

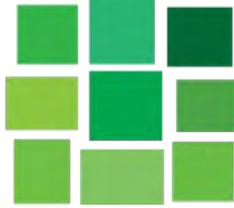
## **Appendix G**

# **Papers and Presentations from Citizens' Assembly**

13<sup>th</sup> & 14<sup>th</sup> January 2018

**Manner in which  
referenda are held**





**13 January – 14 January 2018**

**1**

|  |            |
|--|------------|
| <b>Agenda</b>  | <b>1</b>   |
| <b>Prof. Gary Murphy</b>   |            |
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| • Presentation   | 13         |
| <b>Niamh Hyland S.C.</b>   |            |
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| <b>Dr. Conor O'Mahony</b>  |            |
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| <b>Mark Brennock</b>   |            |
| • Paper  | 42         |
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| <b>Prof. Michael Marsh</b>   |            |
| • Paper  | 62         |
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| <b>Dr. Theresa Reidy</b>   |            |
| • Paper  | 93         |
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| <b>Papers Provided to Members as Part of the Deliberative Process</b>  |            |
| • Note on Voting Arrangements and Procedure 13 <sup>th</sup> & 14 <sup>th</sup> January 2018: <i>Paper Prepared by Secretariat</i> | 116        |
| • Draft Ballot Paper : <i>Prepared by Secretariat and Expert Advisory Group</i>  | 122        |
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| <b>Transcript of Ballot Paper Deliberations, Finalisation and Voting on Sunday 14th January</b>                                    | <b>143</b> |

Agenda

Weekend 10: 13<sup>th</sup> and 14<sup>th</sup> January 2018

Topic: *The manner in which referenda are held*

**Saturday 13<sup>th</sup> January**

|       |   |         |
|-------|---|---------|
| 09.15 | Private Session   | Private |
| 09.30 | Opening Address by the Chair  | Public  |
| 09.45 | <b>Session 1: Referendums in Ireland- History and outcomes to date</b><br><i>Prof. Gary Murphy, Dublin City University</i>                | Public  |
| 10.05 | <b>Session 2: Referendums in Ireland- Legal background and process</b><br><i>Niamh Hyland SC</i>  | Public  |
| 10.20 | Round Table Discussion  | Private |
| 10.45 | Coffee  | Private |
| 11.00 | Q&A   | Public  |
| 11.30 | <b>Session 3: Referendum Campaigns: Legal Regulation</b><br><i>Dr. Conor O'Mahony, University College Cork</i>                            | Public  |
| 11.50 | <b>Session 4: Referendum Campaigns: Legal Regulation- Impact on the media</b><br><i>Mark Brennock, Director of Public Affairs, Murray</i> | Public  |
| 12.10 | Round Table Discussion including discussion on possible issues arising for the Assembly's recommendations                                 | Private |
| 13.00 | Lunch   | Private |
| 14.00 | Q&A and Feedback from Sessions 3 and 4  | Public  |

|  |   |         |
|--|---|---------|
| 14.40  | <b>Session 5: Voter turnout, super referendums and repeat referendums</b><br><i>Prof. Michael Marsh, Trinity College Dublin</i> | Public  |
| 15.05  | <b>Session 6: Citizens initiatives and direct democracy</b><br><i>Dr. Theresa Reidy, University College Cork</i>                | Public  |
| 15.30  | Coffee  | Private |
| 15.45  | Round Table Discussion including discussion on possible issues arising for the Assembly's recommendations                       | Private |
| 16.30  | Q&A and Feedback from Sessions 5 and 6  | Public  |
| 17.15  | Concluding remarks by the Chairperson   | Public  |
| <b><u>Sunday 14<sup>th</sup> January</u></b> |   |         |
| 9.30   | Welcome from the Chair  | Public  |
| 9.35   | Presentation of Draft Ballot Paper  | Public  |
| 10.00  | Roundtable Discussion   | Private |
| 10.45  | Feedback and Q&A from members   | Public  |
| 11.30  | Coffee  | Private |
| 11.45  | Finalisation and agreement on wording of Ballot Paper including explanation of any agreed amendments                            | Public  |
| 13.00  | Voting  | Public  |
| 13.30  | Lunch/ Counting of the votes  | Private |
| 15.30  | Announcement of results, Concluding remarks and Reflections from the Chair  | Public  |

*Paper of*

**Prof. Gary Murphy**

Dublin City University

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

*Referendums in Ireland - history and outcomes to date*  
*Prof Gary Murphy*  
*School of Law and Government, Dublin City University*  
*The Citizens' Assembly, Dublin, 13 January 2018*

*Introduction*

Since its adoption by the people in a plebiscite in 1937 the Constitution of Ireland, *Bunreacht na hÉireann*, has regularly been subject to amendment and referendums have become a regular feature of the Irish political landscape. Ireland is one of the few countries where every constitutional amendment requires the consent of the people. Article 46 states that a proposal to amend the constitution must be passed by the houses of the *Oireachtas* and then be put to a vote of the people in referendum (Gallagher, 2017: 63). *Bunreacht na hÉireann*, like most written constitutions, is less easily amended than ordinary legislation. In the great majority of European countries, a referendum can only be triggered by one of the institutions of representative government, such as the government, a parliamentary majority, a specified minority in parliament, or the President (Gallagher, Laver, Mair, 2011: 370). The use of the referendum varies widely across Europe. Referendums are a regular occurrence in Switzerland where there have been over 550 since the Swiss Federal constitution of 1848 but these include direct citizens' initiatives. Italy is second only to Switzerland in the number of popular votes that take place. Since the adoption of the Italian constitution in 1948 the Italian people have voted in 72 national referendums. These are almost always about laws rather than constitutional reforms. Referendums on constitutional issues are a relatively common feature of politics in Denmark with sixteen referendums being held since 1953. By contrast there have been no referendums held in Germany since their constitution, the basic law, was adopted in 1949.

Ireland is a regular use of referendums and in total 40 amendment proposals have been approved by the *Oireachtas*. The first and second amendment bills referring to the state of emergency, and emergency provisions and various other matters were passed by the *Oireachtas* without a referendum in 1939 and 1941 respectively. This was because Article 51 permitted the *Oireachtas* to amend the Constitution for a period of three years up to June 1941 after the first president

entered office. Since the first referendum to amend the constitution in 1959 there have been 38 referendums. Of these 27 have been approved and 11 rejected by the people.

Of the 38 amendments, nine related to moral and religious issues, nine to the European Union, seven to voting, and four to various aspects of the political, governmental and judicial framework. There has been one referendum on Northern Ireland, one on citizenship, one on children's rights while the other six were on relatively minor or technical matters which did not engender particularly strong emotions.

There have been four repeat referendums; that is referendums where the people have been asked to vote on the same proposal. The first of these was to do with changing the electoral system from PRSTV to a first past the post system. The original proposal in 1959 was narrowly defeated with 51.8 per cent of people voting no, but the second was far more decisively rejected with 60.8 per cent against. Both referendums were extremely contentious with opponents saying that they were designed to enable Fianna Fáil to govern in perpetuity. Turnout for the second referendum went up 7.4 per cent to 65.8 per cent from 58.4 per cent.

In 1995 the people were asked to vote again to permit divorce despite having decisively rejected the original proposal in 1986 by a vote of 2:1. The second referendum was passed by the lowest majority in the history of referendums at 50.3 per cent, just over 9,000 votes. Turnout was up from 60.5 per cent in 1986 to 62.2 per cent in 1995.

In both the Nice Treaty referendum of 2001 and the Lisbon Treaty referendum of 2008 the people having originally said no were asked to vote again and the repeat referendums were subsequently passed in 2002 and 2009 respectively. Turnout was significantly up in the second Nice referendum to 48.5 per cent from a very poor 34.8 per cent in the first vote. On Lisbon turnout went up six points from 53 per cent to 59 per cent. So we can see that in three of the cases of repeat referendums the proposal was passed on the second attempt. These referendums all had the support of both government and opposition parties. The one proposal that was rejected was probably the most partisan with Fianna Fáil being the sole proponent of the electoral reform proposal while all other political groupings were against. There have been five

referendums on abortion but these have all been on differing aspects of the issue and cannot really be described as repeat referendums.

### *The Morality Referendums*

Of the nine referendums on moral and religious issues, the first in 1972 to remove the ‘special position’ of the Catholic church was passed comfortably with the backing of all political parties. The only opposition came from conservative catholic groups. The yes vote was a massive 84.4 per cent and the turnout was just over 50 per cent. Over a decade later, however, the first of five referendums on abortion in just under twenty years engendered enormous passions and deep divisions both within political parties and in the country at large. In 1983 the eighth amendment to the constitution was aimed at preventing any legislation of abortion. The campaign was bitter and divisive and there was much initial controversy over the wording on the ballot paper. Fianna Fáil’s proposed wording was eventually adopted by the Oireachtas and the referendum was comfortably passed with 66.9 per cent voting yes on a 53.7 per cent turnout (Girvin, 1986).

Three further amendments on abortion were held on the same day in November 1992 as a result of a Supreme Court decision in the X case in March of that year which found that Article 40:3:3 did in fact confer a right to an abortion on a woman whose life would be threatened by continuing with a pregnancy – including cases where this risk arose from the possibility of suicide by the expectant mother. Two of these amendments stated that Article 40:3:3 did not limit either freedom to travel outside the state or freedom to obtain information about services lawfully available in other states and were comfortably passed. A third proposal was much more controversial and would have permitted abortion only in cases where a continued pregnancy would have meant a risk to ‘the life, as distinct from the health, of the mother’ (except where the risk to life arose from the possibility of suicide). This was defeated with 65.4 per cent voting against on a turnout of 68.2 per cent. In 2002 another amendment whose essential purpose was to remove the possibility of suicide by the mother as a justifiable basis for abortion was narrowly defeated by 50.4 per cent of voters on a turnout of just under 43 per cent (Murphy, 2017: 283).

Divorce was the other issue which dominated the moral agenda in Ireland in the 1980s and 1990s. In 1986, as part of the Garret FitzGerald led Fine Gael Labour government's constitutional crusade, an amendment to allow for the legalisation of divorce in restricted circumstances was held. The government itself was divided over the amendment. Fianna Fáil in opposition was strongly against and the amendment was decisively rejected with 63.5 against on a turnout of 60.5 per cent. In 1995 the second divorce referendum was passed and Article 41 of the constitution was subsequently amended to allow for divorce in very specific circumstances which are spelled out clearly in the new article.

Finally in 2015, same-sex marriage was legalised via referendum when 62.1 per cent of voters agreed to further amend Article 41 on a turnout of 60.5 per cent. This was the highest turnout at a referendum since the divorce referendum of 1995, a period in which there were nineteen further referendums. The same-sex marriage referendum was a rather unusual one in that the onus for the vote came from an experiment in deliberative politics in the form of the Irish Constitutional Convention (Elkink et al, 2017: 369-70). All other referendums have been driven by the political parties although the impetus for the original abortion referendum in 1983 came from pressure put on the major political parties of the day by pro-life interest groups (Murphy, 2016: 26). The pattern of voting in these moral referendums has been relatively similar. While Ireland has clearly liberalised over the thirty years since the 1983 abortion referendum there has been a strong consistency as to which constituencies are the most liberal and which are the most conservative and there also been a strong urban rural divide.

### ***The European Referendums***

The other main focus of amendments to the constitution has been Ireland's relationship to the European Union. Ireland's original accession to the EEC came via referendum in 1972 and there have been eight other referendums to do with various aspects of deepening Ireland's involvement in the EU. Joining the EEC in the first place required a referendum as the obligations for membership would have been in conflict with the constitution in that the EEC's institutions would have had the power to make laws for the state. Moreover, the EEC's Court of Justice would be superior to Ireland's Supreme Court. This would have conflicted with articles 15:2:1

affirming the legislative monopoly of the Oireachtas and 34:4:6 affirming the finality of all judgments of the Supreme Court. A decision was taken by the then Fianna Fáil government not to amend the particular articles affected but to create a new subsection Article 29:4:3 allowing the state to join the EEC and adding the rider that “No provision of this constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities” (Gallagher, 2017: 65).

The next European amendment came in 1987 with the referendum to allow the state to ratify the Single European Act. The minority Fianna Fáil government neither wanted nor expected to have a referendum on this issue but the Supreme Court in the Crotty judgment voted 3-2 that the government could not sign the Single European Act on the ground that to do so would restrict the freedom of governments to conduct an independent foreign policy. As a result, every subsequent major EU treaty has required constitutional change and hence a referendum (Laffan and Tonra, 2017: 358-9). The 1987 referendum was comfortably passed with close to 70 per cent voting yes on a turnout of just under 44 per cent.

This referendum was followed, in turn, by referendums on the Treaty on European Union (Maastricht) in 1992, the Amsterdam Treaty in 1998, and the Nice Treaty in 2001. Maastricht with 69 per cent voting yes on a 57.3 per cent turnout endorsed Ireland’s participation in the single currency. The numbers supporting a yes vote fell to 61.7 per cent in the Amsterdam referendum on a turnout of 56.2 per cent. The decisive rejection of the Nice Treaty in June 2001 when 54 per cent voted no on a very low turnout of just 34.8 per cent came as a profound shock to the government, its EU partners and to the candidate states in Central Europe that were affected by the result. The Fianna Fáil Progressive Democrat government responded by establishing the National Forum on Europe and brought forward new legislation to improve parliamentary scrutiny of Ireland’s European policy. It also secured guarantees from the EU that Ireland’s participation in the EU’s Common Foreign and Security Policy did not prejudice its traditional policy of military neutrality and that European treaties did not impose mutual defence commitments. The government then re-ran the referendum in October 2002 securing a yes vote of 63 per cent on a turnout of 48.5 per cent (Laffan and Tonra, 2017: 359). The first Nice Treaty was held on the same day as referendums to prohibit legislation allowing for the death penalty

and to permit ratification of the International Criminal Court, both of which were comfortably passed while the Amsterdam referendum was held on the same day as the Good Friday Agreement.

It was a similar tale with the Lisbon treaty of 2008. This time the referendum was defeated with 53.4 per cent voting no on a turnout of 53.1 per cent. The Lisbon treaty showed the difficulty with referendums on European integration as a whole range of issues which had nothing to do with the treaty ended up being discussed among them abortion and hospital waiting lists. The Lisbon treaty saw the entry into the fray of a new political grouping, Libertas, who used the occasion to advocate for a specific neo-liberal vision of the EU (Murphy, 2017: 286; Quinlan, 2009: 111-2). The referendum was also notable for the sharp differences in demographic voting with the unskilled working classes more likely to vote no and the affluent middle classes more likely to vote yes. This led to yet another re-evaluation of Ireland's membership of the EU and the type of Union that Irish people wanted to see. Another set of political and legal assurances were eventually received by the EU and the voters went back to vote in a re-run referendum in October 2009 where a significant majority of 67 per cent voted yes on a turnout of 59 per cent (Quinlan, 2012). There was one further EU referendum in May 2012 when 60.5 per cent voted yes on a 50.5 per cent turnout to the Fiscal Stability Treaty designed to tighten budgetary rules within the Eurozone. This was a rather complex treaty and as the referendum took place during the ongoing economic crisis, the majority of voters seemed to take the view that with the country mired in an economic trough it was best to vote yes.

### *The state referendums*

Of the seven referendums concerning voting rights, the second electoral system referendum in 1968 was coupled with a proposal that was designed to permit rural voters to be over-represented at the expense of urban voters. Both were defeated. The other referendums were relatively non-contentious. The most interesting perhaps was that on Seanad representation in 1979 when 92.4 per cent of the people on a turnout of just 28.6 per cent voted to allow for alteration of university representation in the Seanad. Some 38 years later that decision of the people has still not been acted upon. In 1984 a proposal to permit the Oireachtas to extend the vote to non-citizens was

comfortably carried while in 1999 constitutional recognition was given to local government and stipulated that local elections must take place every five years (Gallagher, 2017: 65).

Four referendums related to the main institutions of the state. Two of these were rejected and two were passed. In 2011 the people refused to give greater powers to Oireachtas committees and in 2013 they rejected the proposal to abolish the Seanad. In 2011 on the same date as the parliamentary inquiries referendum the people agreed to permit the salaries of judges to be reduced in line with other public servants and in 2013 on the same date as the Seanad vote they allowed for the creation of the Court of Appeal. The turnouts on both days were practically identical with 56 per cent of the people voting in both referendums in 2011 and 39.2 per cent voting in both referendums in 2013. The 2011 vote was held on the same date as the Presidential election. In 2015 the same-sex marriage vote and the proposal to reduce the age limit for presidential candidates to 21 were also held on the same day and had a similar turnout of 60.5 per cent. Again the people voted decisively yes for one referendum, 62.1 per cent for same-sex marriage and overwhelmingly no, 73.1 per cent against reducing the age limit. The 26.9 per in favour was the lowest yes vote of any proposal to change the constitution in the history of the state.

The 1998 Good Friday agreement, also known as the Belfast Agreement, involved referendums in both Northern Ireland and the Republic of Ireland. The referendums were held on 22 May 1998 and the wording of the question on the ballot paper was different in the two jurisdictions. The turnout in the Republic was 56.3 per cent and 94.4 per cent of the people endorsed the changes to articles 2 and 3 of the constitution which laid territorial claim to the whole island of Ireland. The new article 2 stated that everyone born on the island of Ireland was entitled to be a member of the Irish nation and that was “also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland”. Article 3 stated that a united Ireland could only be brought about through peaceful means with the consent of the majority of the people in both jurisdictions and also allowed for the establishment of North-South bodies. In 2004 over fears that the Good Friday Agreement basically conferred an automatic right to Irish citizenship to anyone born on the island of Ireland, a proposal to remove this right through the addition of a new section to Article 9 was approved by close to 80 per cent of the voters on a turnout of just

under 60 per cent. The aim of this referendum was to close off what the then government considered to be an unintended loophole which allowed for so-called ‘citizenship tourism’ and provided that children born on the island of Ireland to parents who were both foreign nationals would no longer have a constitutional right to citizenship of the Republic of Ireland.

### *Conclusion*

Ultimately the referendum requirement in Article 46 of the constitution has been a powerful check on governments of all hues who might have wanted to make changes that do not have broad support across the political spectrum. Only on one occasion – the original plebiscite to adopt the constitution itself – have the people approved a proposal not backed by the major opposition party. Since then when governments have proposed amendments not supported by the main opposition party, the people have rejected them. We count here Fianna Fáil’s attempts in 1959 and 1968 to change the electoral system; the efforts by Fianna Fáil led governments to restrict the circumstance under which abortion could be made legal in 1992 and 2002; Fine Gael and Labour’s attempts to permit divorce in 1986; and Fine Gael and Labour’s proposal to abolish the Seanad in 2013 (Gallagher, 2017: 66). The requirement that no changes to the constitution can be made without a referendum certainly enhances the status of the constitution amongst the people as its contents remain under their control. Thus significant and often controversial changes to the constitution in areas such as morality, the EU, and Northern Ireland have the imprimatur of the people and a legitimacy that could not be achieved by politicians making these decisions in parliament. Drawbacks include the cost of referendums and the complexity of some referendums, for instance, that on the Fiscal Stability Treaty in 2012. But the referendum act of 1998 with its provision to establish a referendum commission for every referendum, which would have as its principal function the provision of information to the electorate in respect of the referendum, goes some way to ensuring that citizens are knowledgeable on the issues on which they are being asked to change their constitution. That is the least citizens need as changing the constitution is unquestionably an act of significant civic duty and the more information citizens have before doing so the better.

