Referendums in the United Kingdom

Report with Evidence
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(Q) refers to a question in oral evidence
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CHAPTER 1: INTRODUCTION

Background

1. In November 2009, the Committee began an inquiry into “the role of referendums in the UK’s constitutional experience”. Referendums, by which citizens are given the opportunity to express a view on specific issues, have antecedents in the Middle Ages and earlier. A.V. Dicey advocated referendums for Britain in 1890. But in comparison with some other democracies, the referendum has been little used in the United Kingdom.

2. Although there was prior experience, such as the Scottish referendum on prohibition in 1920, and local polls in Wales on the Sunday opening of pubs during the 1960s, the modern history of referendums in the UK begins in 1973. Box 1 shows the national and regional referendums which have been held in the UK since, including the first, and so far only, UK-wide referendum, conducted in 1975, on whether “the United Kingdom should stay in the European Community (the Common Market)”.

3. The referendum was not used at national level between 1979 and 1997. The Labour Party’s 1997 election manifesto contained commitments to referendums on: the adoption of the European single currency; the adoption of a new electoral system for the House of Commons; the establishment of a devolved Scottish Parliament; the establishment of a devolved Welsh Assembly; the establishment of a Greater London Authority; and the establishment of Elected Regional Assemblies.

4. A series of referendums followed. In September 1997, a three-to-one majority voted in favour of the establishment of a Scottish Parliament, with a slightly smaller majority in favour of the Parliament possessing tax-varying powers. One week later, a small majority voted in favour of the establishment of a Welsh Assembly. In May 1998, on a low turnout, the London electorate voted in favour of the establishment of a Greater London Authority. Three weeks later, a referendum was held in Northern Ireland and in the Republic of Ireland on the Belfast Agreement (popularly known as the Good Friday Agreement), which resulted in a majority for the Agreement. The promised referendums on the electoral system and the single European currency were not conducted.

5. In October 1998, the Fifth Report of the Committee on Standards in Public Life, on The Funding of Political Parties in the United Kingdom, was published. The Report made recommendations for the regulation of elections in the

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1 Witnesses used both “referendums” and “referenda” as the plural form of “referendum”. We have chosen to use the form “referendums” throughout the report, except where quoting directly from witnesses who use the term “referenda”.
2 A.V. Dicey (1890) ‘Ought the referendum to be introduced into England?’ Contemporary Review 57 (April).
3 See Appendix 3 and Q 1.
UK, and for referendums. The regulatory framework for referendums advocated by the Committee was broadly reflected in the subsequent Political Parties, Elections and Referendums Act (PPERA), which was passed in November 2000. The Act established the Electoral Commission, which, in addition to its regulatory responsibilities in relation to elections, was established as the regulator of referendums held under the Act.4

6. One referendum has since been held under the Act. In November 2004, a referendum was held on whether to establish an Elected Regional Assembly in the North East of England (alongside referendums on the consequent reorganisation of local government in County Durham and Northumberland), and nearly 80 per cent of those voting voted against the proposal to establish the Assembly.

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4 See Box 2 for more details.
### BOX 1

**UK experience of national and regional referendums since 1973**

<table>
<thead>
<tr>
<th>Event, Location and Date</th>
<th>Referendum Question</th>
<th>“Yes” vote (per cent)</th>
<th>“No” vote (per cent)</th>
<th>Turnout (per cent)</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Border poll” Northern Ireland March 1973</td>
<td>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?</td>
<td>Remain part of the United Kingdom: 98.9%</td>
<td>Be joined with the Republic of Ireland: 1.1% (the poll was subject to a widespread boycott by the Nationalist community.)</td>
<td>58.7%</td>
<td>Northern Ireland remained part of the United Kingdom.</td>
</tr>
<tr>
<td>Membership of the European Community UK June 1975</td>
<td>Do you think that the United Kingdom should stay in the European Community (the Common Market)?</td>
<td>67.2%</td>
<td>32.8%</td>
<td>64.0%</td>
<td>The UK remained in the European Community.</td>
</tr>
<tr>
<td>Devolution Scotland March 1979</td>
<td>Do you want the provisions of the Scotland Act 1978 to be put into effect?</td>
<td>51.6%</td>
<td>48.4%</td>
<td>63.6%</td>
<td>Devolution did not proceed as the threshold requirement that not less than 40 per cent of the total electorate had to vote “yes” for devolution was not met—only 32.8 per cent voted “yes”.</td>
</tr>
<tr>
<td>Devolution Wales March 1979</td>
<td>Do you want the provisions of the Wales Act 1978 to be put into effect?</td>
<td>20.3%</td>
<td>79.7%</td>
<td>58.8%</td>
<td>Devolution did not proceed.</td>
</tr>
<tr>
<td>Referendum Type</td>
<td>Question</td>
<td>Agree (%)</td>
<td>Do not agree (%)</td>
<td>Result</td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>-----------</td>
<td>------------------</td>
<td>------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Devolution Scotland September 1997</strong></td>
<td><strong>I agree that there should be a Scottish Parliament or I do not agree that there should be a Scottish Parliament.</strong></td>
<td>Agree: 74.3%</td>
<td>Do not agree: 25.7%</td>
<td>60.2% The Scottish Parliament was established.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>I agree that a Scottish Parliament should have tax-varying powers or I do not agree that a Scottish Parliament should have tax-varying powers.</strong></td>
<td>Agree: 63.5%</td>
<td>Do not agree: 36.55%</td>
<td>60.2% The Scottish Parliament was given tax-raising powers.</td>
<td></td>
</tr>
<tr>
<td><strong>Devolution Wales September 1997</strong></td>
<td><strong>I agree that there should be a Welsh Assembly or I do not agree that there should be a Welsh Assembly.</strong></td>
<td>Agree: 50.3%</td>
<td>Do not agree: 49.7%</td>
<td>50.1% The Welsh Assembly was established.</td>
<td></td>
</tr>
<tr>
<td><strong>Greater London Authority London May 1998</strong></td>
<td><strong>Are you in favour of the Government’s proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly?</strong></td>
<td>72.0%</td>
<td>28.0%</td>
<td>34.0% The Greater London Authority was established.</td>
<td></td>
</tr>
<tr>
<td><strong>Belfast Agreement Northern Ireland May 1998</strong></td>
<td><strong>Do you support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?</strong></td>
<td>71.1%</td>
<td>28.9%</td>
<td>81.0% Community consent for continuation of the Northern Ireland peace process on the basis of the Belfast Agreement was given.</td>
<td></td>
</tr>
<tr>
<td><strong>Elected Regional Assembly North East of England November 2004</strong></td>
<td><strong>Should there be an elected assembly for the North East region?</strong></td>
<td>22.1%</td>
<td>77.9%</td>
<td>47.1% The Elected Regional Assembly for the North East was not established.</td>
<td></td>
</tr>
</tbody>
</table>

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5 Parallel referendums were held at the same time on the proposed restructuring of local government.
7. Local referendums have been held in recent years, on the establishment of an elected mayor, council tax rates and congestion charge proposals.

**The current context**

8. In February 2010, the Government tabled amendments to the Constitutional Reform and Governance Bill, proposing a referendum before October 2011 on changing the electoral system for the House of Commons to the “Alternative Vote” system. The Conservative Party have stated that if they win the next General Election they will introduce legislation requiring a referendum on any future transfer of power to the EU. They have also stated that they would hold local referendums, and to empower people to instigate referendums on local issues. The Liberal Democrats have made commitments to hold a referendum before adopting the euro, before any change to the voting system, and before adopting a written constitution (Q 19).

9. There are likely to be commitments to referendums in the manifestos of the main parties for the forthcoming General Election. In addition, the devolved administration in Wales are committed to holding a referendum before May 2011 on further devolution of powers to the Welsh Assembly (p 59). In February 2010 the devolved administration in Scotland published a draft bill setting out proposals for a referendum on Scottish independence.

10. In addition, the perception of a decline in the standing of the “traditional” democratic system, in combination with technological developments, have led some to argue that direct democracy should play a greater role in the UK’s experience. As Professor Bogdanor, Professor of Government, Brasenose College, University of Oxford, argued, “people are no longer prepared to accept a democracy where they vote once every four or five years and then leave everything to their political leaders” (Q 87).

**Our report**

11. In view of the commitments by political parties to the use of referendums, the following questions need to be addressed:

- What are the advantages and disadvantages of referendums?
- How do referendums accord with the UK’s system of representative democracy?
- When is it appropriate for referendums to be used?
- Is it appropriate for constitutional issues to be subject to a referendum?
- If referendums are used, what rules should govern their use?
- Is the regulatory framework, as set out in the Political Parties, Elections and Referendums Act 2000, effective and appropriate?

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• Does the Electoral Commission play an appropriate role as part of this regulatory system?

12. We received oral evidence from 19 witnesses over ten sessions, and received 24 written submissions. We also invited the Conservative Party to submit evidence but they referred us to their published statements on the use of referendums. Dr John Parkinson, Senior Lecturer in Politics at the University of York, has acted as Specialist Adviser for the inquiry. We are grateful for his assistance.
CHAPTER 2: REFERENDUMS—ARGUMENTS FOR AND AGAINST

Claimed positive features of referendums

13. Evidence in favour of referendums and citizens’ initiatives (a related device which we discuss in more detail in Chapter 4) included:

_That referendums enhance the democratic process_

14. Witnesses referred to arguments that referendums enhanced democracy by giving voters greater opportunities for involvement. Caroline Morris, Senior Research Fellow, Centre of British Constitutional Law and History, Department of Law, King’s College London, cited academic arguments that “referendums are a ‘first-best’ form of democracy for which representative democracy (the ‘second-best’ form) attempts to substitute” (p 127). Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh, asserted that referendums could be seen as “‘pure democracy’ ... unmediated by representatives; a symbolic reminder that democratic authority finds its legitimacy in the consent of the people” (p 48). Professor Graham Smith, Professor of Politics, Centre for Citizenship, Globalisation and Governance, University of Southampton, argued that referendums offered the potential “to reshape the political division of labour between citizens and legislators” (p 15).

15. Professor Bogdanor thought that it was “illusory” in the modern world “to believe that you can confine legislative matters solely to parliamentarians” (Q 78). The Government acknowledged arguments that referendums could ensure that the public are consulted on significant issues (p 94).

16. Peter Browning argued that “at a time when public trust in this system is probably lower than ever in living memory”, referendums could help restore faith in British democracy (p 112). Nigel Smith made a similar point (p 144). Unlock Democracy argued that referendums could help to counteract the sense of cynicism and powerlessness amongst voters (p 18). The Government stated that it could be argued that referendums could help strengthen confidence in the UK’s democratic system (p 94).

17. Professor Robert Hazell, Director, Constitution Unit, University College London, argued that referendums could be “an important legitimising mechanism”, by demonstrating that a policy has the specific support of the public (Q 5), as did Professor Michael Gallagher, Professor of Comparative Politics, Department of Political Science, Trinity College Dublin (p 120). Dr Eoin O’Malley, School of Law and Government, Dublin City University, stated that referendums could give a decision “democratic weight” (p 129). Peter Browning suggested that the 1975 referendum on whether the UK should remain in the European Community had helped to ensure popular acceptance of the UK’s membership, but that the Government’s failure to hold a referendum on the Lisbon Treaty had undermined its legitimacy in the eyes of some sections of the British people (p 113).

18. The Government stated that it could be argued that referendums could provide the government of the day with a mandate to undertake change, and could provide Parliament with an indication of public opinion on a given issue (p 94). The Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, said that referendums could “legitimise a significant change” (Q 229).
That referendums can be a “weapon of entrenchment”

19. In the opinion of some witnesses, an important feature of referendums was that they make it difficult to reverse a policy that had demonstrable public support. Unlock Democracy asserted that they were one of the few ways under the UK’s constitutional settlement that Acts of Parliament could be entrenched: “This is not to say that the Acts are codified, just that if a measure has been endorsed in a referendum it would not be politically possible to repeal it without a further referendum. This is particularly significant as it ensures that constitutional changes, such as devolution, have some time to establish themselves rather than being subject to an immediate repeal if there was a change of government” (p 18).

20. Likewise, Dr Andrew Blick, Federal Trust for Education and Research, argued that referendums had helped to place new institutions such as the Scottish Parliament and Welsh Assembly, as well as the Northern Ireland peace process, on a stable footing (p 110).

That referendums can “settle” an issue

21. Some witnesses argued that referendums were able to “settle” a debate on a controversial issue, at least for a period. Peter Kellner, President, YouGov, argued that the 1975 referendum on membership of the European Community “put to bed” the issue “for a generation” because “the opponents of British membership accepted that verdict for a period and without the referendum it might have been re-opened” (Q 45).

22. Professor Gallagher referred to the outcome of the Irish referendum on divorce in 1995, when divorce was approved very narrowly and then “ceased overnight to be a political issue; opponents immediately folded their tents following this decision in a way that they would have been very unlikely to do had the decision been made by Parliament alone” (p 124).

That referendums can be a “protective device”

23. Witnesses saw the value of referendums as a “protective device”, a safeguard against controversial decisions being taken unless and until public support could be demonstrated. Professor Hazell opined that this was the case in Northern Ireland, where people have been told since 1973 that Irish unity will not occur save with the consent of the people (Q 5).

24. Professor Bogdanor asserted that the key to the referendum’s constitutional role was that it should constrain the government of the day. He argued, for example, that it would now be very difficult for a government to avoid having a referendum on a devolution matter (Q 74). Peter Browning argued that it would also be almost impossible for the UK to adopt the European single currency without holding a referendum (p 113).

That referendums enhance citizen engagement

25. Other witnesses opined that referendums enhanced public engagement with the democratic and political process. Dr Daniel A. Smith, Associate Professor, Department of Political Science, University of Florida, asserted that by offering the opportunity to participate directly in policy-making, they made the public more likely to participate in political activity, “as they understand that their participation in the electoral process has real policy implications” (p 141).
26. Caroline Morris suggested that referendums could combat “political alienation and malaise” (p 127), and Navraj Singh Ghaleigh, Edinburgh Law School, argued that an appropriately well-structured system of direct democracy could “create incentives for engagement” (p 139). Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South Wales, argued that referendums had helped “to generate popular ownership and legitimacy in Australia’s constitutional structure” (p 150).

That referendums promote voter education

27. Some witnesses recommended referendums for the debates that they could engender to promote political knowledge, as with Unlock Democracy’s mention of “the opportunity for public education and discourse on a contentious issue” (p 22). Dr O’Malley stated that referendums allowed “the people and political class to focus on an issue in quite a concentrated way”, thus enabling citizens “to learn quite deeply about the topic” (p 129). Dr Daniel A. Smith reported that research into experience in the US, Switzerland and Canada showed that direct democratic tools enhanced political knowledge of the issue in question amongst citizens (p 142).

28. Professor Bogdanor argued that the 1975 referendum on the European Community had raised awareness of the issues in question (Q 78). Likewise, Professor Hazell argued that the referendum campaigns in Scotland, Wales and Northern Ireland raised awareness about the proposals for devolved assemblies (Q 5).

That voters are able to make reasoned judgments

29. In response to those who queried whether referendums were a suitable vehicle by which to determine policy on complex issues, some witnesses asserted that voters are well-equipped to make reasoned judgments on issues put before them at referendums. Peter Facey, Director, Unlock Democracy, argued that voters were “perfectly capable” of making a complex decision, so long as there was adequate public education (Q 42). Professor Gallagher suggested that, if pushed too far, “the arguments highlighting the supposed incompetence of voters to decide on specific policy issues ... can become an argument against allowing people to vote at elections” (p 121).

30. Jenny Watson, Chairman of the Electoral Commission, considered that “most things can be explained and distilled down to a reasonably simple premise” (Q 193). Michael Wills MP agreed that “complex technical issues can with effort, hard work, rigour, intelligence be distilled down to certain key principles and choices ... it would be a terribly retrograde step to take the view that some issues are just too complicated to bother the people’s heads with. That would be a return to an aristocratic principle of government that we have, fortunately, long since rejected in this country” (Q 238).

That referendums are popular with voters

31. Some witnesses suggested that referendums were popular with the public. Unlock Democracy asserted that this was so, because they are seen as a fair way of resolving difficult or significant issues (p 18). Professor Bogdanor asserted that studies of the international use of referendums showed that people

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8 See paras 50–1.
welcomed the opportunity to participate so long as they thought that their participation would have some result and was not a “talking shop” (Q 85).

32. Professor Tierney said that while the turnout on ordinary referendums might be low, evidence suggests that referendums on “big constitutional issues”, such as the Belfast Agreement, the Danish referendum on the euro, and referendums on independence in Montenegro and Quebec, produced a high turnout (Q 90).

That referendums complement representative democracy

33. A number of witnesses stated that referendums could complement representative democracy. Professor Bogdanor argued that “the dichotomy between ‘representative’ and ‘direct’ democracy is ... highly misleading. For the referendum, even in Switzerland, is used not to replace, but to supplement representative democracy. There is little danger that it will come to subvert parliamentary government” (p 45). Professor Michael Saward, Professor of Politics, Open University, opined that enhancing the role of the referendum could enhance representative and parliamentary democracy (p 15). Professor Gallagher stated that “we cannot point to any case where the referendum has led to the collapse of a democratic system ... If used sparingly ... and in a regulated fashion, the referendum can enhance rather than subvert representative democracy” (p 120).

34. A number of witnesses pointed to international experience, for instance in Australia, New Zealand, and the Republic of Ireland, where, it was argued, referendums and representative democracy successfully coexist (QQ 10, 54, pp 19, 133).9

35. Michael Wills MP told us that it was a “fundamental proposition that referendums ... should not be any kind of replacement for representative democracy; they are an augmentation of it in circumstances where there are fundamental changes” (Q 217).

Claimed negative features of referendums

36. Witnesses recited a number of drawbacks to the use of referendums:

That referendums are a tactical device

37. A principal objection to referendums was that they may be used as a tactical device by the government of the day. Professor David Butler, Emeritus Fellow, Nuffield College, University of Oxford, told us that referendums in the UK “are only going to happen when the Government of the day wants it or when it would be too embarrassing (because of past promises) to get out of it. Normally they will have a referendum because they think they are going to win it and they will not have it if they are not going to win it. They will just dodge the issue. It is a matter ... of straight politics” (Q 5).

38. Steve Richards, Chief Political Commentator, *The Independent*, said that “a leader does not dare hold a referendum unless they are convinced they are going to win it, so they are tools for leaders to avoid decisions ... It looks as if they are being rather noble in giving powers away from themselves to take decisions and giving them to the voters to do it. The motives for holding them are far more complicated than that” (QQ 123, 131).

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9 See also Appendix 3.
39. Peter Kellner argued that the decision to hold the 1975 European Communities referendum “was a constitutional outrage ... it was wholly to do with holding the Labour Party together” (Q 46). Other witnesses made similar points (QQ 84, 125). Professor Bogdanor asserted that the offer of the 1979 devolution referendums was made for tactical purposes in order to overcome backbench opposition in Parliament (Q 79).

40. Steve Richards argued that the 1997 Labour manifesto “was almost like a halfway bridge to power and then a lot of the awkward decisions and debates took the form of promises of referendums—the euro, Scottish Parliament, London mayor, electoral reform” (Q 122). He also told us that the decision to hold a referendum on Scottish devolution was only made because Tony Blair, observing that a referendum had been proposed on the euro, “did not think he could go through an election campaign with that contradiction ... it was not that he thought out of principle ‘We must do this’; he was worried about the contradictions in a Labour election campaign” (Q 129).

41. Michael Wills MP opined that the referendum had been used in the UK as a “political tool”, but did not see anything wrong with that, because “politics can be a noble profession; it does, at its best, represent the battle of competing values and ideals and ideologies” (Q 236).

That referendums are dominated by elite groups

42. Some witnesses argued that referendums tend to be dominated by elite groups, including politicians, the media, and wealthy individuals, rather than “ordinary” citizens. Dr Uwe Serdült, Centre for Research on Direct Democracy (c2d), asserted that “the arsenal of direct democracy is an institutional weapon for organized interests (political parties, interest groups, employer’s and employee’s associations) and not for the people as such” (p 137). Peter Browning warned that referendums were rarely if ever free from influence by politicians and minority groups (p 112). Dr Blick opined that referendums could give extra influence to the media and commercial interests (p 110). Steve Richards stated that “the British media is not necessarily the most reliable institution to mediate on the complexities of these issues ... I do not think a referendum on anything to do with Europe, for example, will be fairly reported” (QQ 122, 147). Michael Wills MP said that “the whole system can be hijacked by populist and often very wealthy, very powerful people who can afford to run these campaigns” (Q 226).

43. Several witnesses cited examples. Dr Stuart Wilks-Heeg, Executive Director, Democratic Audit, highlighted the Californian experience of citizens’ initiatives (see Chapter 4), as an example of how referendums can “effectively be hijacked by organised interests, particularly those which have access to substantial financial resources (i.e. private corporations, political parties and large campaign organisations)” (p 36). Professor Butler referred to the first Irish referendum on the Lisbon Treaty, where “a leading, flamboyant, rich man charged in and moved opinion really quite substantially in the opinion poll evidence and got a ‘no’ vote” (Q 16).

That referendums can have a damaging effect on minority groups

44. Professor Gallagher stated that referendums are accused of allowing majorities to override the rights of minorities (p 120). Caroline Morris also warned of “the danger that minority rights may be overridden by populist sentiment” (p 127).
That referendums are a “conservative device”

45. Some witnesses viewed referendums less as a “protective device” than as a “conservative device”: a block on progress. Dr Blick asserted that in the UK, referendums were most often conceived of as “a means of placing a brake on certain developments”, such as European integration (p 110). Steve Richards told us that, with referendums, “the status quo can often seem more reassuring and less threatening than ... change” (Q 151).

46. Peter Kellner pointed out that, in Switzerland, women were not given the vote until 1971, because male voters had rejected votes for women in a referendum in 1959 (Q 43). Professor Williams stated that the Australian system, where a majority of states, as well as a majority of voters, are required to vote in favour of a change in order for a constitutional amendment to be carried, has made change to the constitution extremely difficult, if not impossible (p 150).10

That referendums do not “settle” an issue

47. Some witnesses argued that referendums did not “settle” the issue in question. Dr Wilks-Heeg pointed out that the 1970s referendums in Scotland, Wales and Northern Ireland had not brought to an end Irish, Scottish or Welsh nationalism, but rather, the issues were revisited in referendums in the 1990s, with further referendums planned in Scotland and Wales (p 37).

48. Peter Facey told us that “different generations will take different decisions, in the same way that we do not just have one election and then expect us all to live with it for the next 50 or 60 years” (Q 45). Steve Richards noted that the 1975 European Community referendum was only binding on the Labour Party’s position for four years before they wished to change it (Q 125).

49. Dr Wilks-Heeg also pointed out that, in the case of other EU states that have held referendums on EU treaties, governments had been able to force repeat referendums to get the result they wanted (p 37). The two Irish referendums on the Lisbon Treaty are a case in point.

That referendums fail to deal with complex issues

50. Several witnesses argued that referendums were not an appropriate means by which to take decisions on complex issues. Dr Blick suggested that referendums could oversimplify a complex issue into a simple “yes” or “no” option (p 110). Professor Tierney stated that whereas “elected representatives bring expertise and time to problems that ordinary citizens don’t have; they may be more detached and hence objective; and they see the bigger picture of how different issues inter-relate ... a referendum addresses single issues one by one without proper regard to this larger canvass” (p 48). Steve Richards was concerned that in issues of complexity the arguments and technical detail could get lost. He stated that Parliament was in a better position to make such decisions (QQ 122, 138).

51. Dr O’Malley suggested that it is unrealistic to expect ordinary citizens to be interested in or qualified to have informed opinions on important constitutional issues (p 130). Caroline Morris argued that the New Zealand
experience of citizens’ initiated referendums demonstrated how referendums were not well suited to determining complex questions of law or policy (p 127).

That referendums tend not to be about the issue in question

52. Some witnesses argued that referendum campaigns could become dominated by peripheral issues. Dr O’Malley suggested that when issues are too complex for voters to understand, other issues are projected on to the actual questions. He cited the Lisbon Treaty referendums in Ireland, where abortion and conscription became major issues (p 129). Peter Browning asserted that a referendum is often used to express a view on the governing party rather than the issue in question (p 115). Lord Fraser of Carmyllie said that referendums could be “a barometer on the attractiveness of the political party at any given time”. He cited the 1997 referendum on Scottish devolution (when he was Director of the “no” campaign), which, he argued, voters saw as “a second opportunity, in less than six months, to indicate why they thought the Tory Party was unpopular” (Q 101). Daran Hill pointed out that the “yes” campaign for the 1997 Welsh devolution referendum (for which he acted as National Co-ordinator), “had an aeroplane flying across South Wales trailing a banner which said, ‘Vote Yes, Vote Blair’, which really had nothing to do with the question being posed at all! It chimed in with the political mood” (Q 101).

That voters show little desire to participate in referendums

53. Other witnesses argued that there was little public appetite for referendums to be used. Peter Browning stated that while people may be prepared to vote every four or five years, even then turnout is falling. On past evidence of referendum turnout in the UK, he thought that it was doubtful whether voters would turn out to vote in similar numbers as for elections. He stated that low turnout would weaken the legitimacy of the result (p 112). Professor Butler cited the rapid decline in turnout in Switzerland, often viewed as the European exemplar of direct democracy (Q 6).12

54. Professor Michael Marsh, Professor of Comparative Political Behaviour, Trinity College Dublin, told us that one of the difficulties with referendums is that voters “do not necessarily want to know, they have much more important things on their mind ... It does not fit too well with some of our notions about democratic theory but I think it is like youth is wasted on the young, democracy is sometimes wasted on the people” (Q 174).

That referendums are costly

55. Evidence was received about the cost of referendums. Professor Hazell pointed out that a national referendum costs about the same as holding a General Election, about £120 million (Q 7).

56. Nigel Smith pointed out that referendums cost money and take time (p 143), and Caroline Morris also referred to “logistical difficulties” (p 127). Unlock Democracy stated that referendums are “costly in terms of money, time and political attention and the use of such resources needs to be carefully considered” (p 25). Dr Helena Catt, former New Zealand Electoral

11 See Chapter 4 and Appendix 3.
12 See Appendix 3 for more details of the Swiss model.
Commissioner and former Associate Professor, Auckland University, told us that referendums are “very expensive to do properly and if you are not going to spend the money on it, it is not worth doing it” (Q 157).

That referendums undermine representative democracy

57. A number of witnesses thought that referendums undermined, or had the potential to undermine, representative democracy. Peter Kellner said that “one has to be very careful about the relationship of referendums to parliamentary sovereignty and to the principles of deliberative democracy that underpin parliamentary sovereignty ... I would not couch the argument against referendums in terms of some cataclysm for parliamentary democracy but I do believe it weakens parliamentary democracy” (QQ 41, 54). Steve Richards said that evidence suggested that referendums undermine the parliamentary process (Q 123).

58. Peter Browning stated that the sovereignty of Parliament “is certainly threatened by the use of referendums. Referendums put the people before parliament. The sovereignty of parliament becomes the sovereignty of the people ... Introducing direct democracy into the political system ... challenges the indirect, representative democracy that has been the essence of UK democracy. If the people vote one way, their representatives another, who should prevail, who is sovereign?” (pp 112–3).

Conclusion

59. Michael Wills MP told us that he was “really alarmed sometimes when I hear some politicians speak as if measures of direct democracy are panaceas for all the political challenges that we face. They are not” (Q 266). Professor Marsh told us that “there are all sorts of apparent strengths ... The unfortunate thing is that on the whole it does not do any of those things and quite often it leaves you worse off than you were before” (Q 157).

60. Dr Wilks-Heeg argued that the appeal of referendums was understandable, but that “they must not be seen as a magic bullet. More wide-ranging work would first be necessary to reform the defects in our constitutional arrangements” (p 39).

61. Nine national or regional referendums have been held in the UK since 1973, although only one has been held on a UK-wide basis. Referendums may become a part of the UK’s constitutional system. Some witnesses stated that once referendums are in the democratic bloodstream, they are unlikely ever to be removed (Q 62, pp 136, 144).

62. The balance of the evidence that we have heard leads us to the conclusion that there are significant drawbacks to the use of referendums. In particular, we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day. Referendums may become a part of the UK’s political and constitutional practice. Where possible, cross-party agreement should be sought as to the circumstances in which it is appropriate for referendums to be used.

63. It is therefore necessary to consider when it is appropriate for referendums to be held and what laws and regulatory framework should then apply.
CHAPTER 3: REFERENDUMS ON CONSTITUTIONAL ISSUES

Part One: Should referendums be held on constitutional issues?

64. Some witnesses stated that referendums should not be frequent. Lord Fraser did not think they should be “part and parcel of the everyday business of government” (Q 100). Caroline Morris stated that “frequent resort to referendums ... should be avoided” (p 129). Peter Facey said that referendums should not be “an everyday occurrence”, but should only be used “soberly and cautiously” (Q 40). The Government stated that “referendums should only be used exceptionally within the UK’s system of Parliamentary democracy” (p 95).

65. Many were of the view that if referendums were used, they should be used in relation to constitutional issues, in particular those of a fundamental nature. Caroline Morris stated that “referendums should be held only on fundamental constitutional issues” because “any alteration to the democratic fundamentals of a state should have the endorsement of its people” (pp 127–9). Peter Browning asserted that “major constitutional issues ... would seem to be the most obvious subjects for referendums. If the structure and rules of politics are to be changed, then the people rather than the political players should decide on those changes” (p 113). Professor Tierney argued that referendums should only be held in relation to “fundamental constitutional change” and “the highest issues of constitutional principle”, where “the issues are so fundamental that people should be able to reclaim their direct constitutional authority” (Q 74, p 49). Dr O’Malley suggested that “major constitutional changes ... should require the assent of the people ... this would give democratic weight and some permanence to such a decision” (p 130).

66. On the other hand, Peter Kellner said that “constitutional’ does not mean the same as ‘important’. I think, in terms of the wider public making that distinction, it is fairly difficult. It is not easy to explain to ordinary voters why they should have a vote on whether they have a mayor but not on whether to bail out the banks or on the deficit reduction plan” (Q 42).

67. The Government argued that national referendums should be used “only where fundamental change in the constitution of the country is under consideration” (p 92). Michael Wills MP sought to clarify this, stating that “it is not just a question of the fundamental change”, but also of “a fundamental change which has not been subject to a manifesto commitment”. He also stated that “there are a lot of fundamental changes which, nevertheless, do not significantly rewire the constitution” (Q 218).

68. How should a “constitutional issue” be defined? Professor Stuart Weir, Associate Director, Democratic Audit, told us that “it is an odd question in a way. It is a bit like saying to somebody, ‘Will you describe a camel for me?’ when we all know what a camel actually looks like but would find it perhaps difficult to give a very accurate description of the beast” (Q 65). Professor Gallagher admitted that this was not straightforward, in particular in the UK “given the absence of a single document entitled ‘The Constitution’” (p 121).

69. Dr Blick asserted that without a codified constitution, “it is impossible to establish with a sufficient degree of exactitude what are ‘constitutional
issues’; and a blanket requirement for referendums in this area cannot therefore be introduced” (p 112). Although Professor Saward acknowledged that defining “constitutional issues” was difficult, he thought that it was “realistic to aspire to a workable definition” (p 14).

70. Professor Gallagher argued that the absence of a written constitution made it more likely that an assessment of whether or not an issue was “constitutional” would become a “political” judgment (p 121). Professor Butler told us that he “would quote Austen Chamberlain: ‘Unconstitutional’ and ‘constitutional’ are terms used in politics when the other fellow does something you don’t like!” (Q 3). Professor Bogdanor told us that “an elastic constitution, so it seems, implies an elastic use of the referendum. But this gives rise to a problem. For the referendum, in countries with a codified constitution, is intended to constrain the government of the day. In Britain, by contrast, if use of the referendum lies at the discretion of government, it can be used to augment the power of government rather than limiting it, by allowing a government to bring the people into play against Parliament ... The referendum could then become a tactical device, ‘the Pontius Pilate’ of British politics” (p 45).

71. What is a “fundamental constitutional issue”? What differentiates a “fundamental constitutional issue” from a constitutional issue that is not fundamental?

72. Michael Wills MP told us that the Government had tried unsuccessfully to identify “clear dividing lines so that everyone knows this is when you hold a referendum and this is when you do not ... Every time we tried to come up with a definition that would be sustainable and be consistent with representative democracy we failed ... Inevitably, however carefully you define this, however brilliantly ‘lawyered’ the definition is, there will be equally brilliant lawyers who will find very good reasons why that definition should not apply. You do not actually escape the question of judgment, however you do it ... In the end, I am afraid, we came up with what is inevitably going to be a subjective test” (QQ 211–2).

73. Notwithstanding these difficulties, several witnesses attempted to define more precisely what is meant by a “fundamental constitutional issue”. The following are some examples:

- “Fundamental questions concerning sovereignty or a major constitutional settlement, especially if they concern steps that would be completely or virtually irreversible once enacted” (Professor Gallagher, p 121).
- “Truly major issues of democratic principle—change that alters fundamentally the nature of the state” (Institute of Welsh Affairs, p 126).
- “Topics ... which directly affect the constitutional make-up and powers of a state” (Caroline Morris, p 128).
- “Changes to the sovereign powers of a state” (Caroline Morris, p 128).
- “Those which concern the fundamental structure of politics and government” (Peter Browning, p 113).
- “Those which implicate the sovereign relations between the people and government” (Navraj Singh Ghaleigh, p 139).
• “Anything that changed the power balances within our democratic system ... anything that in any way redistributed power in a significant sense” (Baroness Kennedy of the Shaws, Q 64).

• “Legislative proposals which provide for a radical alteration in the machinery by which the laws are made” (Professor Bogdanor, p 46).

• Issues concerning “the very identity of a sovereign people ... when issues of the highest constitutional principle are at stake regarding the nature of the state or the constitution” (Professor Tierney, p 49, Q 74).

• “Significant, encompassing and lasting change in the formal and general rules and rights which locate political authority” (Professor Saward, p 15).

• “Anything that changes the dynamic and the relationship between the people and those who are elected” (Professor Graham Smith, Q 22).

• “A significant change to the contract between the individual and the state” (Peter Facey, Q 41).

• Issues that are “so fundamental ... to our constitutional arrangements ... that they merit consideration on their own” (Michael Wills MP, Q 210).

74. Some witnesses sought to describe the kinds of issues that would fall under such a definition:

• Membership of the European Union (QQ 45, 60, pp 95, 126, 128, 130).

• Entry to the euro (Q 138, p 95).

• Major changes to the devolution settlement or independent statehood of a sub-state nation or territory of the UK (QQ 41, 59, 157, 167, pp 15, 45, 49, 126, 128).

• Change to the electoral system or to the number of MPs (QQ 65, 77, 157, 167, pp 15, 36, 49, 95, 128).

• Changes to Parliament (including the abolition of the House of Lords) (Q 60, pp 49, 128).

• A fully codified constitution (Q 213, pp 36, 49).

• Fundamental changes to the constitutional status of the Sovereign (p 49).

A matter of debate?

75. There was no unanimity amongst witnesses about whether certain questions should require a referendum:

Referendums relating to the European Union

76. Navraj Singh Ghaleigh opined that European integration would be difficult to undertake “without powerful demands for a referendum” (p 140). Professor Tierney argued that a change in “the sovereign powers of the UK Parliament in relation to the EU or other supra-state institutions” should be subject to a referendum, and that it might be argued that, given the precedent of 1975, referendums on recent “expansionist” treaties should have been held (p 49).
Professor Bogdanor stated that “there does seem a strong case in logic ... that there should be a referendum before major legislative powers are transferred upwards to the EU as well as downwards to devolved bodies”. He suggested that such a doctrine would have necessitated referendums on the Single European Act and Maastricht, but not on the Amsterdam, Nice or Lisbon treaties, since they did not involve major transfers of powers (p 46). Michael Wills MP restated the Government’s argument that a referendum on the Lisbon Treaty was not required because it was an amending treaty, although he conceded that this had been a controversial decision (QQ 237–8).

The Institute of Welsh Affairs argued that “changing the internal arrangements of the European Union” was “of a lesser order of magnitude” (p 126). Peter Facey told us that there was an argument as to whether some European treaties were constitutionally significant enough to warrant a referendum (Q 42). Professor Butler said that the Conservative proposal for referendums on further EU treaties was “absolutely crazy” because many changes may be trivial and entirely in the UK’s interests (Q 4).

Dr Blick stated that “advocacy of EU referendums often rests on the idea that they are required to legitimate further sovereignty sharing by the UK. But the EU is by no means the only body within which the UK shares its sovereignty. Yet there are no demands for referendums in relation to UK membership of bodies such as NATO or the Council of Europe, despite the significant consequences of UK participation within them. Second, it might be asked, if the extension of sovereignty sharing requires a referendum, then should not its reduction as well? In other words, it could be argued that a policy such as the UK withdrawal from the EU Social Charter should be subject to a referendum, a stipulation not currently being called for in political debate” (pp 111–2).

Further devolution

The Government of Wales Act 2006 requires that a referendum be held on the further devolution of powers to the Welsh Assembly. The Labour-Plaid Cymru coalition Welsh Assembly Government propose to hold a referendum before May 2011.

The Institute of Welsh Affairs did not believe that the changes proposed were of sufficient significance to merit a referendum, since the Assembly “already has some powers of primary legislation”, and the proposed change would only alter the way in which those powers were acquired and operated (pp 124–6). Daran Hill told us that he was “rather nervous about the way that the question the Welsh people will next face will be phrased. Essentially, what you would be asking people is, ‘Do you want to move from Part 3 to Part 4 of the Government of Wales Act 2006?’ How else might you phrase that? ‘Do you want to move from an Assembly to a Parliament?’ Is that really what is happening? ‘Do you want the Welsh Assembly to have the same powers as the Scottish Parliament?’ That is not on the table either. How you make that particular thing intelligible is something that is certainly exercising my mind” (Q 108).

On the other hand, True Wales argued that “it is absolutely essential that a referendum should be held to determine how far the people of Wales wish to go in the direction of secession from the United Kingdom”, because “the real people of Wales are locked out of the political process at every level of government, and this democratic deficit needs to be addressed” (p 149).
83. The Institute of Welsh Affairs highlighted the lack of consistency on the part of the UK Government, in that a referendum is required in Wales, but is not proposed in Scotland in relation to the recommendations of the Calman Commission for significant alterations to the powers and functions of the Scottish Parliament, including new powers to raise taxes (pp 125–6).13

The Human Rights Act 1998

84. Professor Bogdanor recognised an argument for using the referendum as a “weapon of retrenchment” of the Human Rights Act 1998 (p 46). Peter Facey told us that there should be a referendum on any proposal to repeal the Act, or to introduce a Bill of Rights “which would fundamentally entrench certain freedoms of individuals” (Q 60). Caroline Morris also thought that it was possible for the protection of rights such as those contained in the Human Rights Act to be subject to a referendum (p 129).

85. Professor Tierney told us that he would “leave the Human Rights Act to one side. This was introduced by Parliament without any call for a referendum and could be modified or repealed by Parliament without necessarily affecting the UK’s international obligations” (p 49). Professor Weir argued that there should be a reliance on the judicial system and the European Convention on Human Rights to adjudicate upon any changes that would affect human rights (Q 65).

The UK’s experience: Constitutional precedents or political inconsistency?

86. To what extent has past experience of referendums in the UK created a precedent for the future?

87. The Government have stated that “the precedents set by previous referendums provide a guide to the types of issue that ought to be considered for any referendum in the future” (p 92). Professor Hazell did not think “we can yet form an overarching or complete doctrine ... At best, I think we can venture a partial doctrine that referendums are required for devolution, for a constitutional change whereby the Westminster Parliament delegates legislative power to a subordinate legislative body ... [and] there is now a kind of reciprocal doctrine in relation to those devolved institutions” (Q 2). On the other hand, he told us, “there clearly has been no established doctrine so far” that a referendum is required “when Westminster delegates legislative power to a superior, supra-national body, like the European Parliament” (Q 4).

88. Professor Bogdanor agreed that “conventions have grown up” that a referendum is required before “any significant devolution of powers away from Westminster” or “when a wholly novel constitutional arrangement is proposed”, but not in relation to the European Union (pp 45–6, QQ 74, 78).

89. In spite of such apparent precedents, witnesses detected a lack of consistency in the UK’s experience of referendums. Professor Hazell noted that though referendums “have been held so far on constitutional matters ... we cannot yet say that a referendum is required for any major constitutional change”, since referendums had not been held on the Human Rights Act 1998 or the 1999 reform of the House of Lords (Q 2). Dr Blick also cited the Human

Rights Act 1998, as well as the Freedom of Information Act 2000 and the establishment of the Supreme Court, as examples of major constitutional issues that had not been subject to a referendum (p 111). Professor Tierney noted an “irregular” pattern whereby referendums were required for Elected Regional Assemblies, but not for the Lisbon Treaty (p 49).

90. We asked Michael Wills MP about this apparent inconsistency, in particular in relation to the Government’s proposals to hold a referendum on the electoral system for the House of Commons but not on any changes to the composition of the House of Lords. When asked if there was a case for a referendum on House of Lords reform, he told us that “changes to the way it is composed do not necessarily require a referendum ... If we were to look fundamentally at changing the powers of the House of Lords ... then I think that we would almost certainly require a referendum on that” (Q 213). Although he conceded that a significant change in the House’s composition would mark “a fundamental constitutional change it is a change that will have been pre-figured in a manifesto commitment, in fact in several manifesto commitments. It will be, we think, probably an all party commitment in all main parties’ manifestos. The people of this country will have had decades to consider this change over time, it is not a change that has suddenly emerged.” For this reason, he asserted, a referendum was not required (Q 220).

91. On the other hand, the Government have judged that a change to the way that the House of Commons is composed should be subject to a referendum, because:

“There is something, we felt, slightly distasteful ... about MPs deciding for themselves without any validation from the public as a whole how they should be constituted. It is the self-legislating aspect of this particularly because it relates to the House of Commons who are the primary chamber, that is the reason for that. People may say that exactly the same criteria should apply in these cases but in this case it is a longstanding manifesto commitment for whatever reason, good or bad, that we should have a referendum on any change to the voting system, and the principled reason behind it is that MPs should not decide themselves alone how they should be constituted ... The House of Lords is in a different position” (Q 222).

Conclusion

92. This Committee’s first report set out what were seen then as “the five basic tenets of the United Kingdom Constitution”:

- Sovereignty of the Crown in Parliament;
- The Rule of Law, encompassing the rights of the individual;
- The Union State;
- Representative Government;
- Membership of the Commonwealth, the European Union, and other international organisations.14

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93. Although these tenets describe a “constitutional issue”, they do not define what constitutes a “fundamental constitutional issue”. Some issues can be judged as “fundamental”, and others not so. There is also a grey area, where it is a matter of judgment as to the constitutional significance of a given issue. The UK’s experience of referendums does not offer any consistency in terms of judging what constitutes a “fundamental constitutional issue”.

94. Notwithstanding our view that there are significant drawbacks to the use of referendums, we acknowledge arguments that, if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues. We do not believe that it is possible to provide a precise definition of what constitutes a “fundamental constitutional issue”. Nonetheless, we would consider to fall within this definition any proposals:

- To abolish the Monarchy;
- To leave the European Union;
- For any of the nations of the UK to secede from the Union;
- To abolish either House of Parliament;
- To change the electoral system for the House of Commons;
- To adopt a written constitution; and
- To change the UK’s system of currency.

This is not a definitive list of fundamental constitutional issues, nor is it intended to be.

Part Two: Mechanisms for triggering a constitutional referendum

95. In the light of the difficulties of defining a “fundamental constitutional issue”, the Government have argued that “the decision as to whether or not a referendum should be held should be made on a case-by-case basis. We do not believe that an objective test could be established as to the circumstances in which a referendum should and should not be held” (p 94).

96. However the decision as to the use and timing of referendums remains almost entirely in the hands of the government of the day. In particular, the inconsistency of its use in the UK lends weight to the arguments set out in Chapter 2 that the referendum remains, at heart, a tactical device rather than a matter of high constitutional principle. As Dr O’Malley surmised, “the question arises, who, in the UK could decide what is a major constitutional issue? If it were the government, this would make a mockery of the constitution” (p 130).

97. Professor Saward told us that the “master constitutional issue” was whether “to take this legally out of the hands of political parties or government managers and put it on a more consistent and more independent basis” (Q 22).

98. Witnesses proposed various “triggers” by which a decision could be made whether or not a referendum should be held.

A written constitution?

99. As we have seen, some witnesses argued that it was particularly difficult to define a “constitutional issue” in the UK in the absence of a written constitution.15

15 See paras 68–70 above.
100. Some advocated the adoption of a written constitution. Dr Blick asserted that “to dabble with the idea of requiring referendums for ‘constitutional issues’ without first clearly codifying the UK constitution is to approach the issue from the wrong end. A codified constitution must be established first. Within such an arrangement referendums could be provided with a clearly delineated role, integrating them within an overarching system of representative democracy” (p 112).

101. Others were less convinced. Professor Butler argued that “if we had got to a written constitution, we might get ourselves entangled, as the Irish got entangled” on the Lisbon Treaty (Q 5). Although Peter Kellner concluded that “if you are going to go down the route of saying we should have referendums on constitutional issues, you need a constitution”, he nonetheless thought that “the fluid constitution we have is actually better than a written constitution” (Q 44).

102. A written constitution could provide a more precise definition of a “constitutional issue”, and define which issues required a referendum before any change. The arguments for and against introducing a written constitution are outwith the scope of this inquiry.

A statutory safeguard?

103. Some witnesses argued in favour of a statutory safeguard, either through a stand-alone Referendums Act which would define the issues for which a referendum would be required, through the entrenchment of existing legislation to prevent its repeal without recourse to a referendum, or through future legislation that would define when referendums were required.

104. The Government’s evidence pointed out that there were already limited statutory provisions setting out when referendums must be held, such as before Northern Ireland could cease to be a part of the United Kingdom and form part of a united Ireland, before an Elected Regional Assembly could be established, or before full legislative competence could be transferred to the National Assembly for Wales. The Government stressed that “these do not provide an objective test for determining when a referendum on other issues should be held, but provide a further guide to the types of issue that might be subject to a referendum in the future” (p 95).

105. Unlock Democracy argued that Parliament could either “pass a Referendums Act which lists all the Acts of Parliament or clauses of acts that cannot be repealed without a referendum”, or it could “amend the key acts themselves so that they cannot be repealed or amended without a referendum. The first option would be clearer and easier for the public to understand” and “would in effect move you towards a written constitution” (p 20, Q 55).

106. Professor Bogdanor suggested that “one possible way of entrenching legislation” would be to ensure that any future amendment or repeal of a particular statute, such as those providing for the devolved bodies in Scotland, Wales and Northern Ireland, should require a referendum (p 46).

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107. Professor Gallagher also suggested that a legal framework could be devised that would give strong guidelines as to the issues on which a referendum would be ruled out, possible, or mandatory. He stated that though a government with a parliamentary majority could interpret this legislation to their own advantage, “the risk of losing support through being seen to violate the ‘spirit’ of the rules might constrain governments to some extent” (p 121). The Institute of Welsh Affairs advocated the amendment of the Political Parties, Elections and Referendums Act 2000 (PPERA) to include a clause that “any referendum on a constitutional change should apply only to truly major issues of democratic principle—change that alters fundamentally the nature of the state” (p 126).

108. Some witnesses emphasised the difficulties with such a statutory approach. Professor Tierney thought that interpretation could be difficult in the absence of a written constitution, for instance in judging which EU constitutional reforms would need referendums and which would not (p 50). Peter Kellner told us that clauses that sought to require a referendum on a particular policy issue would be “an open invitation to any government with a majority to try and entrench a partisan policy by saying any subsequent government cannot simply put it in their manifesto that they going to change it; they would have to go back to the people” (Q 56).

109. There was evidence on whether it was possible for one Parliament to bind another. Professor Bogdanor stated that “upon one interpretation of parliamentary sovereignty, this could not be done, since Parliament could simply ignore the referendum requirement and abolish the devolved bodies without any recourse to the people. The decision of one Parliament cannot, it might be argued, bind a later Parliament. Nothing can prevent later legislation from repealing earlier legislation. But it could be argued that the referendum requirement could be made a condition of a bill ... The referendum requirement would then redefine what was to count as valid legislation on a particular topic ... There seems no reason in principle why such a requirement should not be possible” (p 46). Dr Blick noted that “though in theory a future Parliament could repeal such a statute, there might be a strong political imperative not to do so” (p 111).

110. Michael Wills MP told us that if the referendum were “firmly to become embedded in our constitutional arrangements then the case for some sort of legislative framework would be very strong, but it is not [firmly embedded] and nor should it be, in my view” (Q 214).

111. It is possible to set out in legislation specific issues which should be subject to a referendum, as has been done in the past. Although one Parliament cannot bind another, Parliament might not lightly repeal such legislation. But, since it is impossible precisely to define what constitutes a “fundamental constitutional issue”, it follows that it is impossible to set out in legislation an all-encompassing list of such issues that should be subject to a referendum.

A parliamentary mechanism?

112. The Government asserted that “it is for Parliament to determine whether or not a referendum on any particular subject should be held” (p 94).

113. Various parliamentary trigger mechanisms were suggested. Some advocated the use of parliamentary “supermajorities”. Professor Gallagher suggested
that “the Danish rule that delegation of sovereignty to international authorities requires a referendum unless there is a five-sixths majority in Parliament, or some variant of this rule, would ... be worth considering” (p 121). Peter Facey agreed (Q 42).

114. Peter Browning argued that a free vote in the House of Commons “is probably the best way of deciding the topics on which referendums should be held” (p 114).

115. Nigel Smith suggested that “the Speaker in the Commons could certify that a bill or treaty does not contain constitutional issues as defined in a prior set of tests”. He also argued that the House of Lords “should be given the power to call an optional referendum on a contentious bill” (p 144).

116. Professor Saward suggested that this Committee could have a role in defining a set of issues that “are widely accepted as constitutional issues ... under an appropriate guiding principle. A pragmatically illustrated definition from the Committee, along these lines, may begin to generate consensus ... In this way, the Committee may help to prompt clear, focused debate” (p 15).

117. The Committee’s first report concluded that “we do not wish, nor indeed would we have the time, to become some sort of constitutional sieve, sifting through the fine detail of every constitutional issue whatever its importance. It is for this reason that we will be focusing on significant constitutional issues ... In order to be significant, a constitutional issue needs to be one that is a principal part of the constitutional framework and one that raises an important question of principle.”\(^{19}\) We reaffirm this statement.

118. Parliament should judge what issues will be the subject of referendums. In its first report, this Committee stated that it would “focus on issues of constitutional significance” determined by whether an issue raises “an important question of principle about a principal part of the constitution”.\(^{20}\) We believe that this provides a useful test, first, of whether an issue is of fundamental constitutional significance, and second, of whether a referendum is therefore appropriate.

\(^{19}\) Reviewing the Constitution, op. cit., para 22.

\(^{20}\) ibid., para 27.
119. Witnesses also discussed the use of referendums in other contexts. Two principal cases were identified:

Part One: Citizens’ initiatives

120. A distinctive type of referendum is the citizens’ initiative. Initiative processes allow citizens either to propose statute laws, constitutional amendments or broad policy principles, or to challenge statutes and amendments passed by representatives. They are thus promoted as solutions to several problems, such as voter disengagement, abuse of power and unresponsive government. They are also seen by some as presenting a solution to the problem of defining what counts as an important constitutional issue—rather than attempting to define this a priori, citizens’ initiatives allow the public to decide what issues they want to have a say on.

121. Three of the four referendum processes available in Switzerland are citizens’ initiatives, dating from the second half of the 19th century.21 Half of the States of the USA allow citizens’ initiatives of one kind or another.

122. The process typically starts by gathering signatures on a petition which, if it reaches a pre-set target in a given time-frame, triggers a vote. The signature target might be an absolute number, like the 100,000 required for Swiss initiatives, or be based on a percentage of registered electors. The percentage varies from five per cent in Californian statute initiatives to ten per cent in New Zealand. How demanding these targets are depends on the time limit for gathering them: New Zealand allows 12 months with three-month extensions; California has a 150 day limit, making the Californian daily target three-and-a-half times higher than New Zealand’s. There are many other variables, including when the vote must be held; who sets the question wording; whether there are campaigning controls; whether the vote is binding or not; whether the decision is made by virtue of a simple majority or something more complex; and whether or not it is subject to judicial review.

123. A number of witnesses advocated the citizens’ initiative model. Professor Bogdanor thought that it was “an important way forward and an important instrument of a modern democracy”, allowing voters to “repair sins of omission” by government (Q 87, p 48). Professor Graham Smith asserted that “there is widespread criticism of the current political culture in this country that there are not the opportunities for citizens to participate in politics. The citizens’ initiative is surely one of the options available for realising that possibility of meaningful participation” (Q 33).

124. Navraj Singh Ghaleigh argued that citizens’ initiatives provide “a mechanism by which power can be shared with the citizenry, kicking against a too tightly controlled agenda setting capacity” (p 140). Nigel Smith cited the way in which initiatives encouraged several US states to introduce laws promoting the use of clean energy, in spite of the opposition of the Federal Government (p 148). Unlock Democracy supported the introduction of citizens’ initiatives so long as there were high thresholds so that the proposals could not be abused, and a clear list of policy areas that should be exempt (p 25). Professor Saward asserted that “there is nothing about the institution of the

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21 See Appendix 3.
citizens’ initiative which necessarily says it cannot be used in conjunction with or to prompt or to help set the agenda of parliamentary procedures” (Q 29).

125. However, Professor Gallagher argued that the implications for Parliament are much greater, and the potential for conflict with the system of representative democracy much higher with initiatives than with other referendums. He stated that critics would see the initiative as “empowering well organised lobbies who are able ... to obtain the requisite number of signatures” (pp 120–1, 123). Professor Williams argued that evidence suggested that initiatives were open to manipulation, in particular by the media and “money interests”, and that they did not provide an effective means for the public to bring about legal and policy change (p 151). Professor Tierney pointed out that because of the strong representative tradition in the UK, the initiative process would not seem to be appropriate (p 51).

126. Peter Kellner argued that, in California’s experience, “a citizens’ initiative is a device for the sad, the mad, the bad and the very, very rich” (Q 50). Michael Wills MP asserted that “a whole plethora of populist measures were brought in bringing a large number of direct democratic measures, and as a result of this the State of California has great difficulty in funding all sorts of essential services ... and very recently the Chief Justice of California referred to the system of governance ... as ‘dysfunctional’” (Q 266). However, Professor Graham Smith argued that the Californian model was at the extreme of how an initiative process could work, compared to the more “stable” Swiss model (Q 25).

127. Caroline Morris pointed to the difficulties under New Zealand’s Citizens’ Initiated Referenda Act 1993, which had “essentially led to the referendum becoming an expensive form of opinion poll, and the indicative nature of the result has led to frustrations with the government response”. She argued that the sorts of questions which had been put, for instance on the number of firefighters, reform of the justice system and parental smacking, “are unsuitable as the subject of a referendum. Behind each question lies either an array of complex and involved policy decisions ... or a private matter rather than national public debate, which the public was not best placed to decide.” She also argued that the New Zealand experience had shown the wording of a question to be “an interpretative minefield” (pp 127–9). Dr Catt, a former New Zealand Electoral Commissioner, said that this was “probably the best example of how not to run referenda in the world ... I do not think there is a single part of that legislation that works well” (Q 158).22

128. Some witnesses highlighted the value of other engagement tools such as citizens’ assemblies. Such a model was used in the Canadian province of British Columbia. Professor Graham Smith explained that “the executive decided that they needed to review the electoral system and that it should not be left in the hands of politicians to decide what the referendum question should be; so they established a year-long Citizens’ Assembly of 160 randomly selected citizens who then learnt about electoral issues and put forward a proposal which then went to a referendum. I quite like that idea of, ‘Oh, yes, we have a political problem, we need to change the electoral system’, but then saying, ‘and it’s not necessarily the politicians who should decide what the choice is, we are going to hand that over to a different body’.

22 For further details of these international examples see Appendix 3.
It is those sorts of examples that one should look at: the imaginative mixing of a referendum with other democratic innovations” (Q 24).

129. Baroness Kennedy of the Shaws advocated “deliberative polling where you bring together ... a cross-section of the general public ... and then you provide them with good information and the opportunity to question experts, and then allow them to then reach some sort of conclusion on whatever the issue is that you are placing in front of them. It is a far more satisfactory way than simply asking a perhaps largely uninformed or influenced or manipulated public for a view” (Q 64). Professor Weir advocated “deliberative juries of citizens to consider all the kinds of questions which need thorough investigation in advance” (Q 71).

130. Given our concerns about the use of referendums, we are not convinced by the arguments in favour of citizens’ initiatives. Nonetheless, we acknowledge that there is a need to encourage greater citizen engagement in the democratic process. The use of such tools as citizens’ assemblies and citizens’ juries may be worthy of consideration in this regard.

Part Two: Local referendums

131. A number of witnesses stated that referendums were particularly suited to deciding local issues. The Government outlined current arrangements:

“A number of local authorities have relied on the powers of general competence established by both the Local Government Act 1972 and the Local Government Act 2000 to hold advisory referendums. Additionally, section 116 of the Local Government Act 2003 creates an express power enabling local authorities to conduct an advisory poll or referendum. The Electoral Commission has no role in the conduct of such referendums. There is no obligation on a local authority to hold such a poll, nor any requirement to act in accordance with the result of such a poll but this provision allows authorities to hold a poll on any matter relating to the services for which it is responsible (including where these services may be delivered by a third party), or the finance that it commits to those services, or any other matter that is one relating to the authority’s power under section 2 of the Local Government Act 2000 (authority’s power to promote well-being of its area). Section 116 of the Local Government Act 2003 also provides express freedom to a local authority in determining, for any poll it proposes to hold, who to poll and how the poll is to be conducted” (p 94).

132. Michael Wills MP suggested that “local authorities should engage more vigorously to seek the views of their residents ... Where everyone is looking to give the taxpayer value for money it is the local resident who has the best view of how services can best be deployed” (QQ 263–4).

133. Professor Bogdanor asserted that “we can spend a lot of time on the more glamorous constitutional issues but perhaps the way forward with the referendum and popular involvement is on the less glamorous local issues connected with public services” (Q 87). He argued that local initiatives could deliver “double devolution’ ... not merely from central government to local authorities, but from local authorities to the citizen”, and could contribute to the regeneration of local democracy (p 48). However, Professor Bogdanor said that turnout could be “very low indeed” in local referendums (Q 97).
Professor Saward stated that there was a strong case for greater use of referendums and citizens' initiatives at local level (p 15). In spite of his scepticism about national referendums, Steve Richards said that local polls could be a way of bringing “moribund” local politics “to life” (QQ 139–40).

The Institute of Welsh Affairs pointed to “the honourable tradition in Wales of settling divisive issues”, such as Sunday licensing, “by local referendums or polls”. However they argued that “provision for such polling should only be made where an issue is so divisive that locally elected representatives cannot resolve it”, and that such local referendums “should not be and would not be a quick fix” (p 126). Peter Facey pointed to the inconsistencies at local level, in that a referendum is required if an elected mayor is proposed but not if it is proposed to abolish a local authority (Q 55).

Lord Fraser warned against the use of local referendums, as he feared they could undermine local representative democracy (Q 114). Michael Wills MP also referred to the importance of representative democracy at local as well as national level (Q 261). However, he did not think that the Government’s warnings against the widespread use of referendums would be vitiated by an increase in local referendums, because, he argued, “there is a categoric difference between local referendums and great national referendums” (Q 264).

Concerns were also expressed about the regulation of local referendums. The Institute of Welsh Affairs pointed to “the absence of any standard framework of rules” in relation to such polls (p 127). Unlock Democracy expressed concern about perceptions of bias in the question posed by Edinburgh City Council in February 2005 on whether or not to introduce congestion charging. They argued that the Electoral Commission should be given responsibility for overseeing local as well as national referendums “where referendums are used by principal authorities to endorse significant changes”. They stated that changes to local government structure, for instance proposals to adopt a directly elected mayor, “are significant constitutional changes and as such should be regulated by an independent body” (pp 20–1).

Jenny Watson noted that while the Electoral Commission “have a very clear role in relation to a referendum that comes from the Westminster Parliament which relates to governance in Wales ... it is possible for local people in Greater Manchester to be consulted about a congestion charge without us having any say or any oversight of that referendum whatsoever” (Q 208).

Michael Wills MP did not favour the Electoral Commission having a role in local referendums: “we sought last year really to define the role of the Electoral Commission in a way that focuses their role more precisely and I think if we were to give them a role in local referendums that would run counter to that” (Q 262).

We do not believe that local referendums are the most effective way of increasing citizen engagement with the local democratic process.
CHAPTER 5: THE REFERENDUM CAMPAIGN: PRACTICAL ISSUES

141. In spite of the evidence we received concerning the difficulties pertaining to the use of referendums (see Chapter 2), we have seen that referendums may become a part of the UK’s political and constitutional landscape. Therefore practical issues relating to the holding of a referendum are still relevant and we consider these in this chapter.

142. The Political Parties, Elections and Referendums Act 2000 (PPERA) sets out the legal framework for the conduct of referendums in the UK, in one or more of the UK’s constituent nations, or in any region in England, where that referendum is held in pursuance of an Act of Parliament. The Electoral Commission is responsible for the conduct of referendums which are held under the auspices of the PPERA. Box 2 sets out the main provisions of the PPERA and the main responsibilities of the Commission.

BOX 2

Main provisions of the PPERA and the main responsibilities of the Electoral Commission

The Political Parties, Elections and Referendums Act 2000 (PPERA) prescribes inter alia:
- the means by which a referendum period is determined;
- the means by which referendum question(s) are determined;
- requirements on individuals and groups who campaign in referendums—known as permitted participants—including controls on the amount that they spend and on the donations that they are permitted to accept; and
- the means by which lead campaign groups—known as designated organisations—are determined and the assistance which they are entitled to receive.

The Electoral Commission’s responsibilities include:
- commenting on the intelligibility of the referendum question;
- registering those who want to spend significant amounts on campaigning in the referendum as ‘permitted participants’;
- where appropriate, appointing lead campaign groups (‘designated organisations’) for each outcome;
- ensuring that designated organisations have access to certain assistance,
- including grants that the Commission determine within statutory limits;
- making recommendations to Government on campaign spending limits for sub-UK referendums;
- monitoring and reporting on campaign spending; and
- reporting on the administration of the referendum.

Timing of a referendum

143. The choice of when a referendum is to be held can affect the cost of holding it, voter turnout and the impact of the result. Holding referendums at the
same time as elections can reduce costs (pp 22–23) and, some witnesses suggested, increase turnout. But, the balance of the evidence we received was against holding referendums on the same day as General Elections. Unlock Democracy feared that holding the two on the same day might lead to the referendum being drowned out by other issues (p 23) whilst Nigel Smith’s greater worry was that this could lay the referendum open to the charge of rigging (p 148). He told us that the Electoral Commission had recommended against the holding of referendums at the same time as a General Election (p 148). The Electoral Commission’s own evidence was more equivocal on this point: “what we would want to do in the case of the combination, whether with a UK parliamentary General Election or any other form of combination, is to look very clearly at the situation at that time and to set out what we saw to be the benefits and the risks of such a combination, and to be very clear about how one might mitigate any risks that could arise” (Q 195).

144. It was suggested by some witnesses that referendums might be held on the same day as elections other than General Elections. Professor Gallagher and Peter Facey said that referendums and elections happened simultaneously in other countries with no apparent confusion on the part of the electorate (p 123 and pp 22–23). On the other hand, Professor Tierney told us that referendums should be free-standing events which were kept quite separate from regular representative democracy (p 51).

145. **We recommend that referendums should not be held on the same day as General Elections. For other elections we recommend there should be a presumption against holding referendums on the same day as elections but that this should be judged on a case-by-case basis by the Electoral Commission.**

146. With regard to the timing of referendums, the PPERA (Section 102(4)) specifies that votes must be held within six months of the enabling legislation being passed. However, because paving legislation must be passed by Parliament before a referendum on any particular subject can be held, the overall timetable for the conduct of any referendum is in government hands. Some witnesses were worried that in practice this gave the Government too much control (Q 112 and p 144).

147. We recognise the concerns expressed that government has, in practice, substantial control over the timing of referendums and recommend that consideration should be given to the introduction of legislation about referendum management.

**Wording of the question**

148. Under the PPERA the Electoral Commission must consider the Government’s proposed wording of the referendum question(s) and publish a statement of its views as to the intelligibility of that question or questions. The Secretary of State is not obliged to take this advice into account.

149. We received evidence questioning this arrangement. Professor Graham Smith told us that:

“The Electoral Commission is consulted, but it is not clear what happens if the Commission thinks it is a very poor question. It could send it back to the Secretary of State and the Secretary of State could say, ‘The Electoral Commission thinks it is a very poor question, let’s carry on with my very poor question’. He could still do that. There
needs to be something in there about ensuring that the question is fair and that needs to be done independently” (Q 37).

150. Professor Bogdanor recommended that the question should be formulated by a neutral body such as the Electoral Commission (Q 85). Baroness Kennedy reminded us that the Power Commission, which she chaired, had recommended that an outside body should have control over the question (Q 64).

151. We asked the Electoral Commission whether its powers should be extended in relation to the wording of the referendum question:

“I think our view would be that it would be extremely unlikely for a Secretary of State to be in receipt of our advice with the documentation and the testing and everything that we have done being published transparently and decide not to listen to our advice, because inevitably what that does is to set up a debate between the Electoral Commission and the Secretary of State where we are effectively saying, ‘Your question is not the question which should be put,’ and in that situation I think it would be extremely difficult for the Secretary of State to proceed” (Q 188).

152. Michael Wills MP agreed that it would be difficult for a Secretary of State to ignore the views of the Electoral Commission on the wording of a referendum question: “I think it would be politically extremely unwise. I cannot imagine any sensible politician doing that—it would defeat the whole purpose of having a referendum in the first place, which is to legitimise the decision. To have a controversy, a row with the Electoral Commission would be foolish” (Q 248).

153. Mr Wills was broadly happy with the current arrangements relating to the framing of the referendum question:

“It is right that the ultimate authority should lie with Parliament, with the Government of the day framing the question in secondary legislation, but, of course, it is crucial that the Electoral Commission has the role that it does in deciding on the intelligibility of the question, which is fundamental to it being perceived as a fair process” (Q 246).

154. Notwithstanding the Electoral Commission’s assessment that it was extremely unlikely that a Secretary of State would ignore its advice on the wording of the referendum question we recommend that, rather than the Government making the final decision, the Electoral Commission should be given a statutory responsibility to formulate referendum questions which should then be presented to Parliament for approval.

155. The Electoral Commission stated that referendum questions should present the options to voters clearly and simply and that:

“We would assess the question using our [Referendum question assessment] guidelines, taking account of evidence from research with voters, and discussions with key stakeholders and plain language and accessibility experts” (p 81).

156. Witnesses were unanimous in agreeing that referendum questions should be worded in accordance with the broad principles outlined by the Electoral Commission. There was disagreement however as to whether multi-option questions were compatible with these principles.

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23 A multi-option question is one which has more than two possible responses for voters to choose. It is an alternative to the “yes” or “no” option format.
157. Peter Browning and Navraj Singh Ghaleigh feared that multi-option questions might confuse voters (p 114 and p 141). Professor Butler asserted that multi-option questions were difficult because “countries have tried triple-question referendums or quadruple-question referendums and you get into tangles about what is meant and possible litigation” (Q 5). Dr O’Malley suggested, “it might be cheaper and easier to commission an opinion poll on the subject” (p 131). Professor Saward was against multi-option questions because “there is not an issue where you could not locate something very like a ‘yes’ or ‘no’ principle at the core of it” (Q 36).

158. Unlock Democracy told us that, whilst not preferable, multi-option referendums could be appropriate in some circumstances where the issue at stake could not be reduced to a single question (p 21). The de Borda Institute and the New Economics Foundation advocated the use of multi-option questions because “if a two-option question is posed when the debate is in fact multi-optional, the outcome may well be inaccurate” (p 117). Both Unlock Democracy and Caroline Morris pointed to the referendums in New Zealand in 1992 and 1993 on electoral reform as examples of the successful use of multi-option referendum questions (p 21 and p 129). Dr Catt, however, told us that the multi-option question worked in this case because the winning result was the “only one that any pressure groups were arguing for; nobody was arguing for the other three options” and notwithstanding this successful use of a multi-option question, she said that multi-option questions should be avoided wherever possible (Q 173).

159. We recommend that the presumption should be in favour of questions posing only two options for voters but recognise that there may be occasions when multi-option questions are preferable. We look to the Electoral Commission to assess the merits of multi-option questions in their referendum question assessment exercise.

Information and the media

160. The PPERA does not contain provision for the Electoral Commission to promote public awareness of specific issues relating to referendums. It does however give the Commission the responsibility to decide which permitted participants (if any) should be designated as a lead campaign organisation for each outcome and to determine and administer the level of the public grant (up to £600,000) which designated organisations should receive.

161. The enabling Act\(^24\) for the North East referendum gave the Electoral Commission powers to promote public awareness and the Commission encouraged people to register to vote and provided information on how to take part. This Act also gave the Electoral Commission powers to provide information explaining the “yes” and “no” arguments had they not been able to designate organisations as lead campaigners for each outcome of the referendum. The Electoral Commission told us that, if permitted in paving legislation for future referendums, they would inform voters about the referendum and how to take part (p 82).

162. Many witnesses emphasised the importance of good public information provision in a referendum campaign. Professor Tierney told us that “education is a key factor if the referendum is to be deliberative” (Q 90).

\(^{24}\) Regional Assemblies (Preparations) Act 2003.
Professor Graham Smith agreed that there was a need for independent information provision (p 16). Unlock Democracy asserted that the quality of public information was key to the success of the referendum as a whole:

“Where there are effective public education campaigns referendums can create high levels of support for significant changes to the way we are governed ... If the public education campaign is not properly resourced or is seen to be biased the referendum campaign is unlikely to have a positive effect on political engagement and may even increase disillusionment with the political process” (p 18).

163. Several witnesses pointed to the provision of public information provision for the New Zealand electoral reform referendums of 1992–93 as examples of excellence. Dr Catt told us that there was a, “year-long, very well-funded, independently-run education campaign that went with it [the 1992–93 referendums]. I think that is what makes the difference and it is expensive” (Q 158). In New Zealand the public education campaign ran alongside the campaigns to try and persuade voters to vote one way or another (Q 166). Unlock Democracy praised “the experience in New Zealand of the two referendums on electoral reform [which] demonstrates that setting up an independent body to provide information and run the public education process is money well spent and is in effect an investment in democracy” (p 22).

164. The expense of good public information campaigns was asserted by Professor Weir who also warned of the danger of ill-informed results without a good public information campaign (Q 71). Baroness Kennedy highlighted that “well-informed members of the public reach good conclusions” (Q 64).

165. The extent of government involvement in providing information to voters during a referendum campaign is critical. Lord Fraser told us that prior to the enactment of the PPERA, governments could, “under the guise of putting out information, resort to propaganda” (Q 112). He commended restrictions contained in the PPERA on central and local government putting out information during the 28 day period before a referendum that might have a bearing on the referendum (Q 105). The Electoral Commission suggested that this provision should be changed so that the restriction applied ideally from the start of the referendum period but at the very least from the 28 day period before postal ballot packs are issued (p 81).

166. The Constitutional Reform and Governance Bill is currently going through Parliament. The Bill would confer on the Electoral Commission new power to promote public awareness but only in relation to the referendum on the voting system for parliamentary elections which is proposed in the Bill.

167. **We are concerned about the effectiveness of the regulation of information provision in UK referendums. We commend the model provided by the 1992–3 electoral reform referendums in New Zealand when an independent body provided information and ran the public education process.**

**Funding and campaigning organisations**

168. Box 3 below sets out the requirements of the PPERA relating to the funding of campaign organisations during referendum campaigns and also sets out the Electoral Commission’s role in designating lead campaign organisations.
BOX 3

Requirements of the PPERA relating to funding of campaign organisations and Electoral Commission’s role in designation

The PPERA provides that individuals and organisations who wish to campaign in a referendum may spend up to £10,000 in doing so without facing any restriction or control on their activity.

Permitted Participants

Those individuals or organisations that spend more than £10,000 must register with the Electoral Commission as a “permitted participant”, and are then subject to the restrictions on campaign spending, donations and other activity set out in the PPERA. Permitted participants must name a responsible person to whom liability attaches for any breach of these restrictions. Permitted participants are subject to a maximum spending limit of £500,000, and must provide a return to the Commission as to their referendum expenses following the referendum. Where referendum expenses exceed £250,000, this return must be accompanied by a report prepared by a qualified auditor.

Designated Organisations

The Commission may (but is not obliged to) designate lead campaign organisations for each outcome in a referendum. If the Commission designates a lead organisation for one outcome then it must also do so for the other outcome(s). The spending limit for designated organisations is £5 million.

Grants

Designated organisations receive a grant from the Electoral Commission of up to £600,000 to spend on referendum expenses. The level of the grant and the conditions that attach to it are determined by the Commission. The grant is administered by the Commission. Additionally, designated organisations are entitled to one free item of postal communication to be delivered by the universal service provider, the use of rooms free of charge for holding public meetings, and the right to referendum campaign broadcasts.

Donations

All permitted participants are subject to controls on the donations that they are permitted to accept. These controls mirror the existing controls introduced elsewhere in the PPERA on permissibility of donations to political parties, candidates and other regulated entities. The PPERA specifies categories of permissible donor. Permitted participants cannot accept donations of more than £500 from impermissible donors. Permitted participants must record the details of donations that they receive above £500. Details of donations above £7,500 must be reported to the Commission alongside the referendum expenses return. Loans to permitted participants are currently unregulated.

Source: Government written evidence (p 93)

169. Daran Hill and Lord Fraser had experience of running referendum campaigns prior to the enactment of the PPERA and considered that its provisions relating to campaigning and funding were a definite step forward. (Q 104) Lord Fraser said of his experience of raising funds for the “no” campaign in the Scottish devolution referendum that “we had to rely on the old-fashioned technique of simply begging letters. We did discover some people who were sympathetic to the cause who did contribute significant
sums of money on an individual basis, but nothing like enough money to run a really serious campaign” (Q 104).

170. Daran Hill explained why he welcomed the provisions of the PPERA:

“I am particularly heartened by the existing legislation that has now come, in terms of recognising the ‘yes’ and ‘no’ campaigns and giving them proper status because for about half the campaign [the Wales devolution referendum campaign] ... there was no ‘no’ campaign until late June/early July. We were not really arguing with anyone. Then it came about almost overnight, where two members of the Labour party ... decided to start a ‘no’ campaign themselves ... It grew quite embryonically, but it did seem a relatively strange experience for four or five months—arguing against nobody” (Q 101).

171. The Electoral Commission outlined the principles of how they selected lead campaign organisations:

“I think in approaching the designation process we are clear that we are looking for a campaign organisation to be a ‘yes’ or ‘no’ campaign that had a broad base of support and I suppose our starting position would be that that is likely to be an umbrella type of organisation which brings together perhaps a range of political views within it” (Q 177).

172. In relation to designation, Professor Butler warned that “if there are many sides to a referendum, it can be enormously complicated” and that this was made worse if the various organisations on one side of a referendum argument did not get on well with each other (Q 12). The Electoral Commission told us that in its experience it had not found it difficult to designate lead campaign organisations but some of the groups which were not designated did not agree with its decisions. In any future referendums it intended to make its decision-making relating to designation more transparent to the public (Q 177).

173. A number of witnesses expressed concern about the spending restrictions set out in the PPERA. They were concerned that the current restrictions would allow a campaign organisation to split into a number of organisations each spending less than £10,000 and thus avoid the requirement to register with the Electoral Commission as a permitted participant. Unlock Democracy suggested that it “may be possible to bypass the campaign spending restrictions by having a diffuse movement rather than a centralised campaign” (p 22). Nigel Smith was more sceptical: “The Electoral Commission would not have been able to pin down any shadowy co-operation between them or the presence of richer donors sprinkling money surreptitiously” (p 145). Professor Hazell told us that “it has not yet been properly tested in a national referendum ... whether the Electoral Commission will be able effectively to control the campaign spend on both sides” (Q 8). Dr Wilks-Heeg noted “the Electoral Commission’s own experience of attempting to enforce regulation relating to party finance have revealed the extent to which both political parties and donors to political parties seek to exploit loopholes in the law” (p 36).

174. Clause 89 of the Constitutional Reform and Governance Bill currently under consideration by Parliament would amend the PPERA so that spending limits could be aggregated—this would allay the fears expressed in the previous paragraph.
175. **Current regulation governing funding and campaigning in a referendum has not yet been tested in a national referendum.** We note the concerns about the possible loopholes in the provisions of the PPERA relating to the funding of referendum campaigns. We welcome the Electoral Commission’s decision to make its decision-making relating to designating lead campaign groups more transparent.

**The role of the Government and political parties**

176. Under the PPERA political parties who campaign in a referendum and spend more than £10,000 must register with the Commission as permitted participants. Their spending limit is determined by the share of the vote that they received at the last parliamentary General Election before the referendum, and ranges from £500,000 to £5 million. In addition, as we have noted, there is a restriction on the publication of promotional material by central or local government for a period of 28 days before a referendum.

177. There was some support expressed for the idea that governments should not enter referendum debates, to avoid biasing the debate or undermining one side or the other thanks to a perception of bias. Dr Matt Qvortrup claimed that “there is an emerging consensus that it is illegitimate for governments to spend taxpayers’ money on partisan information, or other partisan activities using state apparatus” (p 135). Nigel Smith stated that governments should take part on the same footing as all other participants or be removed from the campaign (p 145). Lord Fraser said that whilst it would be extraordinary if governments did not take part in a referendum campaign they should not have an advantage over other participants (Q 113).

178. Several witnesses explained that they thought that governments would always be engaged in referendum campaigns because, as Daran Hill put it “essentially British experience on referenda is that referenda are held on issues within the government programme” (Q 112).

179. **Current regulation regarding the role of government and political parties in a referendum has not yet been tested in a national referendum.** Whatever role government and political parties play, it is necessary to ensure that the referendum process is seen by all to be fair.

