is trying to influence them online by requiring all digital campaign materials to include an imprint; 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. In our view making such changes to the law would better protect elections and referendums in the UK from any potential foreign interference. We will continue work closely with the legislatures across the UK to ensure that any future change to legislation to address potential foreign interference will safeguard and maintain the integrity of elections and referendums.

Rules for a referendum in a part of the UK

As I have outlined, we have not undertaken planning into the specific circumstances or practicalities of a referendum under the terms of the Northern Ireland Act 1998. As such we are not in a position to consider fully what changes we think would need to be made PPERA for such a referendum. Our experience of previous referendums, such as those in 2004, 2011 and 2014, would nevertheless play an important part in helping to inform preparations for any future referendum in a specific part of the UK – be that Northern Ireland or elsewhere. The Referendums (Scotland) Act 2020, as mentioned above, also provides useful context as the most up-to-date consideration by a parliament within the UK. We would, of course, work closely with the appropriate governments to ensure that the legislation put in place meets our key objectives on how referendums should be run.

As outlined earlier, the introduction of a standard legal framework would remove any ambiguity over the detailed rules for the conduct of referendums, whether in Northern Ireland or in any other part of the UK.

Question testing

Referendums legislation provides that we must “consider the wording of the referendum question, and shall publish a statement of any views of the Commission as to the intelligibility of that question”. We have a tried and tested established approach to how we conduct question assessment, which [is available on our website](#).

A referendum question should present the options clearly, simply and neutrally. It should be easy to understand, to the point and unambiguous. It should avoid encouraging voters to consider one response more favourably than another and not be misleading to voters. These are the guidelines we would seek to adhere to at any future referendum anywhere in the UK.

We have conducted research with the public in Northern Ireland as part of the assessment process ahead of the 2011 referendum on the alternative vote and the 2016 EU referendum. No issues emerged or were identified during this process that would lead us to consider taking a different approach to our question assessment.

It is clear that a unification referendum on the island of Ireland would present a unique situation in relation the question being asked in each jurisdiction. There is limited scope for international comparisons and this is ultimately an issue that would need to be resolved between the UK and Irish Governments. Our guidelines, as stated above, provide a clear and tested methodology.

Campaign donations and spending and the enforcement of campaign rules

The questions raised by the Working Group in relation to donations and rules are important, but I hope you will appreciate that it would not be appropriate for the Commission to speculate or respond specifically on what is, at this time, a hypothetical situation. These are the issues that we would consider at a time when it would be appropriate for us to fully consider and commit resource to addressing the impact of a unification referendum in Northern Ireland.

The UK and the Republic of Ireland operate under very different rules in relation to political finance. For example, caps are in place for donations made to Irish political parties but no such caps are in place for parties in Northern Ireland or Great Britain. There are also different rules in each jurisdiction on how political donations are reported.

In such a high-profile referendum there is likely to be significant campaigning by political parties and campaign groups across Northern Ireland and the Republic of Ireland as well as in Great Britain. It is important that campaigners are able to put forward arguments for any of the possible outcomes of a referendum. This means that it should be straightforward to register as a permitted participant and to take part in campaigning and that the rules that govern campaign spending and fundraising activity should be clear and fair. In addition, any process for designating lead campaign organisations for each outcome must be clear, and accepted as fair.

The rules governing campaigning and spending at a referendum must be transparent and ensure confidence and integrity in the result. It may be the case that each government chooses to adopt its own rules under existing or new legislation, or that both governments establish agreed rules that are legislated for in each jurisdiction. Given our experience as a regulator of political finance we would seek to inform and share our expertise as appropriate in the formulation of any such rules. The proposed Irish Electoral Commission, if established at such a point, would also play an important role.

On the specific point relating to permissible donors contained within the Northern Ireland (Miscellaneous Provisions) Act 2006, we would like to clarify that this relates to donations made to parties on the Northern Ireland Register of Political Parties. The list of permissible UK and Irish donors was established in law by the UK Parliament.

Unless there was a change in the rules, registered political parties in Northern Ireland would continue to be able to accept donations from permissible UK and Irish sources. At the 2016 EU referendum most registered permitted participants could not receive donations from Irish sources. The exception to this was registered Northern Ireland political parties that also registered as permitted participants. They remained subject to the rules enabling them to accept donations from permissible UK and Irish sources.

Public information

In keeping with our principles on how referendums should be conducted it is vital that there are no barriers to voters taking part. This means that those eligible can register to vote and that voters can easily understand the question (and its implications). Voters should also be informed about the possible outcomes, and campaign arguments should be easy to understand.

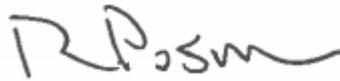
We have considerable experience of delivering high profile public awareness campaigns at elections and referendums across the UK. Most of these have focussed on promoting electoral registration and providing voters with the information they need to take part in major electoral events. This has included leaflets to all households at all referendums in the past decade, mass media advertising, the generation of coverage in the news media and extensive outreach through partner organisations.

As already highlighted, the particular circumstances of a referendum under the terms of the Northern Ireland Act 1998 will impact on all messaging associated with public information campaigns across the two jurisdictions. While voters in the Republic of Ireland are more familiar with referendums as part of the normal political discourse, the complexities of referendums for voters right across the island may require a different approach.

I hope this information is of help to the Working Group and that you understand why there are some questions put forward that it would not be possible or appropriate for us to answer at this time. My colleagues and I would be happy to meet and discuss our position further if that would be helpful.

I look forward to hearing the outcome of this work when you report your findings.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R Posner', with a stylized flourish at the end.

Bob Posner
Chief Executive