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*Presentation of*

**Prof. Gary Murphy**

Dublin City University

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

# ***Referendums in Ireland: History and Outcomes***

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## **Referendums in Ireland**

- **Ireland is one of the few countries where every constitutional amendment requires the consent of the people**
- **38 proposed amendments**
- **27 approved and 11 rejected**



## Referendums in Ireland

- 9 on moral issues
- 9 on the European Union
- 7 on voting
- 4 on political, governmental and judicial framework
- One on Northern Ireland
- One on Children's rights
- Other 7 on relatively technical issues



## Referendums in Ireland

- Major changes have allowed
- Ireland to take a full part in process of European Integration (1972, 1987, 1992, 1998, 2002, 2009, 2012)
- Divorce to be legalised
- Ireland to fulfil its part of the Northern Ireland Agreement
- Legislation of same-sex marriage



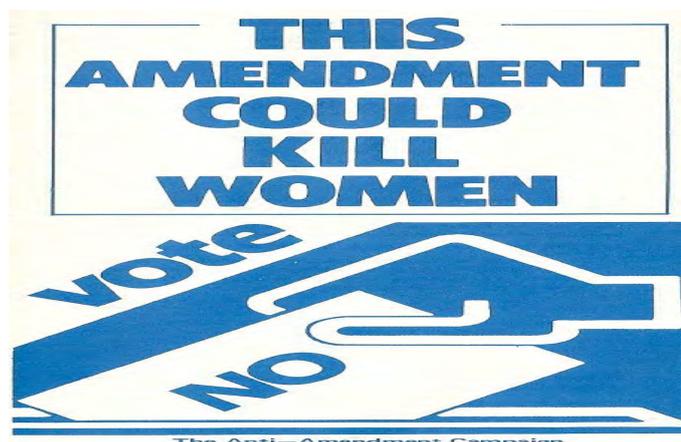
## Referendums in Ireland

- 4 repeat referendums where the people have been asked to vote on the same proposal
- Electoral System 1959 and 1968
- Divorce 1986 and 1995
- Nice 2001 and 2002
- Lisbon 2008 and 2009



## Referendums in Ireland

- Five referendums on abortion
- 1983, three in 1992, 2002



## Referendums in Ireland on the same day

| Year | Topic of amendments  |
|------|--|
| 1968 | Dáil constituencies and electoral system                               |
| 1972 | Recognition of religions and votes at eighteen                         |
| 1979 | Adoption and Seanad reform   |
| 1992 | Abortion: Travel, Information and Right to Life [and General Election] |
| 1998 | Good Friday Agreement and Amsterdam Treaty                             |
| 2001 | Nice Treaty [1], Death penalty and International Criminal Court        |
| 2011 | Judges pay and Oireachtas Inquiries [and Presidential Election]        |
| 2013 | Court of Appeal and Seanad reform                                      |
| 2015 | Same Sex Marriage and Presidential candidate age                       |

## Referendums in Ireland

- Article 46 a powerful check on governments who might have wanted to make changes that do not have broad support across the political spectrum
- The requirement that no changes to the constitution can be made without a referendum certainly enhances the status of the constitution amongst the people as its contents remain under their control.

# Referendums in Ireland

- Considering changing the constitution is an act of significant civic duty
- In that context citizens need as much information as possible before doing so
- Your constitution
- Your decision



*Paper of*

**Niamh Hyland SC**

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

## The Citizen's Assembly – 13<sup>th</sup> January 2018

**Topic: The manner in which Referenda are held**

### Referendums in Ireland- Legal background and process

*Niamh Hyland SC*

#### **I. Background and Constitutional Provision for Referendums**

Referenda have long been a staple of Irish legal and political life.<sup>1</sup> The Free State Constitution of 1922 established a referendum procedure in Ireland for the first time,<sup>2</sup> and even provided an 'initiative' mechanism which allowed the people acting alone to trigger the holding of a referendum.<sup>3</sup>

The Constitution of Ireland 1937 retains the centrality of the referendum, but dispenses with the initiative mechanism. The Constitution provides for a relatively straightforward mechanism of amendment.

At least partly as a result of the ease of the process, constitutional referenda take place quite regularly in Ireland. The tenure of the last government saw an unprecedented flurry of referendum activity, with the holding of eight separate constitutional referenda.<sup>4</sup>

Article 46 of the Constitution governs amendment of the Constitution. In summary, it provides that:

<sup>1</sup> See generally O'Neill, "The Referendum Process in Ireland" (2000) *Irish Jurist* 305

<sup>2</sup> Article 47, Irish Free State (Saorstát Éireann) Constitution, 1922.

<sup>3</sup> Article 48, Irish Free State (Saorstát Éireann) Constitution, 1922. O'Neill notes however that the Cumann na nGaedhail party distrusted both the initiative mechanism, and referendums in general. O'Neill, "The Referendum Process in Ireland" (2000) *Irish Jurist* 305 at 309.

<sup>4</sup> These were on the issues of: judges' pay, Oireachtas inquiries, the European Fiscal Compact, children's rights, abolition of the Seanad, establishment of the Court of Appeal, same-sex marriage, and eligibility age for presidential candidacy.

- Proposals to amend the Constitution shall be commenced in Dail Eireann as a Bill and if passed, a referendum will be held.
- A Bill to amend the Constitution may not contain any other matters.
- If the proposal is approved by the people following a referendum, the Bill is signed into law by the President.

The referendum itself is governed by Article 47 of the Constitution, which provides:

- That a referendum is approved by the people where a majority of the votes cast are in favour of the proposal;
- That every citizen who has the right to vote at an election for members of Dail Eireann shall have the right to vote at a referendum;
- That legislation may be adopted regulating the holding of a referendum.

Oddly, Article 47 does not provide a time within which a Bill to amend the Constitution is to be submitted to referendum after passing by both Houses of the Oireachtas. Nor does it expressly provide that voting is to be by way of secret ballot.<sup>5</sup>

It should be noted that the majority required by Article 47 for constitutional referenda is a simple majority rather than a “super” majority. As such, amendments may pass by only a tiny margin of votes, as was the case in the Divorce Referendum of 1995, in which the difference between the two sides was only .58% of the vote.

## **II. The Referendum Acts 1994-2001**

Regulation of the referendum by law has been effected through the Referendum Acts 1994–2001.<sup>6</sup> The key statute is the Referendum Act 1994. Part II of this Act sets

<sup>5</sup> These unusual omissions are noted in Hogan and Whyte (eds), *JM Kelly: The Irish Constitution* (2003, 4<sup>th</sup> ed, Tottel) at 2102. The secrecy of the ballot is provided for in section 7, Referendum Act 1994.

<sup>6</sup> The Referendum Acts 1994, 1998, and 2001. The 1994 Act repeals the referendum acts that preceded it.

out procedures for the taking of a referendum. Whenever a Bill containing a proposal for a referendum is passed by the Houses of the Oireachtas the Minister must, by order, appoint a polling day between 30 and 90 days from the date of the making of the order.<sup>7</sup> That polling day may be held on the same day as a general election.<sup>8</sup> Polling on the day must continue for at least 12 hours.

The constituencies are the same for both Dáil elections and referenda,<sup>9</sup> and the person who would be the returning officer for a Dáil election in a given constituency is the returning officer for a referendum.<sup>10</sup> The constituencies only serve an administrative purpose in terms of voting and counting of votes. There is no requirement that the referendum be passed in a majority of constituencies. The 1994 Act makes limited provision for postal voting,<sup>11</sup> and provides for special measures for polling on islands.<sup>12</sup>

Part III of the 1994 Act governs the counting of the votes. It provides the rules on what kind of mark is to be interpreted as a valid vote. While an 'X' is specified as the proper way of indicating a preference, votes are not to be regarded as invalid simply because the voter has made a different mark such as a '1' or the word 'one,' which in the opinion of the local returning officer clearly indicates a vote in favour of or against the proposal.<sup>13</sup> Provision is made for recounting of the votes,<sup>14</sup> and the obligation of the local returning officer to furnish a report to the referendum returning officer.<sup>15</sup> The Act provides that the High Court may make an order allowing for the inspection of documents including counted ballot papers, spoiled ballots and counterfoils of ballot papers sent to postal voters.<sup>16</sup>

<sup>7</sup> Section 10, Referendum Act 1994

<sup>8</sup> Section 11, Referendum Act 1994

<sup>9</sup> Section 18, Referendum Act 1994

<sup>10</sup> Section 15, Referendum Act 1994

<sup>11</sup> Section 28, Referendum Act 1994

<sup>12</sup> Section 30, Referendum Act 1994

<sup>13</sup> Section 34, Referendum Act 1994

<sup>14</sup> Section 36, Referendum Act 1994

<sup>15</sup> Section 37, Referendum Act 1994

<sup>16</sup> Section 39, Referendum Act 1994

As soon as the referendum returning officer has received a report from every local returning officer he or she must sign the provisional referendum certificate, recording the number of votes for and against the proposal. The referendum returning officer then publishes a copy of this certificate in *Iris Oifigiúil* with a statement saying that the certificate will become final and incapable of being questioned when the officer is informed by the Master of the High Court (a statutory officer with specific powers under the Courts Acts) either that no referendum petition has been presented, or that every such petition has become null and void.<sup>17</sup> Part IV of the Act governs Referendum Petitions, discussed below at section V. If a person wishes to challenge the outcome of a referendum, they can only do so by way of a Referendum petition prior to the result being finalized.

### **III. The Referendum Commission**

The 1998 Act established the Referendum Commission. It seems that the establishment of the Referendum Commission was, to a large extent, influenced by the need for the dissemination of neutral information about referendum proposals by the State following the judgment of the Supreme Court in the case of *McKenna v. An Taoiseach*<sup>18</sup>. The principal functions of the Referendum Commission are:

- To prepare one or more statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate;
- To publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate and to ensure as far as practicable that the means employed enable those with a sight or hearing disability to read or hear the statements concerned; and,

<sup>17</sup> Section 40, Referendum Act 1994

<sup>18</sup> (No. 2) [1995] 2 IR 10

- To promote public awareness of the referendum and encourage the electorate to vote at the poll.<sup>19</sup>

The Referendum Commission is not a permanent body. Rather, it is established by the Minister when a referendum is held. Establishment of the Referendum Commission is not mandatory, it need only be established where the Minister considers it appropriate.<sup>20</sup> Ruane notes that the time allowed to the Referendum Commission to complete its functions is rather short, and that this has been the subject of criticism.<sup>21</sup>

The Commission consists of the chairperson and four ordinary members. The chairperson must be a former judge of the Supreme Court or the High Court, or following consultation with the President of the High Court, a serving judge of the High Court nominated by the Chief Justice. The ordinary members are: the Comptroller and Auditor General, the Ombudsman, the Clerk of Dáil Éireann, and the Clerk of Seanad Éireann. Members of the Commission are restricted from promoting or advocating a particular result at the referendum in respect of which the Commission has been established. The Commission is entitled to engage consultants or advisors as may consider necessary to perform its functions.

The 1998 Act makes provision for the designation by the Referendum Commission of 'approved bodies.' Approved bodies are entitled to appoint a person to act as an agent to be present at the issuing of ballot papers to postal voters, the opening of postal ballot boxes and the counting of votes.<sup>22</sup> They may also appoint a 'personation agent' to be present in each polling station in order to check whether or not persons voting are in fact who they say they are. This is designed to prevent impersonation of voters. The test for appointment as an approved body is framed in negative terms. A body shall not be appointed as an approved body if it does not have a *bona fide* interest in the referendum proposal, it fails to provide reasonably

<sup>19</sup> Section 3 Referendum Act 1998, as amended by Referendum Act 2001.

<sup>20</sup> Section 2 Referendum Act 1998.

<sup>21</sup> Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 27.

<sup>22</sup> Section 11 Referendum Act 1998.

requested information to the Referendum Commission, or it shares the name of a political party, or so closely resembles the name of a political party as to cause confusion.<sup>23</sup>

Importantly, the provisional referendum certificate cannot be challenged on the grounds of non-compliance by the Referendum Commission with its statutory obligations, or a mistake by the Commission if the High Court concludes that the Commission complied with the statutory principles and that the non-compliance or mistake did not materially affect the outcome. Ruane notes that this affords considerable protection to the Commission, but that this protection only operates after the poll. The position as regards pre-poll challenges is less clear.<sup>24</sup>

In the case of *Doherty v Referendum Commission*<sup>25</sup> the applicant, a sitting Sinn Féin TD, challenged the impartiality of the Referendum Commission's actions during the Fiscal Compact Treaty referendum in 2012. He claimed that the Commission had provided inaccurate information in relation to the effect of the Fiscal Compact Treaty on governmental powers as regards the European Stability Mechanism. The challenge was brought just two days before the poll.

The High Court adopted the test that the Court could only interfere in the holding of the referendum where the Commission's statement was plainly wrong and or manifestly inaccurate or misleading, and likely to materially affect the outcome of the referendum. On the facts, the Court found the impugned statements of the Commission not to meet this threshold.<sup>26</sup>

There is a considerable volume of case law on State Funded Information Campaigns and what are known as the "McKenna Principles". However, these are being dealt

<sup>23</sup> Section 7 Referendum Act 1998.

<sup>24</sup>Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 29.

<sup>25</sup> [2012] 2 IR 594

<sup>26</sup> See discussion of this judgment in Ruane, "Reflections on procedural rights in constitutional referenda" (2012) Irish Jurist 1 at 34-35.

with by another speaker and therefore I do not propose to address them in this paper.

#### **IV. Referendum Challenges**

##### ***Referendum Petitions***

Part IV of the Referendum Act 1994 establishes the procedures whereby the result of a referendum may be challenged. This procedure is a 'referendum petition' which challenges the result of a provisional referendum certificate.

The petitioner must first pass the 'leave stage' that entails establishing before the High Court that there is *prima facie* evidence of an irregularity and that the said matter is such as to affect materially the result of the referendum as a whole.<sup>27</sup>

An application for leave to present a referendum petition may be made by the Director of Public Prosecutions, or by any person registered as a presidential elector.

Section 43 of the Referendum Act sets out the substantive grounds for challenge to a referendum petition. That section provides in substance that:

- A referendum may be challenged on the basis that the result of the referendum was affected **materially** by the following factors:

*(a) the commission of certain types of offences referred to in Part XXII of the Act of 1992 (as applied by section 6 ),*

*(b) obstruction of or interference with or other hindrance to the conduct of the referendum,*

<sup>27</sup> Section 42, Referendum Act 1994.

*(c) failure to complete or otherwise conduct the referendum in accordance with this Act, or*

*(d) mistake or other irregularity in the conduct of the referendum or in the particulars stated in the provisional referendum certificate.*

*The Act provides that the outcome of a referendum cannot be challenged simply because the Referendum Commission made a mistake or didn't comply with the Act governing it provided that the Commission complied with the principles in the Act and such non compliance or mistake did not materially affect the result of the referendum.*

The key phrase in this section is “affected materially,” and much of the discussion around referendum challenges has centred around the precise meaning of these words.

The High Court is empowered to order a number of different remedies in the event that a petitioner is successful. It may order that all the votes in a constituency be counted afresh, or that all the votes in a particular parcel be recounted.<sup>28</sup>

The Court may order that the referendum be retaken in a constituency, but the ordering of this remedy is not permissible where it appears to the court that the error did not affect the result of the referendum as a whole.<sup>29</sup>

At any stage of a trial of a referendum petition the High Court may, of its own motion or on the application of any party, state a case for the opinion of the Supreme Court on any question of law arising at the trial.<sup>30</sup>

<sup>28</sup> Section 47, Referendum Act 1994.

<sup>29</sup> Section 48, Referendum Act 1994.

<sup>30</sup> Section 55, Referendum Act 1994.

## **Case Law**

In two leading cases the Supreme Court has addressed the issue of the effect of a breach of the McKenna Principles on the outcome of a referendum. These cases involved the application of the provisions of Part IV of the Referendum Act 1994, and their interpretation by reference to the Constitution.

### *Hanafin v Minister for Environment*

In the case of *Hanafin v Minister for Environment*<sup>31</sup> the petitioner sought a declaration that the unconstitutional acts of the government which had led to the ruling in *McKenna* meant that the result of the referendum should be set aside.

Importantly, the divorce referendum had passed by a margin of less than one percent, which appeared to provide potential for a successful referendum challenge.

The petitioner in *Hanafin* argued that 'material effect' for the purposes of the 1994 Act should be understood as equivalent to showing that the interference or wrongdoing was not trivial or inconsequential, in circumstances where it was accepted by the Supreme Court that there had been unconstitutional wrongdoing.

The Supreme Court rejected this argument, finding that the Act required that the result of the referendum could only be questioned if it was established that the result was materially affected by the alleged wrongdoing and that this was in accordance with the right of the citizens to vote in a constitutional referendum and to have the result thereof accepted, respected, and not interfered with.

The Supreme Court concluded that even though the result of the referendum had been so close, each voter must be taken to have voted freely, and to have been sufficiently enlightened on the issue in question. O'Flaherty J. interpreted this as

<sup>31</sup> [1996] 2 IR 321

meaning that the presumption of constitutionality in favour of the referendum result had not been displaced.<sup>32</sup>

Barrington J engaged in a detailed discussion of the way in which public opinion may have been affected in the run-up to the referendum. The Supreme Court's ruling in *McKenna* had been handed down on 17 November, while the eventual poll was on 24 November. Barrington J said that it was impossible to say what effect the government information campaign had had, but that the wrong had been discovered before the date of the referendum and the people had voted with full knowledge of what the Government had done. As such, the burden of proving material effect had not been discharged.

*Jordan v. Minister for Children and Youth Affairs*

In the case of *Jordan v Minister for Children and Youth Affairs*<sup>33</sup> the applicant challenged the outcome of the Children's Rights Referendum on the basis that the information campaign conducted by the Minister, which had been found in *McCrystal* to constitute a breach of the McKenna Principles, had tainted the outcome of the referendum. The applicant argued in the Supreme Court that on a true construction of the Referendum Act 1994 the petitioner was not required to demonstrate material effect on the outcome of the referendum, or that in the alternative material effect should not have been interpreted to require the petitioner to demonstrate that a different result would have ensued. Accordingly the applicant also argued that the High Court judge had misapplied *Hanafin*, or that in the alternative *Hanafin* was wrong and should not be followed.

O'Donnell J, with whom the other members the Court concurred, found that the *Hanafin* could not be understood as resolving the matter of the precise interpretation of 'material effect' because the judges in that case took the view that the evidence presented by the petitioner failed to reach any threshold and did not

<sup>32</sup> At p. 437.

<sup>33</sup> [2015] IESC 33

raise a real likelihood that the outcome of the referendum might have been different. He went on to say that the Constitution did not require that a material effect on the result of a referendum be interpreted as meaning “must necessarily have altered the result, or even as a matter of probability.”<sup>34</sup>

O’Donnell J’s analysis focused on the necessity for the reasonable person to have trust in the referendum process. He commented:

*This conclusion in my view follows as a matter of not just textual analysis and precedent, but also as a matter of constitutional principle. Modern liberal democracy involves the ascertainment of the will of the people which it is accepted will be determined by the decision of the majority of them. But democracy depends as much if not more upon the consent of the minority and their acceptance of the result. Part of the consent of the minority is based on acceptance of, and trust in, the process by which the result has been arrived at. Where an irregularity has occurred which is an interference in the conduct of an election or referendum, then there will come a point at which it can be said that a reasonable person will no longer have the requisite confidence in the outcome to allow the result to be accepted as the basis upon which society should collectively proceed. In such circumstances it will be necessary to re-run the election or referendum notwithstanding the difficulties and imperfections of that course.<sup>35</sup> (Emphasis added)*

On the basis of this approach, O’Donnell J formulated a test which aims to ensure the protection of the reasonable person’s confidence in the democratic system:

*Accordingly, I would hold that “material effect on the outcome of a referendum” involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of this test, it may be useful to add that the object of this*

<sup>34</sup> [2015] IESC 33 at para. 79.

<sup>35</sup> [2015] IESC 33 at para. 84.

*test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum.*<sup>36</sup>

This would appear to be a significant gloss on *Hanafin* which makes it substantially easier for a petitioner to succeed in an application of this nature.