**Thresholds**

180. The level of voter turnout at an election or referendum is often used as an indication of how seriously the electorate takes an issue: the result from a low turnout is usually seen as less legitimate than that from a higher turnout. Likewise, a clear majority, perhaps over 55 per cent, is seen as more legitimate and decisive than a narrow victory. Accordingly, some referendums in some jurisdictions have required either turnout thresholds or “supermajorities”. The evidence that we received was broadly opposed to both in principle.

181. Turnout thresholds were criticised by Unlock Democracy because they:

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25 See para 165.

26 Examples include the British Columbia referendum on the electoral system, which required a 60 per cent yes vote; and Italian ‘abrogative’ referendums which require a 50 per cent turnout.
“Can negate the positive, educational impact of referendums ... If the result is dependent on a certain level of turnout then those who wish to oppose the referendum do not need to engage with the debate and make their case to voters, they merely have to convince people to stay at home. This sets a dangerous precedent for democratic engagement. There is also a risk that people who have participated in the campaign and secure a majority but do not meet the turnout threshold will feel cheated and that political engagement is ineffectual” (p 19).

182. Thresholds were dismissed by Professor Gallagher as “unnecessary and undesirable” in most cases (p 120). Nigel Smith similarly told us that thresholds should be avoided as far as possible (p 143). Professor Butler made the point that turnout thresholds are problematic because the “no” side can defeat a proposal simply by encouraging people to stay at home, “the thing to do if you are a negative person is to say, ‘Don’t vote’ because a non-vote is equivalent to a vote in those circumstances” (Q 17). Baroness Kennedy pointed to a referendum in Italy where a proposal which required a turnout threshold had failed to be passed because of a campaign to encourage people not to vote: “People who were at all ambivalent and uncomfortable because of the profound nature of the question just did not vote. That was what happened. It failed because of the turn-out. The campaign was to not let people come out to vote” (Q 69). A further argument against a turnout threshold was advanced by Professor Tierney who, pointing to the Danish requirement of a 40 per cent turnout, said that “what you would take from it is that if you create a high threshold it can be very difficult to get things through” (Q 86).

183. Professor Butler warned of the difficulties of working out the size of the electorate: “The electoral register represents only about 90 per cent of the electorate and about ten per cent of the names are dud names anyway, so what is the electorate? What about people who are plurally registered and so on? You have got to get your facts very accurately done if you have thresholds brought into the argument”. He suggested that this uncertainty was a further argument against turnout thresholds (Q 17). Dr Wilks-Heeg expressed a strong concern about the use of electoral registers to provide a voter threshold because of the inaccuracy of the registers and because they were not designed to be used for that purpose (p 35).

184. Supermajorities (where a referendum result is only deemed valid if it has received a specified proportion greater than 50 per cent of the votes cast) were argued by Professor Saward to be inherently anti-democratic, breaching the “one vote, one value” principle (Q 38). Professor Gallagher dismissed them in his evidence to us: “I do not see any justification for a requirement that a supermajority of more than 50 per cent should be required for a proposal to be deemed to have received the support of the people” (p 122). Professor Tierney told us that supermajorities were unnecessary in the UK context and he advocated simple majority decision-making because “the UK has traditionally not imposed any special majority requirements for constitutional change and for this reason it is difficult to see why they would appear in referendums (as they did in 1978/79). If other aspects of the process are appropriate and transparent then arguably this issue becomes less important” (p 50). He also pointed out that it is difficult to argue the case for supermajorities when they are not required in parliamentary votes (Q 97). Conversely Dr Qvortrup defended the use of voter thresholds. He considered that a result should be accepted “as long as a majority of those eligible (and
registered) to vote have cast a ballot” (p 134). Professor Saward suggested that a threshold of “somewhere between 50 per cent of the electorate and the possibly higher figure of the turnout in the previous General Election” was defensible (Q 38).

185. Michael Wills MP told us that the Government’s view on the use of thresholds was that each referendum should be judged on a case-by-case basis and that there would sometimes be a case for a threshold requirement (Q 253).

186. In spite of the weight of evidence against the general use of either voter thresholds or supermajorities, some witnesses, and even some of those who were against them in principle, maintained that on occasion such measures were justified.

187. The first exceptional situation was if the referendum was seeking to implement a constitutional change. Professor Tierney argued that “there may be an argument for a threshold in terms of voter turnout” for referendums on “big constitutional issues” (Q 97). Professor Saward concurred that “there is a strong case in the UK for referendums on constitutional changes with turnout thresholds” (p 15). Professor Graham Smith agreed (Q 38).

188. The second exceptional situation was in divided societies such as Northern Ireland. Professor Bogdanor explained that in a referendum in Northern Ireland “a simple majority, if composed almost entirely of the majority, Unionist community, might not be thought sufficient” and that “therefore a qualified majority large enough to ensure that at least a substantial proportion, if not a majority, of the minority community, as well as of the majority community, would be needed” (p 47). However, Professor Tierney suggested that “referendums are particularly dangerous ... in divided societies. Northern Ireland in 1973 and Bosnia in 1992 are examples where simple majority referendums simply made the situation worse rather than better” (Q 97). Many countries accordingly require regional “double majorities” or concurrent majorities for minority protection reasons: examples of this include Australia where a majority is required in at least four out of the six states in a national referendum and Switzerland where for some kinds of votes there has to be a majority in a majority of cantons (p 16). Some witnesses suggested that in any future UK-wide referendum it might be considered necessary to have regional concurrent majorities. Professor Graham Smith told us “there would be a concern, for example, in this country if a referendum went through and it was the South East only that voted en bloc. We might have to have some sort of regional concurrent majorities” (Q 38).

189. We recommend that there should be a general presumption against the use of voter turnout thresholds and supermajorities. We recognise however that there may be exceptional circumstances in which they may be deemed appropriate.

Advisory or binding referendums?

190. In Chapter 2 we considered the view put forward by some witnesses that referendums undermined representative democracy. A closely-linked issue is whether referendums should be binding on a sovereign Parliament.

191. Professor Gallagher argued that referendums should be binding because “an indicative referendum is little more than an expensive opinion poll. If the
electorate knows that the result is not binding, then there is an obvious temptation either not to vote or to use the referendum to express a view on something other than the issue at stake, such as the current performance of the incumbent government” (p 122). Dr O’Malley similarly told us “it is important that any referendum should be binding, otherwise the whole point of it is cast aside” (p 131). Caroline Morris criticised the advisory nature of citizen-initiated referendums in New Zealand because “it has essentially led to the referendum becoming an expensive form of opinion poll, and the indicative nature of the result has led to frustrations with the government response. This increases the likelihood of political disengagement” (p 127).

192. A number of witnesses took the opposite view and pointed out that because the UK does not have a written constitution “as a matter of constitutional law a referendum cannot be binding in this country” (p 134) and the Government’s evidence supported this. Michael Wills MP told us “I think the crucial thing here is that the referendum does not bind Parliament. In the end Parliament will make its own decision on that” (Q 253). Dr Maija Setälä, Academy Research Fellow, Department of Political Science, University of Turku, told us that, “the advisory character of referendums appears to be congruent with the idea of parliamentary sovereignty” (p 138).

193. Despite referendums in the UK being legally advisory, a number of witnesses pointed out that in reality referendums might be judged to be politically binding. Dr Setälä argued that “in established democracies, it seems to be very difficult for parliamentarians to vote against the result of an advisory referendum” (p 139). Dr Blick similarly stated that “the political pressure upon a government seeking to ignore the outcome of a referendum would be immense” (p 111). More specifically Professor Bogdanor explained that “a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse the decision of the people” (p 47).

194. In practice, however, the UK Parliament can square the circle by passing legislation which does not come into effect until a referendum is held, or by agreeing to be bound by the result in enabling legislation. Professor Bogdanor thought that it would be possible in the UK to “frame a referendum provision by which legislation was required to come into effect with a ‘Yes’ vote, and required to be repealed with a ‘No’ vote, in other words, a mandatory referendum” (p 47).

195. Related evidence concerned whether a referendum should be held before or after legislation on the referendum topic had been passed. Peter Browning told us that “it should precede the proposed parliamentary statute about which it is being held as then it will help inform parliament’s decision [on the legislation]” (p 115). Professor Bogdanor, whilst acknowledging that this was not a simple decision, recommended that a referendum should be held before Parliament passed legislation on the topic to save parliamentary time (Q 83). On the other hand, Dr Qvortrup argued that because referendums are a constitutional safeguard it is preferable that referendums are held after the third reading of a bill (p 135). Professor Hazell said that there was no universal firm answer (QQ 12–13) whilst Unlock Democracy suggested that pre-legislative referendums should be indicative and post-legislative referendums should be binding (pp 21–22).

196. Professor Gallagher concurred that the referendum should be held first but pointed to the facultative system used in Switzerland whereby it was possible for citizens to challenge laws by referendum after they had been passed (p 121).
197. We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion.

Overall summary of regulatory framework and the role of the Electoral Commission

198. The PPERA was praised by some witnesses: Dr Qvortrup said that, “in international perspective, PPERA is seen almost as the gold standard in referendum regulation” (p 133); Navraj Singh Ghaleigh commended it because it ensured that “the preponderance of income, expenditure and political elites do not determine outcome” (p 141); Jenny Watson reassured us that, “broadly speaking the framework works” (Q 176).

199. Despite this praise for the PPERA, it remains the fact that it has not yet been used as the legal basis for a UK-wide referendum. Unlock Democracy thought it was not able to judge the effectiveness of the legislation because “to date there has only been one referendum campaign run under the PPERA regulations and we do not feel this is enough experience to be able to judge the effectiveness of the legislation” (p 20). Professor Butler told us that the PPERA “did not seem to be very realistic. How it would get deciphered, if we did decide to have a referendum on Europe or human rights or anything like this, you would actually go to the 20 clauses in the PPERA and you would find it would not be a description of what was actually going to be happening out on the ground. It would not be a good guidepost at all” (Q 8).

200. Although the PPERA has not been tested in a UK-wide referendum, a number of witnesses thought that the 2004 North East referendum showed that both the Act and the Electoral Commission could function effectively (QQ 118, 201). On the other hand Professor Hazell pointed out that the North East referendum in 2004 was not as high-profile or politically charged as a nationwide referendum on a subject such as membership of the euro. A UK-wide referendum would, he argued, therefore be more challenging for the Electoral Commission (QQ 14–5). The Electoral Commission told us that the North East referendum was run well. It analysed its experiences after that referendum and wrote to the Government requesting changes to be made to the legislative framework for referendums. The changes requested were (pp 80–81):

- Creation of a statutory Regional Counting Officer role;
- The Chief Counting Officer to have a power of direction in primary legislation over both Regional Counting Officers and Counting Officers to enable efficient organisation and co-ordination of the referendum;
- The restriction on the publication of promotional material by central or local government to apply from the start of the referendum period;
- The Commission to have powers to promote public awareness of the registration and voting processes at a referendum;
- The Commission to have a discretionary power to provide information to voters on the referendum options if it is unable to appoint designated organisations;
- Aggregation of spending limits for permitted participants who operate to a common plan to bring them into line with the rules on spending by third
parties in election campaigns. This would prevent participants circumventing spending limits by registering separately but acting together;

- A generic Conduct Order to set out the detailed regulations governing the administration of referendums held under the PPERA to ensure clarity and consistency for those involved in planning and running referendums and to allow them to develop a shared understanding of the rules that would apply to any referendum well in advance.

201. A number of other witnesses highlighted the need for similar changes. Some of these issues were addressed by the Government in amendments to the Constitutional Reform and Governance Bill which is currently going through Parliament but at this stage in the Parliamentary session it remains to be seen whether this Bill will become law. Michael Wills MP indicated that, whilst the Government thought the PPERA was an effective one, they would keep it under review and were open to suggestions for improving it (Q 239).

202. Any assessment of the overall regulatory framework relating to referendums and the role of the Electoral Commission are theoretical as neither has been tested in a UK-wide referendum. We therefore recommend that after the next UK-wide referendum:

- The Electoral Commission should analyse its experience (as it did for the 2004 North East referendum) and make recommendations for change to the regulatory framework and its role; and

- There should be thorough post-legislative scrutiny of the PPERA at an early date.

203. We are sympathetic to the changes to the legislative framework suggested by the Electoral Commission following its analysis of the 2004 North East referendum. We recommend that the Government take steps to ensure that they are implemented.
CHAPTER 6: CONCLUSION

204. Referendums are not a panacea. We note the arguments for their use as a way of strengthening the democratic process. The drawbacks and difficulties of their use are serious.

205. Referendums may become a part of the UK’s democratic and constitutional framework. There has been little consistency in their use. They have taken place on an *ad hoc* basis, frequently as a tactical device rather than on the basis of constitutional principle.

206. Notwithstanding this, we acknowledge arguments that, if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues. There are difficulties in defining what constitutes a “fundamental constitutional issue”. Although some constitutional issues clearly are of fundamental importance,\(^\text{27}\) and others not, there is a grey area where the importance of issues is a matter of political judgment.

207. To leave such judgments entirely in the hands of the government of the day is in our view inappropriate. Parliament should decide whether or not a referendum is appropriate in a given circumstance.

208. We note the recent commitments by the main parties to use referendums in specific circumstances and the proposals for further referendums in Scotland and Wales in the near future. The question of referendums will arise in the forthcoming General Election campaign. We have set out in this report some considerations which we hope will inform future debate.

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\(^{27}\) See para 94.
CHAPTER 7: SUMMARY OF RECOMMENDATIONS

Referendums—Arguments for and against

209. The balance of the evidence that we have heard leads us to the conclusion that there are significant drawbacks to the use of referendums. In particular, we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day. Referendums may become a part of the UK’s political and constitutional practice. Where possible, cross-party agreement should be sought as to the circumstances in which it is appropriate for referendums to be used. (Para 62)

Referendums on constitutional issues

210. Notwithstanding our view that there are significant drawbacks to the use of referendums, we acknowledge arguments that, if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues. We do not believe that it is possible to provide a precise definition of what constitutes a “fundamental constitutional issue”. Nonetheless, we would consider to fall within this definition any proposals:

- To abolish the Monarchy;
- To leave the European Union;
- For any of the nations of the UK to secede from the Union;
- To abolish either House of Parliament;
- To change the electoral system for the House of Commons;
- To adopt a written constitution; and
- To change the UK’s system of currency.

This is not a definitive list of fundamental constitutional issues, nor is it intended to be. (Para 94)

211. A written constitution could provide a more precise definition of a “constitutional issue”, and define which issues required a referendum before any change. The arguments for and against introducing a written constitution are outwith the scope of this inquiry. (Para 102)

212. It is possible to set out in legislation specific issues which should be subject to a referendum, as has been done in the past. Although one Parliament cannot bind another, Parliament might not lightly repeal such legislation. But, since it is impossible precisely to define what constitutes a “fundamental constitutional issue”, it follows that it is impossible to set out in legislation an all-encompassing list of such issues that should be subject to a referendum. (Para 111)

213. Parliament should judge what issues will be the subject of referendums. In its first report, this Committee stated that it would “focus on issues of constitutional significance” determined by whether an issue raises “an important question of principle about a principal part of the constitution”.28 We believe that this provides a useful test, first, of whether an issue is of

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28 ibid., para 27.
fundamental constitutional significance, and second, of whether a referendum is therefore appropriate. (Para 118)

Other uses of referendums

214. Given our concerns about the use of referendums, we are not convinced by the arguments in favour of citizens’ initiatives. Nonetheless, we acknowledge that there is a need to encourage greater citizen engagement in the democratic process. The use of such tools as citizens’ assemblies and citizens’ juries may be worthy of consideration in this regard. (Para 130)

215. We do not believe that local referendums are the most effective way of increasing citizen engagement with the local democratic process. (Para 140)

216. We recommend that referendums should not be held on the same day as General Elections. For other elections we recommend there should be a presumption against holding referendums on the same day as elections but that this should be judged on a case-by-case basis by the Electoral Commission. (Para 145)

217. Notwithstanding the Electoral Commission’s assessment that it was extremely unlikely that a Secretary of State would ignore its advice on the wording of the referendum question we recommend that, rather than the Government making the final decision, the Electoral Commission should be given a statutory responsibility to formulate referendum questions which should then be presented to Parliament for approval. (Para 154)

218. We recommend that the presumption should be in favour of questions posing only two options for voters but recognise that there may be occasions when multi-option questions are preferable. We look to the Electoral Commission to assess the merits of multi-option questions in their referendum question assessment exercise. (Para 159)

219. We are concerned about the effectiveness of the regulation of information provision in UK referendums. We commend the model provided by the 1992–3 electoral reform referendums in New Zealand when an independent body provided information and ran the public education process. (Para 167)

220. Current regulation governing funding and campaigning in a referendum has not yet been tested in a national referendum. We note the concerns about the possible loopholes in the provisions of the PPERA relating to the funding of referendum campaigns. We welcome the Electoral Commission’s decision to make its decision-making relating to designating lead campaign groups more transparent. (Para 175)

221. Current regulation regarding the role of government and political parties in a referendum has not yet been tested in a national referendum. Whatever role government and political parties play, it is necessary to ensure that the referendum process is seen by all to be fair. (Para 179)

222. We recommend that there should be a general presumption against the use of voter turnout thresholds and supermajorities. We recognise however that there may be exceptional circumstances in which they may be deemed appropriate. (Para 189)

223. We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion. (Para 197)
224. Any assessment of the overall regulatory framework relating to referendums and the role of the Electoral Commission are theoretical as neither has been tested in a UK-wide referendum. We therefore recommend that after the next UK-wide referendum:

- The Electoral Commission should analyse its experience (as it did for the 2004 North East referendum) and make recommendations for change to the regulatory framework and its role; and

- There should be thorough post-legislative scrutiny of the PPERA at an early date. (Para 202)

225. We are sympathetic to the changes to the legislative framework suggested by the Electoral Commission following its analysis of the 2004 North East referendum. We recommend that the Government take steps to ensure that they are implemented. (Para 203)

**Conclusion**

226. Referendums are not a panacea. We note the arguments for their use as a way of strengthening the democratic process. The drawbacks and difficulties of their use are serious. (Para 204)

227. Referendums may become a part of the UK’s democratic and constitutional framework. There has been little consistency in their use. They have taken place on an *ad hoc* basis, frequently as a tactical device rather than on the basis of constitutional principle. (Para 205)

228. Notwithstanding this, we acknowledge arguments that, if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues. There are difficulties in defining what constitutes a “fundamental constitutional issue”. Although some constitutional issues clearly are of fundamental importance, and others not, there is a grey area where the importance of issues is a matter of political judgment. (Para 206)

229. To leave such judgments entirely in the hands of the government of the day is in our view inappropriate. Parliament should decide whether or not a referendum is appropriate in a given circumstance. (Para 207)

230. We note the recent commitments by the main parties to use referendums in specific circumstances and the proposals for further referendums in Scotland and Wales in the near future. The question of referendums will arise in the forthcoming General Election campaign. We have set out in this report some considerations which we hope will inform future debate. (Para 208)
APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The members of the Committee which conducted this inquiry were:

Lord Goodlad (Chairman)
Lord Hart of Chilton (from 25 November 2009)
Lord Irvine of Lairg (from 25 November 2009)
Baroness Jay of Paddington (from 25 November 2009)
Lord Lyell of Markyte
Lord Morris of Aberavon (until 12 November 2009)
Lord Norton of Louth
Lord Pannick
Lord Peston (until 12 November 2009)
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands (until 12 November 2009)
Lord Shaw of Northstead
Lord Wallace of Tankerness
Lord Woolf

Declaration of Interests

GOODLAD, Lord

*12(f) Regular remunerated employment
15(d) Office-holder in voluntary organisations
Sir Robert Menzies Memorial Trust
Opera Australia Capital Fund

HART OF CHILTON, Lord

*12(f) Regular remunerated employment
I am a solicitor (but no longer practising)
I have acted as a paid special adviser to two Lord Chancellors (Lord Irvine of Lairg and Lord Falconer of Thoroton).
*13(b) Landholdings
Farmland in Suffolk
*13(c) Financial interests of spouse or relative or friend
My wife is a practising solicitor
15(a) Membership of public bodies
Chancellor of the University of Greenwich (from 1 January 2008)
15(b) Trusteeships of cultural bodies
Trustee and Board Member of—
Development Council of the Almeida Theatre, Islington
British Architectural Library Trust
Council of University College, London
Member of the Project and Development Committee of the Victoria and Albert Museum
15(d) Office-holder in voluntary organisations
Vice Patron of the Ipswich Blind Society (from 1 January 2008)

IRVINE OF LAIRG, Lord

15(a) Membership of public bodies
Visiting Professor at University College London
15(d) Office-holder in voluntary organisations
Trustee of John Smith Memorial Trust

JAY OF PADDINGTON, Baroness
*12(d) Non-parliamentary consultant
Advisory contract with Gerson Lehrman Group
*12(e) Remunerated directorships
Non-executive Director, BT plc Corporate Social Responsibility Committee
Non-executive Director, Independent News and Media plc
Member, International News and Media International Advisory Board
*12(i) Visits
Attendance at IAC Annual Conferences in Hamburg, Germany and Stockholm, Sweden (June 2008)—IAC paid air fare and hotel expenses
Attended the Annual meeting of the Interaction Council in Saudi Arabia (9–13 May 2009)—the IAC paid my airfare and hotel expenses
As a Fellow of The Industry and Parliament Trust, I am required to travel from time to time and my host company Johnson and Johnson plc will pay
15(d) Office-holder in voluntary organisations
Member of Council Overseas Development Institute
Joint President of the Foreign Policy Centre (this is an honorary post)
16(a) Trusteeships
Trustee, New Health Network
16(b) Voluntary organisations
Patron of several voluntary organisations in the health and social care field
Associate Member of Inter Action Council

LYELL OF MARKYATE, Lord
*13(b) Landholdings
Shared ownership with my wife of a house in London, a property in Burgundy and some farmland, woodlands, and a pair of cottages in Hertfordshire
15(a) Membership of public bodies
Chairman of the St Albans Cathedral Trust (until October 2007)
Member of the Court of the Universities of Hertfordshire and Luton
15(b) Trusteeships of cultural bodies
Chairman of the Federation of British Artists (the Mall Galleries) (a charity)
(I took up office at the meeting of the board on 19 July 2007)

MORRIS OF ABERAVON, Lord
15(a) Membership of public bodies
Chancellor of University of Glamorgan
Hon Fellow of Gonville of Caius College, Cambridge
Hon Fellow of University College of Wales, Aberystwyth
Hon Fellow of University College of Wales, Swansea
Hon Fellow of University College of Wales, Lampeter
Hon Fellow of Trinity College Carmarthen
Bencher of Gray’s Inn
Occasional advisory work as a QC

NORTON OF LOUTH, Lord
*12(f) Regular remunerated employment
Professor of Government, University of Hull (Director, Centre for Legislative Studies)
Director of Studies, Hansard Society
15(a) Membership of public bodies
Governor, King Edward VI Grammar School, Louth
15(b) Trusteeships of cultural bodies
Trustee, History of Parliament Trust
Trustee, Elizabeth Russell Fund (a charity)
15(c) Office-holder in pressure groups or trade unions
Chairman, Conservative Academic Group
Member, Advisory Board, Centre for Policy Studies
Member, Committee, Conservative History Group
15(d) Office-holder in voluntary organisations
Vice President, Political Studies Association of the UK
Member of Council, Hansard Society for Parliamentary Government
Editor, Journal of Legislative Studies (unremunerated but published by commercial publisher)
Council Member, Constitution Unit
16(b) Voluntary organisations
Member, Study of Parliament Group

PANNICK, Lord
*12(f) Regular remunerated employment
Practising member of the Bar
Fortnightly column on legal issues for The Times
15(a) Membership of public bodies
Fellow of All Souls College, Oxford
Hon. Fellow of Hertford College, Oxford
15(d) Office-holder in voluntary organisations
Chairman of the Legal Friends of The Hebrew University, Jerusalem
Bencher of Gray’s Inn

PESTON, Lord
15(d) Office-holder in voluntary organisations
Vice President, Speakability

QUIN, Baroness
15(a) Membership of public bodies
Member of Durham Cathedral Council (unpaid)
15(d) Office-holder in voluntary organisations
President, Gateshead Arthritis Care Association
16(b) Voluntary organisations
Chair of Franco-British Council

RODGERS OF QUARRY BANK, Lord
No relevant interests

ROWLANDS, Lord
*12(d) Non-parliamentary consultant
Consultant to the National Training Federation, Wales
Consultant to Tydfil Training, Merthyr Tydfil
*12(e) Remunerated directorships
Chairman, More Than Just a Game
*13(d) Hospitality or gifts
I have occasionally been a guest of Dyfed Steels at the Llanelli/Scarlets’ matches
15(b) Trusteeships of cultural bodies
Trustee and Member of the History of Parliament Trust
15(d) Office-holder in voluntary organisations
Trustee of the Winston Churchill Memorial Fund for travelling scholarships
16(b) Voluntary organisations
Member of the Pfizer Foundation on health inequalities
SHAW OF NORTHSTEAD, Lord
No relevant interests

WALLACE OF TANKERNESS, Lord
*12(d) Non-parliamentary consultant
I run a company, Jim Wallace Consultancy Ltd
Consultancy advice may involve advising on issues and procedures in relation to the Scottish Parliament; arranging meetings with public bodies in Scotland; attending meetings between the client company and members of the Scottish Parliament or members of the Scottish Executive.
Through the company, I have undertaken consultancy work for:
Aquatera Ltd, a provider of environmental and sustainability services, with particular interests in the renewable energy sector;
Consultancy with Quatro Public Relations in relation to specific renewable energy projects
Simpson & Marwick WS, Edinburgh;
Infinis Ltd;
Hays Specialist Recruitment;
Retail Loss Prevention;
Loganair Ltd
*12(e) Remunerated directorships
Director and Chairman, Northwind Associates Ltd (wind energy)
Director and Chairman, Jim Wallace Consultancy Ltd (general public affairs, speech making, articles)
*12(f) Regular remunerated employment
Employed by Jim Wallace Consultancy Ltd
*12(g) Controlling shareholdings
80% shareholding in Jim Wallace Consultancy Ltd—general consultancy on public policy issues, speech making, articles
*12(i) Visits
Visit with spouse to Guardian Festival of Literature at Hay-on-Wye (22-25 May 2009) as guests of SkyARTS; accommodation and meals provided by Sky
*13(a) Significant shareholdings
20% interest in Northwind Associates Ltd (wind energy)
*13(b) Landholdings
One-half share in two dwelling houses in Annan, Dumfresshire (no rental income)
One-half share in 2 acre field at Annan, Dumfresshire
15(a) Membership of public bodies
Non-practicing member of Faculty of Advocates
Hon. Professor in Institute of Petroleum Engineering, Heriot Watt University
15(d) Office-holder in voluntary organisations
Board Member, St. Magnus Festival Ltd (unremunerated)
Chair of Relationships Scotland (the new organisation which embodies the merger between Family Mediation Scotland and Relate Scotland) (from 1 April 2008) (unpaid)
Board Member, Centre for Scottish Public Policy (independent think tank) (unpaid)
Co-Convenor of the Poverty & Truth Commission in Scotland. It is an independent Commission run under the auspices of the Priority Area division of the Church of Scotland’s Ministries Council
Member, Commission on Scottish Devolution 2008-09
WOOLF, Lord
*12(f) Regular remunerated employment
Non-permanent judge of Hong Kong Final Court of Appeal—Law Lord
Former advisor to CEDR on mediation issues
Former Chairman of the Bank of England’s Financial Markets Law Reform Committee
June 2007-May 2008: Chairman, of the Woolf Committee, which reviewed and proposed standards of ethics and integrity for adoption in existing and future contracts for the manufacture and supply of arms by BAE Systems Limited
President, Commercial Court, Qatar
Chancellor of the Open University of Israel
Income from speeches, writing articles and books on the above subjects
15(d) Office-holder in voluntary organisations
President, Chairman or Patron of numerous voluntary bodies working in the areas of prison and justice
Former Chairman of Financial Markets etc; Chairman Advisory Committee of International Mediation Institute (IMI), practising as a Mediator and Arbitrator from Blackstone Chambers
APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked with * gave oral evidence.

- Dr Andrew Blick
- * Professor Vernon Bogdanor
- Peter Browning
- * Professor David Butler
- * Dr Helena Catt
- The de Borda Institute and New Economics Foundation
- * Democratic Audit
- * Electoral Commission
- * Lord Fraser of Carmyllie
- Professor Michael Gallagher
- * Professor Robert Hazell
- * Mr Daran Hill
- Institute of Welsh Affairs (IWA)
- * Mr Peter Kellner
- * Baroness Kennedy of the Shaws
- * Professor Michael Marsh
- Caroline Morris
- Dr Eoin O’Malley
- Mrs Anne Palmer
- Dr Matt Qvortrup
- * Mr Steve Richards
- * Professor Michael Saward
- Dr Uwe Serdült
- Dr Maija Setälä
- Navraj Singh Ghaleigh
- Dr Daniel A Smith
- * Professor Graham Smith
- Nigel Smith
- * Professor Stephen Tierney
- True Wales
- * Unlock Democracy
- Professor George Williams
- * The Rt Hon Michael Wills MP
APPENDIX 3: INTERNATIONAL EXPERIENCE OF REFERENDUMS

In their survey of the international experience of referendums, David Butler and Austin Ranney noted that while the vast majority of democracies have held referendums, only a few have institutionalised them, and used them in anything other than an *ad hoc* fashion. The vast majority of referendums are held at founding moments: decisions about joining a state or federation, accepting or rejecting new constitutions, or making constitutional revisions. Other referendums are held when elected leaders have reached an impasse on an issue, or when the issue itself is politically risky. Sometimes referendums are held to create broad, popular legitimacy for something that has generated party political division; or even to create party political advantage. Only a handful of states allow citizens themselves to initiate votes at the national level—Italy, New Zealand and Switzerland—and while several others, including the United States, allow them at sub-national level, the great majority of referendums have been government-initiated or constitutionally-triggered affairs.

In those places that have institutionalised referendums, their use is usually limited to the ratification of constitutional amendments. In Ireland, the President possesses the power to refer a bill to the electorate via an “ordinary referendum”, but this power has never been used. Instead, there have been 31 constitutional referendums since 1937, all on proposed amendments that have passed through both the Dáil and the Senate, as required by Section 46 of the Irish constitution. Of those, only eight have failed. In Australia, by contrast, there have been 44 national referendums on constitutional amendments, but only eight successes. This is generally attributed to Australia’s double-majority rule which requires amendments to receive an overall majority of votes in a majority of states. This measure is aimed at protecting small states against larger ones, and states’ rights generally against the federal government. Ireland is a unitary state, and requires only a simple majority, making constitutional change easier.

Switzerland, however, is the place where the referendum is perhaps most embedded in the political system. Their use at the canton level goes back at least to the 13th century, and probably longer. Their use at the national level resulted from efforts to reunify the federation following a civil war in 1848. Four kinds of referendum are available, three constitutional and one legislative. The four, and the year they were created, are:

- obligatory, which require government changes to the constitution to be ratified (1848);
- constitutional revision, a citizens’ device for overall constitutional change (1848);
- facultative, a citizens’ device to send specific legislation to a vote (1874); and
- initiative, a citizens’ device for individual constitutional amendments (1891).

The Swiss do not have a device allowing citizens to propose legislation at the federal level. Specific proposals on issues like drugs or immigration policy must

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30 This appendix was written for the Committee by Dr John Parkinson, Specialist Adviser.
31 David Butler and Austin Ranney, Referendums around the world: the growing use of direct democracy (Washington, DC, 1994), p 1.
therefore be dressed as constitutional amendments. Voter participation rates are around the 40 per cent mark, but controversial topics generate much higher rates. Votes tend to deliver quite clear majorities, with few votes being won or lost narrowly. Government proposals and counter-proposals have a much higher success rate, 65 per cent, than citizens' initiatives at ten per cent. The frequency of ballots rises and falls, but the Swiss will often face two or three federal votes a year, in addition to canton and communal measures. This is partly because signature targets are very low for citizens' initiatives—petitions only require 50,000 signatures for facultative referendums, 100,000 for initiatives. Despite the low hurdle, the device is most used by organised interest groups and smaller political parties as an agenda-setting tool, because the resources required to campaign effectively at the national scale are substantial. Most notable in this regard has been the right-wing Swiss People's Party, which used a series of anti-immigrant initiatives and facultative referendums to increase its electoral support over the last two decades, moving from fourth to become the largest party in the Federal Assembly.

Other jurisdictions that allow citizens' initiatives see similar patterns: relatively few close-run votes; dominance by the well-resourced; government proposals having higher success rates than citizens' initiatives; variable but often low participation rates. The exception is California, where votes are more likely to be close-run than not, something that has been attributed to the polarisation of American politics more generally.

New Zealand is the only other Westminster-based system that uses referendums, albeit sporadically. With no codified constitution and parliamentary sovereignty, referendums are generally held either when governments enact specific enabling legislation, or via citizens' initiative. The Electoral Act 1993 specifies that the term of Parliament may only be changed by a vote of 75 per cent of Members of Parliament or by a referendum. There have been seven national, government-initiated referendums on issues including the voting system, the term of Parliament and national military service, as well as triennial liquor licensing referendums between 1911 and 1989. New Zealand is one of the few countries with experience of the multi-option referendum: the 1992 vote on the electoral system included four options for change. Since the citizens' initiative device was created in 1993, there have been 36 petitions launched but only four have qualified for the ballot, partly thanks to New Zealand's very high signature threshold (ten per cent of registered electors at the last General Election), the non-binding nature of the vote, and the NZ$50,000 spending cap imposed on organisations in both the signature-gathering and campaigning phases. These limiting features, paradoxically, make New Zealand the one place where the general rule about elite dominance of citizen-initiated referendums does not hold true.
Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 6 JANUARY 2010

Present: Goodlad, L (Chairman)  Quin, B
Norton of Louth, L  Shaw of Northstead, L

Examination of Witnesses

Witnesses: Professor David Butler, Emeritus Fellow, Nuffield College, University of Oxford, and Professor Robert Hazell, Director, Constitution Unit, University College London, examined.

Q1 Chairman: Professor Butler and Professor Hazell, can I very warmly welcome you to the Committee and thank you very much for coming to join us, particularly in the light of the extremely inclement weather conditions, and I know, David, you in particular have come all the way from Oxford through the snow. We are being broadcast, so could I ask you please, as if it were necessary, formally to identify yourselves for the record and then, if you want to make a brief opening statement before we have our questions, please do so.

Professor Butler: I am David Butler, a Fellow of Nuffield. I have in the past written three books about referendums and helped, with Robert Hazell, to run a committee that looked into the working of referendums. The only thing I would like to say about the work that I did, a lot of which I have forgotten, is that I started by making a list of every referendum that had taken place at the nationwide level in the history of the world, and this actual list changed my expectations a great deal. Firstly, I discovered that referendums were not ground-breaking, where you have one and then more and more and more. In many cases, the third referendum came longer after the second referendum than the second referendum came after the first, but what was striking was that, virtually speaking, every democratic country in the world has had a referendum. The only exceptions are the United States, which of course has had an incredible number of referendums at the state level, but has not had one at the national level, India, Japan and Israel. Every other country you would think is respectably democratic has tried it and has had a referendum. The only exceptions are Switzerland, (and actually Liechtenstein as well, which have done a great deal by referendums, as you well know), and the other one is Australia which has compulsory voting and is required to have a referendum on anything affecting federal-state relations, as you well know, my Lord Chairman. I just wanted to draw attention to those. The last point is that a very small proportion of referendums end up fifty-fifty and usually the outcome is pretty predictable. There are some very important ones, as you obviously know, that have been fifty-fifty, but that has not been the norm.

Q2 Chairman: Thank you very much indeed, David. Professor Hazell?

Professor Hazell: I am Robert Hazell, Professor of Government and the Constitution and Director of the Constitution Unit at University College London. If I may, I will make one brief opening remark, which complements, I hope, quite neatly that of David Butler’s, but I will confine myself to referendums in the UK. As everyone knows, these were unknown in Britain until 35 years ago, the first referendums being held in the mid-1970s, a referendum in Northern Ireland on whether they should remain part of the United Kingdom or unify with the Irish Republic, known then as a “border poll”, and the only nationwide referendum held in Britain’s constitutional history in 1975 on the renegotiated terms of accession to the European Community and, since then, there have been—I have not added them up—a dozen or so referendums. Can we deduce whether there is yet any doctrine in the UK about the use of referendums? I do not think we can yet form an overarching or complete doctrine. They have been held so far on constitutional matters, but we cannot yet say that a referendum is required for any major constitutional change. If that had been the doctrine, then I would argue that we should have held a referendum on the Human Rights Act 1998 which incorporated the European Convention on Human Rights, and we should also have held a referendum on the major reform of the House of Lords that took place in 1999. At best, I think we can venture a partial doctrine that referendums are required for devolution, for a constitutional change whereby the Westminster Parliament delegates legislative power to a subordinate legislative body, so referendums were held in Scotland, in Northern Ireland and in Wales before their devolved assemblies were established in the late-1990s, and referendums were held here in London before the establishment of the
Greater London Authority, and in the North East a failed referendum in 2004 on the Government’s proposal for a North East Regional Assembly. The latter two were not legislative bodies but referendums were deemed to be desirable. I would finish by saying that there is now a kind of reciprocal doctrine in relation to those devolved institutions. Many people would argue that a referendum would be required before the Scottish Parliament were abolished or before its powers were severely altered because the Scottish Parliament has, as it were, a popular mandate from the people of Scotland as well as a legislative mandate from this Parliament through the Scotland Act 1998.

Q3 Chairman: Thank you both very much indeed for extremely stimulating introductions to this inquiry. Could I begin by asking an impossible question where we would be most interested in your views as to what, if any, constitutional principle you both think should govern the decision to hold future referendums?

Professor Butler: I would quote Austen Chamberlain: “‘Unconstitutional’ and ‘constitutional’ are terms used in politics when the other fellow does something you don’t like”! I am an extreme pragmatist about this. Referendums have sometimes been a very good political device and saved this country and other countries problems and they have legitimised things that were going to happen, but I do not think I have any universal principle to offer which makes something a constitutional issue, and I would not diverge significantly from what Robert said a moment ago about the sorts of situations when it might be politically expedient to have such a referendum, but I do not think it is—

Q4 Chairman: When you say that you would not diverge significantly, how would you diverge? Professor Butler: Well, there are quite a large number of things which might fall under his categories which would be de minimis. I think it is absolutely crazy for the Conservatives to say that any further change of institutions, but we might equally ask the question of things which might fall under his categories which are subordinate legislative bodies, the devolved institutions, but we might equally ask the question when Westminster delegates legislative power to a superior, supra-national body, like the European Parliament. There clearly has been no established doctrine so far that, in those circumstances, a referendum is required. We have had four or five European treaties which have significantly adjusted the balance of powers between the Member States and the institutions of the European Union without a referendum being held in the UK, save in 1975 on the terms of accession. The Conservative Party, in a speech delivered by David Cameron on 4 November after the Lisbon Treaty became fact, has set out its new policy on Europe and one element in that is a commitment to pass a law, if they are elected to form the next Government, which would be passed by Westminster declaring that any future European treaty could not be entered into by the United Kingdom without a national referendum. It is a separate issue whether such a statute would be binding on future parliaments, but there is also the issue that David Butler has raised about whether a national referendum would be required in relation to all future EU Treaties, however small. For example, if there is a new Accession treaty with, I think, Croatia, being possibly the next likely applicant Member State, would a national referendum be required to approve the Accession treaty in relation to Croatia? No doubt these are the issues which will get debated here possibly by this Committee as well as in this House if a Bill is introduced after the next election to this effect.

Q5 Baroness Quin: I was interested in what Professor Butler said about not really seeing a universal principle here, but more seeing referendums as a good political device. I can understand the reason why you say that, but it is quite, I think, a hard thing to explain to the public that it is a good political device rather than a matter of constitutional principle. I wondered also whether or not you had any views on whether a referendum should refer to a fairly straightforward question, or whether it could be on something rather complex? Obviously, this was an issue that was raised at the time of the Lisbon Treaty, which was a long, complicated treaty with some bits in that some people would like and some bits in that people would not like, but even some of the devolution referendums have been about a range of complex powers, and I just wondered if you had any thoughts about whether or not a referendum should be really on something fairly simple where there is a “yes” and a “no” alternative, or whether it is appropriate to use them in these other situations? At least in 1975, it was a sort of “yes” and “no” question about whether Britain should accept the arrangement with the EU or not. Professor Butler: But the Treaty of Rome, as you know better than anyone here, is an extraordinarily complex treaty. I think the issue is fairly simple. I
think the Scottish and Welsh referendums, although they did deal with obviously complex and detailed matters which affect individual people in the countries concerned, the issue was really simplifiable and straightforward. I think certainly a referendum has to be on a relatively simple issue. I think you can get into great trouble even. Countries have tried triple-question referendums or quadruple-question referendums and you get into tangles about what is meant and possible litigation. I do believe really that referendums, certainly as we live in Britain at the moment, are only going to happen when the government of the day wants it or when it would be too embarrassing (because of past promises) to get out of it. Normally they will have a referendum because they think they are going to win it and they will not have it if they are not going to win it. They will just dodge the issue. It is a matter, as we live at the moment, of straight politics. If we had got to a written constitution, we might get ourselves entangled, as the Irish got entangled (they were the only country out of 29 that actually had a referendum on Lisbon or the revised Lisbon). On the whole, governments do not want to have referendums with unexpected outcomes and they will play politics to avoid it. In some countries quite a number of referendums have been on moral issues which cut right across ordinary party lines, such as abortion and divorce. Even the issue of driving on the right or left have been things where Government just wanted to cop out of making the decision and, in some cases, did not really care much about the answer. I do think the straight business of politics lies at the heart of the referendum, whatever one may think in general, moral terms about the desirability of “consulting the people”.

Professor Hazell: May I add just two remarks? I think it can be more than just a political device. It can be an important legitimising mechanism and it can be a protective device. If you think of the long-guaranteed, bipartisan policy in relation to Northern Ireland, the people of Northern Ireland have been told since 1973, and it is in the Northern Ireland Constitution Act of that year, that Northern Ireland will not be unified with the Irish Republic, save with the consent of the people in Northern Ireland in a referendum, a so-called “border poll”. I think you can view that as an important protective device for the people of Northern Ireland and it was not a policy put together to get over some party split here at Westminster. Referendums can also be important, I think, as vehicles for public education. I think the people of Scotland, Wales and Northern Ireland became a lot more aware about the proposals for their devolved assemblies than if they had been created simply by passing statutes here at Westminster because they were required or they were invited themselves to vote on the issue. Your second question was about multi-option referendums. They can sometimes be held successfully to invite people to express a preference between several options, and the best example I can think of is in New Zealand where they contemplated a change to the voting system in the early-1990s and the first referendum held in 1992 offered the people of New Zealand, from memory, five or six alternative voting systems and they were invited to vote for a preferred system which then was put in a subsequent referendum the following year, 1993, in a binary referendum as a run-off against the existing voting system, so I think you can hold referential referendums of that kind to get a kind of indicative view from the public about what their preference might be. This may become a live issue in Scotland where, you will all know, the current SNP Government wants to hold a referendum on independence, but they have made it clear in public statements that they would not be averse to a referendum which included other options, and they have said that they would like the proposals of the Calman Commission on further powers to the Scottish Parliament to be capable of being formulated as an alternative option. That is, in effect, a challenge that they have made to the parties who set up the Calman Commission.
good warning of a more general point about referendums. Essentially they are conservative instruments where there is a scepticism about change. We did a detailed analysis when we were working on this in the 1970s at the American Enterprise Institute. There was quite strong evidence, if you took the sensible democracies of the world that had had referendums, that the general trend was of the outcome being cautionary, people being slightly frightened of the devil they did not know. I think this applies in Australia particularly where it was easy, in most cases, to build up oppositions in the small states, against the big states which led to defeated referendums. There were actually quite a number of cases where defeated referendums had a majority for them, but they were defeated by four small states being frightened of two big states. (To pass a majority of votes and of states is required).

Q7 Lord Norton of Louth: Is it not the case that there is a difference between what people want and what they do? We know from surveys in this country when people are asked, “Do you favour referendums?” that an overwhelming majority say yes and, when you hold referendums, quite a lot stay at home. The evidence of referendums around the world shows that people generally will turn out to vote in greater numbers for candidates than they will in referendums, so therefore is there not an issue with actually getting people to turn out when they actually are faced with a referendum?

Professor Butler: I think there is a lot to be learned from looking back at the 1975 referendum here. There was nearly a two to one vote in the opinion polls in March for saying “no” to Europe and then the Government switched and said, “Please do vote ‘yes’.” It ended up by being two to one ‘yes’ when it came round to June with the whole of the establishment being on the side of a ‘yes’ vote. The public can be fairly volatile and that is its reputation. I might otherwise slip into saying, “why have referendums when you can have opinion polls”, which make plain what the answer is going to be before you start. In fact there are quite a number of referendums, (and Ireland has produced several), where what looked like happening two months before did not happen on the day, and the 1975 referendum in Britain is an extreme case of that.

Professor Hazell: I would only add that I think, to some extent, these are self-limiting. There is a high risk for any government in embarking on a referendum, a risk to its reputation if it does not get the result which it seeks or expects, and there is also a cost, we should remember. A national referendum costs about the same as holding a general election and I believe the cost of that is now about £120 million, so these are not things which any government would embark on lightly.

Q8 Chairman: I will just observe that, amongst others, I participated, because I was then a Member of the House of Commons, in the 1975 referendum campaign. I had a number of public meetings in village halls round my constituency and I had phone-ins which were unheard-of in those days, the first time really it had ever happened, and practically nobody participated in the meetings or phone-ins at all. The Private Eye front cover was of an elderly couple in deckchairs on Blackpool beach with handkerchiefs over their heads, fast asleep, with the headline, “The great debate begins” and yet, as you say, there was a two to one, quite big turnout by today’s standards. How do we account for that?

Professor Butler: Well, there is always the difficulty that on almost any subject there is an articulate minority who care about it, but there is a huge inarticulate majority who do not give a damn. I think Europe was a big enough issue and it did get a 66% turnout and a 65% “yes” vote. Therefore it is quite a good example of what can be done and what can happen. Underlying all of these things, each time I try to find an answer I think of the exceptions and how different the story is. I am very pragmatic about it. Referendums have worked so well in so many countries as convenient ways of solving or putting finesse to a particular issue that is decided in a referendum and that has settled the matter for them, but the variations in procedure, style and the detailed rules of the game are very great indeed. This morning, I rather guiltily went back to the PPERA, the Referendums Act of 2000, and I was struck that it did not seem to be very realistic. How it would get deciphered, if we did decide to have a referendum on Europe or human rights or anything like this, you would actually go to the 20 clauses in the PPERA and you would find it would not be a description of what was actually going to be happening out on the ground. It would not be a good guidepost at all.

Professor Hazell: I would only offer one comment in terms of the current regulatory structure set out in the 2000 Political Parties, Elections and Referendums Act, and that is in relation to the proposed controls on campaign spending. This is the one major issue where the Commission, of which David Butler and I were both members, the Commission on the Conduct of Referendums, which reported in 1996, differs in its main proposals for the regulation of referendums by comparison with the statutory regime put in place in 2000. Our Commission thought that, although it might be desirable to have spending controls, in practice it was almost certainly not feasible because in a referendum the campaigning groups for “yes” or for “no” are ephemeral bodies; they are set up simply to campaign in that referendum and afterwards they disappear. It is, therefore, very difficult to get regulatory purchase on such bodies and that is a big contrast with controlling campaigning spending in
elections where the political parties, at least the major political parties, are permanent or semi-permanent organisations who hope to be fighting the next election and the next election after that and you can get regulatory purchase on those bodies because they continue in existence. It has not yet been properly tested in a national referendum, where some big money might be put out in support of one side or the other, whether the Electoral Commission will be able effectively to control the campaign spend on both sides.

Q9 Baroness Quin: I just wondered, following what was being said earlier, if there were any statistics about how often the result of referendums have disappointed the people who brought them in? I think it was Professor Butler who said that governments tended to resort to referendums if they thought they were going to win them, but there actually seemed, it occurred to me, to be an awful lot of examples where the result has gone the other way. I suppose, even with the European referendum in 1975, that the keenest proponents of that referendum initially were those who hoped that there would be a “no” vote rather than a “yes” vote, so I just wondered if there were any statistics on that? The other point that I also wanted to raise is arising from what was said about the relationship of referendums to opinion polls because, if I think of, for example, the referendum in the North East, there had been a lot of opinion polls in previous years which had shown support for a regional assembly, even though the actual referendum result was very strongly against. I just wondered if you both felt that referendums had the danger of ossifying a situation when representative democracy is more capable of being flexible and responsive to a very strong change in public mood, whereas a previous referendum result ties you down for quite some time?

Professor Butler: Two examples hit me immediately as you asked the question. One is de Gaulle in 1969 who had a referendum on devolution, lost the referendum and resigned. You could argue that perhaps he was getting near to the age when he wanted to resign, but it was definitively the referendum that triggered his going. Secondly, you have got the referendums in France and Holland in 2005, it was Holland’s first ever referendum which made the crucial difference to the first Lisbon Treaty. In both cases, it was a shock to the incumbent government when almost all “good men and true” in both countries went for the “yes” vote and they were stumped by the electorate. Obviously, it is a dangerous area to go into and people do get it wrong because referendums may not follow the ordinary rules. People going into the polling booth are remarkably free from party constraints. There may be a strong party lead and they may be good loyal party people, but at the same time they are free to do what they like. It is like a free vote in the House of Commons when unexpected things can happen if you genuinely let people loose.

Professor Hazell: I would only add that yes, there is a very big difference between opinion polls and referendums, so to those who ask, “Why have referendums when we can hold opinion polls?” opinion polls are, on the whole, pretty shallow and the public give off-the-cuff answers which are cost-free. In a referendum, they are voting for real and that concentrates the mind, so I think the instance you quite correctly cited of the North East Regional Assembly, where the opinion polls suggested that it might be narrowly carried and on the day four to one voted against, is not the only example where the real result has been different from what the opinion polls suggested.

Q10 Lord Shaw of Northstead: A basic question must surely be: is the referendum really compatible with the UK’s system of parliamentary democracy? If it is, if so, in what way should the referendum be used as part of such a system? For example, if it is decided that a referendum is wanted and is suitable, should some of the parliamentary procedures dealing with the motion be gone through before the final vote is taken by way of referendum?

Professor Butler: Well, all of the referendums we have had have actually been on the basis of legislation. Specific legislation laying down that what should happen. I think referendums are quite compatible with parliamentary democracy, and the example I could offer is Australia. Australia has a decent parliamentary democracy very much modelled on British ideas and it has had 48 referendums in its history. People cite referendums as anti-parliamentary. In Britain in 1945 Attlee denounced referendums as un-British. More recently in 1975 in a flamboyant statement Reggie Maudling said he did not give a damn about the referendum, it was unparliamentary and it was unpopular. It is rather interesting that in the last ten or 15 years the referendum has been taken for granted, not an alien thing, because it was seen by quite a lot of people as an alien thing 30-35 years ago and it has now become part of the vocabulary of politics. “Let’s have a referendum” is a cry that any party that is in opposition is likely to fling up when it does not like something that is happening.

Q11 Lord Shaw of Northstead: But would you have, say, a series of debates and perhaps some of the procedures in Parliament before the final vote were taken by the country?

Professor Butler: I think so. I find it hard to imagine an issue coming up that would not be a matter of parliamentary discussion and debate. Anyway, as we now stand at the moment, there is no provision for a
referendum and a referendum would actually require primary legislation. It may be that you are going to recommend some primary legislation which would allow government to switch on a referendum like that and have it in a few weeks’ time, as they are apparently doing at the moment in Iceland, but we are not there yet and I cannot conceive that there would not be a great parliamentary row if anybody tried to shunt through a referendum by standing order.

Q12 Chairman: What we recommend is going to reflect your evidence!

Professor Hazell: I agree that a referendum is perfectly compatible with representative democracy. As David has said, no referendum can be held in the UK without legislation, so, in effect, the elected representatives pass a law saying that they want a referendum to be held. In terms of your second question about whether a referendum should be pre- or post-legislative, I do not think there can be a universal firm answer. I argued in the mid-1990s in relation to devolution that the referendum should be a pre-legislative one and I did so, in particular, looking at the context in Wales where in the first devolution referendum held in 1979 the people of Wales had voted by approximately four to one against the then proposed Welsh Assembly, and it had taken an inordinate amount of parliamentary time and political capital on the part of the then Labour Government to get the Wales Act on to the statute book. I thought that, if a new Labour Government wanted to revisit devolution, it should, in the case of Wales at least, first ask the people whether they were interested in devolution, and that is why I strongly recommended a pre-legislative referendum, which was held in 1997 on the basis of a White Paper, and I would argue that the White Paper was sufficiently detailed that those people who were not interested in Wales who bothered to read the White Paper had a clear idea of the main proposals for the Welsh Assembly.

Q13 Lord Shaw of Northstead: Was that White Paper fully discussed in the Houses of Parliament?

Professor Hazell: Your legal adviser may be able to help us; he is a much greater expert on Wales than I am. The legislation, and it was, I think, the first Bill passed by the new Labour Government in 1997, authorising that the referendums went through within a couple of months, was probably passed in June, the White Paper was published in July and the referendum was held in September, so the text to the White Paper probably was not available during the parliamentary debates about the referendum.

Chairman: “Exhaustive” would not be the word that sprang to mind!
only referendum that has been held where the Electoral Commission was required to supervise it was the North East referendum in the autumn of 2004 and, from memory, the one difficulty that I remember being reported was identifying campaigning groups on either side because the Electoral Commission is empowered under the 2000 Act to make grants to help finance the “yes” and the “no” campaigns and, for that purpose, they, therefore, have to identify one umbrella body on each side of the argument. I cannot remember, Lady Quin might be able to help, on which side they had a difficult decision to make.

Q15 Baroness Quin: I think it was the “no” side initially.
Professor Hazell: Thank you. There were two candidate groups, as it were, both applying to the Electoral Commission for funding. From memory, I think the funding in question was £150,000, so these were not large grants. In the national campaign on a much more high-profile or controversial issue, let us postulate entry into the single European currency on which, incidentally, all major political parties have a commitment that a referendum will be held if the Government ever wanted to take us into the euro, you can imagine it would be more difficult potentially for the Electoral Commission, and we come back to the issue again about controlling campaign expenditure because there would be possibly very large private donations funding one or the other campaign. I hope this Committee might ask the Electoral Commission themselves both about the experience in 2004 and about how prepared they feel for any future referendums.

Q16 Lord Norton of Louth: So is there any way we can address it because David Butler mentioned the massive disparity in funding in the campaigns in the one national referendum we had and I think there was a similar disparity, was there not, in Wales in terms of the funding there between the “yes” and “no” campaigns, so the 2000 Act was designed to try and address the problem, but, from what you were saying earlier, you do not think the 2000 Act is actually adequate?
Professor Hazell: No. I think it is important and I support the provisions in the 2000 Act which provide for the making of grants from public funds to give each campaigning umbrella body a minimum sum of campaigning money. Where I am not confident about the provisions is that there are detailed provisions enabling the Electoral Commission to regulate campaign expenditure and, because, as I said earlier, by definition, the campaigning bodies will be ephemeral, it will be quite difficult through legal mechanisms and subsequent legal enforcement to control the expenditure by bodies which may have gone out of existence.

Professor Butler: I am ignorant of the details of Irish law, but what is remarkable in the Irish story is that in the first Lisbon referendum a leading, flamboyant, rich man charged in and moved opinion really quite substantially in the opinion poll evidence and got a “no” vote. He crashed in again in the second referendum and had no impact at all. I do not know what the regulation is and what would prevent effectively that kind of intervention. It is the definition of what is a campaign activity, what happens in the press and so on and how far the Electoral Commission can start censoring what is in the press.

Q17 Baroness Quin: I just wanted to know if either of you wanted to add anything about your knowledge of the international experience of referendums, and are there any cases that we should consider as either good or bad examples in the use of such referendums?
Professor Butler: I can answer that in relation to one particular question which you raise, which is conditional majorities. There were quite a wide variety of rules in Denmark and in Weimar Germany of what happens. In Weimar Germany, it had to be a positive vote of, I think, more than 50% of the electorate; the thing to do if you are a negative person is to say, “Don’t vote” because a non-vote is equivalent to a vote in those circumstances. There are slight variations in the thresholds in Denmark. There is one technical question that comes if you have thresholds and that is: what is the electorate? I remember arguing with John Smith about this in 1978. The real electorate figure is, we know, bogus really. The electoral register represents only about 90% of the electorate and about 10% of the names are dud names anyway, so what is the electorate? What about people who are plurally registered and so on? You have got to get your facts very accurately done if you have thresholds brought into the argument.

Q18 Baroness Quin: Could I also follow up on something that I asked earlier which Professor Hazell replied to, which was referendums and opinion polls, and refer to the Irish example which Professor Butler talked about a few minutes ago where obviously a second referendum was held, but only a very short time after the first referendum? Professor Hazell, in his reply to me, seemed to indicate that people really focused on the subject at the time of the referendum and, therefore, in a way, the referendum result is more valid than an opinion poll, but this seemed to be an example where then opinion shifted subsequently, not because of changes in the Lisbon Treaty, but because of the climate whereby suddenly the Irish electorate felt they would rather be part of this larger organisation than, at a time of financial turbulence, being outside that organisation or causing difficulties
for that organisation. What does this mean in terms of what we think about referendums? Is it not rather cynical to simply hold a second referendum a short time after the first to try and get a different result, or is this completely valid if public opinion has genuinely changed?

Professor Butler: I think it can change and is meant to change. I think in Ireland the establishment was saying, “Vote yes” the first time, but did not much bother about it. They took for granted that they were going to win the first time and, when they lost, they were shaken and they pulled their fingers out and really got going on the second referendum, put money and effort into it and won by even more than they expected to.

Q19 Chairman: Professor Hazell, the final word?

Professor Hazell: If it is a final word, may I briefly say something about future referendums, and, forgive me, this is changing the subject a little bit. As a small piece of homework for this session, I tried to check what the commitments are of the major political parties in relation to future referendums and it is worth noting, I think, that all the political parties have given commitments to hold referendums on certain topics. Taking them in order and starting with the Labour Party, there are, in effect, commitments to future referendums already on the statute book in terms of Wales where the Government of Wales Act 2006 requires that there should be a referendum before primary legislative powers of a comprehensive kind are conferred on the National Assembly for Wales. In relation to Irish unification, there is a longstanding commitment, which I referred to, first enacted in the Northern Ireland Constitution Act of 1973. Also, there is provision at local level, which we have not discussed, for a referendum before any local authority decides to have a directly elected mayor, and that is in the Local Government Act 2000. In terms of future commitments, the Labour Party has a longstanding commitment that there will be no change to the voting system at Westminster without a national referendum, and that was in the 1997 manifesto, the 2001 manifesto and the 2005 manifesto. It has a longstanding commitment, which we have touched on, not to enter into the European single currency without a referendum, and it had a commitment not to ratify the proposed EU Constitutional Treaty, when it was still called a “Constitutional Treaty” before it became the “Lisbon Treaty”. In terms of the Liberal Democrats, they too have commitments for a referendum before entering into the euro and for any change to the voting system, and they have a longstanding commitment that there should be a referendum before adopting a written constitution, which is longstanding Liberal policy. The Conservatives also have a commitment that we should not enter the Euro without a referendum, and that was first given by John Major in 1996, they have this new commitment to legislate, to pass a law requiring a national referendum before the UK should ratify any future EU Treaty, and they have a commitment in their policy documents on local government to try to hold, I assume they would be, simultaneous referendums in eight or ten major cities on elected mayors, and that is in a Conservative document of last year, 2009, called “Control Shift”. In that same document, they have a pledge to give people the power to instigate referendums on local issues and, therefore, in effect, to open up the possibility of citizens’ initiatives in local government, but we have not touched on local government yet in this session and you may not want to open that issue up now.

Q20 Chairman: Well, Professor Butler and Professor Hazell, can I, on behalf of the Committee, thank you both very much indeed for being with us and for the evidence that you have given, and express the hope that we may keep in touch during the further course of this inquiry, if we may, to draw further on your wisdom? Thank you very much indeed.

Professor Butler: Can I just say how nice it is to have been at a meeting where nobody has used the solecism of “referenda”!
Examination of Witnesses

Witnesses: Professor Michael Saward, Professor of Politics, Open University, and Professor Graham Smith, Professor of Politics, Centre for Citizenship, Globalisation and Governance, University of Southampton, examined.

Q21 Chairman: My Lords, can I welcome on your behalf Professor Saward and Professor Smith to the Committee? We are being broadcast, so may I ask you, if you would be so kind, to identify yourselves formally for the record and then, if you wish to make a brief opening statement, please do so, otherwise we will go straight into questions.

Professor Saward: I am Michael Saward. I am a Professor of Politics at the Open University and prior to that at Royal Holloway, University of London. I am mostly a democratic theorist and that does not mean I do not know about the real world of referendums, but I have written a number of books and articles on democracy which deal with issues of direct democracy and referendums in principle as much as in practice.

Professor Smith: My name is Graham Smith. I am a Professor of Politics at the University of Southampton. Again, I do a lot of work on innovations in democratic practice, mixing empirical and theoretical material.

Q22 Chairman: Could I begin by asking what you think the key constitutional issues, as opposed to technical or legislative issues, are that we should be addressing in the inquiry that we are starting today? What are the key constitutional issues, in your perception?

Professor Saward: In a sense, the question could be understood in two interestingly different ways. One is whether constitutional issues are the only or the prior issues that might be considered the subject of future referendums, a topic that dominated the conversation that has just occurred, and the other is the constitutional provisions which might exist for future referendums, and it seems to me that they are quite interestingly related, but quite separate questions. On the first one very briefly, clearly constitutional issues, which I think can be defined (if you want me to come back to that, we can do so, it is tricky, but it can be done), are the prime, but not the only candidates if you were looking for a consistent and legally established procedure by which future referendums might be held. Particularly difficult and cross-party ethical and moral issues are a second category. Major party or manifesto policy commitments may be more controversial, the third category, and a fourth one, it seems to me, might be initiated issues if something like a form of citizens’ initiative were in place. They are on a kind of sliding scale of controversial nature, I suspect, and, as I suggest, I think those issues can be defined. On the different question of which constitutional issues need to be considered, it seems to me you can boil that down to the question: would this Committee be interested in ultimately concluding or recommending that referendums, perhaps not just for constitutional issues, were a good way to advance the state of UK democracy into the future? It could be the case, it could be argued, that the UK is behind not just Switzerland, the obvious case, but Denmark, the Netherlands, the US in terms of the states and many others in terms of the depth of its democratic practice, and there could be a case here not for saying that governments pragmatically decide when it suits them to hold referendums, but to take this legally out of the hands of political parties or government managers and put it on a more consistent and more independent basis. That would seem to me to be the, as it were, master constitutional issue. Behind that is the suggestion that the UK Constitution does not just evolve and there is not just, as it were, constitutional case-law that evolves, but there are positive decisions that could be made about the shaping of future provision for referendums more generally and consistently.

Professor Smith: I have not got much more to add to that actually. I would agree with Mike that the primary focus on constitutional issues is key and particularly those issues which would affect the practices of Parliament itself. There is always a worry that Parliament makes decisions about its own practice, and I am thinking here about electoral systems and those sorts of changes. I think those areas which, if you like, constitute the House itself can be problematic if left to politicians who obviously have particular interests. So anything that changes the dynamic and the relationship between the people and those who are elected, I think, are absolutely crucial issues for referendums. Also, I agree with Mike that it depends what you mean by “referendums”, “Referendums” is often used as an overarching term to include things like popular referendums and initiatives, and wrongly in some ways. But much does depend upon what the scope of your interest is. If you are just talking about the kinds of referendums that we have held in this country, then we just carry on pretty much the way we have been doing things. If you are looking at trying to change that division of labour between citizens and the elected politicians and others, then you are going to have to really think through quite carefully the implications for the constitutional arrangements.

Q23 Lord Shaw of Northstead: If we look at this, basically a referendum really compatible with the UK system of parliamentary democracy? If it is, and obviously yes, of course it is, in what ways would a referendum be used as part of such a system? For example, could parliamentary procedure be evolved...
in such a way that, after the processes of Parliament have been produced and carried out, the final decision should be left to some form of referendum?

Professor Saward: As you predict, my answer would be there is no incompatibility. Language matters here.

If the question is, is parliamentary sovereignty—a key term, of course, in the UK—compatible with direct democracy, the answer you are more likely to get is "no", but you mention parliamentary democracy and, putting it at its most general, the way to deepen democracy is to make it more direct, to bring people into more decisions as a matter of principle. The clearest institutional way in which to render the compatibility is to place parliamentary debates and, indeed, political parties at the core of a referendums initiating and campaigning process. The US states, for example, often get into difficulty and worry keenly about the bypassing of legislative processes by initiative and referendum rules and the ways in which those are practised. There is absolutely nothing that is not avoidable about that. It would be difficult to conceive in the UK of a consistent and legal basis for referendums in the future which did not put parliamentary debates at their core, which did not conduct key referendum votes once Parliament had done its work which gave Parliament and, indeed, parties the key role in the conduct of referendum campaigns. This would be quite compatible with practice in a number of the smaller European democracies. There are different rules, hugely varied rules, but neither in the case of Parliament nor any other case I can think of is there any necessary incompatibility between parliamentary representation, indeed representative democracy more generally, and this particular form of practice of direct democracy. Can I add one rider to that? There is a lot of representation going on in any form of direct democracy, above all referendums. The 2000 Act, which was part of the conversation you just had, as Professor Hazell pointed out, talks about umbrella groups which may receive a certain amount of public funding. These are representative groups; they are just different sorts of representatives. Representative politics, as it were, in a more complex way runs right through any referendum campaign.

Professor Smith: I have a terrible feeling that I am going to spend most of this session saying, “I agree with what Michael just said”.

Professor Saward: Disagree with me!

Professor Smith: I will try and think of something to disagree with. As now structured there are no problems at all because we have a system for running referendums that is compatible. Of course, Switzerland still has a parliament and a representative democracy, it just extends the scope of citizen participation. Countries which make more use of popular votes still have parliaments, still have legislatures, they do not disappear, it is just that they rearrage the constitutional furniture.

Q24 Baroness Quin: On the international examples, are there examples that either of you would commend to us in terms of countries which have seemingly clear and good rules about when and how referendums should be held? Similarly, are there ones that you feel are bad examples of referendums?

Professor Smith: I think it is incredibly difficult because the constitutional arrangements are so different between countries. It depends where the direction of travel is. If it is towards some of the things that Michael was alluding to, the idea that there might be opportunities for citizens to initiate, then of course there is an enormous difference between going to California or Switzerland. They do things completely differently and, therefore, it has a massive effect on the way that politics occurs in those places. One example of a process that I found particularly interesting is in British Columbia. That is helpful because Canada is a Westminster-style polity and they do not use referendums that often at state level. The executive decided that they needed to review the electoral system and that it should not be left in the hands of politicians to decide what the referendum question should be; so they established a year long Citizens’ Assembly of 160 randomly selected citizens who then learnt about electoral issues and put forward a proposal which then went to a referendum. I quite like that idea of, “Oh, yes, we have a political problem, we need to change the electoral system”, but then saying, “and it’s not necessarily the politicians who should decide what the choice is, we are going to hand that over to a different body”. It is those sorts of examples that one should look at: the imaginative mixing of a referendum with other democratic innovations. Very often when we think about things like referendum campaigns we are very much focused on the “yes” and the “no” sides, but why are we not thinking about how we might promote a structured debate within society as a whole? I think the British Columbia example is interesting because it is so different.

Q25 Baroness Quin: On the Californian example, which you also mentioned, can I ask what each of you think of that as a practical example of a citizens’ initiative? I understand that for good or bad it has only left about a quarter of the state’s budget under the control of elected representatives. Is that a good thing or not? What do you feel about this?

Professor Smith: I think California is at the extreme end. It is interesting when you look at what happens in Switzerland because in California successful propositions go straight to a vote bypassing the legislature completely but in Switzerland there is a period of reflection by the legislature itself, bringing in the proponents just to see whether they can find agreement. Popular vote happens if agreement is not
found. One of those polities tends to swing a lot and the other is quite stable. There are some problems with the way the Californian system is structured, I must admit, but there are some pretty poor legislatures as well which make bad fiscal decisions. Let us compare like with like.

Q26 Chairman: Can I ask a brief supplementary to your previous question, Lord Shaw, when Professor Saward said that he could define “constitutional issues”, which should trigger a referendum? I wonder if the Professor would like to elaborate on what such “constitutional issues” would be?

Professor Saward: I think what I said was that it is possible to define it. It would be possible for this Committee to think very carefully about how to define it. In principle it is definable. The place I would start to define it—now I am choosing my words particularly carefully—is to suggest that constitutions are essentially about rules and rights which have generality, in other words they are not confined to specific policy domains.

Q27 Lord Norton of Louth: I remember we had these very good debates when the 2000 Bill was going through and there was a proposal that there should be referendums on constitutional issues when we raised the problem of how to define it. It was then refined to issues of first class constitutional significance, and then the question was what was the difference between second class and first class. Even if you take your definition, you lead to what you might call practical problems because some of those could be low-level rules where you might put it to a referendum and nobody bothers to vote. How do we refine it in a way where we have got a definition that, if you like, is operational or could be operational in terms of an actual referendum?

Professor Saward: To take one step back, the role of this Committee could well be to come up with a stipulative definition of precisely that with a number of riders and a number of those riders could be illustrative examples of what would fall within that category. You mentioned the work around the 2000 Act and you may well have done that kind of work in some detail then, but it seems to me that that particular question cannot be advanced unless there is a strong stipulative definition either to agree with or partially or wholly argue against. I do not mean to duck the question at all; I am not a legal scholar so I am a little bit careful with the question. This is an enormous opportunity for this Committee to put something up about where the boundaries of such issues may reasonably be thought to lie and see what reasonable or other objections or amendments to those others may put forward.

Q28 Lord Shaw of Northstead: Dealing with the question of who initiates a referendum, the inference has been that, in fact, governments initiate them very often when they are in an awkward spot and do not want to take the decision themselves. It has come up that there were instances of other people initiating them. How, in fact, would that work in this country? To me it seems appalling if Parliament was to be bypassed in a way by the setting up of another authority, possibly with a committee and so on, with debates ensuing and all the rest of it, to decide as to whether or not there should be a referendum. That surely is not being suggested by anybody, is it?

Professor Saward: I am not so sure. Not many weeks ago in a speech at my university David Cameron talked a good deal about the citizens’ initiative. He may well have intended that to be around local government issues, but it seemed to me he left the door a little open on that as to whether it might involve national issues. In direct response, citizens’ initiative, sometimes CIR—citizens’ initiative and referendum—where it is used around the world uses different threshold requirements, so a certain percentage of the electorate, for example, or a certain specified number (hundreds or thousands, whatever it may be), of signatures on the appropriate form gathered in the appropriate way need to be provided.

Professor Smith: In the appropriate time.

Professor Saward: In the appropriate time under specific legal rules to trigger a vote. On the second part, and this goes right back to the core issue, does it not, bypass or undermine existing institutions of representative government—

Q29 Lord Shaw of Northstead: Yes.

Professor Saward: —there is no reason in principle, and I know that is often a phrase used to escape an issue, why an initiative may not initiate or trigger under a set pattern of law a parliamentary debate prior to, or perhaps even instead of or in conjunction with in some way, a popular vote in the form of a referendum. In other words, there is nothing about the institution of the citizens’ initiative which necessarily says it cannot be used in conjunction with or to prompt or to help set the agenda of parliamentary procedures.

Professor Smith: In answer to your question that no-one is surely suggesting this, lots of people are suggesting it. But currently it is mostly being suggested for local government.

Q30 Lord Shaw of Northstead: You talked about somebody in the public initiating this.

Professor Smith: Yes, that is right. Not somebody, a lot of people.
Q31 Lord Shaw of Northstead: Even so, that should siphon through to somebody in Parliament doing it, should it not?  
Professor Smith: Not in all systems.

Q32 Lord Shaw of Northstead: I want to deal with our system.  
Professor Smith: In our system we do not have anything like it so we will be making the rules up as we go along in that sense.

Q33 Lord Shaw of Northstead: Would you recommend it?  
Professor Smith: I would be one of those people you probably would not be very pleased with. I would recommend that you had something that allowed the citizens to initiate and I would probably go along with Michael that what it initiates is another question. It could initiate debates within the House, but one of the problems with those sorts of initiatives is they often get lost in a committee somewhere. The danger here is that people are looking for democratic innovations, democratic change that will be meaningful, and then they get cold feet and say, “Well, we are going to have a form of initiative but it will only generate a debate in a select committee” or something similar. Then often it becomes a worthless piece of institutional architecture. You have got to think quite carefully about how far you want to go and why you are going there. There is widespread criticism of the current political culture in this country that there are not the opportunities for citizens to participate in politics. The citizens’ initiative is surely one of the options available for realising that possibility of meaningful participation.  
Professor Saward: Just one quick rider to that. The Swiss situation is highly distinctive in many ways and if there is a form of direct democracy it is being practised almost certainly in some form in Switzerland. It is interesting that the initiative process in Switzerland is dominated by the mainstream political parties. This has been suggested not least by Ian Budge, author of a key book about the potential for referendums and initiatives in the UK, who has suggested that especially minority parties in Parliament, but not only them—and this is where the pragmatic self-serving, as it were, political side of it perhaps comes back into the picture—if there is an initiative and referendum process in place they will attempt to use it. For example, if a minority party in a legislature feels that its issue is not going to get the airing it wants on the floor of the House then it may well want to use the initiative and referendum process to trigger a debate even if it does not actually trigger a referendum. The parties are absolutely crucial as to which issues are discussed. The Swiss case is distinctive, but not so distinctive that it is well outside the possibilities for the UK on this topic. In answer to your question of who initiates, often it will be established political party figures, parties themselves officially, as it were, minor parties wishing to have an impact on the agenda as well as—I do not know if I am reading this into your thoughts—potentially rogue figures from outside the political system.

Q34 Lord Shaw of Northstead: Say it is a powerful body within the Parliament, the point is that Parliament is governed by the Government and they have the majority. I was imagining that you thought there would be another authority outside which would decide “That is the subject of a referendum and it ought to take place and then the Government has to follow by carrying out the proceedings”.  
Professor Saward: It seems to me the strengths of the referendum for the UK, and arguably elsewhere, are strengths of conjunction. In other words, how they work in conjunction with established democratic institutions. The weaknesses, and this is as true of the initiative as of a referendum, are weaknesses of isolation, whether they are practised here or elsewhere: are they compatible with what we do already, compatible with existing core democratic institutions, above all Parliament? This is a good example of where that principle and fact kicks in. It would not be impossible, and many of the Americans have done it to construct the system that you are concerned about whereby the legislature effectively does get bypassed by a certain kind of initiative process, but that is optional and it is arguable—Graham and I might disagree slightly on this, I am not sure—that in the case of UK constitutional tradition it would not make sense. I would argue it would not make sense to construct a system which would threaten to bypass parliamentary debate or procedure.  
Professor Smith: I think it is highly unlikely to happen. What I see as the best arrangement for a democratic polity is not where we are now and I agree with Michael that we are unlikely to see that kind of initiative emerge any time soon. Interestingly, both parties are playing with this idea at local government level. Apparently at local government level we can mess around as much as we like, but in national politics that cannot challenge parliamentary sovereignty. Local government is not your concern but it is an interesting development.

Q35 Baroness Quin: Earlier on, and I think you were listening to the earlier session that we had, Professor Butler seemed to be saying that he saw referendums essentially as a political device rather than as a sort of point of constitutional principle. I do not want to distort what he said. Can I take it that each of you think that there should be actual rules about the role that referendums should play in our society and the circumstances in which they should be called.
**Professor Saward:** Yes, that is certainly how I feel. Your legal adviser would know much better than I, but presumably a very interesting particular type of Act of Parliament could bring about a principled and consistent basis on which referendum, and perhaps initiative and referendum, could be established for the UK. Professor Butler is a very eminent expert on these issues and had been very much involved as an expert, and in some ways as an expert participant, in the key referendums, for example the ones in the 1970s, that the conversation was on earlier. The experience of the past is absolutely relevant. The experience of the past is that the referendum has been a political tool which has been used or seen as something that could be used pragmatically by parties and party leaders in often sticky political positions. That remains an interesting and germane fact to these conversations but it does not get away from the point that, yes, you could have a consistent, more principled legally established basis for the referendum.

**Professor Smith:** As the Referendum Act exists at the moment referendums can be nothing more than a political tool for government. Just read the legislation: it requires other Acts of Parliament in order for it to be activated. I would prefer to see something like a constitutional referendum where there were certain issues where a referendum was required and we can debate which ones. That was something we were discussing earlier: what those issues should be. One of the problems here is that the referendum is left in the hands of the Government. I think that is a problem if government can either ignore or bring in a referendum as and when it suits its purpose. It is not a misuse of the referendum because that is a power available to the Government, but it is not the only way to use a referendum.

**Q36 Baroness Quin:** Do you have any thoughts about the types of questions and issues that referendums should cover within the constitutional umbrella? I am going back to what I was asking earlier in a way. It seems to me that one of the traditional values of representative democracy is that representatives are elected to carry out detailed scrutiny work of treaties, or whatever it is, and submitting something like the Lisbon Treaty to the public is almost against that kind of principle because you are talking about such a complicated, long document. It is not that people are incapable of understanding it, not at all, but what is representative democracy about if it is not about electing people to carry out that kind of detailed scrutiny work on behalf of the electorate.

**Professor Saward:** There are two or three really key issues in there. One is the issue of complexity and this is very important. There is a view that there are some issues that are technically, or constitutionally, so complex that they cannot be boiled down to a simple “yes” or “no” option. This is putting it too simply, but we are short of time. I would say that is not the case. There is not an issue where you could not locate something very like a “yes” or “no” principle at the core of it. That is an answer to one issue in there. The Australians have recently revisited the public information aspect of the way referendums are conducted nationally in Australia. A Parliamentary Committee felt, not least in the light of new communications technology, that what they have done so far has been strongly inadequate. They are looking at YouTube and Twitter for providing public information, and at levels of funding for public information around specific referendum campaigns. They felt they had not got that right, in spite of, it seems to me—I am not an expert on the detail of this—a good deal of attention in Australia given to how the public has been informed. Complexity, yes, but can it be boiled down to a matter of principle? I would say yes almost all the time. Public information processes need to be adequate to the task of complex issues and, yes, absolutely there is a lot of creative work to be done there, it seems to me. I feel a bit inadequate on this question. It was the one we were discussing earlier, in a sense, on how do you define the boundaries of what is a constitutional issue, for example, and what is not. I am not sure I can provide more that is helpful. Again, a stipulative definition would be helpful. I would start with things like rules and rights and their generality, rules and rights that are not exclusively applicable to any given policy area, such as health, education, environment and so on. Any significant shift in the formal location of political authority—would need to be the focus of it. Lord Norton, from the comments a moment ago, I suspect you have probably been through all of these options and others in the context of the work a few years ago. Again, there is no such neutral definition out there. Is that a blockage or is that something interesting? No, that is an opportunity, for example, for this Committee to press what it would want to stipulate.