## **V. The Venice Commission: Code of Good Practice on Referendums**

The European Commission for Democracy through Law, known as the Venice Commission because it meets in Venice, is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to the member states and, in particular, to help states bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.<sup>37</sup>

In March 2007 the Venice Commission adopted the Code of Good Practice for Referendums. Part I of the Code deals with the principles of Europe's electoral heritage applicable to both elections and referendums. The foundational principle is universal suffrage, which is subject to qualifications of age, nationality, residence, and limited other qualifications flowing from mental incapacity or a criminal conviction for a serious offence. The code separately emphasizes the importance of equal suffrage, comprising equal voting rights, equality of opportunity, and equality for minorities. Notably, the requirement of balanced coverage is part of the requirement of equality of opportunity. This principle requires a neutral attitude by administrative authorities in broadcasting, advertising and the right to demonstrate on public thoroughfares. The Code also states secret suffrage as a fundamental principle.

<sup>36</sup> [2015] IESC 33 at para. 85.

<sup>37</sup> See [website of the Venice Commission,](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN) [http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN)

Part II of the Code concerns the conditions for implementing those principles in Part I. These conditions are respect for fundamental rights, regulatory levels and stability of referendum law, procedural guarantees and regulation of funding. *McKenna* is reflected in the Code's funding requirements, which state that the use of public funds by the authorities for campaigning purposes must be prohibited. The Code's procedural guarantees include the requirement that the referendum be organized by an impartial body, that there must be national and international observers to the referendum and that there must be an effective system of appeal providing for a final appeal to a court.

Part III sets out specific rules for referenda. These rules require that the use of referenda comply with the legal system as a whole and the principle of the rule of law. Texts submitted to a referendum must be procedurally valid, and substantively valid. To ensure substantive validity they must comply with all superior law, and not be contrary to international law or to the Council of Europe's statutory principles.

*Paper of*

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## LEGAL REGULATION OF REFERENDUM CAMPAIGNS

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### 1. USE OF PUBLIC FUNDS

While the text of the Constitution says very little about the conduct of referendum campaigns, the Courts have interpreted the Constitution as prohibiting the Government from using public funds to advocate for a Yes or No vote. This was established in the *McKenna* judgment, which related to the use of public funds to advocate for a Yes vote in the 1995 Divorce referendum. A sum of IR£500,000 was allocated for this purpose; no funding was allocated to advocating for a No vote, or indeed to any groups who were doing so. The Supreme Court ruled that this was unconstitutional as an interference with the referendum process that failed to treat both sides equally. The judgment does not precisely pin down the basis for this, but the following passage from O'Flaherty J captures its core principles:

“...it is unrealistic to expect a Government to remain neutral on a topic which it has, through its initiative, brought to the People. However, 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. To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against). The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it.”<sup>1</sup>

While the *McKenna* decision related to a campaign of intentional and overt advocacy, the same principle was later extended to the expenditure of public funds on campaign materials that are presented as neutral but may be subtly biased in favour of one side or the other. The *McCrystal* judgment related to the 2012 Children referendum, during which the Government expended €1.1 million on an information campaign that included a website, media advertising and a booklet that was sent to every household. While this campaign did not explicitly advocate for a Yes vote, and the Court was satisfied that it was not intended to do so, the Supreme Court nonetheless held that the cumulative effect of language and messaging used in the materials was biased in favour of a Yes vote and thus failed to adhere to the *McKenna* principles. Problems included the use of slogans such as “Protecting Children” and “Supporting Families” to describe the effect of the amendment, thus presenting it as inherently positive in nature; the rhetorical question, “Why do we need a referendum”, which implied that the amendment was a necessity; positive imagery such as a smiley face in the letter O in the word “vote”; and the presence of a “like” button on social media links without any option for a “dislike” button.

In *McCrystal*, Denham CJ summarised the key principles deriving from these judgments as follows:

“(i) The Government is entitled to campaign for a yes vote by any methods it chooses, other than by the expenditure of public funds. Such methods include writing, speaking, broadcasting, canvassing, leafleting and advertising. Some of these methods, such as writing, speaking, broadcasting on ordinarily scheduled current affairs programmes, and canvassing, are cost free. Others, such as the creation of a dedicated website, leafleting and advertising,

<sup>1</sup> *McKenna v An Taoiseach (No. 2)* [1995] 2 IR 10 at 43.

involve expenditure. Partisan advertising, that is advertising in one way or another urging a particular result, may be carried out by any person or by an organised group or political party, including parties composing the Government of the day, but it must be done at their own expense. Any 'information' disseminated by the Government at public expense must be equal, fair, impartial and neutral.

(ii) The Government is entitled to campaign for the change, and the members of the Government are entitled in their personal, party or Ministerial capacity to advocate the proposed change. Government Ministers may use their State transport in relation to the referendum and may avail of the radio, television and other media to put forward their point of view. However, the Government and its members must not spend public monies in favour of one side."<sup>2</sup>

### Discussion points

The understanding and application of the *McKenna* and *McCrystal* judgments to date has been that they prohibit direct expenditure of public funds to favour one side of a referendum campaign during the formal campaign. This is relatively uncontroversial and has been recommended by the Council of Europe as necessary "in order to guarantee equality of opportunity and the freedom of voters to form an opinion".<sup>3</sup> The main points of discussion that arise from the judgments relate to whether the principles might currently, or should in the future, apply in other situations:

1. **Direct versus indirect expenditure:** While direct expenditure of campaigning is clearly impermissible, at least some indirect expenditure is permissible (with the use of State transport by Ministers on the campaign trail being singled out in both cases as acceptable). There are numerous other ways in which indirect expenditure might benefit one side of the campaign more than another. At one level, there is expenditure within the political establishment, such as general funding provided to political parties, and salaries and expenses of staff of Government departments, parliamentary assistants, special advisors and constituency office staff, all of whom may work on a referendum campaign in some shape or form. Closely related is the use of Oireachtas stationery or telephones for campaign-related work. At a further remove, there is the issue of public funds allocated to NGOs and civil society groups who may be actively advocating for a particular constitutional amendment. Clearly, it is not permissible to allocate funds to such organisations specifically for the task of referendum campaigning; but if funds are allocated to them for their general work, and referendum campaigning then becomes part of their work at a particular point in time, it is unclear whether this is captured by the *McKenna* and *McCrystal* judgments.
2. **Application of principles outside of the formal campaign:** The current understanding that the rules only apply once a referendum has been formally called, as up to that point, there is, strictly speaking, no referendum to speak of. However, this distinction might be rather artificial in the context of referendums which are the subject of prolonged public debate prior to the formal referendum campaign itself. Direct or indirect expenditure might be incurred in advance of the formal campaign that is directed to the same result as expenditure that is prohibited during the formal campaign, but the current state of the law allows for this to occur.

<sup>2</sup> *McCrystal v Minister for Children and Youth Affairs* [2012] 2 IR 726 at 753-754.

<sup>3</sup> European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice on Referendums* (Strasbourg: Council of Europe, 2007), p.19.

## 2. CAMPAIGN FINANCE

*McKenna* and *McCrystal* address the role of public funding in referendum campaigns, and their effect is to ensure that campaign funding comes solely from private sources. While private donations to referendum campaigns are permissible, there are extensive regulations governing them. The Electoral Act 1997, as amended, establishes the rules governing campaign finance, donations and disclosure requirements. These rules apply on a general level to political parties; but they also apply to other organisations such as NGOs or civil society groups who may take an active role in referendum campaigns. Any group which seeks to influence the outcome of a referendum and which accepts a donation exceeding the value of €100 in any calendar year falls within the definition of a “third party” working towards “political purposes”, and is thus subject to the rules laid down in the Act.

Irish law places limits on campaign donations, but not on campaign spending. Thus, in theory, there is no limit to what a political party, an individual or another organisation might choose to spend on a referendum campaign. In practice, the donation limits on political parties and third parties are such that there is a natural limit to the funds they can raise and spend. However, there is nothing to stop an extremely wealthy individual from spending exorbitant sums of money in a private capacity advocating for a particular result.

### Donation Limits

The limits on donations to political parties and third parties are as follows (all limits are stated to be “in any calendar year”, which a referendum campaign will, in practice, always fall within):

- Anonymous donations: €100
- Individual donations: €200
- Corporate donations: €200 for unregistered donors; €2,500 for donors registered in the Register of Corporate Donors
- Foreign donations: prohibited, unless the donation is from an Irish citizen residing outside the island of Ireland (in which case the €200 limit for individual donations applies)

If donations are accepted which contravene any of the above regulations, the political party or third party is required to notify the Standards in Public Office Commission (SIPOC) within 14 days. The donation must be handed over to SIPOC.

### Disclosure Requirements

Disclosure requirements for political parties and third parties kick in as soon as a donation exceeding €100 is received. At that point, and before incurring any expenses:

- Political parties and third parties must open a political donations account into which all donations are lodged. Annual statements from this account must be returned to SIPOC and the political party or third party must certify that all monetary donations received by the third party during the preceding year were lodged to the account and that all amounts debited from the account were used for political purposes.

- Political parties are required to establish accounting units to handle donations and return donation statements to SIPOC providing details of all donations exceeding €1,500, including the value of each individual donation and the name, description and postal address of the person by or on whose behalf the donation was made.
- Third parties need not disclose details of donations received, but must furnish to SIPOC:
  - the name and address of the third party and the name and address of the person responsible for its organisation, management or financial affairs;
  - a statement of the nature, purpose and estimated amount of donations to, and proposed expenses of, the third party during the year, and
  - an indication of any connection the third party may have with any political party or candidate at an election or referendum or otherwise.

Failure to adhere to the above regulations is a criminal offence, as is knowingly furnishing false or misleading information to SIPOC.

### International Comparison

1. **Donation and spending limits:** by international standards, Ireland’s campaign finance rules are relatively strict with respect to donations, by virtue of:
  - Relatively low limits placed on permissible donations
  - Onerous disclosure requirements
  - Regulations apply to both political parties and civil society groups

In a study of 25 OECD countries, it was found that just 9 countries impose limits on referendum campaign contributions to political parties and just 7 impose limits on contributions to civil society groups.<sup>4</sup> On the other hand, there are no limits placed on campaign spending in Ireland; the same study found that campaign spending limits were more common than limits on donations, applying in half of the countries studied.<sup>5</sup>

Across the EU, the limit on donations is generally higher than in Ireland, but is often combined with a ceiling on campaign expenditure.<sup>6</sup> For example, in the Scottish independence referendum, there was no limit imposed on the donations that could be accepted, but lead campaign groups had a spending limit of £1.5 million, while political parties and smaller groups had separate, lower limits. The absence of such a limit in Irish referendums is off-set at least in part by the strict limits on how much money can be raised in the first place; while Irish campaigners can spend as much as they can raise, they will not be able to raise very much, whereas in other countries, fundraising might be easier, but becomes pointless once it surpasses spending limits. But as noted above, the absence of spending limits in Ireland does leave wealthy individuals free to spend as much as they can afford on campaigning in a private capacity.

2. **Public funding of campaign groups:** Ireland does not have any system for providing direct public funding to advocacy groups on either side of the campaign (which, it should be noted, could be done in a manner that complied with the *McKenna* principles as long as equal funds

<sup>4</sup> Theresa Reidy and Jane Suiter, “Do rules matter? Categorizing the regulation of referendum campaigns” (2015) 38 *Electoral Studies* 159 at 166.

<sup>5</sup> Theresa Reidy and Jane Suiter, “Do rules matter? Categorizing the regulation of referendum campaigns” (2015) 38 *Electoral Studies* 159 at 168.

<sup>6</sup> *Party financing and referendum campaigns in EU member states* (Brussels: European Union, 2015), pp.51-59.

were provided to both sides). The provision of public funds to referendum campaign groups is relatively commonplace; countries where this approach is taken include Australia, the UK, Denmark, Italy and Sweden.<sup>7</sup> However, as noted in section 1 above, public funds are provided to both political parties and civil society groups for their general work, and when those parties or groups engage in referendum campaigning, this may amount to a form of indirect funding. As against this, there is no system in place for campaigners in Ireland to recoup campaign expenses, which differs from general elections, where candidates may be reimbursed expenses up to a maximum of €8,700 if they are elected or if they are not elected but receive a minimum number of votes.

### 3. BROADCAST COVERAGE

The rules governing broadcast coverage of a referendum campaign derive principally from statute rather than the constitution and apply at all times rather than just when a referendum has been called. However, they take on particular significance during a referendum campaign due to the *Coughlan* judgment, which again related to the 1995 Divorce referendum campaign.

The provision in question was section 18 of Broadcasting Act 1960, the key parts of which are effectively identical to the current provision (section 39 of the Broadcasting Act 2009). This provision requires that every broadcaster shall ensure that:

“the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views, except that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other”.

The matter complained of in the *Coughlan* decision was the allocation of airtime for uncontested partisan broadcasts. Every major political party was given a slot, in addition to which the Yes and No campaigns were given 10 minutes each. However, since all political parties were advocating a Yes vote, the Yes side got 40 minutes of uncontested airtime, whereas the No campaign only got 10 minutes. In the Supreme Court, Keane J held that RTE:

“... is precluded from forming any corporate view as to how the people should vote in a referendum. It is enjoined by the terms of the statutes which created RTE to maintain objectivity and impartiality in all matters of public controversy. It would be remarkable if such a body differed from the Oireachtas and the government in enjoying a freedom to interfere with the result of a referendum by allowing political parties and other bodies which supported a particular outcome a considerable advantage in the broadcasting of partisan material over which they had unfettered control”.<sup>8</sup>

<sup>7</sup> Theresa Reidy and Jane Suiter, “Do rules matter? Categorizing the regulation of referendum campaigns” (2015) 38 *Electoral Studies* 159 at 166.

<sup>8</sup> *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 at 57.

## Discussion points

The main talking point about the *Coughlan* judgment relates to the manner in which it is to be implemented, and it might be questioned whether it has been misapplied by broadcasters in the years since.

1. **Equal time:** the underlying principle of the Broadcasting Act is that broadcasters must be “fair to all interests concerned”. The particular form that the failure to do so took in the Divorce campaign was a significantly unequal allocation of uncontested broadcasting time. Much of the implementation of the judgment has focused on allocating equal time to advocates on either side rather than on the underlying principle of fairness. It would seem fairly obvious that allocating 40 minutes of uncontested broadcasts to one side and just 10 minutes to the other did not comply with the Act. However, this does not lead to the conclusion that precisely equal time must be afforded in every circumstance, including contested debates. It is questionable whether equal time allocation can be effectively achieved in the cut and thrust of a contested debate; nevertheless, stopwatches are routinely employed by broadcasters during debates. An excessive focus on equal time can be particularly artificial during campaigns where there is overwhelming support from the outset for one point of view, but broadcasters feel compelled to manufacture even-handed disagreement. This difficulty may lead to broadcaster choosing to avoid covering the referendum for fear of falling foul of *Coughlan*, which surely is not what the Supreme Court intended.
2. **Unrelated programming:** there have been examples where the *Coughlan* judgment has led to an extremely cautious approach being taken to programming which is not related to the referendum. Recent examples include where a Minister of State was asked to remove a pin from his lapel during an RTE interview that took place during a referendum campaign but did not discuss the referendum;<sup>9</sup> and reports of a Minister being disinclined from appearing on a cookery show that might be broadcast during a referendum campaign on which she has expressed strong views already.<sup>10</sup> Again, it is hard to see much of a relationship between these incidents and the conduct complained of in *Coughlan*.
3. **Interrogation of arguments:** a further issue relates to the extent to which broadcast journalists are willing to challenge campaigners during interviews or debates for fear that robust questioning might be seen as advocating on one side and fall foul of the law, and whether this can allow misinformation to be circulated freely through the broadcast media.
4. **Other forms of media:** it is notable that while the Broadcasting Act and the *Coughlan* judgment impose strict requirements on broadcast media, print media and digital media are wholly unregulated when it comes to referendum campaigns and may adopt entirely partisan positions.

<sup>9</sup> “Ireland's Equality Minister was asked by RTÉ to remove a Yes Equality pin”, *TheJournal.ie*, May 10, 2015, <http://www.thejournal.ie/aodhain-o-riordain-pingate-2094478-May2015/>.

<sup>10</sup> Philip Ryan, “Minister axed from TV cooking show over referendum fears”, *Sunday Independent*, December 17, 2017, <https://amp.independent.ie/irish-news/politics/minister-axed-from-tv-cooking-show-over-referendum-fears-36414526.html>.

#### 4. REFERENDUM COMMISSION

Part of the response to the *McKenna* judgment was to establish the Referendum Commission, an independent statutory body whose function would be to raise public awareness of the fact that a referendum is taking place, encourage people to vote and provide them with information designed to assist them in making an informed decision. As a publicly funded body, the Commission is bound by the *McKenna* and *McCrystal* principles and thus restricted to providing impartial information. The Commission is an *ad hoc* body that is established afresh each time that a referendum is called and dissolved after the vote has been taken. It is ordinarily chaired by a sitting or retired High Court judge.

As originally established under the Referendum Act 1998, the Commission had the additional function of setting out the arguments for and against the proposal. However, the Referendum Act 2001 removed this particular function from the Commission, whose role is now restricted to the matters mentioned above.

##### Discussion points

1. **Fact checking:** one point of discussion that arises is whether the Commission has any formal role in “fact checking” the arguments of campaigners on either side. Misinformation is a common feature of referendum campaigns (not only in Ireland, it should be said), and as an independent body bound by law to be impartial, the Referendum Commission is, in theory, well placed to perform this role. Such a function is not explicitly written into the Referendum Act, but the legislation does allow the Commission to provide “any other information ... that the Commission considers appropriate”. Perhaps because the Commission is an *ad hoc* body that is established and dissolved for each referendum campaign with a different Chair each time, practice has varied over time.

To give some recent examples: during the 2015 Marriage referendum, a central claim of the No campaign related to the effect of a Yes vote on the powers of the Oireachtas to legislate to regulate surrogacy and other forms of assisted human reproduction. On that occasion, the Commission Chair chose to address the claim quite directly in a number of broadcast interviews and to state that it was the Commission’s view that there was no connection in law between the referendum and surrogacy.<sup>11</sup> By contrast, during the 2012 Children referendum and the 2013 Seanad referendum, the Commission Chairs avoided directly engaging with claims made by campaigners and restricted themselves to making factual statements. The difference of approach may also be partly attributable to the centrality to the campaign debates of claims about specific legal effects of the proposed amendment; when a particular claim features very prominently, it is more likely that broadcast journalists will put specific questions about those claims to the Commission Chair during television or radio interviews.

2. **Permanent or ad hoc Commission:** a further point of discussion relating to the Referendum Commission is whether its *ad hoc* form is sufficient or whether it should be a permanent entity. On the one hand, it is conceivable that there could be a long gap between referendums, and it could be questioned whether there is a need to maintain and fund a permanent Commission during these periods. On the other hand, over the past twenty

<sup>11</sup> Ruadhán MacCormaic, “State may Still Favour Opposite-sex Parents if Vote Passes – Judge”, *Irish Times*, May 15, 2015.

years, referendums have been held approximately once every two years. During that time, there has been extensive evidence of voter confusion on multiple proposals, and the current mechanism under which the Commission is not established until the referendum is formally called has often left it with just seven or eight weeks to start from scratch and complete its work. Multiple Commission reports have called for more time in this regard. A further suggestion is that the work of the Referendum Commission could be subsumed into a permanent Electoral Commission, whose remit would cover not just referendums but also elections, including general, local European and presidential elections.

*Paper of*

**Mark Brennock**

Director of Public Affairs, Murray

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

## **Referendum Campaign: Impact on the media of regulation**

By Mark Brennock

Director of Public Affairs

Murray

### **Introduction**

The reason the Assembly asked me to speak here alongside the other very distinguished speakers is, I think, that I have some experience of how regulation of the media affects how referendum campaigns are conducted and in particular how the media behaves during them.

I was a journalist for more than 20 years, spending most of that time working with the Irish Times, and having done a count last week I can see I was involved in covering 14 separate referendums. In 2006 I left journalism for the world of public relations and public affairs, and another count last week told me I have been the project manager of the public information campaign for seven Referendum Commission campaigns covering ten separate referendum proposals.

The questions I'd like to look at today are

1. The role of the media in communicating during a referendum campaign
2. The regulation of media and how it affects journalists and media during a referendum campaign: How the requirement for balance is interpreted by the media and how it should be interpreted
3. Does the Referendum Commission have a role in taking on claims made by one side or the other in a campaign if they are simply untrue?
4. Should regulation apply to other media, not just to broadcasters?

### **The role of the media in communicating during a referendum campaign**

Referendum campaigns, like election campaigns, are fought very substantially through the media. Yes, people also get information on referendums directly. They meet canvassers, they receive leaflets in their letterboxes from the Yes and No campaigns and of course from the independent Referendum Commission.

But it is through the media that almost all information comes to them, and traditional media in particular remains hugely important in referendum campaigns. By traditional media I mean television, radio and print media. It is true that during the marriage referendum campaign there was a lot of comment on the much bigger than usual role of social media. There were statistics showing the huge reach of Facebook and Twitter posts. But reaching high numbers of people isn't the same as influencing them. There is a phenomenon acknowledged universally that on social media people tend to follow people whose views they agree with; they like posts they agree with. Social media is very lively during campaigns. But that, of itself, doesn't mean it is changing people's minds.

I'll come back later to a Reuters Institute report from just a few months ago which shows that in Ireland last year, two thirds of people still said they got news from television, 46% from radio and 40% from newspapers. Yes two thirds also got news online, but the most popular online sources were mainly the websites of traditional media – RTE, the Irish Independent and The Irish Times. The only major relative newcomer is thejournal.ie, a new online only news source which has had remarkable growth in influence.

But news and discussion debate on television and radio is not only a primary source of information from voters, it also sets the agenda for other media too. If the main broadcasters, particularly RTE, decide that a particular aspect of a story is the most relevant, this has huge influence on other media sources too.

So today I want to look at a few aspects of how the media is regulated, and how this regulation affects what journalists actually do during a referendum campaign.

### **Regulation of media and how it affects media and journalists during a campaign**

When you hear people discussing the regulation of media during referendum campaigns or indeed election campaigns, they are almost always talking about the regulation of broadcast media only. Yes the print media is of course subject to regulation by law covering issues such as libel and defamation. People who feel they have been defamed can go to court to vindicate their good names. Online media including social media is subject to these laws too, but it has proven much harder to impose these laws on companies such as Facebook and Twitter who tend to say they are merely providers of the platforms on which these comments are made, and they are not responsible for the content.

But it is only broadcast media that faces the strict legal requirement to be balanced and fair. A newspaper can decide to campaign strongly on one side or another in a referendum. One newspaper could choose to publish a disproportionate amount of news coverage that highlights points being made by the Yes side. Another can publish lots of news information highlighting the points made by the No side. They can be as one-sided as they choose to be. Of course in every referendum campaign most newspapers publish material on both sides of the debate, but there is no doubt that it is often easy to detect the viewpoint or bias of a particular publication, and this is perfectly legal.

Later I'll talk a bit about the arguments over whether it is right, or not, that these requirements apply to broadcasters only. But first let's look at the current rules and regulation, and how they work.

The Broadcasting Acts require broadcasters, in their treatment of current affairs, to be objective, impartial and fair to all interests.

In the past broadcasters have tended to interpret this as meaning they must give exactly equal time to each side in a referendum debate. As Conor O'Mahony explained earlier, this may well be due to an over-interpretation of the Coughlan judgment... So even if there is a referendum proposal for which there is clearly overwhelming public support, broadcasters have felt obliged to seek out people who are against it in order to fulfil what some have seen as a 50/50 coverage requirement.

For example in 2013 there was a referendum held on whether or not to abolish the Senate, and there was a lively debate about this. However on the same day there was also a referendum on whether to establish a new Court of Appeal. There was no real campaign mounted to argue against this. However broadcasters felt they could not put many people on air arguing that this new court of appeal was a good idea, if there weren't voices from the other side saying it was a bad idea. And because there wasn't really another side, then there wasn't much discussion at all.

The same issue arose in relation to the referendum held in 2012 on children's rights. There seemed to be an overwhelming consensus in favour of this proposal among the main political parties and campaigning groups. This time there was a small number of opponents. These were very small groups but the 50/50 approach meant that although these were small groups with very limited support, they received very substantial airtime.

As Conor O'Mahony has outlined, the Coughlan decision seem to have been interpreted by broadcasters as being more restrictive than it actually is. It said that referendum broadcasts, which is time handed over to the Yes and No sides to make their case without interruption, must be allocated on a 50/50 basis. It did not, however, say that all coverage must be divided strictly in this way. Indeed the Broadcasting Authority of Ireland issued guidelines for coverage of the 2015 marriage referendum which made clear that there was room for flexibility on this. Perhaps the most significant thing they said was that there is no obligation to allocate an absolute equality of airtime to each side. They said that one can achieve fairness, objectivity and impartiality through the selection of contributors, the amount of airtime given to each side, the scope of the debate, the structure of the programme, the presenter's handling of the topic and so on.

They urged broadcasters to focus on the issue to be decided in any referendum, rather than just to measure the amount of coverage given to each side. In other words, the journalists should themselves do programmes and items on the factual situation rather than just allocate airtime to each side on a 50/50 basis.

As a former journalist I'd like to make a personal observation here. Journalists in general, and broadcast journalists in particular, come under huge pressure from all sides when they are covering contentious issues. They deal with accusations of bias all the time. In a referendum, as in an election campaign, they are under additional pressure in that any lack of fairness and balance is not just contrary to their own rules and codes of conduct, it is illegal. It takes a very brave journalist to do a programme on the subject matter of a referendum, using their own judgement as to what is fair and balanced. It is much easier simply to allocate half the time to one side, and half to the other, and just let them at it. It may not provide for great public education, but it does allow a journalist and his or her editor sleep more easily at night, free of the fear that one side or other might unsuccessfully claim you have been unfair or unbalanced. However let's be clear again: There is no legal requirement to divide broadcast time for referendum coverage on a strict 50/50 basis.

In practice, the Coughlan point is currently largely academic. In each referendum, all the uncontested broadcast time is given to the Referendum Commission to give a neutral explanation of the referendum proposal. There is no free airtime handed over to the Yes and No sides any more.

There is another aspect of the restriction on broadcasting that is the subject of comment and discussion. It is the very strict instruction to all radio and television presenters that they must appear neutral during a campaign. This is problematic when you consider the typical style of political interview we are used to hearing. The typical style of broadcast interview these days tends to be quite confrontational. The questions are less likely to sound like: "Good morning Minister, tell me about the plan you are announcing today?" Instead they have a tone of "Ah come off it Minister, what you're proposing clearly won't work." This confrontational style usually involves the interviewer putting the views of the politician's critics across in robust terms with a view no doubt to providing a lively discussion. However in circumstances where the interviewer is concerned about the need to seem neutral, then he or she is less likely to be confrontational. Critics say this means that advocates of the Yes and No side are given their allotted time to make their case, and that if they want to make outlandish claims then by and large they are allowed to do so.

Let's take a slightly silly example to highlight this point. In the normal course of events, someone who goes on air and declares that the world is round is typically allowed to say that without being challenged. However someone who comes on to argue that the earth is flat gets a more robust approach. They are asked to justify this view in the light of well established, known scientific evidence. They are shown photos of a round earth taken from outer space, as proof that the earth is round. They are asked how come, if the earth is flat, ships don't just disappear over the horizon all the time, and so on.

But if there were a referendum on the shape of the earth, broadcast interviewers might feel like holding back. So for example, when the campaigner who argues that the earth is flat makes his or her point, a normal response might be to say "oh for God's sake don't be ridiculous, sure look at the photo which shows it's round". But during a referendum campaign the interviewer might simply ask the speaker to explain what they mean and why they think it's flat, rather than challenge or question them robustly.

Journalists have a fear that if they robustly challenge one side or other, then they will be seen as behaving in an unfair and biased way.

Again, the 2015 guidelines from the Broadcasting Authority of Ireland have something to say on this, which suggests perhaps this requirement to seem neutral has been interpreted by journalists too strictly in the past.

They say: “the critical examination of the views of referenda interests campaigning for a particular outcome is not, in and of itself, evidence of a lack of fairness, objectivity and impartiality”. They say it is appropriate for journalists to examine and even robustly challenge statements made by various people during a campaign. So again, the impact of the requirement to be seen to be neutral may have led to a culture of caution which may not be justified.

However in the light of the regulations and requirements that are there, that caution is understandable.

### **Challenging untrue claims during a campaign. Has the Referendum Commission a role?**

But in this regulated atmosphere, the question arises as to how any patently untrue claims can be challenged. To go back to the earlier example, when our imaginary flat earth campaign is out there making its case, who can stand up and point out that they are talking nonsense?

This brings me to the role of the Referendum Commission. I have managed the public information campaign of the Referendum Commission for each of the last seven campaigns covering ten different referendum proposals. On each occasion, media have contacted us during the campaign to ask would the Commission adjudicate on whether claims being made by one side or the other are factual or not. The Commission has from time to time clarified certain issues of controversy, but has always been reluctant to get involved in the daily cut and thrust of the campaign. The Commission is there to provide factual information and so they are slow to adjudicate on large numbers of assertions that properly belong in the realm of political and media discussion.

First, as discussed earlier, the role of the Commission is laid out quite clearly in the Referendum Act. It is

- *to prepare one or more statements containing a general explanation of the subject matter of the referendum proposal;*
- *to publish and distribute these statements in a way that ensures that the electorate becomes aware of them;*
- *and to promote public awareness of the referendum and encourage people to vote.*

So it is not set up as some sort of highly activist referee, jumping into the debate, exploding myths, and brandishing yellow and red cards at campaigners who say things that are not

quite true. Its job, set out in law, is to prepare statements giving a general explanation of the proposal, not to instigate high profile public disagreements with various campaigns.

Nevertheless, over the past ten years the Commission has steadily grown in its interaction with the media. Each Commission has a chairperson appointed, and that person is either a sitting judge of the High Court, or a retired judge of the High Court of Supreme Court. In recent years, the chairperson has done a number of media interviews, with that number growing steadily.

The interviews allow the Commission both to explain the referendum proposal in general, and also to answer questions about claims that have been put forward during the campaign by different sides of the debate. The broadcasters generally accept that the Commission Chair's role is to explain the proposal, and not to argue directly with campaigners on one side or another.

The Commission does not answer questions on a particular issue without thought. Each issue of significance is considered by the full Commission with the assistance of legal advice, and an answer is then prepared. In other words the Commission considers its answers very carefully – its members do not see their role as being to appear all over the media answering questions off the top of their heads. As mentioned earlier the Commission also uses a substantial amount of airtime on all national and local television and radio stations to broadcast brief explanations of the referendum proposals, and to encourage people to vote.

The Commission has grown steadily into being a very valuable source of public guidance during any campaign. My own experience is that people believe it – a rare achievement for any public body in these days of growing scepticism about all official sources of information. During and after a number of recent campaigns, the Commission has been subject to judicial review proceedings by individuals unhappy with things the Commission has said or done during the campaign. None of these proceedings has ever succeeded. There are those who demand that the Commission become even more interventionist in the referendum debate. However in my view, the fact that it does not enter the debate at the drop of a hat means that when it does say something during a campaign, it carries a lot of weight.

Importantly, my experience is that the media rely more and more on the Commission to help them to explain referendum proposals. So when confronted with campaigners making claims as to what some aspect of a particular referendum proposal will mean, the Commission's explanation on that particular aspect will very often be given prominence as being the most credible view.

### **Should regulation apply to other media, not just to broadcasters?**

A final point I'd like to look at is whether regulation of media coverage should apply to broadcasters only. As a former newspaper journalist I know very well how the influence of newspapers and indeed of all traditional media is declining as more and more people access information and opinion online. But newspapers remain influential. Should they not have a legal obligation to be fair and balanced?

One side of this argument asks is it right that the owners of media can potentially have huge influence on voters' decisions simply because they own the press. We hear an argument in many countries that well-off media owners can influence election outcomes and therefore they have disproportionate political influence. If this is so, then they also have huge power to influence referendum outcomes.

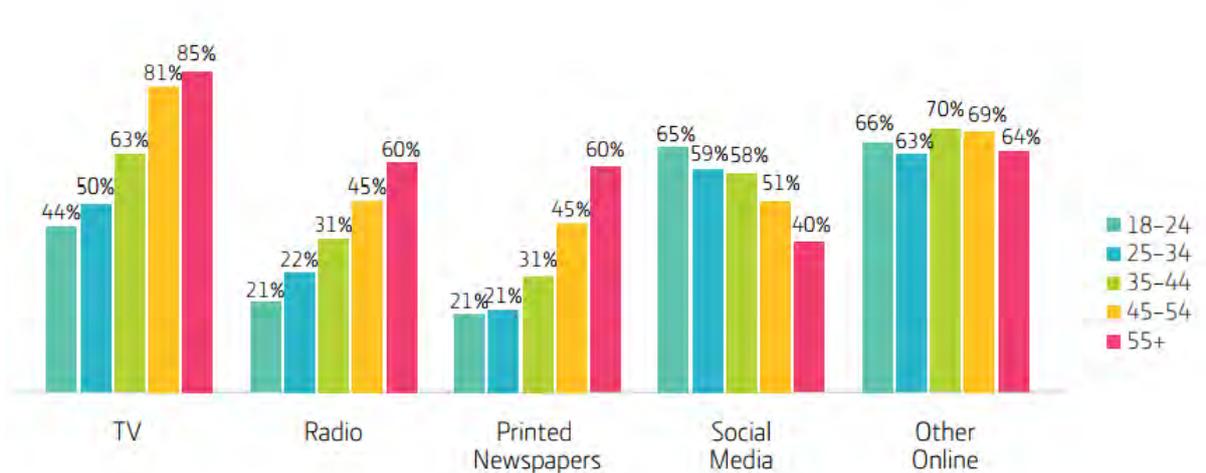
But the other side is that it is dangerous to have the State, and perhaps the Government of the day, regulating media output. The typical argument for freedom of the press states that a newspaper should have the right to argue for whichever side it chooses. It is also easy to see that in the case of broadcasters that receive substantial state funding such as RTE, they should be neutral and be seen to be neutral.

But what about privately owned broadcasters? Should they be regulated? To give one example, in the United States Fox news is often accused of bias towards the views of the political right. We might not like this, but should there actually be laws preventing this?

You'll notice that I'm taking the position of an impartial journalist here: asking questions, not giving the answers. But ultimately these are issues for you to consider. Finally, when looking at the regulation of media during referendum campaigns, it is worth reminding ourselves just how much the media landscape is changing, and how journalism is changing with it. The Reuters Institute produces an annual digital news report and last year's shows that while television and radio are still very powerful sources of news for Irish people, they have strong competition.

When people were asked which sources they used for news in the last week, 68% said they got it from television and 46% from radio. However 66% also got news online, and that's not including those who got it from social media and blogs. A further 52% got their news from social media, and in bad news for fans of newspapers, just 40% got it from printed newspapers.

The trend is obvious when you look at how news is sourced by different age groups. The graph below shows how younger age groups are moving away from traditional media such as television, radio and newspapers. As time passes these will certainly have less influence, though they remain powerful in terms of their ability to set the agenda for others.



Which, if any, platforms have you used in the last week as a source of news?

Because when you look more closely you can see that the traditional established media retains strong influence among the online news consumers too. The top digital sources of news, TheJournal.ie, Irish Independent Online and RTÉ News Online, all showed growth during the period covered by the report. When the public was asked which news sources they trusted most, the online offerings of legacy newspaper brands scored best for accurate news, as aids to understand complex issues and for providing strong viewpoints and opinions.

And despite the growth in the use of social media for news, the report shows people trust social media a lot less than traditional media. They understand that online there are many sources of what today we call fake news. So the fact that regulation does not apply to social media and many online sources matters less than it seems: It applies to the media that matters most.

### **So some conclusions**

- The requirement for balance applies to broadcasters only. There is no doubt that other media, such as newspapers, online sources and social media have a major influence during referendum campaigns, and these do not face the same legal restrictions.
- However there is an argument that broadcasting is a special case and deserves special regulation. Despite the rise of online and social media sources, radio and television remains hugely influential in setting the agenda for a referendum campaign.

- There is a requirement on broadcast media to be balanced, but the Broadcasting Authority of Ireland made clear in its guidelines for the most recent referendum that this did not mean that coverage should be split precisely 50/50 between the yes and no sides.
- Broadcast media are also allowed to do their own programmes on the subject matter of referendums, so long as they are balanced. However there is a very understandable culture of caution among journalists about doing this. Campaigners on each side of a divisive referendum campaign will complain about perceived bias very easily, and broadcasters will need to be courageous and confident in their own abilities to make programmes that would stand up to criticism and dissection, possibly in a court of law.
- The Referendum Commission itself has become a very strong and well-regarded voice in the course of referendum campaigns and is seen as providing a detached and unbiased explanation of referendum proposals. It does not, however, intervene in the campaign date on a very regular basis and in my view this is the correct approach.

Ends.

*Presentation of*

**Mark Brennock**

Director of Public Affairs, Murray

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

# Impact on the media of regulation during referendum campaigns

Mark Brennock  
13<sup>th</sup> January 2018

## Issues

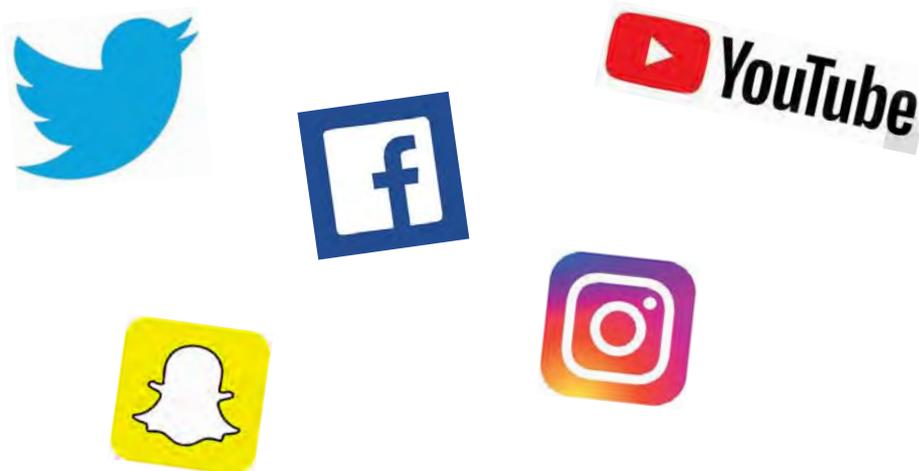
- The role of the media in communicating during a referendum campaign
- The regulation of media and how it affects journalists and media during a referendum campaign: How the requirement for balance is interpreted by the media and how it should be interpreted
- Does the Referendum Commission have a role in taking on claims made by one side or the other in a campaign if they are simply untrue?
- Should regulation apply to other media, not just to broadcasters?

# Role of the media

Referendum campaigns are fought substantially through the media



Social media is busier and busier during campaigns...