**Q37 Lord Norton of Louth:** I have two points that are not particularly related. Just on this point about principle, you say you could resolve it in terms of a “yes/no” vote on an issue and boil it down to a principle where you could argue “yes/no”. Is there not a problem though that there may be other principles which people could agree to which then conflict with the principle that is being put? For example, if you had a referendum on “Should we protect privacy, have a privacy law?” there is a good chance people may vote “yes” rather than “no”, but if you had a separate referendum on “Should the freedom of the press be protected?” you would probably get a “yes” vote and you have then got the
problem of resolving those two. The problem is you might just have a referendum on one and not the other, so there is that issue of principle. The question I was going to ask about process is very different and relates to what you were saying at the beginning. There is what do you hold a referendum on, but then there is the process by which you hold the referendum, and you were saying that we ought to think about rules that should govern it. Taking the point about the 2000 Act not being a generic referendums Act providing necessarily the rules and procedures, from a procedural point of view is there anything that is obviously missing that you would recommend in substantive terms, for example should there be a threshold requirement or anything of that sort?

Professor Smith: There is an interesting issue about the referendum question in the existing Act. The Electoral Commission is consulted, but it is not clear what happens if the Commission thinks it is a very poor question. It could send it back to the Secretary of State and the Secretary of State could say, “The Electoral Commission thinks it is a very poor question, let’s carry on with my very poor question”. He could still do that. There needs to be something in there about ensuring that the question is fair and that needs to be done independently. That has not been resolved adequately. Again, that is something about taking the power away from a Secretary of State. That was one thing that struck me about current legislation.

Q38 Lord Norton of Louth: The original draft of the Bill did not even have a requirement to consult the Electoral Commission; it was only because I moved an amendment.

Professor Smith: I was glad to see it was there. In terms of thresholds, Michael had more to say about this. I do not think you can stipulate a general threshold for all referendums—this may be a point of disagreement, I do not know—it depends on the type of issue. Just to go back to a slightly earlier question: if we are going to have, for example, two different types of referendums, one that is a constitutional referendum where if the Government wants to make a constitutional change, a referendum has to occur, then we might think about thresholds because they are going to be questions of a fundamental type; but if it is the more occasional government-sponsored referendum, and I imagine both types would still exist, after all we are not suddenly going to move to constitutional referendums only, then thresholds would be more issue-specific. Deciding on a 50% or 60% threshold is a difficult judgment to make. Certainly concurrent majorities make some sense. There would be a concern, for example, in this country if a referendum went through and it was the South East only that voted en bloc. We might have to have some sort of regional concurrent majorities. That would be my sense of it, but I would have to do more thinking about that.

Professor Saward: I would be happy to say something on the threshold. It seems to me that the question of the threshold can be understood in two quite separate ways: in terms of turnout and in terms of voter percentage. In terms of specifying the percentage of the vote, say 60% for the sake of argument before a “yes” vote beats a “no” vote in a given referendum— I will cut to the chase on this—I think such stipulations are undemocratic in principle. They bias the option that favours the status quo over the option for change, they render votes in the referendum unequal, whereas one vote, one person, one value is fundamental to any democratic practice. They are the two main reasons. However, I think it is much more defensible on grounds that I do not have time to spell out, but on democratic grounds, to have turnout thresholds: for the sake of argument you need at least 50% of the electorate, not setting aside Professor Butler’s concern about the Electoral Roll. Different countries do this in different ways, but I would suggest as a guide somewhere between 50% of the electorate and the possibly higher figure of the turnout in the previous General Election would be roughly the kind of figure that often gets cited in debates and could be the one to play with. You would not want to set those thresholds too high as to render the referendum process theoretical rather than practical. It seems to me that they are the core issues.

Chairman: Professor Saward and Professor Smith, can I thank you both very much on behalf of the Committee for joining us on this wintry day and for the evidence that has given us an enormous amount to think about. Thank you very much indeed.

Supplementary letter from Professor Michael Saward, Professor of Politics, Open University

You asked for further comment on how constitutional issues might best be defined, and on recent recommended changes to the conduct of referendum campaigns in Australia.


Defining or distinguishing “constitutional” issues is difficult, perhaps especially in the UK. Nevertheless, it is realistic to aspire to a workable definition.
A key premise is that there is no neutral definition available. Defining constitutional issues is a political as well as a legal art. But I suggest that the appropriate guiding principle is that changes that would likely result in significant, encompassing and lasting change in the formal and general rules and rights which locate political authority should be thought of as constitutional. Generality matters because constitutional issues are not policy-specific—they do not pertain only to education policy for example. Lasting change matters because it is persistent or long-term changes that are most significant. Encompassing change is that which applies to all within the relevant political community—the whole UK in the case of a UK-wide change in the number of MPs, for example, or all of Wales for a significant shift in the nature and extent of the Welsh Assembly’s powers. Rules and rights for the location of political authority go to the heart of who holds the democratic authority to decide for whom, and how participation and accountability operate.

Pragmatically, many politicians and commentators in the UK share views as to what is a constitutional issue, views that can be brought into focus by using such a guiding principle. Changes in the electoral system, major changes to devolution, adoption of a new constitutional settlement for the EU, or changes to the number of MPs, for example, are widely accepted as constitutional issues. The Committee might seriously consider listing a set of such issues under an appropriate guiding principle. A pragmatically illustrated definition from the Committee, along these lines, may begin to generate consensus. Using specific examples of constitutional change would in turn prompt critics to be specific; they would need to say what cases they would include or exclude according to the guiding principles. In this way, the Committee may help to prompt clear, focused debate.

Clearly, any such definition would require interpretation; if referendums were to be a formal part of the UK constitutional landscape then a parliamentary committee—as opposed to the Government or an independent body—would need to interpret it in specific cases.

I would like to comment briefly on the overall strengths and weaknesses of the referendum as a democratic and constitutional tool, expanding slightly on my oral evidence.

The strengths of the referendum as a constitutional tool are strengths of conjunction and consistency. Its strengths in the UK would rest on its conjunction with other potential constitutional developments (e.g. clarification of the future of the House of Lords, or the potential adoption of such innovations as the citizens’ initiative). They would also rest in conjunction with other institutions’ roles (Parliament of course, but also political parties and local government). Enhancing the role of the referendum in the UK in conjunction with other institutions and developments may be seen as enhancing representative and parliamentary democracy.

By contrast, the constitutional weaknesses of the referendum are weaknesses of isolation and inconsistency. Where there is no firm legal basis for referendums and no clear or consistent constitutional relationship with parliamentary procedure, for example, the use of the referendum may be subject to manipulation and controversy.

In conclusion, my considered view is that there is a strong case in the UK for referendums on constitutional changes with turnout thresholds. There is also a case for rejective policy referendums (with turnout thresholds) based on either or both (a) major government policy commitments, and (b) products of high-threshold citizens’ initiatives. In either case, Parliament should vote prior to a popular referendum. There is a strong case for even greater use of the initiative and referendum at local government level.

1 February 2010

Supplementary memorandum by Professor Graham Smith, Professor of Politics, University of Southampton

Following the oral evidence I provided on 6 January 2010, I was invited to offer further reflections on a number of issues pertinent to the Committee’s work.

What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

The obvious strength of the referendum as a democratic device is that it provides citizens with exactly the same amount of political power in decision making on policy and constitutional measures. No other democratic innovation offers this degree of political equality and popular control. Where citizens also have the power of initiative they have equal power to set the political agenda. The potential of the referendum and other forms of direct legislation (eg initiative) to reshape the political division of labour between citizens and legislators should be given careful consideration given the level of public disaffection with the political process.

As with any democratic institution, referendums and other forms of direct legislation have weaknesses, some of which can be mitigated to some degree by careful institutional design. Some of the most common criticisms of the practice of referendums include:
— *Low and differential turnout.* Turnout tends to be lower than national elections—and even lower in those polities that use forms of direct legislation regularly (40% in Switzerland; 35% in California). However, participation appears to be selective—citizens turn out in higher numbers for more controversial ballots. Participation also tends to be uneven across social groups: as Wolf Linder famously argues, “the choir of Swiss direct democracy sings in upper and middle-class tones”. But this is a familiar problem for elections—it is not particular to referendums.

— *Repressive impact on minorities.* There appear to be relatively few propositions that have been successful in challenging minority rights. Recent research by Shaun Bowler and Todd Donovan suggests that in the US the success of repressive measures appears to be strongly correlated to factors such as community homogeneity, level of education and size of population (ie most prevalent at local level). They also point out that legislators can be equally as intolerant as citizens. We need to compare like with like. The potential for repressive propositions is also affected by the role of constitutional courts in the referendum process. In California the constitutional court can only intervene *after* a proposition has been passed; in Italy I believe the constitutional court can rule a proposition non-constitutional *before* it is put to a vote, thus offering increased protection to minorities.

— *Extent to which citizens are informed.* Critics of referendums suggest that citizens are not well-informed by the highly partisan debates that precede ballots and that money influences campaigns. Again emerging research from the US suggests that while citizens may not be fully informed, most use shortcuts to vote in line with their preferences: they use the judgements of trusted information sources (eg political parties, interest groups, media outlets, etc) to guide their decisions. However, to ensure as fair a process as possible, the strength of laws associated with (for example) truth-in-advertising and perjury is key, as well as a firm regulatory framework that includes limits on campaign spending, declarations of the sources of funding and independent provision of information. There is also growing interest in ensuring more structured opportunities for citizen engagement as part of the referendum process, in particular the idea of introducing “citizens’ assemblies” that allow a small cross-section of the population to learn about the issue and to make recommendations. This would ensure that there was a further trusted information source that represented the considered judgements of citizens, rather than only the established views of interest groups. The most impressive example of a citizens’ assembly to date is arguably the British Columbia Citizens’ Assembly. In this case the Assembly was charged with deciding on whether there should be a referendum on electoral reform. Although the subsequent referendum was lost, those citizens who were aware of the BCCA, tended to follow its recommendations.

*What are the arguments for and against the use of threshold requirements for referendums?*

The Committee will need to consider at least three different forms of threshold:

— size of majority required to pass a referendum;

— whether concurrent majorities should be required; and

— the time and number of signatures required to initiate a proposition.

**Overall majority**

The requirement for the size of a majority varies between political systems and type of referendum—usually 50%, but for constitutional issues occasionally 60%. The higher level clearly makes it more difficult to bring forward change and clearly gives an advantage to those supporting the status-quo, and so on *democratic* grounds is difficult to justify.

**Concurrent majorities**

Rather than simply requiring a majority of votes, many referendums—in particular constitutional referendums—also require concurrent majorities, ie a requirement that the proposition is supported in more than half of the geographical areas that make up the polity. For example, in Switzerland, a constitutional referendum has a double majority provision: an amendment requires a majority of the votes cast nationally and a majority of votes in over half of the 23 cantons. For a UK-wide referendum, this might equate to half of the “regions” of the UK. Concurrent majorities ensure that a proposition has widespread support across a polity.
Concurrent majorities tend to be geographic in nature, although there is no reason why such a requirement could not be based on other socio-demographic criteria. For example, one could consider requirements for majorities across different social groups where a proposition has potentially repressive impacts, thus offering further protection to minorities.

Proposition requirements
If the Committee is considering the idea of some form of initiative—allowing citizens to bring forward propositions (whether this generates some form of parliamentary debate through to a popular vote)—then it is important to consider the relevant thresholds for the gathering of signatures: too low, then parliament will have to respond to many frivolous propositions that have little public support; too high and the public will quickly become disaffected. The number of signatures required and the time allowed to collect signatures varies across polities and types of direct legislation. In Switzerland, for example, a constitutional initiative requires signatures from 100,000 citizens (about 2% of the population) collected within 18 months, whereas a popular referendum requires only half the number of signatures, but collected in ninety days of a law’s publication or an international treaty. Compare this to California, where an initiative requires a higher number of signatures to be collected in only 150 days.

It is also possible to introduce concurrent thresholds into the signature gathering process: in Massachusetts no more than 25% of signatures can come from the densely populated and urban Boston area.

What would you identify as the most important components of a referendum campaign? What issues need to be borne in mind in order to ensure the effective operation of a referendum campaign?

As I have already stated, the strength of laws associated with (for example) truth-in-advertising and perjury is fundamentally important to ensure a degree of fairness. The specific regulatory framework for referendums needs to ensure limits on campaign spending, declarations of the sources of funding and independent provision of information (this could be a role for the Electoral Commission).

Again, consideration should also be given to promoting structured engagement opportunities for citizens, in particular the type of citizens’ assembly that was utilised in British Columbia in 2004 to consider the issue of electoral reform.

Does the Electoral Commission have an appropriate role in relation to referendums? How would you assess the work it has undertaken in this field?

Two areas where the Electoral Commission’s role needs to be reconsidered are in relation to the referendum question and provision of information. While the Commission is charged with publishing a statement on the intelligibility of any question, the relevant Secretary of State is not required to rephrase the question if the Commission believes that it is unfair or unintelligible. Arguably the balance of power needs to be reconsidered so that the Commission can override the Secretary of State to ensure fairness and intelligibility.

Additionally, the Electoral Commission could be charged with producing an accessible information booklet that presents the arguments for and against the proposition. Citizens would then have a reliable source of information providing an overview of the issues at stake. Independent agencies in other polities are charged with such a function.

Given that there have been no referendums since the Political Parties, Elections and Referendums Act, it is impossible to assess the work of the Commission in this area.

For the sake of brevity, I have not referenced all the studies on which this evidence is based. More details can be found in chapter 4 of my book Democratic Innovations (Cambridge University Press, 2009).

1 February 2010
WEDNESDAY 13 JANUARY 2010

MEMORANDUM BY UNLOCK DEMOCRACY

1. What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

The strengths and weaknesses of referendums are essentially the same as the strengths and weaknesses of elections. Indeed Unlock Democracy believes that referendums should be considered as single issue elections.

The strengths of referendums are:

- They strengthen popular sovereignty by giving people a say and allowing voters to mandate change.
- They are one of the few ways in which under our current constitutional settlement Acts of Parliament can be entrenched. This is not to say that the Acts are codified, just that if a measure has been endorsed in a referendum it would not be politically possible to repeal it without a further referendum. This is particularly significant as it ensures that constitutional changes, such as devolution, have some time to establish themselves rather than being subject to an immediate repeal if there was a change of government.
- Where there are effective public education campaigns referendums can create high levels of support for significant changes to the way we are governed. They create a public space for political discourse about important issues so that once the referendum is concluded there is often a degree of consensus about the outcome. This can be seen in the significantly different levels of support for the European Union in countries where there are referendums on the treaties compared to the UK where the public have no direct say on further European integration. The 2009 Eurobarometer survey found that while only 30% of UK respondents thought that membership of the EU is a good thing 65% of Danish respondents and 72% of Irish respondents thought that their country’s membership of the EU was a good thing. Whilst referendums are by no means the only factor that influences public attitudes towards Europe they are a significant factor because they enable there to be a genuinely national debate about contentious issues.
- Referendums are popular with the public as they are seen as a fair way of resolving difficult or significant decisions. David Drew MP conducted a survey of his Stroud constituency on constitutional reform and found that 75% of his constituents agreed that governments should make greater use of referendums with many respondents saying that they felt referendums were "real democracy".
- Referendums can help to counteract the prevailing sense of cynicism and powerlessness.

The weaknesses of referendums are:

- They can lead to the simplification of very complex and nuanced issues. This is because of the need to make them understandable to a population that may have little or no knowledge of the subject being decided. The need for a clear, simple question, usually with a “yes” or “no” answer, inevitably simplifies issues.
- Voters may not understand what they are being asked and misinterpret the question or they may use a referendum to vote on other issues such as the popularity of the government.
- If the public education campaign is not properly resourced or is seen to be biased the referendum campaign is unlikely to have a positive effect on political engagement and may even increase disillusionment with the political process.

1 Standard Eurobarometer 72 Autumn 2009 http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_en.htm see country factsheets for detailed data on individual countries

2 Up for Debate report capturing the views of the Stroud constituency on constitutional reform conducted by David Drew MP
As mentioned above these criticisms could equally be applied to elections and to public involvement in decision-making more generally. Certainly in the context of elections these are weaknesses that are accommodated and seen as being outweighed by the benefits of democracy. Unlock Democracy recommends that these weaknesses do not prevent referendums from being an important element in the UK’s political system.

2. What assessment would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?

Referendums have been used relatively rarely in the UK, particularly before 1997. There have been nine UK wide or regional referendums held since 1973: for a full list see the appendix. They have been on issues of significant constitutional changes that needed the buy in of the whole community, such as national sovereignty or about the transfer of powers to different levels of governance within the UK. Some of them have been UK-wide referendums while others, notably those on devolution have been held in specific parts of the UK.

Where referendums have been used to endorse devolution to Scotland, Wales, Northern Ireland and London they have effectively entrenched these changes in governance. Whilst they could be repealed by a simple majority in Parliament, it is inconceivable that this could be done without a further referendum. Equally when in 1997 the Labour Government wanted to introduce devolution to Scotland and Wales this would have been politically impossible without referendums even though constitutionally they had the power to enact the necessary changes.

The key lesson from the UK experience that Unlock Democracy would seek to highlight is the damaging impact of thresholds. This will be explored in more detail in question 8 but thresholds can negate the positive, educational impact of referendums. One of the reasons for holding referendums is to have a debate about a contentious issue and to reach a consensus that the community can unite behind. If the result is dependent on a certain level of turnout then those who wish to oppose the referendum do not need to engage with the debate and make their case to voters, they merely have to convince people to stay at home. This sets a dangerous precedent for democratic engagement. There is also a risk that people who have participated in the campaign and secure a majority but do not meet the turnout threshold will feel cheated and that political engagement is ineffectual.

The question of the public education campaign is also very significant. There have been very limited attempts at this in the UK and we should learn from the experience in New Zealand during the two referendum campaigns on electoral reform.

3. How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

There is no reason why referendums cannot be used effectively with a parliamentary system of government as demonstrated by the Republic of Ireland and New Zealand, which both have parliamentary systems and use referendums in certain specified circumstances. Referendums can either be used at a pre-legislative stage to indicate public support for a proposal, as with the referendum in Northern Ireland on the Good Friday Agreement, or to endorse changes made in Acts of Parliament as was the case with the devolution referendums.

Unlock Democracy would like the UK to move towards a codified constitution that sets out what government may and may not do in our name. However it is possible to set out when referendums should be initiated by government without going as far as codifying the constitution.

Unlock Democracy believes that referendums are an important tool in involving the public in decision-making and that while they should not be used frequently they have an important role to play. This inquiry is looking primarily at the use of government initiated referendums. Unlock Democracy believes that it should also be possible for citizens to initiate referendums in certain circumstances. This is explored in more detail in question 8.

4. Is it possible or desirable to define which issues should be subject to a referendum?

It is both possible and desirable to define which issues should be subject to a referendum.

Unlike many other countries the UK does not have a written constitution or a referendum law that sets out when referendums have to take place. This means that there are no mandatory referendums only optional referendums. The weakness of optional referendums is that they are generally more politicised as the government itself determines whether the issue should be put to a referendum and when it is put to a referendum. The controversy over whether there should have been a referendum on the Lisbon Treaty is a good example of this. Equally in some US states, the state legislature has been perceived as using referendums held
on the same day as other elections for political purposes such as mobilising certain sections of the electorate to come out and vote. This perception that referendums can be used to manipulate voters is not helpful.

Unlock Democracy therefore believes that situations when the government must initiate referendums should be clearly set out. This would depoliticise referendums and help to give the public a clearer sense of how they are governed.

Government initiated referendums should be held on significant issues such as constitutional changes and should not be held frequently. If referendums are held too frequently there is a danger that turnout will decrease and the legitimacy of the referendums could be undermined.

There are two ways that the UK could define what issues must be subject to a referendum without moving to a written constitution. The first would be to pass a Referendums Act which lists all the Acts of Parliament or clauses of acts that cannot be repealed or amended without a referendum. The second is to amend the key acts themselves so that they cannot be repealed or amended without a referendum. The first option would be clearer and easier for the public to understand and would therefore be our preference.

5. Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

Yes as outlined above in answer to question 4 constitutional issues should be subject to a referendum. Defining constitutional issues can be contentious in itself, particularly as the UK does not have a codified constitution. Rather our constitution consists of statutes, court judgements, treaties as well as parliamentary conventions and royal prerogatives. This makes defining constitutional issues in the UK context difficult but certainly not impossible.

Unlock Democracy believes that constitutional issues are those that change the contract between the government and the governed. These include, but are not limited to:

- transfers of power from the UK Government to other units of government within the UK or to supra-national bodies such as the European Union;
- Acts of Parliament to do with when elections should be held and entitlements to vote; and
- Acts of Parliament that define the rights of residents of the UK such as the Human Rights Act or any future Bill of Rights and Responsibilities.

Alternatively it could be decided that referendums on constitutional issues would only be required if they were not passed by a super-majority in Parliament. For example in Denmark referendums are held on transfers of power to international or supra-national bodies unless it is passed by a five-sixths majority in the Parliament.

6. Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

To date there has only been one referendum campaign run under the PPERA regulations and we do not feel this is enough experience to be able to judge the effectiveness of the legislation.

7. Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission’s work in relation to referendums?

Unlock Democracy believes that the Electoral Commission should be given responsibility for overseeing local as well as national referendums. There have been 35 local referendums held since 2001 on the issue of whether or not to have directly elected Mayors. These referendums are regulated by the Local Government Act 2000, rather than PPERA, and we believe that this is anachronistic. Changes to local government structure are significant constitutional changes and as such should be regulated by an independent body.

One of the criticisms made about the referendum held by Edinburgh City Council in February 2005 on whether or not to introduce congestion charging was that the question was overly complicated and was perceived to be biased. Ideally the body initiating the referendum should not be responsible for drafting the question and

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3 The 2006 referendum on the definition of marriage in Virginia was widely perceived as an attempt to mobilise Republican voters and prevent the Democrats gaining the Virginia senate seat which would give them a majority in the Senate. The state had already legislated to prevent gay marriages and civil unions conducted in other states from being recognised in Virginia so there was no confusion about the state’s position on the issue. Although the referendum was passed the Republicans were not able to hold on to the senate seat.

while we do not believe that the Electoral Commission should be involved in parish polls; where referendums are used by principal authorities to endorse significant changes, we believe the Electoral Commission should have a role.

8. What comment would you make on key components of a referendum campaign, such as:

— Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;

As outlined above Unlock Democracy does not support the use of thresholds in referendums. Whilst we understand the desire to ensure that there is a significant level of support for any changes proposed in the referendum, specifying a quorum does not necessarily lead to high turnout. Experience in Italy has shown that thresholds can encourage non-participation and that this sets a dangerous precedent. Rather than campaigning against a proposal and making a case to voters no campaigns can simply opt out of the process and rely on the threshold to prevent change. This is not conducive to a healthy democracy.

Thresholds can also lead to repeat referendums. For example in Palau seven referendums were held between 1983 and 1990 on the proposed compact of Free Association with the United States. In each referendum there was a simple majority in favour of the proposal but not the 75% required for approval in a referendum. Eventually the constitution was changed to remove the threshold requirement for referendums and the proposal was approved in an eighth referendum in 1993.

— the wording of the referendum question (including the appropriateness of multi-option questions);

Simple and clear wording of a referendum question is essential and we believe that the current system under PPERA where the politically neutral Electoral Commission is responsible for determining the wording of the question is the appropriate solution. It is generally simpler and less likely to lead to either spoil ballot papers or voters misinterpreting the question if the referendum involves one question with a yes/no answer. However there are some issues that cannot be reduced to this level of simplicity and multi-option referendums can be run effectively with minimal levels of confusion. The referendums on electoral reform in New Zealand held in 1992 and 1993 are good examples of successful multi-option referendums. In these instances there was an initial yes/no question followed by a multi-option question. Where multi-option questions are used the public education campaign takes on an even greater significance and the design of the ballot paper is particularly important.

— the design of the ballot paper;

As the Gould Report into the May 2007 elections to the Scottish Parliament found, the design of the ballot paper is critical to whether or not voters understand how to cast their ballots. This is particularly important where there are either different electoral systems being used, as in the Scottish elections, or where there is a multi-option referendum question.

It is essential that any ballot paper design is tested before it is used as this is one area where the unintended consequences of a change can undermine the legitimacy of an election or potentially change the result of a referendum. It had been assumed that the changes to the ballot paper design in Scotland in 2007 would make it simpler for voters—this was clearly not the case.

— whether there should be formal, constitutional triggers for referendums;

Yes as outlined above Unlock Democracy believes that there should be a Referendums Act that sets out when government is required to hold referendums. This is not to say that governments should be unable to hold what are often termed optional referendums on issues, just that the expectation should be that these are rare occurrences. We believe that this is essential both to depoliticise the holding of referendums and so that voters and political parties are clear about the circumstances in which referendums take place. The need for a referendum should not be determined on the basis of a government or political party deciding whether or not they are likely to win the campaign.

— whether a referendum should be indicative or binding;

Unlock Democracy believes that the status of the referendum should depend on the stage in the policy formation process that it is held. Specifically a referendum held on a policy proposal before legislation has been passed should be indicative whereas a referendum held after legislation has been passed should be binding. As already stated we do not believe that referendums should be used regularly but if the public are to be involved in decision making it is essential that they are listened to. At a pre-legislative stage it is possible for government
and/or Parliament to take on views expressed during the referendum campaign and alter the proposal accordingly. Also if voters are still unhappy with the proposal they still have representation in the process through their MPs. Therefore the referendum need only be indicative. However once Parliament has already taken a view and passed legislation on a proposal it is essential that the referendum is binding. Asking the public their opinion in a referendum and then ignoring it would be hugely damaging to democracy and participation in the UK.

Also if a referendum is triggered by a constitutional mechanism then the referendum should be binding while if the referendum is triggered by citizens through an initiative process then the referendum should be indicative although in reality it may be that such referendums were politically binding even if not formally so.

However it should be recognised that the distinction between an indicative and binding referendum may, in reality, not be very important. It is difficult for a democratic government to disregard the result of a referendum even if it is only consultative. This is clearly demonstrated by the referendums in the Netherlands and France in 2005 on the EU Constitutional Treaty. There was no prospect of either government saying that as the referendums were only consultative they would go ahead and ratify the treaty anyway.

— whether a referendum should ask broad questions of principle, or refer to specific legislation;

Again this would depend on the stage at which the referendum is being used. If the referendum is pre-legislative then the referendum should be on broad principle and the government and Parliament should work on the details of the proposals. However if, as is the case with the devolution referendums in 1997 the proposals have already been defined and passed by Parliament then the referendum should refer to the legislation or at least to the specific proposals in the legislation.

— whether a referendum should precede or follow statutory enactment;

Referendums can be used at either stage—it depends on what the government is trying to achieve with the referendum.

— campaigning organisations and the funding of campaigns;

There is little UK based evidence to draw on but Unlock Democracy is concerned that it may be possible to bypass the campaign spending restrictions by having a diffuse movement rather than a centralised campaign. Specifically if it is not possible to define either the official “yes” campaign or the official “no” campaign, how would spending limits be applied?

— Public information campaigns and media coverage;

Unlock Democracy believes that it is essential that if referendums are to be used in the UK then the public information campaigns should be extensive and run independently of government. For us, one of the main advantages of referendums is the opportunity for public education and discourse on a contentious issue. This will not exist without high quality, independent information from a trusted source. This inevitably increases the cost of referendums and the length of the campaign. However we believe that the experience in New Zealand of the two referendums on electoral reform demonstrates that setting up an independent body to provide information and run the public education process is money well spent and is in effect an investment in democracy.

— Party political activity;

Unlock Democracy believes that political parties should be able to campaign for or against referendums. They should be regulated in the same way as other campaigning organisations but they should not be prevented from taking part in the campaign. One of the weaknesses of the first Irish referendum on the Nice Treaty in 2001 was that the governing party, the main supporters of the treaty, were not able to take part in the campaign.

— whether referendums should coincide with other elections or not;

Referendums should be held at the same time as other elections so as to reduce their costs and to encourage turnout. There is substantial experience worldwide of holding referendums at the same time as other referendums and there is no reason to think that that creates unnecessary confusion.
It may not be appropriate for referendums to be combined with general elections, as there is a significant danger of the referendum campaign being drowned out by other issues and of the chance for debate on the referendum question to be lost. However we do not believe these problems would arise if the referendum was held at the same time as European, devolved or local elections. We also already have experience of combining these elections in the UK and so it would be a relatively low risk way forward.

— the strengths and weaknesses of in-person, postal or electronic forms of voting.

Unlock Democracy reaffirms its strong opposition to any election which only has a single way of registering a ballot. We believe this would represent an unacceptable barrier to someone trying to exercise their democratic right to vote. We strongly believe there must always be multiple ways to cast a ballot at an election, whether this is a single issue election or a candidate election. We continue to support the concept of postal voting on demand, and recognise Government efforts to put in place electoral safeguards.

There have been pilots of electronic voting in the local elections held in 2002, 2003 and 2007. These pilots have tested a variety of forms of electronic voting, including remote voting via the Internet, telephones, and digital television, as well as the use of mobile electronic voting kiosks and laptops within polling stations.

The Electoral Commission found that four sets of key issues emerged from these pilots, all of which highlight significant limitations with e-voting:

— Turnout: The Electoral Commission evaluation report consistently states that the e-voting pilots had little or no impact on turnout. Surveys did reveal that e-voting proved popular among those making use of the facility, however evidence suggests that many e-voters would have voted anyway.

— Security: E-voting does continue to raise security questions and the Commission’s report highlighted notable security weaknesses in the systems used.

— Reliability: While the 2002 and 2003 pilots ran without any significant technical hitches, the more ambitious 2007 pilots witnessed a failure of network connections at two polling stations and a loss of wireless connectivity.

— Cost: The Electoral Commission’s evaluation of the 2007 pilots estimated that the cost of providing e-voting facilities was £102 for each voter making use of the facility, compared to a cost of £2 per elector for conventional ballots.

We therefore agree with the Electoral Commission which calls for a much stronger regulatory and policy framework before further e-voting pilots are contemplated.

Unlock Democracy also shares their view that fundamental weaknesses in our current 19th Century electoral laws need to be rectified as a matter of urgency. We therefore welcome the planned introduction of Individual Voter Registration, something we strongly campaigned for in our Stamp Out Voting Fraud Campaign, however we strongly believe weaknesses remain. If these are not addressed, it is our belief that elections will remain open to electoral fraud, resulting in high profile media cases similar to those we have seen in recent years.

That is why we continue to call for two specific measures:

— Increased Ballot Security by asking voters to provide identification when collecting their ballot ensuring both that the person who votes is actually the person on the register and that their vote is counted accurately.

— Strengthening the powers of the Electoral Commission to investigate and police the electoral system. Where the Commission recommends specific changes in the law there should be an obligation for the Government to respond within a specified time frame and if they are not implementing the recommendations, to report to Parliament giving their reasons for not doing so.

These reforms could be easily legislated for and in our view would represent a more effective form of electoral modernisation than e-voting. Following the Electoral Fraud (Northern Ireland) Act 2002, Northern Ireland has both Individual Voter Registration and increased ballot security. In tandem, both have proved to be an accurate way of tackling fraud, whilst eight years on are popular with voters. We look forward to the Government reporting to Parliament the results of their considerations on the practicalities of implementing such a system in the UK.
This inquiry has focused on the question of governments initiating referendums. It is equally possible through the use of citizens’ initiatives, for citizens to put a question to a referendum. Although the outcome, the referendum campaign, may be the same, the process for triggering a referendum is distinctly different when citizens, rather than governments are involved.

Citizens’ initiatives do not always lead to referendums. For example agenda initiative, which was recently endorsed by the Committee on the Reform of the House of Commons, does not lead to a referendum and decision-making rests firmly with the legislature, rather than being held jointly with citizens. Generally speaking an agenda initiative leads to either a committee of the Legislature, or the Legislature as a whole examining the issue, deciding whether it has merit and how if at all it should be taken forward.

Worldwide, Citizens’ Initiatives have been increasing in popularity in recent years. Famously, the system forms a central part of the Swiss constitution, but they are an increasingly common feature in the USA, Germany, Italy and elsewhere.

In countries where direct democracy tools such as citizens’ initiatives are used, referendums are usually seen as the last resort once all other options to influence a decision or process have been exhausted. As well as initiating debates using agenda initiative it is also possible for citizens to either veto legislation that has already been passed by a government or to initiate legislation. Citizens’ initiatives generally start with a petitioning process and the thresholds set for the petition as well as the time allowed to collect the signatures greatly influences how easy or difficult an initiative process is. Unlock Democracy believes that citizens initiatives should be possible but difficult so we would support high thresholds. Also the more influential the initiative process then the higher the threshold should be. For example there should be a significantly lower threshold for agenda initiative, which enables a debate to take place, than for a legislative initiative which could create new law.

Most countries that use these tools also have clear exemptions from initiative processes. Austria, Brazil, Cape Verde and Thailand do not allow agenda initiative to be used for amendments to the constitution while Niger does not allow agenda initiative on devolution. Citizens’ Initiatives on financial matters are not permissible in Germany, while even Switzerland prevents initiatives which contravene binding international law. Many countries also prevent the repeal of their Bills of Rights or human rights legislation by citizens’ initiative as well as having provisions in their constitutions to prevent initiatives being used for discriminatory purposes. As the UK does not have a codified constitution it would be necessary for any act enabling the introduction of citizens’ initiatives in the UK to clearly state on which issues initiatives could be used.

It has almost become cliché to describe Switzerland as “the land of the contented loser”, but there is considerable evidence to suggest that more direct democracy does contribute directly to the well-being of Swiss citizens, as outlined in Richard Layard’s book Happiness. While each individual Swiss citizen may lose numerous referendums that they feel strongly about, crucially they seem to be content that the system is fair.

Initiatives and Referendums have the potential to draw the sting from some of the most divisive issues Britain has faced in recent years. For example, it is possible that if we had had such a system in place a few years ago, then the Hunting with Dogs issue would have been both less divisive and would have taken up less Parliamentary time. Numerous issues, from constitutional reform through to climate change and Britain’s place in the EU, have festered for many years in the political background, yet political parties have successfully avoided tackling them on the basis that while people might have strong opinions on the subject, they don’t feel strongly enough about them for them to become political issues. Citizens’ Initiatives provide an outlet for this sort of issue.

UK citizens already have a right of initiative in a number of cases, although these rights are strictly limited:

- Local Government Act 1972: This act spells out a system of Citizens’ Initiative, although it is only applicable at a parish level and is non-binding. Just 10 people voting in support at a Parish Council meeting can demand a referendum on an issue, and the District Council is obliged to hold it.
- Formation of local parishes: This right was introduced in the Local Government and Rating Act 1997. 250 people, or 10% of electors in the area concerned (whichever is higher) can demand that the Secretary of State allows for the formation of a Parish Council in an area. The Secretary of State can insist on a referendum and can ultimately block it, but 100 new parish councils have been formed since this legislation was introduced. The 2006 Local Government White Paper proposes devolving the Secretary of State’s role to the relevant local authority and allows for the creation of parish councils in London.
— Local Government Act 2000: 5% of the electors in a local authority can call for a referendum on a change to the method of appointing the authority’s executive (e.g., Mayor or cabinet model). A “yes” vote in such circumstances is legally binding.

— Scottish Parliament: while most Parliaments (including the UK’s) have a public petitioning system, the Scottish Parliament has been remarkably pro-active in promoting its own system. Any member of the public can collect petition signatures online using a Parliament-hosted website (http://epetitions.scottish.parliament.uk/). These petitions are considered by the Public Petitions Committee.

Unlock Democracy supports the introduction of citizens’ initiatives in the UK for raising issues, vetoing legislation and initiating legislation. However, we believe that there should be high thresholds set so that the proposals could not be abused and that there should be a clear list of policy areas that should be exempt from citizens’ initiatives so that they cannot be used to resile from international treaty obligations or be used for discriminatory purposes.

10. How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?

Referendums can be an important tool for involving citizens in decision-making and there is substantial worldwide experience on running successful referendums.

Government initiated referendums have been used since the 1790s and currently about half of all countries have provision for mandatory referendums (i.e., a referendum that is automatically triggered by a constitution or referendum law). In countries such as Australia, Denmark, Japan, Switzerland and Venezuela, all changes to the constitution have to be approved by a referendum. Some countries such as Spain, Malta, Austria and Peru have referendums for significant amendments to the constitution but not for all changes.

In addition to approving changes in constitutions, referendums are commonly used to resolve conflicts between different branches of government, particularly in presidential systems, or they can be used to ratify transfers in national sovereignty. In most political systems where referendums are used, the criteria are set out in either a constitution or referendum law. Even in countries where referendums are commonly used, there are certain issues that are exempt from referendums, these usually include issues of taxation and public expenditure.

Referendums may be initiated by governments for a variety of reasons and in reality there are usually a combination of factors. For example, they may be used to resolve differences within a governing party or coalition, may be used by a government to show support for a proposal that would otherwise not be able to get through Parliament, or they may also be used to demonstrate support for a government or president although this can be a high risk strategy as Charles De Gaulle ultimately found out.

Mandatory referendums are usually restricted to issues that are considered particularly important as holding too many referendums can reduce their political efficacy and may even affect political stability. Italy is a good example of a country where referendums are relatively frequent but concerns about the wording of the questions and a turnout threshold have meant that very few recent referendums have actually been passed. Referendums are also costly in terms of money, time and political attention and the use of such resources needs to be carefully considered.

As with any political engagement tool, whether elections or deliberative exercises, there are examples of good and bad practice. While it is certainly easy to find examples of referendums where the questions have been biased in favour of the government’s preferred outcome, or examples where referendums have been used for partisan purposes, this does not mean that the tool itself should be devalued or even abandoned. Rather, the UK should take advantage of the best practice from around the world, particularly in the field of public education and use referendums appropriately for the UK context. In Unlock Democracy’s view this would be the approval of constitutional changes.

As President of France Charles De Gaulle used referendums to endorse his leadership on several occasions. However, it was the failure of a referendum in 1969 which was inevitably seen as the loss of public support for his presidency that ultimately prompted his resignation.
APPENDIX

GOVERNMENT INITIATED REFERENDUMS IN THE UK SINCE 1973

<table>
<thead>
<tr>
<th>Year</th>
<th>Referendum</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>On whether Northern Ireland should remain in the UK or join the Republic of Ireland</td>
<td>Stayed in the UK</td>
</tr>
<tr>
<td>1975</td>
<td>On whether the UK should remain part of the European Economic Community</td>
<td>Yes</td>
</tr>
<tr>
<td>1979</td>
<td>On the creation of a Scottish Assembly</td>
<td>Yes but the thresholds were not met so the proposal fell</td>
</tr>
<tr>
<td>1979</td>
<td>On the creation of a Welsh Assembly</td>
<td>No</td>
</tr>
<tr>
<td>1997</td>
<td>On the creation of a Scottish Assembly and whether it should have tax varying powers</td>
<td>Yes to both questions</td>
</tr>
<tr>
<td>1997</td>
<td>On whether there should be a Welsh Assembly</td>
<td>Yes</td>
</tr>
<tr>
<td>1997</td>
<td>On whether there should be a directly elected Mayor of London and a Greater London Authority</td>
<td>Yes to both questions</td>
</tr>
<tr>
<td>1998</td>
<td>On whether the Belfast (Good Friday) Agreement should be ratified</td>
<td>Yes</td>
</tr>
<tr>
<td>2004</td>
<td>On the creation of a directly elected regional assembly for the North-East of England</td>
<td>No</td>
</tr>
</tbody>
</table>

4 January 2010

Examination of Witnesses

Witnesses: Mr Peter Kellner, President, YouGov; and Mr Peter Facey, Director, Unlock Democracy, examined.

Q39 Chairman: Peter Kellner, Peter Facey, can I welcome you most warmly to the Committee and thank you very much indeed for coming to join us through snow and ice? We are being audio-recorded so could I ask you please to formally identify yourselves for the record and thereafter if you wish to make brief opening statements please feel free to do so, otherwise we will go straight into our session.

Mr Kellner: My name is Peter Kellner and I am the President of the polling organisation YouGov. In 30 seconds, may I perhaps disturb the present equilibrium by saying something that people in this room who know me fairly well will not have heard me say before, which is I think Baroness Thatcher got it just about right in her speech to the House of Commons on the second reading of the Common Market Referendum Bill in March 1975. She had been leader for just a few weeks and I thought she made a speech which had stood the test of time on the dangers of referendums and the hurdles. Can I just say one other thing, which probably causes more upset? To me the plural is “referendums” not “referenda” because, as I understand it, referendum is a gerund and not a noun.

Q40 Chairman: We are all agreed on that.

Mr Facey: My name is Peter Facey and I am Director of Unlock Democracy. I take the opposite view to Peter. Unlock Democracy believes that referendums have an important constitutional role in our democracy. It is one of the few ways in which we can entrench a decision within our constitutional framework. We believe they can play a part in combating public cynicism. We do not believe though that referendums should be an everyday occurrence; they should be something which is done soberly and cautiously.

Q41 Chairman: Thank you very much. Perhaps I could kick off by asking you both what you think the constitutional criteria, if any, are that should govern the use of referendums? And perhaps to Peter Facey: where do you stand on your previous assertion that “referendums should be considered as single issue elections”?  

Mr Kellner: First of all, I think it is implicit in the question that you are not looking at what might be regarded as the Swiss or Californian approach to referendums; that is referendums or indeed citizens’
initiatives on a wide range of non-constitutional issues. If I am right in that understanding, that puts quite a lot of the arguments to one side if the focus is more specifically on constitutional issues. To me, there are various problems, some of which are general and some of which are specific to the UK. On general issues I think one has to be very careful about the relationship of referendums to parliamentary sovereignty and to the principles of deliberative democracy that underpin parliamentary sovereignty. I think also—and this was one of the warnings of Baroness Thatcher 35 years ago which has been amply fulfilled—this is a potentially slippery slope down which governments looking for some tactical reason to use referendums will resort to it rather than something which is done on a matter of principle and against clear-cut criteria and not merely according to the government of the day. The more specific point—and I am sure I am saying things which cover ground you have already covered before—is we do not have a formal written constitution. In a sense, it is quite easy if you have a written constitution because you can have a grown-up argument as to whether you should have referendums when you wish to amend that constitution. If you do not have a written constitution or perhaps more accurately one has a fluid constitution as we do, I think it becomes much more problematic to decide when it is appropriate, even on what one might consider constitutional issues, to have a referendum or not.

Mr Facey: Like Peter I think one of the problems we have is because we do not have a written constitution and therefore deciding what is a constitutional issue becomes a matter of debate. Firstly, one solution to that would be to move to a written constitution, as an organisation which has long advocated that. Accepting that is not an immediate possibility, there are a number of issues where we already as a country I suppose seem to have decided that referendums are appropriate tools to be used. I do not think anybody is suggesting that the break-up of the United Kingdom could happen without a referendum in the particular part of the United Kingdom which wanted to leave. We seem to have come to a position whereby if as a country we want to devolve power significantly from the centre to new Parliaments in Scotland, Wales or any regional assemblies in England that we should have referendums at that point. There is also now a growing body of opinion. The official Opposition has now stated that they want to amend the European Communities Act to ensure that if there are future changes to European treaties that we should have referendums there. Broadly I think it can be done. Our line is that if it is a significant change to the contract between the individual and the state that you should have a referendum in those circumstances. We believe we should move, where at all possible, to mandatory referendums, not to referendums which are decided by government on a whim but where we clearly set out “These are the circumstances in which the government must have a referendum”. In terms of our assertion that referendums should be considered as single issue elections, if you think about a referendum, both as a participant in it but also as someone organising it, 99% of what you have to do is exactly the same as an election. From the point of view of the citizen it is the same process as an election. You go and put a mark in the ballot box, you go to a polling station. All the issues about campaign expenditure, about polling stations and the basic requirements in a democracy apply to a referendum. In most countries referendums are actually held on the same day as an election. From the point of view of the voter the only real difference is in one case you are electing an individual or a party and in the other you are voting on an issue.

Q42. Baroness Quin: Could I pick up on the single issue answer and ask whether you feel that certain subjects because of their complexity are not suitable for referendums? I am thinking for example of things like the Lisbon Treaty which is very difficult to boil down to a single yes or no or given the number of different issues that are involved, the different powers that are involved, transfer down to national parliaments, transfer up to the Commission both in the same document. What are your thoughts on how straightforward the question should be in a referendum?

Mr Facey: Firstly, on the question of the ratification of the treaty, in effect Parliament—yourselves and Members of the other House—had to take a yes/no answer because ratification is a yes/no process. You can ratify it or you do not ratify it. You do not have an option at that stage of re-opening it. It is kind of straight. I hear this argument that some issues are too complex to put to voters. I am not saying that every issue should be put to voters, but I find it a difficult one to accept. If we think about what we are going to ask voters to do in a general election, they may be asked to take the Lisbon Treaty and attitudes to it, they have to take a whole range of other issues, the party philosophy, the attitude of the individual candidate in terms of their character, also the tactical situation in their constituency, all those things combined, and make a rational judgment on electing a party or an individual. If they are capable of doing that incredibly complex act of mental arithmetic then they are perfectly capable on a single issue with good public education of taking a complex decision. Around the world there are plenty of examples of people doing that. There is an argument about whether some treaties in terms of European treaties are constitutionally significant enough to warrant a referendum and the expense. I am perfectly warm to
the Danish approach which is if there is a super majority in Parliament you do not have to have a referendum but if there is not a super majority in Parliament you do. The reason why the Danish voters did not get a choice on Lisbon was because Parliament by five-sixths agreed that the Lisbon Treaty was not a major constitutional document for Denmark. On things like Maastricht they did have referendums.

Mr Kellner: The only point I would make—and I do not want it to become an argument between Peter and me—is I think Peter’s phrase “the contract between the individual and the state” is a slippery notion. I think most ordinary people, the people that YouGov poll day in day out would think that the contract between the individual and the state would relate to things like immigration or identity cards or bailing out the banks. I am sure that is not what Peter meant but it raises an issue which is if we are saying there should be consideration of referendums on constitutional issues, “constitutional” does not mean the same as “important”. I think, in terms of the wider public making that distinction, it is fairly difficult. It is not easy to explain to ordinary voters why they should have a vote on whether they have a mayor but not on whether to bail out the banks or on the deficit reduction plan. I would come back to the point that I do not think the argument about the contract between the individual and the state is good enough. Again I come back to the point, I agree with Margaret Thatcher’s speech when she said that if you are going to have it on constitutional issues you have to have a constitution. She could see and I can see no need to have referendums on constitutional issues you have a constitution. She could see and I can see no need to have referendums on constitutional issues you have a constitution. She could see and I can see no need to have a referendum is that you have to have a proposal that that was not the case and whether it was right or not go away; it did not settle anything. Please tell me could we turn to

Q44 Lord Lyall of Markyate: I am a little anxious that we should not give the impression that a written constitution is a self-evident truth for Britain. There is a great deal to discuss before one takes that step. Would you agree?

Mr Kellner: Absolutely, let me be clear. I think the fluid constitution we have is actually better than a written constitution. I was simply saying that if you are going to go down the route of saying we should have referendums on constitutional issues, you need a constitution.

Mr Facey: I am an advocate of a written constitution. I believe from the point of view of controlling government that is a great advantage, but we are not here to debate a written constitution; we are here to debate referendums. Even if you accept that it would be better to have a written constitution to define when a referendum is used, it is perfectly possible for us to pass a Referendum Act which will actually specify in an Act of Parliament which Acts would require a referendum. Or it is possible, as the Conservative Party has proposed, to amend particular pieces of legislation so beforehand you know when a referendum is going to happen. If you decide that the European Communities Act is a document you need to amend, that can be amended. It can specify when a referendum must happen. It is perfectly possible, even within a country that has parliamentary sovereignty as its philosophy, to do that. It is also worth noting that the founder of the theory of parliamentary sovereignty, Dicey, was an advocate of referendums and thought they did have a role within our system. It is perfectly possible to marry parliamentary sovereignty, our present constitution, with referendums even though I am an advocate of moving away from a fluid constitution because I think it gives too much power to executives.

Q45 Lord Rodgers of Quarry Bank: Could we turn to a specific example which Peter Kellner has already mentioned—1975—and see what conclusions we can draw about that and its strengths and weaknesses? If I may put this proposition in this way: firstly, it was a political convenience or device, neither more nor less than at that time; secondly, the vote was 64.6% or 64.8% and it is argued that you get a much bigger referendum vote whereas in the two general elections just before 1975 one was 78% and then 72%. My memory is in 1979 it was 76%, so in general elections of that time we had a much larger poll than on this single very important nationwide issue. Then the third point is being decisive. The Prime Minister of the day as decisive but in 1983 the government of the day was trying to reverse the decision made in the 1975 referendum, so it was not decisive and it is not decisive now. It will continue to be indecisive; it does not go away; it did not settle anything. Please tell me that was not the case and whether it was right or
wrong on such a large nationwide issue and what conclusions could we draw about the future?  

Mr Kellner: Lord Rodgers, you were much more actively involved than I was. I was a foot soldier in the “Get Britain Out” campaign at the time, along with people like Lord Kinnock. It plainly had one practical advantage which is that it put to bed the issue of Britain’s membership of the EC in terms of domestic politics for a generation. My general view, as I said earlier, is I do not like referendums at all. In terms of non-constitutional issues they are crazy although on constitutional issues it is a closer judgment call. I would be 60/40 against them rather than 90/10. I would not dispute that the 1975 referendum did have the practical advantage that, broadly speaking, the opponents of British membership accepted that verdict for a period and without the referendum it might have been reopened. On the other hand of course, it has opened up the floodgates to other referendums. Before then I think I am right in saying there had been a referendum in Northern Ireland in 1972 or 1973 and there had been a clutch of referendums in parts of Wales in the 1960s on Sunday pub opening. However, it was the 1975 referendum which breached the dam in terms of the place of referendums in our national political life. That part of it I am sorry about although I recognise that in terms of the particular issue it addressed it did have some political advantages.

Mr Facey: If we are looking for referendums to put issues to bed then in the same way that a vote in Parliament cannot do that I do not think referendums can. What they can do is settle an issue for a moment. Like Peter I think, effectively, it decided a particular issue in terms of membership of the Economic Community at the time and it settled it to that degree. It also set the precedent, and unlike Peter I think it was a positive one, that ultimately it is the people who should decide those types of fundamental issues. Joining the European Economic Community was probably one of the most profound historical changes in this country post-War, and I think it is perfectly right that that decision should have been taken in a referendum and not simply in a general election, in the same way the decision to have a Scottish Parliament, which again is a profound change, was endorsed in a referendum and not just in an election. What it also does is make it very difficult if this country were to leave the European Union not to have a referendum on that issue. Effectively, it created a precedent and it created for a time a settlement of the issue, but only for a time. If we want referendums to settle it forever, the reality is I was seven years old at the time of the referendum and I do not feel bound one way or the other by a decision of my forebears in that sense. Therefore different generations will take different decisions, in the same way that we do not just have one election and then expect us all to live with it for the next 50 or 60 years.

Q46 Lord Lyell of Markyate: Just on the 1975 referendum, it was a skilful and highly political act by Harold Wilson partly in order to hold his party together. Of course all parties were split. Peter Kellner, you were in the “no” camp and the present Lord Salisbury, Robert Cranborne was in the “no” camp. I was in the “yes” camp. Yes, it did in a way settle an issue but it was really done for political reasons, was it not?

Mr Kellner: Absolutely, and while I think there was a political positive to come out of the 1975 referendum, frankly it was a constitutional outrage. You said it was partly to do with holding the Labour Party together; I think it was wholly to do with holding the Labour Party together. In a sense this is the constitutional problem that once you effectively allow governments for wholly tactical reasons to employ this device you put the constitution, fluid or written, into a very difficult place.

Mr Facey: I think this is the central issue because the reality is governments have at the moment the ability to call referendums when they want them. I think, like Peter, yes, it should be there but it can be quite damaging and that therefore codifying as much as possible where we should have referendums will remove some of that sting about it being a purely political tool designed to solve an issue of a party at a time. Therefore we need to move on. I find in some ways that if you are an advocate of our fluid constitution, this is the direction our constitution has flowed, and therefore what we need to do now is work out whether there are new rules about saying that in these circumstances referendums should be held, and therefore reducing the ability of governments just to call them on a whim so they actually have to pass certain hurdles to do it. I think that would be a good thing from the point of view of the constitution but also from the point of view of the public and the point of view of Parliament and government.

Q47 Baroness Quin: Following that up, I do hear the argument, and you have largely just said it, that referendums can settle things for a considerable amount of time, but we have just had the recent example in Ireland where you have had two successive votes within a short space of time on the Lisbon Treaty, and I wonder what your thoughts are about that kind of procedure and indeed how far on the same subject referendums should be set apart from each other?

Mr Facey: I think it is regrettable but when we are looking at a general election where it is quite possible that we may have two elections in a short period of time, partially because the reality is the parties may not be happy with the result at the election because no
one party may have a majority and they may therefore call another election like there was in 1974, the same issue can happen in elections as it can in referendums. I am not an advocate and I do not think that what the Irish Government did was right. If at all possible we should have a rule that if you have a referendum you should not have it for a period of time afterwards. Maybe that would be five years or whatever. That is a difficult thing to actually do. The same criticism that government can if it does not like the answer hold another one applies to elections. It is quite likely that after this election, if we have a hung Parliament, whichever leader may decide that they do not like the result, it is too difficult, and we should have another election to get a clear result.

**Mr Kellner:** Here is where I really do part company with my friend. I think this is again a fundamental point that referendums, if you are going to have them, then it is plain that you need some mechanism to prevent governments from repeatedly re-asking the same question until they get the answer they want. You require a certain rigidity. This is one of the reasons why I favour our deliberative parliamentary democracy because democracies are made up of human beings who make mistakes. It is right to have mechanisms for undoing those mistakes. Take the poll tax for example. I am not genuinely seeking to make a partisan point here. If for some reason the poll tax were approved by referendum and you had a rule whereby ten years had to pass before another referendum, what would you have done? What you instead had was a Government that realised it had done something which was not sustainable, could not be carried on and needed to be changed. Apart from all the other advantages of a deliberative system of negotiation—trade-off, of consideration of different issues, none of which can happen in a referendum because it is frozen into a yes/no either/or decision—it is the rectification of mistakes. If you go down Peter Facey's route—and I agree with the logic that referendums should be binding for a period of time—you introduce a rigidity which in time you are going to regret.

**Mr Facey:** That is why I think it is very difficult, although it is attractive, to think about having a bar on time, that is why I said I think it is very difficult to do. Unless you actually had a constitutional framework which specified it on purely constitutional issues, it is possible there that you could have something like that. Where countries have citizens' initiative processes, they regularly have a process whereby if you have a citizens' initiative on something you cannot have it again for a period of time because you cannot keep coming back on it. Where we have complete flexibility of government and Parliament, introducing that sort of hurdle, although attractive, without a more detailed constitution would be quite difficult to do.

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**Q48 Lord Norton of Louth:** I want to knock on the head this comparison between a referendum and an election because there is a complete difference because you are talking about an election that produces an indecisive result and a referendum that produces a result that you disagree with. They are completely different.

**Mr Facey:** I do not think it is an indecisive result.

**Q49 Lord Norton of Louth:** It is a yes/no.

**Mr Facey:** If people are saying in an election that Parliament should have no one party with a majority that is a result, that is what the people have actually said. It is Parliament which then decides. It is not the people who go back and say, “We do not like the result and want to do it again.”

**Lord Norton of Louth:** That is produced because you have more than two parties. With a referendum it is a yes or no vote and you have a decisive outcome.

**Q50 Baroness Jay of Paddington:** I really wanted to go back, Peter Kellner, to what you were saying at the beginning about the issues that really engage people you were daily polling and to ask both of you, taking the point about citizens' initiatives, if there was ever a case to be made—and I think we have all agreed for example that the 1975 referendum was a party political device—for expanding the citizens' initiative concept to looking at a referendum on an issue which in Parliament would be called a free vote issue which does not have party political resonance. The classic example which is always given is the one of capital punishment but there is a whole range of what I suppose one would call general social policy issues where legality, democracy, morality if you want to call it, all impinge on each other where there are very definite citizens' views and not party political views.

**Mr Kellner:** I understand the argument. I think it is profoundly mistaken. I spent some time during the last US presidential election just over a year ago in California where on the same day they had about a dozen citizens' initiative votes. Anybody with any sense in California thinks—I was told and I found this was a widespread view—that a citizens' initiative is a device for the sad, the mad, the bad and the very, very rich because those are the people who can mount the organisation. Also there is the cumulative consequence of a whole variety of citizens' initiatives in California on economic and governance issues. You have ended up cumulatively with a state legislature which is required to do more than it should but barred from raising the money it needs to do the things that people want. It is a classic example of the fact that if you have a range of citizens' initiatives that you cannot get some orderly trade-off, as is part of the everyday life of any proper legislature in the world, for people want to pay less in tax and have more services. A large part of politics is arbitrating...
between those two positions in all sorts of complex ways. That is the first point very briefly. Secondly, even if you were to try to restrict it to what you call moral free vote issues, I personally think it is a bad idea but, above all, I think there is a practical problem in defining that. Capital punishment perhaps or drugs—what about drugs because of the consequences for criminal procedures or immigration. I think a lot of people would say immigration is a moral issue and I suspect that is not what you had in mind.

Q51 Baroness Jay of Paddington: No, but I would challenge your point about the Californian position, which I agree with you last year was hideously over-complicated, but if you take for example the state one state north, Oregon, and you look at the referendum on assisted dying which established a different change in the law and has stood now for 12 years or something, that was not devised by the mad, the bad and the rich and has effectively achieved a citizens’ initiative, although it was not called that, on an issue which is of the type that I am thinking about.

Mr Kellner: What I would say is if one tries to look through the prism of results one likes—

Q52 Baroness Jay of Paddington: Of course.

Mr Kellner: I could cite Australia where the Menzies Government after the Second World War held a referendum to try and outlaw the Communist Party. It failed and I am delighted they failed. It was clearly an outrageous idea but I do not think if one goes through the record it is right to cherry-pick. One should have some sort of basic principle. I would go back to two principles. One is it is difficult to define and the second is I do think parliamentary democracy is the right forum even for these kinds of issues.

Mr Facey: I take the completely opposite view. Firstly, the citizens’ initiative is one element of a number of tools which people are now talking about introducing into the United Kingdom, so that alongside it you have an agenda initiative, which is the ability to force Parliament to discuss an issue, you also have citizens’ initiatives but you also have recall. They are things which ten years ago were not discussed in the United Kingdom and now they are regularly discussed within Parliament and outside it. I believe that citizens’ initiatives can play an important role. We do have to look at what issues are covered. Lots of jurisdictions exclude things like finance and a range of issues to do with human rights, et cetera, for the reasons which you have stated in terms of you do not want to have government by referendum, but you can actually have processes whereby you make it more difficult than you have in California but you make it possible to do it, but it is a deliberative process. It is a process which takes time. I believe if you are going to introduce it in the UK you should first have to force Parliament to debate an issue and only then be able to actually go to a situation where you have a referendum on it. We already allow people to petition to have an elected mayor locally. If you raise 5% of your fellow citizens you can hold a referendum on that. I would say that issues like fox hunting, which this place spent huge amounts of time debating to what seems from the outside to be not necessarily any great effect, that referendums or citizens’ initiatives at a regional or local level or even a national level would have been a better way of dealing with that and would have taken a lot less time in this place on an issue which is ultimately one about how people feel about an issue. It does have a place. I am not saying it should be easy but I think it should be possible. The international range is between 1% and 10% which is the norm in terms of what you would actually have to have on a petition. Personally think that the 5% rule we have for mayors is a fairly good one. It is in the high range internationally. There are also other ways of making it more difficult. I do not believe you should be able to do it by email. It is important that there are laws about how much money you can spend. In the same way we regulate elections we would have to regulate that but I think it is perfectly possible to do and it is something which will help deal with some of the citizen and politics issues of people feeling powerless. Mr Kellner: Let me very briefly say, unless you believe in having a referendum on capital punishment then your position, Peter, is that you would have to go out to explain to people why they could have a referendum on shooting foxes but not on killing people.

Q53 Baroness Jay of Paddington: That is the problem.

Mr Facey: One issue is you have to careful that you do not take unintended consequences, so you have to actually say that if you are going to change international treaties you cannot do something which would do that without deliberately intending to do it. The reality is if we were to reintroduce the death penalty we would have to leave the Council of Europe and the European Union as a result of that. I do not believe it should be put to the people but, if you do, you have to be clear on citizens’ initiatives that it is something which people can decide without the consequences binding on other things. That restricts what issues you can do it on. There are many perfectly proper democracies in the world which have managed to find ways of doing this. Even countries like New Zealand, which are the mirror to us in large degrees, have found a very weak way, and there is a very high threshold, in New Zealand it is 10%, to actually introduce citizens’ initiatives. It is interesting on the polls which the Hansard Society do here about
the levels of public citizenship. Here about 85% of people think they are powerless to change things within our system of government and politics. In New Zealand they had very similar poll trends before they introduced it and also they changed to proportional representation in the 1990s, and today it has dropped and the poll figures have gone more positive by about 20%. It is possible to do. It is possible to do it within our type of governance structure and I think if we take a very sensible and sober approach to it, which puts safeguards in and which puts Parliament in the centre of the process, that that can reconnect people with the political process rather than alienating them from it.

Q54 Lord Shaw of Northstead: I must confess that I am deeply suspicious of referendums. Viewing it from that point of view, the basic question has not clearly been answered yet: is the referendum compatible with the UK system of parliamentary democracy? Following on from that, is there not a real danger that the fundamental principles of our parliamentary system will be weakened by the referendum? Following again on that, if one believes in the use of referendums, should the system be extended or restricted, and in any case should we not, if in fact we referendums, should the system be extended or restricted, and in any case should we not, if in fact we believe that there is a case for them, be concentrating on defining the rules under which referendums can be permitted and indeed the way in which they are conducted?

Mr Kellner: My answer is that the British constitution in its fluidity has been sufficiently robust over hundreds of years to absorb many things and plainly it has absorbed referendums over the last 35 years. I regret their incidence but you are all still here, deciding things, passing laws, and so on. I would not couch the argument against referendums in terms of some cataclysm for parliamentary democracy but I do believe it weakens parliamentary democracy. As for your other points, I hope I have sort of covered them in the remarks I have made so far. If we are going to have them and if they are going to have a permanent place then it should be on constitutional rather than “important” issues. It should be narrowly defined and it should be defined objectively in order to minimise the opportunity for governments to use them on a whim. It would be easy for me to say this is utterly incompatible with parliamentary democracy and therefore we should have no truck with them. I am giving myself a slightly tougher task of saying of course you can have them and a parliamentary democracy but I think they have a negative rather than a positive impact on that system.

Mr Facey: Like Peter I believe they are compatible with parliamentary democracy. There are plenty of parliamentary democracies which have referendums built into their system of government. Even countries like New Zealand that, like us, do not have a written constitution have them within a parliamentary democracy. I believe they are complementary rather than an alternative to representative democracy. We also need to recognise that in a lot of the referendums we have had they have been post-legislative, so Parliament has already spoken. Parliament has done all its business in terms of passing a law and then saying “subject to referendum”. In those circumstances it is difficult to say that a post-legislative referendum is not compatible with parliamentary democracy or with our traditional system of government because what it is actually saying is Parliament has decided something and it is confirmation from the people, so in those circumstances I think it is perfectly compatible. Now that we have had the experience we have had since 1975 (but particularly since 1997) in terms of referendums, we need to start defining where we have them for constitutional reasons. If we do that I think we will deal with some of the issues around the accusation that governments use them for purely political reasons. The reality is historically looking at some of the decisions they have taken, you have to say that they were taken for purely political reasons. I do not think that is necessarily a good thing and if we can define specifically where we are, either through a written constitution or simply by deciding which particular Acts of Parliament we think are significantly important so that if they are changed or elements have been changed that there is a referendum, that will move us forward in that process. On the issue of rules around referendums, we already have the power that outlines some rules. The difficulty is that we have not had enough real experience to say whether those rules really work because we have only had one referendum conducted under those rules.

Q55 Lord Shaw of Northstead: Would you say therefore that if there is going to be a referendum it will arise out of a statute or legislation that has been passed in the House and that the conditions of the referendum are laid down within that legislation?

Mr Facey: That is certainly one possibility. That is the proposal the Conservative Party seem to be putting into their manifesto in terms of changing the European Communities Act. I have a preference myself for having a single Referendum Act which specifies which bits of legislation if they are going to be changed there would need to be a referendum on. I think that would in effect move you towards a written constitution. It would codify and entrench in some way the core parts of our constitution. I think that would be a helpful step. I think it is a step which would fit within the fluid constitution of adapting to the way things move forward. I think that would be a way forward. If you do not do that you could simply amend each piece of legislation and specify that if you
were going to abolish the Welsh Assembly or if you were going to abolish the Scottish Parliament there needs to be a referendum. It is interesting. At the moment you have to have a referendum when introducing an elected mayor but if you abolish a local authority you do not have to have a referendum. I happen to think that is a rather peculiar circumstance, that you can abolish a county and not have a referendum but if you want to have an elected mayor for a district authority you have to have a referendum. I think some codification and clarity would be a good thing.

Q56 Lord Woolf: Peter Kellner, as I understand it, your position is that you accept with reluctance and regret the fact that we now have a fluid constitution which includes having referendums in certain circumstances. You see the biggest danger in that it is a slippery slope. Would you place any limitations on bringing forward legislation as to the circumstances where a referendum should be held and, if so, what? Mr Kellner: Yes, and assuming what I am about to say is practically possible, and I am not sure it is, they should be limited. Here I half agree with Peter Facey: if we are going to go down this route we need to have a set of rules, and the rules must in some way relate to the issues and the question being constitutional issues. There is then the matter of defining what is a constitutional issue. I am not in favour of doing what I understand Peter Facey to have just said, which is you can put in legislation that to undo that you need a referendum because it seems to me that this is an open invitation to any government with a majority to try and entrench a partisan policy by saying any subsequent government cannot simply put it in their manifesto that they going to change it; they would have to go back to the people. I am not in favour of that unless there was a prior umbrella piece of legislation which specifies the kind of legislation into which you can insert this condition. If it is possible then I would regret it but I think it can be lived with, but I am not sure it is practically possible.

Q57 Lord Pannick: Can I press Peter Facey on the suggestion that we can define the circumstances in which legislation raises a constitutional issue and therefore amendment needs a referendum? Your suggestion a few moments ago, if I understood it correctly, was that one could have an umbrella piece of legislation which would identify those Acts of Parliament—
Mr Facey: Or clauses of Acts.

Q58 Lord Pannick: Or clauses, sections of the legislation which would require a referendum were there to be an amendment. That is a monumental task, is it not, because there are many, many provisions of highly important legislation—the European Communities Act—the amendment of which may well not raise a constitutional issue and it is very, very difficult in advance to know what the particular proposal is for amendment to identify whether it raises or does not raise a constitutional issue. This seems to me with respect wholly impractical.

Mr Facey: Firstly, if you take the fact that most countries have written constitutions and they define their constitution, if Malta was capable of defining its constitution, this country is certainly capable of defining its constitution as well, so it is possible for us to do. I am not saying it is easy but we could move to a written constitution if we wanted to.
every circumstance when a referendum would be required. I do not think that is possible. I do not have a crystal ball; you may do but I do not. It is perfectly possible to say for what core changes to our constitution, if they happen, there should be a referendum in those circumstances. Again, I think it would be very difficult for this country to leave the European Union without a referendum, and I think saying so would help, and I think also other changes like that would be a positive. That may not cover everything but it would mean that there is clarity on some core parts of our constitution. It means that those changes could only happen with the consensus of the people.

Q61 Lord Norton of Louth: It is really a follow-up because I do not think we have really resolved it. To provide an example of a core issue is not to define the constitution. If you say you list core issues then you are presumably excluding everything else or else you bring back in the question of what falls in that dividing line. You mentioned the House of Lords. If you have a proposal for an elected second chamber should that be subject to a referendum? If it was who would bother to vote? You really do not resolve the issue unless you can actually define it. Just to define a constitution, which this Committee did in its first report, would not resolve it either. You would have constitutional issues that are not important constitutional issues.

Mr Facey: It is possible to define constitutional issues. Most countries define their own constitution, so we can do it. We could actually have a written constitution and say, “In these circumstances . . . ”

Q62 Lord Norton of Louth: You have to do it on core constitutional issues. That is your point.

Mr Facey: But most countries that actually have referendums built into their constitution do not have a requirement that any constitutional change should have a referendum. Most of them specify in certain circumstances referendums are used. I can give you my wish list of those things but it is perfectly possible for Parliament to define what core changes to our constitution would require a referendum. The alternative is that you simply leave it to the executive to decide for any issue in future it wants to have a referendum on, if it can get a parliamentary majority it has a referendum. That is where we are. That is the slippery slope that Peter has talked about. I may be wrong but I do not see this country going back to a situation where there are no referendums. At the moment, all the major parties in Parliament which are likely to form a government have some commitment which they say should go to a referendum, whether that be a Labour Government on changes to the electoral system to AV, or whether it be a Conservative Government on future changes to the European Communities Act, referendums seem to be now with us for the long term. The question is do we put rules in place to define when we have them or do we simply leave it up to Parliament and the executive to decide on an ad hoc basis, in which case we are likely to get more of them in those circumstances than we would do in circumstances of defining them, but that is the choice of the Committee.

Mr Kellner: I agree with a lot of what Peter Facey has just said. It seems to me where we are at is referendums have arrived in our state of affairs. Logic says to me that the best way forward, if we are going to keep them, is to have a written constitution and then you have referendums only to amend that constitution. However, if we are not going to go down the written constitution route it strikes me that there are a lot of very, very difficult practical issues, but what I would say—and this is where I would agree with Peter if I am not putting words into his mouth—is where one should go is not to use the difficulty as the reason for abandoning referendums. I would abandon them on the principle of how we should operate our democracy. I am in favour of a deliberative system through a parliamentary democracy. That is different to the practical problems and is my core reason for disliking referendums. If they were a good thing but very difficult to do, then I think it would be incumbent upon you to solve the difficulties. I do not think the difficulties should be used as an excuse for not doing something on its merits.

Chairman: Time has marched on. Peter Kellner, Peter Facey, thank you very much indeed on behalf of the Committee for joining us and for the evidence that you have given. I wonder if we might trespass even further on your generosity by communicating in writing about one or two matters we would have liked to have covered but time has precluded us from doing so? In the meantime, thank you very much indeed.
Memorandum by Dr Stuart Wilks-Heeg, Executive Director, Democratic Audit

Summary

Democratic Audit’s view is that referenda are neither sound nor appropriate instruments of governance and decision-making in a nation, like the United Kingdom, that does not possess a written constitution.

We base this assessment on the following key points:

— There are fundamental tensions between the use of the referendum and the doctrine of parliamentary sovereignty on which the UK’s system of parliamentary democracy is notionally still based.
— Importing referenda into UK politics without clarifying their role within a fully codified constitution would add to the piecemeal changes which have prompted growing constitutional confusion over the past decade.
— Although largely untested, there are grounds to suggest that existing regulatory frameworks would be insufficient to prevent referenda becoming open to abuse by political parties and corporate interests.
— There are alternative means of developing citizen initiatives as a means for putting issues on the parliamentary agenda, rather than bypassing it.
— Turnout in past referenda suggests there may be less popular enthusiasm for them than opinions polls suggest, and that the extent to which they provide a popular mandate may often be questionable, particularly at a local level.
— The inadequacy of the electoral registers would further diminish the claim of any referendum to provide a popular mandate, and would become potentially problematic should thresholds based on the size of the electorate be introduced.

We therefore recommend that the Constitution Committee should not encourage the use of referenda except in one major area—that of constitutional change where there is otherwise meagre protection against a single party in power enacting partisan measures.

Introduction

1. The Constitution Committee’s Inquiry into the place of referendums in the UK constitution is a timely one. The appeal of referenda as a means of promoting wider popular engagement with politics has obvious appeal, particularly at a time when representative democracy appears to be in crisis. At the same time, there is growing recognition that recent constitutional change has challenged many of the UK’s core constitutional doctrines, suggesting a need to revisit some of the most basic principles of our democratic settlement.

2. In this submission, we place particular emphasis on the third of the 10 thematic questions outlined in the Committee’s call for evidence—“how does, and how should, the referendum relate to the UK’s system of parliamentary democracy?” We suggest that this question is of such a fundamental importance that it must be considered separately, and prior to, any further questions about the use of referenda.

3. Our submission also raises concerns that referenda would become open to abuse by political parties and corporate interests, and suggests that past experience of turnout, as well as the incompleteness of the electoral registers, would seriously diminish claims that referenda provide a popular mandate. Overall, we feel that the use of referenda for matters other than constitutional reform would be a distraction from the urgent need to pursue a broader and more coherent set of democratic reforms.

How does, and how should, the referendum relate to the UK’s system of parliamentary democracy? (question 3)

4. We have given priority to this question because we believe it raises issues of basic principle which must be answered before proceeding to consider any other aspects of the use of referenda. Specifically, it raises the fundamental issue, on which the Committee will clearly need to take a view, as to whether ultimate sovereignty should lie with Parliament, as now, or with the people.

5. If sovereignty is deemed to reside fully and ultimately with Parliament, then it follows that none of the Committee’s other preliminary questions is capable of an answer. Conversely, if sovereignty is seen to reside in the people, then issues to do with the fundamental rights of citizens, and the system of representation (composition of Parliament, electoral systems, local government, etc.) are all properly a matter for the citizen body to determine, via a referendum or some other agreed form of direct democracy.

6. That such a fundamental question of principle needs to be raised at all is an obvious consequence of the absence of a written constitution for the UK. In the main, countries which use referenda as instruments for decision-making on a regular basis do so within the context of a fully codified constitution, within which referenda have a defined place. The one exception is New Zealand, where 10 national referenda have been held...
Commission's remit has had to be refocused, its powers bolstered and regulations tightened in order for it to work to preserve the integrity of both. Such work should form the basis of the response to popular anger and distrust of members of Parliament and disillusionment with formal politics.

7. Given these observations, it is our considered view that importing referenda into the UK constitution without the overall framework of a codified constitution would be a further example of ill-considered piecemeal change. The widespread use of referenda would further undermine established constitutional doctrines, but would also take place in a context in which alternative constitutional principles have yet to be articulated. We do not seek to defend traditional constitutional conventions—the issue is that, without a codified constitution defining their role, the use of referenda would give rise to an even more confused constitutional settlement.

Should constitutional issues be subject to a referendum (question 5)

8. Given the above, any answer to this question hinges on the above interpretation of where sovereignty should rest. It is Democratic Audit’s view that issues such as fundamental rights, the powers of the executive, and the terms on which it and elected representatives serve should be set out in a written constitution which has been subject to wide-ranging public debate and endorsed by a popular vote; any subsequent revisions should be similarly subject to a popular referendum. Elections to a particular Parliament are secondary, and logically cannot determine either the terms of that election or the powers of the Parliament so elected. This basic democratic principle, that the nation’s constitution belongs to the people and not to the government of the day, is fully realised, for example, in the Republic of Ireland, where all constitutional amendments require the direct consent of the people.

9. At the same time, there are clearly issues on the current political agenda that are germane to the Committee’s inquiry and which cannot simply be dismissed because of the absence of a written constitution. These include the Prime Minister’s commitment to a referendum on a choice between the existing electoral system for elections to Parliament and the Alternative Vote; and possible Conservative proposals for reducing the number of parliamentary seats. Such reform proposals raise profound democratic issues that ought to be preceded by deliberative public participation and should certainly not be determined by an unrepresentative single party government which may wish to accomplish partisan objectives.

10. In these specific circumstances, the use of referenda to determine answers to constitutional issues seems preferable to allowing such matters to be determined by Parliament. However, we would reiterate that we would regard this position as one of several “stop gap” measures made necessary by current constitutional confusion and one which would quickly become untenable should the use of referenda become widespread in the absence of a written constitution.

Referenda and citizen initiatives (question 9)

11. Democratic Audit takes the view that there is a place for citizen initiatives, though only as a means for putting issues on the parliamentary agenda, rather than bypassing it. More accessible and effective arrangements for petitioning Parliament and other representative bodies would be preferable to advancing the place of referenda in our governing arrangements, accompanied by a clear and principled distinction between what is a proper subject for the people’s decision in a representative democracy, and what for Parliament, and work to preserve the integrity of both. Such work should form the basis of the response to popular anger and distrust of members of Parliament and disillusionment with formal politics.

The effectiveness of PPERA 2000 and the role of the Electoral Commission (questions 6 and 7)

12. As the Committee’s call for evidence notes, the current UK legislation governing referenda is largely untested. While the current legal framework provides for expenditure limits, the Electoral Commission has raised important concerns about the scope to enforce these within the context of a relatively short referendum campaign. These concerns are significant for two key reasons. First, experience elsewhere, particularly in California, highlights how referenda can effectively be hijacked by organised interests, particularly those which have access to substantial financial resources (ie private corporations, political parties and large campaign organisations). The role of major companies in providing support for the “no” campaign in the referendum seeking to establish a Greater Manchester congestion charge in 2008 offers a clear evidence of the role which corporate power could play in influencing future UK referenda, locally, regionally and nationally. Second, the Electoral Commission’s own experience of attempting to enforce regulation relating to party finance have revealed the extent to which both political parties and donors to political parties seek to exploit loopholes in the law (and, in some cases, show blatant disregard for it). Since the passage of PPERA 2000, the Electoral Commission’s remit has had to be refocused, its powers bolstered and regulations tightened in order for it to
become a more effective regulator of party finance. We would strongly urge that every attempt is made to learn from the Electoral Commission’s existing experience with party finance, since there is every reason to believe that similar deficiencies would be revealed in the regulatory framework for expenditure on referenda campaigns should referenda become widespread.

Assessing the UK’s experience of referenda (question 2)

13. Because of the historical assumption that parliament is sovereign, the UK’s experience with referenda has necessarily been limited. Moreover, with the exception of the 1975 referendum on UK membership of the EEC, referenda in the UK have only been used to settle constitutional issues with a territorial dimension. As table 1 highlights, there was an initial wave of such referenda in the 1970s, followed by a second wave beginning in the late 1990s.

Table 1

<table>
<thead>
<tr>
<th>Date</th>
<th>Territory</th>
<th>Issue</th>
<th>Turnout (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 March 1973</td>
<td>Northern Ireland</td>
<td>Should Northern Ireland remain part of the UK?</td>
<td>58.7</td>
</tr>
<tr>
<td>5 June 1975</td>
<td>UK</td>
<td>UK membership of the EEC</td>
<td>64.6</td>
</tr>
<tr>
<td>1 March 1979</td>
<td>Scotland</td>
<td>Devolution for Scotland</td>
<td>63.0</td>
</tr>
<tr>
<td>1 March 1979</td>
<td>Wales</td>
<td>Devolution for Wales</td>
<td>58.3</td>
</tr>
<tr>
<td>11 September 1997</td>
<td>Scotland</td>
<td>Establishment of Scottish Parliament</td>
<td>61.2</td>
</tr>
<tr>
<td>18 September 1997</td>
<td>Wales</td>
<td>Establishment of Welsh Assembly</td>
<td>50.6</td>
</tr>
<tr>
<td>7 May 1998</td>
<td>Greater London</td>
<td>Creation of Greater London Authority and Mayor of London</td>
<td>34.5</td>
</tr>
<tr>
<td>22 May 1998</td>
<td>Northern Ireland</td>
<td>Good Friday Agreement</td>
<td>81.1</td>
</tr>
<tr>
<td>4 November 2004</td>
<td>North East England</td>
<td>Establishment of North East Assembly</td>
<td>47.8</td>
</tr>
</tbody>
</table>


14. Two key conclusions can be reached from this past experience. First, while referenda are advocated as a means of definitive decision-making, they do not necessarily settle an issue, or may only do so for a generation. The referenda which resulted in Northern Ireland remaining in the UK, and devolution to Scotland and Wales being rejected in the 1970s clearly did not bring an end to Irish, Scottish or Welsh nationalism within UK politics. Rather, these debates were revisited in referenda 20 years later, with very different outcomes. Current plans for a referendum on Scottish independence and a referendum on granting additional powers to the Welsh Assembly underline this point. Likewise, the only UK national referendum to date, on membership of the European Economic Community in 1975, has never been accepted as having settled the issue of the place of the UK in Europe. In practice, referenda often create a demand for more referenda. It is also noteworthy that the experience of other EU member states which have held referenda on EU treaties is that governments are generally best placed to force, and resource, a repeat referendum with the aim of getting the outcome they want.

15. Second, the apparent public enthusiasm for referenda voiced via opinion polls rarely translates into high turnouts when referenda are actually held. As table 1 shows, turnouts in referenda held in the UK since 1973 have ranged from 34.5 to 81.1%, with the referenda on devolution in Greater London and North East England prompting fewer than half of the eligible electorate to participate. While the average turnout of 57.8% compares favourably to turnouts in local elections, and falls only slightly short of turnout in recent General Elections, it remains the case that referenda have not tended to result in high levels of public participation.
Given the experience of referenda turnouts of less than 50%, the issue of whether thresholds should be imposed is inevitably raised—which in turn highlights concerns about the state of the electoral registers (see paragraph 19, below).

16. The use of referenda in English local government has grown significantly over the last decade—largely because of legal provisions enabling a referendum to be called on the issue of whether a local authority should have a directly-elected mayor. In addition to the 35 mayoral referenda held from 1997–2007, there have also been 20 non-binding referenda organised by local authorities as part of their submissions to the Boundary Committee on local government re-organisation, and 4 binding referenda held by local councils to set local council tax rates. Again, the experience of local referenda suggests that they have not become a focal point for widespread citizen engagement with the political process. Turnouts in the 35 local referenda on mayors have varied enormously, although there were only two instances where they exceeded 50% (Berwick-upon-Tweed, 2001: 63.8%; the Isle of Wight, 2005: 62.4%). The average turnout has been about 30%; and it has been below 20% in six cases, including Ealing where a turnout of 9.8% resulted in the rejection of proposals for a directly-elected mayor in 2002. While average turnout in local referenda on local government reorganisation and council tax levels has been somewhat higher, it remains well below 50%.

Table 2
REFERENDA IN ENGLISH LOCAL GOVERNMENT, 1997–2007: ISSUES AND TURNOUTS

<table>
<thead>
<tr>
<th>Type of referendum</th>
<th>No. referenda</th>
<th>Mean turnout</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mayoral</td>
<td>35</td>
<td>29.2</td>
</tr>
<tr>
<td>Local government reorganisation</td>
<td>20</td>
<td>45.4</td>
</tr>
<tr>
<td>Council Tax</td>
<td>4</td>
<td>38.8</td>
</tr>
</tbody>
</table>

Source: Miller, 2009, *op cit*, p.6

THE STATE OF THE ELECTORAL REGISTERS AND THRESHOLD REQUIREMENTS
17. While not included as part of the scope of the Inquiry, we would suggest that the state of the electoral registers represents a major challenge to the legitimacy of referenda in the UK. If referenda are to confer popular mandates on specific issues, then everyone who is entitled to vote must be able to do so. However, the last published research on the completeness of the UK’s electoral registers estimated that around 3.5 million (8–9%) of eligible electors were absent from the registers following the annual canvass in Autumn 2000.6 In addition, given that around 10% of the adult population change address each year, a further three to four million electors are likely to become disenfranchised during the period in which the registers are in force. Depending on the timing of a referendum, it is therefore likely that anywhere between 8 and 18% of the eligible voters will be unable to participate, with these proportions being significantly higher in metropolitan areas. It is also clear that non-registration rates are significantly higher among young people and some ethnic minority groups.

18. Clearly, these concerns about the electoral registers apply with equal force to elections. However, given existing patterns of under-registration, it is important to underline the risk that referenda will serve to widen existing political, economic and social inequalities. Given that the motivations for their use would be to promote political participation and enhance the popular legitimacy of decisions, this would clearly be a paradoxical outcome. It is therefore Democratic Audit’s view that every effort should be made to ensure that the electoral registers are as complete as possible before any consideration is given to extending the function of the franchise to include forms of direct democracy such as referenda. The significance of this point is underlined by the recent passage of legislation making provisions for the phased introduction of individual voter registration in Great Britain over the next five years—the most significant reform of voter registration procedures for over 100 years.

19. The issue of the completeness of the electoral register is particularly significant where threshold requirements based on the size of the electorate are imposed, as they were in the referenda on Scottish and Welsh devolution in the 1970s. In both cases, it was stipulated that in addition to securing the support of more than half of those casting ballots, “yes” campaigners were required to secure the support of at least 40% of the electorate. As Balsom and McAllister noted at the time, such thresholds were deeply problematic in view of the state of the electoral registers since the “requirement gives a political significance to the electoral registration system for which it was not designed and is quite inappropriate”.7

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CONCLUSION

20. The appeal of referenda as an instrument that will encourage a more participatory politics in the UK is understandable. However, they must not be seen as a magic bullet. More wide-ranging work would first be necessary to reform the defects in our constitutional arrangements, to ensure the electoral registers are fit for the purpose and to take wider steps to fashion a more deliberative and participatory democracy. Moreover, without a written constitution the use of referenda would risk becoming purely ad hoc, exposing further contradictions in the UK’s existing constitutional arrangements. The immediate appeal of referenda as a form of direct democracy cannot be a substitute for some hard thinking about what role people’s direct input could or should play in government, and through which mechanisms.

21. Given the basic defects of the UK constitution, it is not currently a worthwhile exercise to try to define when and how referenda should be used, and we should not allow contingent problems about particular uses of the referendum to obscure the fundamental point about their necessity in the context of a written constitution which recognises the ultimate sovereignty of the people.

22. In the absence of a written constitution, however, we should give serious consideration to any reforms which would strengthen and deepen democracy in the UK. Given our majoritarian electoral system, the risk that such reforms may be motivated by the partisan objectives of governing parties suggests that major constitutional changes, such as reforms to the electoral system, should be subject to referenda. However, we would strongly advise against the Committee supporting the use of referenda in relation to non-constitutional issues. At this time, the focus of reform needs to be on strengthening Parliament against the executive, rather than encouraging popular sounding initiatives which will only undermine its diminished authority still further.

3 January 2010

Examination of Witnesses

Witnesses: Professor Stuart Weir, Associate Director, Democratic Audit; and Baroness Kennedy of the Shaws, a Member of the House, examined.

Q63 Chairman: Lady Kennedy, Professor Weir, can I welcome you most warmly to the Committee and can I thank you very much indeed for joining us? We are being audio-recorded but not televised so, as if it was necessary, could I please ask you to identify yourselves for the record and if you would like to make a brief opening statement please do so but do not feel obliged to and otherwise we will pitch straight in.

Baroness Kennedy of the Shaws: My name is Helena Kennedy. I imagine I have been invited here because I did chair the Power Inquiry which was established at the end of 2005 by the Rowntree Trusts, the Reform Trust and the Charitable Trust, to look at the issue of why there was a downturn in electoral turnout and why so many fewer people were joining political parties. It was to look at the state of British democracy. A small Commission was established and we travelled up and down the country and took evidence and we created a report which was published after 18 months. Since that time the Power Inquiry in this last six months has been involved in a sort of second stage which relates to basically the concern that we had that there was now much more debate, as a result of the allowances scandal, about reform of our political system, and so we have been involved in a process since that time of inviting the public to engage in an on-line consultation asking them for their ideas on reform. In turn, we have had a deliberative poll just this last weekend. I will explain that to the Committee in due course. Prior to my invitation to chair the Power Inquiry, from 1992 until 1997 I was the chair of Charter 88 and so I have been very involved in constitutional reform issues for a very long time. I was one of the founding members of Charter 88.

Professor Weir: I am here on behalf of the Democratic Audit which is an independent research body set up initially by the University of Essex and is now more attached to the University of Liverpool as it happens. We evolved a methodology for assessing the quality of democracy and the protection of human rights which we have applied in three successive audits of the arrangements in the United Kingdom for democratic governance and protecting human rights. Our methodology has been adopted internationally by the International Institute for Democracy and Electoral Assistance. It is an inter-governmental body based in Stockholm. Our methodology is being used now in about 24 different countries or regions around the world. I just want to say very briefly we think that referendums are neither sound nor appropriate mechanisms for dealing with the kinds of problems which they are supposed to be dealing with. We think this is particularly the case because the United Kingdom does not have a written constitution and we believe that any kind of rules and procedures for holding referendums should be governed by the referendums and not left to the executive of the day, the Parliament of the day and ad hoc bodies like the Electoral Commission. That is our basic position.

Baroness Kennedy of the Shaws: They should be governed by a constitution. That was not what you said.
**Professor Weir:** I meant to. They should obviously be governed by constitutional arrangements through a written constitution. We believe that should be the result of very, very close and detailed consultation with the public. We have one exception to this basic position. We believe that the executive is in such a powerful position when it comes to making changes to our governance arrangements and we have already had notice that both the major parties have ideas of this kind in mind, so we do think there needs to be at least some kind of additional check on the executive when they are making arrangements which have constitutional implications. Obviously we are very aware that the House of Lords exists and we would assume that the House of Lords as a body would take a very close interest, but we think there ought to be an additional check and therefore there ought to be referendums on any changes which are going to take place which will affect constitutional arrangements and that a referendum in that case preceded by proper consultation and deliberative information should be made available.

**Q64 Chairman:** Thank you very much. Could I ask each of you to expand on precisely what you mean by “constitutional”, how widely you think the word “constitutional” should be applied? What do you mean by “constitutional arrangements”?

**Baroness Kennedy of the Shaws:** I did not use my moment of introduction to describe my own position on this. The Power Inquiry made a number of recommendations and one of the recommendations was that there should be a greater use of referendums and that in fact you could have citizen-initiated referendums. That was the view of the Panel as a whole and I should indicate that it is not a view that I share with great enthusiasm, but as a democrat I accepted that that was the view of most of the people on the Commission. I think the Power Commission certainly felt that in order to have any kind of citizen-initiated referendums there should be a limitation on the sort of subjects that there could be such a referendum on, and again they confined it to constitutional issues, but did not define what constitutional issues meant, so we are left with that uncertainty. However, I think that it was very clear that one was talking about anything that changed the power balances within our democratic system, and so that involved issues like devolution but also issues in relation to our relationship with Europe; anything that in any way redistributed power in a significant sense. I think that was what they had in mind. When they spoke about citizen-initiated referendums they wanted certainly it to be cushioned with a number of very clear conditions, in that there should be a very significant threshold that would have to be passed before you could initiate, that the turn-out of people who actually voted would have to be significant enough for it to have any meaning, that it would only be recommending positions to Parliament because ultimately the sovereignty of Parliament was still considered vital in this. The acceptance was that if it was significant enough then Parliament would take cognisance of any referendums. There was concern about the nature of the question that would be asked and it was felt that there had to be some body that had oversight of the question. It would presumably be the Electoral Commission now and they would want to have the position of the Electoral Commission on that made much clearer. They also felt very strongly a concern about the sort of manipulation that there could be of any campaign by the media, by lobbyists and so on. I think there was a very strong feeling within the Power Inquiry that you would have to have deliberative processes around any referendum, so that you would actually hold around the country deliberative processes. I just had the experience this last weekend of holding for Power a deliberative poll. YouGov helped us to select the people. It was intended that it should be 200 people but it was 130 in the end because of the weather conditions. They came from all over the country and in the end the group who did arrive was measured and was still representative of the whole of the country, so you had the nation in one room. They stayed over two days to deliberate on reform that they would like to see within their democracy in order to improve, they felt, their democracy. The results have only just been published today and a press release is going out today. It was very interesting because what it showed was that when the public are given good information they move away from populist positions. When they are given the opportunity of taking part in debate and discussion and then can ask their questions of experts whom they trust they actually shift their position. They do not choose populist reform. It was very interesting to see that when they were polled before the two days of conferring they actually took positions about voting, you should be allowed to vote for your Prime Minister; there should be an English Parliament; they wanted referendums on all manner of things. By the end of the two days of deliberations they had shifted their positions significantly on all of those things and had drawn away from populist reform. You will be happy to know, those of you who are interested, that House of Lords reform fell way down their feelings of determined changes that have to be made with alacrity. It did not come up there as one of their key issues. In fact I think a deliberative poll would be a very useful thing for this House to have on House of Lords reform because I think you would find that the results would be very different from what you would get as a knee-jerk response when you ask the question: “Do you want it to be simply voted on?” Just to turn to the issue of referendums, we had evidence given which changed
the position of the deliberative poll this last weekend. When there was a discussion on referendums the example was given of what had happened recently in New Zealand. It is maybe something that you are all familiar with already. The way in which that initiated referendum still has left people with a bad taste in their mouths in New Zealand is partly because the question seemed to be so poorly drafted but also because there is an issue about how many people turn out in a referendum like that. It was just over the 50%, so even with an incredible poll which has 86% of the electorate deciding that they wanted to be allowed to smack, it still took it below 50% of the population, and so what meaning do you take from that? It has caused a great deal of debate amongst reformers, and amongst politicians of course, and generally in New Zealand about the whole question of initiated referendums. I go back to the position I set out at the beginning. I am not a great enthusiast of referendums. I think that if you really do want to engage the public and have the public’s views, it has to be based on proper discussion and debate and the public have to have an opportunity of becoming well informed. I now veer towards much more use of deliberative polling where you bring together what is a cross-section of the general public. You can do it on a more regular basis and you can bring them together, and then you provide them with good information and the opportunity to question experts, and then allow them to then reach some sort of conclusion on whatever the issue is that you are placing in front of them. It is a far more satisfactory way than simply asking a perhaps largely uninformed or influenced or manipulated public for a view. I think well-informed members of the public reach good conclusions but there are other ways of doing it.

Q65 Chairman: Professor Weir?
Professor Weir: It is an odd question in a way. It is a bit like saying to somebody, “Will you describe a camel for me?” when we all know what a camel actually looks like but would find it perhaps difficult to give a very accurate description of the beast. Essentially I agree with Helena that firstly anything that bears upon the arrangements over the disposition of power within our society ought to be potential candidates for a referendum under current circumstances. Clearly Gordon Brown’s idea of a referendum on a choice between first-past-the-post voting and the Alternative Vote ought to be a candidate for a properly conducted deliberative approach to the public. Similarly, the Leader of the Opposition’s ideas about changing the composition of the House of Commons clearly is another matter which ought to be subjected to a referendum and the kind of conditions that Helena has outlined. I suppose, in a way, the New Zealand poll on smacking is a human rights issue and I would have said that any human rights issues ought to be properly debated too, but I think that is slightly trickier, and perhaps we ought to rely upon our existing judicial system and the European Convention on Human Rights to actually adjudicate upon any changes that are going to affect human rights in this country.

Chairman: Noble Lords who have been Members of the House of Commons will have spent many, many years having deliberative meetings in draughty halls in their constituencies up and down the country so we are well familiar with the experience. Lady Quin?

Q66 Baroness Quin: You have partly already touched on my question which is really about the strengths and weaknesses of the referendum as a democratic and constitutional tool, but I just wondered if either of you would like to add anything not just on referendums that have taken place in this country but also any international examples? I thought the examples of New Zealand that you have both already referred to were extremely interesting in this respect incidentally.

Baroness Kennedy of the Shaws: I think we have covered the ground in that we have the concerns that are the usual ones and we are particularly concerned about the quality of discussion that there is around a referendum. That is why I think the only way you can do this really successfully is for a few issues. I think it should be a rare use and when it is used I think you should pack it around with deliberative processes. The way that you do that is that you roll them out around the country and then you try to have them televised so people can see what is happening and people can see the way in which people hear evidence and change their views. My confidence in this largely comes from my 35 years’ experience of doing jury trials, where I am a big believer that when you give the general public, whatever their level of education, good information and good evidence, they will work on it and they usually will come out with sensible conclusions. The experience of this last weekend was conducted by a man called Professor Jim Fishkin from Stanford University. He is originally from Yale and he has become the king of deliberative processes and has done them all over the world. He did them in Canada around their intention of having reform of their voting system. He has been doing them all around the world and he has done them in the United States. He has developed a methodology and one of the reasons why I wanted him to come in and conduct this one over this last weekend was because I wanted us to learn from him but I also wanted the independence of that and experience of that so that it is not just being invented on the hoof. I am sure that Philip Norton knows the person I am speaking of. It was very interesting to see the preparation that went into it and also to see the results. What was so interesting was, just to mention this so that it is before
the Committee, what the deliberative poll, which ended up being 130 people, came out with in the end were very sensible proposals. Some of them are ones which may seem mundane to all of us because we are so familiar with the system but they really wanted to see the strengthening of select committees. They wanted to empower Members of Parliament more. Of course, there was a certain amount of concern over abuse of allowances but they left that behind very quickly and moved on to what they would like to see in the way of changes and a lot of the things were very sensible. For example, quite high up was the business of statutory instruments. Very few of them knew what a statutory instrument was before but in advance we had provided them with a document which set it out. We had had it reviewed by independent sources to make sure it was setting out what the position was and it was a learning document. Many of them came very uncertain as to what a statutory instrument was. When they got to understand it and to know it they felt that it should not be used as readily as it is being used. I thought it was very interesting that it came quite high up in one of the changes they would like to see. It was interesting that they wanted to empower the voice of Members of Parliament and they also wanted to empower the voice of the citizen. They wanted for example consideration for elections to take place at weekends to make it easier but they did not want you to be able to vote sitting in your armchair as you might do watching Big Brother. They did not want that kind of thing. They were very concerned about the ways that that could be abused in the way the postal vote perhaps has been. The reforms they went for very sensible ones, some of them quite radical, but on the whole it was about letting more voices in and empowering their Members of Parliament, their representative democracy, and it was not a move away from representative democracy in any way. As I say, some of the things fell away, some quite interesting things. For example, the idea of electing the Prime Minister directly halved. The idea of allowing on-line voting halved and although they came in thinking this would be a good idea, once they heard what the arguments were it changed. Included in this was one of the suggestions that had come from the internet from a lot of people, that party manifesto promises should become legally binding. You can see where this comes from, which is the idea that they make promises to us before an election and then they never deliver and so they should be forced to deliver. Then we pointed out “how are you going to force anybody to deliver a manifesto promise?” Again, it completely dropped away as a suggestion. They also did not like the idea of electing judges, they did not like the idea of the public or local people being able to elect the heads of key services like police commissioners and so on. There is a lot of stuff in this for the different political parties who are riding some of these horses at the moment about how the public once they get good information actually think it is all rather shallow stuff.

Professor Weir: To go back to your question, our concern is that referendums are so open to manipulation, especially by the executive but also by vested interests of one kind or another. If you get comparatively low turnouts then a particular section of the population could be mobilised one way or the other. Indeed, you can get campaigns not to vote in a referendum at all. So there are very real operational problems with them. The thing that really concerned us when we looked at this was that everything would be based on existing electoral registers, and they are well-known to be deficient and they are well-known to depend upon the diligence of the local electoral officers in the first place. There are major omissions of particular groups in the population from the electoral register, especially young people. One of the things we are supposed to be doing is encouraging young people to take an interest in politics. This simply would leave them out. When you get a relatively deficient and inaccurate electoral roll, it gets more and more inaccurate as time passes. We estimate that between 8% and 18% of the public are probably not properly represented through the electoral register. I think that is a major problem for the people who wish to see this idea. The idea of referendums is a very beguiling idea but in actual fact there are so many deficiencies, so many unexamined questions and implications come out that we think we need to seriously consider the use of any kind of citizens’ initiative in relation to the role of both Houses of Parliament and that far more should be done to bring people into contact with their representatives in Parliament. We would go further because we would say that we think parliamentary sovereignty is a very poor substitute for popular sovereignty but we do believe that everything should be channelled through Parliament as far as possible, so it is for those reasons that we are very, very sceptical about the value of referendums.

Q67 Lord Norton of Louth: It is really the point about deliberative democracy. I can see the arguments for the exercise you have outlined, but if one is offering it as an alternative to a referendum I am more concerned with the outputs of the process and how they relate to Parliament, and how it would be embodied in terms of actually affecting public policy because it would be confined to a few people and therefore those not engaged in deliberative democracy would feel excluded.

Baroness Kennedy of the Shaws: Can I make it clear that I am not suggesting it as an alternative. I think it should be used for example when you are talking about a policy like ID cards. It would be very useful
to have run out a whole set of deliberative processes around the country to see how people actually felt about it once they knew. What we know was that when they first started on that policy there was a great enthusiasm because people thought it was simple, and it was only when you dug deeper into this and you understood what was involved that people started becoming very hostile. What I am saying is that on the few occasions where I think that a referendum is appropriate, the way that you enrich it is by having deliberative processes around the country. I am not suggesting it as an alternative to it. I do not think you can do that. What you do is have deliberative processes in the period immediately before. Fishkin has done this. He did it in Australia on the referendum on the monarchy. He ran out deliberative processes immediately before the poll. He did it elsewhere where you make it a part of the process so that you create a kind of culture of wanting to know more, there being more debates, a representative section of the public being involved in a deliberative poll, having it televised, having an internet reaction to it. You try to generate much greater information.

Q68 Lord Norton of Louth: In previous evidence we were told the cost of a referendum was about £120 million. If you are having extensive deliberative democracy you then have a practical problem about cost.

Baroness Kennedy of the Shaws: That is an issue.

Q69 Lord Norton of Louth: Is not your argument that if you have deliberative democracy it is not so much an alternative to referendum but actually undermines the case for a referendum because if you have a referendum debate without the sort of exercise you are talking about, then that would suggest you might get an ill-informed result?

Baroness Kennedy of the Shaws: I think that you could easily get an ill-informed result. I think that this process that we went through last weekend gave you an inking of that because you got the people at the beginning taking quite strong views on all manner of things. They were very cross about the idea that English legislation should be voted on by Scottish MPs to an extent where they can change the outcome on some things where the MP has no constituency to call them to account. Yet at the same time once they gave consideration to the implications of setting up an English Parliament and so on, they then started to feel there was a threat to the Union in this and that you do not create a proper federal system because England is so large. Once they got more information they retreated from some of this stuff. That is why it really made me much more reflective about the business of referendums. Being so closely involved in this process made me think that it is very easy to plump for this and actually the learning for me out of the last weekend was that you get very vulgar responses to things.

Professor Weir: I would like to agree entirely with Lord Norton. That does not happen that often actually! I think what Helena has been saying does undermine the case, but I would add that if we are going to have democracy in the United Kingdom, we should be prepared to pay for it. I think a lot of the problem with the House of Commons and expenses has been that the political class has been unwilling to confront popular prejudice and MPs ought to have been paid properly from the very beginning rather than forced to all the kind of devices that we have seen. I would like to put in a little pitch for the methodology that Democratic Audit has pioneered, as it were, and which is now used internationally. In the Netherlands the Government there actually used our system for assessing the quality of democracy for a major inquiry into the equality of their democracy after the two fairly notorious murders. They set the civil service to work in that country using our criteria and our methodology to assess the quality of their democracy and they came up with quite a few reforms which in fact the Dutch Queen used in her Christmas-time address to the nation, as it happens. In this country we need to shift away from the idea of magic bullets, the idea of hit-and-miss electoral registers and the huge amount of discretion that is available to the executive. We need to move in our culture and ethos to a much more deliberative way of doing politics. I would have hoped that your consideration of the use of referendums would include some thoughts on the quality of the culture of our democracy in this country, our willingness to pay for things, and the approach we make to major reforms, both constitutional and in other areas, where there are very, very real deficiencies, and the way we have passed legislation of course.

Baroness Kennedy of the Shaws: It was very interesting that in this deliberative process last weekend when they heard that in fact our Parliament is actually, by comparison with most others, an incredibly cheap Parliament, in fact it costs very much less than most other Parliaments and indeed France and Britain together still do not come to as much as what Italy costs in terms of its Parliament, it was of interest to people. There was a real shift if you went around the tables in the views that they took about the allowances scandal once they had more information. In the same way, I just wanted to mention on the issue of referendums the recent referendum that they had in Italy, which was either on the use of IVF or abortion. It was on a very controversial issue in which the Vatican was also having a say. What happened was because in their constitution they insist on there being a certain amount of turnout before it can have validity, the phone campaign and internet campaign
was all about persuading people not to turn out. People who were at all ambivalent and uncomfortable because of the profound nature of the question just did not vote. That was what happened. It failed because of the turnout. The campaign was not to let people come out to vote. It is interesting how those things work out but it is a much more complex issue than people often think.

Q70 Baroness Jay of Paddington: I think we may have moved on but it was really a supplementary to the question of Lord Norton about the responsibilities for providing the kind of information or in fact building the deliberative process that you have both talked about in different ways. What role do you think the government of the day in a referendum might have in that sort of process? Could it have any role? Would it be the provider of the information?

Baroness Kennedy of the Shaws: I think that you therefore have to hand it over to civil society. I do think that the deliberative processes have to be run by something separate from government because otherwise the sense that people get is, “Is it trustworthy?”

Q71 Baroness Jay of Paddington: Then the question of resource and paying for such an operation as you describe it would be pretty demanding on civil society organisations unless they were publicly subsidised?

Baroness Kennedy of the Shaws: They would certainly have to be publicly subsidised. There is no doubt about that. It is about who runs it and who creates the information packs and all of that. We had it over the weekend where questions were asked where they actually wanted to know about the background of experts and so forth. They really did want to know the sources of information. It was interesting because they wanted to be confident that they were not being moved in a particular direction and that was interesting.

Professor Weir: The problem is really that the executive so much dominates Parliament that anything that comes out through Parliament which should be the focus for any kind of information that is provided is absolutely tainted by the fact that the executive controls Parliament. It is a very difficult situation. Then you are driven to all these expedients of trying to find ways of remedying that position. I think it is a very difficult position, which is why we think we should have a much more independent Parliament in terms of the way elections work and so on. I suppose there is one deliberative alternative to referendums which might be quite interesting, although it probably will sound revolutionary, but instead of having Royal Commissions, as it were, of the great and the good, the Chilcots and so on, we could actually set up deliberative juries of citizens to consider all the kinds of questions which need thorough investigation in advance. I think they do that in Scandinavia to some extent but I am not sure about that. It would be an interesting experiment and I think the citizens would certainly do as well as the experts and possibly even better because the choice of them would depend upon some kind of YouGov exercise making sure they were generally representative rather than it being the prerogative of the executive to decide who was the appropriate person to conduct an investigation or an inquiry.

Q72 Chairman: Professor Weir, when you say a “more independent” Parliament could you just expand on what you mean by that?

Professor Weir: Essentially I believe that Parliament should be elected by a system of proportional representation. I have ideas about which system would be the most appropriate given our culture and so on. Until you do that, if you fuse, as it were, the major parties with the control of Parliament in the way that we do at the moment, you are not going to get a properly independent Parliament. I know there are things that alleviate that, the existence of the House of Lords being one of them, but so much initiative lies with the executive in our system of government. We keep on trying to find ways of evading that fact. It might just be better to change the system which puts people into Parliament in the first place and then you would obviously get a much less “take it or leave it” political system and a much more balanced system within which Parliament and then the people could operate.

Chairman: Lady Kennedy and Professor Weir, time, alas, is our enemy. You have been extremely generous with your time for which the Committee is most grateful. I wonder if we might trespass further on your generosity by communicating with you in writing on one or two of the questions that time has precluded us from covering this morning? Thank you very much indeed for joining us.
Constitution Committee: Evidence

Wednesday 20 January 2010

Present
Goodlad, L (Chairman)
Hart of Chilton, L
Jay of Paddington, B
Lyell of Markyate, L
Norton of Louth, L
Pannick, L
Rodgers of Quarry Bank, L
Shaw of Northstead, L
Woolf, L

Memorandum by Professor Vernon Bogdanor, Professor of Government, Brasenose College, University of Oxford

1. The Referendum and the British Constitution

Almost all democracies employ the referendum. Amongst countries which have been continuously democratic since the 1940s, only Germany, India, Israel, Japan and the United States have not used referendums at national level.2

But the referendum is not addictive. Switzerland, which holds on average around one national referendum a year, is very much the exception to the general rule. Indeed, Switzerland has held around half of all of the national referendums that have ever occurred.3 Australia and Italy are the only other democracies to have used referendums at national level at all frequently. No other democracy has held more than 45 nationwide referendums. The typical democracy, like Britain, holds referendums but very infrequently.

The dichotomy between “representative” and “direct” democracy is, therefore, highly misleading. For the referendum, even in Switzerland, is used not to replace, but to supplement representative democracy. There is little danger that it will come to subvert parliamentary government.

Referendums are used primarily to resolve constitutional issues. For fundamental changes, so it is argued, ought not to be implemented without the consent of the people. They should not be implemented simply at the will of the government of the day. If they are to secure legitimacy, they need the endorsement of the people as well as that of the legislature.

Britain, of course, lacks a codified constitution. This means that there are no legal rules requiring a government to hold a referendum on particular issues. And no definition of what is to count as a “constitutional” issue. The referendums that have been held or promised have been decided upon by the government of the day at its discretion. An elastic constitution, so it seems, implies an elastic use of the referendum. But this gives rise to a problem. For the referendum, in countries with a codified constitution, is intended to constrain the government of the day. In Britain, by contrast, if use of the referendum lies at the discretion of government, it can be used to augment the power of government rather than limiting it, by allowing a government to bring the people into play against Parliament. That was perhaps the case with the devolution referendums. The referendum could then become a tactical device, “the Pontius Pilate” of British politics.4

In fact, however, conventions have grown up as to when the referendum ought to be used. These conventions, though in no sense legally binding, may serve to act as precedents constraining future governments.

The examples of the devolution referendums in 1979 and 1997 in the non-English parts of the United Kingdom, together with the referendum on regional devolution in the north-east in 2004, would seem to imply that a referendum needs to be held in the area concerned before there is any significant devolution of powers away from Westminster.

The 1973 border poll in Northern Ireland, together with the commitment, first made in the Northern Ireland Constitution Act of 1973, and reiterated, most recently, in the 1998 Belfast Agreement, would seem to indicate that a referendum should be held in the area concerned before any part of the United Kingdom is allowed to secede. It seems generally agreed that, even were the SNP to win a majority of Scottish constituencies in either Westminster or Holyrood, a referendum would be held before independence would be conceded.

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2 There have of course been many referendums and initiatives at state level in the United States. Indeed, every state except, for some reason, Delaware, requires a referendum to amend its constitution.
The examples of the European Community referendum of 1975 and the referendum in London in 1998, seeking approval for the first directly elected mayor in British history, together with the promises to hold a referendum before joining the eurozone or changing the electoral system for elections to the House of Commons, would seem to show that a referendum is required when a wholly novel constitutional arrangement is proposed.

The referendum, then, is used not on bills which propose changes, however radical, in the laws, but for legislative proposals which provide for a radical alteration in the machinery by which the laws are made. The rationale for this requirement lies deep in liberal thought and was well stated by John Locke in his *Second Treatise of Government*, para. 141. “The Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others”. Voters entrust their power to representatives, but they give them no authority to transfer those powers, to make radical alterations in the machinery by which laws are made. Such authority can be obtained only through a specific mandate, that is a referendum.

Locke’s doctrine would seem to imply that a referendum is required, not only when power is transferred downwards, as with devolution, but also when it is transferred upwards to the European Union. However, there has not been a referendum on any of the five amending treaties to the Treaty of Rome—the Single European Act of 1986, which involved a very wide transfer of powers, the Maastricht treaty of 1992, the Amsterdam treaty of 1997, the Nice treaty of 2000, nor the Lisbon treaty of 2007. The promise of a referendum on the now defunct European constitution but not on the Lisbon treaty could perhaps be defended on the grounds that the former was a wholly new constitution for the European Union, while the Lisbon treaty was a mere amending treaty like the Single European Act and succeeding amending treaties. Significantly, while nine member states, including Britain, either held referendums or were proposing to do so on the constitution, only Ireland held one on the Lisbon treaty, and that because she was required by her constitution to do so.

Nevertheless, by analogy with the referendums on devolution, there does seem a strong case in logic for arguing that there should be a referendum before major legislative powers are transferred upwards to the EU as well as downwards to devolved bodies. Were that doctrine to be accepted, it would have made for referendums on the Single European Act and Maastricht, but perhaps not on the Amsterdam, Nice or Lisbon treaties, none of which involved major transfers of powers—moreover, the Lisbon treaty provided for opt-outs for the United Kingdom for many, though not all, of the transfers. But there is of course much room for argument as to which transfers of power are “major” and which are not.

There are, then, persuasive precedents and these may in the future come to constrain governments. But, even if they do, national referendums are likely to be held only very infrequently.

Might it be possible to go further in making the referendum a weapon of retrenchment, as early advocates of it such as Dicey hoped that it would be? One possible way of entrenching legislation might be to suggest that any future amendment or repeal of a particular statute e.g. the Scotland Act, should require a referendum. It would be natural to apply such a provision to legislation of fundamental constitutional importance such as devolution or the Human Rights Act. It might, for example, have been provided that the devolved bodies in Scotland, Wales and Northern Ireland, which were established after referendums, could not be repealed without a referendum. Upon one interpretation of parliamentary sovereignty, this could not be done, since Parliament could simply ignore the referendum requirement and abolish the devolved bodies without any recourse to the people. The decision of one Parliament cannot, it might be argued, bind a later Parliament. Nothing can prevent later legislation from repealing earlier legislation. But it could be argued that the referendum requirement could be made a condition of a bill purporting to abolish a devolved body receiving the Royal Assent. The referendum requirement would then redefine what was to count as valid legislation on a particular topic. The Parliament Acts of 1911 and 1949 redefined what was to count as valid legislation, by providing that a money bill could be passed without the consent of the House of Lords, and that a non-money bill could be passed without the consent of the House of Lords, provided that the same bill had been passed by the House of Commons in two successive sessions. From this perspective, the referendum requirement would be doing nothing more than laying down a further rule for what was to count as valid legislation. There seems no reason in principle why such a requirement should not be possible.

2. Binding Referendums?

In countries with codified constitutions, the outcome of a referendum generally binds both parliament and government. In Britain, however, with an uncodified constitution, the position is much less clear. For, although neither Parliament nor government can be legally bound by a referendum result, the government could agree in advance that it would respect the result, while a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse the decision of the people. Shortly before the European Community referendum in 1975, Edward Short, the Leader of the House of Commons insisted to the House that “This referendum is wholly consistent with parliamentary sovereignty. The Government will
be bound by its result, but Parliament, of course, cannot be bound”. He then added, “Although one would not expect honourable members to go against the wishes of the people, they will remain free to do so”.5

Presumably Short meant that the government would be morally bound. It seemed then that it could not be legally bound. For it seemed then as if the British constitution knew nothing of the people.

It is worth asking, however, whether a referendum could be mandatory rather than advisory, or whether the people must be held to have irretrievably delegated the authority to legislate to their elected representatives in the House of Commons. In 1653, Oliver Cromwell’s Instrument of Government declared that legislative power resided in the person of the Lord Protector “and the people”. Such a doctrine, however, does not seem to have survived the fall of Cromwell. Yet there seems no reason in principle, despite the doctrine of the sovereignty of Parliament, why a referendum result should not be mandatory in the sense that legislation passed by Parliament would automatically come into effect if there were a vote in favour, and automatically be rejected if there were a vote against.

There is a precedent, perhaps not of very great significance, seeming to show that a mandatory referendum is not incompatible with the British constitution. When the Callaghan government, in February 1977, produced its referendum amendment to the Scotland and Wales bill, the New Clause 40 originally provided for a mandatory referendum. The clause originally declared that “If the decisions in the referendum are that no effect is to be given to the provisions of this Act, this Act . . . shall not take effect”.6 Were the referendum outcome to be favourable, the government would have been under a legal duty to bring forward a commencement order so that the devolved bodies could be established, although Parliament would still enjoy the purely theoretical right to reject the commencement order. The government, however, changed its view during the course of the debate, and decided that the referendum should be advisory and not mandatory. It seems, nevertheless, that it might be perfectly possible to frame a referendum provision by which legislation was required to come into effect with a “Yes” vote, and required to be repealed with a “No” vote, in other words, a mandatory referendum. Whether it is desirable to provide for a mandatory referendum is, however, another matter. The next section provides arguments to show that it would not.

3. Thresholds

A threshold can be in the form either of a minimum turnout level or a minimum percentage of the registered electorate. There are strong arguments against thresholds. It is difficult to be precise on what constitutes a sufficient turnout or a sufficient majority. Suppose there were a 50% turnout threshold, and the outcome of a referendum was that 49% of the electorate voted “Yes” and 10% “No”. Then it would probably be reasonable to implement the measure concerned. If, on the other hand, the result were to be 25% “Yes”, and 22% “No”, it would probably be reasonable not to proceed. There was a 34% turnout in the referendum on the London mayor and assembly in 1998, which had no threshold requirement, and the government took the view that, with a 72% “Yes” vote, the measure should be implemented.

Similar considerations hold when the threshold is in the form of a minimum percentage of the registered electorate being required to vote “Yes”. In Denmark in 1939, there was a referendum on the abolition of the upper house, proposed by the government. 92% of those voting supported this measure. But, because turnout was below 45% of the electorate (the then mandatory requirement in Denmark for constitutional change—it has since been lowered to 40%), the government could not implement the change, even though over nine out of 10 of those voting had supported it.

A threshold requirement in the form of a proportion of the registered electorate is likely to depress turnout. For a “No” voter might believe that an abstention was equivalent to a “No” vote, and that she need not, therefore, bother to turn up at the polls. Simply by staying at home, she would in effect be voting “No”. An extraneous factor such as the weather on polling day may influence the result. Suppose that in the Scottish devolution referendum of 1979, when the threshold was 40% of the electorate, turnout had been 80%, and the outcome had been 41% “yes” and 39% “No”, but one-quarter of the abstainers, i.e. 5% of the electorate, had stayed at home in the belief that abstention was the same as voting “No”. The true strength of the Noes would be not 39% but 44%, and the “Noes” would have won. A threshold, therefore, may confuse voters and produce an outcome which does not reflect their true intentions.

There is, however, a strong case for using a threshold in Northern Ireland where a simple majority, if composed almost entirely of the majority, Unionist community, might not be thought sufficient. Instead, a majority of those in both communities may be needed to secure legitimacy. It is, however, difficult to ascertain the precise composition of a majority other than by asking voters to label themselves “Unionist” or “Nationalist”. Therefore a qualified majority large enough to ensure that at least a substantial proportion, if not a majority, of the minority community, as well as of the majority community, would be needed. Where there is to be a

threshold in a referendum, it is better to implement it in the form of a specific percentage of votes cast, rather than a percentage of the eligible electorate.

Outside Northern Ireland, however, it seems more in accordance with the constitution as it has developed to allow the government and Parliament to make the final decision after a referendum, using its own judgment where there is a narrow majority on a low turnout. The government and Parliament decided, perhaps rightly, not to allow Scottish devolution to go ahead in 1979 despite the small positive majority for it—33%-31%—far below the 40% threshold which Parliament had set. On a figure of 39% to 31%, however, the government would almost certainly have proposed to allow devolution to go ahead. But it is difficult to specify in advance the precise margin or size of turnout which would justify the government and Parliament in its decision whether or not to accept the outcome of a referendum. That is a matter perhaps best left to the discretion and judgment of MPs.

There might, however, be a stronger case for a turnout requirement in local referendums. For the average turnout in local elections is under 40%, and there is some danger of vociferous local minorities imposing their policies on the apathetic majority, who do not bother to vote. It might be reasonable perhaps to require a turnout of, say, 35% for the outcome in local referendums to be accepted as valid.

4. Local Referendums and Initiatives

There is much more scope for the referendum at local than at national level. The Local Government Act, 2000, allows, but, following the Local Government and Public Involvement in Health Act of 2007, does not require, a local authority to hold a referendum before introducing a directly elected mayor system. But the Local Government Act, 2000, also introduced, for the first time into British politics, the initiative. The Act provided that any 5% of registered local electors could, by signing a petition, require a local authority to hold a referendum.7 The purpose of introducing this device was to overcome the opposition of the local authority establishment, and in particular, local councillors, to the introduction of directly elected mayors. So, for the first time, voters were given the power to override the wishes of a local council which was unwilling to hold a referendum on the mayor option.

The referendum allows voters to repair sins of commission by government. The initiative allows them to repair sins of omission. The referendum, as it currently operates in Britain, is a weapon that can be used only by the political class. The initiative is a weapon to be used by the people.

There seems no reason why the initiative should be confined to just the one issue of a directly elected mayor. It could be argued that if voters are to be entrusted with the decision as to how their local authority is to be governed, they might also be entrusted with the decision, for example, as to how their local authority should be elected. 5% of local authority electors could be allowed to petition for an alternative voting system for local elections. They could be allowed to petition also on such matters as the shape and size of the local authority budget, or the organisation of the schools in their local authority. The initiative is an innovation with very radical possibilities.

I would hope, therefore, that the Committee will examine the use of the referendum at local as well as national level. Local initiatives perhaps lack the glamour of national referendums, but they can yield real “double devolution”, that is devolution not merely from central government to local authorities, but from local authorities to the citizen. They could prove an instrument to encourage participation at local level, so contributing to the regeneration of our democracy.

31 December 2009

Memorandum by Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh

1. What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

In a sense the referendum can be seen as “pure democracy”. In other words democracy unmediated by representatives; a symbolic reminder that democratic authority finds its legitimacy in the consent of the people. But there are problems with this assumption at the levels of both principle and practice. In theoretical terms it might be argued that representative democracy is not only the most practical way to run a democratic society, it is in fact preferable to direct democracy as a matter of democratic principle. Elected representatives bring expertise and time to problems that ordinary citizens don’t have; they may be more detached and hence objective; and they see the bigger picture of how different issues inter-relate—a referendum addresses single issues one by one without proper regard to this larger canvas.

7 There is also provision for voters to require a referendum on the abolition of grammar schools.
On the other hand we might say representative democracy could work better: the party system; ministerial patronage; the whip system etc all conspire to constrict representatives from exercising their expertise and objective judgment free from political control. But the answer to this is not referendum democracy but some reforms of representative democracy where possible. So I am opposed to the idea of referendum democracy replacing representative democracy at any general level.

It may be, however that limited room should be made for referendums at the level of “sovereignty decision-making”—in other words, on issues that fundamentally redefine the nature of the state. For example:

- a new constitution;
- fundamental changes to the electoral system or nature of Parliament;
- fundamental changes to the constitutional status of the Sovereign;
- the transfer of substantial constitutional powers to institutions beyond the state; and
- independent statehood of a sub-state nation/territory.

There seem to be arguments for referendums if they are only used at this level. First, that the issues are so fundamental that people should be able to reclaim their direct constitutional authority; and secondly, that these decisions involve the very identity of a sovereign people and again, therefore, that people should be able to play a direct role in such an exercise of constitutional “self-definition”.

2. What assessment would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?

In this light the UK’s experience has been fairly positive. Referendums have been used rarely, and usually only for fundamental constitutional issues (although regional assemblies perhaps don’t fit this description). We might argue, however, that if one was used in 1975 for EC membership then there was a strong case for a referendum on one or more of the more recent, and very expansionist EC treaties since the 1990s. Another question is the use of “territorial referendums”: in other words referendums on devolution. Should these only be held in the territory in question? Is there an argument for a broader UK say on these issues? Or is that expressed by Parliament in subsequent “enabling” legislation? We might say the same on a referendum on Scottish independence. The rest of the UK would still have a say in any negotiation process.

3. How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

One objection of course is that a referendum can upset the workings of a representative system. If referendums are over-used I agree this would be an issue. But the limited use I suggest should not be a problem; and in any case citizens do have the right to determine these questions. A bigger issue is that with an unwritten constitution the use of referendums remains at the discretion of Parliament and of the sub-state legislatures (eg Scottish Parliament). This can lead to irregular use: yes for regional assemblies, no for EU Reform Treaty. Some form of regulating how and when constitutional referendums should be used may be worth considering.

4. Is it possible or desirable to define which issues should be subject to a referendum?

It has been done: Northern Ireland Act 1998 s.1 and the Government of Wales Act 2006. Beyond this it could be argued that some kind of convention has emerged that a referendum is needed for devolution or for fundamental changes to a devolution settlement. But no such convention has emerged on Europe. Certainly a law could have been passed requiring a referendum on the ratification of any new EC/EU treaty. This would not be constitutionally problematic. Such a law could also provide for a referendum on future issues such as the secession of a constituent part of the UK; any move to a written constitution; a change in the electoral system; abolition of a House of Parliament etc.

Whether one sees this as desirable would depend upon how one views the current, highly flexible position but it would surely be possible as a matter of legislative drafting.

5. Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

I think yes for reasons above. The issues I have mentioned seem to be ones that could reasonably be covered. Included in my idea of fundamental constitutional change would be: a move to a written constitution; a questioning on the status of the Sovereign; on the relationship between the two Houses of Parliament; on the sovereign powers of the UK Parliament in relation to the EU or other supra-state institutions; on the territorial integrity of the UK.
I would leave the Human Rights Act to one side. This was introduced by Parliament without any call for a referendum and could be modified or repealed by Parliament without necessarily affecting the UK’s international obligations. I think in general the ratification of international treaties are not the proper subject of constitutional referendums unless they impact on the other issues I have outlined.

6. Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

I don’t have any comments on the details of the Act except to say that how a referendum campaign is funded and organised is fundamental to its democratic and constitutional legitimacy.

7. Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission’s work in relation to referendums?

Again I have no specific criticisms of comments to make.

8. What comment would you make on key components of a referendum campaign, such as:

— Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;

This is a difficult question as there is no settled agreement on, or even on the reasons for, threshold requirements on constitutional change in general. The UK has traditionally not imposed any special majority requirements for constitutional change and for this reason it is difficult to see why they would appear in referendums (as they did in 1978–79). If other aspects of the process are appropriate and transparent then arguably this issue becomes less important.

— the wording of the referendum question (including the appropriateness of multi-option questions);

It seems that the key to a legitimate referendum is process, and by this I mean proper deliberation that engages the public. The pre-referendum deliberation process should include the framing of the question and here some form of citizens’ assembly might be useful. Experiments in this type of activity can be found before the referendum on the head of state in Australia 1999 and in British Columbia on Electoral Reform 2004. Clarity was a big issue in Quebec in 1995, but we should remember that complex questions may not be clear. The crucial issue is to get agreement on the question beforehand and to test it on citizens to see if they find it accessible.

Multi-option referendums are to be avoided if possible. Two options seem to be the clearest model on offer. There may be arguments for more than two options but how decisions can be made on this basis become much more complex. For example, will there be a run off on the two most popular options?

— the design of the ballot paper;

I have no particular comment beyond the general principle of clarity.

— whether there should be formal, constitutional triggers for referendums;

As I say, this is difficult in an unwritten system. An Act could be passed trying to specify the types of issues that would need referendums but interpretation could be difficult. E.g. which EU constitutional reforms would need referendums and which would not?

— whether a referendum should be indicative or binding;

In the UK system arguably all referendums are indicative, since each would need parliamentary ratification by way of legislation to become law. This could come before the referendum takes place (1978–79) or afterwards (1997–98). Even a referendum on Scottish independence would need negotiation, and presumably UK legislation, to be accepted by the UK Parliament as having lawful force.

The option of a second referendum after negotiations should perhaps remain where these lead to very different outcomes than were anticipated by the parties.

— whether a referendum should ask broad questions of principle, or refer to specific legislation;

It is obviously better for the question to be clear and based on principles, but clarity and simplicity are not
synonyms. A clear question might be something like: Do you want Scotland to be an independent state? Do you approve of the UK signing and ratifying the EU Constitutional Treaty?

But often such simple questions beg more complex ones—what will this mean? And in that case a reference to eg a white paper on what an independent Scotland (including social union?) with the UK) would look like, or a paper explaining what the Constitutional Treaty will mean for UK powers etc. would be needed to inform voters. In 1998 every voter in the referendum on the Belfast Agreement received a copy. In Australia in 1999 they received information from each side on their respective views of the issue at stake. This would seem like a fairer model—giving voters a short summary written by each side of the outcomes they foresee.

So a broad question is good, but background explanatory material will inevitably be needed.

— whether a referendum should precede or follow statutory enactment;
It makes sense for it to precede statute so that parliamentary time is not wasted as in 1978–79. On the other hand, the statute should be faithful to the referendum and should mirror as much as possible the white paper or other explanatory paper that preceded the referendum.

— campaigning organisations and the funding of campaigns;
I have little to add beyond the view that there should be one campaign for each position in the referendum and the regulation of funding upon the “equality of arms” principle should be followed as much as possible. The danger of a partisan media is very difficult to overcome (eg on the EU).

— Public information campaigns and media coverage;
Very important. There are good models from Australia and British Columbia.

— Party political activity;
This should be regulated through the official campaigns so far as possible.

— whether referendums should coincide with other elections or not;
Given that I advocate the very rare use of referendums only for very important issues—precisely because they should be taken to stand apart from regular representative democracy—it would be better if they are free-standing events.

— the strengths and weaknesses of in-person, postal or electronic forms of voting;
No strong views.

9. How does the referendum relate to other tools such as citizens’ initiatives? Should citizens be able to trigger retrospective referendums?
This is a tricky issue and stems from particular constitutional cultures. The UK has a strong representative tradition and so an initiative process would not seem to be appropriate in our country. Initiatives may also work better in smaller countries than in the UK. If a small group could initiate referendums in the UK, the danger of the tail wagging the dog emerges.

10. How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?
It seems that where referendums are constitutionally required for major issues the people do retain important powers while not unsettling the norm of representative democracy—Ireland, Denmark. This seems like a good balance. The Swiss experience seems to turn the balance too much the other way. This may suit a small, relatively homogeneous state like Switzerland, but would not seem to suit our country.

On the other hand, if you use referendums for every type of constitutional change but make the threshold too high, as is arguably the case in Australia, then you would make constitutional change very difficult to achieve.

I think for the UK the best model would be: limited use of referendums for very important constitutional matters; simple majority decision-making; a transparent question broadly agreed by different groups; a deliberative, and if needs-be a lengthy, process involving citizen participation and education.

12 January 2010
Examination of Witnesses

Witnesses: Professor Vernon Bogdanor, Professor of Government, Brasenose College, University of Oxford, and Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh, examined.

Q73 Chairman: Professor Tierney, Professor Bogdanor, welcome to the Committee. Thank you very much for joining us. Would you identify yourselves formally for the record, as if it was necessary, and if you want to make a brief opening statement, please do so? Otherwise, we will go straight into the discussion.

Professor Bogdanor: My name is Vernon Bogdanor. I am Professor of Government at Oxford University.

Professor Tierney: I am Stephen Tierney. I am Professor of Constitutional Theory at Edinburgh University.

Q74 Chairman: Can I begin by asking whether you both or either of you think that constitutional issues should be subject to referendums and, if so, how constitutional issues should best be defined?

Professor Bogdanor: There is an important distinction to be made according to whether referendums are discretionary, that is, whether they are held at the will of the Government, or whether according to certain rules laid down in advance, for example in a constitution. Obviously, in our system it is very difficult to have rules because we do not have a constitution and we have the principle of parliamentary sovereignty, according to which Parliament can do what it likes. Nevertheless, there are certain precedents that have grown up as to when referendums ought to be called and it may be that those precedents amount to a convention requiring governments to call them on certain occasions. For example, on each occasion when devolution from Westminster has been proposed, there has been a referendum, either before or after the relevant legislation. I think it would now be very difficult for a Government to avoid having a referendum on devolution. This shows how a precedent perhaps amounting to a convention has grown up—not planned by anyone but in an evolutionary way so as now to constrain government. I think that this is the key to the constitutional role of a referendum: that it should constrain the government of the day.

Professor Tierney: I would begin with the general position that, within a representative system, referendums as a generality are not a particularly good idea. There are three main objections to referendums in principle. One is elite control; that typically referendums promise popular sovereignty but in fact they can be controlled by governments and governments use them when they want to effect a particular result. Secondly that, in terms of the process, they crystallise pre-fixed views. They do not permit the kind of deliberation that we find within representative legislative assemblies, where we expect our representatives to have the competence and capacity to consider matters in the round. Thirdly, they promote majoritarianism, whereas, again, within a representative system we hope that there are systems in place to effect a broader level of pluralism than you would find in a referendum. Beginning with those three objections, therefore, I take the view that referendums, if they are to be permissible or within a representative system, should be retained for the highest issues of constitutional principle, where it is genuinely important to call upon the people to speak to matters of what an American theorist called “constitutional authorship”. In other words, when issues of the highest constitutional principle are at stake regarding the nature of the state or the constitution, then only at that point would a referendum on principle be a suitable device.

Q75 Chairman: You have used the expression in writing, “very important constitutional issues”. What sort of threshold would you apply to “very important”? 

Professor Tierney: It would obviously vary from system to system. I jotted some possibilities down in my written submission in terms of sovereignty of decision-making, and the ones I suggested would be a new constitution; fundamental changes to the electoral system or nature of Parliament; fundamental changes to the constitutional status of the sovereign; the transfer of substantial constitutional powers to institutions beyond the state; and possibly independent statehood for a sub-state territory. Those would seem to be the kinds of issues that might lend themselves to a referendum.

Q76 Lord Woolf: Following on from what you said and taking into account your helpful written evidence, Professors, could I ask you for a little bit of clarity? Of course, we do not have a written constitution, but in relation to a particular constitutional issue is there any reason why Parliament should not pass legislation which says, for example, that before the electoral system is interfered with it is mandatory that a referendum takes place and the referendum should be binding? If that was done, would it not elevate that legislation to a constitutional status which it would be difficult for a government, perhaps without holding a referendum, to interfere with?

Professor Bogdanor: There is no reason in principle why such a statute should not be passed. Obviously, given that Parliament is sovereign it could be ignored but, as you imply in your question, Parliament would be unlikely to ignore it. In my view, it is a question of
judgment as to whether the outcome should be mandatory. One might argue that the outcome should come back for Parliament to use its discretion. There might be certain cases, for example a very low turnout or a very narrow majority, when Parliament might want to think twice. As I understand it, however, there is certainly no objection whatever in principle; indeed, I think it would be a good idea to pass a statute of the kind that you suggest.

Professor Tierney: Following on from that, I would probably distinguish between making the holding of the referendum mandatory, which the Act could provide for, and making the consequent result mandatory; because you could then come back with the result and it would again be at Parliament’s discretion what to do with it. I think that would depend on the kind of issue at stake. But, yes, there is no principle against it; and such a statute, one would assume, would begin to take on the notion of constitutional statute as used by Sir John Laws, as he was at the time, in the Thorburn case.

Q77 Lord Pannick: Is there a problem here, though, that it surely cannot be any amendment to a particular statute which requires a referendum? There may be minor changes to even the most important of constitutional statutes; therefore there would still need to be a judgment made as to whether the proposed amendment is sufficiently important, or I suppose one could say amendment to particular sections of a statute?

Professor Bogdanor: I thought that Lord Woolf was referring to a proposal to change the electoral system for elections to the House of Commons. I think it is generally accepted that, even though there is no statute of the kind that Lord Woolf mentioned, such a change should require a referendum. It has an obvious rationale and a party in government should not be able to change the electoral system simply for its own partisan purposes; and there is obviously a broader issue that major changes of this kind should not be made without popular approval. However, I imagine that Lord Woolf is not referring to any minor change in electoral administration but rather to a change in the electoral system by which the House of Commons was elected.

Lord Woolf: Maybe, being even more controversial, suggesting that perhaps another issue would be to interfere with the circumstances which have to elapse before the Commons can override the Lords.

Chairman: I do not think that is at all controversial!

Q78 Lord Lyell of Markyate: The general question is “What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?” Professor Bogdanor, you pointed out that our elastic constitution implies an elastic use of the referendum, but you also point out, I think quite rightly, that whilst it can augment the power of government it may constrain it as well. Could you elaborate a little?

Professor Bogdanor: Yes. My argument is that, because we do not have a constitution and because Parliament is sovereign, it would seem to be difficult to lay down any rules for when a referendum should be held. However, in an unplanned, perhaps typically British way, certain precedents have grown up which some people may say amount to a convention—for example as I said earlier, on the devolution of powers from Westminster. I think that with regard to any radical change in the way that we are governed, such as the electoral system for Westminster, also the institution of a directly elected mayor in London—the first directly elected mayor that we have had in our history—it was right to have a referendum. It may be argued that, if we require a referendum for the devolution of major powers from Westminster why should we not also require a referendum for the transfer of powers upwards, as it were, from Westminster to the European Union. So far, we have not had referendums on European Community or European Treaty amendments. That is what I meant by saying that in principle an elastic constitution implies an elastic referendum but, in practice, the referendum is now no longer such an elastic weapon as one might have thought; it may now constrain governments. I think that is a good thing. I do not wholly share my colleague’s scepticism towards referendums. Most democracies do use them. They do not use them regularly; they use them occasionally. I do not believe that they weaken the process of deliberation; I believe that they widen it by bringing the public into the debate. I think that is very important in the modern world. The public want to be consulted on these major changes and I think the referendum could have an educative function. One consequence of the 1975 referendum on the European Community was to make people much more aware of the issues involved in our membership of the European Community, and I think the same is true of the devolution referendums. In the modern world, I think it is illusory to believe that you can confine legislative matters solely to parliamentarians.

Q79 Lord Lyell of Markyate: I very much agree, if I may say so, but they are also a valuable political tool, are they not? You offer a referendum when you seem to be on a hook and when you thought you had got off the hook you removed the offer of the referendum. There has been a recent instance, I think.

Professor Bogdanor: Yes, indeed, it can be used to overcome backbench opposition in Parliament. I think that was true of the offer of the devolution referendums in the late 1970s. It can be used for tactical purposes. Nevertheless, the history does show that it now has the function of constraining government: preventing government from doing
what they otherwise might want to do. One example might be entry into the eurozone. Mr Blair’s government was in favour in principle of entry into the eurozone. One reason why it could not secure entry was because it had committed itself to a referendum, and I believe that not one single opinion poll has shown a majority in favour of entry into the eurozone, and so the Blair government took the view that it would be unlikely to win a referendum. If the instrument of a referendum had not existed, however, we might well now be in the eurozone, for better or for worse—people have different views about that—but it has constrained what governments might want to do.

Q80 Lord Lyell of Markyate: But it did offer a referendum on the Lisbon Treaty and it did then, after the election, decide that that referendum should not be offered. Was that not also a matter of political judgment?

Professor Bogdanor: My understanding is that the Government offered a referendum on the Constitutional Treaty but took the view that the Lisbon Treaty had a different function; that it was not a new constitution for the European Union but an amending treaty to the existing system. That was a matter of great controversy and some people argued that the differences were not very great; but, as I understand it, that was the Government’s view.

Q81 Lord Lyell of Markyate: Do you hold a view yourself?

Professor Bogdanor: I hold the perhaps unfashionable view that there are quite significant differences between the Constitutional Treaty and the Lisbon Treaty and that the Government does have some justification for its position. I am supported in that view by the fact that nine countries had referendums on the Constitutional Treaty but only one country, the Irish Republic, had a referendum on the Lisbon Treaty, and that is because it was required to do so by the terms of the Irish constitution. However, I appreciate that is a controversial view.

Q82 Chairman: Professor Tierney, anything to add?

Professor Tierney: No.

Q83 Lord Rodgers of Quarry Bank: Can I pick up a point about 1975, about the stage of the process? As I recall, there had been a discussion about renegotiation in 1974-75 and the government of the day published a White Paper. The first stage was a White Paper and was a referendum appropriate at that time after the White Paper? The second stage was a vote of principle which was made in the House of Commons in October 1971. The third stage was a completion of the legislation to the end of 1972, as I recall. My question is this: At what particular point should there be a referendum, if there is to be a referendum, on a constitutional issue of this importance?

Professor Bogdanor: This is a difficult question to answer. We have had referendums before legislation has been brought into Parliament and we have had referendums after legislation has been brought into Parliament. My instinct would be to have a referendum before the legislation is brought into Parliament. The advantage of that would be that if people said they did not want the relevant legislation, you would save a lot of parliamentary time. You may argue that in the late 1970s, when we had a post-legislative referendum on devolution and it was rejected by the Welsh—and, you may argue, in effect rejected by the Scots—if Parliament had known there was no great demand in Wales and Scotland for devolution they would not have spent as much time as they did on that legislation. I think there is therefore a case for holding a referendum before legislation is introduced into Parliament, to secure the opinion of the country on it.

Q84 Lord Rodgers of Quarry Bank: A vote on principle which was made in Parliament before the legislation was begun. Would it have been appropriate before the House had decided or would it be more appropriate after there had been a vote in favour of joining the Common Market, as it then was?

Professor Bogdanor: The 1975 referendum to which you refer was remarkable, because of course it took place some time after the legislation had been passed providing for our entry into the European Community. The issue was not whether we should enter but whether we should leave. The then Conservative Government under Edward Heath decided not to have a referendum on whether we should enter the European Community and, for various reasons relating to political vicissitudes, it was held some time afterwards; so I am not sure that it is a good precedent. I think that in general there is a case for having a referendum before Parliament has a vote in principle because then MPs can vote, knowing what the opinion of the country is on a particular issue.

Professor Tierney: I would tend to agree with a referendum before a lot of parliamentary time was spent. I think that 1978 to 1979, on the Scottish legislation, shows how much time was spent on something which ultimately never resulted in devolution. Also the point of principle, as soon as the issue is clear. If it is a constitutional question and it will be put to the public, then there is no reason not to put it once the principled issue is clear.
Q85 Baroness Jay of Paddington: Could we turn to the international experience? Professor Bogdanor, I think you have said in your written evidence that only a handful of countries that have been continuously democratic since 1945 have not had national referendums. Can we learn anything from international experience broadly about what you might call a good and a bad referendum experience? Specifically, are there questions—the way that questions are framed in referendums—we can look at internationally and say, “That’s a good example and that is not”?  
Professor Bogdanor: It is certainly the case that the way the question is put can affect the answer. It was discovered in pilot surveys in the 1970s that people’s reactions, when asked whether they wanted to join the European Community, were very different from their reaction when asked whether they wanted to join the Common Market, because “community” has a much warmer sound than “market”. I think the solution is to have the question formulated by an independent body such as the Electoral Commission. If there is a post-legislative referendum one can simply ask as the Government did in 1979, “Do you wish to accept the provisions of the Scotland Act or the Wales Act?”; but if the referendum is introduced before legislation, there is some difficulty, and it is vital, therefore, as you imply, that the question be drawn up by a neutral body. I think the main lesson to be drawn from studies of referendums abroad is that people are willing to participate and welcome the opportunity to participate if they think their participation will have some result, some outcome. They are not willing to participate in what may seem to be a talking shop—mere consultative exercises. Where something depends on their participation, however, people are willing to participate. 

Professor Tierney: It seems to me that when we look at the evidence from abroad we can look at the referendum in three stages: the decision to hold a referendum, and that is, if you like, the trigger mechanism. The decision to make then is do you go down the road of an Act that requires a referendum on particular issues? Some countries have gone down that road, such as Ireland, Denmark and Australia. The second issue is—

Q86 Baroness Jay of Paddington: That is what you describe as a good balance?  
Professor Tierney: Possibly. Certainly the Danish model arguably works fairly well, and I will come back to that maybe in a moment. The Australian model arguably not, because it is so difficult to get matters through the majority of the states. The issue of the question brings up the second stage, if you like, which is framing the issue and framing the question. I would agree that certainly some independent involvement is important, be it an Electoral Commission. A more radical approach, of course, is to involve popular deliberation at that stage. We have seen precedents for that in Australia in 1999 on the head of state issue, and in British Columbia, Canada, on the electoral system, where different forms of civic assembly were put together and people were asked to deliberate on what the issue should actually be that then goes to the referendum. So it is possible to involve the public in framing the question and arguably that is something that would be important. The third issue maybe to consider from international experience is thresholds. There are two types of threshold. One is do you require a supermajority to pass a referendum? A more modified version of a threshold is do you require a particular turnout? That is the Danish experience, where I believe that 40% of the electorate must vote. Those are therefore some of the things from historical experience. What you would take from it is that if you create a high threshold it can be very difficult to get things through. Secondly the question, without some independent involvement, can be very controversial. In Quebec in 1995 the question was very controversial, because it was set by the Quebec nationalists. People do hold that up as an example of a situation where a more independent process might have been better.

Q87 Baroness Jay of Paddington: There is obviously work that is being done in this country currently about what one might call a citizens’ initiative part of a referendum process. Do you think that there is any future in pursuing that?  
Professor Tierney: My view is that that would be the approach. I have argued that if referendums are to be acceptable within our system, it would be for the highest constitutional issues, and the very reason that would require a referendum at that time would also require broad citizen involvement. Yes, I think that it is a good model. The Canadian model of almost a lottery of citizens, bringing them together to deliberate on an issue, with the help of experts to help frame an issue, can be important. It would depend on the issue at stake, but it could be useful on something like the electoral system. 

Professor Bogdanor: May I add something to that point, because I think that Lady Jay has raised a very crucial issue? I do think the citizens’ initiative idea, both at local and national level, is an important way forward and an important instrument of a modern democracy. People now believe, in a way they did not, say, 50 years ago, that they have a right to be consulted on major changes and on change in the public services which affect their lives. I think that they feel in particular that they want greater control over public authorities. Frankly, I feel that the expenses crisis confirmed that view. I therefore believe that this is an important way forward. As I have said in my evidence, we can spend a lot of time...
on the more glamorous constitutional issues but perhaps the way forward with the referendum and popular involvement is on the less glamorous local issues connected with the public services, where I think citizens’ initiatives and consultations have a fundamental role to play. I think that people are no longer prepared to accept a democracy where they vote once every four or five years and then leave everything to their political leaders.

Q88 Chairman: Professor Tierney, do you want to come back to the Danish experience? You were going to say a word about that.

Professor Tierney: Only on the threshold issue. It is sort of a separate issue that has not really been raised yet, about whether super majorities are a good idea. I will maybe hold that back to see if people are interested in discussing that.

Q89 Lord Norton of Louth: First a comment. Is it not the case in comparative experience that generally the turnout in referendums is actually lower than in elections of candidates? Looking at this country, is not the problem that remains clear from what you have said so far that you still cannot draw a very clear dividing line between what should and should not be subject to a referendum? Professor Bogdanor, you make the point that of course there is much room for argument as to which transfers of power are major and which are not; and so we will have that problem of being quite precise. There may be a problem with generating, say, legislation that is generic, when referendums should be held. What we have, of course, is legislation covering the conduct of referendums once it has been decided to hold a referendum. I want to get your comments on our experience to date, whether you think the 2000 Act has made a significant difference, whether it is sufficient and, if not, what is missing.

Professor Bogdanor: Do you mean the 2000 Local Government Act?

Q90 Lord Norton of Louth: No, the Political Parties, Elections and Referendums Act 2000.

Professor Bogdanor: I see. I think the establishment of the Electoral Commission has made an important difference, by providing a neutral body that can scrutinise both the question in the referendum and the fairness of the procedure. In one or two of the referendums there have been arguments about how fair it was. I am thinking particularly of the 1975 European Community referendum. There was a great imbalance in expenditure between the pro-European side and the anti-European side. I therefore think that the establishment of the Electoral Commission does make it easier to hold effective referendums. You are absolutely right that turnout in referendums is in general lower than it is in general elections. However, in a referendum one is asked to do something different from a general election. One is asked to give one’s verdict on a specific question. In a general election one is asked to give a verdict on a whole host of questions. It is rather as if one were a member of a jury and one was told by a judge that one could only convict one person, if one convicted another 20 people who were accused of quite different offences. Although the turnout is lower in a referendum, therefore, I think it does have an important function in giving people the right to make a judgment on a specific item of legislation, as opposed to the whole menu which they are presented with in general elections.

Professor Tierney: On the turnout question, while the turnout on ordinary referendums is low, there is actually evidence that referendums on big constitutional issues produce a high turnout. If you take for example the Belfast Agreement, the turnout on that would compare very favourably to general elections. Similarly, in Denmark, referendums on the euro; in Montenegro in 2006; in Quebec 1995 there was a turnout of over 94%; I believe. So if it is the big issues, I think there is evidence that people will be mobilised—provided the issue is big enough. As far as the 2000 Act goes, I think it is very useful. The positives are the notion of permitted participants; the creation of umbrella organisations where you have two main groups; the role of the Electoral Commission on the intelligibility of the question; financial aid; the provision for sending literature out, because education is a key factor if the referendum is to be deliberative; limiting donations and limiting spending; broadcast rules. All of those things are very important. Where I would situate the 2000 Act is that it basically covers the third stage, which is the campaign. The two earlier stages that we have already been talking about are the trigger issue—should a referendum be forced or not by Parliament—and, secondly, the process of setting the rules and setting the question. Those are the two gaps, if you like; but as far as the third stage goes, I think that the 2000 Act is very positive.

Q91 Lord Norton of Louth: Just on the big issues, I think what is clear from what you are saying is that it is big in relation to whether it is a big constitutional issue or whether it is an issue that really exercises people, which may not be a constitutional issue in a formal sense. To come to the point about the 2000 Act, if one had the chance to amend it—not necessarily in terms of prescribing issues on which referendums should be held but governing the conduct—what specific changes would you think would be appropriate?

Professor Tierney: There is maybe a minor one, which would be the opportunity for parties to spend a particular sum of money, given that you could find...
two or more parties aligning on a particular issue and suddenly there is a lot more spending on that particular question. People mentioned that with regard to the euro. You could end up with Labour and the Lib Dems spending a lot. People might balance that against the media. One issue would therefore be media regulation; but whether that is possible or not I just do not know. On the bigger issue, I stay with the slightly more radical point that you have to step back a stage and begin to think about the role of citizens' assemblies or citizen juries in framing what issue actually goes to the people. For me, that would be the big opportunity.

Professor Tierney: For me, this is where the breakdown of a process into different stages is crucial. You can certainly ask at the beginning a principled question, “Do you want a written constitution?”, but that simply begs the question, “What kind of written constitution?” This is where the second stage of the framing of the issue is so important. For example, if we take the British Columbia experience, rather than simply ask people, “Do you want some form of proportional representation?” a group of citizens was brought together to consider all the different models and came up with a model which most people thought was the best one to then go to the referendum. It may be that, in the event of a written constitution, first of all you would have to determine if there was in principle agreement or support for such a proposal and then I think you would need a stage where citizens were brought together to try to work out what that model might look like, so that when the referendum took place a detailed model could be put to the people. Otherwise it simply begs the question.

Professor Tierney: Education for the voters is a difficult question. One model is simply to send them the whole agreement—as in the Belfast Agreement or a European treaty—but there would not seem to be much sense in that. One option that was used in Australia in 1999, I believe, was to allow both sides to summarise their key positions and then basically to send two documents to every voter, saying, “Here is a summary of both sides”. That maybe would be one way to do it. It does not stop all the other information that they get, but that may be one way to do it.

Q92 Lord Shaw of Northstead: I wonder if I could ask about the question of the information that you feel should be supplied for the voters to reach any sort of proper decision, particularly the financial consequences of any referendum? It seems to me that, if you look at the results of some of these referendums, the final financial results clearly were not envisaged by a lot of the people who voted at that time.

Professor Tierney: For me, this is where the breakdown of a process into different stages is crucial. You can certainly ask at the beginning a principled question, “Do you want a written constitution?”, but that simply begs the question, “What kind of written constitution?” This is where the second stage of framing the issue is so important. For example, if we take the British Columbia experience, rather than simply ask people, “Do you want some form of proportional representation?” a group of citizens was brought together to consider all the different models and came up with a model which most people thought was the best one to then go to the referendum. It may be that, in the event of a written constitution, first of all you would have to determine if there was in principle agreement or support for such a proposal and then I think you would need a stage where citizens were brought together to try to work out what that model might look like, so that when the referendum took place a detailed model could be put to the people. Otherwise it simply begs the question.

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Q93 Lord Shaw of Northstead: Could I interrupt there? Surely this discussion should take place in Parliament, with Treasury officials and so on being involved, either in committees or in the Chamber itself, before the referendum?

Professor Tierney: For me, this is where the breakdown of a process into different stages is crucial. You can certainly ask at the beginning a principled question, “Do you want a written constitution?” These are questions that simply beg the question. It does not stop all the other information that they get, but that may be one way to do it.

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Professor Tierney: The problem is largely a practical one of incomprehensibility. The notion is easy enough if we are, say, taking a vote on a toll for a bridge. You can have a range of options. If some people vote for a £5 toll and some people vote for £10, you can say that there is a general consensus in the middle. The problem is when you have a lot of options that can contradict one another. If you take Australia in 1999, you could have put “Keeping the status quo of head of state”, “A directly elected head of state” or “An appointed head of state”. The consensus would not necessarily fall between the two latter options. A lot of people who wanted a directly elected head of state would much rather keep the status quo than have an appointed head of state. It therefore becomes very difficult to work out what
would be a consensus option when you have more than two options on a lot of these issues.

Q97 Lord Pannick: Professor Bogdanor, your written evidence demolishes the case for the use of threshold requirements, whether in terms of the turnout or the percentage of the vote. You point out that it is very difficult to be precise in advance; that such requirements are likely to depress turnout; that there may be extraneous factors such as the weather. Far better, you say—and I agree—to allow government and Parliament to make a final decision after the referendum, in the light of all the circumstances. Yet you then say that nevertheless there are strong arguments for threshold requirements in Northern Ireland and in local referendums. I am puzzled as to why the same general arguments do not apply.

Professor Bogdanor: In Northern Ireland there is a very special situation because of the community division. You could have a majority in a referendum which was composed entirely of the Unionist community and I suspect most people would say that would not be sufficient to yield legitimacy. In local referendums turnout could be very low indeed. For that reason I think that one might have a very low minimum requirement of turnout. It is difficult to give a precise figure on it. I accept that. One good illustration of the difficulty was the London referendum—the referendum on the Mayor and Assembly for London—where the turnout was 36% but there was a very large majority in favour. The Government, in my view rightly, took the view that this was sufficient to implement the reform. In a local referendum, if one had, say, just 10% of people voting, then I think it might reasonably be held to be an invalid outcome. I think that different considerations do arise. In my view, local referendums should be held much more frequently than national ones; so I think that the question of voter fatigue might come into it as well.

Q98 Lord Lyell of Markyate: On this question of threshold, it is often said, “They are very low turnouts. People are disenchanted with politics” but I think that it can often be a political decision not to vote, and therefore either it does show in an oblique way how people are thinking or, alternatively, it can be used as a tactical move in order to prevent a threshold being reached.

Professor Bogdanor: Yes, indeed. This, it seems to me, is a question for Parliament to decide upon at its discretion, when the result is known. There are all sorts of reasons, as you suggest, why people may not vote and Parliament will have to make a decision—sometimes a difficult one—based on the size of the turnout and the size of the majority. The 1979 referendum in Scotland was a good example, where 40% of the registered electorate were required to vote “yes” for the legislation to go through, and the vote was 33 to 31. Parliament then decided, perhaps rightly, that because it was under 40% and because the majority was so narrow, the legislation should not go through. However, if the vote had been, shall we say, 33 to 19, even though you would have had a much smaller turnout I think Parliament might have said, “The majority is large and we ought to let it go through”. It is therefore difficult to lay down any rules in advance.

Chairman: Professor Bogdanor and Professor Tierney, thank you very much indeed for being with us and for the evidence that you have given. We have covered an enormous range. May we trespass on your kindness, on reflection on what you have said, by communicating in writing if there are one or two other points coming forward?
Memorandum by Mr Daran Hill, former National Co-ordinator,  
Yes for Wales 1997 Welsh devolution referendum “yes” campaign

I am submitting evidence in a personal capacity, being a member of no political party. I was the National Organiser of the Yes for Wales campaign in 1997. This was a paid position which lasted less than a year and involved the co-ordination of much of the campaign alongside a committee of activists. In that role I was the most senior paid official of the campaign.

In my opinion the conduct of the 1997 devolution referendum in Wales was fair, but the constitutional arrangements underpinning the referendum were not adequate. The Political Parties, Elections and Referendums Act 2000 is helpful in putting in place constitutional arrangements in terms of the conduct and funding of referendum campaigns and, though of course it remains largely untested, is a definite step forward in this respect.