...But traditional media remains more influential



## Regulation of media

- The legal requirement to have balanced coverage applies to broadcasters only, not newspapers or online news outlets
- Broadcasters have interpreted the rules to mean they must give 50/50 coverage
- This is hard when there are very few voices on one side, and almost all spokespersons on the other side. For example Children referendum, Court of Appeal referendum



# Broadcasting Authority of Ireland guidelines

Some room for flexibility

BAI issued guidelines for broadcasters before the 2015 Marriage Referendum:

- Must be objective, impartial and fair
- But “there is no requirement to allocate an absolute equality of airtime” to each side
- Balance and fairness can be achieved through choice of contributors, airtime given, scope of debate, structure of programme etc.
- Don’t just measure each side’s airtime: focus on the issues, not the clock
- No obligation to ‘balance’ each person with an opposing view
- It is appropriate that decisions on coverage rest solely with broadcasters



## Presenters must seem neutral







## Key BAI guideline

“The critical examination of the views of referenda interests campaigning for a particular outcome is not, in and of itself, evidence of a lack of fairness, objectivity and impartiality.”



# Role of the Referendum Commission

- *to prepare one or more statements containing a general explanation of the subject matter of the referendum proposal;*
- *to publish and distribute these statements in a way that ensures that the electorate becomes aware of them;*
- *and to promote public awareness of the referendum and encourage people to vote.*



## How the Commission has evolved

- Referendum Commission explains the proposal; it doesn't referee the campaign
- Its presence in media has grown steadily
- Valuable source of public guidance
- Media gives prominence to relevant aspects of the Commission's explanation



## Changes have been proposed

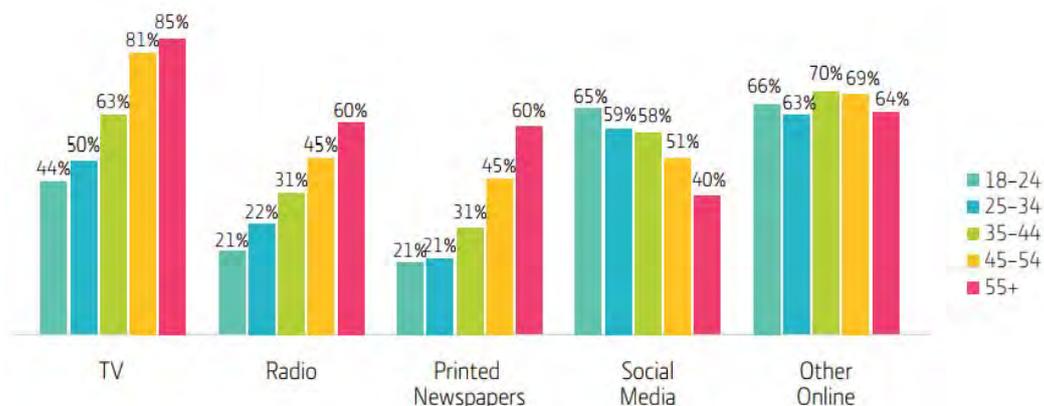
- Some past Commissions have said they have not been given enough time to perform their functions. Others have been happy with the time.
- Referendum Commission functions could have permanent existence within an Electoral Commission



## Should regulation apply to other media too?

- Lack of legal requirement for balance and fairness gives newspaper owners significant power to influence outcome
- But in liberal democracies, the idea of the State tightly regulating privately-owned media is not always seen as healthy

# Media landscape is changing



Which, if any, platforms have you used in the last week as a source of news?

Data source: Reuters Institute Digital News Report (Ireland) 2017 <http://ujomedia.eu/wp-content/uploads/2017/06/Report-for-Web.pdf>

## Some conclusions

- Requirement for balance, fairness and impartiality applies to broadcasters, not newspapers or online outlets
- Broadcasting remains the most influential outlet. Despite the rise of online and social media sources, radio and television remain hugely influential
- Broadcasting Authority of Ireland made clear in its guidelines for the most recent referendum that “balance” does not mean that coverage should be split precisely 50/50 between the yes and no sides
- Guidelines seem to offer more flexibility to journalists, but there is a very understandable culture of caution among journalists
- The Referendum Commission is a well-regarded voice, but does not intervene in the campaign debate on a regular basis.
- There are proposals for consideration on giving Referendum Commission functions to a permanent Electoral Commission, and guaranteeing more time for the Commission to perform its functions

*Paper of*

**Prof. Michael Marsh**

Trinity College Dublin

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

## **Session 5: Voter turnout, super referendums and repeat referendums**

*Michael Marsh, Trinity College Dublin*

Voter turnout and any reasons for low/ high voter turnout including information in relation to information and the role that this has in driving turnout; consequences of the regulation of information in respect of voter turn-out.

Research into voter turnout has been extensive, because the participation of citizens is a critical feature of liberal democracy. Most attention has been devoted to explaining why people vote (or do not vote) but attention has also been given to exploring the consequences of patterns of turnout for the result: would the outcome have been different if everyone (or even more people) had voted? What is clear is that turnout in major national elections varies a lot across countries. In some it is typically very high – in Malta above 90 per cent for instance – and in others it is low, with Switzerland and the US, even in Presidential elections, seeing half of eligible voters staying home. Turnout is normally lower in other elections, local or regional votes, and in referendums, although that is not always the case. Turnout in established democracies has also tended to fall over the last couple of generations.

There is no simple explanation for such variation, but there are three broad sets of important factors, notably norms and perceived rewards, as well as the extent to which the process addresses the costs, or convenience of voting. Some are very regular voters and some who never vote, but for many more voting is something they do usually, or sometimes, or perhaps rarely.

Voting might be a duty: some people feel they “ought” to vote and others do not share that view. Those who feel some sense of duty are much more likely to vote in any one election. A variation of this is the sense of voting as ‘normal’, almost a matter of habit. There is evidence that people get into this ‘habit early in their political life, and it has been argued that it is particularly important to encourage people to vote as soon as they are eligible to do so as to inculcate the norm. (There is evidence that lowering the voting age to 18 from 21 across Europe meant less eligible voters turned out in their first election, and this had long term consequences for overall turnout: Franklin 2004) This sense of duty is related to higher political interest and positive evaluations of politicians: those with more interest and more favourable views are more likely to accept a duty to vote, in referendums as well as elections.

A second explanation is that people vote because they care about the outcome. While it is extremely unlikely that any vote will make a difference (some economists talk about the paradox of voting since the costs must outweigh expected benefits) we do see that some elections are perceived as more important than others, and this will affect turnout. A close election, particularly one in which possible ‘winners’ are seen as promoting very different policies, is conducive to higher turnout. This is a common explanation for high turnout in Malta where the two-party system makes winners uncertain and where each side’s supporters feel very antagonistic towards the other party. Conversely, in Switzerland, the same

national government will form almost regardless of the outcome and the power of the Swiss federal government is also heavily diluted by the governments at Cantonal (regional) level and by citizens' initiatives/referendums. PR electoral systems, where fewer votes are 'wasted' also tend to see higher turnout than those using first-past-the-post rules. Of course, this situation also affects the behaviour of parties and the media, so 'important' elections will generate more campaigning, and more campaign coverage.

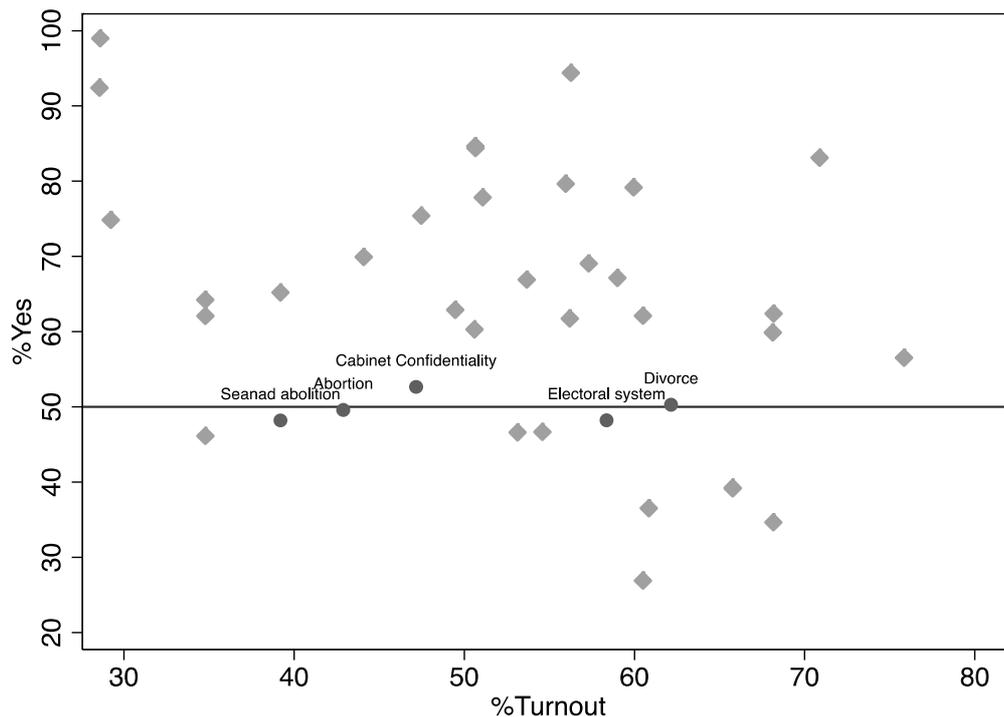
Information is a factor here, but a voter may need very little information to decide that the outcome is important. Information levels are typically related to turnout, a fact that comes out in almost all studies. But the topic of a referendum is critical here. Those on issues closely related to deeply held beliefs and loyalties will mean voters will be able to form a view on them quite easily, without much additional campaigning, while those on more technical, institutional arrangements will have little resonance without a stronger campaign. Typically, we see more campaign change in vote intentions in referendums where proposals are of the latter kind (Le Duc 2004).

A third set of factors concerns the ease of voting, including ease of registration. US turnout, in particular, is low partly because the onus is on the citizen to become registered to vote and there are significant barriers to that in many states. Voting in some countries is always on a weekday, when most are at work, while in others it is on a weekend day, or even the whole weekend. There have been many moves to facilitate voting in many countries, allowing voting early where it is convenient, and allowing voting by post, and there have been some experiments with internet voting. In principle, these should boost turnout if it is accepted that the difficulty of voting puts some people off. There is evidence that those countries who vote on Sundays, and weekends generally, do tend to have a higher turnout, as do those with optional postal voting, but it is far from established that simply changing the day or days on which votes are held will make much difference (Franklin 2004). US based studies exploring the impact of different factors to make voting easier (for registered voters) concluded that the impact on overall levels of turnout was no more than around 4 per cent. The experience of internet voting is limited to a few experiments (though it is widely used in Estonia) but what evidence exists suggests such procedures do not have much impact on voting levels. Procedures to make voting easier (at least for some) may have more impact on some social groups than others: e-voting is more likely to be used by the young who will typically be more confident about the mechanics of the process; postal voting may be of more benefit to older voters. A wide range of options is probably a best arrangement, but the evidence to date cautions against expecting any changes to have a big impact. It is also the case that making voting easier for citizens may increase the financial cost of elections and referendums for the State and those same citizens.

Concerns about low turnout often focus on the possibility of outcomes being distorted by the lack of participation. This underpins the requirement in some countries for a relatively high turnout threshold for a referendum to be valid. Firm evidence that were higher turnout would change outcomes significantly is hard to find, although most of the research has been done on elections rather than referendums. Of course, where turnout is far from 100 per cent and outcomes are

marginal, then it would be easy to see a different outcome being possible with much higher turnout. Close outcomes are not the norm in Irish referendums (see Figure 1) but a few have been very close and these have also been very controversial. Divorce (1996) and Abortion (2002) each saw margins of less than 2 points while in the referendums on Seanad abolition (2013) and electoral system reform (1959) the margin was just under 4 points. Turnout was around 60 per cent in the two closest votes, but only 39 per cent voted in the Seanad referendum and just 42 per cent in the 2002 referendum on abortion.

Figure 1. Closeness of referendum and turnout



One extensive study of 144 popular votes in Switzerland between 1981 and 1999 estimated that about 35 percent of the votes would have had a different approval rate if all citizens had voted, but even more results would have changed had voters been much better informed. (Lutz 2007)

One 'solution' is to make voting compulsory. This is now rare in established democracies, though Australia and Belgium are notable exceptions. Those for it argue that ensures that the views of everyone are counted, and that the element of compulsion puts the onus on the State to make it as easy as possible to vote. Critics argue that the measure addresses the symptom – low levels of interest in some parts of the electorate – rather than the cause of that apathy, and that the “views” of those with no interest should not be considered.

Factual background on super referenda days; outline of history to date of Ireland holding more than one referendum on one day- outcomes and issues arising.

Usually, when there has been a referendum in Ireland there has been just one proposal on the ballot paper. We have had 18 such votes, but there have also been seven occasions on which there were two propositions and two where there were three. Table 1 gives the instances of multiple referendums. These have become more common, with most of them in the last 20 years. There are some good arguments for doing this. Most importantly, having more referendums raises the profile of the occasion and makes it more likely that voters will find at least one of the items important. It also lowers the cost. However, the danger is that people may be confused about some of the proposals, being drawn to vote by one item and ignorant of the rest. The experience to date makes it hard to know whether two or three questions together boosts turnout. It averages 54 per cent when there is one item, and 51 where there are two or three, but of course there are not many cases and there is significant variation. The three votes on abortion in 1992 saw a turnout of 68 per cent, but only 35 per cent turned out to vote on *Nice* (the first time), the abolition of the death penalty and provision to ratify the statute establishing the International Criminal Court.

Table 1. Instances of multiple referendums

| Year | Topic of amendments   |
|------|---|
| 1968 | <i>Dáil constituencies and electoral system</i>                               |
| 1972 | Recognition of religions and votes at 18                                      |
| 1979 | Adoption and Seanad reform  |
| 1992 | Abortion: Travel, Information and <i>Right to Life</i> [and General Election] |
| 1998 | Good Friday Agreement and Amsterdam Treaty                                    |
| 2001 | <i>Nice Treaty [1]</i> , Death penalty and International Criminal Court       |
| 2011 | Judges pay and <i>Oireachtas Inquiries</i> [and Presidential Election]        |
| 2013 | Court of Appeal and <i>Seanad reform</i>                                      |
| 2015 | Same sex marriage and <i>Presidential candidate age</i>                       |

Note: Defeated amendments in italics.

What is more clear is that voters do distinguish between proposals. On the first two occasions, in 1968 and 1972, voters (in aggregate) made almost the same decision on each of the two proposals (though they rejected both by 61 to 39 in 1968 and accepted both by 84 to 16 in 1972) but this pattern of firm linkage has since changed. Most obviously, voters have voted yes to one and no to another at the same time, and have done so on the last four occasions where there was more than one item to decide. Judges pay cuts were accepted but *Oireachtas Inquiries* rejected; *Nice I* was defeated but proposals on Death penalty and ICC accepted; Same sex marriage was accepted but lowering age qualification for presidency heavily rejected. Differences between yes and no votes have sometimes been marked. Altogether on five occasions there has been a mixture of yes and no. Voters may know more about one than they know about another, but almost all voters, once they are in the ballot box, do vote on each of the items.

## Overview of international position in relation to the holding of super referenda- what happens elsewhere?

The experience elsewhere is that where referendums are common, they are typically held in batches. However, this generally applies to referendums called through a process of citizen initiative, often on matters of policy, rather than those called on the initiative of the government to change the constitution, as is the case in Ireland. The most notable cases are Switzerland, Italy, Australia and many US states.

**Australia** is the most comparable case with referendums held to approve constitutional changes suggested by the government. These have not occurred since 1999, but there were many from the 1970s with between two and four items at once, with a fifth item in 1977, a non-constitutional vote on the national song.

**Italy** has had over 70 referendum over the last 50 years, almost all of them initiatives, which required support of five Regional Councils or 500,000 Italian voters [about 1 per cent of the electorate], averaging between three and four each time with a minimum of one and a maximum of 12.

**Switzerland** is very different. Not untypically, in 2016 16 votes on federal initiatives were held across four separate dates. Proposals require just 100,000 signatures [less than 2 per cent of electorate] within 18 months. There have been more than 200 to date, but only about 10 per cent successful, although the success rate is much higher in this century. There can also be votes on objections to laws (requiring 50,000 signatures) as well as government initiated votes to change the constitution. A study on votes in the 1980s and 1990s found that the Swiss typically vote on 2-3 proposals at once but there have been more on some occasions with one case of 9, as well as six cases of just one.

**USA** also sees initiatives at State level. These may be essentially policy issues. In **California** initiatives require signatures on petitions from registered voters amounting to 8 percent (for an amendment to the state constitution) or 5 percent (for a statute) of the number of people who voted in the most recent election for governor. A total of 214 measures appeared on state-wide ballots from 1996 to 2016: the range was from eight to 28: Between 1996 and 2016, the average was 18. These will always occur at the same time as elections, so people will vote to fill any number of federal and state and local offices at the same time as making decisions about the propositions.

## What are the advantages / disadvantages of posing multiple questions? Is there a distinction to be drawn in this analysis between more than one question (2 or 3 questions as we have seen here previously) versus more significant super referendum days where multiple questions are asked of the people?

As is the Irish experience, there is ample evidence that people do distinguish one item from another, but we should be cautious in drawing too many lessons from what are, with the exception of those in Australia, very different types of votes. In most cases people who vote on one will vote on all, and decisions will vary. The US case is different, with a significant drop-off in participation of anything up to 25 per cent as voters go down through the ballots. In the US and Swiss cases, campaigns

are mounted by those who were responsible for getting those propositions onto the ballot paper, in many cases citizens or business groups independent of parties. It is not obvious that anyone would do this in Ireland with even four or five items on the ballot.

The demands on the voter are arguably quite high even when there are a small number of items for decision. The burden is higher when there are more. All studies of US initiatives do show low levels of citizen knowledge about most items but some researchers argue that voters can still make good decisions – the decisions they would make if they were well informed – by using ‘short-cuts’, such as knowing who was arguing for or against any item and using their evaluation of that body as a guide (Lupia and McCubbins, 1998). To some degree this holds for all referendums, and holds whether there is one or several. Voters are likely to use short cuts when they have little information, and in some cases this means voting ‘no’ to anything proposed by a disliked government, or anything on which they have little or no information.

To be a success in Ireland, a super-referendum occasion would in my view require some controversial proposals to raise interest and a well-established referendum commission, which would have adequate time to do its work. But the danger would remain that low-key proposals, however significant, would not provoke much interest from those who arrived to vote. Nor would there be much campaigning on them. Where there is some link between the proposals, as in the three on abortion in 1992, there is less of a problem. An analysis of the Oireachtas Inquiry referendum held along with the 2011 Presidential election found that a near majority of voters could not recall any arguments for or against those items, or those who made them (Marsh, Suiter and Reidy 2012), and anecdotal evidence was that many voters were unaware until they arrived to vote that there were two referendums, because they had been largely overshadowed by the presidential contest. This also points to a danger when combining referendums with elections that campaigning on the latter will be at the expense of the former.