There are two particular aspects which I would highlight to the Committee in advance of questions.

Firstly, in 1997 the Yes campaign was funded in total to the tune of some £140,000. The core funding came from the Joseph Rowntree Foundation (from memory, less than half the total) and the rest was raised through fundraising. The No campaign in Wales had a budget of £100,000 of which, again from memory, some 90% was provided by a single donor. Although both sides kept accounts, there was little accountability for such funds. The PPERA makes provision for the funding of both sides in a referendum and since public money is involved this is a definite improvement.

Secondly, the Government of Wales Act 2006 contains provision for the calling of a referendum to move from Part 3 to Part 4 powers for the National Assembly for Wales. As you are aware, we can expect this referendum to take place during the life of this Assembly (before May 2011). This makes this inquiry particularly timely for those interested in democratic engagement and debate in Wales. The nature of the question to be posed is both complex and liable to misinterpretation. It cannot be presented meaningfully in simple terms without context and it would be helpful therefore if a neutral explanatory paragraph also appeared on the ballot paper.

The involvement of the Electoral Commission would be critical in drafting both such a paragraph and in framing the question to be posed, and it is therefore welcome that the Commission now has a role in framing the question.

19 January 2010

Examination of Witnesses

Witnesses: Lord Fraser of Carmyllie, a Member of the House, former Director, Think Twice (1997 Scottish devolution referendum “no” campaign) and Mr Daran Hill, former National Co-ordinator, Yes for Wales (1997 Welsh devolution referendum “yes” campaign), examined.

Q99 Chairman: Lord Fraser, Mr Hill, welcome to the Committee. Thank you very much for joining us. We are being sound-recorded and so I have to ask you, as if it were necessary, formally to identify yourselves for the record. If you would like to make a brief opening statement, please do. Otherwise, we will go straight into discussion.

Lord Fraser of Carmyllie: My name is Lord Fraser of Carmyllie and I was Director of the Think Twice campaign in the referendum in Scotland in 1997. The title Think Twice comes not from a particular cerebral vanity on our part but because there were two questions on that particular referendum paper. That is why we were asking people to think twice.

Mr Hill: My name is Daran Hill. Back in 1997, I was the National Organiser of the Yes for Wales campaign, which was a cross-party and no-party campaign, which campaigned for a “yes” vote in the referendum on the establishment of a Welsh Assembly.

Q100 Chairman: Could I ask each of you to share your thoughts with us on what the strengths and weaknesses of referendums are on constitutional matters and what sort of issues are most appropriately submitted to people for referendums?

Lord Fraser of Carmyllie: I would restrict myself in the use of referendums to those situations where there were substantial constitutional issues raised. I certainly do not think they should be part and parcel of the everyday business of government; nor do I think they should be used in relation to issues that might be thought to be capable of standing alone, such as the death penalty or abortion or something like that. I would restrict myself to just those significant constitutional matters.

Mr Hill: I find myself in general agreement with Lord Fraser. I think the use of the word “substantial” is particularly appropriate. It is matters that are constitutional but outside normal politics. What I would say in terms of weaknesses, though, in terms of
the use of referenda, would be that sometimes they can be used as a political tool. Sometimes they are a general political barometer and people answer for a variety of reasons, rather than the question that has actually been posed to them; but I am sure that is a common factor in the evidence you have received throughout your inquiry.

Q101 Lord Norton of Louth: You are not our first witnesses but you are our first witnesses who have practical experience of being at the heart of campaigning. It would therefore be very useful from our point of view if you would give us a few insights into how you developed your own campaigns and, from your point of view, what you thought were the strengths and limitations of the campaigns that you undertook.

Lord Fraser of Carmyllie: I think that too often a referendum is capable, as has been indicated, of being simply a barometer on the attractiveness of the political party at any given time. The referendum campaign we were engaged in, which was the Welsh Assembly and the Scottish Parliament, fell some months after a very unpopular Conservative Government in Scotland had been defeated. I do not think we had a snowball’s hope in hell of doing anything because that is the way that people saw it. They saw this as just a second opportunity, in less than six months, to indicate why they thought the Tory Party was unpopular. In some countries such as Switzerland where referendums are held pretty regularly, I can see the sense of government using that device on a regular basis, but I would be pretty loath to see them extended much in the United Kingdom. I think, as in our campaign, when not even the whole of the Tory Party was on side and ranged against us was the Labour Party, the SNP and the Liberals, we never stood a chance. Frankly, a lot of people were still reeling from the effects of a general election campaign.

Mr Hill: Again, I would echo what Lord Fraser has said to a certain extent. I remember that one of the campaign tools, ethical or not, that we used in the “yes” campaign was that, on polling day, we had an aeroplane flying across South Wales trailing a banner which said, “Vote Yes, Vote Blair”, which really had nothing to do with the question being posed at all! It chimed in with the political mood. In terms of positive and negative experiences—and the point you made in terms of our being the first practitioners that have come in, as it were—that was reflected to a certain extent when we were trying to run the referendum campaign as well, because the only previous experience had been some 18 years earlier. As I understand it, the referendum campaign back in 1979 in Wales certainly was not a particularly energising campaign; it was not one that engaged the public on either side of the debate in a particularly meaningful way. In terms of a particular weakness, without wanting to point the finger at the media—it is always tempting to do so but I will refrain—the number of newspapers that are produced for a Welsh audience is radically different to Scotland, and the readership of said papers that are produced in Wales is vastly smaller proportionally. The broadcast media as well: a lot of televisions point over the border, so where do they get their meaningful and intelligible news, interpretation, et cetera? It was therefore quite difficult in a lot of places to get a message out and across. I am particularly heartened by the existing legislation that has now come, in terms of recognising the “yes” and “no” campaigns and giving them proper status because for about half the campaign, or half the period of the existence of the Yes for Wales campaign—we were established back in January 1997, so before the parliamentary election—there was no “no” campaign until late June/early July. We were not really arguing with anyone. Then it came about almost overnight, where two members of the Labour Party—not particularly powerful members of the Labour Party, they were ordinary members of the Labour Party in the Rhondda—decided to start a “no” campaign themselves, with the support of Viscount Tonypandy. It grew quite embryonically, but it did seem a relatively strange experience for four or five months—arguing against nobody. I think that is something that certainly could be learned from in terms of a fair vote.

Q102 Lord Norton of Louth: You say there was not much past experience. In both your cases you were more or less starting from scratch, getting a campaign underway.

Lord Fraser of Carmyllie: The legislation of 2000 is very important, and I think we are coming on to that later. We were caught flatfooted. We had no money; we had no premises. Most importantly, the general principle I would draw from it is that we had a complete absence of local networks. People understood how to fight constituencies on a general election basis or a by-election basis, but they did not really understand how to campaign in a referendum on a local basis. So, apart from the headquarters which we eventually established, there was really very little else. We did not have sub-offices around the place.

Q103 Baroness Jay of Paddington: Lord Fraser, you mentioned the always difficult but necessarily crucial question of money. How did you or both of you go about raising funds? I was interested in the written paper from Daran Hill saying that most of the funding for the “yes” campaign came from a single source.
Mr Hill: Roughly half the funding for the “yes” campaign—I am sorry, I do not have the precise figure with me—came from a series of grants; one block grant at the start and then some later grants from the Joseph Rowntree Reform Trust. The rest was raised by public donation, by engagement with other stakeholders. I was personally more concerned on the “no” side, who ultimately had less money than us. Their final accounts demonstrated some £100,000 to our £140,000 or £145,000.

Q104 Baroness Jay of Paddington: They are still small sums.

Mr Hill: They are still relatively small sums, especially compared to what the PPERA now proposes to allocate to campaigns on referenda. On the “no” side, however, it was quite clear from their accounts that 90% of their funding had come from one single source. I do not think that is a particularly healthy situation to be in either. I think it is a definite step forward that both sides would be properly funded.

Lord Fraser of Carmyllie: I would have loved to have had money from one large, single source! We had to rely on the old-fashioned technique of simply begging letters. We did discover some people who were sympathetic to the cause who did contribute significant sums of money on an individual basis, but nothing like enough money to run a really serious campaign. Some money was spontaneously donated and some was just handed in at the office, but we never really had a well-organised campaign to raise money before the referendum campaign got underway.

Q105 Baroness Jay of Paddington: Do you think the 2000 legislation has completely transformed that? Will this never be an issue in a future referendum?

Lord Fraser of Carmyllie: I think it is a significant improvement and it is a very valuable part of that legislation that, 28 days prior to the referendum, neither central nor local government can put about information that might bear on that topic; because I am bound to say I do think that government is not trying if it does not know how to put across information which is effectively propaganda in an information fashion.

Q106 Baroness Jay of Paddington: On the other hand, we have had some discussion in earlier sessions with witnesses who we have asked about how they think information is effectively given to the public and whether the Government does have a role in that; so there is obviously as narrow tightrope to walk there.

Lord Fraser of Carmyllie: Yes, I agree with that.

Q107 Lord Shaw of Northstead: What lessons do you reckon we should draw, either positive or negative, from the operation of the referendum as a whole? Unlike the political situation, which can change every few years and a different climate comes in with different results, once the referendum has taken place and is put into operation you cannot keep switching from one situation back to the old one and then on again. It therefore seems to me that there is a case for a delay, in perhaps having even two referendums with a few years’ interval, to reflect on the whole thing.

Lord Fraser of Carmyllie: Yes, I think there is some force in that. I was very interested that, as the First Minister in Scotland, Alex Salmond, has been proposing—although he seems to be delaying it a bit—a referendum on independence, he has said quite clearly that it is an event that should happen once in a lifetime. I think that is quite valuable. If, say, you get to 43%, do you have another one next year and hope to get 44, and go on and on, until you secure a majority? I think that they ought to be used sparingly and if the issue is the same, the sort of Alex Salmond principle of “once in a lifetime” or once in a decade, or something like that, seems to me to be a sensible idea.

Q108 Lord Shaw of Northstead: So far as finance is concerned—this is the practical argument—it is very difficult to get over the financial situation when feelings are running high, but did the people of Scotland really understand the true cost of what was about to happen?

Lord Fraser of Carmyllie: No, and we did not have free mailing then either. What had happened was that the Government, quite sensibly and wisely, had booked with the Post Office when every household would get a delivery. By the time we had enough money to be confident that we could mail every household in Scotland, the only date that the Royal Mail could give us was after the referendum—which we thought was rather a waste of money, frankly, and so we did not take it up.

Mr Hill: This is a particularly interesting question to me at the moment because we are about to face another referendum in Wales. The Government of Wales Act 2006 enshrines a process by which a further referendum can be triggered to move from Part 3 to Part 4 powers. It is this whole issue of asking a question of people only once in a generation and the constitutional significance of the question that is asked. Back in 1997 I think there was a deeply substantial constitutional issue that was posed to both the people of Wales and of Scotland, which could be relatively easily expressed. I think that was certainly a lesson that was learned from that
The questions were generally well structured and helped, certainly from the Welsh end, to stimulate a real debate. I am rather nervous about the way that the question the Welsh people will next face will be phrased. Essentially, what you would be asking people is, “Do you want to move from Part 3 to Part 4 of the Government of Wales Act 2006?” How else might you phrase that? “Do you want to move from an Assembly to a Parliament?” Is that really what is happening? “Do you want the Welsh Assembly to have the same powers as the Scottish Parliament?” That is not on the table either. How you make that particular thing intelligible is something that is certainly exercising my mind. It was a lesson that was learned properly from the last referendum but goodness knows how it will be applied to the next one, to make that one intelligible.

Lord Fraser of Carmyllie: The one matter on which I would disagree with Mr Hill is that although editorially the Scottish press was almost unanimously against us—as was the radio and the television—nevertheless I have absolutely no complaints about the conduct of the media. It may be that they had had only three or four months from a general election and so they did fastidiously come along, at an appointed time, to a press conference and would listen to what we had to say for the day; but whether that is a reflection of their recent experience at a general election or whether it is something that happens more generally in referendums, I do not know. I suspect it had to do with their having had it inculcated in them from the recent general election. We all know that at general elections they go round from one party to another at an appointed time and ask questions or hear what the story of the day is.

Q110 Lord Norton of Louth: What strikes me, particularly from Lord Fraser’s comments, is that the techniques you were using—whether it is correspondence columns or an interview for the media—are not expensive. Presumably that was a significant factor.

Lord Fraser of Carmyllie: That was a bit of a necessity!

Q111 Lord Norton of Louth: Yes, and if funding had been different—Mr Hill, you have raised the point about how you fund it, not so much where it comes from but I suppose the amount itself—would that have made it.

Lord Fraser of Carmyllie: One of the things that we tried to do was fairly similar. We did not have “Teachers Say No” or “Doctors Say No” or anything like that, but what we did try to recruit was a number of people who had been proud enough to put on a Scotland jersey who wanted to say “no”. We thought that would make a big impact; that if people felt patriotic enough to do that, they could not be accused of being lackeys of the English or anything like that. I have to say that sometimes we got it wrong and we were not quite sure what their views were; and, on a number of occasions when we did get very good support from well-known sporting personalities, they were unprepared to put their heads above the parapet at the time.
Q112 Lord Woolf: I think that your personal experience is so very interesting. Based on that experience, do you think there is room for greater statutory control for referendums generically?

Lord Fraser of Carmyllie: The interesting thing is that in 2009 we had a Political Parties and Elections Bill, but it does not mention referendums as it did in the year 2000; so I do not know as yet whether the existing statutory framework for a referendum—we will be finding that out fairly soon—is better. However, it seems to me that in principle it is better. First of all, governments cannot, under the guise of putting out information, resort to propaganda and all that kind of thing. There is funding available. I think it is about £600,000. We never had anything like that money. There is an argument for a proper statutory control for it, because, as I say, our experience was that government had a full hand and we had none at all.

Mr Hill: I welcome the same sort of initiatives as Lord Fraser does. The Government will always be engaged though, because essentially British experience on referenda is that referenda are held on issues within the government programme. It strikes me that that will always be a factor. How much power the Government is given within that situation is the critical point. That is the power ultimately to set the question, which is a matter that, as I say, exercises my mind. It is the question that will be set for the Welsh referendum probably over the coming year. We also have government control over timing. I think that was quite an interesting point back in 1997, where Scotland went first and we were about a fortnight afterwards, or something of that nature. We were in no doubt that whatever the outcome was in Scotland, it would have a huge knock-on effect in terms of the vote that we were able to generate in Wales. They could not be detached, partly because of the way the UK media was focusing more on Scotland than on Wales—because it was a bigger constitutional question that was being posed, as well as everything else. This issue of timing is quite interesting in terms of the current Welsh experience, where there is a debate going on between the UK Government and figures within the UK Government and the Welsh Assembly government, and the two parties within the Welsh Assembly government, over when the precise timing of the next Assembly referendum will be. You really cannot detach the politics from that because, as well as the phrasing of a question, the funding of a campaign, the timing of the referendum can be a very political issue too.

Q113 Lord Hart of Chilton: Following on from those answers and from your own perspectives, how do you see the role of the Government in the referendums? Do you see it as a genuine enquiry after public opinion or do you see it more as a cynical use of a political tool?

Mr Hill: I think “cynical use” is possibly a bit strong, from my own perspective. Certainly experience shows that governments often use referenda to answer questions that they find difficult to answer themselves, or politically expedient sometimes to pass the issue over for others to deal with. For example, my own experience with the forthcoming referendum in Wales: the use of the referendum in that instance grows out of the Government of Wales Act 2006, which has been perceived as a compromise within the governing party—Labour at the time in Wales—around the whole issue of how things move forward. I would not go as far as to say “cynical” but I think that political buy-in can often be manifested in lots of different ways, some of which are more subtle than others.

Lord Fraser of Carmyllie: I think that the electorate would find it quite extraordinary if the government of the day did not actively participate in a referendum, because that is why they have elected them previously. I do think that sometimes it is used as a political device if there are intractable difficulties within the government of the day. I am sure that is the case. I have no objection to the Government participating, but that is why I said in answer to an earlier question that I do think there ought to be a proper statutory framework, so that they do not enjoy an unfair advantage in approaching any particular referendum. Certainly at the time we were engaged in the 1997 election we did think that the Government was enjoying an unfair advantage. May I just say as a postscript to what Mr Hill has said that we were very clear in Scotland in 1997 that the outcome of the referendum in Scotland would have a significant bearing on what happened in Wales as well.

Q114 Lord Rodgers of Quarry Bank: Could I ask whether referendums could be infectious? We had a reference earlier to local referendums. Do you anticipate experience of referendums on smaller issues in local government? We did not discuss this earlier but, if the idea becomes infectious—I have perhaps chosen the wrong subject—but if, for example, there is a move to close a hospital or even to close a department of a hospital, do you think there is any feeling that there may be increasing demand for this device?

Lord Fraser of Carmyllie: I think there might be such a demand, particularly in the example that you have chosen, where a much-loved hospital is in danger of being closed, and I will tell you what the result will be, wherever it is in the country! It will be overwhelming. However, I think that there are considerable dangers about that, and often on things like planning matters. That is why local councillors are elected. If they have
got it wrong, they will suffer next time round. Issues of definition would be extremely difficult. Is it to be pylons? Is it to be hospitals? Is it to be roads? What? It seems to me that you could find yourself in a very real danger of taking the centre out of local government, where such decisions should be taken. I would strongly resist the idea of doing it on a localised referendum basis.

Mr Hill: There has been the use of referenda to establish local mayors, has there not? That has been a local example. To my knowledge, there has only been one such plebiscite in Wales and that was in Ceredigion in west Wales, where the vote was overwhelmingly against. Sometimes infections can travel more speedily in certain parts of the country than others, I guess. Even in our major cities in Wales, so far there has been no real appetite to exercise the powers in the previous Local Government Act to use referenda to establish mayors.

Q115 Baroness Jay of Paddington: This is going on to talk about what you think might happen now, because obviously when you were both involved in the two major referendums things were very different about the processes of elections. To start with, we did not have the 2000 Act but also I am sure you would be aware of the importance that people are now seeing, for example, in online campaigning and education vis-à-vis general elections. I wondered if you thought there would be very different outcomes and indeed methods if you were running a referendum campaign today?

Mr Hill: Looking back to the 1997 experience, I remember our putting out a press release when we launched our website, which had one web page on it. That was the infancy of the internet as a political tool. The only people who had email addresses were generally academics. Even though it is only 13 years ago, it was a different world in terms of political campaigning. One of the things I do in my spare time is to edit a non-party, cross-party website that dealt with political issues and tries to raise the tone of the debate within the Welsh blogosphere. We have welcomed articles from people on both sides of the debate, the “yes” campaign and the “no” campaign, already, so that people can start to engage in a more meaningful way and realise what exactly are the issues at stake in advance of the next referendum. I have to say that I am generally pleased by the tone of that debate and the breadth of contributions that are coming out.

Q116 Baroness Jay of Paddington: And the responses?

Mr Hill: It is growing. We have run two articles online now from the “no” campaign. The website is www.waleshome.org, if anyone wants to have a look. The level of debate around the two “no” campaign articles in particular has been quite striking and there has been a degree of civilised discussion between both sides. I compare that to most of the blogosphere, which is quite often a nasty and vile place, where people are often misrepresented or their ideas abused quite freely. I think that might well be a feature during a referendum campaign as well. Unfortunately, the downside of online campaigning is as prevalent as the upside.

Lord Fraser of Carmyllie: I placed emphasis in the 1997 campaign on local networks. I am not so confident that I would place quite the same weight on it now because I do think that there will be a greater use of the internet and online campaigning. That would have been a considerable advantage to us actually, because it does not cost anything like the money of setting up offices in ten cities or towns, which is extremely expensive and takes up a lot of time to work up. If you just had two or three people working out an online campaign, it would be infinitely preferable—and it might be a lot easier. I think that would affect all sorts of campaigning. I do not think that it is exclusively a remark directed to a referendum campaign.

Q117 Baroness Jay of Paddington: No, it will have a massive impact in a general election. I am just thinking that, from your experience and the point you have just made, it would have been much simpler and less expensive to be able to conduct what was in a sense a minority campaign if you were using online techniques.

Lord Fraser of Carmyllie: That is right.

Mr Hill: I suppose the most valuable thing to possess in terms of online campaigning is not necessarily a Twitter feed that reaches hundreds of thousands of people, is not necessarily a very active Facebook page or even a very active website. From what I am told by people on the frontline, the most precious thing of all is often email addresses, so that you are able to connect directly with potential voters. I think that will be where the biggest step forward in terms of connection will come.

Q118 Lord Pannick: You have both mentioned the 2000 Act and the impact which its provisions would have had on the campaigns for which you were responsible. Are there any other specific legislative reforms which either of you think we should now be considering?

Lord Fraser of Carmyllie: I do not think so but I would reserve my position, in that we have not had a referendum campaign of any order since the year 2000, and I hope it works. If it does not work, we might need to amend it further. The short answer, however, is that I do not know, because I have not been able to observe any campaign subsequent to that date.


Mr Hill: There has been only one, the North East referendum, and I did not observe that one particularly closely either. However, I think it is quite indicative that the “no” campaign won. That probably demonstrates the fairness of the legislation perhaps—that a “no” campaign can triumph, using the mechanics that have been put in place.

Q119 Chairman: Following from Lord Pannick’s question about possible legislative changes, is there anything either of you or both of you would like to add to what you have already said about how you would like to see referendums conducted in the future, in addition to legislative changes?

Lord Fraser of Carmyllie: I do not see how you would write into legislation “sparingly”, but that is what I would like to see. As I said to Lord Pannick, I would like to see how the 2000 Act works before I would propose any further changes. I think what is contained within it has all the germs of a very good scheme; that is to say, financial support, free mailing, access to broadcasting. I am not complaining about the access we had to broadcasting but it does not seem to me to be undesirable to have it on a statutory basis that you should have access. If they had decided that they were not going to give it to us, it would have been very difficult to know what to do about it.

Mr Hill: There is a point that I made in my brief written evidence to you which relates to framing an explanatory paragraph and the questions to be posed in the next Assembly referendum. I think that improving a referendum can be done by offering more context rather than just placing a simple question, however easily intelligible that may or may not be, before the public. I think that, particularly from the 1997 experience, if there had been a paragraph which said, “If you vote ‘yes’ it will mean this. It will not mean independence but it will mean the establishment of an Assembly”—and of course I say this knowing full well that that form of words would need to be negotiated, involving the Electoral Commission and possibly both sides of the campaign as well—sometimes having explanatory paragraphs can add real value. I say that particularly in the context of the future Welsh referendum, which will likely happen in the next 18 months or so, where it is about moving from one part of an Act to another. I think that just posing a question on its own without any form of context that seeks to explain what powers are already held by the Assembly, what the net effect would be, would undermine the asking of the question.

Chairman: Lord Fraser, Mr Hill, on behalf of the Committee, thank you very much indeed for joining us and for the evidence you have given. You have been most generous with your time.
WEDNESDAY 27 JANUARY 2010

Examination of Witness

Witness: Mr Steve Richards, Chief Political Commentator, The Independent, examined.

Q120 Chairman: Mr Richards, good morning. Mr Richards: Good morning.

Q121 Chairman: Thank you very much indeed for joining the Committee and welcome. We are being sound recorded so could I ask you, please, if you would be so kind as to identify yourself for the record, and if you want to make a preliminary brief statement, please do so, otherwise we will go straight into the discussion.

Mr Richards: I am Steve Richards, Chief Political Commentator of The Independent and presenter of the Week in Westminster on Radio 4.

Q122 Chairman: Thank you very much. Could I begin by asking how you see the strengths and weaknesses of referendums as part of the political process and their compatibility with parliamentary democracy?

Mr Richards: I am deeply sceptical about referendums in terms of their compatibility with parliamentary democracy, but also as someone who has watched closely how referendums have been used over recent years. It seems to me that because, actually, referendums are not deeply embedded in our political culture—for good reasons—they are the equivalent for political leaders of a sort of film noir character. They are very attractive to others, but actually to hold them they come back and become a real problem and almost kill you, and therefore they are not often held. I have written so many commentaries on offers of referendums which get political leaders out of a hole—it is a way of postponing awkward decisions—and then quite often they are not held. If you look actually at the build-up to Labour’s manifesto in 1997, the manifesto was almost like a halfway bridge to power and then a lot of the awkward decisions and debates took the form of promises of referendums—the euro, Scottish Parliament, London mayor, electoral reform. Some of them were subsequently held but a couple of the big ones never were. Similarly with the euro, the debate really is postponed on both sides by this device of a referendum. In terms of its compatibility with Parliament, there are real issues there; I sort of take the Ken Clarke view that on some of these issues of real complexity Parliament is better placed to make these decisions than a referendum. There is a third issue which obviously I would like to talk about, because this is an area where I can offer a degree of expertise—and in some areas I cannot—the British media is not necessarily the most reliable institution to mediate on the complexities of some of these issues and they will be determined by the British media. Those are the reasons why, for all the attractions—and of course I understand those arguments as well—I am very sceptical about the extensive use of referendums in Britain.

Chairman: Thank you. Lord Shaw.

Q123 Lord Shaw of Northstead: That really comes on to what puzzles me, which is should a referendum be regarded as a tool of the parliamentary process or should it be regarded as being independent, perhaps even above the parliamentary process?

Mr Richards: That is interesting, because at the moment I do not think it is either of those two things. It is certainly not above the parliamentary process in the sense that any referendum would be instigated by the government who would then have to get it through Parliament, but nor is it a tool of the parliamentary process because all the evidence that I see is that it undermines the parliamentary process, to the point where—certainly, say, in the first term of the Labour Government and arguably even the final phase of the Major years—there could well have been a majority in the House of Commons for the euro actually at certain points, but they would never have won a referendum. Who prevails under those circumstances? The answer is, of course, a leader does not dare hold a referendum unless they are convinced they are going to win it, so they are tools for leaders to avoid decisions; I do not think they are a tool for Parliament.

Q124 Lord Shaw of Northstead: In themselves they do not indicate which type of potential legislation should come forward and which should not, they are
realistically deal with the state of the Government and whether they think it will go through.

Mr Richards: I think so.

Q125 Baroness Jay of Paddington: You have covered some of these points but we have had some discussion with previous witnesses about the experience of the 1975 referendum and whether that was not merely a tool as it were for government but a tool for internal party political purposes to unite the Labour Party or get a Labour Party position. To what extent do you think you can see across the board—because we have only got that one experience in this country—that kind of attitude to referendums by governments? I suppose the second question on that is do you think that if there is a referendum, for whatever purpose and with whatever intent, the Government should then be necessarily bound by the result?

Mr Richards: On the first point it seems to me to be absolutely clear that referendums on the whole are a device for keeping a party together, of which the 1975 one is absolutely vivid. In fact there is a quote from your father about Tony Benn’s initiative for a referendum. Jim Callaghan said “Tony Benn has given us a life raft on which we can all climb aboard”. That was the proposal to hold a referendum. The other interesting thing is clearly, yes, it must be binding on a government. If a government holds the thing it cannot then disown the result, it would create a massive crisis, but what is interesting if you look at that 1975 experience is how its binding nature was so time-limited, so by 1983 the Labour Party, who in government held the referendum and actually sort of campaigned for a yes vote—or at least its leadership did, the Cabinet of course was famously split—were calling for the withdrawal of Britain from the Common Market. The referendum on Labour, therefore, was binding for about four years and then they wanted to change it, and there is an issue of how long a referendum can be seen as being the authoritative position because you could argue that the electorate in 1975 was very different to the electorate in 1995. There is therefore a real issue about how authoritative that verdict is when a referendum is held; it is another of the problems with it.

Q126 Baroness Jay of Paddington: If I may just have a quick supplementary, that is obviously relevant when you talk, for example, about the potential for a referendum on the euro or, for example, the whole discussion that has been going on about the Lisbon Treaty.

Mr Richards: Yes.

Q127 Baroness Jay of Paddington: Although you are adamant that the Government would have to abide by it at the beginning, would you say there is enormous room to manoeuvre, particularly around international obligations?

Mr Richards: Absolutely. If the European constitution had gone ahead as planned and Britain had held a referendum, and by some extraordinary twist there had been a yes vote, by now that would be being called into question and many Conservatives and others would be saying “That was then, we know a lot more about it now, it clearly is not working, we need to revisit this”. The interesting one obviously in the near future is this commitment to hold a referendum on electoral reform again because that would have to produce a sequence that happens very quickly. If you have got a referendum in favour of changing the voting system you would have to change the voting system, and that would be a lasting measure, but on Europe it seems to me these referendums are absolutely time-limited and people change their minds on the principle of referendums depending on whether they think they are going to win them or not. For example, Tony Benn was the advocate in the early Seventies; I remember when, after the huge yes vote in 1975, he said “Well, it is clear referendums are not of any use in Britain, the media is too biased” and all the rest of it, and then he became an ardent supporter of one when it looked as if there was going to be one on the euro and his side would win. That is an example of the sort of fickle way people view referendums.

Q128 Baroness Quin: I have to say I have a lot of sympathy with your view about the fickleness which surrounds this debate, but you started off by stressing the role of governments in calling referendums and yet the example, the 1975 one, as both you and Lady Jay said, was actually much more instigated by a particular voice and faction within the Labour Party at that time. I just wondered if referendums are to be part of our system what rules do you think should obtain in determining how a referendum should be called, should it be the government, should it be some other formula? Similarly, to pick up your point on timing, the 1975 referendum put the issue to bed for quite a long time and yet you have had, as you have correctly pointed out, the European referendums where you have one referendum and then you have another one less than a year later to change it. Again, if referendums are part of the system do you have any view as to what kind of timing is acceptable between the same consideration of the same issue?

Mr Richards: Implicit in the question are real concerns about the whole extensive use of referendums because, to go to the first part first, while there are obvious problems in the Government alone being able to trigger referendums for the reason we have discussed, I cannot see any other legitimate device because presumably the Government would have a majority in the House of Commons and any
To be honest there are two parts. There are a positive in this particular context? Mr Richards: remain sceptical but they have worked well and they there any examples you would cite as saying “I Parliament a moment ago. So far as the referendums to us the position with regard to the Scottish scepticism and perhaps you have already illustrated— inevitably it will have to come from the Government (assuming they have a majority in the House of Commons). In terms of the timing of it, this again is a problem. When a referendum is held both sides during the campaign say the decision is binding, and I remember that was the line on the 1975 referendum. Just the dynamics of politics will mean that that is not the case, whether in principle you think it should be or not, so my personal view is that it is inevitably time-limited and the issues will be revisited very quickly. That is one of the reasons why people need to think very carefully about it. Even in Scotland where the referendum very quickly brought about the establishment of the Scottish Parliament, as everyone here knows better than me the debate about the powers, the independence, none of it has gone away and in some ways it has intensified. Even where a referendum produces the concrete tangible change that a yes vote is meant to bring about I still do not think the arguments are resolved there, ever, in these areas.

Q129 Lord Woolf: You have indicated your scepticism and perhaps you have already illustrated some reasons for the scepticism, and you mentioned to us the position with regard to the Scottish Parliament a moment ago. So far as the referendums that have been held in the UK are concerned, are there any examples you would cite as saying “I remain sceptical but they have worked well and they are a positive in this particular context”? Mr Richards: To be honest there are two parts. There is a case for saying that the devolution referendums were necessary, that they brought about a change which was so profound it required a degree of legitimacy beyond a general election campaign, which was Labour’s original intention before Tony Blair changed it, but, incidentally, the only reason why that change came about was quite interesting. Blair in about 1996 took a week off and looked through every Labour policy to see how it would stand up under scrutiny during an election campaign, and he noticed that they were calling for a referendum on the euro on the grounds that it was a constitutional change and they were not offering one in Scotland on those grounds. He did not think he could go through an election campaign with that contradiction, so he came back and said “We are going to offer a referendum in Scotland”. It caused mayhem at the time in the Scottish Labour Party but it was not that he thought out of principle “We must do this”: he was worried about the contradictions in a Labour election campaign. But there is an argument that for the Welsh Assembly, for the Scottish Parliament it needed the degree of legitimacy that a direct vote brought about, so I accept that there are cases where it might be necessary to hold them. I do not think they achieve any of their pure stated aims of ending the argument, of being a noble consultation of the people, the politicians stepping back and letting the people decide. I do not think it does any of those things in any of them, but I can see occasions where the constitutional change is so big it is necessary to hold them.

Q130 Lord Wallace of Tankerness: Can I follow on from the Scottish experience in 1996/1997 in which I had some involvement? From our perspective, as a non-Labour party, there were two questions in the referendum, the second one being the tax question, and certainly those of us who were sceptical about the change of policy thought that actually to put a tax question into a referendum neutralised it during the election campaign and I just wondered if you have any insight as to whether that hunch on our part was right.

Mr Richards: Completely, yes—neutralised it as a problem for Labour you mean.

Q131 Lord Wallace of Tankerness: Yes.

Mr Richards: Yes, absolutely. Referendums are held by leaders to get them through an awkward situation it seems to me. It looks as if they are being rather noble in giving powers away from themselves to take decisions and giving them to the voters to do it. The motives for holding them are far more complicated than that.

Q132 Lord Norton of Louth: Two questions, the first is simply process rather than principle. Parliament has sought to anticipate that if there is a referendum there should be certain rules that govern it so we have got the 2000 Act, the Political Parties, Elections and Referendums Act. Do you have any view on that; is it likely to be effective and does it have much impact from the point of view of broadcasters?

Mr Richards: Broadcasters are already very constrained actually. As far as I know, and I am not completely up to speed on this, the rules governing broadcasters during referendums are almost as strict as during general election campaigns. However, managing the referendum campaign from a broadcaster’s perspective is much more complicated than in an election campaign. The referendum dimension of the 2000 Act was drawn up in the anticipation that there would be a referendum on the
Mr Steve Richards

27 January 2010

Constitution Committee: Evidence

Euro. All I know is that there was a heck of a lot behind the scenes manoeuvring—Gordon Brown reading every single word of it, speaking to Jack Straw and saying “We cannot do this, this means we are completely buggered on the euro referendum”, so I would be wary as to whether that Act was put together as an objective means by which referendums are held in a sort of clear, clean way. In terms of the coverage of it the newspapers will play a big part as well now, and the blogosphere, and that is more my worry about referendums than the broadcasters who are so constrained in these campaigns.

Q133 Lord Norton of Louth: The Act may need to be revisited but there is no way you are going to be able to control the changes that you just mentioned?
Mr Richards: The Act will need to be revisited and it needs to be revisited away from the feverish context in which it was put together, which was very much on the assumption that a referendum on the euro would be held. The media climate has changed so much since then and the media in the end will mediate; most people will not watch a referendum campaign in the raw. A few of us will, we will be hooked on it, but on the whole it will be done through the media and I do not, on some of these issues, have great faith in a balanced view coming across.

Q134 Lord Norton of Louth: You have touched upon the fact that something like the blogosphere is going to be very difficult to have regulation of anyway and that is an unmediated contact.
Mr Richards: Yes, and increasingly influential. It will play quite a big part in the coming general election and—this is a different issue in some respects but not entirely—it is having a very big impact on the orthodox media as well. For a referendum campaign on an issue as complex as joining the single currency, and for it to be mediated by some of these blogs and so on, I have some worries about.

Q135 Lord Norton of Louth: Moving on to the second question, Lady Quin has already mentioned the experience elsewhere where a regime may have a referendum and not get the result it wants and then hold a second one. If we are looking at overseas experience, where the Committee has taken at least some evidence, do you have any views on that? Is there anything we should learn from overseas experience?
Mr Richards: I am afraid, again, they reinforce my doubts in virtually every case. It was very interesting watching, from a distance in my case, for example the French referendum on Maastricht. From all I read it was partly about Maastricht but quite a lot about the verdict on Mitterrand at the time. The Irish referendum was a whole series of motives and, as you say, anyway they held it again, so on the question about time limits there it was about three months or whatever. I have not seen many which lead me to suggest these are what they on the surface appear to be: instruments to enhance the democratic process and engage people. I know now there is a very strong argument coming from some people that the disillusionment with politics is so great that one way of addressing it is to have more referendums so that people feel more engaged and so on. Because of all the problems I do not buy that argument, but I can understand it. I cannot think of one foreign referendum of recent years which makes me challenge some of the things I have been arguing actually.

Q136 Lord Norton of Louth: I was just thinking if one looks elsewhere—and I agree with what you are arguing—if one was going to have a referendum, because you have conceded that in certain circumstances there may be a referendum, is there anything we can learn from elsewhere that might render it less bad, perhaps in terms of process, than otherwise would be the case?
Mr Richards: I suppose there is an argument for saying—although I hesitate—that in certain circumstances if there is a rule in place that triggers a referendum irrespective of the short-term political considerations of any of the parties, that at least establishes a degree of neutrality. I personally would not argue it—for example in Ireland there has to be a referendum on every big treaty change—but I can see how that to some extent depoliticises the context in which they are held and that addresses one of my concerns. That is one thing that maybe, if it is established clearly and not just out of convention that on major constitutional matters there must be a referendum, and you define very clearly what those constitutional matters are, addresses some of the sorts of problems that we have in Britain where it is sometimes used, but not always, as a way of offering a referendum which then sometimes is not held anyway. I can see that there might be a case for that in certain circumstances.

Q137 Baroness Quin: You have partly touched on what I was going to ask but it does relate to the quality of information that people are given during the course of a referendum campaign. I wondered what your thoughts were, if referendums are being held, as to what the best ways are of making sure that the public is as well informed as possible and what role government should or could play in that process.
Mr Richards: There is another side to the developments in the media since 2000 which is that while actually a referendum campaign on just about anything would be more raucous and less enlightening on the whole because of the changes in the media, there is now, because newspapers have less of a monopoly of media opinion than they used to
have, a chance for diverse voices to be heard. If there was one even on Europe now—although most of the problem bloggers in Britain are eurosceptic—there would be ways in which arguments could be heard that were not the case ten years ago. That is one thing. Because I come at it, I am afraid, with such wariness I cannot think of ways in which the Government can directly assist matters and in fact the more they try to do so the more that might fuel suspicion actually. The problem is that when you have a referendum almost certainly the Government will take a view one way or another, not just on the desirability of holding a referendum but on the outcome, so when that is the case the Government clearly will go out there and put the argument, but it cannot at the same time be the regulator of the process without fuelling the already existing cynicism. For example, say Labour were to win—and we are leaping about eight hurdles here—and they were to have a referendum on the Alternative Vote and campaigned in favour of it, there is a strong case for saying—although actually this was one of the things that Brown, Straw and Blair got very worked up about in 2000—that the Government should not set the question of the referendum because if they are taking a view on what they want the outcome to be they should be well out of setting the question. I know that when they thought they were going to have one on the euro they were all very worked up about not being able to control the question, but that is a big control to have and I do not think the Government should have that control.

Q138 Baroness Quin: Are there some subjects that you think are particularly unsuitable for referendums, perhaps because of their innate complexity or for some other reason?
Mr Richards: You will not be surprised to hear I do, yes. It is very difficult when you have got something like the single currency because it is a huge move and maybe it is one of those where it is necessary, given the level of controversy and the degree to which things will change as a result, that you do have to hold one. But I do worry that if it is an issue of such complexity actually the arguments will get completely lost and the technical detail will not be followed for totally understandable reasons. Ken Clarke has said this is one of the reasons why you put elected representatives into the House of Commons, and it seems to me the wrong thing to just transfer all this power into a referendum campaign. I do think that some of these really complex economic issues are completely wrong for a referendum campaign but I totally understand, in the current culture of mistrust, why people find it necessary to do it and inevitably there will be a referendum on that issue if it ever comes up in the next 50 years. I can see exactly what form the campaign will take and it is quite interesting, looking back at the 1975 campaign, quite a lot of the issues actually did not surface in much detail at the time and the euro referendum will be “If we go in tomorrow we lose all power over everything and prices will go up by £100 when you go shopping”. That will be the way it will be fought I suspect. It also depends on who is in power at the time.

Q139 Baroness Jay of Paddington: Picking up your point which you have mentioned twice just now about the disillusion and culture—I cannot remember the phrase you used but we all know what we are talking about, which is that in this environment where the political process seems both unattractive and very distant to an enormous number of people—you have indicated that you might be less sceptical about a local referendum, and in this Committee we have heard evidence about various citizens’ initiatives which you have touched on. Do you see any legitimate role for the bloggers, the citizen’s local agitator, to use that tool much more productively on issues which are of immediate relevance in a neighbourhood for example?
Mr Richards: I do actually. I cannot see the same set of problems arising. I remember when David Miliband was briefly Communities Minister he was proposing that people living in a community, on an estate or something, could have the power to trigger some kind of poll over the quality of recreational provision or something and get something changed. That is quite interesting, though there are practical questions about it and in fact even there it is quite complicated. Someone was telling me that the Tories are going to propose that local referendums could be held—if the local housing estate wants to become responsible for their maintenance and cleaning and so on they should have the right to do that, but actually most local authorities have contracted that out and companies are on five-year contracts. These are really complicated things when you look at them in practical terms but local referendums seem sensible and a way of trying to get more interest.

Q140 Baroness Jay of Paddington: If you take the particular example of a Member of the Commons at the moment who campaigned on the single issue of the local hospital closure, would it perhaps be a more sensible way, if that is not an inappropriate word, of dealing with those kinds of local issues and local campaigns than electing someone to the Commons on a particular local initiative?
Mr Richards: Completely. I am really sceptical of independent, single issue MPs coming to the House of Commons because the House of Commons has to consider a whole range of issues and it seems to me it would not be a healthy development if, as a result of the disillusion with mainstream politics, we get a load of these single interest MPs. It just seems to me
completely at odds with what MPs are meant to be doing, and that is another way of dealing with it. However, there is always a problem because you could have a referendum on a single issue, but as you will know much better than me, because most of you have been in government at certain points, they nearly all interconnect with other things. If there is a hospital project and you have a referendum against a hospital closing, that probably does not address what do you then do if that one stays open and who decides that. There is a very interesting debate going on in the Conservative Party at the moment about devolving power to very local groups; they are calling it part of their post-bureaucratic age and they want to get money down to the lowest groups for them to decide themselves how to spend it on housing and all the rest of it. I went to one seminar where they were looking at all of this and someone said “Who decides how much money and how do you hold them to account for that money if it is taxpayers’ money?” By the end of the day they had created 10,000 bureaucrats to manage the purse, and it is the same sometimes with a referendum on a single issue in that it seems to address something but actually then produces another 10,000 problems. Local politics is so moribund, more so than national, that I can see it is a way of bringing it to life actually.

Q141 Chairman: If you have a referendum, for example on the closure of the local hospital, you are always going to get the answer “No” because it is going to be merged into a new modern one 20 miles away or something like that. If people want to elect a local doctor to say “I stand up for our hospital”, surely they are free to do so, that is what democracy is about.

Mr Richards: If people want to do that, that is fine. I do not think it is a healthy development in general terms because it is not necessarily the best way actually for them to achieve their goal I suspect. This is a separate but slightly related issue; the decline in the support for the mainstream parties is, in my view, not a healthy development and, therefore, the subsequent soaring of these kinds of independent figures is not a good thing either.

Q142 Lord Rodgers of Quarry Bank: It seems to me you are slipping away from your very strong and committed position and I am rather unclear, if I may say so. You suggested that people are disillusioned or unhappy, not content, that people are not engaged, can you really make a case on any issue to say “in order to get people engaged let us have a referendum”? The argument for what I call virtuous politics, encouraging young people to have an interest, let us have a referendum, that is a very dangerous way of moving. We have to judge the issue and the outcome not simply on behaviour.

Mr Richards: I completely agree with you. All I was saying is I could see the case locally for having these sometimes. On a national level I agree with you completely.

Q143 Lord Rodgers of Quarry Bank: When you say you can see it, we can all see it.

Mr Richards: I am just trying not to appear totally sceptical.

Q144 Lord Rodgers of Quarry Bank: I know you are.

Mr Richards: I am basically wholly sceptical of referendums so I am not being inconsistent. I am suspicious of them on every front including as a device to get people engaged. Locally I cannot see some of the problems I have talked about at a national level; that is what I am saying.

Q145 Lord Pannick: You told us earlier that one of the reasons for your suspicions about referendums is that the result will be determined by the media. Would you agree that despite the growth in popularity of internet sites, blogging, the print media remain enormously influential in this country?

Mr Richards: Yes.

Q146 Lord Pannick: Do you think, if we are to have further referendums, that legislation ought to impose some requirements on the print media to require them to give access to each side of the referendum campaign?

Mr Richards: You have just put another case against referendums really; just imagine what would happen if any attempt was made in that direction. Let me tell you the sequence: the Government is about to announce it is going to hold a referendum in which it wants a yes vote and at the same time announces moves to force newspapers to put the case. It is a sequence which in itself spells total doom on lots of levels, so that will not happen.

Q147 Lord Pannick: Politically or for practical reasons, it is just impossible.

Mr Richards: Both actually, but certainly politically. Any government that tried to do that would be slaughtered by the papers who would be quite influential in the campaign, but there would be practical problems as well. It is a serious issue; I do not think a referendum on anything to do with Europe, for example, will be fairly reported. It is a statement of the obvious, I think even the newspapers themselves would admit they would passionately put the case one way or the other, mainly one way, so that is one of the many problems with referendums.
Q148 Lord Wallace of Tankerness: You indicated earlier that there was consternation if there was a referendum on the euro as to who would frame the question.
Mr Richards: Yes.

Q149 Lord Wallace of Tankerness: If I could just perhaps broaden it out into a more general question, if there are to be referendums do you have any view as to how the question should be designed? It has been accepted that there have been one or two constitutional issues where there has been fundamental change and perhaps a referendum missed out on the Scottish Parliament, Welsh Assembly, possibly even if we were to go into the euro there maybe would be a case. What would be your view as to how the question in a future referendum should be framed?
Mr Richards: What, who should frame it?

Q150 Lord Wallace of Tankerness: Who should frame it?
Mr Richards: It is difficult, but it needs to be taken out of mainstream politics altogether and it should be framed by—I do not know, could the Electoral Commission do it? It needs to be a body outside those who will be taking part in the subsequent campaign and, as a result, you know, the Government instigating the referendum already loses a bit of control but it is important that it does.

Q151 Lord Wallace of Tankerness: It has been sometimes suggested in the Scottish context of independence, the status quo or the possibility of a multi-option referendum or does that make worse every reservation you have?
Mr Richards: Yes, it does, because one of the things has to be simplicity. You raise an interesting question because I am told by the people who study this that something which is seen as the less threatening option tends to be more popular. For example, in 1975 we were already in; should we stay in is less threatening, so the status quo can often seem more reassuring and less threatening than if it is projected as change. The framing of it is therefore very, very important.

Q152 Lord Norton of Louth: If I could just add a postscript to that, there is evidence that if it is put in a yes/no form there is a slight tendency to favour the yes, which reinforces the point you are making.
Mr Richards: Absolutely.

Q153 Lord Norton of Louth: But the Electoral Commission tends to favour that rather than, say, two neutral statements, simply for reasons of campaigning—it is difficult to campaign unless you can say vote yes.
Mr Richards: Yes, that is another problem.

Q154 Lord Shaw of Northstead: One further point. I take all the points about complexities and so on—in certain cases anyway—but is there any case for the subject of a referendum to come before a House committee for general discussion and a process of parliamentary scrutiny before it goes out to the public?
Mr Richards: Yes, that would be useful because it would get a lot of reporting but I still do not think it addresses the sort of fundamental problems that I have raised.

Q155 Chairman: Mr Richards, thank you very much indeed for joining the Committee and indeed for the evidence you have given. We have covered a lot of ground and you have been most generous with your time; thank you very much indeed.
Mr Richards: Thank you very much.
WEDNESDAY 3 FEBRUARY 2010

Present
Goodlad, L (Chairman)
Hart of Chilton, L
Irvine of Lairg, L
Jay of Paddington, B
Lyell of Markyate, L
Norton of Louth, L
Pannick, L
Quin, B
Rodgers of Quarry Bank, L
Shaw of Northstead, L
Wallace of Tankerness, L
Woolf, L

Examination of Witnesses

Witnesses: Professor Michael Marsh, Professor of Comparative Political Behaviour, Trinity College Dublin and Dr Helena Catt, former New Zealand Electoral Commissioner and former Associate Professor, Auckland University, examined.

Q156 Chairman: Dr Catt and Professor Marsh, can I welcome you to the Committee and thank you very much indeed for joining us? We are being sound recorded and so I will ask you, if I may, to formally identify yourselves for the record; and if you wish to make a brief opening statement, please feel free to do so. You are under no obligation to do so.

Dr Catt: I am Dr Helena Catt. Most recently I was the Chief Electoral Commissioner in New Zealand; prior to that I was an Associate Professor in Politics at the University of Auckland. I will not be making a brief statement, I will just go straight to questions.

Professor Marsh: My name is Michael Marsh: I am Professor of Comparative Political Behaviour at Trinity College Dublin; and I will not be making an opening statement. Again, I would move to your questions rather than my views.

Q157 Lord Norton of Louth: We have dealt with the issue, if you like, of principle, but if we come on then to the practice. If you turn to New Zealand you are in a similar situation to us in that there is no codified constitution so you have the problem of what triggers a referendum. The actual practice, if you could explain what the process is, what is the role of the Electoral Commission, and, from your point of view, what do you see as the benefits and the problems associated with the actual practice?

Dr Catt: There are three separate sorts of referendum in effect in New Zealand and they all have different triggers and different rules. The Citizens’ Initiated Referenda is triggered by a petition from parliament and said that if electoral reform is the answer it must be the wrong question and I feel a bit like that with referendums: if referendums are the answer then we are asking the wrong question. I think there are all sorts of apparent strengths of referendums: they involve the people widely, they allow them to have a direct say; they are clearly educative; they move us beyond narrow parties to involve everybody, just as should be done in a democracy. The unfortunate thing is that on the whole it does not do any of those things and quite often it leaves you worse off than you were before. That is probably not to say that there are not times when a referendum seems to be a reasonable safeguard for the people. There were a couple of referendums about changing the electoral system in Ireland which were defeated, and most of us would probably say it was a good thing that they were defeated as well. Most countries do not need referendums to change the electoral system; they do not have parties trying to take very narrow advantage in terms of electoral reform, as we have seen very often in France; and I think if you do have a problem of that sort the solution is not in referendums, you just have big problems which are not solved by referendums. So generally, if your remit states “shall we have referendums or not?”, I pass on that one.

Q158 Lord Norton of Louth: We have dealt with the issue, if you like, of principle, but if we come on then to the practice. If you turn to New Zealand you are in a similar situation to us in that there is no codified constitution so you have the problem of what triggers a referendum. The actual practice, if you could explain what the process is, what is the role of the Electoral Commission, and, from your point of view, what do you see as the benefits and the problems associated with the actual practice?

Dr Catt: There are three separate sorts of referendum in effect in New Zealand and they all have different triggers and different rules. The Citizens’ Initiated Referenda is triggered by a petition from parliament but is non-binding, and is probably the best example of how not to run referenda in the world. The Electoral Commission has no role whatsoever in relation to Citizens’ Initiated Referenda. The Chief
Electoral Office that runs the elections, as opposed to the Electoral Commission that does education and finance control, actually does the campaign expense component to Citizens’ Initiated Referenda, and the legislation there is also not one to be copied. Basically the Citizens’ Initiated Referenda and legislation is problematic in every single respect. I would say that I do not think there is a single part of that legislation that works well. All other referenda are initiated by government and there is a new piece of legislation for each one, we do not have any standing legislation about how referenda are run. Each time there is a referendum they pass a piece of legislation and set out the rules for that referendum. So they have been different; the different government-initiated ones have had different rules around them as to whether they are binding or not, as to whether there is a government-funded education campaign, as to what role any other body has. A referendum is being proposed by the current government on the electoral system and they are going to set up an independent panel to run the education campaign; they are not going to give that role to the electoral administration bodies. That was what happened in 1992-93 with the last votes on the electoral system. I would say that whilst Citizens’ Initiated Referenda are an example of how not to do it, the referenda in 1992 and 1993 are probably an example of how to do it: that if you really do want to have a referendum, that one was done well mostly because it had a year-long, very well-funded, independently-run education campaign that went with it. I think that is what makes the difference and it is expensive. The regulation is ad hoc really and depends a lot on what question it is and the views of parliament at that time.

Q159 Lord Norton of Louth: You mentioned earlier that it depends on what the question is. Who actually decides the question? 
Dr Catt: Parliament.

Q160 Lord Norton of Louth: Do you have any role in commenting on that? Is there any independent body that does? 
Dr Catt: On the Citizens’ Initiated Referenda the Clerk of the House is meant to coach the people putting it up as to how to write it well, but the problem has been that most of the people putting up questions have been quite insistent that their question is correct even when it does not meet any of the guidelines, and the Clerk has no power to make them change it. For every other one nobody has a right of comment, but in New Zealand any member of the public can make a submission to the committee that considers a piece of legislation. The only comment on how the question is written would be through that open submission process; but nobody has a right, so it is decided by Parliament in effect.

Q161 Lord Norton of Louth: And really from what you are saying there are no generic rules? 
Dr Catt: No.

Q162 Lord Norton of Louth: It is distinct to each? 
Dr Catt: Even though there have been quite a few there is nothing that would be deemed to be tradition or norms, except possibly that they are probably doing the Independent Committee for Education on this upcoming MMP referendum because they did it on the last one, in 1992 and 1993. It is kind of, “It worked last time”, so it looks like they have just blown the dust off the briefing papers from last time and brought them forward again. No, there is no generic and no tradition. 
Professor Marsh: There are certainly things to learn from the Irish experience of referendums. I notice my colleagues were described as being “fairly positive” about the referendum experience in Ireland, and they certainly did say that, but I think the subtext in there is how on earth did they come to that conclusion because much of what they say is fairly negative. In terms of the rules governing referendums, referendums are necessary in Ireland to change the constitution and all the referendums we have there are to change the constitution. Sometimes it is because politicians decide they want to change the constitution and sometimes it is the courts that say you need a referendum; for instance, to adopt the Single European Act you need a constitutional change. In at least one case politicians were persuaded by interest groups that they needed to change the constitution and that was probably the worst case of all. In terms of running referendums, originally nothing was done at all. I think that referendum rules tend to follow rules for elections and since we really did not have any expenditure or campaigning rules for elections we did not have any for referendums. They develop slowly, as many things do, by reference to the courts and also by reference to the experience of referendums. So originally the Government would campaign for its own referendum and other people would do their best to campaign against it if necessary. That was taken to court and the court said that it is inappropriate for the Government to spend taxpayers’ money putting its own point of view. It seems perfectly reasonable to me in many cases. The Government spends its own money passing its own legislation and some kind of legislation is defined as constitutional and therefore it cannot spend its own money. I do not really accept that, but that is the general view. So a Referendum Commission was then set up and the Referendum Commission was one of the more ludicrous bodies. It was responsible for putting forward the case for and against. Everybody made submissions to this learned body, chaired by a High Court judge, as they always are, and they bought lots of television advertisements.
and you would have actors saying, “I think we should sign the Treaty of Nice because it is a really good idea because it will ...” Then somebody else would say, “But I am very concerned ...” And it was: “who are these people?” That was responsible for both informing people and giving them the views for and against. I apologise to all the learned judges here, but I think that only people soaked in the law could come up with a view that that was the way to educate the public. The final upshot of that was the total failure of the Treaty of Nice both to get any turnout and to get any support. Then they thought, “Maybe that is not a good idea and we need the Referendum Commission to inform people but we really have to leave it to the public and parties to actually move themselves and get out to argue for what they believe in.” So we moved to that situation and that has been the case since. The other change we had was about access to the media and it is really laid down that access to the media really has to be equal for both sides—at least fair for both sides. What does “fair” mean? Before the last referendum on Lisbon the Broadcasting Commission said that fair does not necessarily mean equal; it is not a matter of having a stopwatch and it is not a matter of having someone to say “no” every time you say “yes”, it is a little bit more flexible than that. These things are, I suppose, continually under review. Even with the same system you can get different results. For the first Treaty of Lisbon, without running ahead of myself, the Commission was headed by a High Court judge who prepared a document of about 20 pages to explain to everybody what the Treaty of Lisbon was about and most people arrived at the vote not knowing anything about it and, perhaps accordingly, voted “no”. The next time around there was a different High Court judge. Now this one was actually very good, and it was a much shorter document and he went on radio regularly on Fridays and dealt with all the things that had been raised and said, “No, that is wrong; that is right,” and he was pretty active and a very clear communicator; so he did a very good job and in part was responsible—for the change in the vote. In terms of the rules governing how they work, we are still making those up as we go along.

**Q164 Baroness Quin:** Professor Marsh, following up about the Irish experience, given that there are obviously a lot of concerns about how referendums work is there any move afoot to try and limit the use of referendums or, given that that would just be seen as denying the public a voice, is it just impossible to put referendums back in the box once they are out of the box?

**Professor Marsh:** No, it is not impossible but the only way to not have referendums would be to have a referendum on not having referendums.

**Q165 Baroness Quin:** Do you have any views as to whether that might ever happen?

**Professor Marsh:** It might, but it seems unlikely that people would say, “That is great; we will give it up!” Under the first Irish Constitution we actually had Citizens’ Initiatives as well and that got quietly buried by Mr de Valera in that debate the second time around in the 1937 Constitution. I think many people feel that at times it is beyond a joke. There is a difficulty in a written constitution that requires a referendum to change it. For instance, the language of the referendum is sexist so it would be nice if it talked about men or women instead of men all the time, or that it used even more mutual language. It would take an awful lot of referendums to change. You either change every clause with a separate referendum or you have a whole new constitution with a referendum to adopt that—that is probably the best way to go, to say: “There are all sorts of things wrong with this constitution, we need a new one; we can clear up all sorts of tidying things and maybe we will limit referendums as a part of that”, but I think that in the foreseeable future there is no possibility whatever that the public would put up with that because they would just assume that this was some cunning ploy by politicians again.
Q166 Lord Wallace of Tankerness: This seems the appropriate time to ask, because you have mentioned the Lisbon Treaty referenda, Professor Butler expressed the first time around, in the first Lisbon Referendum, about how a “leading, flamboyant, rich man charged in and moved opinion really quite substantially”; although the second time he, “crashed in . . . and had no impact at all.” Could you just comment on that and whether such interventions can be prevented, should they be prevented and has there been any New Zealand experience of one big financier, perhaps one organisation which has been able to put in substantial resources and how do we deal with that?

Professor Marsh: It is certainly true that Declan Ganley, the very rich businessman, had a big impact the first time and maybe he had a big impact because the politicians had gone missing, the government had its own problems, so there was a vacuum and he stepped into it and he had the money to step into it. It is almost certain that the “no” side outspent the “yes” side. That is the only time they have ever done that. And why should they not do that? Next time round the “yes” side outspent the “no” side and won; so if it was wrong the first time it was wrong the second time. He did a very good job the first time; he argued very well. I would not blame him, I would blame the complete failure of the “no” side to mount any kind of copious campaign. It seems to me very difficult, even if you wanted to do so, to prevent third parties from having a role in referendum campaigns. That is one of the arguments to have referendums, to move in outside parties, to bring in the people more widely. Some people just have more money than others and that is the nature of our society, both here and there. So it seems to me that all you can do is to try and look for some kind of transparency and a lot of the argument about Ganley was, “Where is his money coming from? Is it his money? He has all these shady links”, it was said, “with the American armaments industry and we know that they do not like the EU, so is he just a voice for them?” This goes back to the transparency argument I made before that people want to know where the money is coming from. In the first referendum I think that people accepted him at face value; in the second referendum he was much damaged really by his failure to win a seat in the European election, and by other activities.

Dr Catt: In the 1993 referendum in New Zealand there were a number of businessmen who heavily funded a “no” campaign, which they then lost; so the side with the most money lost, which is very, very unusual in referenda. One of the few stats that are known quite clearly about referenda is that the vast majority of the time the side spending the most money wins; so New Zealand 1993 is one of the few examples when that was not the case. I think you do need spending caps in referenda campaigns of some kind so that people cannot come in with excessive amounts of money, whatever the cap is decided it should be. Transparency is necessary as well in that kind of financing. I think one of the important things in the New Zealand case was that there was this independent government-funded education campaign alongside the “vote this way—vote that way” campaign, so there was the actual information as well as the arguments for both sides, and most of the political parties were also campaigning—mostly against a change in the electoral system as well. So there was a lot of other campaigning going on as well, but, yes, big money went in there.

Q167 Lord Lyell of Markyate: Looking around the world, what assessment would you make of other nations’ experience of referendums? Are there any cases that the Committee should consider as good examples of the use of referendums? I think you have already indicated that there are plenty of bad examples, but are there any of good examples?

Dr Catt: No, I do not think so. There are really good examples of bad ones. I think the Australian one and the republic is a fantastic example of how to ask the question to get the answer you want, in that the majority of Australians, as far as the polls said, wanted a republic; but from the way that the question was worded and the particular option given to them a lot of people who wanted a republic did not want that form of it. I think that the referenda in both British Columbia and Ottawa on changing the electoral system are a really good example of if you do not do a good informational campaign and you do not give voters time to think about it then it is not going to work well. So those are really good bad examples, but I cannot think of any really good examples.

Professor Marsh: Broadly I would go along with that, following the comments I made earlier. I do think that it is reasonable to have referendums to set the very narrow rules of the game, perhaps on the electoral system, but if you have them on the electoral system you certainly do need a very long time to explain to people what it is, even when it seems quite simple, as it did in Ireland, and do we want the current system, which people understood, or do we want first past the post, which it does not take a rocket scientist to understand. That seemed simple enough but even that was much more complicated than it seemed. There have been referendums elsewhere on that; there have been referendums on things like the voting age, although why you need a referendum on the voting age I do not know. The Swedes, for instance, had three referendums on the voting age: the first was, “Do we drop it from 21 to 18?” and a huge majority said “no”. About five years later, “Shall we drop it from 21 to 20?” and a small majority and a lower turnout said “yes”. Then five
years later they said, “Shall we drop it from 20 to 18?” There was a lower turnout again and a smaller majority again said yes; so they finished up with it. I think that sort of exercise has much to commend it. The other one, I suppose, where you might argue that they are useful is on basic issues of nationality—“Which country should we be governed by?”—and there are times when one can see that that provides legitimacy to particular political decisions. The Good Friday Agreement referendum in Northern Ireland and in the Republic, in the Republic I think it was relatively trivial but in Northern Ireland it was quite important to get the majority, although there is still some doubt about whether it was a majority of Unionists for that, which I do think helped legitimise the views on peacekeeping. But elsewhere it is the bad things that tend to spring to mind rather than the good ones.

**Q168 Lord Woolf:** I think in many ways, Professor Marsh, you have already answered this but perhaps I should just give Dr Catt an opportunity to do so. Assuming that there is going to be a referendum do you have any principles that should be applied to the information that the electorate is given?

**Dr Catt:** I think after you write the question the information that voters are given is the most important component of running a good referendum. I think that voters need simple, easy to understand information, on what the different options are provided by an independent body, using good communication methods.

**Q169 Lord Woolf:** Such as?

**Dr Catt:** Delivered in a variety of ways. I think one of the reasons that the New Zealand one worked is partly it lasted a year. People do not go around thinking about electoral systems all the time; they need to start thinking about it. Although we had first-past-the-post it soon became apparent that a lot of voters did not actually understand first-past-the-post. They thought they were electing the government and they were not, they were electing their local MPs. So there was a lot of misunderstanding about even first-past-the-post. There had to be education about that and for a different alternative to the electoral system. So there were five electoral systems being explained. A lot of it was “Keep it simple” and the booklet that the information campaign had in the end had one page for the basics of each system. It was done graphically and also there were good TV ads done, there were radio debates, there were TV debates, there were lots of people who went out and did talks to Rotary, Women’s Institutes, church groups, all the local community groups. People went out and talked to them so that there was a lot of information provided in a lot of ways.

**Q170 Lord Woolf:** That was presumably by the Government and the two parties? When I say “the Government”, an independent body and by the two parties?

**Dr Catt:** All of that information was the independent body, and then there were also interest groups campaigning for the status quo and for MMP, which is the option we have at the moment. A lot of politicians actually kept quiet because most of the politicians were opposed to change, but it became very clear very early on that every time a politician said, “We do not want change” another 2,000 voters decided they would vote for change. So mostly the politicians kept quiet after a while because they were seen as “If they think it is good it must be bad”. There was that kind of view going on in New Zealand politics at the time, so actually a lot of the politicians kept quite quiet. There was division inside the major parties as well: there were members of both of the major parties for change and against change, so it was not as if there was a united political party view from the major parties. Mostly it was the independent body—and it truly was an independent campaign—and then the different pressure groups that were doing the campaign and talking about it and stuff.

**Q171 Lord Woolf:** Professor Marsh, would you like to add something to that?

**Professor Marsh:** No, I have probably made all the points I want to make about education. I spoke to the parallel Committee to this one—a little bit broader and in both chambers—our Committee on the Constitution about referendums about a year ago and there were a couple of points I made that may bear repeating. One is that if you want to set up a Referendum Commission to inform people why do you pick a judge, why do you not pick a tabloid newspaper editor to do it? Or somebody whose expertise lies in communication? I think that needs to be thought about. The other point I wanted to make will come back to me in a minute, but it has just disappeared!

**Q172 Lord Pannick:** Do you have any views on the role of the United Kingdom Electoral Commission under the statutes or any views on the performance of our Electoral Commission in relation to referendums?

**Dr Catt:** I think that somebody has to oversee regulation of spending and the Electoral Commission seem to be the sensible people to do that—they are doing it anyway. Somebody has to provide an independent education campaign and we feel that the Commission has good experience in that as well. I would be quite happy to see them taking on both of those roles as long as their independence in running the education campaign is guaranteed and there is no
government interference in how the education campaign is run.

**Professor Marsh:** I would go along with that. I think it is recognition of the need for some kind of regulation and quite a lot of regulation about transparency, some of which we simply do not have in Ireland at the moment, and I think that is useful to be built on. Obviously it has not worked in a lot of referendums yet so we need a bit more experience, and as a political scientist I guess I ought to know more before I talk about it.

**Dr Catt:** The 1992 referendum in New Zealand did have such a question. It actually had two questions. The first was: “Do you want the status quo or do you want to change the electoral system?”—two options. Then the second question was: “If the system is going to be changed which of the four following options would you prefer?” and you only got one tick so you could only choose one. As it happened one system, MMP, the one we have now, won way ahead of everything else, mostly because it was the system that had been recommended by the Royal Commission that had investigated the question of which electoral system should New Zealand have. So it had some history and it was the only one that any pressure groups were arguing for; nobody was arguing for the other three options. It was an unusual campaign and, therefore, it turned out okay because it was way ahead. If the situation had been different and two of the systems had been very close then I do not think the next stage in the process would have had the same legitimacy. I think that there is a real legitimacy issue if you are putting up several options: who is the winner? You might want to use a preferential voting system to choose the options but then it is harder if the argument is about do we want a preferential system in elections. It might be seen as skewing the argument if you then use a preferential system in the referendum. By and large I would say avoid multi-option referenda when you can. To be slightly frivolous, the Australian example of choosing their National Anthem is a really good example of multiple choice referenda, giving everyone a result with which nobody was particularly happy. They had four options and the anthem they have now, which was not the most exciting of the ones that was on offer to them, came through the middle because people were polarised as to the other options. It is one of the few other examples of where multi-options were used. So it is fraught, particularly if there is a good chance that two of the options will get quite a close result.

**Chairman:** Was that Advance Australia Fair? A final question from Lord Hart.

**Dr Catt:** Capping for the Citizens’ Initiated Referenda. It is actually quite problematic. The pro side and the anti side are both capped. One of the problems is that the cap is ridiculously low, so it means in effect there is no campaigning it is so low. The other really big problem is that there is often more than one group on each side, but the cap says that there is this amount of money for the pro side—all of them—and this much for the anti side. So who has to choose? Who are the pro side and the anti side? In terms of administering it, it is good that it is so low because in effect nobody really does anything, so it takes the issue away, but in the legislation that they will bring in for the referendum on changing the electoral system this is one of the things that they are really going to have to grapple with. Are you going to let as many groups as you like do it and then how do you stop one rich group setting up ten splinter groups so that they can get round the cap? Regulating finance in elections is always fraught and people will always try and get round the letter of the law; but I still think in principle that there should be a cap on how much can be spent. It is a minefield trying to regulate it.

**Professor Marsh:** I think that the transparency and the accountability is the good thing. In an ideal world caps would be nice to ensure greater fairness, but I just think that the difficulties of dealing with that are too great and, to some degree, run counter to the purpose of having referendums, or at least to some of the apparently good things about having referendums, to bring in people in the first place. Just one other point, if I may—it flew back into my head—about information. I was talking to one of our Deputies about the poor information in Lisbon 1 given to people and he complained that when he
knocked on a door and said, “I have come to talk about the Lisbon referendum” people would say, “I do not want to know” and shut the door. This is one of the difficulties in informing people about referendums; they do not necessarily want to know, they have other much more important things on their mind—"Big Brother is just on the television; go away; I do not want to know.” It does not fit too well with some of our notions about democratic theory but I think it is like youth is wasted on the young, democracy is sometimes wasted on the people.

**Chairman:** On that note, Dr Catt and Professor Marsh, thank you very much indeed for joining the Committee and for the evidence you have given.

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**Memorandum by The Electoral Commission**

1. **The Legislative Background**

1.1 The Political Parties, Elections and Referendums Act 2000 (PPERA) established the Electoral Commission and gave us statutory responsibilities in relation to elections and referendums. In particular, Part 7 of PPERA sets out the legal framework for UK-wide, national and regional referendums and the Commission’s role in those. Additional legislation must be made to enable any specific referendum to take place.1

1.2 Our role in elections is twofold: we are the independent regulator of party and election finance, and we set standards for electoral administrators, provide advice and assistance and report on their performance.2 In referendums our role is significantly wider, as we have the additional responsibility for the conduct of the referendum. A referendum under PPERA is the only electoral event that has a framework for national coordination and accountability.

1.3 Our powers and responsibilities relating to referendums include:
- commenting on the intelligibility of the referendum question;
- registering those who want to spend significant amounts on campaigning in the referendum as “permitted participants”;
- where appropriate, appointing lead campaign groups (“designated organisations”) for each outcome;
- ensuring that designated organisations have access to certain assistance, including grants that we determine within statutory limits;
- making recommendations to Government on campaign spending limits for sub-UK referendums;
- monitoring and reporting on campaign spending; and
- reporting on the administration of the referendum.

1.4 The Chair of the Commission (or someone they appoint) will be the Chief Counting Officer (CCO), responsible for the conduct of the referendum and ensuring the accuracy of the overall result. The CCO appoints a Counting Officer for each local authority within the referendum area.

2. **Our Referendum Experience**

2.1 Our direct experience of running a referendum was the November 2004 North East regional assembly referendum (“the North East referendum”). This was the first practical test of the PPERA referendum legislation.

2.2 The Chair of the Commission appointed the Chief Executive of Sunderland City Council as CCO, to give a regional focus to the leadership of the administration of the referendum. The CCO appointed 22 Counting Officers from the network of local Returning Officers, and designated regional coordinators in each county in the region to enable a consistent and coordinated approach to the administration of the referendum.

2.3 Our report on the North East referendum concluded it was successfully run, producing a clear outcome in which people had confidence.3 It was an experience from which we learned important lessons, including identifying where changes to the legislative framework would be beneficial for future referendums (see

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1 Such as an enabling Act; a Conduct Order; a Fees and Charges Order.
2 The Electoral Administration Act 2006 gave the Commission powers to set and monitor performance standards for the administration of elections.
3 Not printed.
section 4). We have recently revisited the experience of the North East referendum during our work to prepare for possible forthcoming referendums.

2.4 We have also commented on the intelligibility of referendum questions for other proposed referendums (none of which were ultimately held).  

3. **Key Principles that should Inform the Way Referendums are Run**

3.1 Our focus is on voters and on putting their interests first, and that underpins everything we do. Referendums should be administered in a way that engenders confidence, is credible, transparent, and open to scrutiny. Our objectives for referendums are:

- they should be well-run and produce results that are accepted; and
- there should be integrity and transparency of campaign funding and expenditure.

3.2 In that context, we set out here the principles we believe should inform the way referendums are run.

3.3 There should be no barriers to voters taking part. This means:

- those eligible can register to vote;
- voters can easily understand the question (and its implications);
- voters are informed about the possible outcomes, and can easily understand the campaign arguments; and
- voters can have confidence that:
  - campaign funding is transparent;
  - distribution of any public support and access to media is fair; and
  - any rule-breaking will be dealt with;
- the voting process should be easy to take part in and well-run; and
- the result and its implications should be clear and understood.

3.4 There should be no barriers to campaigners putting forward arguments for any of the possible outcomes. This means that:

- it is easy to register as a permitted participant and to take part in campaigning;
- the rules that govern campaign spending and fund-raising activity are clear and fair; and
- the process for designating lead campaign organisations for each outcome (and consequent distribution of public funds and access to media) is easy to understand, and accepted as fair.

3.5 The referendum should be administered efficiently and produce results that are accepted. This needs:

- a clear legal framework with clear roles and responsibilities communicated to those who are bound by them;
- clear guidance and efficient procedures for voters, campaigners and administrators;
- Performance standards against which the performance of Electoral Registration Officers and Counting Officers at referendums is evaluated;
- an efficient process for distributing funds to campaigners and administrators;
- rapid and clear reporting on campaign funding and spending; and
- a timely and persuasive report on how the referendum worked.

4. **The Legislation**

4.1 PPERA provides the generic legal framework for referendums. The detailed rules for the North East referendum were provided by secondary legislation (three separate Orders). Following that referendum and our analysis of our experience, we wrote to the Government setting out the areas where we believed changes should be made to the legislative framework for referendums, which are:

- Creation of a statutory Regional Counting Officer role (similar to that of a Regional Returning Officer at a European Parliamentary Election) on a level between the CCO and Counting Officer. This would support the effective management of the poll, ensure consistent standards of administration,

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4 We commented in 2004 and 2005 on proposed questions for a European Constitution referendum, and in 2007 and 2008 on proposed questions for local referendums on local governance arrangements.

5 We wrote to what was then the Department for Constitutional Affairs in 2007; subsequently to the Ministry of Justice; and most recently to the Minister of State for Justice in June 09.
and enable regional co-ordination and communication between the CCO and local Counting Officers, particularly in the case of any national referendum;

— The CCO to have a power of direction in primary legislation over both Regional Counting Officers and Counting Officers to enable efficient organisation and coordination of the referendum;

— The restriction on the publication of promotional material by central or local government to apply from the start of the referendum period (i.e. the date from which campaigners can be registered as permitted participants). The existing restriction applies to the period of 28 days immediately before polling day. We believe it would be fairer if the restriction covered—ideally—the entire referendum period, or at the very least, the 28 day period before postal ballot packs are issued;6

— The Commission to have powers to promote public awareness of the registration and voting process at a referendum, akin to those we have in relation to elections, to ensure that voters are informed about how to participate;7

— The Commission to have a discretionary power to provide information to voters on the referendum options, if it is unable to appoint designated organisations (we already have this power in Wales).8 This avoids a scenario whereby no organisation has responsibility for informing voters about the options being put to them at the referendum, and allows us to undertake such activity if we decide that it is necessary in the interests of voters; and

— Aggregation of spending limits for permitted participants who operate to a common plan in campaigning, to bring them into line with the rules on spending by third parties in election campaigns. This would prevent participants circumventing spending limits by registering separately but acting together.

4.2 We support the idea of a generic Conduct Order that would set out the detailed regulations governing the administration of referendums held under PPERA. This would ensure clarity and consistency for those involved in planning and running referendums, and allow them to develop a shared understanding of the rules that would apply to any referendum well in advance.

5. Our role in future referendums

5.1 There is potential for a referendum in Wales on law-making powers of the National Assembly and, at UK-wide level, there has been considerable recent speculation about the possibility of referendums on topics including electoral reform.

5.2 There is also the possibility of a referendum in Scotland on independence, though based on current information that would be a non-PPERA referendum, for which we would have no statutory responsibility under existing legislation.

5.3 We have therefore recently reviewed our referendum planning and our approach to key elements of our role. In doing so, we have in particular sought to take account of our role as a UK-wide organisation operating in the context of devolution.

Commenting on question intelligibility

5.4 Referendum questions should present the options to voters clearly, simply and neutrally. Our preferred approach to assessing question intelligibility is published on our website, as are our Referendum question assessment guidelines.9 We would assess the question using our guidelines, taking account of evidence from research with voters, and discussions with key stakeholders and plain language and accessibility experts.

Making recommendations on spending limits in sub-UK elections

5.5 Spending limits for UK-wide referendums are set out in PPERA. The Government will set the limits for sub-UK referendums but must have regard to the views of the Electoral Commission.

5.6 Our advice will be based on the principle that limits should be set at a level which allows effective campaigning for all outcomes of a referendum, deters excessive spending, and is not so low as to distort reasonable campaigning behaviour and affect transparency (e.g. by giving campaigners an artificial incentive to split their spending between multiple campaigning bodies).
Setting grants for designated organisations
5.7 We are responsible for setting the value of the grant available to all designated organisations at a referendum, up to a statutory maximum of £600,000. Our principle is that grants should be set at a level that will ensure voters are well-informed about the arguments for all possible outcomes, while ensuring proper use of public money.

6. Other Issues
6.1 This section addresses some of the issues mentioned in question 8 of the Committee’s call for evidence.

Ballot paper design
6.2 We believe voters should be confident that their vote will be counted as they intended. We have recently issued good practice guidance on ballot paper design that aims to improve the usability and accessibility of voter materials.10

Public information
6.3 PPERA does not contain any provisions for the Commission to undertake public awareness activity in relation to referendums. The enabling Act11 for the North East referendum gave the Commission powers to promote public awareness, and the Commission encouraged people to register to vote and provided information on how to take part.

6.4 The enabling Act also gave us powers to provide information explaining the “yes” and “no” arguments in the event that we were unable to designate organisations as lead campaigners for each outcome of a referendum. We have similar powers for referendums in Wales.12

6.5 If permitted in subordinate legislation, at any future referendum we would carry out activity to inform voters about the referendum and explain how to take part.

Combination of referendums with other elections
6.6 In the event of a government proposal to combine a referendum with an election, we would advise on a case-by-case basis. We would consider the facts relating to that specific election/referendum combination, looking at what the benefits or drawbacks to the voter would be, in order to advise on the particular risks of combination, and how they could be managed.