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*Presentation of*

**Prof. Michael Marsh**

Trinity College Dublin

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

# Session 5: Voter turnout, repeat referendums and super referendums

Michael Marsh

Turnout

# Why is one person more likely to vote than another?

- DUTY: They feel they ought to
- IMPORTANCE: They care about the outcome
- CONVENIENCE: and the cost is not too high
  - How easy is it to get onto the electoral register
  - How accessible is polling station
  - What day or days can you vote, and can you vote early
  - Can you vote by post, or internet, and if so when, and in what circumstances

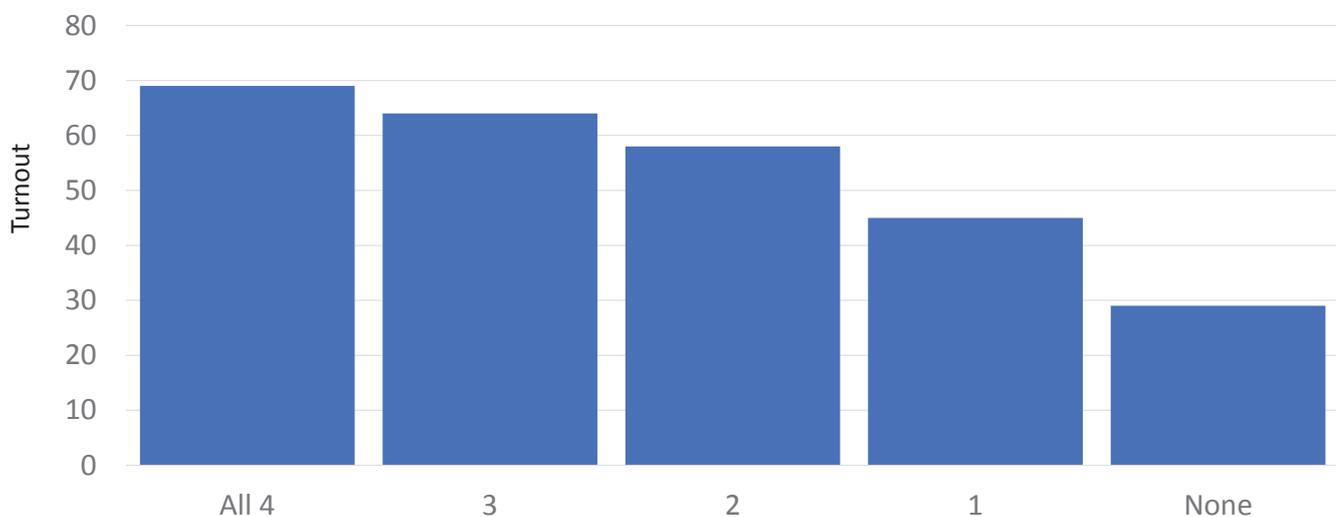
# Why is a person more likely to vote in one election another?

- DUTY: They feel they ought to
  - Duty sense will vary across votes
- IMPORTANCE: They care about the outcome
  - But some votes are more important than others, because closer, because of different voting systems, or sees a stronger campaign...
- CONVENIENCE: and the cost is not too high
  - Cost may vary from time to time, and rule changes will affect convenience
  - BUT cost most relevant to those who already have an inclination to vote, so reducing tends to have only a marginal effect

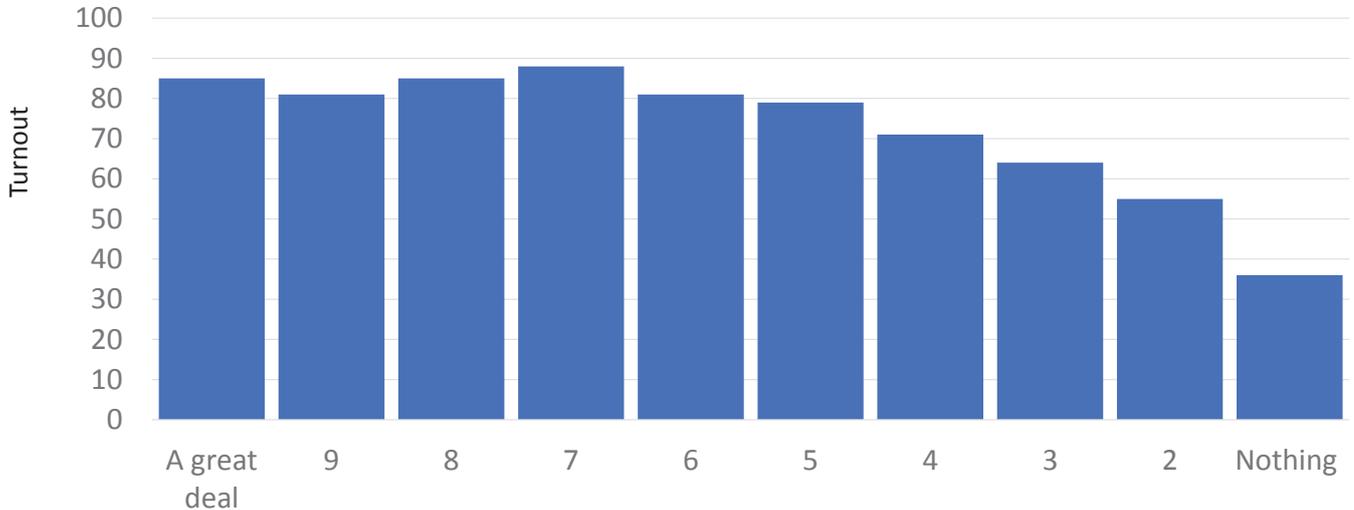
# The importance of Information

- Level of information typically related to turnout

## Lisbon I Turnout by knowledge of EU: 4 point scale



# Lisbon II turnout by subjective knowledge: 10 point scale



Session 5: Marsh/Turnout, repeats and super refs

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## The importance of Information

- How much do most voters know?
  - Nowhere near as much as is typically assumed by most commentators, because most people simply not interested on a day to day basis; but knowledge will go up as voting day nears

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# The importance of Information

- How much do they need to know?
  - Enough to make the decision they would make if they knew a great deal more
  - Enough to link decision to people they trust (or do NOT trust), or to relatively strong underlying opinions and values

## Cautionary tale? A low information vote

In a survey completed just 4 weeks after the referendum on Oireachtas Inquiries [*which coincided with the Presidential Election in 2011*]

- Campaign: 50% of all who voted unable to answer question of who argued Yes; and 57% unable to say who argued No

## Cautionary tale? A low information vote

In a survey completed just 4 weeks after the referendum on Oireachtas Inquiries *[which coincided with the Presidential Election in 2011]*

- Content: 44% could give no arguments made for a yes vote [42 yes, 47 no] and 46% no arguments for a no [50 yes, 42 no]

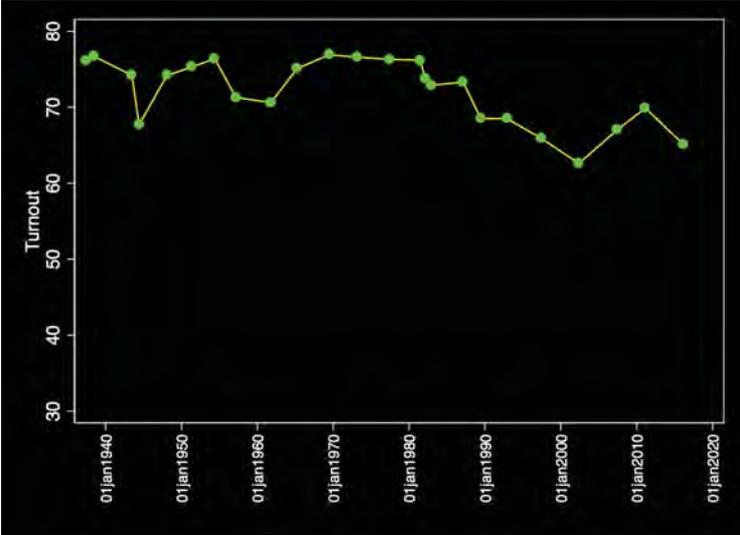
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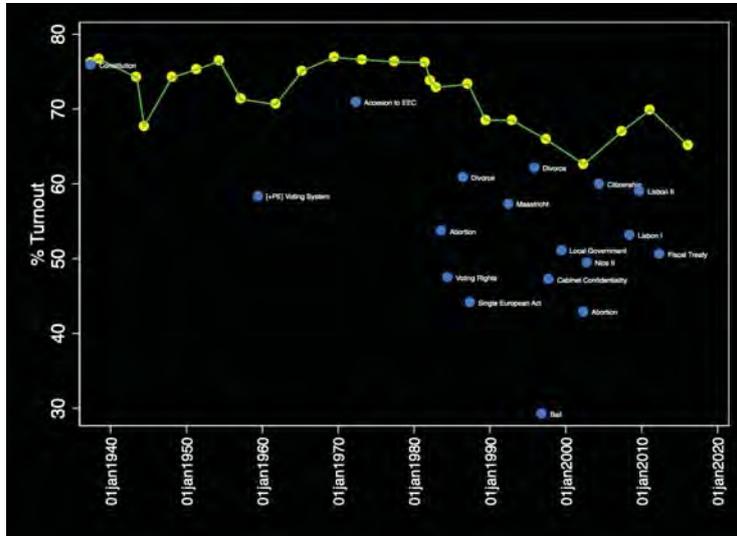
- Reasons: 47% could not explain their yes vote, and 44% could not explain their no vote.

# Irish referendum experience

## Turnout in elections



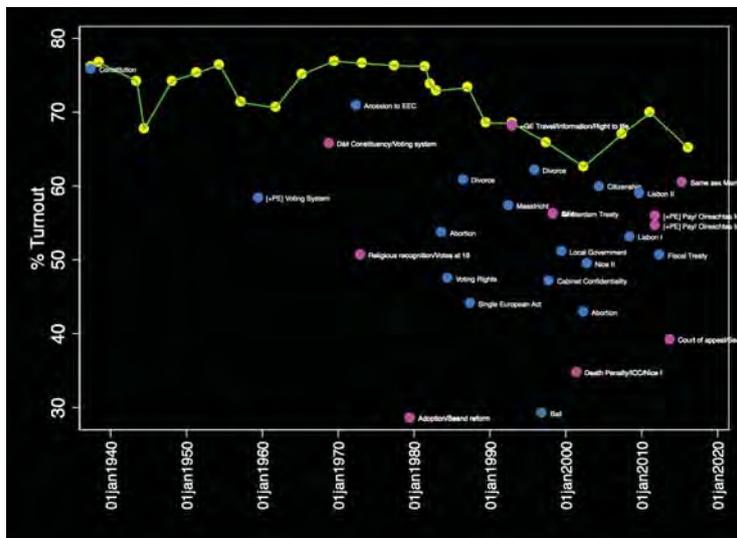
# Turnout in elections and single referendums



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# Turnout in elections and all referendums

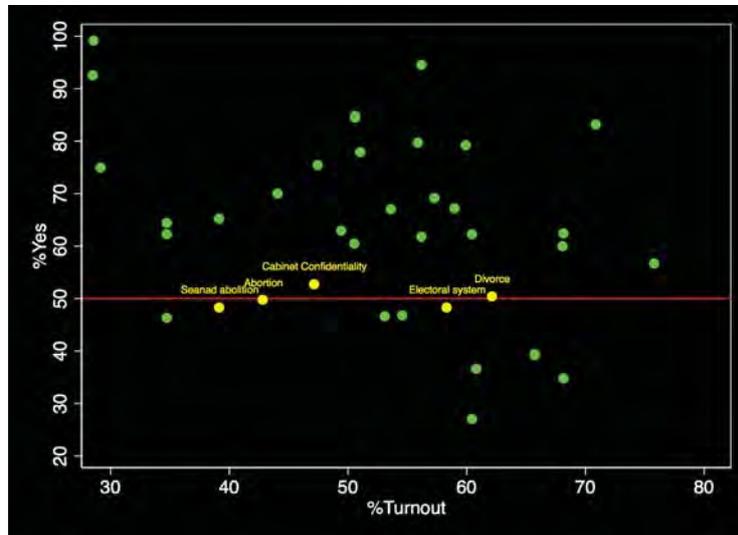


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# Close votes in referendums by turnout



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## Referendums and elections

- Generally **lower turnout in referendums** than general elections in Ireland
- Can see this as a result of a lower sense of duty, and perception by voters that these **votes less important**
- We also see that **campaigns less vibrant**, with parties – particularly activists – much less involved
  - Interesting that geographic pattern of turnout is very different, with rural turnout in particular much lower

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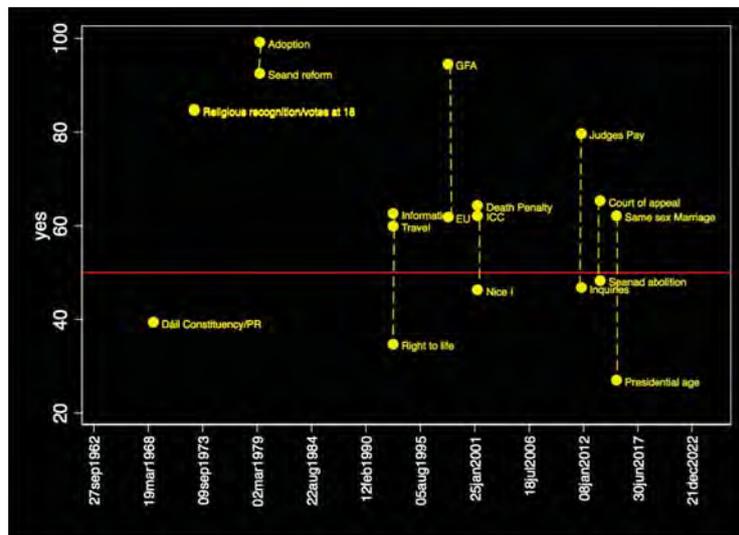
21

## BUT: do multiple referendums help turnout?

- No, if anything single referendums have seen more people vote, at least when no other elections on the same day
- Even so: still very few cases and not clear that the two sets are necessarily comparable

Do people see differences when voting on two or more things on the same day?

Do people see differences when voting on two or more things on the same day? YES!



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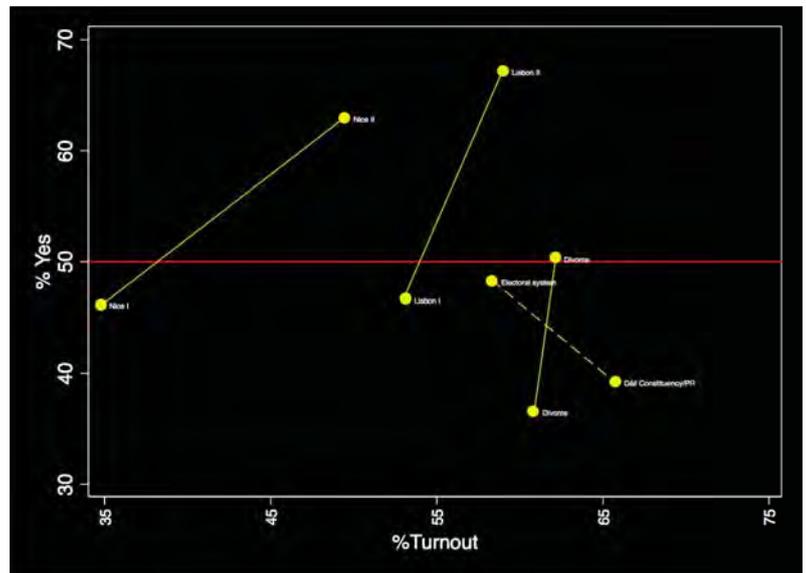
## Repeat referendums

- PR – bigger defeat second time in 1968 after defeat in 1959
- Divorce – passed in 1995 after defeat in 1986
- Nice – passed in 2002 after defeat in 2001
- Lisbon: passed in 2009 after defeat in 2008

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# Repeat referendums

- Against:
  - The People's considered view not taken seriously if political elite does not like outcome – devalues the process:
    - "Just look what happens when we vote no. They make us vote again!"
  - Difference between gap of a decade or so and just a year: how long is long enough?
  - What would be the response if turnout lower and decision reversed?

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- Difference between gap of a decade or so and just a year: how long is long enough?
- What would be the response if turnout lower and decision reversed?

- For:

- Changes between two votes in exactly what was the proposition, and arguably this made a difference, but people also believed different things about the proposals
- Concerns about levels of information, or low turnout when item defeated
- People free to decide differently
- Second vote showed very different outcome
- Electorate endorsed second referendum with higher turnout
- Happens elsewhere: Denmark had two votes on Maastricht, following a renegotiation; Quebec on independence; many votes on prohibition etc.

## Experience from elsewhere

# Multiple referendums

- Few other countries have hold votes on constitutional change and fewer still have held multiple votes on the same day
  - Many votes in Australia in last century, sometimes severally and once with five Q on the ballot
- Some countries allow citizens themselves to propose questions for referendum, subject to a certain number of signatures. These typically **not** constitutional matters (as they always are in Ireland)
  - Many in Italy, and Switzerland
  - Many in many US states (but not at Federal level)
  - More countries allow such initiatives at local level
  - Where this happens there are typically several at once, and more in the US examples, where they coincide with Federal or State elections

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## Illustrative Swiss votes 2016: 62.9-63.7% turnout, all defeated.

- ..**prohibited discrimination in taxes for married couples** (who pay more in certain circumstances) compared to other cohabiting couples, but it would also have added the definition of marriage being "the union of a man and a woman"..
- .. provide full implementation of an initiative approved in a 2010 vote. **Foreigners who commit a crime would be automatically expelled** from the country, regardless of the severity of the crime.
- ...**"No speculation on food"**
- A federal law on road transit in the Alpine region allowed **building a second road tunnel** in order for the current tunnel to be reconstructed. This plan was **challenged** to a referendum by opposition groups who fear the four lanes would eventually be used, increasing traffic, and who considered it too costly.

Session 5: Marsh/Turnout, repeats and super refs

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## California initiatives Nov 2016: 14.2m voted in Presidential contest, just over 70% [US 55%]

1. \$9 billion in bonds for education and schools [13.6m]
2. Voter approval of changes to the hospital fee program [13.5m]
3. *No Blank Checks Initiative: Projects that cost more than \$2 billion would need approval [13.2m]*
4. Conditions under which legislative bills can be passed [13.2m]
5. Extension of personal income tax on incomes over \$250,000 [13.6m]
6. Increase the cigarette tax by \$2.00 per pack [13.9m]
7. Felons convicted of non-violent crimes and juvenile trials [13.7m]
8. Bilingual education in public schools [13.6m]
9. State's position on Citizens United v. Federal Election Commission [13.9m]
10. *Require the use of condoms in pornographic films [13.3m]*
11. *Prescription drug price regulations [13.4m]*
12. *Repeal the death penalty [13.6m]*
13. Background checks for ammunition purchases [13.7m]
14. Legalization of marijuana and hemp **[14m]**
15. *Redirect money obtained from Grocery and retail carry-out bags [13.5m]*
16. Death penalty procedures **[13.0m]**
17. Prohibition on single use plastic bags [13.6m]

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## What does this experience tell us

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- Good evidence from Switzerland – where turnout is usually less than 50% [but often higher than in Federal elections] that higher turnout and/or more information would see a different result in a lot of cases, underlining the importance of persuading people to vote

## Turnout can matter. So: What measures would help turnout?

Facilitation – make voting more convenient: more days and more ways: weekend voting, easier postal voting,

*Facilitation will do more than add a few % to turnout; and will only affect those who tend to vote anyway*

Importance – provide people with enough **information** to persuade them that the vote is important:

permanent electoral commission, ensuring commission has adequate time

Importance: vibrant campaigns from parties, citizens groups

*Cannot force people to take in information.*

*Cannot force campaigns either: could provide public funding but would have to be to both sides*

*People need to know WHO is making the arguments*

No good to rely on neutral, unsourced arguments pro and con

Compulsory voting

*Addresses symptom, not problem*

## Should Ireland have super referendum days?

Might raise turnout because something would interest more voters; and bigger event in media, so more information

Could certainly raise turnout above what it might be for some items

Would make it more practical to work through the many items that committees and CA have highlighted

Would reduce financial cost of referendums

Evidence that people do discriminate between items

## Should Ireland have super referendum days?

No evidence that holding several votes at once does increase overall turnout, at least over what it might be for most important item

Fear that more items mean more people voting on things they have little information about or interest in

Hard to see who would run campaigns on many items

Media likely to highlight one or two items rather than all of them

Another possibility is a referendum in which the people choose between several options, rather than between change and the status quo. This multi option vote is sometimes called a 'preferendum'.