6.7 Relevant factors would include whether any additional legislation applied for the first time, the complexity of running a particular referendum and election at the same time, the likely increase in turnout resulting from combination and issues of accountability for the administration of the elections and referendum.

4 January 2010

Examination of Witnesses

Witnesses: Ms Jenny Watson, Chairman, Mr Andrew Scallan, Director of Electoral Administration and Boundaries of the Commission, and Ms Kay Jenkins, Head of Performance and Head of Wales Office, Electoral Commission, examined.

Q175 Chairman: Jenny Watson, Kay Jenkins and Andrew Scallan, thank you very much for joining us this morning. We are being sound recorded and so I will ask you, if I may, to formally identify yourselves for the record; and if you would like to say a few words by way of a brief opening introductory remark, please feel free to do so.

Ms Watson: Thank you very much, my Lord Chairman. I am Jenny Watson and I am the Chairman of the Electoral Commission.

Mr Scallan: Andrew Scallan, Director of Electoral Administration and Boundaries of the Commission.

Ms Jenkins: I am Kay Jenkins; I am Head of Performance and Head of the Commission’s Wales Office.

Ms Watson: Thank you very much for inviting us to come and give evidence today. I thought it might be helpful to you if I briefly outlined the context of our involvement in referendums. We are the body that is charged with conducting referendums held under the framework established in the Political Parties, Elections and Referendums Act. In our written evidence to you we have focused on the effectiveness of that framework based on our experience to date.
and how we fulfil those various responsibilities. We have as an organisation recently published more information about how we intend to carry out our role in the future to make the process clear to those who might have an interest. Because we necessarily concentrate on the specifics of running a referendum as an organisation we have not looked at the wider constitutional questions which relate to referendums as to whether it is possible or desirable to designate or design which issues should be subject to a referendum; but we can obviously see the need for such issues to be addressed, and it may be that at least a shared understanding of those issues might emerge from the deliberations of this Committee, because there is no other forum, I do not think, where at present such big picture issues are currently being considered. These constitutional issues that would have an impact on our role would, for example, include the extent to which constitutional issues are suitable issues to be addressed by referendums; whether the PPERA framework should be extended to cover other referendums or polls; whether there should be a consistent framework for all referendums run in the UK, including those run by devolved governments; and whether what one might term lower order referendums or polls, such as community polls, should be regulated. But I should stress that these are issues we have looked at ourselves; we have had one referendum under PPERA in the ten years of our existence. It may be in future years, when we have more experience perhaps of such referendums, assuming, that is, that more will be held, we will have more relevant experience to put towards that debate. But for the purposes of your deliberations I think it is very valuable that these issues are being raised and we will do what we can to give you what answers we can to those questions.

Q176 Lord Norton of Louth: To pursue the point back to the 2000 Act, you have touched upon it and you mention in your evidence as well the sorts of changes that you think might be appropriate. Would you like to expand on those? You have mentioned that you have also proposed those too to Government, to amend the Act. Can you perhaps say what response you had on that?

Ms Watson: I think it is important to start by saying that broadly speaking the framework works, so I would like to reassure you of that. We have tested it, albeit in a regional referendum, and it works. But there are improvements that we think could be made, and Andrew, you might perhaps listen to what I say and see if you want to supplement any of it. For example, we would like to see Regional Counting Officers being, if you like, a layer in between the Chief Counting Officer role, which is that given to the Commission, and Counting Officers locally, to improve that local co-ordination and administration. We would like to see a change to the way in which government is able to produce promotional material during a referendum period; we would like to see that amended completely to prevent that being able to happen. We would like to see a generic conduct order which would effectively lay the rules for future referendums and make sure that they are there and that everybody knows what they are and that they are very clearly set out. We would like to see aggregation of spending limits for permitted participants in a campaign, to make sure that where there are people who might be working to a common agenda we can better police that agenda. And we would like to have more powers to promote public awareness. That might be awareness of the issues in the referendum, but also awareness of the fact that a referendum is happening and that in order to vote on it you need to be on the electoral roll, which is not something that should be taken for granted. In the most recent amendments that the Government has submitted to the Constitutional Reform and Governance Bill we do see some of those things being addressed, particularly, for example, the aggregation of spending limits and powers to give us public awareness. You asked more generally about the response from Government; we would need to see referendum legislation being brought before the House in order to be able to see those things come forward and I am greatly encouraged, seeing the amendments that have been put, to think that there will be opportunities to get that framework more closely in line with what we would like. Andrew, is there anything you would like to add to that?

Mr Scallan: The only point to add, in relation to the management of the referendum itself, is that the Commission suggested that it should be very clear that the Chief Counting Officer has a power of direction over local Counting Officers, and that was one of the issues that was brought into the North East Referendum, but it is very clear that it facilitates the management of the referendum.

Q177 Baroness Jay of Paddington: Specifically continuing with the 2004 Referendum, we heard some evidence earlier that the Electoral Commission had great difficulty in deciding between two groups who came forward to represent the “noes”, as it were, which had been officially designated as the one to carry that banner; and we have also heard, for example, this morning what people feel on the academic side about referendums in other countries—New Zealand and Ireland specifically this morning—about transparency and clarity about funding particularly and who gets the funding, and whether or not it can be influenced by individuals, et cetera, is very important. So I wonder if amongst the lessons you learnt from 2004 was one about the difficulties of designating an official group who could...
be funded and how much more difficult that might be
if it was something which was very high profile like,
for example, a referendum on Europe?
Ms Watson: I think it is fair to say that we found it not
so difficult to designate, but those that we did not
designate did not agree with our decision, and that
might be a different interpretation of the situation. I
think in approaching the designation process we are
clear that we are looking for a campaign organisation
to be a “yes” or “no” campaign that had a broad base
of support and I suppose our starting position would
be that that is likely to be an umbrella type of
organisation which brings together perhaps a range
of political views within it. From our perspective I
would say that I am clear about how we would
approach that; that does not mean to say that
everybody will agree with the decision that we make.
I would like to stress that it is not entirely a paper
exercise and in such a situation were we to receive a
request to be designated as the “yes” or “no”
campaign we might well decide that we wanted to see
people and talk to people and ask them different
questions before we made that decision. In relation to
the transparency of funding, it is again worth me
sharing with you that of course the grant that we give
to those designated campaign organisations is not
intended to cover the whole of their spend for the
referendum campaign; it is designed to cover essential
core costs. Again, we would want to anticipate that
any organisation that is designated would be able to
raise funds from other sources and not public funds
to work towards its campaign. Kay, is there anything
that you would like to add to that?
Ms Jenkins: Just to add that I think on the
designation process one of the lessons that we have
learnt from the North East experience is that we
would increase the transparency of our own decision-
making process so that we would publish an
application form, and indeed publish the
applications that we receive on our website and make
clear the criteria by which we are making our
decision, so that the process is as open and
transparent as we can make it.

Q178 Baroness Jay of Paddington: But you are
neither of you concerned that in a broader
referendum in terms of the numbers of people
involved and the national issues concerned that you
would get a substantial number of legitimate
umbrella organisations competing in a way which
would make it more difficult?
Ms Watson: That is of course possible; we could, and
I think we would approach that situation as it arose
on the facts. There is nothing to stop us from saying
that we think there are a couple of good organisations
here and would you want to go away and talk to each
other and think about whether there is some kind of
different organisation that you feel you might come
to? It has often struck me that much of what we do
around referendums is a little like the aircraft black
box—it is all happening in there but it is not always
visible to everybody, and I think that the point Kay
makes about transparency is pertinent.

Q179 Lord Lyell of Markyate: You talked earlier in
your answer about the problem of groups with a
common agenda, and then you used the expression
“how you would police that agenda”. It did not
sound terribly democratic but I assume you were just
talking about the amount of money that you could
dish out. How much money were you dealing with
and is that what you meant or did you want to police
things more widely?
Ms Watson: I apologise if it did not sound very
democratic. We do have a regulatory role in relation
to financing of referendum campaigns, so if I might
tackle that and, Kay, I might turn to you for the
supplementary part. The point I was trying to make
is that in a referendum campaign if you want to spend
more than £10,000 in that campaign you need to
register with us as a campaign organisation, and at
present there is nothing in the legal framework to
stop possibly hundreds of campaign organisations
being set up, funded through the same route and
working to a common agenda in terms of providing
the question outcome. What we have said—and
indeed we have seen in the amendments to the
Constitutional Reform and Governance Bill—is that
we would like to see the ability to aggregate that
spending so that if there are groups that are working
to a common agenda, whatever that is, they have to
aggregate their spending together. So, to give you a
very practical example: if both of them working to a
common agenda spend £50,000 they both have to
declare £100,000 because that is the common
spending, and that is the point I was making about
the aggregated spend. Kay, do you want to add to
that?
Ms Jenkins: Just in relation to the grants that we
would give to designated organisations. One of the
issues there is that we are required to pay grants to
organisations which are designated the lead
campaign organisations and obviously those are
grants of public money. We would seek to have as
much probity in that process as we can by paying 30%
of the grant to the organisations upfront, and look to
pay the remainder of the grant after the campaign has
finished, on evidence of appropriate spending, so that
we can protect public money as much as we can.
Obviously otherwise there is a danger of us paying
the grant upfront to an organisation that is set up for the
sole purpose of a referendum and then disappears
afterwards.
Q180 Baroness Quin: Perhaps I should declare an interest as an enthusiastic campaigner on the losing side in the 2004 referendum campaign. Our previous witnesses this morning I think argued very persuasively that referendums, if they are going to be well run and seen to be valid, should be preceded by a long period of information as possible and I wondered if this is anything that the Electoral Commission has taken a stance on?

Ms Watson: We certainly do not think that the period should be any shorter, but we have not taken a view on whether it should be could be longer; whether that would help people understand it more easily. But I certainly would not want to see a shorter period than that which we currently have. I think that there is possibly a question beyond that, if I may, which is the type of information that voters would need in order to be able to make their decision, and that again comes back to the request that we would like to have a public awareness power. So it might be that you have a range of campaign material but that we could also provide information for people, possibly through a household booklet, if we thought that that was necessary.

Q181 Baroness Quin: Similarly, have you taken any view on the complexity of particular issues being subject to a referendum? We have talked about a lot of different referendums so far, some of them on fairly straightforward issues and some of them on extremely complex issues. Is that something on which the Electoral Commission has a view?

Ms Watson: It is something that we would be extremely concerned about in terms of the role that we have to give advice on the question. So it speaks to the heart of part of our role in a referendum campaign. What we would want to do in terms of giving our advice on the question for any referendum would be to test the kind of question that is put with voters, to see how they engage with it and what they think the question means; so if they vote “yes” or “no” is that what they meant to do. We would want to do a lot of plain English testing and talk to people who were accessibility specialists who could help us understand how people might approach that question. On the broader point about the kind of topics that might be put to the referendum I think it is usually possible to make most things comprehensible but one of our concerns would be if there was a question that seemed to need a rather long preamble before it—that is something we would be keen to avoid. So you can usually reduce things to a simple question but it needs work to do it, and we would anticipate that it—which is I suppose a very practical answer to your question—would probably take us about ten weeks to do that work in order to be clear that we had been able to do the right kind of work with voters and that we had been able to be very sure that the question was comprehensible. In the North East Referendum we did suggest changes and those were, I think, almost overwhelmingly taken on board.

Q182 Lord Woolf: To some extent you have covered what I want to ask already, but I would like you to focus on the spending control powers that you have. Do you think that they are adequate?

Ms Watson: Yes. I assume, my Lord Chairman, that there is a follow up to that!

Q183 Lord Woolf: In order to police what you are involved in are you adequately funded?

Ms Watson: That is a separate question. Perhaps let me supplement my first answer. Yes, I think they are. Obviously the powers that we currently have will be supplemented with those that will come to us we hope at the beginning of July this year, through the Political Parties and Elections Act, and those are currently in a Statutory Instrument which is going before the House. That will give us new powers, which will apply to both elections and, for your purposes, referendums, which will include monetary penalties and which will also include a new power called a Stop Notice, which enables us in real time, so within a referendum campaign, to be able to intervene if we think a particular campaign organisation is likely to break the law. We did not have those powers previously and hopefully from 1 July we will have them, and I think that gives us a very significant addition to how we can regulate. Are we funded adequately? In relation to the costs of any referendum the process for agreeing our budget is that we would need to return to the Speaker’s Committee and request the funds to carry out the work on that referendum because although we can obviously project ahead and think that there might be a referendum in this year and these would be the costs that we might need, until that is certain we would not be granted those funds from the Speaker’s Committee.

Q184 Lord Lyell of Markyate: This rather comes back to my policing question. You did not have any teeth before but now you have teeth and are you going to be able to stop people communicating their views by saying, “You have already spent everything communicating this particular type of view, or somebody else has already spent it; so shut up”? 

Ms Watson: I do not think I would quite say that we did not have teeth but we certainly have a better set of teeth now, or we will have after July than we had in the past. That is exactly the purpose of the stop notice—to enable us to intervene in that kind of situation or possibly another kind of situation. Where we felt that the law on spending was being broken, yes, it does give us the ability to do that.
Q185 Lord Lyell of Markyate: But what does it mean? Supposing people start writing to the newspapers saying that they want “yes” or “no” in a particular referendum, and supposing the newspaper takes it up and publicises it, how does that all fit in with your stop notices? Are you going to tell the newspapers to censor themselves?

Ms Watson: The regulatory framework that we have relates to those organisations that are either designated “yes” or “no” campaigns and who would have to follow a certain framework, or who are campaigners who want to spend over £10,000 in a referendum campaign and therefore would have to register with us. If they want to spend below £10,000 then that is a different scenario; but I think your question is one which goes to the heart of a free press and we do not have the ability to say to the media, “You cannot give your opinions within a referendum campaign.” We certainly would not be able to have the ability to stop individuals writing letters to the press within a referendum campaign; indeed, I would argue that that is at the heart of the kind of debate and deliberative process that a referendum is designed to encourage. But if there were organisations who came to us and said, “We want to be permitted participants; we want to be part of the process,” and we then think, for example, that they are acting in concert or that they are not declaring things or that they are spending in a particular way, then, yes, we would be able to intervene. Kay, do I not know if there are any practical scenarios that might illustrate that?

Ms Jenkins: I think that the analogy is like an election, in fact, in that there is debate about the issues in an election in the press, in the way that there would be during a referendum, that spending controls apply to candidates and parties in an election campaign and the spending controls would apply to the campaign organisations in a referendum. It is actually very similar.

Q186 Lord Lyell of Markyate: Buying television time as opposed to having an editorial decision to have a discussion?

Ms Watson: Yes.

Q187 Lord Lyell of Markyate: You are nodding your heads in agreement and that is what you mean?

Ms Watson: Yes.

Ms Jenkins: Any money spent on advertising, for example, would be controlled as part of the campaign spending and would be regulated.

Q188 Lord Wallace of Tankerness: You mentioned the testing of questions and I understand that your powers extend to commenting on the intelligibility of the referendum question. But what if the position of the Electoral Commission, having done some testing, was to go back to the Secretary of State and say, “We actually think that the question is a very bad question,” and the Secretary of State said, “That is too bad, it is the one that is going on the ballot paper”? What would be your response to that? Do you think that that is an area where perhaps your powers should be extended?

Ms Watson: I think our view would be that it would be extremely unlikely for a Secretary of State to be in receipt of our advice with the documentation and the testing and everything that we had done being published transparently and decide not to listen to our advice, because inevitably what that does is to set up a debate between the Electoral Commission and the Secretary of State where we are effectively saying, “Your question is not the question which should be put,” and in that situation I think it would be extremely difficult for the Secretary of State to proceed.

Q189 Lord Wallace of Tankerness: So it would become a political issue?

Ms Watson: It would, and I should assure the Committee that in such a situation we would be extremely robust about ensuring that our views were known and the transparency that we have already discussed I think would be helpful in that regard.

Q190 Lord Wallace of Tankerness: One of the other possibilities that we have discussed is the possibility of multi-option referendums and indeed I know that you have indicated in your evidence that you do not have any responsibility should any referendum take place under the auspices of the Scottish Government, where it is suggested there that there might be a multi-option referendum. Perhaps you can speak freely because you do not have a statutory role—do you have any views on a multi-option referendum?

Ms Watson: If I may, my Lord Chairman, whatever I say here will be taking as expressing a view on a multi-option referendum question and what we have said is that any question that would be put to the voters would be tested and our view on any question would be guided by the voters’ response to such questions. Kay was indicating that she wanted to come in.

Ms Jenkins: I just wanted to say as well that in looking at the question we would also look from the voter perspective at how they were able to frame their answer, so that in a multi-option question we would be testing whether the voter was able to answer the question straightforwardly or not.

Q191 Lord Lyell of Markyate: What factors do you bear in mind in appointing designated organisations and then setting them grants?

Ms Watson: I think I alluded to this in an earlier answer, that our premise would be to say that we would like to see organisations which could
command as broad a base as possible of support and so we would be looking for an umbrella type organisation with a credible structure behind it in order to make sure that the public money that is given through the grant can be appropriately spent. As Kay mentioned earlier, we would put in place our own controls on when we might release that money to be sure about that.

Q192 Lord Lyell of Markyate: You are really trying to prevent some fly-by-night organisation wasting the money, are you?

Ms Watson: We are trying to do two things, I think. One is to make sure that the money is adequately stewarded and well spent and that the grant goes to an organisation which has the potential, through the fact that it has broader support, to raise more money to campaign effectively. But we are also trying to ensure that in any designation process, be that “yes” or “no”, that where we can those organisations which we designate have a broad base of public support. So it is a twofold aim.

Q193 Lord Woolf: I would like to follow up, if I may, this idea of taking into account potential voters’ views of what should be the question. I am puzzled about that because it is not a matter on which voters are trained to give you a response. We have heard evidence indicating how very difficult it is to decide how the question should be framed, and if you were to go to an untutored body to find what should be the question are you not going to create problems?

Ms Watson: I would start personally from a slightly different premise, which is that I think most things can be explained and distilled down to a reasonably simple premise. Our reason for going to voters to say, “This is the question that has been put so far; will you help us work it through?” is precisely to see whether or not that question can be understood by what we might at one time have described as the man on the Clapham omnibus, because it is the man on the Clapham omnibus who is going to have to decide the result of the referendum. So if there is a potential for misunderstanding, much better for us to know that and test it and to give some views on that prior to, rather than putting a question that we then find has been approached in a different way by voters; and I think that is a perfectly appropriate way to conduct the testing because that is what we have to have at the end of it—a question that can be easily understood by the majority of the population. Kay, do you want to add anything to that?

Ms Jenkins: It might help if I explained just briefly what the process would be by which we would follow. We would use a public opinion research company and we would have—I dread the term—focus groups to look at the question, and we have used that process so far in responding to draft referendum questions, and found that to be very valuable. So you have groups of potential voters looking at particular words, which to you and I may seem straightforward—the use of words like “committee” and “council”—but how those might be understood by people who are not familiar with the mechanics of government in their everyday lives. So we will be looking at how voters would respond to the language in the question, and if they were able to make a decision based on the words that are put before them on the ballot paper.

Q194 Lord Woolf: Your experience is very limited in practice so far because there has really only been one relevant referendum for which you have been responsible. To what extent have you studied and heard the views of experts on the different bodies such as yours, and the problems that they have had?

Ms Watson: We always look for international experience and comparisons, and indeed in the working through of our approach as it is now we have looked at some international experience, and either of my colleagues may want to give more details about that. You are right to point out that we have only had one referendum in ten years, but actually that is quite a good one for the purposes of the issue that we are discussing because that did relate to an issue of Government in a particular area of England, which was not, I think it is fair to say, generally widely understood, and there was a good deal of work that had to be done to make sure that that question was as clear as it could be. So that has been quite an instructive experience. I do not know if you want to pick up anything more on the international side, Andrew.

Mr Scallan: On the international side certainly we are aware of the nature of the processes other bodies have been through. Coming back to the national picture, whilst we have only had one question that has been used in a referendum we have also been consulted by Communities and Local Government (DCLG) on the wording of questions around changes in the local government arrangements and the wording of questions, and have gone through the process that Kay explained and have been accepted by CLG, although not used in any referendum; but the basis for our response to the suggested questions has been accepted.

Q195 Baroness Jay of Paddington: You may feel that this falls into the category of a constitutional question rather than one which you want to deal with in terms of the mechanics, but it does seem to me that talking about complexity that one of the potentially most complex situations is where you try to combine a General Election and a referendum issue, and you have said that obviously if that arose you would deal with it on a case-by-case basis. But you must have some views about that, which are, as it were, not
very important work which you do in terms of the important work of communication along with the skill sets that you can combine the quite difference. I want to know what you think of communicator, and it was suggested to us that that and in the second one there was a skilled campaign—doubtless not a skilled communicator; judge was in charge of the public information the first Lisbon Referendum, an Irish High Court heard evidence earlier this morning that in Ireland, in the question about raising public awareness, we Lord Wallace of Tankerness:

Q198 Baroness Jay of Paddington: But it would be in terms of mitigation of risk with which you would be primarily concerned?
Ms Watson: It would be the benefits of a combination and any risks and therefore what steps might be taken in mitigation.

Q197 Baroness Jay of Paddington: I know it is a theoretical question, but can you hypothecate about what might be those risks that you would have to deal with?
Ms Watson: One of them for example would be if voters in that General Election were casting their votes or there was some kind of administrative change that Returning Officers in that election might be implementing for the first time, where we might in such a situation conclude that to add a referendum on top of that might—and I stress “might” because we would want to look at every situation on its merits—not be desirable; or that it was a risk but it could be managed and there would be ways to mitigate that risk.

Q198 Lord Wallace of Tankerness: Going back to the question about raising public awareness, we heard evidence earlier this morning that in Ireland, in the first Lisbon Referendum, an Irish High Court judge was in charge of the public information campaign—doubtless not a skilled communicator; and in the second one there was a skilled communicator, and it was suggested to us that that made a difference. I want to know what you think your skill sets are that you can combine the quite important work of communication along with the very important work which you do in terms of the regulation and conduct of elections. The two are quite distinct.
Ms Watson: Yes, they are, but—and it is perhaps very obvious to us so it is perhaps worth me explaining it for the benefit of the Committee—that kind of communication work is something that we do all the time. We are doing it now in relation to the forthcoming General Election. I am quite prepared to lay substantial sums of money on the fact that none of you will have seen any of the communication work that we are doing because you are not our target audience in terms of those who might not be on the electoral roll for that registration. So, for example, we are doing work with overseas voters to make sure that they know how they can register; with service voters, with members of the Armed Forces who are going to vote perhaps serving in Afghanistan; with young people in the run-up to the election, targeting them because we know that they will not be on the register; people living in private rented accommodation who perhaps move a great deal. So although our campaigns are generic in the run-up to the election they are heavily weighted towards those who have an under-representation on the electoral register. I would say that the population of the Electoral Commission is also not our target audience—our staff, I would hope, are on the electoral register. So what we do is the same kind of thing that Kay discussed earlier on; we test those campaigns with the people that we want them to reach and we make sure that the arguments we use work with those people; we make sure that they address the problems and concerns that they have in terms of getting on to the register. So the skill set that we have is not that we are in that demographic group and therefore we understand how to put things, but that we know how to put together a good communications campaign that can be easily comprehended by those that it needs to reach, and on that I would be extremely confident because it is work that we do all of the time.

Q199 Lord Wallace of Tankerness: Can I just clarify, is that raising awareness of the fact that there would be a referendum on such and such a date, or do you think that that also extends to being able to present, in a balanced way but in a way which engages, the issues which are at stake in that referendum?
Ms Watson: The experience that we have all the time would relate to, “Here is what you have to do in order to be able to vote and actually here is how to vote,” because let us not forget that not everybody knows how to vote and people in the UK vote in many different ways at different elections. But I would not have any doubt in saying that the skills that my staff deploy in relation to that area could equally well be deployed in relation to marshalling different arguments and presenting those clearly. I am absolutely confident about that.
Q200 Lord Rodgers of Quarry Bank: May I turn back to the eligibility question, and I am looking at paragraph 5.4 in the document that you sent to us. In a sense we recognise it is commenting on this rather feeble way of the role, but you say here about the discussions with key stakeholders. Let us talk about a referendum on voting. Who would you—and the Prime Minister would make a proposal as I understand it—be discussing with—the key stakeholders?

Ms Watson: In relation to any referendum I would want to make sure that we talked to those who might be campaigning in such a referendum and to political parties, but the predominant—

Q201 Lord Rodgers of Quarry Bank: Forgive me, I did not quite understand. The Prime Minister has decided to have a referendum and put forward a draft, is that right? But there are no campaigning organisations by that stage, are there?

Ms Watson: No, but we would have an idea. For example, in the case relating to the North East Referendum we would have spoken to a range of people who were already active, both thinking about that referendum, people know that referendum is coming. There may be organisations that might be getting themselves organised to ask us to designate them as the “no” campaign and there will be people getting themselves organised to ask us to designate them as the “yes” campaign, and we would want to talk to them and we would want to talk to political parties. But our primary body of evidence, to give our views on the intelligibility of the question, would be the work that we would do with voters, with plain English specialists and looking at things like the accessibility of the design of the ballot paper. So whilst I would want to have as broad a process as possible our final decision would be shaped more by the voters’ experience and engagement with the question, as we would judge it. Kay, I do not know if there is anything that you want to add to that?

Ms Jenkins: It is really to ensure that we are not just making a decision based on a group of officials of the Electoral Commission, but that we are getting as broad a spectrum of views as we can, and that we will consult the lead campaigners in any particular case.

Q202 Lord Rodgers of Quarry Bank: In the North East when the question came forward, where did it come from? There must have been a question and you then discussed it and consulted. Where did it come from?

Ms Watson: From the Government.

Q203 Lord Rodgers of Quarry Bank: And it was submitted and how long did you have to consult before?

Ms Watson: Before giving our view? We will have to go away and look at precisely how long we had.

Q204 Lord Pannick: Can I follow-up on Lord Wallace’s question about whether you should have more extensive powers to provide information to the public? I well understand the strength of the argument that of course you should have extensive powers to inform people about the existence of a referendum, how to vote and process questions. I am a bit troubled about the idea that you should be able to provide information about the substantial content of the arguments on each side. My concern is—because however hard you try these are inevitably subjective issues—about whether the Commission can maintain the appearance of impartiality in a regulatory sense if it is at the same time descending into the grubby arena of the merits of competing arguments, even if only to present them in as objective a way as you can.

Ms Watson: I think that is why we have said that what we would like in terms of those powers is that we would like to have to run activity which is about, “There is a referendum coming; here is how you participate in it; here is how you register to make sure you can”, and that we may present information in terms of wider public awareness about the issue, and that is a question that we would decide on the merits of each case. So, for example, in relation to the designation of “yes”/“no” campaigns, if we cannot designate both we cannot designate either. So were we to find ourselves in a position where we had a lot of arguments on one side and perhaps a lot of organisations coming to us saying, “We would like to have to run activity which is about, “There is a referendum coming; here is how you participate in it; here is how you register to make sure you can”, and that we may present information in terms of wider public awareness about the issue, and that is a question that we would decide on the merits of each case. So, for example, in relation to the designation of “yes”/“no” campaigns, if we cannot designate both we cannot designate either. So were we to find ourselves in a position where we had a lot of arguments on one side and perhaps a lot of organisations coming to us saying, “We would like to be designated on one side of the argument” but we could not find anybody to designate on the other, or there was not an appropriate organisation we cannot designate at all, and in that situation we would need to think very carefully about what we might provide to put the facts on those different sides.

Q205 Lord Pannick: Is that a realistic problem, though, given that one is assuming that there is a referendum? This suggests, does it not, that there is a major issue on which different views are taken and it is highly likely, is it not, that you would be able to find someone to designate it?

Ms Watson: I would hope and our presumption would be that we would always seek to designate and that is the posture—that we would seek to designate rather than seeking to hold that role in any way ourselves. But I could not be categorical about it, particularly given our wish to make sure that we designate organisations that have a broad base of public support. Kay, do you want to add anything to that?
Ms Jenkins: Just that it is a question of scale as well. In a UK-wide context it seems inconceivable that there will not be campaigners on both sides of the debate, but you could have a campaign in a region of England or within Scotland and Wales where the debate is ranged up largely on one side and not on the other, and so there is this fallback provision essentially for the Commission that in such circumstances we could step in and provide public information if it were needed. But, as Jenny said, ideally we would want to designate the campaign organisations because they are clearly the best organisations to present arguments about the issues of debate.

Q206 Lord Shaw of Northstead: Dealing with the possibilities of future referendums coming along, any future referendum obviously has to start in Parliament and it has to go through the due processes there, but is Parliament limited as to what it can put in to the referendum legislation by what are the powers that you already possess? Or can it build in conditions that really go against the things that you are working for? In other words, how free is Parliament to put what it likes into the terms of the referendum?

Ms Watson: Parliament can decide to hold a referendum on whatever subject it would wish and our role relates to assessing the intelligibility of that question, registering the participants, acting as Chief Counting Officer in that referendum and making sure that the thing is well run. So it seems to me that those roles are quite clearly separate. Of course, we could find ourselves in a situation where we assess a question as being a bad one and I think in that case the Secretary of State would be bound to say, “Actually, I am going to listen to the Electoral Commission’s advice.” Beyond that I cannot think of anything else that I would want to stress.

Q207 Lord Shaw of Northstead: Timing and things like that, that is flexible, and you just pick up the terms of the referendum and deal with it?

Ms Watson: Yes.

Q208 Lord Shaw of Northstead: How long it takes?

Ms Watson: The regulated period is clearly set, yes. But I should perhaps say that it is also possible for referendums to be initiated within local government and indeed one of the interesting things—and this perhaps takes me into category that I said I did not want to go into, but I shall venture there anyway—is that you can see that we have a very clear role in relation to a referendum that comes from the Westminster Parliament which relates to governance in Wales, but it is possible for local people in Greater Manchester to be consulted about a congestion charge without us having any say or any oversight of that referendum whatsoever. So I think it is important for the Committee’s deliberations, if I may, my Lord Chairman, to remember that it is not only PPERA referendums that exist—there are others.

Chairman: Jenny Watson, Andrew Scallan and Kay Jenkins, thank you very much indeed for joining us this morning and for the evidence which you have given; you have been most generous with your time and it has been extremely helpful.

Supplementary memorandum by The Electoral Commission

Referendum Questions for the 2004 Regional Assembly and Local Government Referendums

1. In May 2002 the Government published a White Paper setting out its proposals for elected regional government in the English regions. This included establishing elected regional assemblies, but only where this was endorsed by a “yes” vote in a referendum in the affected region. These referendums would be held under the Political Parties, Elections and Referendums Act (PPERA), which set out the legal framework for UK-wide, national and regional referendums and the Commission’s role in those. In particular, PPERA gave us a duty to comment on the intelligibility of proposed referendum questions.

2. These proposals were taken forward by the Regional Assemblies (Preparations) Bill 2002, which made provision for regional referendums to be held on elected regional assemblies. The Bill was amended in the House of Lords so that where a regional assembly referendum was to be held in a region containing two-tier counties, a local government referendum must be held at the same time in those counties, on the Government’s proposals for restructuring in that area (i.e. moving from a two-tier to a unitary structure). The specific options to be put to voters in the local government referendum would be specified later by order, and the Bill required the Electoral Commission to be consulted on the intelligibility of the question in that order.

3. This was the first time that the Government had made provision for a referendum to be held since the introduction of PPERA and therefore the first time that the Commission had been required to comment on the intelligibility of a proposed referendum question.
4. The tables below show that we commented on the questions proposed for the 2004 referendums relatively quickly. Since then, we have been required to comment on a number of other referendum questions (although none of these referendums have actually taken place). Our experiences led us to review the way in which we assess the intelligibility of referendum questions, particularly in terms of how best to incorporate the views of voters.

5. In November 2009 we published our revised approach to assessing referendum questions, which is evidence-based, focusing on the need to look at a proposed referendum question from the perspective of voters, to see whether they can easily understand and answer it. This approach would take a minimum of 10 weeks from receipt of the proposed question, primarily to allow us to conduct research with voters, and to take the findings into account in forming our views.

6. The following tables set out the process of the Commission’s assessment of the referendum questions for the planned regional referendums.13

**Questions for Regional Assembly referendums**

As these questions were published in a Bill, we were required to comment on them “as soon as practicable”.14

<table>
<thead>
<tr>
<th>Date</th>
<th>Activity</th>
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<tbody>
<tr>
<td>14 November 2002</td>
<td>Regional Assemblies (Preparations) Bill published containing the proposed regional assembly referendum question and the preamble to the local government referendum question.</td>
</tr>
<tr>
<td>25 November 2002</td>
<td>We published a statement of our views on the regional assembly question.</td>
</tr>
<tr>
<td>7 &amp; 8 April 2003</td>
<td>Bill amended to provide for local government referendums and to include the question preamble.</td>
</tr>
<tr>
<td>17 April 2003</td>
<td>We commented on the question preamble.</td>
</tr>
<tr>
<td>8 May 2003</td>
<td>Bill received Royal Assent.</td>
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</table>

**Questions for local government referendums in areas having a regional assembly referendum**

These questions were contained in secondary legislation. The requirement was that we were consulted before the draft legislation was laid before Parliament, though there was no statutory timetable. In the event we responded as soon as possible to each part of the consultation.

<table>
<thead>
<tr>
<th>Date</th>
<th>Activity</th>
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<tbody>
<tr>
<td>7 April 2003</td>
<td>We were consulted on the question (and accompanying explanatory material) that the Government proposed to include in the local government referendum order.15</td>
</tr>
<tr>
<td>16 April 2003</td>
<td>We responded to the consultation giving our views on the proposed question.</td>
</tr>
<tr>
<td>6 July 2004</td>
<td>Final draft of local government referendum questions submitted to Commission for further consultation.</td>
</tr>
<tr>
<td>7 July 2004</td>
<td>We commented on the final versions of the questions.</td>
</tr>
<tr>
<td>8 July 2004</td>
<td>Draft order laid before Parliament.</td>
</tr>
<tr>
<td>23 July 2004</td>
<td>Order made.</td>
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22 February 2010

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13 Referendums were originally planned for the Yorkshire and Humber, North West and North East regions.
14 As specified in section 104(2)(a) of PPERA.
15 The Regional Assembly and Local Government Referendums (Date of Referendums, Referendum Question and Explanatory Materials) (North East Region) Order 2004. This Order set the questions for the local government referendums in County Durham and Northumberland.
CONSTITUTION COMMITTEE: EVIDENCE

WEDNESDAY 10 FEBRUARY 2010

Present

Goodlad, L (Chairman)
Hart of Chilton, L
Irvine of Lairg, L
Norton of Louth, L
Pannick, L
Quin, B
Shaw of Northstead, L
Wallace of Tankerness, L
Woolf, L

Memorandum by the Government

SUMMARY

The Political Parties, Elections and Referendums Act 2000 (PPERA) sets out the broad legal framework for the conduct of referendums in the UK held in pursuance of an Act of Parliament, and the regulation of individuals and entities that campaign in them. However, further paving legislation must be passed by Parliament before a referendum on any particular subject can be held, including setting the referendum period, date and question(s). The Electoral Commission is responsible for the conduct of referendums which are held under the auspices of PPERA.

Additionally, section 116 of the Local Government Act 2003 creates an express power enabling local authorities to conduct an advisory poll or referendum. The Electoral Commission does not have responsibility for the conduct of such referendums.

Referendums in the UK have been rare—only one UK-wide referendum has ever been held, in 1975, on whether or not the UK should remain a member of the European Economic Community. The Government believes that the holding of national referendums should continue to be an exceptional feature of our constitutional arrangements, to be used only where fundamental change in the constitution of the country is under consideration. This is in line with the Government’s support for the fundamental principles of representative democracy.

It is for Parliament to agree whether and when a referendum should be held. It is also for Parliament to determine what specific circumstances should apply in each referendum.

The Government believes that the precedents set by previous referendums provide a guide to the types of issue that ought to be considered for any referendum in the future. The outcome of any referendum does not bind Parliament (unless that Parliament has previously agreed that it will) but would be expected to influence significantly subsequent parliamentary consideration of an issue.

DETAIL

Legislative background

The Political Parties, Elections and Referendums Act 2000 (PPERA) sets out the legal framework for the conduct of referendums in the UK, in one or more of the UK’s constituent nations, or in any region in England, where that referendum is held in pursuance of an Act of Parliament. PPERA makes broad provisions regarding:

— The means by which the referendum period is determined.
— The means by which referendum question(s) are determined.
— Requirements on individuals and groups who campaign in referendums—known as permitted participants—including controls on the amount that they spend and on the donations that they are permitted to accept.
— The means by which lead campaign groups—known as designated organisations—are determined and the assistance which they are entitled to receive.

However, further paving legislation must be passed by Parliament before a referendum on any particular subject can be held, including setting the referendum period, date and question(s). The Electoral Commission is responsible for the conduct of referendums which are held under the auspices of PPERA. The Commission’s responsibilities include:
— Considering the wording of the proposed referendum question(s) and publishing a statement of its views as to the intelligibility of that question;
— Receiving and administering declarations by permitted participants who wish to campaign in the referendum;
— Deciding which permitted participants (if any) should be designated as a lead campaign organisation for each outcome and determining and administering the level of the public grant (up to £600,000) which designated organisations should receive;
— Acting as, or appointing a Chief Counting Officer for the referendum and appointing counting officers for each relevant area in Great Britain (in Northern Ireland, the Chief Counting Officer is the Chief Electoral Officer) as necessary, and certifying the total number of votes cast for each answer to the referendum question; and
— Following the referendum:
  — making available for public inspection the returns as to the donations to and spending of permitted participants; and
  — reporting on the administration of the referendum.

PPERA provides that individuals and organisations who wish to campaign in a referendum may spend up to £10,000 in doing so without facing any restriction or control on their activity. Those individuals or organisations that spend more than £10,000 must register with the Electoral Commission as a “permitted participant”, and are then subject to the restrictions on campaign spending, donations and other activity set out in PPERA. Permitted participants must name a responsible person to whom liability attaches for any breach of these restrictions. Permitted participants are subject to a maximum spending limit of £500,000, and must provide a return to the Commission as to their referendum expenses following the referendum. Where referendum expenses exceed £250,000, this return must be accompanied by a report prepared by a qualified auditor.

Political parties who campaign in the referendum and spend more than £10,000 must also register with the Commission as permitted participants. Their spending limit is determined by the share of the vote that they received at the last parliamentary general election before the referendum, and ranges from £500,000 to £5 million. Where a referendum is not held across the UK, the spending limits imposed on permitted participants are determined by the Secretary of State, having regard to the views of the Commission.

The Commission may (but is not obliged to) designate lead campaign organisations for each outcome in a referendum. If the Commission designates a lead organisation for one outcome then it must also do so for the other outcome(s). The spending limit for designated organisations is £5 million.

Designated organisations receive a grant of up to £600,000 to spend on referendum expenses. The level of the grant and the conditions that attach to it are determined by the Commission. The grant is administered by the Commission. Additionally, designated organisations are entitled to one free item of postal communication to be delivered by the universal service provider, the use of rooms free of charge for holding public meetings, and the right to referendum campaign broadcasts.

All permitted participants are subject to controls on the donations that they are permitted to accept. These controls mirror the existing controls introduced elsewhere in PPERA on permissibility of donations to political parties, candidates and other regulated entities. PPERA specifies categories of permissible donor. Permitted participants cannot accept donations of more than £500 from impermissible donors. Permitted participants must record the details of donations that they receive above £500. Details of donations above £7,500 must be reported to the Commission alongside the referendum expenses return. Loans to permitted participants are currently unregulated. The Government intends to bring forward secondary legislation to regulate loans to permitted participants in due course.

UK historical experience of referendums
Referendums have been rare in the UK. Referendums have been held in the following circumstances:

— The Northern Ireland Border Poll in 1973 asked the people of Northern Ireland whether Northern Ireland should remain part of the UK or be joined with the Republic of Ireland;
— In 1975, a referendum asked the people of the UK whether they wanted to remain in the European Economic Community;
— Post-legislative referendums were held in Scotland and Wales in 1979 on devolution;
— Devolution in Scotland, Wales and Northern Ireland\(^1\) was the subject of referendums (in 1997 and 1998);
— Regional referendums have been held to ask local communities whether they would like an Elected Regional Assembly;
— Local referendums have been held to ask local communities whether they would like an elected Mayor (these referendums are held without the involvement of the Electoral Commission); and
— Local referendums have been held on issues such as congestion charging and council tax.

**The Government’s view**

The Government has recently set out its views on referendums and their role in the UK constitution. The discussion paper *A national framework for greater citizen engagement*, published by the Ministry of Justice in July 2008, considered the use of referendums alongside other engagement mechanisms, such as deliberative forums and petitions. Additionally, the Lord Chancellor and Secretary of State for Justice, Jack Straw, set out his and the Government’s views on referendums during oral questioning by the House of Lords Constitution Committee on 28 January 2009, and in a subsequent follow-up letter.

The Government’s views remain as put forward previously. The Government believes that the holding of national referendums should continue to be an exceptional feature of our constitutional arrangements, to be used only where fundamental change in the constitution of the country is under consideration. The decision as to whether or not a referendum should be held should be made on a case-by-case basis. We do not believe that an objective test could be established as to the circumstances in which a referendum should and should not be held. In any case, the Government firmly believes that it is for Parliament to determine whether or not a referendum on any particular subject should be held.

We do not believe that a referendum result should bind a Parliament (unless that Parliament has previously agreed that it will)—were it to do so we consider that would undermine the principle of representative democracy. Nevertheless, we would expect that the outcome of a referendum would have a significant influence on subsequent Parliamentary consideration of an issue.

A number of local authorities have relied on the powers of general competence established by both the Local Government Act 1972 and the Local Government Act 2000 to hold advisory referendums. Additionally, section 116 of the Local Government Act 2003 creates an express power enabling local authorities to conduct an advisory poll or referendum. The Electoral Commission has no role in the conduct of such referendums. There is no obligation on a local authority to hold such a poll, nor any requirement to act in accordance with the result of such a poll but this provision allows authorities to hold a poll on any matter relating to the services for which it is responsible (including where these services may be delivered by a third party), or the finance that it commits to those services, or any other matter that is one relating to the authority’s power under section 2 of the Local Government Act 2000 (authority’s power to promote well-being of its area). Section 116 of the Local Government Act 2003 also provides express freedom to a local authority in determining, for any poll it proposes to hold, who to poll and how the poll is to be conducted.

The Government makes the following comments in response to the specific questions put by the Committee in its call for evidence:

**What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?**

**How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?**

It can be argued that the key strengths of a referendum as a constitutional tool are:

— Ensures that the public are directly and democratically consulted on particular issues involving changing the wiring of the constitution, thereby strengthening confidence in the UK’s democracy.
— Ensures that the public can consider significant issues whilst insulated from the other considerations that occur in a general election.
— Provides the Government of the day with a clear mandate to undertake such change, ensuring that the change is viewed with greater legitimacy.
— Provides Parliament with a clear steer of the national public opinion, to take into account when considering such change.

\(^1\) The 1998 referendum in Northern Ireland was a referendum on the Good Friday Agreement more generally.
It can be argued that the key weaknesses of a referendum are:

— Excessive use of referendums could undermine the principles of representative democracy.

— The public could perceive that politicians are elected to govern the country, and that the frequent use of referendums undermines that. Thus, holding a referendum could diminish public confidence in the strength of the UK’s democracy.

The Government believes firmly in the principles of representative democracy. The Government believes that referendums should only be used exceptionally within the UK’s system of Parliamentary democracy, where issues involving significant constitutional change are under consideration.

What assessment would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?

Previous referendums in the UK are discussed above. Only one referendum has been held since the enactment of PPERA (the North East referendum in 2004). Other referendums were conducted under a framework established at the time. The Government believes that the experience of previous referendums should inform debate and discussion on any future referendums. We would highlight in particular the establishment of a common framework for the conduct of referendums under PPERA as a significant positive development. We believe that the common standards imposed by PPERA as to the regulation of those who campaign and how the referendum itself is run is to be welcomed. This in turn ensures that the result of any referendum is regarded with greater legitimacy. We note that the outcome in certain previous referendums was disputed by some in light of certain specific conditions relating to the conduct of the poll (for example, the threshold specified in the Scottish devolution referendum of 1979).

Is it possible or desirable to define which issues should be subject to a referendum?

Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

The Government believes that a decision on whether a referendum should be held on any particular subject must be made on a case-by-case basis, with the ultimate decision resting with Parliament. The Government’s broad view is that issues which would result in a fundamental change to our constitution (eg membership of the European Union, entry to the Euro, or a change in the voting system for the House of Commons) should be subject to a referendum. The Government believes that the precedents set by previous referendums provide a guide to the types of issue that ought to be considered for any referendum in the future.

It should be noted that there are limited statutory provisions in place setting out when referendums must be held on specific issues:

— The Northern Ireland Act 1998 requires a referendum before Northern Ireland could cease to be a part of the United Kingdom and form part of a united Ireland.

— A referendum is required before an Elected Regional Assembly can be established (under the Regional Assemblies (Preparation) Act, 2003).

— The Government of Wales Act 2006 requires a referendum before full legislative competence (that is, the ability to make primary legislation) can be transferred to the National Assembly for Wales.

These do not provide an objective test for determining when a referendum on other issues should be held, but provide a further guide to the types of issue that might be subject to a referendum in the future.

Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

The Government believes that the framework for the conduct of referendums established in PPERA is broadly effective. The Government will keep this framework under review and will make any updates that may be considered necessary, in the light of experience. The Government is happy to consider any suggestions as to how the framework might be improved.

Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission’s work in relation to referendums?

The Government believes that the role of the Electoral Commission in relation to referendums is appropriate. The Government believes that the Commission’s independent status and experience mean that it is ideally placed to hold responsibility for the conduct of referendums. The Electoral Commission had a role in the Referendums for the Elected Regional Assemblies which were well run—we believe that both the then Office
of the Deputy Prime Minister and the Electoral Commission worked co-operatively together and the Electoral Commission were constructive and helpful in the preparation of the leaflet for local government reform that accompanied the ballot paper. We note that the Commission has recently reviewed its preparedness in the event of any future referendums.

What comment would you make on key components of a referendum campaign, such as:

— Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;
— the wording of the referendum question (including the appropriateness of multi-option questions);
— the design of the ballot paper;
— whether there should be formal, constitutional triggers for referendums;
— whether a referendum should be indicative or binding;
— whether a referendum should ask broad questions of principle, or refer to specific legislation;
— whether a referendum should precede or follow statutory enactment;
— campaigning organisations and the funding of campaigns;
— Public information campaigns and media coverage;
— Party political activity;
— whether referendums should coincide with other elections or not;
— the strengths and weaknesses of in-person, postal or electronic forms of voting.

The Government believes that the approach to many of these points will depend on the specific nature of the issue which is being considered in any referendum. PPERA establishes only a broad framework for the conduct of referendums and the activity of those who campaign, including political parties. Any specific provision relating to the conduct of a particular referendum poll—that is, legislation in addition to the framework set out in PPERA—would need to be approved by Parliament. This ensures that consideration can be given to the specific circumstances of a referendum on a given issue at the most appropriate time.

How does the referendum relate to other tools such as citizens’ initiatives? Should citizens be able to trigger retrospective referendums?

The Government believes that a referendum is one of a range of engagement tools, including citizens’ summits and citizens’ juries. These are considered further in the July 2008 discussion paper, A national framework for greater citizen engagement. As set out above, the Government believes that it is for Parliament to decide whether and when a referendum should be held. The Government believes firmly in the principles of representative democracy and, where Parliament has taken a decision on an issue, we do not believe that a retrospective referendum should be triggered. The Government strongly supports the use of public petitions as a means by which the public themselves can register interest in a particular issue and inform policy making on it.

How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?

The Government believes it is for each country to determine whether and in what circumstances referendums should be held, in accordance with its own constitutional experience and traditions. The Government notes the work of the European Commission for Democracy through Law (“the Venice Commission”) which has recently produced a code of good practice on referendums.

1 February 2010
Examination of Witnesses

Witness: The Rt Hon Michael Wills, Member of the House of Commons, Minister of State, Ministry of Justice, examined.

Q209 Chairman: Minister, can I welcome you most warmly to the Committee; thank you very much for joining us. We are being audio-visually recorded; so may I ask you, please—as if it were necessary, which I am sure it is not—to formally identify yourself for the record?

Mr Wills: Michael Wills, Minister of State for the Ministry of Justice with responsibility for constitutional affairs.

Q210 Chairman: Thank you. Can I begin by asking you how you see the strengths and weaknesses of referendums as a political and constitutional tool? Do you think that they are compatible with representative parliamentary democracy?

Mr Wills: To take the last part of your question first, I think that they are compatible but only if used sparingly and fully in recognition of the central importance of representative democracy, by which I mean representatives elected to Parliament and who are there to exercise their judgment as well as their industry, if I could paraphrase further. Obviously referendums can exist alongside that but only if they are used very sparingly. The strength of them is that on occasion—rare occasions—I think there are times when it is important, when issues have not been covered in the manifesto, for example, which arise, or indeed where they are so important, they are somehow so fundamental primarily to our constitutional arrangements, that they merit consideration on their own away from all the noise and fury of a General Election campaign.

Q211 Lord Norton of Louth: To pick up on both what is in your submission and, in fact, what you have just said about the circumstances in which a referendum may be held, because in the submission you say only where fundamental change in the constitution of the country is under consideration but a few moments ago you seemed to be slightly broadening that, I wonder how you would narrow down the definition? In other words, where do we draw the dividing line? You say only fundamental change but in the submission push up responsibility and say that there is no objective test and it should be on a case-by-case basis. If we were looking at issues, if one accepts that there are cases where there may be a need for a referendum, where do we draw the dividing line?

Mr Wills: That is a very good question and one which we agonised about for some time in the Department. Two years ago when this Prime Minister took office he put constitutional reform very much at the centre of his agenda and it was quite clear that our constitutional system continues to need overhauling, for reasons which are clearly known to this Committee. We did feel that we needed to augment the traditional systems of representative democracy, so we did look at this in some detail. My instinct is always to tidy things up and, as you say, have nice clear dividing lines so that everyone knows this is when you hold a referendum and this is when you do not, and so on. We did try to define exactly those lines—this side of the line yes and this side of the line no—and it actually proved impossible in any meaningful sense. Every time we tried to come up with a definition that would be sustainable and be consistent with representative democracy we failed and the outcome of our failure or our attempt to mitigate our failure is in the Framework for Citizen Engagement—professor the title exactly. We put out a document which tried to set out the circumstances in which various forms of engagement with the citizen would be relevant, with the referendums on the one hand, citizens' juries, citizens' summits—a whole range of methods of engagement. In the end, I am afraid, we came up with what is inevitably going to be a subjective test. It does not mean that it is without value; I think that most people broadly understand the principles behind holding a referendum and they are pretty much what I have said. There will be sometimes very rigorous political disagreements, over the Lisbon Treaty, for example, and whether it is appropriate or not; and I am not proposing to revisit that here unless you want me to. But for the most part I think that people understand that. For example, the debate we had yesterday on the Alternative Vote system, I think that most people—whether they think it is a good system or not, whether they think we should be embarking upon it now or not—would accept that if we were to change the voting system in some way that there should be a referendum.

Q212 Lord Norton of Louth: I take the point that you take an example and you can illustrate it by saying, “This is an issue which clearly is of fundamental constitutional importance” and there are others which would be generally regarded as minor; but you still have the problem of the grey area and I just wonder if there is not a problem, that if you concede a referendum on one topic then on other issues about which people feel very strongly they will say, “This is not legitimate; we have not had a referendum,” and that is always going to be an inherent problem once you have conceded that there should be.

Mr Wills: There is indeed a problem; you are quite right. There is a problem and that will be the case with any subjective test, any case-by-case basis. The problems on the other side are equally great, if not
greater, and that is why in the end we opted for the line that we took. If you apply a strict set of formulae for holding a referendum there will be cases, inevitably, where actually it is not appropriate—it turns out not to be appropriate. Inevitably, however carefully you define this, however brilliantly “lawyered” the definition is, there will be equally brilliant lawyers who will find very good reasons why that definition should not apply. You do not actually escape the question of judgment, however you do it. If this Committee has a better approach we would really welcome it. We tried; I tried and failed, but if you can do a better job then we would be very grateful.

**Q213 Chairman:** What do you think, Minister, about a possible referendum on potential changes to the House of Lords?

**Mr Wills:** At the moment, as you know, we are proposing change to the House of Lords, but we are not proposing a change in its functions. My own view on that is changes to the way it is composed do not necessarily require a referendum; some may argue it does but that is not my view. If we were to look fundamentally at changing the powers of the House of Lords, which is not, I think, being proposed anywhere at the moment—but if we were to—then I think that we would almost certainly require a referendum on that. Even if we were not to change the powers fundamentally but if at some point in the future—and I think this is a fairly distant prospect at the moment but a prospect on which we are engaged in realising at some point—we were to fully codify our constitution, I think then even if the powers of the House of Lords stayed fundamentally the same we would almost certainly want to have a referendum on that move to a fully codified constitution, of which the role of the House of Lords and the composition of the House of Lords would obviously be part.

**Q214 Baroness Quin:** Given that we do not have a written constitution, do you think that there should be at least some kind of legislation about when referendums are appropriate? Or, failing that, should there be some attempt to at least get a cross-party consensus over when referendums are appropriate in our constitution?

**Mr Wills:** Certainly I think that the case for the latter is very strong and, by and large as a Government, we have always tried to seek consensus on constitutional matters. It is not always possible, but in the protracted progress of the Constitutional Reform and Governance Bill, for example, which has accumulated measures of constitutional reform as it goes, we have always striven for consensus. It is not always possible, as we saw yesterday, but we have striven for it because constitutional change by definition should try and proceed on the basis of consensus otherwise you get the wiring rewired every other election or so and that is not healthy. You need constitutions to have time to bed down and endure, so change needs to be careful and consensual as far as possible. As far as some sort of legislative framework, we tried to look at whether this was possible. Clarity is always a good thing, axiomatically a good thing. The dangers are of trying to be too prescriptive about something which, for reasons that I have said earlier, I think should only be held rarely, we are not looking at regular use of referendums. If we were, if it was firmly to become embedded in our constitutional arrangements then the case for some sort of legislative framework would be very strong, but it is not and nor should it be, in my view.

**Q215 Lord Woolf:** Can I just press you slightly to try and see whether one can see in the landscape issues which are pointers to when the pragmatic approach should lead to a referendum, and can I go back to the House of Lords? If there was a change to making the House a wholly elected House, that surely would be a fundamental change?

**Mr Wills:** It would be a fundamental change in the composition; it is not our view that it would be a fundamental change in the role of the House.

**Q216 Lord Woolf:** I accept that it does not apply to the role at all necessarily, but surely changing the nature of one of the Houses of Parliament as to the way Members are appointed, would you not regard that as a fundamental change?

**Mr Wills:** I think it is a fundamental change; I think it goes back to what I said at the beginning about when a referendum might be appropriate, again with all the caveats hedged around that. If you have had a matter which has been the subject of political debate, which is contained in a manifesto—and the changes to the composition of the House of Lords have been the subject of a very protracted political debate for 100 years or so—we would only proceed on the basis of a clear manifesto commitment, and it would be so clear and so fundamental, and probably—it will go across all the main parties as well, I am not sure that there is a case for a referendum in those circumstances. I think that the role and powers of the House of Lords is an even more fundamental change and a very complex change. With all respect, this is a relatively simple change which does not require a huge amount of constitutional sophistication to form a view on whether you want a wholly or partially elected House of Lords or not.
Q217 Lord Woolf: Does not the fact that it is a clearly definable issue make it more suitable to a referendum than a complex issue that has a number of sub-issues?
Mr Wills: We are moving on to a slightly different area now. Part of the case-by-case analysis, as it were, that we would always put in in deciding whether there should be a referendum is, by and large, that it is preferable that it should be a simple issue which is susceptible to a yes or no answer rather than a complex nuanced issue; and of course that is right. I go back to the fundamental proposition that referendums are not or should not be any kind of replacement for representative democracy; they are an augmentation of it in circumstances where there are fundamental changes.

Q218 Lord Woolf: Would you agree that what I am putting to you is a fundamental change?
Mr Wills: It is a fundamental change but there are some sub-clauses which define that. It is not just a question of the fundamental change, it is also a question of a fundamental change which has not been subject to a manifesto commitment and there are a lot of fundamental changes which, nevertheless, do not significantly rewire the constitution, and I think the sub-clauses are important.

Q219 Lord Irvine of Lairg: I have some difficulty in understanding your answer about the nature of a fundamental change because another way of putting Lord Woolf’s question would be to say that if you create a new directly or indirectly elected tier of new appointed politicians alongside the House of Commons in its present form, why is that not a fundamental constitutional change appropriate for a referendum?
Mr Wills: It is a fundamental constitutional change.

Q220 Lord Irvine of Lairg: And appropriate for a referendum.
Mr Wills: In our view, nevertheless, it is not appropriate for a referendum. If I may I will try and spell out my answer again in a perhaps slightly fuller way. It could be appropriate for a referendum. This is a judgment and that is one of the problems we have with not having a clear legislative framework for when to hold a referendum. Nevertheless I suspect there would still be an argument about whether this was an appropriate subject for a referendum. We have a case-by-case approach and inevitably there will be differences about when cases fit into that approach. Our view at the moment is that although it is a fundamental constitutional change it is a change that will have been pre-figured in a manifesto commitment, in fact in several manifesto commitments. There will be, we think, probably an all-party commitment in all main parties’ manifestos.

The people of this country will have had decades to consider this change over time, it is not a change that has suddenly emerged. Even the European Union, the issue of membership of the EEC as it then was, was a relatively recent issue for the nation compared with this particular issue. The arguments for, as it were, supplementing a system of representative democracy where MPs are elected to come here and exercise their judgment is not strong enough in our view in this case, for those reasons.

Q221 Lord Irvine of Lairg: But that is just a political judgment, it is not a principled judgment that you can express in any way.
Mr Wills: With respect, I think it is a principled judgment because I said that there is not the case for supplementing our system of representative democracy. Look, if it was a straight political judgment there would be no issue about it; we would have a referendum and without any doubt, I think, we would win the referendum on the case for a wholly or partly-elected House of Lords. I think that once this issue was put in front of the population they believe in having the right to elect their representatives. It is not a political judgment; it is, we think, a principled judgment, a principled judgment with which you may disagree, and that is one of the problems with a case-by-case basis. But as I said, even if we had a fairly rigid and rigorous structure which prescribed when referendums should be held I suspect there would still be disagreement on individual cases about whether they fitted that individual framework. Brilliant as lawyers are they nevertheless still find plenty of room to argue.

Q222 Lord Wallace of Tankerness: Very briefly following up on these points, it perhaps illustrates the difficulty in trying to decide as a matter of principle. I am interested to know what the principle is which justifies a referendum in the case of changing the system of election for one House of Parliament but not having a referendum to move from wholesale unelected to wholesale elected in the other House of Parliament.
Mr Wills: If I can just go back to the importance of representative democracy. We elect MPs to exercise their judgment. There is something, we felt, slightly distasteful, if you like, about MPs deciding for themselves without any validation from the public as a whole how they should be constituted. It is the self-legislating aspect of this particularly because it relates to the House of Commons who are the primary chamber, that is the reason for that. People may say that exactly the same criteria should apply in these cases but in this case it is a longstanding manifesto commitment for whatever reason, good or bad, that we should have a referendum on any change to the voting system, and the principled reason behind it is
that MPs should not decide themselves alone how they should be constituted; how their chamber should be constituted, and that is the reason for that. The House of Lords is in a different position. There is no right or wrong answer in this; there is a judgment and you may disagree with our judgment on this but that is the reason for it.

Q223 Lord Norton of Louth: Really Lord Wallace has just asked the question I was going to put because if you are going to modify the system of choice of either House that has to be approved by Act of Parliament, it goes through both Houses. It is the same situation, which you are suggesting in one case requires a referendum because you are changing the mode of choosing one House but you do not require a referendum when you change far more fundamentally the composition of the other. Mr Wills: Look, of course you are right. In the end referendums do not bind Parliament unless Parliament decides that they should be so bound, and of course that is right. Nevertheless, it is a question as much of perception and legitimacy. Perception matters in these matters and we felt that in this particular case, in the case of changing the voting system in the House of Commons—and this goes back many, many years now—that it would be a better and more legitimate process if the people themselves directly had a say on any change in the way that they elected the primary chamber.

Q224 Lord Norton of Louth: If we take the other criterion and you can change to something like AV for the House of Commons, you are not going to change fundamentally what the House of Commons does with its powers. You can argue that if you change to an elected second chamber a consequence is likely to be a significant change in the relationship between the two Houses and, therefore, have more significant constitutional implications than a modification of the electoral system for the House of Commons. Mr Wills: That might be the case; there are many who say that is not necessarily the case actually. Some have argued quite powerfully in the House of Commons at least that the current House of Lords in its composition is a very effective scrutineer and if we were to move to elections it would become less effective, and you will be familiar with those debates. That again is a matter of judgment; it is not axiomatic and that is why we take the view that we do.

Q225 Lord Norton of Louth: It could be less effective but would still change fundamentally the relationship between the two Houses. Mr Wills: It may not change the relationship at all but it would mean that Members of this place would be more accountable directly to the people; therefore, it may be a way of legitimising this chamber in the public eye. It may not be; many people would argue that it would have the opposite effect. That is not our view, but there is a very strong point of view that elections would not aid the legitimacy of this place. Baroness Quin: Just so that you do not feel entirely beleaguered I happen to agree with you on this, although I am sure I am a minority among colleagues. Given what you have said, and given the fact that the House of Lords and the House of Commons have evolved as our constitution has evolved, and our constitution has shown itself to be very flexible I think to changing circumstances, is there not a case for just saying that the whole of this idea of having referendums was a mistake and we should go back to a fully representative democracy?

Q226 Lord Norton of Louth: Hear, hear! Mr Wills: There is a case for it and it is not a case with which I agree. I think that by and large referendums do have a role to play, but I do think we need to be clear about what role that is. I do not want to digress too much but we are living in a period of quite intense constitutional change, not driven entirely by the Government but actually by the changing nature of our democracy and the way that people relate to their representatives and what people expect; and historically we are now three, four generations on from universal suffrage and people have a different attitude towards their vote than they did in the mid-twentieth century, for example, when universal suffrage was still fairly fresh. Cultural change always takes a long time—several generations—to feed through, and I think we are at a stage where people’s attitudes towards politicians—not just to do with expenses but actually going back many years before this—is changing fundamentally. There is a real risk—and you hear voices in the House of Commons and you hear politicians speaking about this all the time—that somehow it is seen as more legitimate to bypass Parliament and go straight to measures of direct democracy, and this is now technologically possible in a way that it just was not even 20 years ago. If you wanted to have regular referendums 20 years ago with a big, complex society like this it would have been unbelievably expensive, and there were large practical difficulties in organising your governance around the basis of direct democracy. It is not true now. 70% of the country has broadband and that will go up very much and it is at the click of a button, and often we face the prospect—and I keep raising this fear, but it is a very real fear for me—where very powerful, rich people can organise campaigns very, very simply through the Internet, so that measures upon which the House of Commons has taken a settled view, difficult social issues sometimes but which are very susceptible to popular agitation—and it can be to do with financial matters.
or social issues—can be whipped up very quickly. Big advertising campaigns—all you have to do is go on the Internet and one click and you send a message to your elected representative; and you can target it; you can target people with marginal seats and suddenly there is a majority of 5,000, and you get 20,000 emails—not once but every month—until you have put your name to a motion in the House of Commons and so on, it is quite frightening, and how many elected representatives in those circumstances one, two years before an election are actually going to hold to that Burkean precept of owning your voters your judgment as well as your industry? It is very tough. When you had the old system where people sent in postcards and charities and the third sector sent in a postcard every Minister knew that you would get one postcard because actually you have to go and get the postcard, you have to go out and buy the stamp and go out into the cold, wet evening and put that postcard in the box. People do not do it very often. If you talk to campaigning organisations they know you have one hit. With this stuff you sit at home in the warmth of your living room and “click click”. You only have to do it once but you still get the email every month and how do we know as MPs? This is a very real threat and this is deeply damaging to our democracy, potentially, because what it means is that the whole system can be hijacked by populist and often very wealthy, very powerful people who can afford to run these campaigns, and we have to be very careful about this. We have to be very clear about the fundamental place of our representative democracy but we also have to be engaged with this appetite that people have to have a more direct say in policy-making and formation of policy between elections and not just simply voting once every four or five years. There is a very careful balance to be struck. I do not think we can close the door completely on referendums because there is an appetite in certain circumstances for this and, although I disagreed with it there was a very significant popular outcry for a referendum on the Lisbon Treaty, for example. I think that was misguided and I am glad that we did hold the line on that but people want to vote and you cannot draw up a drawbridge on it altogether—only in certain circumstances. I am sorry, a very long answer.

Mr Wills: I very much agree with that, absolutely, and the document, the Framework for Democratic Engagement—I am sorry, I probably got the title wrong earlier, the title went through various permutations—that we published did that and it set out circumstances in which we felt that they might be appropriate as well, again, largely on a case-by-case basis and not too rigorous guidelines. That is precisely what we are doing with the Statement of Values. The Prime Minister decided that he thought it would be a good idea to have the Statement of Values that bind us together as a nation and what we have done is, rather than the Government coming up with such a statement in the normal kind of way that governments do, quite deliberately given the responsibility for deciding, first of all, whether we should have such a statement; secondly, if so, what it should be and how it should be used to guide people through a series of deliberative forums. These are 450 people in five regional venues coming together. These are demographically representative in terms of gender, age, ethnicity and so on, and they spend a whole day discussing this issue and actually they will in the end have spent three whole days, with all the arguments for and against, deliberating on these issues, not as a focus group, not even as a citizens’ jury, but completely openly with the arguments put for and against, the core questions put to them, and they are deciding. We have made it quite clear that if they decide they do not want one we will not have one. There is an example of how a representative sample over time of British people had a chance properly to get to grips with the issue and make that fundamental decision. It will not be appropriate in all sorts of areas and it is not really appropriate to make all the complex trade-offs that government has to do, but it is a way of doing exactly what you are suggesting and we very much support that.

Q228 Lord Pannick: I am concerned by the argument that whether there is a manifesto commitment should be highly material to whether we have a referendum on major constitutional change. Does that not inevitably politicise a process which should depend on the significance of the reform which is proposed?

Mr Wills: To some extent. The key words you used were “highly material”; but not decisive. That is what I would say—“not decisive”. Of course it is material and any referendum actually will still be political, inevitably; these are politicians making the decisions and that is not a bad thing. We are elected to represent certain values and I think all of us would think that our own party represents a distinctive set of values and that is why we stand for election and it is right that those values should be brought into play in deciding what is an appropriate subject for a referendum or not.
Q229 Lord Pannick: It is very easy, is it not, for a party to put in its manifesto a commitment and to use that as an argument why very substantial constitutional change should not require a referendum?

Mr Wills: “Very easy” I think is too strong, but I think the arguments against any party doing that are evident from any study over time of history. The reason why a referendum is important, just to go back to it, is to legitimise a significant change, primarily in our constitutional arrangements. If the judgment is wrong, if the scenario which I think you are painting were to materialise and a party were to somehow seek to avoid the judgment of the people on an issue of profound constitutional significance and politicise it and try and bury it in a whole plethora of manifesto pledges, it would backfire if they got that judgment wrong in the way that you are suggesting, because it would politicise an issue which would then become a matter for party political controversy. Governments change—they do change—and an incoming government which had been on the wrong side of that particular debate, that had lost the election which that manifesto pledge related to, in part, would change it. That, axiomatically, is a bad thing. When profound constitutional change of the sort that merits a referendum becomes a party political football I think that most people would agree that is damaging to the country—it is damaging. If it is so fundamental then it needs to endure and it only endures if there has been substantial cross-party consensus and/or—preferably both—the legitimisation in a referendum by the people.

Q230 Lord Hart of Chilton: On February 2 the Prime Minister, in his speech, *Transforming Politics*, said this: “But we are agreed that there should be a referendum at a date in the near future...”—this is on AV... . . . because any decision on something as fundamental as electoral reform must not be the subject of an executive decision endorsed by Parliament but rather a question for the British people in a referendum, and I will argue and campaign for such a change. And because this is a major change in our democratic arrangements we are today publishing the key clauses we are tabling as part of the Constitutional Reform and Governance Bill and that Bill will have the effect of introducing the primary legislation required to hold a referendum on moving to the Alternative Vote system, which we intend should be held before October 2011.” So two questions. First of all, electoral reform is seen here as a fundamental change, and last night you put the provisions in the Bill. To inform the public to make a decision on electoral reform, they will only be given one choice of electoral reform. Do you not think that there will be an argument that in fact it should be widened out to other systems of electoral reform so that a proper choice could be offered to the public?

Mr Wills: There is an argument—and it was made quite forcefully yesterday in the House of Commons—that there is always going to be a question of judgment. There is always going to be a judgment about when referendums should be held, but there is also going to be a judgment about what the choice should be in a referendum. As you know, the Electoral Commission has a responsibility for framing the question but we—any government—will be responsible for setting the parameters of the choice. We made it quite clear why we took the view that this choice should be made in this particular way. There is a fundamental commitment of my party—this Government—to what could be called, I suppose, a majoritarian system of voting, and primarily the constitutional reason for that is because of the importance in our view of the direct accountability of a Member of Parliament to their constituents. That accountability is fundamental in our view and it is an accountability which underpins both the first-past-the-post and the Alternative Vote systems, but does not apply in the same way to a proportional voting system. That is why we framed the choice in the way that we did, but it will be a matter of political debate, I am sure, in the forthcoming General Election campaign. Obviously if my party loses we cannot bind the next Parliament to it and it will be up to them to take a different view.

Q231 Lord Hart of Chilton: My second question is in relation to that. This Constitutional Reform Bill has been from its conception a very long period of gestation, and it is some two years ago that the first draft appeared. It is going to come to this House pretty late in this electoral cycle and although it may get a second reading it is pretty unlikely that it will get through all of its phases and will then have to go into the wash-up. What do you think is going to happen in relation to this proposal if you do not succeed in getting it through? Does it not all fall away?

Mr Wills: Clearly it falls away until the result of the General Election is known if we do not get it through this place—clearly it does. If you ask me what I think is going to happen, I wish I knew.

Q232 Lord Wallace of Tankerness: To follow up briefly on Lord Hart’s first question, resisting the temptation to go into the merits of different systems of proportional representation, what consideration did you and your Department give to the New Zealand experience when they decided to change their electoral system and the referendum process that they went through, about which we have heard some evidence?
Mr Wills: A bit. Inevitably one always takes account of what happens elsewhere in the world, but the circumstances are so different and specific here and there are very specific needs that we feel are driving this that we would not claim that it was a decisive influence.

Q233 Lord Pannick: Minister, you spoke earlier about the difficulty of defining a governing principle as to when a referendum should be held, but what is wrong with a governing principle that states something like there is a strong presumption that there should be a referendum on major constitutional change but it would be inappropriate to hold a referendum on any other subject? That at least would frame the debate as to whether a particular case fell within those criteria and that would serve a valuable purpose, would it not?

Mr Wills: There is nothing wrong with it and I think you are right, it would serve a valuable purpose. It is the sort of thing that we attempted to do in the Framework for Democratic Engagement and your wording may well be better. It is not, with all respect, what I would say is a rigorous set of principles into which you can put any measure and say, “This fits, this does not.” There are a lot of value judgments.

Q234 Lord Pannick: Of course.

Mr Wills: You used the word “major”, for example. That, again, is a matter of some debate. We have had a debate today about whether changes to the composition of this place is major or not, fundamental or not. It still leaves open a huge amount of area for debate and that is really the issue. Do you have something which, as it were, is sufficiently rigorous that the courts could in the end interpret whether it fits or not? Our view is that the dangers of trying to do that significantly outweigh the case-by-case basis. Your formulation may well be better than ours but it still, with respect, in the end ends up as a case-by-case basis.

Q235 Lord Pannick: I entirely accept that, but a principle would serve a valuable purpose in directing the debate.

Mr Wills: Look, I agree; I agree entirely. What we have tried to do is to frame such principles. Now, I am absolutely open to them being framed far better than we have been able to do and if in your report you come up with a better framing device we will be delighted.

Q236 Baroness Quin: In previous evidence sessions a number of witnesses have talked about the way that we have used the referendum in the UK as being essentially a political tool, and very, very largely in the hands of the Government. Would you accept that as a description of how referendums have been used in the UK?

Mr Wills: I would certainly accept the first, but I do not see anything wrong with it at all. It sounds as if your previous witnesses may have used that in a pejorative sense and I would not regard it as that at all. Politics can be a noble profession; it does, at its best, represent the battle of competing values and ideals and ideologies and I think that is healthy, that is what healthy democracies consist of. I do not see anything wrong in it—it is clearly political. Whether or not it is in the hands of the Government is another matter. Clearly the government of the day can decide how to apply the case-by-case criteria that we have just been discussing, so to that extent of course the government, the executive always has a hand in framing political direction in this country. Whether the government can dictate the outcome I think is highly dubious. You will remember the referendum on the Regional Assembly in the North East where the Government had a very clear view of what was desirable and the people took a very different view and a view which solidified over the period of that referendum campaign. I do not think that the government has control over it and, as you will be aware, we have taken steps to try and remove the government from the process for holding the referendum, with a great deal of responsibility given to the Electoral Commission, which means that we cannot rush into it and there has to be proper consultation on the question and that, as far as we can, there are proportions against governments rigging the questions or skewing them in any way. I accept the first part; I do not accept it as a pejorative categorisation, and I do not really accept the second part of that proposition.

Q237 Baroness Quin: Nonetheless, a lot of reference was made to the first referendum that we had in the UK on the continued membership of the EEC and the fact that that was very much politically driven actually by internal considerations within the Labour Party rather than anything else. Do you think that there can or should be any kind of external safeguard as to what triggers a referendum, or is it satisfactory for it to be entirely left in the government of the day’s hands, with obviously the sanction of Parliament, but if the government has a majority in Parliament then it tends to get its way.

Mr Wills: The question really of whether there should be a trigger, some sort of automatic trigger, really goes to the question of whether you can define adequately the circumstances and almost by definition if you take a case-by-case basis there cannot be any automatic triggers. One of the key things about this is that there is this sort of discussion, which is why I very much welcome this Committee’s investigation into this area. If there is enough
discussion and debate about this and we have these sorts of exchanges more regularly than we currently do as politicians, then clearly people will come to have an expectation, it may not be rigorously defined.

It may not be as a lawyer would draw it up, but there is a general political expectation about the sorts of areas—and this is deliberately vague—in which a referendum should be held. People do have these views; as I say, a lot of people had the view—whether they were the majority or not—that there should have been one on the Lisbon Treaty, and the debate over that was very healthy. I think, democratically even though it was uncomfortable for the Government from time to time, but it was still healthy in terms of democracy because it did get an airing for the times in which the debate should be held.

Q238 Baroness Quin: The Lisbon Treaty itself was a long and complex document which indeed it seemed that some of the people who were dealing with it had not read. That also therefore begs the question, which we were talking about before, as to how straightforward a question should be in a referendum. Whilst some European Treaties do have fundamental changes, so therefore they presumably would come in the principled approach that Lord Pannick was describing earlier, there is the problem with long treaties which Parliament may have considered in great detail but actually it is hardly realistic to expect everyone to have read a 300-page treaty, and so many other issues can get caught up in it. Do you feel that you can make a case for treaties like that being exempt from the referendum process?

Mr Wills: No, I do not think you can make such a case. The reason, we would argue, that the Lisbon Treaty was not suitable for a referendum was because it was an amending treaty and the fact that it was an amending treaty I think is at least in part responsible for the enormous length and complexity of the document at stake. It was the fact that it was an amending treaty. To the broader point, if we accept for now Lord Pannick’s definition, that only for constitutional issues should a referendum be held, constitutional issues are almost by definition at one step removed from the daily concerns of voters, they are not housing, jobs, these sorts of issues, they are quite often arcane, quite complicated, technical legal issues; but at root there are always fundamental principles, all these complex technical issues can with effort, hard work, rigour, intelligence be distilled down to certain key principles and choices. I fundamentally believe that. It is not easy and politicians often—perhaps even usually—fail to do that act of distillation. To distil without distorting is a great craft; it is very arduous, but it is necessary and we can do it—it is not impossible at all—and we should never admit defeat because in the end people have to make these judgments, and I think it would be a terribly retrograde step to take the view that some issues are just too complicated to bother the people’s heads with. That would be a return to an aristocratic principle of government that we have, fortunately, long since rejected in this country. It is difficult. It is difficult and it requires a great deal of attention and I am sure that the measures we have taken, for example, to give the Electoral Commission the responsibility for framing the question and the duty to consult and so on will be important in that process. It is tough but not impossible.

Q239 Lord Shaw of Northstead: Two basic questions, if I may? The first one relates to the regulatory framework. Is the statutory provision on referendums set out in the Political Parties, Elections and Referendums Act 2000 effective and can it be improved?

Mr Wills: Our view is that it is effective and correct but inevitably it has not been put to the test that often, so clearly we will keep it under review and we will always be open to suggestions for improving it.

Q240 Lord Shaw of Northstead: A small point perhaps, but it has intrigued me. The House of Commons now has a lot of pre-legislative committees sitting. If we are going to set up forms of referendum, in setting them up do we have a pre-legislative committee before that, or do we have it after the referendum has taken place? Or do we have any at all? Would this not help to clear the ground if there was a discussion with witnesses coming from all over to get a bigger background for the public?

Mr Wills: I think it may well be a very valuable innovation. It is not one which we are currently engaged in considering, but we will now that you have raised it.

Q241 Lord Shaw of Northstead: Have you found pre-legislative committees useful or not?

Mr Wills: Yes, without any doubt.

Q242 Lord Shaw of Northstead: We seemed to survive without them years ago.