## Multi option referendum experiences

- multiple choice (non-binding) referendums held in Sweden, in 1957 and in 1980, offered voters three options: winner was that with most votes
  - Winner would be that with most votes...e.g. 1980
    1. Nuclear power would be phased out over a period 18.9%
    2. (1) plus efforts to reduce energy consumption whilst protecting less well off 39.1%
    3. Expansion of Nuclear power to end immediately, and strict measures to cut back 38.7%

# Multi option referendum experiences

- New Zealand held a five-option referendum on its electoral system
  - 1992: consultative: two Qs: (1) Keep or change and (2) which change: 4 options
  - 1993 : binding : two options: Old system vs new system (most popular choice in 1992)

# Multi option referendum experiences

- Australia voted to determine a new national anthem. Voters had four choices: winner was that with majority using PR
  1. Advance Australia Fair 43.3% first preferences
  2. Waltzing Matilda 8.3% first preferences
  3. God Save the Queen 18.8% first preferences
  4. Song of Australia 9.6% first preferences

# Advantages and disadvantages of multi-option ballots

## AGAINST

- **TOO COMPLICATED:** both for voters and to count
  - Campaign might be hard to focus
    - with referendums on complex issues, referendums introduce more complexity and the possibility of confusion
  - Simple majority system could easily lead to results which a majority oppose strongly
  - All party report 2001 said “*impossible to devise a satisfactory method of weighing voting preferences*” ...options include PR and Borda Count (used in Eurovision Song Contest)
- At a referendum there is a majority one way or the other on the issue before the people. A referendum might result in an option, which did not obtain the support of a *majority* being nonetheless adopted
- How would the set of different proposals be decided: open to abuse by, for instance, splitting a proposal that might be supported by a majority into a number of proposals and leaving a proposal supported by a minority intact and therefore predominant.

# Advantages and disadvantages of multi-option ballots

## FOR

- Don't need very many options : just a reasonable choice.
- Less complicated than multiple referendums on different subjects on same day:
  - Different groups should campaign for different options
- Concerns about weak 'majorities' addressed by using, e.g. PR, which would hardly be too complicated for the Irish voter
- Majority for single referendum question simply means a preference for that over the alternative, the status quo, or support for status quo over the proposal. Does not mean this is best option over other, unlisted, possibilities.
- Removes need to try to identify option that it is *believed* commands majority support
  - consider discussion about upcoming abortion vote, and failure of 2001 referendum which was defeated as too liberal and too conservative

# Summary

- Turnout lower in referendums than elections and sometimes very low; and low turnout and low information can alter result
- No simple measures to increase either much if people not interested, but could make voting easier and improve campaigns
- Holding multiple referendums does work, but does not do much for turnout, and some items may get overshadowed
- Repeating referendums upsets some, but voters seem to respond positively
- Multi option referendums worth looking at seriously, using PR

*Paper of*

**Dr. Theresa Reidy**

University College Cork

*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

## **Session 6: Citizens' Initiatives**

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### Introduction

Voters in most countries choose their public representatives at national elections. The representatives elected go on to sit in parliament and/or take up executive office. They are responsible for governing on behalf of the citizens that have elected them. We call this representative democracy. Direct democracy occurs when citizens are asked to vote on a specific issue in a referendum or initiative vote. Ireland is a representative democracy which uses referendums (an instrument of direct democracy) to make decisions on changes to the constitution. Many states incorporate elements of direct democracy into their overall systems of representative democracy. Citizens' initiatives are another tool of direct democracy.

### Citizens' initiatives

Citizens' initiative is an umbrella term often used to cover a series of instruments which allow voters to propose a new policy, law or constitutional amendment or to repeal an existing or new piece of legislation. The specific instruments which fall into this category include:

1. A citizens' initiative which refers to voters proposing and voting in a popular vote on a new legislative or constitutional proposal.
2. An agenda initiative which allows citizens to propose new legislation. If the vote on the agenda initiative is successful, the proposal passes to parliament. Parliament may accept or amend the proposal.
3. An abrogative referendum (sometimes also known as a repeal initiative) which allows citizens to vote to retain or repeal an existing law.
4. A rejective referendums which allows citizens to vote accept or reject a new law.

In all cases, citizens must register their proposal with the appropriate state authority and reach a legal threshold of support for their proposal (usually a set number of signatures of registered voters) within an agreed timeframe. Once the required level of support is achieved, a popular vote is triggered. Magleby (in Butler and Ranney, 1994) describes the citizens' initiative as dealing with 'sins of omission' and the abrogative referendum as being about 'sins of commission'.

Citizens' initiatives are provided for in a small minority of countries. Constitutional referendums are much more widely used. Initiatives are most commonly found in Europe and

Latin America. IDEA (2008) and Altman (2011) provide detailed information on which instruments are available in countries around the world.

### The international experience

Initiatives are a powerful agenda setting tool and confer considerable influence on voters. They are most frequently associated with the system of semi-direct democracy in Switzerland which has a long history of citizen involvement in decision making. The Swiss experience with direct decision making dates back to medieval times and later ideas from the French Revolution influenced the evolution of citizen involvement in decision making while a movement in the 1800s copper fastened the legal structures which support the system today. Citizens have the right to veto legislation which has been passed by the federal assembly and also to initiate constitutional legislation. The main issues addressed through initiatives include tax policy, social spending, political rights (especially immigrant rights and asylum rules) and infrastructure projects (Trechsel and Kriesi, 1996). Referendums and initiatives are clustered and votes take place three to four times a year with most of the voting taking place by post. Turnout is often quite low, below fifty percent.

Aside from Switzerland, both Canada and the US also have long histories of citizen initiatives, Canada at the local level and at state level in the US. Twenty-four US states have initiative provisions (Qvortrup, 2013). The provisions were used widely in the early twentieth century but their use declined from the 1920s until the 1970s when there was a resurgence of interest in the procedure. Initiatives are most commonly used in the Western States in the US and California, Oregon and Colorado have frequent votes on all kinds of issues including drug legislation, penal policy, social policy and fiscal affairs.

More generally, the use of initiatives has been increasing around the world in recent decades. Initiative instruments were included in the constitutions of many democratising post-Soviet states in the 1990s. In more recent years, the introduction of citizens' initiatives has been informed by a desire to engage citizens in the democratic process. Turnout at elections has been declining in the democratic world and in tandem, there has been a fall in trust in political institutions and a greater questioning of representative democracy. The initiative has been proposed as a tool that could reinvigorate democracy by giving citizens more meaningful ways of participating in politics. Zittel and Fuchs (2007) have called this type of reform 'participatory engineering'. Voting at national elections every couple of years provides for passive involvement by citizens but proponents of the initiative argue that it can give an enhanced and regular role to citizens and they have also pointed to evidence that initiatives can engage citizens that have been disaffected by mainstream representative politics.

New Zealand introduced non-binding citizens' initiatives in 1993 and the Netherlands introduced agenda initiatives in 2006 with Finland following in 2012. Across Europe, Hungary, Latvia, Slovakia and Lithuania all have provision for citizens' initiatives. Germany has provision for citizens' initiatives at the state (lander) level. Following the passage of the Lisbon Treaty, a pan-EU initiative procedure was introduced.

In general, the number of initiatives voted on tends to be much lower than the number registered by citizens and the overall success rate of those that go to popular vote also tends to be low. In the case of Switzerland Setälä and Schiller (2012: 27) report that of 378 initiatives launched from 1891-2010, only 174 made it to a popular vote and only 18 were approved. While the numbers of proposals being approved in Switzerland has increased in recent years, the overall success rate is still quite low internationally. In Finland, 700 initiatives have been launched since 2012 but just 20 of these have reached parliament.

#### Limitations on the subject matter of initiatives and procedural rules

The right of initiative by citizens is one of the most contentious areas of direct democracy and many states impose specific restrictions on the scope of initiative proposals. The International Institute for Democracy and Electoral Assistance (2008: 61) identifies three broad groups of restrictions which are applied to initiative proposals.

1. Restrictions on constitutional amendments.

It is not unusual that constitutions have clauses which cannot be revised either by proposal of parliament or citizens. These clauses are often referred to as immutable and tend to cover requirements that states must be free and democratic (for example the Basic Law, Germany). The individual rights of citizens are also often included in this category of restrictions. For example, in Slovakia, basic rights and liberties may not be subject to initiatives.

2. Issues concerning the integrity of the state.

A number of countries preclude initiatives in areas relating to war and peace and the negotiation of international treaties. For example, in the case of Italy, state pardons, international treaties and budget matters cannot be subject to an abrogative referendum. Military service is excluded from initiatives in Latvia and the territorial integrity of the state is precluded in many states.

3. Limitations relating to legislation and other decisions.

It is quite common that budgetary matters, taxes and public expenditure are excluded from initiative procedures (Hungary, Italy, Latvia). Other restrictions to be found include changes in election procedures (FYRM).

Some states verify that an initiative proposal is compatible with constitutional and legal requirements upon its registration in the system and confirm that it does not violate any

relevant provision while other states do not conduct this process until after the proposal has reached the signature threshold and a vote has been triggered. In the case of the European Citizens' Initiative, once a proposal achieves 100,000 signatures (one tenth of the full requirement) a decision on its admissibility is made.

### *Principles and procedural rules*

There are both broad principles and procedural rules which govern the operation of initiative instruments (Butler and Ranney, 1994; IDEA, 2008; Setälä and Schiller, 2012). Initiatives are binding in the case of Switzerland but consultative in the case of New Zealand. Some countries apply additional requirements for the result of an initiative vote to be valid. Commonly, there are two particular requirements, a turnout threshold and/or double/super majorities. In Switzerland, for constitutional proposals, there is a minimum participation threshold of 40 percent. In Italy, at abrogative referendums, a majority of registered electors must cast their ballots for the result to be valid. Double majority requirements are common in federal states. In the Swiss case, again for constitutional proposals, a majority of voters and a majority of cantons must favour the proposal for a valid outcome.

There are a number of technical procedures which also apply in the case of initiatives.

Beginning with the signatures required to trigger an initiative, thresholds are usually set out in law and vary from a specific minimum number to a percentage of the total registered electorate. Time limits for a proposal to collect the required number of thresholds are in place in most countries which use these instruments and average at about one year. In the case of Switzerland, the requirements are as follows:

- 50,000 signatures collected within 100 days are required to initiate a veto referendum,
- 100,000 signatures collected within 18 months are required to initiate a constitutional proposal.

Signatures must also be verified and this administrative work is usually carried out by an electoral commission or the elections/franchise section of the government department responsible for managing the electoral process. One of the most controversial procedural aspects relates to the naming of the initiative votes and how the proposal is summarised in the voter information booklet. It is not unusual for naming issues to be adjudicated on by the courts.

Finally, procedures must be put in place to deal with contradictory initiative proposals. In the case of Switzerland, where constitutional proposals contradict each other, a tie break question

is included on the ballot while in the many US states, it is the proposition that gets the most voters that is deemed to be the decision taken.

### When citizens take the lead: Key debates and controversies

Initiative instruments can alter the balance and nature of politics within a state and as a result, they have proven controversial in a number of ways.

#### *Impact on representative democracy*

The ability of voters to initiate or reject laws may make legislators more likely to seek consensus in the laws which they introduce and may encourage legislators to be more responsive to their voters, all of which is considered positive from a normative standpoint. However, arguments have also been advanced that initiatives can immobilise politics and inhibit both the capacity and inclination of governments to make difficult decisions if they can be undone by populist initiative proposals. Matsusaka (1995 and 2006) makes this point in relation to the US and he demonstrates that both Republicans and Democrats have faced governing constraints as a consequence of initiatives.

Initiative instruments have also been criticised for supplanting representative politics and undermining the role of parliament and the votes of citizens at parliamentary and presidential elections. At the extreme end of this argument, their introduction is seen a sign of failure in the political system and the tension between parliamentary institutions and instruments of direct democracy is discussed in more in detail in IDEA (2008).

The inclusion of certain types of citizen initiatives on the ballot at the same time as other elections is sensible from an administrative point of view as it can increase participation but it has also been criticised as an abuse and has been termed an attempt to manipulate sectoral turnout. The most prominent case has been the inclusion of citizens' initiatives to limit marriage rights for same sex couples on the ballot paper at US presidential elections in an attempt by Republicans to mobilise conservative voters who might not have otherwise participated in presidential elections.

Finally, Lutz (2006) and Matsusaka (1995) both found that the presence of initiative procedures in a system tended to lead to lower taxes, lower public debt and also greater use of benefit principle taxes (such as water charges, airport taxes and road tolls).

#### *Tyranny of the majority*

A common criticism of initiatives is that they may lead to the introduction of measures which restrict the rights of minority groups within a state. Initiatives could be used to restrict language rights, religious freedoms and freedom of association for some groups within a state. While international treaty obligations may limit these proposals in some countries, this

has not been the case in all states and there have been controversial initiatives in Latin America and Switzerland which have raised these issues.

### *Big Money*

The influence of big business and powerful interest groups in both the triggering of initiatives and their subsequent campaigns is a persistent issue and the one which receives the greatest attention (see Broder, 2000 for a comprehensive discussion). Initiative vote campaigns are often governed by the same regulations as referendums but the signature collection period is frequently subject to few restrictions and often very little information provided to voters on who paid for the signature collection and the initiation of the process. Furthermore, there is evidence from both the US and Switzerland that high campaign spending can be successful in defeating a proposal although the same is not true in relation to getting a proposal passed (Bowler, Donovan and Tolbert, 1998).

### *Quality of legislation*

Some critics of initiatives have queried whether voters have the skills and training to write legislation and conduct campaigns. It should be pointed out that the same skills principle is rarely applied to parliamentarians. There is very little research on this topic but one study from 1996 found that there was no evidence that the bills processed through initiatives were any worse than those advanced through the representative process (Polhill, 1996).

### *Voter interest and attention*

There is a lot of evidence to show that voters do not give much attention to their decisions on individual initiatives. Some initiatives relate to complex decisions and survey evidence suggests that voters may not be interested in taking these types of decisions and in part this may explain the low turnouts which are a feature of initiatives in many countries. Although research has shown that voters can use cues such as party support for a measure to arrive at decisions which are consistent with their values and views (Bowler and Donovan, 2000), there are arguments that this type of decision making does not meet the direct democracy goals of deliberation and informed decision making. A growing concern in the study of initiatives relates to the impact that declining trust in elites and experts and 'fake news' may have on the information environment at campaigns.

### European citizens' initiative

The European Citizens' Initiative (ECI) was introduced by the Lisbon Treaty in EU member states and it came into force in 2012. The initiative instrument was introduced after a long

debate about how European citizens could be brought closer to the EU and participate more effectively in its governance. Specifically, the ECI provides for one million citizens from 25 percent of the member states of the EU to request the European Commission to initiate a policy proposal in a specific area. Each ECI must be proposed by a citizens' committee of at least seven people who are resident in at least seven member states.

The EU commits that when it receives a proposal that meets the required thresholds, it will publish the proposal in its register, meet with the organisers of the proposal to discuss the details and within three months respond to the proposal with grounds for why it is taking the action chosen.

Initial enthusiasm about the ECI waned when it became apparent that the threshold for success was very high indeed. Since its introduction, just four initiatives have reached the required levels of support. The topics covered were water rights, protection of the human embryo, animal rights and a ban on glyphosate herbicides. In 2017, a review of the process was initiated.

## Ireland

### Article 48 of the 1922 constitution of the Irish Free State

The idea that citizens should have an active role in decision making is not new in Ireland. The 1922 Constitution of the Irish Free State included provisions for direct democracy in Articles 47, 48 and 50. As is the case today, amending the constitution required a referendum (but the constitution could be amended without referendum for the first eight years, a term which was subsequently extended for another eight years). And there were also provisions for citizen initiated processes; veto of legislation and right of proposal. The veto of legislation (rejective referendum) required either five percent of voters or 60 percent of the members of the Seanad to demand a referendum on a piece of legislation which had just been passed. If the bill was rejected at the referendum, it could not become law. Citizens were given the right of initiative on both legislation and constitutional changes. A petition had to receive the support of 50,000 voters to proceed. Once this threshold was achieved the proposal moved to the Oireachtas which had up to two years to pass the law. If it was not passed during this time frame, the proposal proceeded to a binding referendum. The article in the constitution on the initiative process required that the Oireachtas bring forward legislation to underpin the practice and included a clause where this decision itself could be forced by a petition of citizens. However, no legislation was brought forward and the clauses on veto of legislation and right of initiative were eventually removed from the constitution by the Oireachtas.

The 1922 constitution was replaced by Bunreacht na hEireann and it retained the provision that amendments to the constitution required a referendum. It also included provision for what is called an ordinary referendum which means that ordinary bills (proposed laws) may also be put to a referendum but this provision has never been used.

## The Whitaker Report of the Constitution Review Group

A constitution review group was established in 1995 to consider any changes which might be necessary. The group was chaired by TK Whitaker and as part of its deliberations considered whether a popular initiative mechanism to amend the constitution should be introduced. Having considered the arguments, the group decided that an initiative instrument had the potential to pose ‘the dual risks of effecting inadequate or undesirable amendments to the Constitution and of leading to many fruitless and expensive referendums’ (Report of the Constitution Review Group, 1996).

## Conclusion

Citizens’ initiatives drifted from the political agenda for a time after the report of the Constitution Review Group. Internationally, they have received renewed interest especially as they may have potential to engage citizens who have become dis-connected from the democratic process. In Ireland, the economic crisis from 2008 brought about renewed evaluation of the political institutions of the state and of the nature and conduct of politics. All political parties at the 2011 general election produced extensive political reform proposals, some which included types of citizens’ initiatives. There has also been some limited civil society campaigning on the issue.

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*Presentation of*

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*delivered to*

**The Citizens' Assembly**

*on*

**13 January 2018**

# Citizens' Initiatives

Theresa Reidy  
University College Cork



- Types of initiatives
- International experience
- Topic limitations, validity rules, technical requirements
- Key debates
- Irish experience

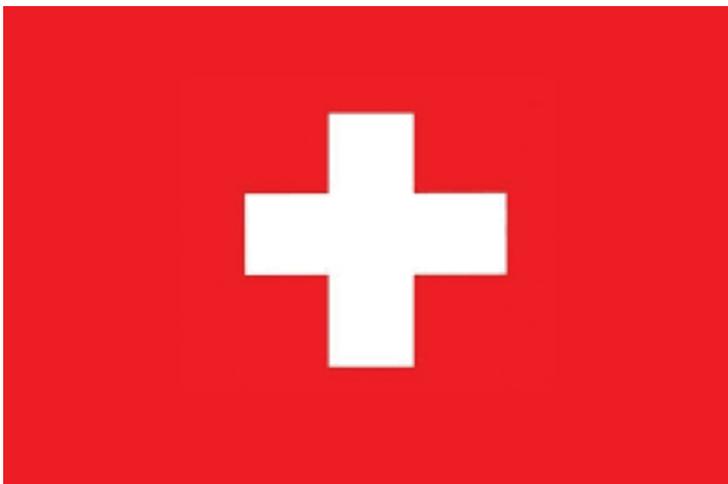
## What are we talking about?

- **Citizen initiative** – citizens propose and vote on new legislation/constitutional change
- **Agenda initiative** – citizens propose new legislation for consideration by parliament
- **Abrogative referendum** – citizens use a popular vote to make a decision on an existing piece of legislation (repeal)
- **Rejective referendum** – citizens use a popular vote to make a decision on a new piece of legislation

# International Experience

Switzerland, USA, Canada, EU

## Switzerland



- Veto of legislation
- Right of proposal (constitutional issues)
  - Tax policy
  - Social policy
  - Political rights (immigrant and asylum policy)
  - Infrastructure
- Voting takes place 3-4 times a year
- Postal voting
- Variable turnout



## USA



- State level (24, most common in western states)
- Citizens' initiatives (direct and indirect)
- Dates from early 20<sup>th</sup> century
- Renewed use from late 1970s
- All kinds of issues...