Mr Wills: We did, but I think that constitutions evolve and the procedures certainly of the House of Commons are arcane and not really as effective as they might be in scrutinising the executive and I have no doubt that pre-legislative scrutiny is improving the scrutiny of the executive. Post-legislative scrutiny I think will do more as well. These are evolving mechanisms; I do not think they are anywhere near reaching a settled destination yet and problems will undoubtedly emerge with them as we go and we will have to adapt as we go. I think the suggestion is a valuable one and we will investigate it.
Q243 Chairman: The Electoral Commission has made some recommendations following its review of the 2004 Referendum in the North East, advocating possible changes to the 2000 Act, pursuant to which you tabled some amendments to the Constitutional Reform Bill. You are therefore familiar with the content of what the Electoral Commission is recommending. Is there anything that you would like to add to what the amendments are putting forward?
Mr Wills: Not really, no. I think we are broadly supportive of the approach that the Commission are taking and there is not much more I want to say.

Q244 Lord Pannick: Can I ask you specifically about spending limits in relation to referendums. Do you think that the current system is an effective one? Do you think that it is realistic to think that you can control what disparate groups do in fact spend in promoting or opposing a particular view on a referendum?
Mr Wills: Realistic, optimistic, having wrestled with the whole issue of party funding for far longer than I should have done in relation to the PPE Act last year, this is very fungible really. We do our best; it is a moving target and it continues to move and every time you legislate it moves somewhere else and it is very difficult. We do our best is what I would say.

Q245 Lord Pannick: Your obvious concern about the efficacy of the system may suggest that the lack of control undermines the fairness of any referendum result.
Mr Wills: No, no, I was trying to be frank in answering your question. I would not push my concerns as far as that. Regulation of political spending of all sorts, whether it is for referendums, elections, is enormously difficult—not just in this country, but every democracy wrestles with this problem and goes on wrestling with it. It is an eternal problem and goes on wrestling with it. It is an eternal cult. We do our best is what I would say.

Q246 Lord Wallace of Tankerness: With regard to referendum questions, what do you think is the appropriate balance of responsibility between ministers and the Electoral Commission? Do you think any changes are required in the present arrangements?
Mr Wills: As I say, we are broadly comfortable with the current arrangements; we have done our best. They are not tested very often, which is one of the problems, and until they are tested it is hard to say. With all constitutional reform we have to keep an open mind and go on evolving and that is the way we have always done it in this country, and by and large it works. It is a careful, cautious way of making progress. I do not want to sound complacent about this, but I think broadly the combination is right. It is right that the ultimate authority should lie with Parliament, with the government of the day framing the question in secondary legislation, but, of course, it is crucial that the Electoral Commission has the role that it does in deciding on the intelligibility of the question, which is fundamental to it being perceived as a fair process. Obviously you will be aware that exactly how the question is phrased can have quite a significant bearing on the outcome and, as we know from opinion polls, if you ask a question one way you get one answer and if you ask a question a slightly different way in relation to exactly the same issue you get a very different answer from the public.

Q247 Lord Wallace of Tankerness: Do you envisage circumstances where you think that ministers and Parliament could diverge significantly depending on what recommendation came from the Electoral Commission?
Mr Wills: Could?

Q248 Lord Wallace of Tankerness: Diverge by overturning the recommendation?
Mr Wills: I think it would be politically extremely unwise. I cannot imagine any sensible politician doing that—it would defeat the whole purpose of having a referendum in the first place, which is to legitimise the decision. To have a controversy; a row with the Electoral Commission would be foolish.

Q249 Lord Wallace of Tankerness: Has any thinking been done within your Department about multi-option referendums? We could have a multi-option referendum on systems of proportional representation, for example.
Mr Wills: We are open, as I say, to all sorts of views. I personally would be very worried about that. As far as we can we have to distil, as I was saying earlier, to clear straightforward propositions which do not distort; distilling without distorting is the objective. As soon as you get multi-option referendums it becomes very, very difficult. Again, I think that those sorts of complex issues, which inevitably involve making trade-offs, are more suited for more traditional processes of representative democracy—that is what Parliament is really for, to debate complex options and multi-options, if you like.
Q250 **Lord Norton of Louth:** My first question relates to the government’s role once a referendum campaign has been triggered and what role do you think the government should play once it is underway? Should it have a role in informing the public; should itself be an actor in the process?

**Mr Wills:** Again, I think this is a matter for a case-by-case basis; but again, personally I would think that once a referendum is called then by its very nature I would hope that the government of the day would feel free to let its members campaign as they thought fit on either side of the referendum. By its nature these should be fundamental issues. They will inevitably be political because of, as I say, their values, but not necessarily party political; parties will have wide divergences of opinion on all the issues actually that have come up for referendum, certainly on Europe and on voting systems for example. There are wide divergences of opinion within all parties actually. I think maybe with the exception of the Liberal Democrats who seem fairly united on voting systems. Otherwise, I think there is a wide divergence of opinion. My own view is that I would hope that the government of the day would allow its members to campaign as they thought fit.

Q251 **Lord Norton of Louth:** So your view is that the government would have a hands-off approach and leave it to individual members to campaign as they wish?

**Mr Wills:** That would be my view.

Q252 **Lord Norton of Louth:** So it would be a fundamental constitutional issue but one on which the government was not taking a view?

**Mr Wills:** I think we would have taken a view that we should have a referendum on it; to that extent it needed that sort of legitimisation. The government has taken a view on the fact that we should have a referendum. The Prime Minister has expressed his own personal preference for the Alternative Vote system and that is my own view as well. I would prefer to see a move. I would expect some members of the Cabinet—if the current Cabinet is still the Cabinet at the time of the referendum—to take a different view, and I would certainly not feel that they should do anything other than express that view forcefully and try and persuade the British people to support them.

Q253 **Lord Norton of Louth:** The second question relates to thresholds because obviously practices have varied there. It relates to your earlier point about the aspect of legitimacy. If you have a very low turnout does that really not then raise questions about the legitimacy of the outcome? If you take, say, the referendum on electing the Mayor of London—and I note you seem to regard, therefore, electing the Mayor of London as a fundamental constitutional issue as electing Members of the second chamber is not—if you take the turnout there it was extremely low. Should there be a threshold to determine whether an outcome actually proceeds because if it is a very low turnout then of course you are just getting a minority actually determining what can be a fundamental issue?

**Mr Wills:** Again, at the risk of returning to the mantra, it has to be a case-by-case basis. Again, a judgment has to be made about why you are holding the referendum and what legitimates it. There will be cases for thresholds—they have been held in the past, not usually, but they have been applied in the past. I think the crucial thing here is that the referendum does not bind Parliament. In the end Parliament will make its own decision on that. That is really where the question of judgment of Members of Parliament comes into play. Clearly a high turnout and a decisive vote for or against something and/or a decisive vote will be a very clear signal to Parliament, and it would be an imprudent Member of Parliament who ignored that and took a different view. It may be a brave Member of Parliament may take such a view—but many brave Members of Parliament—but given that they would subject themselves to the wish of the electorate it might be imprudent. Conversely, on a low turnout, a very low turnout or a very evenly split result, I think Members of Parliament would feel much more empowered to exercise their own independent judgment, and it is probably right and proper that they should do so, and that is a flexible and responsive system and personally I think that is where we should be.

Q254 **Lord Norton of Louth:** Is not the logic of that, though, that you do not need a threshold because since it is not binding it is then up to Parliament to assess turnout as just one of the factors that it takes into account in making its decision?

**Mr Wills:** As you have probably gathered I am quite sceptical personally about thresholds, but I would not ever go as far as to say never. I can imagine certain circumstances, but by and large, for the reason I have just given, I would suggest that I would personally need to be quite rigorously persuaded. I am always persuadable, but it would need quite a lot of persuasion in this case.

Q255 **Lord Norton of Louth:** If you have a threshold in one referendum and not in another you can see the problems that would cause where if you do not have one people will say, “We should have one”?

**Mr Wills:** The problem with a case-by-case basis is that precedent is always going to be difficult for us. We will always be informed and one of the things that will inform the judgment is that if you have similar issues arising, an issue similar to that which has already been the subject of a referendum, it would be
hard to resist that case, but one of the issues about not having that is that people will always seek to produce a similarity between previous referendums and the issue under consideration and in some ways having the kind of rigorous framework for when you hold an election would make it much easier for governments, but I do not think it would remove the difficulty altogether, as I have said.

**Q256 Lord Wallace of Tankerness:** Do you think that there is a case for there to be some sort of public information, the education process which is independent and neutral from the respecting campaigning sides, so that information can be put forward for the public in an objective way? If so, who do you think should have the responsibility for doing that?

**Mr Wills:** The question that you have asked raises the difficulties with that. Look, my own view is that it is very difficult to do that in the context of a campaign and almost by definition if the only time that you bring this public information or campaign forward is in the context of a campaign it is going to make it very difficult. Let me go back. I think there is clearly a case for the public to be objectively informed about the issues—that is certainly the case. The clauses that we have laid provide that the Electoral Commission can do that if necessary. My own view, strongly, though, is that we need to do better at informing the public about all these issues outside the hurly burly of General Election or referendum campaigns. That is really a fundamental democratic obligation which governments and politicians have not been great at.

We have tried to introduce citizenship classes into schools and it is beginning to work but we need to do a lot more on that. The Electoral Commission can do it, if necessary. I think it is necessary but not that it should be conceived of as a continuing process, and by the very nature of any referendum it will be so fundamental that the issues involved ought to be the subject of continuing public education outside any referendum.

**Q257 Lord Wallace of Tankerness:** Can I just be specific on the referendum which is proposed in a bill currently before Parliament—the House of Commons voted last night. Quite aside from the arguments for and against electoral reform and the Alternative Vote, is any thinking being done, any plans being laid, so that the public actually knows what the Alternative Vote would mean, if it was to be adopted and they had polling stations that they would know how to vote in an Alternative Vote election? It is purely factual information as to what the Alternative Vote is and how it works.

**Mr Wills:** Of course there will have to be such a programme of education and information. As I say, the Electoral Commission is probably best fitted to do that. In terms of whether the Government has laid any specific plans beyond those broad outlines—not yet. Let us get the legislation through.

**Q258 Lord Wallace of Tankerness:** You have not elected a new body to do it?

**Mr Wills:** I think it would be a mistake to set up a new body because it would inevitably become more raucous if it was a political operation. The Electoral Commission is established and we conducted significant reforms to it last year which we think will enhance its credibility still further. It is doing a good job as far as we can see; it is the obvious place to do this. The duty to do this—and it is a duty—goes beyond the Electoral Commission in this specific issue.

**Q259 Chairman:** Minister, you mentioned earlier in passing citizens’ initiatives. Can you amplify what your view is on citizens’ initiatives and other consultative mechanisms and how they relate to referendums?

**Mr Wills:** The terminology of these things is quite difficult because they are used interchangeably. We again have tried, and perhaps imperfectly, in the framework that we published to try and produce some definitions for this. The usual language, when you think about this—and the Government has been responsible for some of the misunderstandings in this area in the past, I have to say—is that they are focus groups which are snapshots of opinion. You give people a set of propositions and then you monitor their responses to the propositions. There is a place for them. I do not think that they are particularly valuable in any profound constitutional way. What I think is far more valuable are what I would call deliberative events which fall into various categories, but by that what I mean is that a demographically representative sample of people—I think the minimum would be 100, 500 is probably optimum for a decision-making body as opposed to an advisory panel and 1,000 possibly—is given the information that Parliament would be given, for example, and then deliberates on it with expert moderators to steer the discussion, but, nevertheless, they are given a wide range of information, both printed and, in an ideal world, they are given the ability to interrogate expert witnesses in the same way as committees in this place and the other place do, and they then reach a decision on that. That decision can either be advisory on government or it can be binding on government.

I think that there is a very considerable role for such bodies. It is quite clear that people increasingly want a say in the formulation of policy between elections; that the old view where they exercise their democratic rights once every four or five years and have either kept their current MP or chucked them out and got somebody else, remains fundamentally important.
but actually people want a bit more and we need to find ways of augmenting it. This is a way that could be implemented, that gives people a real say, that over time I think would add to the credibility and validity of our entire system of representative democracy, in much the way that the jury system does enhance the credibility of the criminal justice system. Very few people proportionately, I think, overall serve on a jury but over centuries it has commanded respect; it is seen as a fair way of dispensing justice and, as a result, we have for the most part a fairly high degree of confidence in that system and I think the model is replicable in the political world as well in this way. As I say, we have started this process with these deliberative events on the Statement of Values. It is a fairly limited area. We have given the power of decision-taking away to them. The process is nearing its completion; we will be publishing a report very shortly on the process. It has been independently run by an independent market research organisation— the Government has not interfered with the process at all, just to make that clear—and the results will be there for people to judge. We believe that it has been a successful exercise and we hope others will too and will replicate it in future for other areas of public policy.

**Q260 Baroness Quin:** I listened to what you said on local initiatives, but on local referendums does the Government have any plans for increasing or bringing in a system of local referendums on such things as council tax levels or any other proposals that might come from the local area?

**Mr Wills:** I think local authorities already have those powers under the 2003 Act and they do have that and it is a matter for them to use it. I hope they will. Some local authorities are doing this very well already. Inevitably with 350 local authorities there is a patchiness of performance, but some local authorities are very adventurous in consulting their residents about services, levels of service, levels of council tax, different priorities and central government has a lot to learn from those local authorities. In the same way there are some local authorities who remain arrogant and complacent and stuck in the old ways of doing things without any real concern for their residents and they need to change.

**Q261 Baroness Quin:** Is the consultation binding? Is the outcome of such local referendums binding?

**Mr Wills:** No, and nor should they be. I think it is important both locally and nationally that the representative and those representatives elected to do that job should in the end still be able to exercise their judgment. In the end practically and politically—and it goes back to Lord Norton’s questions about thresholds—if these referendums are conducted properly with high levels of turnout with a decisive vote for or against something it would be a very unwise politician who ignored them.

**Q262 Chairman:** Minister, in 2003 Parliament legislated for “an express power enabling local authorities to conduct an advisory poll or referendum . . . on any matter relating to the services for which it is responsible”. This gives rise to a number of questions of which I will, if I may, confine myself to three. Firstly, on what grounds are the Government willing to facilitate referendums at local level on a broader range of issues than at national level? Secondly, how do the Government’s warnings about the impact on representative democracy of—and I quote the Government’s words—“the excessive use of referendums” apply at local level? Thirdly, should the Electoral Commission have a role in the conduct of local referendums?

**Mr Wills:** No, I do not think so. As I have said, we sought last year really to define the role of the Electoral Commission in a way that focuses their role more precisely and I think if we were to give them a role in local referendums that would run counter to that. I do not think we would do that; and there would be cost implications as well. We would not submit it to the Electoral Commission. Again, given essentially the local and limited nature of such referendums, they are categorically different from great national referendums—do we really see much need for it? I am sorry, would you remind me of the first question?

**Q263 Chairman:** Government facilitation of local referendums.

**Mr Wills:** I think it is for local authorities to decide that, as I have said. We hope that they will adopt them and, indeed, other mechanisms for consulting the residents more frequently. The main value of this is that it improves the services. Where everyone is looking to give the taxpayer value for money it is the local resident who has the best view of how services can best be deployed.

**Q264 Chairman:** If there was a proliferation of such referendums this would not trespass on the Government’s ruling against the excessive use of referendums?

**Mr Wills:** No, it would not. As I have said, there is a categoric difference between local referendums and great national referendums. All the remarks I made earlier were to do with the great national issues. In terms of locally, referendums have a place just as they do nationally, but what I am primarily concerned about is local authorities should engage more vigorously to seek the views of their residents. The sorts of citizens’ initiatives that we discussed a few moments ago are very important in this as well. Referendums have their place, but so do they. The
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key thing is that they engage vigorously with their residents about the services that they provide.

Q265 Lord Wallace of Tankerness: Are there any international examples which you would like to put before the Committee either as good examples of the use of referendums or bad examples of the use of referendums?
Mr Wills: No, not really. It is not appropriate for me really, if you will forgive me.

Q266 Chairman: Minister, you have been very generous with your time, thank you very much indeed. This is the final evidence session of this inquiry and it has been for us a most interesting one. You expressed confidence that a referendum on House of Lords reform would be won, which gives rise to the question: why not have one? I do not think that is entirely within the scope of our inquiry.
Mr Wills: Because politicians sometimes do things for the right reasons and not just to win elections. I realise that might be a slightly heretical view but I think that it is very important. If I may just conclude? Can I just thank you for conducting this investigation? I hope you have gathered from what I say that I think this issue is (a) fundamentally important, and (b) it requires this sort of public debate. As I say, we have tried to construct, as it were, a taxonomy of when such constitutional arrangements should be called into play. We may well have not got it quite right and I think that anything which advances the public’s understanding of these issues is greatly to be welcomed, so I am very grateful to you for that. Can I just conclude by repeating something that I mentioned earlier, which is my worry about getting the balance right between representative democracy and direct democracy. I am really alarmed sometimes when I hear some politicians speak as if measures of direct democracy are panaceas for all the political challenges that we face. They are not. We have to adapt, we have to reform, and I hope I have given you some evidence that we want to do that and we are actively engaged in doing that, but we cannot sacrifice the principles of representative democracy for all sorts of reasons, which I am sure will be clear to this Committee. There is an example—I just said to Lord Wallace that I did not want to draw international comparisons—there is a quote, and I hope I am quoting him correctly, by the Chief Justice of California—and in many ways California 100 or so years ago was subject to a great political crisis with people feeling that politicians were being hijacked by the wealthy and powerful and a whole plethora of populist measures were brought in bringing a large number of direct democratic measures, and as a result of this the State of California has great difficulty in funding all sorts of essential services like the university system—and very recently the Chief Justice of California referred to the system of governance in California as “dysfunctional”. I think that is the correct quote. That is a lesson that we should draw. We have to engage people, we have to be more accountable to the people we serve and we have to remember the virtues of a representative democracy in doing so. With that homily I conclude.
Chairman: Minister, thank you very much indeed for being with us this morning and thank you very much for the evidence you have given the Committee.
Written Evidence

Memorandum by Dr Andrew Blick, Federal Trust for Education and Research

1. **What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?**

   1. The main strength of the referendum as a democratic and constitutional tool is that it enables all those on the electoral register within a specific area to participate directly in the taking of decisions that relate to the workings of the constitutional system itself. This approach is of particular value when there may not exist a representative institution appropriate for the taking of a particular decision. For instance, the holding of referendums prior to the establishment of devolved tiers of governance in Scotland, Wales, Northern Ireland and London was appropriate since no such bodies existed in these territories. The only clear means of taking a democratic decision within these territories as a whole was through the holding of referendums.

   2. The main general weaknesses of the referendum as a democratic and constitutional tool—some of which are considered in more detail below—are as follows:

      (a) There is a tension between its use and the basic principle of representative democracy;

      (b) It can entail the oversimplification of a complex issue into a simple “yes” or “no” option;

      (c) It does not necessarily settle an issue, and can serve to create a demand for more referendums; and

      (d) Rather than widening effective public participation in the political process, it might serve to afford extra influence to already powerful groups such as media and commercial interests.

3. The more UK-specific weaknesses of the referendum include:

   (a) There are tensions between it and UK constitutional principles including that of collective Cabinet responsibility;

   (b) The UK lacks a codified constitution within which the role of the referendum might be clearly defined; and

   (c) The referendum is often conceived of within the UK not as a means of enhancing democratic decision-taking, but as a means of placing a brake on certain developments, most notably increased participation in European integration; or at local level on preventing increases in council tax above certain centrally-determined levels.

2. **What assessments would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?**

4. A positive feature of referendums in UK history is that they can contribute to the establishment of institutions, such as the Scottish Parliament and Welsh Assembly, which have successfully commanded a high degree of legitimacy and become established features of the un-codified UK constitution. The Northern Ireland peace process as well can be seen as having benefited from the referendum held (on both sides of the border in Ireland) on the Belfast or “Good Friday” Agreement.

5. But the way in which referendums relating to issues of devolution have been handled reveals a series of confusions surrounding their role. To varying extents referendums since 1997 have led to alterations to the constitutional configuration of the UK, but the UK electorate as a whole has not been consulted. In the case of the Irish referendum, voters in the Republic of Ireland were given a direct say, while UK voters outside Northern Ireland were not. Moreover, of the nine English regions, only the electorates of London and the North East have been consulted over whether they want devolution to their regions. All of the referendums on devolution were brought about on the initiative of the UK government; yet at local level in England there is provision for referendums on the introduction of directly elected mayors to be triggered by local voters. Further confusion surrounds the issue of whether additional referendums are required for the extension of devolution. The Government of Wales Act 2006 granted legislative powers to the Welsh Assembly, without a referendum being held; but the Act also provided for a further extension of devolution which was dependent upon agreement in a referendum, which the current Welsh government is committed to holding.
6. Consideration of the only UK national referendum to date, on continued membership of the European Economic Community in 1975, illustrates certain negative features of this device. There were constitutional problems. As well as the difficulty of reconciling the holding of a referendum with the principle of collective Cabinet responsibility, dilemmas arose regarding the activities of ministers who were engaged in various European negotiations but were opposed to continued membership of the EEC; the maintenance of Civil Service impartiality; and the appropriate role of special advisers to ministers.\(^1\) Debate at the time of the vote tended to focus on economic aspects of the commitment at the expense of the constitutional issues involved, a weakness to which those who disagreed with the “yes” vote were subsequently able to point when challenging the legitimacy of the referendum. Finally persistence of a lack of consensus about the role of the UK within Europe; and the present-day strength of so-called “Euroscepticism”, show that the 1975 referendum did not produce a final decision, despite its clear result.

3. **How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?**

7. At present the result of a referendum could not in formal terms be binding upon Parliament. Even if Parliament had committed through an Act of Parliament to abide by the outcome, it could in theory repeal such an Act. However the political pressure upon a government seeking to ignore the outcome of a referendum would be immense.

8. Parliament could become bound in practice not only to abide by the outcome of referendums, but to the holding of them in certain circumstances. The Conservative Party proposal to, in the words of David Cameron, “prohibit, by law, the transfer of power to the EU without a referendum” would introduce a new practical constraint upon the freedom of action of a government (and arguably undermine the parliamentary sovereignty that advocates of such a measure might claim to be defending). Though in theory a future Parliament could repeal such a statute, there might be a strong political imperative not to do so.

9. Finally there are certain institutions such as the Scottish Parliament which were established following referendums and have become an entrenched part of the un-codified UK constitution. Though it might in theory possess the power to do so, the Westminster Parliament could not in practice abolish or even significantly alter them without resort to a further referendum.

10. The ideal relationship between mechanisms such as referendums and representative democracy in general is in the view of the Federal Trust that the former can in some circumstances enrich the latter—helping to make it more responsive and better informed—but they should not supplant it.

4. **Is it possible or desirable to define which issues should be subject to a referendum?**

11. The definition of which issues should be subject to a referendum is an essential—if complex—task which should be undertaken before any further move to increase the use of this deliberative mechanism.

12. There have been a number of policy decisions over which it might be argued that referendums should have been held, but they were not, and no demand was made that they should be. For instance, major constitutional changes have been introduced in the UK since the 1975 European referendum without referendums taking place. They include the passing of the *Human Rights Act 1998* and the *Freedom of Information Act 2000*; and the establishment of the UK Supreme Court, which became active in 2009. As already noted, the devolution programme enacted since Labour took office in 1997 has never been subject to a full UK-wide referendum, but only in the prospective devolved territories (and the island of Ireland as a whole for the Belfast Agreement).

13. At present discourse around UK-wide referendums seems to be focussed largely on issues associated with the EU (the most obvious exception being the recent Labour pledge to hold a referendum on electoral reform if returned to office at the 2010 General Election). This tendency can be traced to the calls for a referendum which culminated in the vote of 1975; and was sustained subsequently by such groups as the Referendum Party and its demand for another referendum on continued membership; the commitment of the main parties not to join the single currency without a referendum; the more recent debate about the EU Constitution then Treaty of Lisbon and whether it required a referendum; and finally the Conservative Party commitment to an Act of Parliament requiring it to hold referendums on the further sharing of sovereignty.

14. This focus on the EU and the apparent rationale behind it can be challenged in a number of ways. Advocacy of EU referendums often rests on the idea that they are required to legitimate further sovereignty sharing by the UK. But the EU is by no means the only body within which the UK shares its sovereignty. Yet

\(^1\) As revealed in official files made available in the National Archive/Public Record Office 30 years later, such as: BA 7/10 “EEC Referendum guidelines for conduct to Ministers and special advisers”.

there are no demands for referendums in relation to UK membership of bodies such as NATO or the Council of Europe, despite the significant consequences of UK participation within them. Second, it might be asked, if the extension of sovereignty sharing requires a referendum, then should not its reduction as well? In other words, it could be argued that a policy such as the UK withdrawal from the EU Social Charter should be subject to a referendum, a stipulation not currently being called for in political debate.

15. If the idea of further sovereignty sharing requiring a referendum takes hold, it is not clear whether it would apply to the accession of new EU member states, which entails further sharing of sovereignty. Such a practice could create substantial problems for the functioning of the EU as a whole.

5. Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

16. This question is central to the subject of referendums in the UK. Arguably the most appropriate use of referendums would be in relation to “constitutional issues”; and most referendums which have been held to date have been over matters which could be regarded as constitutional.

17. But it should be noted that other methods exist of introducing “hurdles” which must be cleared in order to alter the constitutional settlement of a country, such as a requirement for the support of more than a simple majority in the legislature.

18. Moreover, in the UK context, the constitution is not codified. Consequently, it is impossible to establish with a sufficient degree of exactitude what are “constitutional issues”; and a blanket requirement for referendums in this area cannot therefore be introduced.

19. In other words, to dabble with the idea of requiring referendums for “constitutional issues” without first clearly codifying the UK constitution is to approach the issue from the wrong end. A codified constitution must be established first. Within such an arrangement referendums could be provided with a clearly delineated role, integrating them within an overarching system of representative democracy.

20. The establishment of a formal settlement of this sort would be a substantial task, and would presumably require the use of deliberative mechanisms, probably including final endorsement (or rejection) by a UK-wide referendum. It is perverse to consider establishing the principle that a change to the constitution demands explicit democratic assent of some kind, without the constitution as a whole having an equivalent form of legitimacy.

3 January 2010

Memorandum by Peter Browning

This paper gives my responses to the ten questions listed in the Committee’s call for evidence published on 20 November 2009.

Q1 What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

Referendums could have the great benefit of making the political system more democratic and more legitimate. At a time when public trust in this system is probably lower than ever in living memory, the greater use of referendums could be an important means of restoring faith in British democracy and underpinning the constitution. They give the citizens a direct say in deciding policy and thus make the system more democratic. Introducing direct democracy into the political system, however, challenges the indirect, representative democracy that has been the essence of UK democracy. If the people vote one way, their representatives another, who should prevail, who is sovereign? This issue needs very careful consideration.

Perhaps the main weakness of referendums is the need for public participation. Most people are prepared to vote every four or five years to choose their representatives, whether national, local or, in Scotland, Wales and Northern Ireland, regional. Even then turnout varies considerably, depending on the perceived importance of the election. Even then, turnout tends to be falling. On the evidence of local and regional referendums held in the UK in recent years, it is doubtful whether voters would turn out to vote in similar numbers in referendums. Low turnout would weaken the legitimacy of the result and thus of the policy decided by the referendum.

Another weakness of referendums is the danger that they can be—some would say are always—manipulated by elected politicians to achieve their desired goals. Special interests and the mass media will also have their say in the referendum campaign. Thus referendums are rarely, if ever, the expression of the will of the people, free from influence by politicians and minority groups. This danger means that referendums, far from actually strengthening democratic politics, have the opposite effect, adding to public disillusionment with the political process.
Q2 What assessment would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?

The experience has been mixed. At the local government level, referendums have usually been used with regard to directly-elected mayors and mainly at the behest of central government. Of some 35 such referendums since 1997, only one-third voted for direct election of mayors. In Doncaster and Stoke-on-Trent, the experience of having mayors chosen directly by the people has not been a success. There have been some local referendums on policy issues, most notably in Edinburgh in 2005 on whether to have a traffic congestion charge; here 74% of the 62% of voters who participated voted against a congestion charge. The 1972 Local Government Act does allow people living in parish councils in England and community councils in Wales to request these councils to hold referendums but there are few examples of the Act being used in this way.

At the regional level, referendums have been used to legitimise constitutional change, mainly with regard to devolution in Scotland, Wales, Northern Ireland and one English region. Two further referendums planned for 2004, in Yorkshire and Humberside and North West England, were cancelled a few months beforehand. All but two referendums (Scotland in 1979 and North East England in 2004) have supported changes which the government had planned. Whether the reforms would have been any less legitimate had the referendums not taken place is impossible to judge.

There has been only one national referendum, in 1975, on whether the UK should stay in what was then the European Community. The vote resulted in a clear majority in favour of staying in the Common Market. Joining this supranational body was such a significant change in the position of the UK that the referendum almost certainly did help ensure popular acceptance of EC membership. Since then, other national referendums have been proposed by political parties, most notably by Labour in 1997 on the voting system for UK elections and in 2004–05 on the EU Constitution. The latter has proved especially controversial, particularly when the Labour government refused to hold a referendum on the 2007 Treaty of Lisbon which replaced the EU Constitution. In this case the failure to hold the referendum made the Lisbon Treaty less legitimate with some sections of the British people. It is almost impossible to imagine the UK adopting the euro as its currency without having a referendum.

Some would argue that these experiences show Clement Attlee was correct when in 1945 he called referendums a device “so alien to all our traditions”. Since 2000 just one regional referendum has taken place while four have been cancelled or postponed. Incorporating referendums into British political life has proved particularly problematic.

Q3 How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

The fundamental principle of the UK system of government is the legal—if not the political—sovereignty of parliament. This principle has been challenged by the UK’s membership of the European Union (EU); some commentators believe that this membership in effect means the end of that legal sovereignty while others argue it is still intact. Whether the UK parliament is sovereign or not in relation to the EU, its sovereignty within the UK is certainly threatened by the use of referendums. Referendums put the people before parliament. The sovereignty of parliament becomes the sovereignty of the people. The problem arises with national referendums and regional referendums on regional independence. Thus if referendums of these types do become a regular feature of British politics, they do pose problems for the position of parliament. This is why the scope and processes of referendums need to be considered very carefully.

Q4 Is it possible or desirable to define which issues should be subject to a referendum?

It could be possible but it would not be desirable. Democratic politics requires an open debate on all issues and how they are best decided. It is more important to define the processes by which issues might be subject to a referendum.

Q5 Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

Major constitutional issues, those which concern the fundamental structure of politics and government, would seem to be the most obvious subjects for referendums. If the structure and rules of politics are to be changed, then the people rather than the political players should decide on those changes. This was the reason for holding regional referendums on devolution to Scotland, Wales and Northern Ireland. In recent years, however, there have been important constitutional changes which no one proposed should be subject to a referendum. These include the 1998 Human Rights Act and the 2005 Constitutional Reform Act. (The latter is especially noteworthy as it had not been included in Labour’s 2001 election manifesto and thus lacked a democratic mandate.) And no one is suggesting a referendum on the issue of making the House of Lords fully elected. Yet changing the UK’s voting system and introducing the euro currency will almost certainly require
referendums to go ahead. Why are referendums proposed for some constitutional issues and not for others? They are decided by the balance of political forces, almost always within the governing party. If those political forces could be widened to require a free vote in the House of Commons, then that is probably the best way of deciding the topics on which referendums should be held.

Q6 Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

The Act covers national and regional referendums only and makes the Electoral Commission responsible for the conduct of referendums. Thus this question is better answered as part of Q7.

Q7 Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission’s work in relation to referendums?

The role of the Electoral Commission, according to the Act, would seem broadly appropriate. The practice of this role raises concerns, however. There has been one referendum since 2000 for which the Electoral Commission has had responsibility and that is the all-postal referendum in North East England in November 2004. A year later, the Electoral Commission published a report on the referendum which included nine recommendations about future referendums. It is unclear whether the government has acted to implement any of these changes. If it hasn’t done so, then the Electoral Commission, which reports to parliament, would appear to be ineffective in influencing the administrative and legal framework essential to the proper conduct of referendums. This concern is further reinforced by an interview given to The Times on 24 April 2004 by the then chairman of the Electoral Commission, Sam Younger. He identified a series of loopholes in PPERA concerning how much money could be spent in a referendum and by whom. He said, “The legislation is flawed. There appears to have been an oversight and it is something we are making representations to the government about”. Again, it is hard to find any evidence that the government has acted to close these loopholes. The Electoral Commission needs to be more effective. It needs greater status, greater powers. It should more clearly be a part of Parliament. As the Audit Commission is to government expenditure so the Electoral Commission should be to democratic politics.

Q8 What comment would you make on the key components of a referendum campaign such as

— Whether or not there should be any threshold requirements, eg in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;

There probably should be a threshold in terms of the level of turnout required for a vote to be carried, as was the case in the 1979 referendum on Scottish devolution.

— The wording of the referendum question (including the appropriateness of multi-option questions);

The Electoral Commission’s duty to comment on the wording of the referendum question should continue; the government’s power to ignore the Electoral Commission’s comments should be taken away. There should be no multi-option questions as almost certainly they will confuse many voters.

— The design of the ballot paper;

This needs to be as clear and as simple as possible.

— Whether there should be formal, constitutional triggers for referendums;

I don’t know what “formal constitutional triggers” look like. Every national or regional referendum must require an Act of Parliament, approval of which must be by a free vote of MPs.

— Whether a referendum should be indicative or binding;

Given the concept of parliamentary sovereignty, referendums should be indicative in law. In politics, however, even an indicative referendum will bind the government.

— Whether a referendum should ask broad questions of principle or refer to specific legislation;

They should refer to specific legislation and/or specific policies. It is hard to think of examples of “broad questions of principle” which could usefully be subject to a referendum vote, which would not be better being left to debate in parliament. Even the question of a reformed voting system for the UK parliament, which might be the subject of a referendum before too long, would be better expressed in terms of a specific voting system rather than whether the voting system should be changed.
— **Whether a referendum should precede or follow statutory enactment;**

It should precede the proposed parliamentary statute about which it is being held as then it will help inform parliament’s decision on the law.

— **Campaigning organisations and the funding of campaigns;**

The loopholes mentioned in answer to Q7 concerned this issue. There is much work to be done in order to ensure that the funding of campaigns does not favour one side at the expense of the other. It needs more detailed consideration than can be given here. The current laws on campaigning organisations and campaign funding need to be changed.

— **Public information campaigns and media coverage;**

In the 1975 national referendum, if I remember correctly, the government published two pamphlets, one setting the case for remaining in the EEC, the other the case against. The government’s official position was to recommend staying in. The print media was also in favour of staying in.

Media coverage of referendums influences the outcome of the referendum, though to what extent is impossible to quantify. Future referendums will be covered by a greater range of media, old and new, especially the internet. Even compared with 2004, when the last regional referendum was held, the latter has grown in importance. The print media, however, continue to lead the news agenda, despite the internet and the public service broadcasting requirement imposed on the terrestrial television channels. It therefore remains important that public information campaigns put both sides of the argument in a dispassionate manner. However old-fashioned they now seem, official pamphlets detailing the cases for and against the referendum issue still have an important part to play in the referendum campaign.

— **Party political activity;**

Issues which become the subject of referendums usually divide parties and attract cross-party support. A referendum on the euro would be one such example of this tendency. Thus individual political parties are less effective in referendum campaigns. Given the continuing decline in membership and support for the main parties and the rise of single interest groups (which also include single interest political parties such as UKIP), the main parties might struggle even more to make their voices heard in future referendums.

The main issue is the influence on the campaign of the party in government. The UK has a system of party government. Even if divided, that party can use its control of the government machine to its advantage, which gives power to the party’s frontbench ministers, as was seen in the 1975 campaign.

This danger could well be offset by the unpopularity of the party in power. Voters often use a referendum vote to express their views of the governing party rather than the specific issue. However, the advantage the party in government might gain from its position in power is an issue which needs to be addressed. If the public believes that party is manipulating public opinion, it could well become even more cynical about referendums and the whole democratic process.

— **Whether referendums should coincide with other elections or not;**

In order to reduce the danger of voters voting on party political lines, referendums should not coincide with elections.

— **The strengths and weaknesses of in-person, postal or electronic forms of voting.**

Voting in person is best, postal voting needs more careful monitoring and electronic voting is not yet secure enough to be trusted.

Q9 **How does the referendum relate to other tools, such as citizens’ initiatives? Should citizens be able to trigger retrospective referendums?**

If the UK is to make greater use of referendums as a form of direct democracy, then it should allow citizens the opportunity to decide on referendum issues. Part of the problem with the current use of referendums is that they are “top down”, decided on—or avoided—by party politicians. Whether local, regional or national, referendums should take place if (a) a certain minimum percentage of the voters of that constituency request it and (b) parliament supports that request. The involvement of parliament provides some kind of check on the “bottom up” process, which might be taken over by special interests.
Constitution Committee: Evidence

The idea of retrospective referendums has nothing to commend it, however, even if accompanied by various safeguards. Presumably such referendums would apply to laws and not policies. The best form of retrospective vote would be a general election. Retrospective referendums would give special interests and minority groups the potential to block almost all change.

The greater danger of retrospective referendums, however, comes from governments requiring them rather than the people, as shown by the example of Ireland and the European Union. Governments need to accept the results of referendums just as much as the people are required to.

Q10 How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?

The state of California serves as a warning of the dangers of too much direct democracy while Switzerland would seem to provide an example of a state which has successfully combined direct and indirect democracy. The political culture of a state will determine whether referendums are successful forms of democracy or not. The political culture of the UK combines deference and dissent in an unusual mix. The less deferential attitudes of many modern voters mean that referendums could become a useful means of expressing dissent and reconciling different interests. So far, they have been used in an ad hoc way to benefit politicians. It is important that from now on they are used more systematically and for the benefit of the people.

Memorandum by the de Borda Institute and the New Economics Foundation

Summary

As it were by definition, in a plural democracy, there are bound to be more than two possible options on most contentious subjects. Accordingly, any decision-making procedure should also be multi-opional.

If the decision-making process is to facilitate the correct identification of the collective will, the voting procedure must be one by which the voter can express his/her individual will with a certain degree of accuracy. Any single-preference voting procedure is therefore insufficient; instead, the procedure should be multi-opional; and in the count, all preferences cast should be taken into consideration.²

Accordingly, it is suggested that, as and when appropriate, referendums should be multi-opional and preferential. (Such referendums are sometimes known as “preferendums”.) Furthermore, the democratic process should enable the electorate, not only to vote in the ballot, but also to participate in the choice of questions. In debating electoral reform, for example, everyone should be able to submit their proposals to an independent commission or enquiry, and then to vote on the resulting short list of, let us say, about five options.

If the voting procedure is the Modified Borda Count, MBC, individuals will be encouraged to cast preferences for all the options listed. Not only, then, can they cast their 1st preference for their favourite option; they may also state their compromise option(s); and in casting a last preference, they will acknowledge the legality of that option and the aspiration of its supporters. In a word, in consensus voting, no one votes “no” against anyone or anything; instead, everyone votes (with varying degrees of enthusiasm) in favour.

And just as majority voting can divide societies or exacerbate existing divisions therein,³ so, in contrast, an MBC can be the very catalyst of consensus.

Reference:

The Constitution Committee’s Call for Evidence, Referendums in the UK’s Constitutional Experience, dated 20 Nov. 2009.

Abbreviations

AMS additional member system  AV alternative vote
AV + AV plus a form of PR-list  BC Borda count
FPP first-past-the-post  IOC International Olympic Committee
IRV instant run-off  MBC modified Borda count
MMP multi-member proportional  STV single transferable vote
TRS two round system  WTO World Trade Organisation

² AV or STV are therefore inadequate.
³ “… all the wars in the former Yugoslavia started with a referendum,” Oslobodjenje, 7.2.1999.
OUTLINE

1.0 The following submission concentrates on two aspects of para 8 of the reference: the wording of the referendum; and the appropriateness of multi-option questions.

The wording of the question

2.0 Some referendum questions are dichotomous. Even in these circumstances, however, the choice of question can be crucial. In the French 2002 referendum on the EU constitution, the question was “*oui ou non*”. Those who supported M. Giscard d’Estaing’s new proposals voted “*oui*”; and those opposed “*non*”. But a number of others also voted “*non*”: those who did not like the EU in general, and/or McDonalds, globalisation, Jacques Chirac, the prospect of Turkish accession, or “*je ne sais quoi*”. At the very least, the question should have been set in a positive format: “should the EU constitution be *comme ci ou comme ça*?”

2.1 To identify the collective will, one first has to identify all the individual wills. This cannot be done if some voters are saying only “*no*”, identifying only what they don’t want. Such negative voting has hindered many political processes: in Northern Ireland (as in Dr. Paisley’s “Ulster says no” campaign following the 1985 Anglo-Irish Agreement); in Bosnia (when Radovan Karadžić used three referendums in *Republika Srpska* in 1991–92 to veto every peace initiative); in Gibraltar (2003); and in Cyprus (2004). A referendum, therefore, should always offer a choice of positive alternatives, as in a constructive vote of no confidence in the German Bundestag.

The appropriateness of multi-option questions

3.0 If, for instance, the UK were to choose a new electoral system, there could be a multi-optional referendum, as there was in New Zealand in 1992. And some UK referendums could have been multi-optional: the SNP had hoped the 1997 Scottish referendum would include an independence option and be three-optional, while Plaid Cymru had requested a four-option ballot in Wales (Wigley, 1996).

3.1 If a two-option question is posed when the debate is in fact multi-optional, the outcome may well be inaccurate. In the Welsh referendum, for example, the outcome was “devolution” 50.3% and “status quo” 49.7%. If a third option, “independence”, had been included; and if but 1% of the devolution supporters had voted in favour of independence, the winner of a plurality vote would have been the “status quo” option.

3.2 A theoretical comparison can be made with the IOC’s decision on London for the 2012 Olympics. Given the five options—London, Madrid, Moscow, New York and Paris—a majority vote could have been held—“Madrid, yes-or-no?” say, or maybe “Moscow or Paris?”—but the outcome might have been meaningless. Similarly, returning to the theme of electoral reform, any Jenkins type ballot between FPP and AV could be a totally inaccurate measure of the collective will; and the best way to ensure an accurate outcome is to use a more accurate, multi-optional measure.

3.3 In 1948 in Newfoundland, it was proposed that the people should decide their constitutional status on a choice of “Commission Government” or “Responsible Government”. Some wanted a third option, “Confederation with Canada”, and after demonstrations on the streets of Halifax, this was duly added… and it won (Emerson, 2002, p 120).

3.4 In the wake of this precedent, there can be no legal/constitutional obstacle to the holding of a multi-option ballot in the UK. There may, therefore, be considerable interest in the latest White Paper from the Scottish Government.

COUNTING PROCEDURES

4.0 If there are only two options on the ballot paper, then, no matter which voting procedure is used, the outcome will be the same as that which would be given by a majority vote, which may be the preferred choice of the majority. If there are more than two options, however, then there are a number of different ways in which the votes may be counted. They include the following:

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4 Having been asked to propose just one alternative, the Jenkins Commission suggested AV + .

5 New Zealand’s five-option TRS ballot was on the *status quo*, FPP, or AMS, AV, MMP or PR-STV, (Emerson, 2002, pp 119–20).

6 Slovenia chose a new electoral system on the basis of three options, but they held three majority votes, one on each, and all three were lost. *Ibid*.

6 Both supported AV.

7 Maybe the most popular option was indeed “devolution”. If a more accurate measure of social choice had been used, however, the conclusion would not have been in such doubt.

8 The IOC take a series of plurality votes, with the loser dropping out of the next round. All but the results of the last round are kept secret.

9 This assumes that everyone votes “sincerely” as opposed to “tactically”. And even when the question is dichotomous—as was, “which side of the road shall we drive on?”—there may be more than two ways of answering. Sweden posed this question in a 1955 referendum, with three options: “left”, “right” and “blank”.
4.1 plurality vote: but the winner may have only the biggest minority.\footnote{As an electoral system, it is called FPP; the “smallest largest minority” was in Papua New Guinea in 1992, when the winner got 6.3%, (IDEA, p 42).} In the voters’ profile shown, A would win because five people think it is the best, yet seven think it is the worst.

\begin{center}
\textbf{Table I}
\end{center}

\begin{center}
\textbf{A VOTERS’ PROFILE}
\end{center}

<table>
<thead>
<tr>
<th>Preferences</th>
<th>No of Voters</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>5</td>
</tr>
<tr>
<td>1st</td>
<td>A</td>
</tr>
<tr>
<td>2nd</td>
<td>B</td>
</tr>
<tr>
<td>3rd</td>
<td>C</td>
</tr>
</tbody>
</table>

4.2 two-round voting.\footnote{A form of TRS is used in French presidential elections. In 2002, this led to the anomalous situation in which, supposedly, M. Le Pen was the second most popular candidate whereas in fact, and but for the split Left vote, M. Justin deserved that accolade, (Maurice Salles, in Emerson, 2007, pp 107–8).} In the above profile, C wins the second round by 7 to 5.

4.3 approval voting: in a ballot of n-options, voters may “approve” of as many options as they wish. A voter may thus be tempted to cast only one “approval”… in which case, the procedure is little more than a plurality vote. In the above profile, if only 1st preferences are regarded as “approvals” the winner is A; whereas if both 1st and 2nd preferences are counted, the score is B-12, C-7, A-5, and B is the winner.

4.4 alternative vote:\footnote{Sometimes called STV or IRV, AV is used as in Australian elections.} In the above profile, B, arguably the most popular option because it is the 1st or 2nd preference of everybody, loses the first stage, and its votes are transferred to C which then wins the second stage. And the 2nd preferences of nine voters remain uncounted (see footnote 1).

\begin{center}
\textbf{Table II}
\end{center}

\begin{center}
\textbf{AN AV OR STV COUNT}
\end{center}

<table>
<thead>
<tr>
<th>Option</th>
<th>First stage</th>
<th>Second stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>B</td>
<td>3</td>
<td>-3</td>
</tr>
<tr>
<td>C</td>
<td>4</td>
<td>+3</td>
</tr>
</tbody>
</table>

5.0 In the following three systems, the voter may cast his/her preferences on all n-options:

5.1 In a BC, the voter’s \{1st-2nd-3rd-… preferences\} get \{(m, (m-1), (m-2)…\} points. The voter may again be tempted to cast only one preference, whereupon this methodology also deteriorates into a plurality count.\footnote{The BC is used in Slovenia for the election of the representatives of its ethnic minorities. It is also used in Kiribati.}

5.2 A Condorcet count: five voters prefer A to B, but seven prefer B to A, so A:B = 5:7; similarly, A:C = 5:7 and B:C = 8:4. Thus B wins two pairings, C one, and A zero, so the winner is B.

5.3 Condorcet suffers from the paradox, if one exists; a BC/MBC is susceptible to the irrelevant alternative. Nevertheless, of the above and other systems, “There are two defensible procedures for aggregating votes: the Condorcet rule and the Borda rule,” (Iain McLean and Neil Shepherd, 2004 –W11). Nothing, of course, is perfect—Arrow’s impossibility theorem—but as shown below, some procedures are better than others. Furthermore, “The BC is a unique method… to minimise the likelihood that a small group can successfully manipulate the outcome,” (Saari, 1995, p 14), and the MBC is even better.

\footnote{Some think that this is the original formula, as proposed by Jean-Charles de Borda in 1781 (Saari, 2008, p 197). Others are not so sure (Arrow, p 94).}

\footnote{In practice, as it were psychologically, the MBC actually encourages the voter to submit a full ballot (Emerson, 2007). Such is the evidence from a number of MBC votes.}
### Table III

**VOTING PROCEDURES IN DECISION-MAKING**

<table>
<thead>
<tr>
<th></th>
<th>CLOSED QUESTIONS</th>
<th>SEMI-OPEN QUESTIONS</th>
<th>OPEN QUESTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Count</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All prefs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>some prefs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st prefs</td>
<td>Weighted majority voting</td>
<td>Consociational majority voting</td>
<td>Norwey New Zealand referendums</td>
</tr>
<tr>
<td></td>
<td>Simple majority voting</td>
<td>Twin majority vote Switzerland referendums</td>
<td>Plurality Vote Puerto Rico referendum</td>
</tr>
<tr>
<td></td>
<td>1 of 2 options</td>
<td>1 of some options</td>
<td>1 or some of all options</td>
</tr>
<tr>
<td></td>
<td>1st preference only</td>
<td>preferential</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BINARY</td>
<td>MULTI-OPTIONAL</td>
<td></td>
</tr>
</tbody>
</table>

* = a series of closed questions.

VOTERS’ CHOICE →

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**Conclusion**

6.0 In an MBC, success depends upon, not only a large number of high preferences, but also a small number of low preferences. Thus the protagonist of any one option would be wise to talk to any erstwhile opponents, so to persuade them to cast, say, a 3rd preference rather than a 5th. And just as the threat of a majority vote may often antagonise,\(^{16}\) so, in contrast, the prospect of an MBC vote may well help to create a more inclusive milieu.

**References**


Emerson, Peter (Ed) 2007, *Designing an All-Inclusive Democracy*, Springer.


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\(^{16}\) “…prior to the 1983 and 1992 referenda, the debate became bitter and polarised,” Irish Government, p 126.
Memorandum by Professor Michael Gallagher, Professor of Comparative Politics, Department of Political Science, Trinity College Dublin

In this submission I offer some reflections, having conducted some research in this area, on some of the issues that the Committee is considering.

In summary, I suggest:

(a) in principle one could make a case either that the referendum is an essential component of a truly democratic state, or, conversely, that the referendum is inherently destructive to coherent government and perhaps to democracy itself. The evidence does not support either of these extreme claims;

(b) while there would be major difficulties in accommodating the citizens' initiative within the UK’s system of parliamentary democracy, the referendum could much more easily be accommodated;

(c) it is certainly possible to argue reasonably that certain issues should, and others should not, be the subjects of referendums. Complications, though not insuperable ones, arise in defining these issues in the UK given the absence of a codified constitution;

(d) threshold and turnout requirements are in most cases unnecessary and undesirable, though a case can be made for some combination of the two;

(e) there is little to be said for a referendum that is designated as merely “advisory”; and

(f) the history of the referendum experience of one particular country, Ireland, is on the whole supportive of the claim that the referendum can enhance representative democracy.

I will address a number of the specific questions posed in the Call for Evidence.

QUESTION 1

What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

These are fairly well rehearsed so I will refrain from relaying conventional wisdom at length.

On the positive side, the referendum can be seen to enhance democracy by increasing opportunities to participate, educating the voters by enabling them to decide on issues directly, and enhancing the legitimacy of decisions made in this manner compared with those made by Parliament. On the negative side, it is accused of weakening representative institutions of government, disrupting the process of government, and allowing majorities to override the rights of minorities.

There is a certain amount of rhetoric and hyperbole in both of these cases, and the most sweeping statements about the supposed transcendent benefits or disastrous consequences of the referendum are difficult to sustain on the basis of the evidence. Democratic societies can function perfectly well with the referendum or without it, and within the USA some states, especially in the south-west, use the referendum extensively while others do not use it at all, without any obvious difference in the “level of democracy” enjoyed by their inhabitants. Such countries as Belgium, Finland, Germany, India, Japan, the Netherlands, the USA and indeed the United Kingdom are fully functioning democracies despite making little or no use of the referendum. On the other hand, so are Europe’s most extensive users of the referendum, such as Switzerland, Italy, Ireland and France, and we cannot point to any case where the referendum has led to the collapse of a democratic system.

If used sparingly (that is, as a supplement to representative democracy, rather than so extensively that we could speak of a “referendum democracy” or of “direct democracy”, a straw man erected by some of those who oppose referendums in principle) and in a regulated fashion, the referendum can enhance rather than subvert representative democracy.

QUESTION 3

How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

The distinction between two states of affairs is important:

(i) a referendum can take place only after Parliament has passed a bill or motion to that effect, specifying the precise proposal to be voted on; and

(ii) extra-parliamentary actors, such as a specified number of electors, can promote an initiative on which the people vote.

Broadly speaking, where the situation is as in (i), there is no reason to doubt that parliamentary democracy and the referendum can co-exist and the referendum can reasonably be seen as enhancing representative democracy rather than challenging or threatening it. Where the initiative exists (situation (iii)) the implications for
parliament are much greater, and the potential for conflict and for a fundamental alteration to the existing practices of representative democracy is much higher. In short, introducing provision for the initiative is more “high risk”, and few countries have done this, Italy and Switzerland being the best known examples. I imagine that the Committee is unlikely to recommend the introduction of the initiative, either concerning the introduction of new proposals or the rejection of recently-passed legislation, as in Switzerland, or on the abnegation of existing legislation no matter how old, as in Italy. Consequently, I shall confine most of my comments to the first situation outlined above.

In theory, even the existence of referendums in such regulated circumstances might be thought to pose a threat to representative democracy. The essence of the argument is that voters are less informed, and less cognisant of the need to respect minority rights, than legislators (“legislators may be ignorant, but not so ignorant as the masses”, as Lord Bryce summed up this line of thought over a century ago). In reality, there is no evidence that the quality of democracy is weakened in the extensive list of democracies that hold referendums under these circumstances. Electorates can make ill-considered decisions, but so can legislatures, and if the arguments highlighting the supposed incompetence of voters to decide on specific policy issues are pushed too far they can become an argument against allowing people to vote at elections.

Questions 4, 5

Is it possible or desirable to define which issues should be subject to a referendum?

Should “constitutional issues” be subject to a referendum? If so, how should “constitutional issues” be defined?

Analytically it certainly seems that some issues are generally deemed more suitable than others for resolution by referendum. There is a clear logic in putting to a referendum:

(a) fundamental questions concerning sovereignty or a major constitutional settlement, especially if they concern steps that would be completely or virtually irreversible once enacted; and

(b) important issues that cut across party lines and upon which the electorate cannot reasonably be said to have delivered a verdict at a parliamentary election.

Conversely, it does not make sense to put to a referendum either:

(a) questions that relate closely to the left–right spectrum on which the party system is based, since it is reasonable to take the position that a general election broadly indicates the electorate’s decision here; and

(b) issues of secondary importance.

While this makes sense in theory, defining the relevant terms is not straightforward. This applies a fortiori in the UK given the absence of a single document entitled “The Constitution” which, if it existed, could specify the issues on which a referendum could (or must) be held. The absence of any such document constraining the parliamentary majority (i.e. the government) of the day might well mean that in practice the decision as to whether a particular issue is to be put to a referendum is likely to be influenced by political considerations. This is something that has bedevilled the history of referendums in France, for example, resulting in a perception that the government of the day there chooses to hold or not to hold a referendum on a particular issue depending mainly on where it sees its own partisan advantage to lie.

Perhaps with sufficient thought a legal framework could be devised that would give strong guidelines as to the issues on which a referendum is ruled out, is possible, or is mandatory. The government of the day would still inevitably have freedom through its parliamentary majority to interpret this legislation to its own advantage in any particular case, or to amend the legislation, giving something of an ad hoc character to every referendum, but the risk of losing support through being seen to violate the “spirit” of the rules might constrain governments to some extent. The Danish rule that delegation of sovereignty to international authorities requires a referendum unless there is a five-sixths majority in Parliament, or some variant of this rule, would also be worth considering.
QUESTION 8

What comment would you make on key components of a referendum campaign, such as:

(a) Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;

I do not see any justification for a requirement that a super-majority of more than 50% should be required for a proposal to be deemed to have received the support of the people.

A turnout requirement is, in my opinion, definitely a bad idea, because this creates a dilemma for opponents of a proposal, who may be unsure whether to turn out and vote “No” or not to vote at all. Such a requirement means that a voter who takes the trouble to vote “No” to a proposal that receives majority support from voters may inadvertently be helping to validate the poll by raising the turnout level.

Such turnout requirements do exist in some countries—for example, in Italy a “Yes” vote is not valid unless turnout exceeds 50%. This leads to the anomalous situation where if 49% of electors turn out and vote “Yes” while absolutely no-one votes “No”, the proposal is deemed not to be approved, yet if 26% of the electorate turn out to vote “Yes” and 25% vote “No”, it is carried, even though quite evidently support is much greater in the first case than in the second.

A requirement that avoids these difficulties and is employed in Hungary is that the proposal for change must receive a majority of the votes cast, and the Yes vote must amount to at least 25% of the electorate. This ensures that proposals cannot be passed unless they generate significant support, but at the same time removes from opponents of a proposal both the uncertainty as to whether a negative vote could have the unintended effect of validating the result, and the power to thwart the majority’s preferences by simply not voting.

(b) the wording of the referendum question (including the appropriateness of multi-option questions);

A referendum question should be framed in such a way that the answer is unambiguous. Multi-option referendums carry the risk that none of the options receives a majority, leaving it open to debate and interpretation as to what the electorate has said. If no one option receives a majority, some might interpret this as a choice of the one that received most votes, yet it is possible that that option is the “Condorcet loser”, i.e. the option that would be defeated by any other in a head-to-head contest. Hence a choice between two options—in essence, asking the electorate to give a “Yes” or “No” answer to a question as to whether it supports a specific proposed change—is preferable.

This also implies that the questions that should be put to voters are precisely those that can be answered with a clear “Yes” or “No”. It makes more sense to put to the electorate a proposal put together by political actors which is then referred to the people for their verdict, rather than to bring in the electorate by referendum at an earlier stage in an attempt to define the options.

(c) the design of the ballot paper;

(d) whether there should be formal, constitutional triggers for referendums;

That would be the ideal, i.e. a referendum could not be triggered simply by a possibly opportunistic decision made by the government of the day. As discussed re Qns 4 and 5 above, while the problems of institutional design involved in achieving this are not insuperable, they would require some thought.

(e) whether a referendum should be indicative or binding;

Binding, in my opinion. An indicative referendum is little more than an expensive opinion poll. If the electorate knows that the result is not binding, then there is an obvious temptation either not to vote or to use the referendum to express a view on something other than the issue at stake, such as the current performance of the incumbent government.

Given the UK’s absence of a codified constitution, it may be impossible to treat a referendum as being legally or constitutionally binding, but it could certainly be politically binding. That was the case with the UK’s only national referendum, for example; the 1975 referendum on whether the UK should leave the EC could not be formally binding, in that Parliament could not have prevented from disregarding the decision of the people had it chosen to do so, but there was never any question of that happening. A number of other countries, including Denmark, Finland, Italy, Norway and Sweden have held referendums that, while formally only advisory, have been effectively binding.
(f) whether a referendum should ask broad questions of principle, or refer to specific legislation;
As indicated at 8(b) above, a referendum makes sense only if it carries a specific question to which voters may respond with a “Yes” or a “No”. Asking about broad principles (“Should the membership of the upper chamber be broadened?” “Should the Scottish parliament have greater powers?”) has the effect of turning the referendum into an expensive opinion poll, and leaves huge scope for argument as to what specific proposals are required by, or are compatible with, the broad principles that the electorate has said that it supports.

(g) whether a referendum should precede or follow statutory enactment;
In principle it would be more logical for Parliament to receive the approval of the electorate before enacting a piece of legislation. That said, there is provision in some countries (such as Switzerland) for a bill passed by Parliament to enter a short state of suspension, typically three months or so, pending the outcome of a referendum. Provided the people are asked to vote on something specific, as opposed to a broad principle, the precise sequencing does not seem to be crucial.

(h) campaigning organisations and the funding of campaigns;

(i) Public information campaigns and media coverage;

(j) Party political activity;

(k) whether referendums should coincide with other elections or not;
There are advantages and disadvantages in holding referendums on the same day as other elections, or in holding more than one referendum on the same day. On the plus side, this is likely to increase turnout compared with the result of holding each contest on a separate day. On the minus side, there is a risk that the, or a, referendum issue will be submerged by what voters see as a more important contest.
In practice, many referendums around the world have taken place on the same day as an election or another referendum, and voters seem able to distinguish the two contests.

(l) the strengths and weaknesses of in-person, postal or electronic forms of voting.

QUESTION 9

How does the referendum relate to other tools such as citizens’ initiatives? Should citizens be able to trigger retrospective referendums?
As noted above in answer to Q3, provision for the initiative is a step further—probably several steps further—than introducing provision for the referendum. The initiative could be presented as a device that empowers citizens, but critics would be more likely to see it as empowering well organised lobbies who are able, if necessary by employing commercial signature-gathering organisations as in California, to obtain the requisite number of signatures.

Retrospective referendums would be another adventurous option; even Switzerland does not employ this device. They exist in Italy, where a specified number of citizens can launch an initiative to strike down or amend any piece of legislation, no matter how old, which enables citizens or interest groups to launch “random shocks” against the political system. I very much doubt whether this option is under serious consideration in the UK, and nor, do I imagine, would many people recommend that it should be.

QUESTION 10

How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?
It is difficult to summarise worldwide experience of the referendum in a paragraph or two, but I believe that the evidence supports the view that the referendum (as opposed to the initiative) is perfectly compatible with, and indeed enhances, representative democracy.

Since the Constitution Committee may be receiving many submissions that evaluate worldwide experience or experience in particular countries, I will briefly discuss Ireland’s experience with the referendum.

Ireland has a written constitution, dating from 1937, and this can be changed only by referendum. The referendum, then, is intrinsically tied to constitutional change. If a particular step requires an amendment to the constitution, then there must be a referendum; if it does not require an amendment to the constitution, then there is no referendum. The question of whether there should be a referendum is thus taken out of the hands
of political actors; while they have discretion as to whether to try to bring about some change (e.g. the legalisation of divorce in 1995), they have no discretion as to whether there should be a referendum on the issue once it has been decided to go ahead. As already noted re QQ 4 and 5 above, there is an obvious contrast here with the UK given that the UK does not possess a document called “The Constitution”.

There is surprisingly little debate in Ireland about the merits of the referendum as a decision-making device, which could be taken as an indication that it does not give dissatisfaction, or that it is taken for granted as an unmoveable part of the institutional furniture. The last time there was a sustained debate on the subject appears to have been in 1928, when the government of the day used its parliamentary majority to remove provision for the initiative from the 1922 constitution, despite vehement protests from the then main opposition party (which took a rather different view once it came to government).

Ireland held 31 referendums in the period 1937–2009, all tied to constitutional change. The direct involvement of the people in deciding issues such as abortion, divorce, and constitutional recognition of Northern Ireland may have resulted in a slower pace of change than would have occurred had parliament alone been able to make these decisions, but it has conferred much greater legitimacy and finality upon these decisions once they were taken. A good example is the legalisation of divorce, a long-running issue in Irish politics from the 1960s to the 1990s, which was approved very narrowly in a 1995 referendum and which then ceased overnight to be a political issue; opponents immediately folded their tents following this decision in a way that they would have been very unlikely to do had the decision been made by Parliament alone.

In recent years the issue most commonly put to the people by referendum has been Ireland’s relationship with the European Union, an issue that has been responsible for five of the most recent eleven referendums to take place (1998–2009). As is well known, Ireland was one of the few EU member states to decide by referendum on the Nice Treaty, and was the only EU member state to hold a referendum on the Lisbon Treaty. The initial No vote on both treaties led to major problems for Irish governments within the EU, and after an initial period of uncertainty on each occasion the government eventually re-ran the referendums, having achieved clarifications on some points that seemed to underlie the opposition to the treaty, and on the second occasion each time the treaty was ratified by a comfortable majority, with the “Yes” vote exceeding 60%.

There is undoubtedly a feeling among some commentators in Ireland that treaties of this nature are too complex to be suitable objects of referendums, and that the requirement that there should be a referendum on each EU treaty (a requirement resulting from a 1987 Supreme Court judgment that raised eyebrows at the time) is an encumbrance to Irish governments when it comes to taking part in the European project. Others maintain that when questions of sovereignty arise it is right that the people should have the final say, though the fact that the other 26 member states did not require a referendum on the Lisbon Treaty raises the question of whether every such delegation of sovereignty, no matter how minor, should require a referendum. However, there are no proposals to change the requirement that a referendum be needed for constitutional change, if only for the simple reason that any such change would itself require approval from the people in a referendum.

Overall, an evaluation of Irish experience of the referendum would be more supportive of the institution than critical of it. Partly because the question of whether or not it should be used to resolve a particular question is determined by the constitution and not by political actors, the institution has not become discredited by partisan deployment. Even though the number of referendums is high by European standards, referendums are still sufficiently rare (fewer than one every two years since 1937) that the electorate does not appear to be jaded or resentful. While turnout is low at what are seen as unimportant referendums (for example, in a 1996 referendum on changing the bail laws, turnout was only 29%), when the issue is seen as important it is not much less than at a general election (it was 58% in the second referendum on the Lisbon Treaty, held in October 2009). Every country is different and has its own conventions, practices and traditions, but comparative experience strengthens the basis for assessments about how an institution will operate in a new setting.

22 December 2009

Memorandum by the Institute of Welsh Affairs (IWA)

Summary
The Institute of Welsh Affairs would be pleased to expand on the points made in this submission, which are summarised below:

1. It is the view of the IWA that the definition of what are the constitutional issues which justify a referendum has become grossly over-extended. In particular, we do not believe that the changes proposed to the legislative powers of the National Assembly, as set out in the Government of Wales Act 2006, are of sufficient significance to merit a referendum.
2. We would argue that, given the inconsistencies of practice across the United Kingdom, it is time to set in legislation what types of constitutional innovation do justify a referendum. We suggest it should only be major issues of democratic principle.

3. It is anomalous that the standard framework for referendums enacted in the Political Parties, Elections and Referendums Act 2000 (PPERA) should only apply to referendums authorised by Westminster statute. We believe that the same rules should apply in all referendums across the United Kingdom.

4. We believe that referendums should not be treated as a quick fix for the perceived problems of local government. Improving the effectiveness of representative democracy could be better achieved by giving greater powers to local councils.

Geraint Talfan Davies
IWA Chair

John Osmond
IWA Director

Glyn Mathias
Wales Electoral Commissioner 2001–08

Introduction

1.1 The Institute of Welsh Affairs published a report on referendums prior to the referendum on devolution for Wales in 1997. Its recommendations included, inter alia, the establishment of a referendum commission and that the polls in Scotland and Wales be held on separate dates.

1.2 Since then, both the political and legislative landscape has significantly changed. The National Assembly for Wales was established in 1999; the Political Parties, Elections and Referendums Act 2000 (PPERA) created a standard framework for the conduct of referendums, and the passage of the Government of Wales Act 2006 has established the conditions under which the National Assembly may acquire increased law-making powers and for a referendum to take place before those further powers can be granted.

Referendums on Constitutional Issues

2.1 Over the last four decades, the idea of referendums has been superimposed on the system of representative democracy that we have in the United Kingdom. The theoretical rationale for such referendums as a constitutional tool has been that the issue at stake would so change the nature of that representative democracy that the people should be asked directly if that is what they want. The practical reasoning, however, has often been more to do with political calculation.

2.2 We would argue that, as a result, the definition of what are the constitutional issues which justify a referendum has been grossly over-extended. In particular, it is our view that the changes proposed to the legislative powers of the National Assembly, as set out in the Government of Wales Act 2006, are not sufficiently significant to merit a second referendum in little more than a decade. The Assembly already has some powers of primary legislation, and the proposed change would serve only to change the way in which those powers are acquired and operated. This is not a proposal which should require a referendum. It is going to be immensely difficult to formulate a referendum question which accurately conveys this narrow issue to the voters. How a question is formulated can heavily influence the outcome, as the All Wales Convention noted in its recent report.

2.3 We entirely understand that the requirement for a referendum is written into the Government of Wales Act 2006 and there can be no going back on that. It would be impossible to rewrite recent political history and cancel the requirement for a referendum. However, it should act as a warning that the threshold of what is considered a constitutional issue demanding a referendum is now too low.

2.4 As a further example of that threshold becoming progressively lower, we would cite a recent speech by the Justice Secretary, Jack Straw on the arguments for and against a separate Welsh jurisdiction arising from an increasing legislative competence for the National Assembly. The Justice Secretary was opposed to such a development, and he argued that it was such a large and ambitious project that there “would be an expectation for it to be approved by a referendum”. It defies belief that such a technical issue could be construed as being of sufficient constitutional importance to merit a referendum.

2.5 A further concern is the lack of consistency by the Westminster government on the issue. The Calman Commission has proposed significant alterations to the powers and functions of the Scottish Parliament, including new powers to raise taxes. These changes are arguably of greater importance than what is proposed
for the National Assembly for Wales, but, so far as we know, it is not currently being suggested that they should be subject to a referendum.

2.6 It would be difficult to try to anticipate the politics of future generations, but we feel it is necessary to attempt to define what types of constitutional issues might merit a referendum. We would advocate that PPERA be amended to include a clause providing such a broad definition. It could be along the lines that any referendum on a constitutional change should apply only to truly major issues of democratic principle—change that alters fundamentally the nature of the state. At the very least, this might provide a benchmark against which the demand for a referendum could be judged.

2.7 Ultimately, what constitutes a major change in these terms will always be a matter for political judgment. However, it is likely that such a change will either involve a basic alteration of the structure of the state’s institutions, such as occurred when Britain entered the Common Market in 1973, or the creation of completely new institutions, as obtained when the devolved institutions were proposed in Wales and Scotland in 1997. When set against these innovations it can be seen that changing the internal arrangements of the European Union or the further development of the devolved institutions are of a lesser order of magnitude. Such evolutionary change of existing structures cannot be said to be a point of principle to the same extent as presented by completely new ventures. Evolutionary change is a constant.

APPLICATION OF REFERENDUM RULES

3.1 The introduction of a standard framework for referendums in PPERA applies only to referendums authorised in statutes enacted at Westminster. Referendums arising from legislation in the National Assembly or, for that matter, in the Scottish Parliament, are not subject to PPERA rules. There is a presumption here that referendums not arising from Westminster statute are somehow not as important. This is a presumption which we would refute.

3.2 Under the terms of the Government of Wales Act, the Welsh Assembly Government may hold a poll “for the purpose of ascertaining the views of those polled about whether or how any of the functions of the Welsh ministers . . . should be exercised”. It is left to Welsh ministers to make provision, by order, for any such poll. The rules governing the referendum or poll could therefore be decided by a government minister commanding a relevant majority in the Assembly. It might well be the case that such a minister would not be impartial as to the outcome of that poll, and we would prefer to make any referendum authorised by the National Assembly subject to the same PPERA rules as referendums authorised by Westminster.

3.3 In Scotland the SNP government has proposed a referendum on Scottish independence in 2010. Because it will be based in Scottish, not Westminster, legislation, the PPERA rules will not apply. We understand that the Scottish government is therefore proposing to legislate for a separate Scottish Referendum Commission and a separate system of referendum rules, which may or may not replicate the rules which apply at UK level. The issue of independence for Scotland has consequences for the whole of the UK, and it does therefore seem anomalous that a separate Scottish set of rules needs to be created in order to run that referendum. In Wales, the proposed referendum on further powers for the Assembly will be subject to PPERA rules, because it is based in an Act of the Westminster Parliament. Our 1997 report, anticipating the formation of the Electoral Commission, recommended that, at the very least, such a Commission “should ensure that the same rules apply in all referendums”.

COMMUNITY POLLS

4.1 There is an honourable tradition in Wales of settling divisive issues by local referendums or polls. The series of polls held on a county by county basis from the 1960s onwards on the issue of Sunday licensing are a case in point. We would argue that provision for such polling should only be made where an issue is so divisive that locally elected representatives cannot resolve it. We would not advocate a system whereby citizens can trigger referendums themselves. That would risk further undermining the role of democratically elected bodies.

4.2 Over the last decade, Westminster legislation has encouraged the holding of mayoral referendums with the stated aim of reinvigorating local government. One such poll was held in Ceredigion in 2004. In fact, however, the poll was called because of discontent over the local authority’s housing plan rather than the structure of the council. The turnout of 36% was higher than in most equivalent polls in England, but still fell short of what could be described as public enthusiasm. It is doubtful whether the structure of local government is a suitable issue for decision by public vote. We should seek to improve the effectiveness of representative democracy by restoring powers to local councils and considering more seriously proposals for local income tax or the introduction of proportional representation. Referendums should not be and would not be a quick fix.
4.3 The other feature of community polls is the absence of any standard framework of rules. In community polls, there is no provision, for instance, for postal voting and no provision to ensure the question is fair. Whereas it would not be appropriate to apply the full panoply of rules which apply to national referendums, there should be some basic regulations to ensure a level-playing field.

23 December 2009

Memorandum by Caroline Morris, Senior Research Fellow, Centre of British Constitutional Law and History, Department of Law, King’s College London

1.1. Member of the International Advisory Committee, IRI-Asia (Initiative and Referendum Institute).

1.2 I make this submission in my personal capacity. My views should not be taken to have the endorsement of IRI-Asia or of King’s College London.

2. Summary of Evidence

2.1 In a democracy, referendums are primarily employed to legitimate or substitute for government decisions.

2.2 Referendums should therefore be binding on the government.

2.3 If binding, the question to go forward must be carefully worded and of an appropriate nature for public decision of this sort.

2.4 In particular, referendums should be held only on fundamental constitutional issues, with appropriate protections for fundamental human rights and those of minorities.

3. Evidence

3.1 The role of the referendum

3.1.1 The role of the referendum in a constitution is not always easy to pin down. Referendums may serve different purposes at different times. However, it is generally agreed in the academic literature that referendums are a “first-best” form of democracy for which representative democracy (the “second-best” form) attempts to substitute. This view is mostly premised on the importance of popular sovereignty and the consequent higher legitimacy that can be attached to decisions made by, or subsequent to, a referendum. Other goals served by referendums include the greater opportunities for participating in government by the people (and thus a possible decrease in political alienation and malaise) and providing a restraint on the powers of government.

3.1.2 Despite these goals, referendums are not widely employed as a form of government. This is because, in my opinion, referendums are not well suited for determining complex questions of law and/or policy. This conclusion is borne out by the New Zealand experience of citizens’ initiated referendums, to which I will return later. Referendums also carry with them the potential for manipulation of a government’s popular standing, the abdication of government decision-making on controversial or difficult issues, and the danger that minority rights may be overridden by populist sentiment.

3.1.3 They also suffer from logistical difficulties; the practicalities of holding a referendum, the cost, the appropriate timing (separately or with a local or parliamentary election) and the issue of how to respond to and/or implement the decision can steer governments away from their use.

3.2 Whether referendums should be indicative or binding

3.2.1 New Zealand has legislated for indicative referendums, to be held on any topic (with a few restrictions) proposed by any individual and supported to go forward to a referendum by at least 10% of eligible electors.

3.2.2 I do not support this approach. It has essentially led to the referendum becoming an expensive form of opinion poll, and the indicative nature of the result has led to frustrations with the government response. This increases the likelihood of political disengagement. The open-ended nature of the questions which may go forward has created a further set of interpretation difficulties, perpetuating the problem of arriving at a suitable response.

3.2.3 However, where referendums are made binding on government, much more care needs to be taken with the wording of the question to be put, and the appropriate sort of question that may be put.
3.3 The appropriate subject for a referendum

3.3.1 In a Westminster parliamentary democracy based on parliamentary sovereignty, a referendum may be held on any topic for which the empowering legislation provides. If the empowering legislation is general in form, there may be no restrictions, limited restrictions, or the holding of a referendum may be restricted to certain clearly delineated topics. I am of the opinion that this latter option is to be preferred.

3.3.2 The New Zealand Citizens’ Initiated Referenda Act 1993 chose the middle option: referendums may be held on any topic, other than:

   (i) calls for an inquiry into the way a previous CIR Act referendum was conducted or an electoral petition under the Electoral Act 1993; and

   (ii) those questions which have already been the subject of a referendum “of like effect” under the CIR Act.

3.3.3 This open-ended approach has led to a wide variety of questions being proposed for referendum, of which four have gathered the required number of signatures for a referendum to be held under the CIR Act. The questions are:

   — Should the number of professional fire-fighters employed full-time in the New Zealand Fire Service be reduced below the number employed in 1 January 1995? (1995)
     Result: 12% Yes 88% No

   — Should the size of the House of Representatives be reduced from 120 members to 99 members? (1999)
     Result: 81.5% Yes 19.5% No

   — Should there be a reform of our Justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences? (1999)
     Result: 92% Yes 8% No

   — Should a smack as part of good parental correction be a criminal offence in New Zealand? (2009)
     Result: 12% Yes 87% No

3.3.4 The first question came out of an industrial dispute, the second was a response to the recent increase in MPs following New Zealand’s adoption of the Mixed Member Proportional Representation electoral system, the third followed a brutal attack on the proposer’s elderly mother, and the most recent question followed the abolition of the defence of parental reasonable force in the Crimes Act.

3.3.5 These sorts of questions (other than the question relating to the size of the legislature) are unsuitable as the subject of a referendum. Behind each question lies either an array of complex and involved policy decisions involving the careful weighing of different values and social priorities or a private matter rather than national public debate, which the public was not best placed to decide. These matters are not suitable for resolution with a simple “yes” or “no”.

3.3.6 To avoid this sort of scenario, consideration should be given to adopting one of two options for circumscribing the subject of a referendum. Obviously where legislation is drafted to provide for a single referendum question this would not be necessary, but if general legislation is adopted, some topic restrictions should be adopted.

The negative model

3.3.7 Following the model of certain US jurisdictions, certain subjects may be made off-limits e.g. matters of taxation, defence, foreign affairs, the independence of the judiciary and constitutional rights. Likewise, the Venice Commission, in its Guidelines for Constitutional Referendums at National Level suggests that fundamental human rights, most notably “freedom of expression, freedom of assembly, and freedom of association” should not be vulnerable to the referendum process. There should also be a prohibition on questions that are of dubious value, such as vexatious, frivolous, scandalous, defamatory or indecent questions.

The positive model

3.3.8 The alternative is to adopt a positive model, specifying in advance which subjects may be the subject of a referendum. In my opinion, the most appropriate topics are those which directly affect the constitutional make-up and powers of a state, ie the “constitutional issues” of the terms of reference. The 1975 EC membership referendum is an excellent example of the proper use of a referendum. Other appropriate topics would be a change to the electoral system or government (eg the adoption of a new voting system or the abolition of the House of Lords), devolved government, or changes to the sovereign powers of a state. Any
alteration to the democratic fundamentals of a state should have the endorsement of its people. This aligns with the foremost rationale for the holding of referendums. This is something I believe was lost sight of when the NZ CIR Act was drafted.

3.3.9 The protection of rights such as those contained in the Human Rights Act 1998 is somewhat more controversial but still possible.

3.4 The wording of the referendum question

3.4.1 The New Zealand experience has shown this to be an interpretative minefield. Referendum questions should be clear, open to only one interpretation (e.g. what is a “smack”? what is “hard labour”?) and not be leading. To achieve this goal, questions should be carefully scrutinized before the enabling legislation is drafted. In New Zealand this function is performed by the Clerk of the House of Representatives. However, experience shows that the Clerk has been somewhat shy to engage with the proposed question wording. This may well stem from early litigation over the Clerk’s actions over the re-wording of a question about battery hen egg production.

3.4.2 There should also be a requirement that questions should address only one subject. The New Zealand legislation does contain a provision that questions should be capable of only one answer, but it does not seem to have been interpreted as allowing for the imposition of a “single subject” rule.

3.4.3 For example, the 1999 criminal justice question can be broken down into five possible single questions. A “yes” vote for this sort of question is impossible to interpret: does the voter agree with the entire proposition, or only one aspect of it?

3.4.4 I do not believe that voters are unable to follow and vote on a series of questions. For example, in the 1992 binding referendum on electoral reform, New Zealand voters were faced with a two-part question. In Part A they were asked whether they wished to change the electoral system. In Part B (regardless of their answer in Part A) voters were then asked to indicate their preference for one of four alternatives to the then First-Past-the-Post system. There does not appear to be any evidence that voters were confused by this format nor that it prevented them from expressing their views. In Part A, 1,271,284 people voted, and 92% of those voters then went on to vote in Part B (1,121,261 people).

3.5 Conclusion

3.5.1 Referendums should be employed as a form of decision-making only where the usual channels of representative government are seen to be inappropriate.

3.5.2 Because of this, referendums should be held infrequently, and when they are held, the result should be binding on the government. Frequent resort to referendums, or the use of indicative referendums, should be avoided.

3.5.3 The binding nature of any referendum held necessitates careful attention being paid to the wording of the question which is to be put.

31 December 2009

Memorandum by Dr Eoin O’Malley, School of Law and Government, Dublin City University

Referendums: Learning from the Irish Experience

Ireland is a useful comparator for the UK on this subject because it has much the same institutional set up and quite similar political culture, both inherited from the British. One fundamental difference is the existence of a codified constitution which is quite rigid requiring a referendum of the people to change it and it is for this reason that Ireland is a country with more experience of referendums than most others.

1. The referendum as a tool can give a good deal of democratic weight to a decision, and allows the people and political class to focus on an issue in quite a concentrated way. This enables the citizens of a country to learn quite deeply about the topic. At a time when many are extolling the virtues of deliberative democracy, it might then be thought to produce better decisions. That said, referendum campaigns can become dominated by non-issues when the actual subject of the referendum is not very accessible—for instance abortion and conscription became major issues in the referendums on the Lisbon Treaty.

2. The major issue of how a referendum would work in the UK is to do with what the referendum proposes to do. In Ireland it is clearly used just to change the constitution, which is somewhat inefficient when there are minor housekeeping changes requiring very expensive campaigns, often with little public or political engagement. It is also arguable that some issues, such as EU Treaties, are too complex for ordinary people to understand and instead other issues that people can understand are projected on to the actual question. Other
issues are so technical in nature—an example might be the referendum on the confidentiality of cabinet discussions.

3. As the UK has no codified constitution, or at least no single document it can call the constitution, this is not going to be the route to referendums. But one could argue that major constitutional changes, such as the decision to join the EEC should require the assent of the people and that this would give democratic weight and some permanence to such a decision. The Irish Supreme Court has ruled that any Treaty of the EU also has constitutional force and requires constitutional amendment which at least engages the Irish people in these subjects more than in most other countries. The question arises, who, in the UK could decide what is a major constitutional issue? If it were the government, this would make a mockery of the constitution. Perhaps Parliament could with a statutorily-guaranteed free vote.

4. The question of whether it supplants parliamentary sovereignty is important, but arguably for certain issues that are of such importance, one would not want to see Parliament able to change the constitution very easily—for instance the proposal to abolish the post of Lord Chancellor. But does one really want or expect that ordinary citizens are interested or qualified to have informed opinions on this type of subject? A better solution might be to look at the Swedish system where constitutional changes are made by legislation at both sides of a general election, so at least two parliaments have acceded to the changes and the public have the ability to make it an election issue if they so want.

5. As well as constitutional issues, in Ireland moral issues have become “constitutional” issues. Abortion, especially has become a major issue in the courts, mainly because a clause in the constitution was open to differing interpretations. As such the law on abortion in Ireland is given to us by the courts rather than the Oireachtas (Parliament). The courts have not overtly attempted to take on this role, it has been pushed on them by a legislature unwilling to legislate and the pretty horrific cases that it has asked to adjudicate on. At times politicians are happy to push out issues to referendum, especially where there are splits within parties, this can reduce the pressures of fissure—this I suspect was one of the reasons for the referendum on EEC membership in the UK. Sometimes referendums are of purely optical value, so next year (2010) Ireland will probably have a referendum on enshrining children’s rights with constitutional guarantee, which will probably be legally valueless as the courts already regard children as individuals with rights independent of their parents, but it will show that the government “cares”, and is willing to act on the horrific revelations of the systematic abuse sanctioned by the Catholic Church in Ireland on children in its care—at €3 million it is an expensive PR exercise.

6. In Ireland referendums are conducted under rules resulting from a number of legal challenges. So government cannot use public funds to campaign for a specific result, which on the whole seems fair, and does force political parties to campaign and use their own resources, therefore minimising the likelihood of spurious referendums. Ireland, again as a result of legal rulings, has an independent Referendum Commission which non-partisan information on the subject of the referendum. It is argued that very often this information is so banal it depresses turnout and the Commission does not engage in the veracity of the points made in the course of the campaign, making it largely irrelevant. Furthermore broadcasting rules require equal time be given to each side which leads to some odd situations where unelected interest groups who have positions contrary to the political parties get inordinate amounts of air-time. One could of course argue that this at least ensures that there is a healthy contestability of views. But overall it seems that most agree this is not a model one would want to adopt.

7. Ireland has no threshold requirement for referendums affecting the constitution (there are turnout requirements for other types of referendum, but these have never taken place) and a simple majority is required. Turnout is seen to have been a determining factor in the defeat of the Nice and Lisbon Treaties in 2001 and 2008 respectively—both subsequently overturned by a second referendum with significantly higher turnout. As such it would appear that turnout is important, as a low turnout may indicate that only small elements of the electorate, with views that do not accord with the rest of the population have engaged. If one includes a turnout requirement it can also lead to deliberate intention to defeat a proposal that might otherwise be passed. It is also instructive that the weather on the day of a divorce referendum in 1995 might have had an impact as it rained in the more conservative west, thus depressing turnout there, whereas it was fine on the more liberal east coast.

8. Referendum wording tends to indicate two options, accepting or rejecting a proposal and as such give a good deal of power to the group writing that proposal—it is arguable that the 1995 divorce referendum was passed only because the government using opinion poll evidence had submitted a wording that it estimated could be passed—anything more liberal might have been rejected. Therefore a great deal of power would be given to those framing the questions (even informally). For instance, when there was a discussion of having a referendum on the EU’s Constitutional Treaty in the UK, the then prime minister, Tony Blair, suggested that...
the referendum would be about whether Britain wanted to be in Europe or out of it, thus framing the referendum about Britain’s membership of the EU rather than just its accession to the Treaty.

9. Multi-option questions might enable to one draw a more accurate picture of what the electorate actually wants—if indeed we feel that the electorate wants something coherent, i.e. that there is a “will of the people” rather than a collection of “wills”. It might be cheaper and easier to commission an opinion poll on the subject, and I suspect this is frequently employed by government considering major legislative changes already. The argument in favour of the referendum is that people might think more deeply when they are being asked to go out and vote rather than been asked a question on their doorstep by a nice lady from Mori. This is why it is important that any referendum should be binding, otherwise the whole point of it is cast aside. Again one needs to be careful as if you decide to ask questions on a number of aspects of a certain issue, one might get contradictory results—for example if asked two questions on abortion, one on whether to allow it or not and a second as to what stage in pregnancy it should be allowed might yield a result that the people want to ban abortion in all circumstances and to allow it only before 16 weeks of pregnancy. One can also see where voters would support proposals to extend health care rights to all and reduce taxation. It might then be useful to ask a single question on a broad principle. But the question of what legislation will be enacted following a referendum is important, as if the legislation is not on offer, voters are essentially being asked to vote in the dark—as frequently happens on abortion referendums in Ireland.

10. Overall the experience of the referendum in Ireland points to a healthy democratic legitimacy and engagement with the constitution as a document. But there have been some problems which should not be repeated. The rigidity of the Irish constitution means that some legitimate attempts to steer public policy in one direction or another have been thwarted or not even undertaken because of the potential difficulties posed by holding a referendum on an awkward subject that would not necessarily be easy to sell to the people.

16 December 2009

Memorandum by Mrs Anne Palmer

1. What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

Its strengths are in giving the people a say. Inclusion. Allowing the people a voice in their future and future generations. Listening to different points of views. Its weaknesses. Fraud. I witnessed on T.V. one man collecting counted votes from the tables, he then removed some votes from the piles in his hand and put them in his pocket. I have no idea if this was “permitted”, or if he put them back. Fraud in Postal votes. I propose that in future referendums and general elections, all Ballot Boxes delivered should be transparent enough to ensure that the box can be seen to be empty before people come to place their votes inside when the “polling station” is opened. Voting completed, top opening sealed securely as well as the lid.

2. What assessment would you make of the UK’s experience of referendums?

UK Governments seem to fear referendums. What positive or negative features of this experience would you highlight? Some people no longer believe the reason given for not allowing a referendum on “Lisbon”. It is doubtful many people trust politicians anymore.

3. How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

Do we still have a “Parliamentary democracy”? Had the EU brought in legislation instructing all 27 Countries to hold a referendum on the Treaty of Lisbon, our Government would have had to hold a referendum. How could that be Parliamentarly Democracy? In a General Election, the people can “choose” between three Political Parties that all want the same thing. “To remain in the European Union”. That is not true “Parliamentary democracy” either. There should, without doubt, have been a referendum before the ratification on every European Union Treaty and particularly before the Treaty of Lisbon.

4. Is it possible or desirable to define which issues should be subject to a referendum?

See responses to question three. Plus, as regards the division of the once United Kingdom of Great Britain and Northern Ireland into twelve EU Regions, I do not see how the people can possibly vote on any matter unless they are told all the true facts. The permanent effects it would have on the United Kingdom, the true costs of building the Scottish Parliament, the running of it, and how much for the cost re MSPs and their staff, heating costs etc and if the people are prepared to pay for all those costs? I quote from the meeting that took place in the Scottish Parliament on 22 May 2001, when Mr Dammeyer had been speaking to the Scottish Parliament about devolution, that as far as the Scottish people are concerned, Scotland is a “Country”, the Scottish people
are “nation”, but Mr Dammeyer explained that from the European point of view Scotland is like a Region of the European Union. Ditto the Welsh Assembly. Likewise the Northern Ireland Parliament, London and the eight other EU Regional Assemblies.

5. Should “constitutional issues” be subject to a referendum? If so, how should “Constitutional issues” be defined?
All constitutional issues should be put before the people. However, all those that did not allow a referendum on the very constitutional Treaty of Lisbon unless they decide to live far from these shores, will also come under the same regime as the people they once represented.

6. Going to question 8) The strengths and weaknesses of in-person, postal or electronic forms of voting?
I believe the “in-person” is the only “safe” way of holding a referendum. The person can verify that they are the person on the Election/Referendum form. They may even have ID with them. I no longer trust Postal Votes except for the “few” genuine ones from people that are sick or will be away on holiday. Acceptable of course, postal voting arrangements for our forces. I would not trust electronic voting at all, because anyone could be using another person’s Computer. Electronic voting is wide open to abuse.

7. (9) How does the referendum relate to other tools such as citizens’ initiatives? Should citizens be able to trigger retrospective referendums?
There has always been great “play” on “No Parliament may bind another”, anything that one Parliament or Government may have done, can be altered or undone by the next. However, does that also apply to International law? Treaties? According to the Ruling of Lord Denning MR in Macarths Ltd v Smith, Yes, even a Treaty can be deliberately repudiated, for he said:

If the time should come when Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provisions in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of Parliament. I do not however envisage any such situation...Unless there is such an intention and express repudiation of the Treaty, it is our duty to give priority to the Treaty.

Have Governments of this Country gone too far into the EU though since that ruling? We read only this week that our Financial Services—known as the best in the World—is now under threat from a “take-over” by the EU. Lord Denning understood fully the meaning of the Treaty of Rome, his ruling therefore stands. Our solemn Oath of Allegiance is to this Country, if Governments have gone so far that Lord Denning’s ruling could not take effect, has there been a violation of that solemn Oath and have Government, in accepting that EU Law has “competence” over our Constitution and laws, destroyed our own Constitution? That may be a question for the future? Our Constitution cannot be changed like other countries’ constitutions, it is however, being ignored. I should imagine the people could and perhaps should trigger a retrospective Referendum. Government and all that read this, know that the people should have been told Lisbon’s awful contents before they had a referendum, instead, the people were told that there was no need of a referendum.

8. (10) How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?
I will look firstly at the referendums that took place on the failed “Treaty Establishing a Constitution for Europe”, in which two large and important countries voted “NO”. The EU noted the people’s views for a little while and then brought fourth eventually the Treaty of Lisbon, which held most of the same contents of the failed Treaty plus a few more far reaching Articles. I name but one, new article 188R, The Solidarity Clause. A new article which introduces a new and wide-ranging “solidarity clause” which compels the Member States to act together in the event of a natural disaster or a terrorist attack, which we have always done—though by accepting any sovereign state first. Outside the Treaty, yet little mentioned, although signed and accepted by a UK Representative is “the SOFA Directive” in the Official Journal of the EU, C 321/6 dated 31.12.2003. An “AGREEMENT” which also re-inforces Article 17 (2) of the Treaty on European Union. Government was failing the people in a) not explaining this fully to the people, and b) by not allowing a referendum on it.

The Constitution of Ireland allows for the people to have a referendum on any major Treaty. Some countries are able to alter their Constitutions to accommodate EU Treaties that might be contrary to it. However, how that will “sit” when the EU ratifies Treaties for all 27 countries through Art 47 remains to be seen, especially if it is with a country one of the 27 would never have agreed to under other circumstances. The UK, with its unique long standing Common Law Constitution of which the Treaty between the Crown and the people are not so easily altered without the consent of either party. This consent has not been sought. It would appear that UK governments have chosen to ignore them, but the people, as we know now, may not. New Treaties
may not encroach upon the solemn Oaths of our beloved Queen made at Her Coronation, and we are mindful that “No foreign Prince, person prelate, state, or potentate hath, or ought to have any jurisdiction, power superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm”. I have always believed that Magna Carta is best left “sleeping”, that sadly is no longer the case.

14 December 2009

Memorandum by Dr Matt Qvortrup

Thank you for asking me for advice on the issue of referendums. It is an honour to be able to help you. I have carefully considered the questions, and I have endeavoured to answer them as thoroughly as the limited space permitted. Please do not hesitate to contact me if you require further elaboration on the questions.

What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

The strengths are that it allows the people to have a final say on fundamental changes affecting the constitution. It has become standard in most democratic countries to require referendums before constitutional changes. The problem though is that the voters are sometimes uninterested in the often technical constitutional issues, eg as has been the case in several recent Irish referendums (the turnout was below 35% in 2001).

What assessment would you make of the UK’s experience of referendums? What positive or negative features of this experience would you highlight?

The positive experience is that it allowed the voters to have a final say. However, as the low turnout rates in Wales 1997 and the North East 2004 shows, the interest in the issue was low—possibly because the voters did not like the options on offer. I would suggest that referendums be made optional, so that the voters can decide when or if to have a referendum. This would ensure that referendums are only held when there is a public demand. This system has worked tolerably well for the provision that there must be a citizen initiated referendum on whether to have directly elected mayors in England.

How does, and how should, the referendum relate to the UK’s system of parliamentary democracy?

I think this question has been answered by history. The debate as to whether referendums are compatible with a Diceyan constitution was raised by Wilson in the House of Commons in 1967—but when it became opportune he changed his mind. Referendums are now—to use a somewhat technical term—“a convention of the constitution”. Further the argument that they are not compatible with the doctrine of the Sovereignty of Parliament has been eroded by the practice of referendums in this country—as well as by extensive usage of referendums in New Zealand (a country without a written constitution and explicit adherence to the principle of the sovereignty of Parliament).

Is it possible or desirable to define which issues should be subject to a referendum?

I would argue that it is up to the people to decide the issues. In some countries, eg Denmark there is a ban against referendums on taxation issues—but there can be referendums on foreign treaties. In Italy the reverse is true. So the evidence is mixed, but—needless to say—referendums should be avoided on issues affecting human rights and named individuals.

Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

Of course, one should never be complacent, but in international perspective, PPERA is seen almost as the gold standard in referendum regulation.

Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission’s work in relation to referendums?

This is difficult to say as the only experience we have is the 2004 referendum. I would say that the jury is still out as regards the role of the Electoral Commission in referendums.

What comment would you make on key components of a referendum campaign, such as:

1. Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried. Thresholds are rare but they do exist. It is common but inaccurate to cite the Canadian Clarity Act as a precedent for supermajority requirements. As the example is often mentioned, it is instructive to give a brief description on this model. After the 50.58% to 49.42% result in Quebec in 1995, the House of Commons in Canada sought to establish that, a future referendum was not won by a narrow margin. The act, however, stops short of recommending a specific majority. See Clarity Act, 2000, c. 26 [Assented to 29 June 2000] 2. (1) The House of Commons shall consider “whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province ceases to be part of Canada”. Factors for House of Commons to take into account include (2) (a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant.” A better example of a Supermajority, albeit a small one, was used in 2006 in Montenegro (a referendum that has become the gold standard of best practice); the law stipulated that independence be approved if supported by 55% eligible to vote. (The total turnout of the referendum was 86.5%, 55.5% voted in favour and 44.5 were against breaking the state union with Serbia. Another example is St Kitts and Nevis in the Caribbean. Under the constitution, Nevis has considerable autonomy and has an island assembly, a premier, and a deputy governor general. Under certain specified conditions, it may secede from the federation. In June 1996, the Nevis Island Administration under the concerned citizens’ movement of Premier Vance Amory announced its intention to do so. Secession requires approval by two-thirds of the assembly’s five elected members and by two-thirds of voters in a referendum (Art 38.1 (b).) After the Nevis Reformation Party blocked the bill of secession, the premier called for elections for 24 February 1997. Although the elections produced no change in the composition of the assembly, Premier Amory pledged to continue his efforts toward Nevis’ independence. In August 1998, a referendum on the question of independence for Nevis failed and Nevis presently remains in the Federation. The March 2000 election results placed Vance Armory, as head of the CCM, the leader of the country’s opposition party. In most other referendums (e.g. East Timor 1999, Malta 1955, the referendums on independence for former Soviet States 1990) there were no special majority requirements. Special majorities and turnout requirements were used in Scotland in 1979. The outcome was a rejection of the proposal for self-government, although a majority had voted in favour. The result exacerbated antagonisms. The method of voting must be as simple as possible, to allow maximum effective participation. In conclusion, a result endorsed by 50% of those voting plus one should be accepted, as long as a majority of those eligible (and registered) to vote have cast a ballot.

2. The wording of the referendum question (including the appropriateness of multi-option questions). The experience tells us that the wording of the question is of little importance. E.g. in 1980—despite the employment of pollsters and rudimentary focus-groups—the secessionists were not able to win despite having chosen a very loaded question. As for multi-option referendums, they have been used in Sweden in 1955 and in 1980, on the first occasion, when there was a clear majority, the result was positive (the same was true in New Zealand in the early 1990s and in Puerto Rico in 1993). But more often than not it results in competing options—with no one receiving support (eg as in the case in Sweden in 1980). So generally, multi-option referendums confuse matters and detract from the major attraction of the referendum, namely that it provides a clear choice.

3. Whether there should be formal, constitutional triggers for referendums and whether a referendum should be indicative or binding. As a matter of constitutional law a referendum cannot be binding in this country. If we were to have a written constitution (and I might personally have reservations about this) there would normally be formal constitutional triggers for a referendum. It is possible to have constitutional triggers for a referendum under our system. In New Zealand changes to the electoral laws are entrenched and require a referendum before they are changed. A.V. Dicey the constitutional lawyer suggested that referendums should be held before changes to fundamental parts of the constitution. The problem—as he admitted was—that this Act could be repealed.

4. Whether a referendum should ask broad questions of principle, or refer to specific legislation. There are examples of both. In 1998 there was reference to a special agreement (the Good Friday Agreement).

5. Whether a referendum should precede or follow statutory enactment. There are—once again—examples of both. In 1997 the legislation on devolution was pre-legislative, whereas in the referendum on the Good Friday Agreement the referendum was held to ratify a decision. Post legislative referendums are the most common (by a factor of 8 to 1). This is possibly because referendums are seen as final decisions. From a theoretical

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18 The 1983 Constitution of St Kitts and Nevis states: 38.—(2) b) [a constitutional amendment must be] approved on a referendum by not less than two-thirds of all the votes validly cast on that referendum in the island of Saint Christopher and two-thirds of all the votes validly cast on that referendum in the island of Nevis.

perspective—ie one that stresses that the referendum is a constitutional safe-guard—it is preferable that referendums are held after the third reading of a Bill.

6. Campaigning organisations and the funding of campaigns. Public information campaigns and media coverage and Party political activity; This is a vast topic worthy of a doctoral thesis. But the general principle is that referendums are not party political contests but (as was the case in 1975) a public vote that goes beyond party lines. As a result of this it is necessary to secure that both sides get a fair hearing—and it might be necessary to have public funding. I have divided my answer to this in two:

Government Spending

In referendums around the world, concerns are often raised about the government using public funds to support a favoured position, when the perceived goal is for people to decide without politicians biasing their thought process. In 1994, the Austrian government spent considerable sums on a pro-EU campaign, but without violating Austrian election and referendum laws. The same has been true, more recently, in Spain where the government is reported to have spent considerable amounts of public monies on a (successful) campaign in support of the European Constitution. In other countries—most notably in Ireland—similar examples of government spending in support of a proposition have been ruled illegal by the courts. In an oft-cited case from Ireland in 1995, an Irish MEP to the European Parliament argued that the government had breached the Irish Constitution by spending public funds on aspects other than the impartial organization of the process. While the Supreme Court held that: “The Government is clearly entitled to spend money in providing information…[and that] the Government, as such, is entitled to campaign for the change and the individual members of the Government are entitled either in their personal, party or ministerial capacities to advocate the proposed change”, it ruled that “the Government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment”. Although legally non-binding, this judgment has inspired legislation in both Ireland and elsewhere. There is an emerging consensus that it is illegitimate for governments to spend taxpayers’ money on partisan information, or other partisan activities using state apparatus.

Campaign Spending

The issue of whether there ought to be a ceiling on campaign expenditure is contentious. Some argue that expenditure ceilings keep costs within manageable limits, ensure that referendums cannot be “bought” by the richer side, and increase public confidence in the result. Others contend that ceilings prevent a truly effective information campaign.

This is not a conclusive debate. Many argue that the outcome of the referendum seems to be driven by other structural factors, such as the economy, the length of tenure of the respective governments and other factors. Some doubt the importance of money in ballot campaigns, though it has been reported that “negative” spending in many cases has been successful. Still, restrictions on expenditures in ballot campaigns are common: In the 1970s, in the run-up to the first Québec referendum on “sovereignty association”, the provincial Parliament restricted campaign expenditure, and mandated that two campaigns be established representing each side of the argument. Québec’s Minister of State for Electoral and Parliamentary Reform, in a 1977 paper, noted that the regulations it had passed were inspired by Great Britain’s experience with a referendum in 1975, which it held up as an “invaluable guide”, reflecting a “deep-rooted sense of fair play.”

In the more recent past the UK Labour government has in turn enacted legislation based on the Québec Act, namely The Political Parties, Elections and Referendum Act 2001 (PPERA). PPERA also introduced limits on campaign spending, and due to its comprehensiveness, this Act is often cited as a key reference point in debates about referendum regulation, internationally. The restrictions on campaign spending are as follows (Sections 117–118): Similar provisions exist in New Zealand under the Citizen Initiated Referenda Act 1993. Under this act, it is an offence to spend more than $50,000 promoting the petition (at the qualification stage),

20 El País 5 January 2005, “Periodistas, futbolistas y actors abren el viernes la campaña del referendum europeo”
21 M.H. Qvortrup, “How to Lose a Referendum”. The Political Quarterly Vol. 72, No. 1, 2001
22 Elizabeth Gerber, an American political scientist, has found that campaign spending in support of a proposition was ineffectual. However, negative campaign spending, ie spending against a proposition was often effective. See E. Gerber, The Populist Paradox. Group Influence and the Promise of Direct Legislation. Princeton: Princeton University Press, 1999.
23 In a 1998 amendment, contributions were limited to $3,000 per donor to each campaign. (1978 Québec Referendum Act 1978.) The 1998 Amendment states “The total of contributions to each national committee by the same elector in the same referendum shall not exceed the amount of $3,000” (Section 91).
24 See also: The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004.
25 See also: The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004.
and to spend more than $50,000 promoting an answer to the referendum. As in the UK and Australia, what an organisation is spending on advertising in relation to the petition or referendum must be reported to the Chief Electoral Officer.

Whether referendums should coincide with other elections or not

The practice is varied. A case can be made for the view that referendums on the same day as elections muddies the political waters—and make voters focus on something else. This is a valid objection, which can be raised against referendums in American states (where there are often several referendums on the same day as elections—and hence “a drop-off” as voters get tired of voting).

However, Britain cannot be compared to California or Switzerland. The referendum is unlikely ever to become part of the political woodwork in the way that it is in the aforementioned cases. If referendums are held on the same day as elections in countries where referendums are relatively rare, there is very little that suggests that the voters get tired of voting—or even let their decision be influenced by their decision to vote for a particular party. For example, in 1959 Eamon de Valera was elected president—at the same time he campaigned for the abolition of Proportional Representation (and the introduction of First-Past-the-Post). While he won the presidency handsomely, he lost the latter by a clear margin. The voters, in other words, are capable of distinguishing between measures and men. Sure, the turnout in referendums tend to be marginally lower than in candidate elections (more people vote for candidates than for or against propositions), but turnout in referendums held on the same dates as elections tend to get higher turnout than other referendums. This strengthens the case for referendums held on the same days as elections.

4 January 2010

Memorandum by Dr Uwe Serdült, Centre for Research on Direct Democracy (c2d)

1. Introduction

As a general remark it should be noted that I would only like to highlight a few general points regarding the use of referendums and the implications this has on a political system. I mainly draw on the experience in Switzerland and our database covering the use of referendums worldwide (see: www.c2d.ch).

2. Development of Direct Democratic Institutions Over Time

The introduction of direct democratic elements into a constitution can be perceived as a “critical juncture” on a historic path, to put it in the jargon of neo-institutionalist theorists. Once it is in the system there is hardly ever a return to the status quo ante. Some direct democratic institutions might be ill-designed or not work well, they might even stagnate and not be used much, however, since direct democracy provides the means to redesign itself by its own mechanisms, such difficulties can in the long run usually be overcome. Especially political elites making use of direct democracy or advocating it also have to keep in mind that the instrument could one day be turned against them.

3. Direct Democracy and Federalism

For direct democracy to work and to be overall beneficial (and be it only in the subjective understanding of citizens) certain preconditions need to be fulfilled. Among the most important is the presence of strong, competing political parties. Party competition has positive effects on the use of direct democratic instruments. In general, direct democracy needs powerful political actors besides the central government, providing the connection between the state and society. In federal political systems these actors can also be territorial subunits. Federalism is therefore a component in a political system enhancing the beneficial use of direct democracy. Or to put it the other way round, direct democracy is more problematic in centralized systems without a sound power balance between the state and organized civil society. However, central government has to expect and be prepared for subunits of the political system to organize referendums against its interests.

4. The “People” in a Direct Democracy

A few words about the notion of the “people”. They are certainly there and, in the end, as individuals have the final say over important political matters (at least in Switzerland where referendums are binding). However, they only on very rare occasions intervene directly and organize a referendum or a citizen’s initiative.
Contrary to what quite a few scholars and advocates of direct democracy suggest (namely that the worldwide use of direct democracy is on the rise) bottom-up mechanisms that involve the active participation of citizens in the form of signing petitions and/or collecting signatures are still very much the exception (compared to automatic referendums or plebiscites). Out of 37 countries worldwide providing bottom-up mechanisms of direct democracy on the national level only 14 have had more than one referendum experience according to our database.

### Table 1
NUMBER OF REFERENDUMS ORGANIZED BY THE COLLECTION OF SIGNATURES TO TRIGGER THE VOTE, 1874–2009

<table>
<thead>
<tr>
<th>Countries and year of introduction</th>
<th>Parties of the governing coalition</th>
<th>Initiators of Opposition parties</th>
<th>Civil society</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy (1974)</td>
<td>2</td>
<td>60</td>
<td>–</td>
<td>62</td>
</tr>
<tr>
<td>Lithuania (1994)</td>
<td>–</td>
<td>9</td>
<td>–</td>
<td>10</td>
</tr>
<tr>
<td>Latvia (1923)</td>
<td>–</td>
<td>9</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Hungary (1989)</td>
<td>–</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Uruguay (1958)</td>
<td>–</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Liechtenstein (1925)</td>
<td>4</td>
<td>17</td>
<td>33</td>
<td>54</td>
</tr>
<tr>
<td>Switzerland (1874)</td>
<td>37</td>
<td>91</td>
<td>195</td>
<td>323</td>
</tr>
</tbody>
</table>

Source: www.c2d.ch

In the first place, the arsenal of direct democracy is an institutional weapon for organized interests (political parties, interest groups, employer’s and employee’s associations) and not for the people as such.

There is not much room for a detailed analysis of what is presented in Tables 1 and 2. The main point is to show that in an over-crowded party system such as the one of Italy and as well in recently democratized countries with authoritarian legacies such as in Lithuania, Latvia and Hungary, combined with a relatively weak civil society sector, referendums are mainly used as a tool of the opposition parties to fight the ruling party or governing coalition. Only in very few countries with a longer tradition of direct democratic mechanisms are referendums also organized by civil society actors. And as Table 2 shows for Switzerland in more detail, even in those countries with a frequent use of bottom-up referendums those mechanisms used to be an important tool for opposition parties (to gain politically and eventually being co-opted into the governing coalition such as in Switzerland) and only recently became frequently used by actors of a nowadays well organised civil society sector.

### Table 2
INITIATORS OF REFERENDUMS IN SWITZERLAND FROM BOTTOM-UP (COLLECTION OF SIGNATURES WAS NECESSARY TO TRIGGER THE PROCEDURE) FROM 1874–2009

<table>
<thead>
<tr>
<th>Time</th>
<th>Parties of the governing coalition</th>
<th>Initiators of Opposition parties</th>
<th>Civil society (social partners)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1874–1919</td>
<td>2</td>
<td>28</td>
<td>11 (4)</td>
<td>41</td>
</tr>
<tr>
<td>%</td>
<td>4.9%</td>
<td>68.3%</td>
<td>26.8%</td>
<td>100%</td>
</tr>
<tr>
<td>1920–1959</td>
<td>3</td>
<td>39.1%</td>
<td>56.5%</td>
<td>69</td>
</tr>
<tr>
<td>%</td>
<td>4.3%</td>
<td>39.1%</td>
<td>56.5%</td>
<td>100%</td>
</tr>
</tbody>
</table>
Memorandum by Dr Maija Setaä, Academy Research Fellow, Department of Political Science, University of Turku

1. The role of referendums depends largely on how they are initiated and how their agenda is set. Depending on agenda-setting and initiative procedures, referendums may be triggered by government, opposition, or non-governmental organizations. Further, certain types of referendums can be used to promote new legislation whereas other types can be used to impede a particular law. The variety of referendum institutions raises the question whether there can be “a general theory of referendums”.

2. The importance of referendums varies considerably in different political systems. Switzerland is an example of a political system where various forms of referendums have become central instruments of political contestation. According to the Swiss constitution, referendums are required on all constitutional changes. In addition, 100,000 voters can make a popular initiative demanding a referendum on a legislative (constitutional) change put forward in the initiative. The Swiss constitution also allows 50,000 voters to demand a referendum on any law that has recently been passed by the Parliament. All Swiss referendums are legally binding. During the past 10 years, the Swiss voters have voted yearly on average on about 10 issues in national referendums, and in addition to these there have been a number of referendums at the level of municipalities and cantons.

3. In the UK political system where there are few restraints on the powers of a parliamentary majority, referendums tend to play a marginal role. As a contrast, in some countries referendums have been particularly designed to function as a check on a parliamentary majority. For example, in Denmark a retrospective referendum can be initiated by a parliamentary minority. According to the Danish constitution, 1/3 of parliamentarians can demand a binding referendum on a recently passed bill. Although this type of a rejective referendum has actualized in Denmark only once (1963), the possibility of a referendum has strengthened the position of opposition parties and enhanced consensual forms of policy-making. Switzerland has a stronger institution of a rejective referendum as according to the Swiss constitution 50,000 voters can demand a referendum on a recently passed law. This gives an opportunity for extra-parliamentary opposition groups to try to veto legislation. The possibility of a rejective referendum has very much contributed to the consensual character of the Swiss political system.

4. The question of the types of issues that can or should be submitted to a referendum may not be as relevant as the question on the agenda-setting and the initiation of referendums. However, the constitutions of countries such as Australia, Ireland, Denmark and Switzerland require that all constitutional amendments need to be submitted to a referendum. In some cases, the requirement of a mandatory referendum has proven to be a major obstacle for any constitutional changes. This is the case especially in Australia, largely due to its compulsory voting and double majority requirements.

5. In the UK context, only one type of a referendum is possible at the national level, that is, a referendum initiated by a parliamentary majority (i.e. government). In this respect, the UK is not unique as this is the only type of a referendum experienced in many other West European democracies (e.g. Sweden, Norway, Finland, the Netherlands and Austria). Whenever the initiation of a referendum is in the hands of a parliamentary majority, public debate on referendums can often be understood in terms of party political tactics. Governmental parties may use referendums in order to remove a divisive issue from the political agenda. Opposition parties may demand referendums in order to achieve particular policy goals. Sometimes referendums are, however, called in order to legitimate some major constitutional decisions, such as membership in the EU. In the British context, regional referendums on devolution have been very important, and these can be motivated by the need to legitimize new constitutional and fiscal arrangements.

<table>
<thead>
<tr>
<th>Time</th>
<th>Parties of the governing coalition</th>
<th>Initiators Opposition parties</th>
<th>Civil society (social partners)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960–2009</td>
<td>32</td>
<td>36</td>
<td>145 (17)</td>
<td>213</td>
</tr>
<tr>
<td>%</td>
<td>15%</td>
<td>16.9%</td>
<td>68.1%</td>
<td>100%</td>
</tr>
<tr>
<td>Total</td>
<td>37</td>
<td>91</td>
<td>195</td>
<td>323</td>
</tr>
<tr>
<td>%</td>
<td>11.8%</td>
<td>27.8%</td>
<td>60.4%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: www.c2d.ch

4 January 2010
6. It is notable that British referendums are formally advisory which means that the power to legislate remains exclusively in the hands of the parliamentary majority. The advisory character of referendums appears to be congruent with the idea of parliamentary sovereignty. However, based on the experience on national level referendums in established democracies, it seems to be very difficult for parliamentarians to vote against the result of an advisory referendum. Therefore, it is often argued that formally advisory referendums are binding de facto.

7. When it comes to the procedures used in referendums, questions allowing more than two options might be recommendable in the UK context where referendums are advisory. Multi-option questions might help to highlight the advisory character of a referendum to voters. Also, multi-option questions may help to emphasize the responsibility of the parliamentarians as ultimate decision-makers because the referendum outcome does not entail such a clear indication of “the will of the majority”. In advisory referendums, there is no need for threshold requirements or quorums as the formal decision-making power remains with the elected representative bodies. However, also in case of advisory referendums governments should take responsibility for the quality of campaigns and the information provided for voters.

8. Overall, the adoption of new forms of referendums would potentially change the character of the UK political system. Therefore, the implications of such reforms should be carefully considered. The recently adopted Treaty of Lisbon includes a provision for a citizens’ indirect initiative which is submitted to the European Commission for consideration. As a consequence of the Lisbon Treaty, there will be a need to develop the infrastructure for making citizens’ initiatives also in the UK context. This seems to provide a good opportunity to consider the adoption of a citizens’ initiative also in the UK. If the Swiss format of popular initiatives triggering binding referendums appears too radical, one option would be to follow the example of New Zealand where citizens’ initiatives lead to advisory referendums. A further option is to allow indirect initiatives (or agenda initiatives), which means that citizens’ initiatives are considered by the parliament only and no referendums follow. Such institutions exist at the national level, for example, in Austria, Spain and Poland.

4 January 2010

Memorandum by Navraj Singh Ghaleigh, Edinburgh Law School

I. INTRODUCTION

The UK’s limited experience of running national referendums is quite at odds with its detailed regulation of them. When combined with the expertise accrued from the eight sub-national referendums held since 1973, there is a body of constitutional law and practice that amounts to a regulatory regime of some sophistication. Whether over-engineered or gold plated or merely appropriate, many of our mechanisms for the holding of referendums stand well in comparison with those in jurisdictions that deploy devices of direct democracy more frequently. This is not to say that it is unimprovable. Technical issues such as power sharing and agenda setting, the facilitation of popular involvement and the use of ICTs remain problematic, though far from insoluble. The greater challenge—and one which this inquiry can positively contribute to—is that of the broader malaise of democratic participation. Trends of voter turnout, voter volatility, partisan attachment and cognate measures all point towards a citizenry that is increasingly detached from democratic politics, paired by the opportunity to consider the adoption of a citizens’ initiative also in the UK. If the Swiss format of popular initiatives triggering binding referendums appears too radical, one option would be to follow the example of New Zealand where citizens’ initiatives lead to advisory referendums. A further option is to allow indirect initiatives (or agenda initiatives), which means that citizens’ initiatives are considered by the parliament only and no referendums follow. Such institutions exist at the national level, for example, in Austria, Spain and Poland.

II. EXPERIENCE OF REFERENDUMS

The use of the referendum device in the UK is distinct from most comparable polities in quantitative and qualitative terms, with the two being closely linked. The relative paucity of use can be explained using a definition of constitutional referendums as those which implicate the sovereign relations between the people and government. In this light the referendums relating to Northern Ireland (1973 and 1998), Scottish and Welsh devolution (1979 and 1997) and assemblies in London and the North East region (1998 and 2004), together with that of 1975, can be seen as constitutional referendums, distinct from those relating to matter of social policy. In Canada for example, of the 74 referendums held, the majority have related to the regulation of alcohol (40), with other quintessentially “social policy” issues such as gaming (2), schooling (2) and day light savings (4) also weighing in. Only recently have constitutional questions been the subject matter of referendums, including Quebec (1980 and 1995), electoral system (BC and PEI in 2005) and Constitutional

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patriation (1982). An even more extreme skewing towards “ordinary” referendums is found in the case of the states of the USA, which have conducted approximately 2,300 initiatives since 1900. Of European comparators, both Denmark and Ireland have deployed the constitutional national referendum more frequently than the UK—15 and 21 times respectively. (Such countings are inevitably contentious—is abortion a constitutional matter for these purposes? Arguably not in that it does not pertain to fundamental territorial definitions of the state or the ceding of sovereignty to international organisations, though it certainly does in the case of Ireland go to citizens’ authorship of the state.)

Viewed in this way, the UK’s modest use of the referendum is less to do with inherent incompatibility with the Westminster system and/or parliamentary sovereignty than a historically laggardly approach to constitutional renewal. Certainly in the future, it is difficult to imagine major changes to constitutional arrangements such as devolution, voting system or European integration without powerful demands for a referendum.

In terms of policy lessons from those referendums that have been held in the UK, the following suggest themselves:

1. Public Funding

Present in 1975, absent in the referendums of 1979 and 1997 and reappearing under the scheme in PPERA (and as such deployed in the NE referendum 2004), public funding of referendum campaigns is decisive. The Referendum Act 1975 provided for equal funding to the “Yes” and “No” campaigns in the EEC referendum which in the case of the former accounted for 12.5% of its income and 94% of the latter’s. Put another way, but for public subvention, the “No” campaign in 1975 would have been unable to organise, mobilise, communicate or campaign. In the event it lost—67.2% against 32.8%. The argument that a campaign that is unable to engage the political donating classes should not be availed of the crutch of public funding ignores the endogeneities at play. These were laid bare in the case of the Welsh referendum of 1997 where there was no provision for public funding. The “No” campaign emerged only at the eleventh hour of the campaign, consisting of a disgruntled Labour Party member and a single donor. Nonetheless, it ran the forces of the Welsh political establishment, which were arrayed against it (the seat-less Welsh Conservatives chose not to campaign) mighty close, losing by a short nose—50.3% to 49.7%. The Committee on Standards in Public Life noted in its report on party funding that “a fairer campaign might well have resulted in a different outcome.” The North East referendum of 2004 demonstrates the pivotal role of “raising all boats” that PPERA’s scheme provides for in giving equal public support for each campaign (or “Designated Organisation” in the language of the Act). Each of “North East Says No” and “Yes4theNorthEast” received public funding of £100,000, administered by the Electoral Commission. As a percentage of expenditure by answer, public funding represented a mere 18% of the “Yes” total but 49% for “No”, which campaign defeated the proposition comprehensively—77.9% to 22.1%.

Public funding of this sort is unusual in comparative perspective, even in polities with regular recourse to direct democracy. Occasionally it is mistaken with government neutrality—an entirely different matter. What core funding provides is a vital means for organised opinion to argue its case against what may often be a near consensus among political elites. In its absence, those lacking traditional channels of support would be starved of funding and unable to mount a meaningful challenge.

2. Power Sharing—Citizens’ Initiatives

The calling of a referendum in the UK is, as a matter of substance, not in the gift of Parliament, or even the government so much as the Prime Minister. As such, and like so much in the UK’s system of government, it depends on the office holder’s position of strength within the party, cabinet and so on. A “weaker” PM may have to seek consensus with colleagues—the non-referendum on the Euro between 1997–2001 has some of this. A consequences is that Prime Ministers are reluctant to call for referendums unless they are assured of victory—a loss being too closely associated with their own, or their party’s, fortunes.

Citizens’ initiatives (CI) provide a mechanism by which power can be shared with the citizenry, kicking against a too tightly controlled agenda setting capacity. The details of its implementation are crucial and ensuring “fit” with the UK’s broader constitutional arrangements is key (which makes “abrogative” referendums problematic). As such, the configuration of the (i) relevant number of signatures, (ii) timeframe within such signatures must be accumulated, and (iii) any territorial requirement assumes great importance. If direct democracy in the UK is to remain the preserve of “constitutional” matters, the threshold for CIs can justifiably be moderately high. A trigger threshold of 400,000 signatures (approx. 1% of the registered electorate),

31 The range of qualification rules in the US states is to be found in CJ Tolbert et al, “Election Laws and Rules for Using Initiatives” in S Bowlar, T Donovan & CJ Tolbert (eds), Citizens As Legislators: Direct Democracy in the United States (Ohio State University Press, 1998), Table 2.1.
collected in an eight week period, with at least 1000 signatures in each of one quarter of all Westminster constituencies may satisfy that requirement. Such a scheme would ensure that a successful CI would need to generate nationwide activism in order to trigger a poll. Evidently, an attendant funding regime would be necessary.

3. PPERA’s Effectiveness

PPERA’s regulation of referendums draws heavily on the broader scheme of electoral and party funding. Notwithstanding the unfortunate amendments wrought by the Political Parties and Elections Act 2009 in terms of partisan Commissioners (s.5) and substantial increases in donation and reporting thresholds (s.20), this remains a broadly successful scheme. The experience of the NE referendum—the only such poll held pursuant to the PPERA regime—pleasingly demonstrates that the preponderance of income, expenditure and political elites do not determine outcome.

If future referendum campaigns are to satisfy the demands of deliberative democracy they must engage with technological developments and in particular what is known as “web 2.0”. This is an approach to online communication that is familiar though tools such as YouTube, Wikipedia and social media platforms. As opposed to conventional forms of authorship, web 2.0 is authored by an infinite number of contributions, users may post anything at anytime (as opposed to strict editorial limits), external contributions are encouraged and the channels of communication are dynamic and various. Web 2.0 has been most famously deployed in the political context with the US Presidential Election of 2008. In the context of direct democracy, the 2008 Californian ballot measure on same sex marriages raised an important issue—namely, is the reporting requirement for address information of donors to be published “protected speech”. The below image (from http://www.eightmaps.com/ not printed) illustrates how donors’ address data can be deployed when “mashed up” with online mapping services.32

Such innovations would be impossible in the UK owing to s.69(4) PPERA which exempts individual donors’ address information from disclosure. This is an odd exemption in the absence of any evidence or even risk assessment of threats, harassment or reprisals. Nor is there any evidence of such disclosure having a chilling effect on donations. Combined with PPERA’s staggeringly high disclosure thresholds, the regime gives scant regard to the electorate’s legitimate entitlement to have adequate information as to where campaign money comes from and how it is spent. This provides crucial information in evaluating who back or oppose referendum propositions, a key heuristic shortcut for citizens. In an online world, this is even more true.33

III. Conclusions

Updating of the UK’s approach to direct democracy requires a more modest approach to constitutional reform than might be imagined. Much of the constitutional apparatus is already in place, operates well (to the extent that it has been tested) and is consistent with comparative best practice. Reforms which have no pedigree elsewhere, such as multi-option referendums, should be treated with caution. In terms of power sharing—a failing apparent across various constitutional settings—there is a clear need for reform. Similarly, any recommended reform will need to harness the energies and opportunities yielded by ICTs.

4 January 2010

Memorandum by Daniel A. Smith, Ph.D., Associate Professor, Department of Political Science, University of Florida

EDUCATIVE EFFECTS OF DIRECT DEMOCRACY: EVIDENCE FROM THE US STATES

1. In examining arguments for and against the expansion of referendums (and possibly initiatives) in the UK, I would urge the Constitution Committee to take into consideration some of the ameliorative “educative effects” of ballot measures (Smith and Tolbert 2004). Recent research on the potential impact of ballot measures (initiatives and referendums)—irrespective of their instrumental policy outcomes—has found that citizen lawmaking can enhance civic engagement and political participation. Because it offers citizens an opportunity to directly participate in policymaking as a citizen-lawmaker, the plebiscitary process can substantively alter the political attitudes and behavior of individuals (Bowler, Donovan, and Tolbert 1998). Scholars studying the educative effects of ballot measures in the American states and other contexts have found that individuals desire more direct democracy (Bowler, Donovan, Karp 2007; Donovan and Karp 2006). More importantly, citizens are more likely to engage in political activity when they are exposed to ballot measures, as they understand that their participation in the electoral process has real policy implications.


33 See my presentation, “Donors, data and speech: Mashup!” at http://tinyurl.com/18r
Specifically, as I will outline below, scholars have found that ballot measures can increase political interest, political knowledge and voter turnout.

2. Scholars conducting research on the American states, 24 of which permit citizens to place initiatives on the ballot (Smith and Fridkin 2008), have shown that the mere exposure to policy questions on the ballot can increase political interest among the electorate. The logic is relatively simple. Ballot issues—be they questions concerning tax limitations, term limits, affirmative action, gay marriage, abortion rights, immigration, the minimum wage, the environment, or in the case of Britain, membership of the European Economic Community—generate considerable media attention, position-taking by the parties, and reflection and commentary by political elites. In a sense, ballot measures can create “state-specific issue publics,” as the rich information environment that results from the plebiscitary process elevates some policy issues, making them more salient in the minds of voters. Faced with being a lawmaker for a day, most voters take their responsibility seriously, engaging in discussion and deliberation about the policy questions on the ballot. In 2006, for example, six American states had statewide ballot measures raising the minimum wage on their ballots. Drawing on national survey data from across the 50 states, Smith and Tolbert (2010) show that those voters who were directly exposed to the ballot initiative campaigns were not only more likely to support hiking the minimum wage, but were more likely to say that the economy was the most important issue in the election. The minimum wage issues, they find, were the source of considerable discussion during the election. Scholars also have demonstrated that ballot measures can prime voters to consider the issue at hand when assessing candidates running for office (Nicholson 2005; Donovan, Tolbert, and Smith 2008). In 2004, for example, the American presidential campaign was influenced by the presence of same-sex marriage measures placed on 13 statewide ballots, which raised the import of moral values in the consideration of the candidates (Smith, DeSantis, and Kassel 2006; Donovan, Tolbert, and Smith 2008).

3. Scholars working in the U.S. and elsewhere have found that citizens’ political knowledge is enhanced when they are exposed to ballot questions. In particular, scholars have shown that exposure to salient ballot propositions can increase a citizen’s political knowledge (Smith 2002; Tolbert, McNeal, and Smith 2003). These studies, which draw on 50-state data from the American states, are bolstered by findings from Switzerland which show that citizens are better informed when they reside in cantons with more opportunities for direct political participation (Benz and Stutzer 2004). In addition, research on a 1992 national referendum in Canada shows that exposure to the referenda in the provinces led to increased citizen interest in politics as well as knowledge (Mendelsohn and Cutler 2000). Others have shown that being exposed to ballot measures has a broad knowledge effect, as the increase in political knowledge extends to those with low levels of formal education (Tolbert and Bowen 2008).

4. One of the most important and robust educative effects of direct democracy is increased voter turnout (Smith and Tolbert 2001; Smith and Tolbert 2005; Smith 2001; Schlozman and Yohai 2008). Recent research has found that the presence of ballot measures increases turnout in low profile, midterm elections, as well as in higher profile presidential elections. Using the number of initiatives on state ballots to measure campaign effects over a twenty-five year period (1980–2004), Tolbert and Smith (2005) found that, on average, each initiative boosted a state’s turnout by almost one percent in presidential elections and almost two percent in midterm elections, all other factors held constant. For example, a state with four initiatives on the ballot is expected to have four percent higher turnout in a presidential election than a similar state with no initiatives on the ballot. Using an experimental design, Lassen (2005) found that citizens permitted to vote on referenda in Switzerland had increased levels of participation. Individual-level survey data provide evidence that voters exposed to initiative contests (or residing in states with salient propositions on the ballot) are more likely to vote, controlling for other known predictors of turnout, including age and education (Tolbert, Smith, and McNeal 2003; Lacey 2005). Using national opinion data from the 2004 and 2006 U.S. elections, Donovan, Tolbert, and Smith (2009) find that independents (relative to partisans) had greater awareness of and interest in ballot measures in the midterm election, but not in the presidential election, where peripheral voters are already likely to be mobilized by the stimulus of the presidential race (Smith and Tolbert 2001). Without measures on the ballot, it appears that many episodic voters without partisan affiliations may not be engaged by candidate races alone. Perhaps more than any other “educative effect”, then, turnout effects of ballot propositions are well established both in the United States and cross-nationally.

5. To be sure, direct democracy in the form of referendums or initiatives, is no panacea for political participation and civic engagement, as there are many potential pitfalls of ballot measures, including the domination of vested economic interests (Smith 1998; Garrett and Smith 2004; Smith 2004; Smith 2010). But the plebiscitary process—if properly implemented and regulated—can give a greater voice to ordinary citizens, and by doing so, enhance their political interest, political knowledge, and likelihood to turnout in elections.

4 January 2010
Memorandum by Nigel Smith

SUMMARY

UK democracy would benefit from extending its use of referendums.

Referendums must first be removed from their existing plebiscitary context and placed on a new constitutional footing independent of government.

Referendums on constitutional matters should become obligatory.

The Lords should be given a qualified right to call a referendum.

PPERA is unsatisfactory and needs to be revised or replaced.

The Electoral Commission should be continued but its role clarified.

Multi-option referendums on major issues should be avoided.

Thresholds in referendums should be avoided as far as possible and when used be open and minimal.

Major referendums should be stand alone political events held separate from General Elections.

The minimum length of the referendum period should be increased to protect and improve the deliberative process prior to the vote.

The introduction of Citizens Initiative should be encouraged and anticipated.

What are the strengths & weaknesses of the referendum as a democratic tool?

1. Absolutists argue that ceding any decisions to incompetent voters undercuts representative democracy leading to “wrong” decisions, that referendums are conservative devices incapable of dealing with reform and worse they can be used to oppress minorities. Much of their evidence lies in a plebiscitary past.

2. Having studied referendums in modern democracies, I believe the criticisms overstated. If absolutists were prepared to cede a little, they would find our democracy would gain a lot just at the time it needs to be revitalised.

3. Referendums cost money and take time, are not so good with new, unfamiliar issues or with multiple options for reform, are cautious rather conservative when considering change. Without fair and good procedure especially in initiative referendums, they can soon demoralise voters and distort political priorities.

4. On the other hand, they tiebreak major issues that have split politicians and parties, make decisions that voters are committed to, induce consensus and embrace reform. They educate and involve the voter in both the issues and the democratic process. They can introduce new issues or highlight ones that politicians would like to ignore.

5. Most of the procedural problems that critics highlight can be avoided by good design that sets out to give a proper role to referendums rather than with a wilful intent to cripple them. The UK is in the position to choose best practice from around the world.

6. Some argue that constitutional issues are too complicated for the voter yet they remain a frequent source of referendums usually with positive effect.

What assessment would you make of the UK’s experience of referendums?

7. The UK has used referendums for a long time—my local authority decided by referendum in 1878, more than 130 years ago, to municipalise the gas supply—but much of this experience of minor referendums is lost. Even bigger events like the 1920 Scottish referendum rejecting prohibition are forgotten and we are left largely with the post war record from 1973 the Northern Ireland Border referendum onwards.

8. I would separate the 70s referendums from the 90s. Some features of these deserve recalling. The way the Government arranged the 1975 EU public debate (a plan now declassified) would probably not be acceptable to the Electoral Commission, the use of thresholds to hobble the first devolution referendums, the option of the Orkney & Shetland veto, the very use of a referendum and subsequent abstention of the catholic vote in 1973. It is arguable that the 70s referendums although providing valid results didn’t entirely settle matters.

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34 I chaired the cross party campaign for a Yes vote in the Scottish Devolution referendum in 1997, advised the Yes campaign in the Northern Ireland referendum in 1998 and chaired the UK Euro No campaign from 2002 to 2004. In the latter role, I worked with the Electoral Commission for two years interpreting PPERA in preparation for the Euro referendum and then beyond its abandonment in June 2003 to the conduct of the NE Regional Assembly referendum in November 2004.
9. There have been big changes in society since the 1970s. Voters and the media are less deferential and both are much less inclined to take for granted the advice of politicians. Better educated voters served by plural sources of information, the replacement of class politics by managerial politics and the fragmenting of the big party duopoly created the more fluid political society desirable for referendums.

10. The devolution referendum of the 90s apart from making a historic decision cutting through years of political impasse also sustained public support for the Scottish Parliament through the first difficult years to a degree that would not have been possible without a referendum. In Northern Ireland, the result showed a large body of Unionists prepared to share power certainly enough to protect reforming politicians and sustain support for the long end stage. And in Wales, it showed how far public opinion had moved from 1979 to 1997 making clear that the narrow result was part of a movement of opinion.

11. Yet even the major referendums of the 90s remained very much a tool of government—closer to a plebiscite than a referendum. Governments used them to take controversial issues out of a General Election or consider putting one on PR into an election in order to appear progressive. Governments decide the issues for a referendum then change their mind. They choose the timing and even the length of the referendum debate then give themselves a privileged position in it.

12. In the absence of a culture of direct democracy, the referendum is conducted as much as possible on a party basis suppressing dissenters in their own party where they can and hoping that giving a party lead will be decisive with their voters. Even political commentators became lulled by the Westminster prism into seeing it as a tool of government. Journalists were surprised to learn that in the honeymoon after 1997 the majority of Labour voters in Wales ignored Blair’s appeal and stayed at home rather than vote for the Assembly.

13. Although the UK experience may be described as mixed with more recent experience the more encouraging, it is clear that referendums are here to stay. The first reform must be to extricate the referendum from this plebiscitary context and to give it a separate role in our democracy, independent of government where all referendums would use fair and good procedure and some become obligatory.

How does the referendum relate to the UK’s system of Parliamentary democracy?

14. The UK is a representative democracy and should remain so. Putting a few major issues and rather more minor ones to referendum will hardly undermine the principle of representative democracy. There would have to be a wholesale adoption of Citizens’ Initiatives in a quite radical way to bring the degree of change some fear.

15. The more immediate danger for our democracy is that in 50 years the standing of Parliament has fallen from its post-war high to its present low to a degree that simply can’t be explained by a loss of deference or the problems of the past year. Restoring trust needs radical reform on several fronts. Greater use of referendums should be one part of this wider reform but it is not a panacea on its own.

16. It is worth noting the loss of trust in politicians was a material factor in the referendum on the NE Assembly and the Edinburgh and Manchester transport referendums.

Should “constitutional issues” be subject to a referendum? If so how should it be defined?

Rather than raising all the referendum options piecemeal, I list them together here as a scheme.

17. Constitutional issues should be subject to obligatory ratification referendums.

All the recent and most of the proposed major referendums are prima facie constitutional in nature involving either a change in governance, method of election or the ceding of powers not easily retracted.

The obvious difficulty is the lack of a written constitution. The Scottish Parliament must certify that a bill is within its devolved powers. The Speaker in the Commons could certify that a bill or treaty does not contain constitutional issues as defined in a prior set of tests. The creation of the tests is itself a political act but it would separate the principle from the issue and ought to reduce the area of future controversy.

18. Governments and Local authorities retain their existing right to hold optional referendums.

19. The Lords should be given the power to call an optional referendum on a contentious bill.

This would rarely lead to a referendum because its value lies as a check on government leading to some referendum proofing by the government of the day. It would certainly be a very British use of direct democracy but not without variants elsewhere.

20. Optional veto referendum on new legislation invoked by valid Citizens’ petition.

This gives rise to perhaps one referendum a year in Switzerland. In more than half the instances, the voters support the Government. I include it for the sake of completeness but a reformed House of Lords might well anticipate at least some of the bills that would otherwise provoke its use.
21. Citizens Initiative can propose new law which may or may not lead to a referendum.
There must be a process to produce both a legally viable initiative and sufficient democratic backing to validate it.

*Is PPERA 2000 an effective piece of legislation? How if at all could it be improved*

22. The short answer is that for referendums—it is not. It is both unfair and unenforceable in places

23. It is unfair that all participants except the Government must obey the Act for the whole of the referendum period (a maximum of six months) while the Government need only comply for the last 28 days. According it this privileged position which betrays once again the plebiscitary origins of referendums in the UK and is certainly inappropriate. The Government should be put at least on the same footing as everyone else or better still removed entirely from the campaign.

24. The Act was the first attempt to control spending in a UK referendum. Leaving aside the important principle involved, the controls would have proved unworkable and become a serious distraction from the referendum debate given journalists obsession with process.

25. The main loophole was the £10,000 limit that could be spent by each of an unlimited number of people provided they acted as individuals and not in concert. This class of “donor”, a little analogous to 527 campaign groups in the US, would have been beyond the reach and influence of the designated campaigns. The Electoral Commission would not have been able to pin down any shadowy co-operation between them or the presence of richer donors sprinkling money surreptitiously.

26. Although our campaign had every intention of abiding by the financial requirements of the Act (we had to convince the Commission we had the means to do this before being designated) there was a substantial risk that despite our best efforts at compliance we would have failed. As MPs have had difficulties enough with returns from permanently established constituency offices, we should not have been surprised if the temporary nature of cross party campaigns, their instant dissolution on referendum day and the scale of a UK wide referendum meant that our “Responsible person” required by the Act would have been left unable to satisfy the Commission on all counts. The Commission would have been faced with prosecuting a non-existent campaign or invalidating the result.

27. The maximum referendum period is six months but the minimum could be as short as eight weeks amounting to a snap referendum and given that some of that time is taken up with designation process and early voting, the referendum debate could be very short. It should be increased to at least 12 weeks minimum for major referendums to protect the deliberative process.

*Is the role of the EC in regard to referendums as set out in PPERA appropriate?*

28. If state aid is not to be given automatically to every campaign group then some selection has to be made and an independent body such as the Commission would be required to do it. I don’t think the option of no state aid is practical.

29. In the two years that I dealt with the Commission, I came to respect its intellectual approach to the wording of the question, the consultation on combining referendums and general elections and the way it tackled voter information all of which seemed appropriate.

30. However I had many doubts about its ability to handle the more practical issues of designating organisations and managing the permitted participants in the actual campaign. As there was to be no pre-qualification process (something that might be possible in obligatory referendums) I thought that the Commission would introduce a protracted bureaucratic diversion at just the moment both sides should be concentrating on the referendum debate. My worst fears were confirmed in the NE referendum, a fraction of the size of a UK referendum. Much of the complication and potential delay arises from the financial controls required by the Act.

*Whether or not there should be any threshold requirements?*

31. Over much of the referendum world such thresholds have been incorporated in the referendum process either in a covert way or at unreasonable levels with the (usually) wilful intent of crippling the referendum process. With the result that in many countries, neither the GLA nor the Welsh Assembly would exist.

32. Democracy seems to get along pretty well on a simple majority. So the supermajority of 60% of votes cast required to validate the “Yes” vote in British Columbian PR referendum seems unreasonably high if at least open and honest.
33. A common threshold is that 50% of the registered electorate must vote yes for the result to be valid. The arithmetic of this beguilingly democratic requirement is, given a 60% turnout, yes must win 83% of the votes cast. Just this threshold has neutered Italian referendums and the variant used in Scotland in 1979 produced a strong adverse reaction to referendums afterwards.

34. Using registered voters instead of votes cast makes non voters into no voters and thus encourages abstention campaigns. A democracy requires precisely the opposite effect.

35. Thresholds can also be uneven in effect. Threshold seen as reasonable for a major issue can prove impossible for a more specialist issue like “Dentures for old people.”

36. If used at all, turnout quorums should be set at levels to avoid ridicule and not as additional democratic hurdles. Above all the thresholds must be obvious to all voters.

The wording of the referendum question including multi-option questions.

37. The question should not be leading nor combine decisions in a single question.

38. A single referendum is not an ideal device for a major multi-option issue. Yet often more than one reform of the status quo is possible. The central problem is not the ballot paper design but that nobody has yet found a way of conducting a multi-option referendum debate that enlightens the voter and doesn’t make broadcasting balance impossible to achieve.

39. One reason the Scottish Referendum gave such an unequivocal result was the independence option was not only not on the ballot paper (obviously) but also largely removed from the debate by the consent of the SNP. Then as now, pitching Sovereign independence against Devolution is more likely to confuse than enlighten. A referendum on independence should be just that.

40. The Scottish Devolution referendum was a simple multi-option referendum, a feature largely ignored by the voters. But if held under PPERA, the Commission would have had to fund all possible outcomes on the ballot paper, including—a Parliament without a tax power—complicating the debate as every broadcaster would have had to follow suit.

41. In some multi-option referendums, authorities have tried to manipulate the result by deliberately excluding popular options leading to write-in campaigns.

42. Sweden held a multi-option referendum on nuclear power generation involving one principle and variations of degree. While the narrower focus helped, the interpretation of the result remains controversial.

43. The most satisfactory way of holding a major multi-option referendum is to hold a pair of referendums as New Zealand did on PR. In the first referendum the alternative PR systems were ranked by voters. The winning PR system then went head to head with the status quo (FPTP) 14 months later.

Should there be formal constitutional triggers for a referendum?

44. There is already such a trigger in the Belfast agreement which requires a referendum should NI wish to join the Irish Republic.

45. Less certainly, powers devolved to the Scottish Parliament were powers retained by Westminster. But it is hard to see that what came by referendum won’t have to go by referendum.

Whether a referendum should be indicative or binding?

46. A binding referendum is much to be preferred. Voters know they are making a decision they will have to live with and the decision attracts the media earlier and more intensely thus invigorating the referendum debate, educating the voters and increasing turnout.

Whether a referendum should ask broad questions or refer to specific legislation?

47. A broad principle is generally not sufficient. The voters are perfectly capable of extracting a broad principle of what is at stake in specific legislation.

48. For example, I supported the broad principle of a regional assembly for the NE until I saw the legislative detail and then predicted its rejection. Sadly the result has been widely interpreted as the wholesale rejection of a broad principle rather than the sensible rejection of a weak proposal.

49. A broad principle may be sufficient dealing with “liberty” like the Independence of East Timor but as Scottish independence would be more about good governance than liberty the referendum ought to refer to a specific proposal post negotiation with the UK.
50. Mandate referendums may only have a broad question to deal with. De Klerk in SA sought a mandate to continue negotiating. The Conservatives have talked about getting a mandate to negotiate with the EU. The SNP could seek a mandate to negotiate independence by referendum rather than General Election raising the possibility of two referendums on independence.

51. Defensive referendums again using a broad principle have been suggested recently to counter Independence. It seems unwise as a general practice to call a referendum as soon as a “threat” appears on the horizon. The risk is that there is differential voting, one side seeing an opportunity, the other not sufficiently aroused by a distant and apparently premature issue. The outcome becomes a mandate to negotiate.

52. The only way round it is to hold the referendum at the same time as a General Election banking on the trend that the status quo vote increases as it often does. But this would breach UK good practice and lay the referendum open to charges of rigging. When the Swiss voted to join the UN it was a completely stand alone referendum with a turnout of 81% vindicating the policy of selective participation.

Whether a referendum should precede or follow statutory enactment?

53. There should be a firm proposal. Obviously an un-ratified Act is one way of achieving this but not the only way. A treaty, the existence of the euro and the Scottish Convention in their various ways crystallised the issue.

54. The Scotland Act might well have been improved if the referendum had followed enactment because the Government used the referendum result to ram it through Parliament paying little heed to the suggestions of friend or foe. So if the issue has emerged from Parliament, I would prefer ratification referendums.

Campaigning organisations and the funding of campaigns

55. The Electoral Commission may designate one organisation on either side as lead campaigns.

56. Because of the way the UK currently holds referendums, these campaigns are usually hastily formed working against the clock drawing activists, endorsements and donations wherever they can. Beside campaigning skills, they must now build compliance structures. Because of the indecision over the euro referendum, the euro campaign had the luxury of time to prepare. Nevertheless from the opening of the referendum period there would have been a great scramble to be selected as the designated organisation with a still half formed organisation. It is a selection process that could make enemies of allies usually on one side only and thus a considerable responsibility for the Electoral Commission.

57. Apart from immediately being elevated to lead campaign in the eyes of the media and public, the state aid for each designated organisation is a free mailing of a referendum address, UK funding of £600,000, free use of premises and referendum broadcasts.

58. Though PPERA didn’t exist in 1997 it is worth considering how it would have worked in the Scottish Devolution referendum.

59. The UK funding pro-rated for Scotland would be £55,000 that is about 9% of what the Scottish Yes campaign actually spent and would have paid for the polling research. Free premises represent a further modest financial contribution.

60. There were no referendum broadcasts because of court rulings in prior referendums. So this provision is an important new contribution to the referendum debate though the format could be improved.

61. The most valuable aid is the free mailing to the electorate. This was far beyond the financial resources of either side in Scotland. At first the new Blair government tried hard to keep out of the referendum process anxious to be seen as “whiter than white” after its criticism of the Major government. Eventually convinced that the electorate had to be given some information but to avoid being seen as partisan, a rather milk-and-water leaflet was distributed by the Scottish Office.

62. Drawing on experience elsewhere, the format of the referendum address could be developed into a statement and rebuttal from both sides contributing more to the referendum debate.

63. There is never enough money in campaigns. The state aid in the Act might be raised for obligatory referendums but otherwise it is probably about right. My concerns are more about the regulatory process and compliance getting in the way of the deliberative debate.
Public information and media coverage

64. Though hardly ever an Athenian ideal, Switzerland gets close, the referendum debate is one of the defining features of a referendum. It is greatly helped by the UK tradition of 50:50 broadcasting balance in referendum coverage, something the UK shares with few other countries, notably Switzerland and Ireland.

65. But if this referendum debate is itself preceded by some kind of event which both crystallises the issue and educates many especially the media, politicians and opinion formers then the subsequent referendum debate will be enhanced. In Scotland obviously the Constitutional Convention, in Northern Ireland the long negotiation of the Belfast Agreement, on the euro its very existence alongside the “five tests”, even on a small scale the Harris super quarry and its public inquiry, all these served to prepare the arguments, brief the media and move opinion.

66. The council tax referendums in the South of England and the movement opinion in the Harris super quarry referendums showed that public information works. But greater thought could be given to how this can be improved especially in those parts of the country not well served by regional newspapers and the broadcasters.

Party political activity

67. Politicians should take part in referendums as individuals but the role of the Party should be restricted to endorsing an issue.

Whether they should coincide with other elections or not?

68. Major referendums should not coincide with a General Election, minor referendums may or may not. No major UK referendum has yet coincided with a General Election. While this tradition has arisen more from low politics than high principle, the Electoral Commission have since given their independent view that this is a sound practice worth continuing.

69. Towards the end of 2002, there was talk of the euro referendum being held at the same time as the second Scottish General election. As a devolutionist, I had seen the way the Kosovo crisis had overshadowed the first SGE and knew the euro referendum would dominate the second. So I put the international experience to the Electoral Commission who in turn launched a consultation. The Commission subsequently recommended against holding a major referendum at the same time as a General Election.

70. The arguments briefly are General Elections are party events, referendums are not. Broadcasters find it difficult enough to maintain the 50:50 referendum balance without the simultaneous complication of reflecting party strength in a general election. So the referendum debate is damaged even obliterated.

How does the referendum relate to other tools such as citizens initiatives?

71. All referendums discussed so far represent responses to the legislative agenda. Citizens’ Initiatives would for the first time in the UK allow voters to impose their agenda directly on the Legislatures raising issues ignored by politicians.

72. The US Federal Government for long opposed clean energy policy. At the same time citizen initiatives encouraged several States to introduce laws promoting the use of clean energy so change came from the bottom up. The recent initiative in Switzerland banning minarets articulated a problem being swept under the carpet. Not all successful initiatives end in a referendum because governments may simply adopt the initiative into their own agenda or make a counter proposal.

73. There is also a provision for an EU Citizens Initiative in the Lisbon treaty. However it is closer to transnational petition for a policy. The more likely development seems to be the Conservatives who will nominate policy areas within which initiatives can be used to set the agenda (on whom is unclear). If successful, one can see them self seeding into other policy areas but it is just this kind of unplanned growth which gives rise to later procedural difficulties.

74. The Committee is right to anticipate this and to set the innovation and procedure in proper constitutional context.

How would you assess the experience of other countries in relation to the use of referendums?

75. Many countries use referendums, the majority on an occasional basis. There are quite a number of countries with a referendum process in their constitution, rather fewer with an initiative process but still plenty of experience good and bad.
76. The ones the UK should look at are—Switzerland is in a class of its own but has many good practices especially the deliberative culture. California will this year hold a constitutional convention to reform its over active initiative process. Despite the current difficulties, it is very striking how attached Californians are to Initiatives. US states have certainly something to teach us. Germany has greatly expanded its use of citizen initiatives in the last 10 years and Ireland has used referendums from the foundation of the State.

9 January 2010

Letter from True Wales

We write on behalf of True Wales, the cross-party, cross-sector body opposed to the devolution of full law-making powers to the National Assembly for Wales. Our aim is to ensure balance in the debate about Wales’ constitutional future, and to campaign for a “No” vote in the promised referendum.

We understand that Mr Geraint Talfan Davies, Chairman of the Institute of Welsh Affairs has submitted evidence to the House of Lords Constitution Committee’s investigation of referendums, in which he appears to advocate a change in the law relating to referenda and speaks specifically about the Welsh devolution process.

In the submission, he states his organisation’s argument that “the threshold for calling referendums is already too low, and that it should be applied only to major issues of democratic principle”. IWA acknowledges that there is now no going back on the next referendum on law-making powers—already enshrined in the Government of Wales Act 2006 and underlined by the One Wales agreement between Labour and Plaid Cymru—but argues that the changes proposed in that Act “are not sufficiently significant to merit a second referendum in little more than a decade.” and, “Such evolutionary change of existing structures cannot be said to be a point of principle to the same extent as presented by completely new ventures. Evolutionary change is a constant”.

This change is nothing so random or accidental as evolution. These are deliberate steps set out by politicians and establishment figures for which there is no mandate from the Welsh people. The result of the Welsh Assembly referendum in 1997 (50.3% of the 50.1% who turned out to vote) was so narrow as to require that any change as significant as primary law-making powers should be voted upon by the people of Wales. The political establishment had pledged that law-making powers would not be devolved until a further referendum was held to determine whether such change would have a popular mandate. Nevertheless, in 2006, the Government of Wales Act was placed on the Statute Book, conferring legislative powers and making provision for the establishment of a full Welsh Parliament.

We believe that the people of Wales have deep concerns that further powers will be a prelude to separation from the United Kingdom since Nationalist politicians in the Labour-Plaid Administration have now openly stated their aim of an independent Wales within twenty years. Though we have also been told by politicians from other parties that devolution is a process not an event, no one is prepared to tell us what the final destination of devolution is expected to be. The vast majority of Welsh people oppose the break up of the UK and we, in True Wales are determined to vocalise this opposition. We believe that the United Kingdom is stronger than the sum of its parts and that Wales is better positioned in the world as an important part of that union.

IWA has mentioned in its submission to your Lordships’ Committee that it would be difficult to formulate the question in the referendum. We in True Wales believe that the only difficulty is that the current mooted question as to whether the Welsh Assembly Government should have more powers devolved now in one fell swoop or gradually, is meaningless. There is no provision for people to express a view as to whether or not they want the Welsh Assembly to be a full law-making parliament, or whether they remain unconvinced by the kind of establishment that the Assembly has developed into.

Currently the real people of Wales are locked out of the political process at every level of government, and this democratic deficit needs to be addressed. Whilst we are in favour of the devolution of power to the people, our vision as to the role of the Assembly differs from that of the Welsh political establishment, and is set out in the enclosed paper entitled “True Wales Devolution Charter” (enclosed).

Perhaps the Institute of Welsh Affairs believes that a “Yes vote” cannot be attained, and it is for this the reason that it wants the goalposts to be moved. Conversely, True Wales believes that it is absolutely essential that a referendum should be held to determine how far the people of Wales wish to go in the direction of secession from the United Kingdom. We ask your Lordships to give sympathetic consideration to this view.

12 January 2010
Memorandum by Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South Wales

1. What are the strengths and weaknesses of the referendum as a democratic and constitutional tool? What issues is it appropriate to submit to a referendum?

Referendums can provide an outcome with a form of direct democratic legitimacy not normally obtainable through the system of representative government.

On the other hand, referendums can greatly increase the difficulties in bringing about a change. They are expensive, and can place a sometimes insurmountable hurdle in the face of change. Referendums are also not well-suited to complex issues involving the need for compromise and high-level community education. Referendums can also be open to manipulation through the provision of misleading information and scare campaigns.

2. How would you characterise the experience of referendums in Australia? What is the nature of the regulatory framework? What positive and negative features should we take note of?

Would you agree with Dr Setälä that the Australian requirement of a mandatory referendum, in conjunction with its compulsory voting and double majority requirements, has proved to be a “major obstacle for any constitutional changes”? Do you agree with Professor Butler that the referendum, in the Australian experience, has essentially been “a conservative instrument”?

Yes, I agree with the above comments. Involving the Australian people in constitutional change has undoubtedly been positive in terms of helping to generate popular ownership and legitimacy in Australia’s constitutional structure. On the other hand, there is little to suggest that it has improved the level of education about that system, and has indeed made change of the system extremely difficult, and in some areas almost impossible. It is fair to say that Australia’s referendum process makes its Constitution one of the very hardest in the world to alter.

A number of witnesses have referred to the 1999 Australian referendum on the establishment of a republic. What assessment would you make of the positive and negative features of this referendum campaign?

I believe that a referendum was an appropriate means of deciding this issue. Moving to a republic was the type of issue that required a popular mandate to bring about. On the other hand, the referendum also demonstrated some of the worst features of holding a referendum, such as the high level of misinformation, the often poor quality of the debate and the possibilities of manipulating the outcome.

3. What kinds of information do you think that voters need to make informed decisions in referendums? Should government have a role in providing or assessing that information?

Some witnesses have referred to the pre-referendum deliberation process that took place before the 1999 Australian referendum on the establishment of a republic. What assessment would you make of this process?

I think that it is important, if the referendum is to succeed, that the community see that they have a level of ownership not only of the outcome but also of the question put at the referendum. Community ownership and engagement can occur through community consultations, conventions or other means. However, this does not exclude an important role for the government of the day. The government should play a major role in helping to establish the community process and also in ensuring that the referendum is held in a technically sound and appropriate manner. It would normally also be expected that the government will play a lead role in advocating a particular outcome at the referendum.

To both witnesses: Are there any issues in your judgment that could be deemed too complex to subject to a referendum?

Referendums work best when dealing with a discreet policy issue or change in legal direction. They are not appropriate to be used for what are essentially government decisions, such as budgetary allocations.

4. What principles should be borne in mind in designing a referendum question? Is it appropriate for multi-option referendums to be put forward?

To both witnesses: Should referendums ask general questions of principle, or yes/no questions on a specific course of action?

The question should be fair and straightforward. there should be no suggestion that it lends itself to bias by being out of a particular way. I think both yes/no referendums are appropriate, as well as multi-option referendums. It depends upon the issue.
5. **What principles should be borne in mind in terms of regulating the financing of referendum campaigns?**

It can make sense to establish public yes and no committees, along with appropriate financing for those committees to engage in advocacy. However, it is also particularly important that there is a significant amount of neutral material put out during and before the actual campaign. The recent report of the Australian House of Representatives legal and constitutional committee on referendums is useful in this regard.

6. **How can it be ensured that a fair and effective referendum campaign is delivered? What role do you think it is appropriate for the government (and political parties more generally) to play in referendum campaigns?**

I do not think it is appropriate to exclude the government or political parties from extensive involvement. They have a right to be involved along with many others, and it would not make sense to exclude them. It is particularly important though that the referendum process is overseen by an independent, expert body able to adjudicate any disputes and to ensure that public funding for advocacy is spent appropriately.

7. **What are the arguments for and against the use of threshold requirements (whether in terms of turnout or vote percentage) for referendums?**

I would support a referendum being successful if a simple majority of the people voting cast a ballot in favour of the proposal.

8. **What is your opinion of other tools such as citizens’ initiatives? How does the referendum relate to such tools?**

While I favour the occasional referendum, I do not support citizens initiated referendums. There is too much evidence that referendums of this latter type are open to manipulation, especially by media and money interests, and that they do not actually provide an effective community means of bringing about legal and policy change.

*3 February 2010*