## 2016 Ballot Measures (cont'd)

- 60 Adult films – condoms, health requirements
- 61 State purchases of prescription drugs – price standards
- 62 Repeals death penalty
- 63 Firearms – prohibits large-capacity magazines, regulates sales of ammunition, requires reporting of lost firearms
- 64 Legalizes and regulates marijuana – imposes state excise tax and cultivation tax, allows local regulation and taxation.
- 65 Redirects revenue from bag sales to environment (See 67)
- 66 Changes procedures for death penalty appeals (See 62)
- 67 Referendum to overturn ban on plastic bags.

Source: League of Women Voters

| Citizens' Initiative  | Agenda Initiative                           | Abrogative Referendum | Rejective Referendum |
|---|---|-----------------------|----------------------|
| Lithuania<br>Hungary<br>Latvia<br>Italy<br>New Zealand<br>Germany<br>(Länder) | Austria<br>Spain<br>Poland<br>Finland<br>EU | Italy                 | Liechtenstein        |

## European Citizens' Initiative



- Introduced by the Lisbon Treaty
- One million citizens from 25% of member states can request the Commission to initiate a policy proposal
- Initial enthusiasm but just four topics have reached the threshold

# Limitations on Subject Matter Valid Votes Procedural Rules

## Limitations on the subject matter

- IDEA (2008: 66) identifies three groups:
  - Restrictions on constitutional amendments
  - Issues concerning the integrity of the state
  - Limitations relating to legislation and other political decisions

# Validity Rules

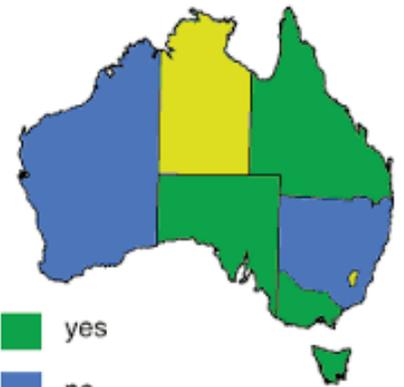
- Binding or consultative?



- Turnout thresholds
- Double majorities
- Super majorities



More than half the voters in more than half the states must vote YES.



■ yes  
■ no  
■ not applicable



# Procedural Rules

- Number of signatures to get legislation on the ballot
- Length of time initiative can be in circulation
- Signature verification
- Naming and summary of the initiative

## Signature Rules (Source: Qvortrup, 2013: 62)

| Country     | Population (millions) | Signatures Required |
|-------------|-----------------------|---------------------|
| AUSTRIA     | 8.1                   | 100,000             |
| FRANCE      | 59.6                  | 4,100,000           |
| HUNGARY     | 10.2                  | 50,000              |
| ITALY       | 57.6                  | 50,000              |
| LATVIA      | 2.3                   | 230,000             |
| LITHUANIA   | 3.5                   | 50,000              |
| NETHERLANDS | 16.3                  | 40,000              |
| POLAND      | 38.6                  | 100,000             |
| ROMANIA     | 22.3                  | 250,000             |
| SLOVAKIA    | 5.3                   | 350,000             |
| SLOVENIA    | 1.9                   | 5,000               |
| SPAIN       | 39.4                  | 500,000             |

## Procedural Rules

- Number of signatures to get legislation on the ballot
- Length of time initiative can be in circulation
- Signature verification
- Naming and summary of the initiative
- Competing measures



## Citizens' Initiatives: debates and controversies

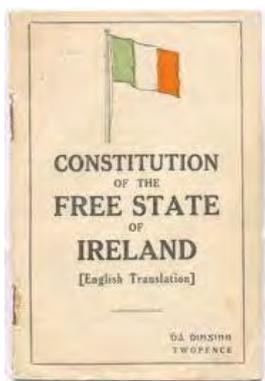


### Key Debates

- Impact on politics
- Tyranny of the majority
- Big money
- Quality of legislation
- Voter interest and attention

# Irish Experience

- 1922 Constitution
- Whitaker Report
- Constitutional Convention



Extract from the 4th Report of the Constitutional Convention (results of voting)

Should 'direct democracy' (i.e. citizens' initiatives) with adequate safeguards be introduced?

| Yes | No | No opinion |
|-----|----|------------|
| 83  | 16 | 1          |

In the event that the Constitutional Convention votes in favour of direct democracy, which of the following should it apply to:

| Yes   | No | No opinion |
|---|----|------------|
|   |    |            |
| Placing items on, or removing them from, the legislative agenda |    |            |
| 80  | 19 | 1          |
| Requiring constitutional referendums to be held                 |    |            |
| 78  | 17 | 4          |

## Conclusion

Initiatives are an attractive proposition.

They give voters a great deal of influence to set the agenda.

They provide opportunities for voters to engage with politics more regularly and effectively.

### However

In practice, initiative instruments are very complex, require careful consideration and design.

And often, they fail to deliver on the promises of democratic empowerment and engagement.

**Citizens' Assembly**  
**Note on Voting Arrangements and Procedure**  
**13 – 14 January 2018**

**Background**

This note has been prepared for the Members in advance of the voting on the Assembly's fourth topic: *the manner in which referenda are held*.

This is the first weekend that the Assembly will consider and make recommendations on a topic by the conclusion of proceedings on Sunday afternoon. For this reason, a draft Ballot Paper will not be circulated to the Members until Sunday morning.

Time has been allocated on the agenda on Saturday 13<sup>th</sup> January, to ensure that the Member's views on which issues could/should be included on a ballot paper can be heard. The Secretariat and Expert Advisory Group will be closely following the comments from the members and a draft ballot paper will be prepared based on this feedback on the instruction of the Chairperson. This will be explained in further detail on Saturday morning.

Much of the material in this note is identical to that provided in advance of the voting on the three topics considered by the Assembly to date, namely; the *Eighth Amendment of the Constitution*, *how we best respond to the challenges and opportunities of an ageing population* and *how to make the State a leader in tackling climate change*. Members are asked to consider this note carefully in advance to familiarise themselves with the procedure to be used on the day.

According to the resolution approving establishment of the Assembly:

*“all matters before the Assembly will be determined by a majority of votes of members present and voting, other than the Chairperson who will have a casting vote in the case of an equality of votes”.*

### **Voting Arrangements**

Voting will be done in secret and will be anonymous. There will only be one Ballot Paper on this occasion.

- Members will register for and collect their Ballot Paper individually; ballots will not be individualised, but the Secretariat will keep a record of how many ballot papers have been issued and which Assembly members collected their ballot paper;
- There will be only one Ballot Paper, but for counting purposes each question will be on a separate sheet of paper;
- Members will then move on to cast their Ballot in a booth. To allow the voting to happen as quickly and efficiently as possible there will be three booths in total, with four voting positions at each;
- Completed Ballot Papers will then be placed in locked ballot boxes;

### **Announcement and Presentation of Results**

It is intended that the results of the Ballot Paper will be announced at the end of the meeting at 3.30pm.

When the results are announced the following information will be provided:

- the number of Members eligible to vote;
- the number of Members who voted. In theory this figure should be the same as the first, but there may be reason why a discrepancy might arise, for example if a Member decides not to cast their ballot;

- the outcome of the vote. The results will be presented in absolute terms as well as in percentage terms.

Once the counting has been concluded and verified, the ballot papers will be retained by the Secretariat until the work of the Assembly has been completed, after which they will be destroyed.

### **Presentation of Results and Determining the Majority**

The following explanation is provided to clarify how it is intended to present the results of each question on the Ballot. In each case clarification is also provided about how the majority will be determined in respect of each type of question that may appear on the Ballot Paper.

#### Simple referendum style question with a single yes/no answer

The results will provide details of the number of votes cast in respect of 'Yes' and 'No' for each question in this category.

A majority, and therefore the recommendation of the Assembly, will be determined by reference to the total votes cast in favour of 'Yes' and 'No', with the option with the highest number of votes deemed to be the majority and therefore the recommendation of the Assembly.

#### Multiple choices questions of which the Member is to select one option only

The results will provide details of the number of votes cast in respect of each option for questions with this structure. This will be reported by simply counting the number of votes for each preference and reporting that as a table with the most popular option at the top followed by the remaining options in decreasing order of popularity.

A majority, and therefore the recommendation of the Assembly, will be the option which obtained the highest number of votes with the chair having a casting vote if required. The majority will be determined by reference to the total votes cast in favour of all options available in each individual question.

Questions with multiple possible answers where the Members are asked to rank these in order of preference

The results will provide details of the number of votes cast in respect of each option for questions with this structure. In order to facilitate clear reporting for these questions, the returning officer will assign a score to each question for each question and these scores will be added up. For example if there are 5 options in the question then each time an option is voted as the first preference of a citizen that question scores 5 points. Similarly a score of 4 points is awarded for a second preference down to 1 point for last preference. The total scores are added up to give an overall vote for each question and the results can be reported as a list of options in decreasing order of preference.

A majority, and therefore the recommendation of the Assembly, will be the option which obtained highest score. However the report of the Assembly on this topic will provide the full voting results, and will therefore reflect the full spectrum of opinion of the Members of the Assembly.

Question with multiple possible answers where the Members are asked to tick each one that is relevant to them

The results will simply report for each of the options the number of people who marked that option along with the percentage of the electorate that number represents.

The recommendation or recommendations of the Assembly, will arise where a majority, i.e. 50% or more of the Assembly, votes in favour of an option.

**Casting Vote**

The Oireachtas resolution provides that '*the Chairperson (who) will have a casting vote in the case of an equality of votes*'.

If in any of the ballots there is an equality of voting, the Chair will have the casting vote as provided for in the Resolution of the Oireachtas.

In practical terms, as we will to publish the actual number of votes cast for each ballot as well as the percentages, any required casting vote will be done by means of a verbal statement by the Chair.

### **Spoiled Votes**

In national elections a vote which does not express a clear preference or which expresses multiple preferences is a spoiled vote. For the purposes of voting at the Citizens' Assembly these categories will apply as outlined below. Please note that not all of these categories may arise during the vote on each topic:

1. The voter does not mark an X against any option for a question. This would not affect the validity of other questions on the same Ballot Paper.
2. The voter marks an X against more than one option in a single question where only one option is sought. In this case it is again not possible to determine the intention of the voter so the vote should be treated as invalid.
3. Where a voter is asked to rank options in order of preference and marks 1 beside more than one option or does not mark 1 beside any question.
4. Where a voter is asked to rank options in order of preference and either skips or duplicates a preference other than the first preference then only any preferences indicated up to the missing/duplicated one will be counted. For example in a question with five options if the voter marks 2, 1, 3, 4, 3 then preferences 1 and 2 are counted and the remaining ones are not. Similarly if a voter marks 1, 2, 4, 5 then only preferences 1 and 2 are valid.

### **Observing the Counting of the Ballots**

The Rules and procedures of the Assembly state that:

“Votes shall be overseen by the Chairperson with the support of at least 2 members of the Assembly.”

Accordingly, prior to the commencement of the counting of the Ballots, at least two members will be invited by the Chair to carry out this function.

**ENDS**

**Draft Ballot Paper**  
**As circulated to the Members of the**  
**Assembly in advance of the voting**  
**which took place on**

14 January 2018

**Draft Ballot Paper**

**The Manner in which referenda are held**

**For discussion by Members of the Assembly in advance of the voting to take place on Sunday 14<sup>th</sup> January 2018**

**Introduction**

On Saturday 13<sup>th</sup> January, the Members of the Assembly have considered a range of issues in relation to *The Manner in which Referenda are held*.

This draft Ballot Paper attempts to capture some of the key issues which have emerged during discussions.

The core business on Sunday 14<sup>th</sup> January 2018 will be discussions on the draft Ballot Paper. The Chairperson will introduce the complete draft Ballot Paper and the members will then have an opportunity to discuss it in their groups.

The members of the Expert Advisory Group, together with the Chair and the Secretariat, will then be available to answer any questions on the draft. Time has been included on the agenda to allow any amendment agreed by the members to be included on the final Ballot Paper.

The results of the final Ballot will form the basis of the recommendations to be made to the Houses of the Oireachtas.

The draft Ballot paper is broken down into three sections as follows:

- A. Organisation of Referendum Campaigns
- B. Voting in a Referendum
- C. Citizens Initiatives

Under each section a number of draft questions are provided.

Please note that in order to ensure that the timings for voting on the Sunday are adhered to, it will be necessary to strictly follow the agenda. This may mean that not every point of view will be heard in the feedback and questions and answers session.

## A. Organisation of Referendum Campaigns

### Question 1- Referendum Commission

Please Mark X in one box below.

|  | Mark X in one box |    |
|--|-------------------|----|
| <b>Question 1</b>  | Yes               | No |
| Do you think the functions of the Referendum Commission should be carried out by a permanent Electoral Commission? |                   |    |

### Question 2- Referendum Commission

Please Mark X in one box below.

|  | Mark X in one box |    |
|--|-------------------|----|
| <b>Question 2</b>  | Yes               | No |
| Do you think the Referendum Commission should be obliged to give its view on significant matters of factual or legal dispute that arise during a referendum campaign in the public domain (including on social media)? |                   |    |

### Question 3- Spending in referendum campaigns

Please Mark X in one box below.

|   | Mark X in one box |    |
|---|-------------------|----|
| <b>Question 3</b>   | Yes               | No |
| Do you agree with the current position where the Government is not permitted to spend public money to advocate on one side only of a referendum campaign? |                   |    |

### Question 4- Spending in referendum campaigns

Please Mark X in one box below.

|   | Mark X in one box |    |
|---|-------------------|----|
| <b>Question 4</b>   | Yes               | No |
| Do you think the Government should provide money to both sides equally in referendum campaigns? |                   |    |

**Question 5- Spending in referendum campaigns**

|  | <b>Mark X in one box</b> |           |
|--|--------------------------|-----------|
| <b>Question 5</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think the Oireachtas should give consideration to a system of spending limits in referendum campaigns for registered political parties and campaign groups? |                          |           |

## B. Voting in a Referendum

**Question 6- Super-referendums**

**Please Mark X in one box below.**

|  |                          |           |
|--|--------------------------|-----------|
|  | <b>Mark X in one box</b> |           |
| <b>Question 6</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think that it is a good idea to have more than one referendum, on unrelated issues, at the same time? |                          |           |

**Question 7- Super-referendums**

**Please Mark X in one box below.**

|  |                          |
|--|--------------------------|
| In the event that there is more than one referendum, on unrelated issues, at the same time, what do you think should be the maximum number of referendums? |                          |
| <b>Question 8</b>  | <b>Mark X in one box</b> |
| There should be no more than two referendums at the same time  |                          |
| There should be no more than three referendums at the same time  |                          |
| There should be no upper limit on the number of referendums held at the same time  |                          |

**Question 8- Multi-option voting**

**Please Mark X in one box below.**

|  |                          |           |
|--|--------------------------|-----------|
|  | <b>Mark X in one box</b> |           |
| <b>Question 8</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think that it is a good idea to use multi-option voting in referendums? |                          |           |

**Question 9- Implementation of Referendum outcome**

Please Mark X in one box below.

|  | Mark X in one box |           |
|--|-------------------|-----------|
| <b>Question 9</b>  | <b>Yes</b>        | <b>No</b> |
| Do you agree that, in principle, the Oireachtas and the Government should give effect to the outcome of a referendum within 5 years? |                   |           |

**Question 10- Enhancing voter turnout in Referendums**

Please vote in respect of each of the initiatives by marking X in one box for initiative a) to f)

| <b>Question 10</b>  |   |           |
|---|---|-----------|
| Which, if any, of these initiatives do you think should be introduced to try to increase voter turnout: | <b>Please indicate in relation to each initiative if you think it should be introduced by marking X</b> |           |
|   | <b>Yes</b>  | <b>No</b> |
| a) Early voting in the weeks before the poll  |   |           |
| b) Extended voting over a number of days  |   |           |
| c) Weekend voting   |   |           |
| d) Online voting  |   |           |
| e) Wider availability of postal voting  |   |           |
| f) The ability to vote at any polling station in the State  |   |           |
| g) Automatic inclusion of all eligible voters on the electoral register                                 |   |           |
| h) Compulsory voting  |   |           |

## C. Citizens' Initiatives

### Question 11

| <b>Question 11</b>   |   |           |
|--|---|-----------|
| Which, if any, of the following types of citizens' initiatives do you consider should be provided for?                               | <b>Please indicate in relation to each initiative if you think it should be introduced by marking X</b> |           |
|  | <b>Yes</b>  | <b>No</b> |
| a) A citizens' initiative to put a constitutional referendum proposal to the people  |   |           |
| b) A citizens' initiative to put a legislative change proposal to the people (including enacting, changing or repealing legislation) |   |           |
| c) A citizens' initiative to put an item on the agenda for decision by the Oireachtas  |   |           |

**Final Ballot Paper**  
**As voted upon by the Members**

14 January 2018

## A. Organisation of Referendum Campaigns

### Question 1- Referendum Commission

Please Mark X in one box below.

|  | Mark X in one box |    |
|--|-------------------|----|
| Question 1   | Yes               | No |
| Do you think the functions of the Referendum Commission should be carried out by a permanent Electoral Commission? |                   |    |

**Question 2- Referendum Commission**

**Please Mark X in one box below.**

|  | <b>Mark X in one box</b> |           |
|--|--------------------------|-----------|
| <b>Question 2</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think the Referendum Commission should be obliged to give its view on significant matters of factual or legal dispute that arise during a referendum campaign in the public domain (including on social media)? |                          |           |

**Question 3- Spending in referendum campaigns**

**Please Mark X in one box below.**

|   | <b>Mark X in one box</b> |           |
|---|--------------------------|-----------|
| <b>Question 3</b>   | <b>Yes</b>               | <b>No</b> |
| Do you agree with the current position where the Government is not permitted to spend public money to advocate on one side only of a referendum campaign? |                          |           |

**Question 4- Spending in referendum campaigns**

**Please Mark X in one box below.**

|   | <b>Mark X in one box</b> |           |
|---|--------------------------|-----------|
| <b>Question 4</b>   | <b>Yes</b>               | <b>No</b> |
| Do you think the Government should provide money to both sides equally in referendum campaigns? |                          |           |

**Question 5- Spending in referendum campaigns**

|   | <b>Mark X in one box</b> |           |
|---|--------------------------|-----------|
| <b>Question 5a</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think the Oireachtas should develop and effectively implement a system of spending limits in referendum campaigns for registered political parties, campaign groups and individuals? |                          |           |

|   | <b>Mark X in one box</b> |           |
|---|--------------------------|-----------|
| <b>Question 5b</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think that anonymous donations to registered political parties and campaign groups should be prohibited? |                          |           |

**B. Voting in a Referendum**

**Question 6- Super-referendums**

**Please Mark X in one box below.**

|  | <b>Mark X in one box</b> |           |
|--|--------------------------|-----------|
| <b>Question 6</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think that it is a good idea to have more than one referendum, on unrelated issues, at the same time? |                          |           |

**Question 7- Super-referendums**  
**Please Mark X in one box below.**

|  |                          |
|--|--------------------------|
| In the event that there is more than one referendum, on unrelated issues, at the same time, what do you think should be the maximum number of referendums? |                          |
| <b>Question 7</b>  | <b>Mark X in one box</b> |
| There should be no more than two referendums at the same time  |                          |
| There should be no more than three referendums at the same time  |                          |
| There should be no upper limit on the number of referendums held at the same time  |                          |

**Question 8a- Multi-option voting**  
**Please Mark X in one box below.**

|   | <b>Mark X in one box</b> |           |
|---|--------------------------|-----------|
| <b>Question 8a</b>  | <b>Yes</b>               | <b>No</b> |
| Do you think it should be permissible to have more than two options on the ballot paper in a constitutional referendum? |                          |           |

**Question 8b- Multi-option voting**

**Please Mark X in one box below.**

|  |                          |
|--|--------------------------|
| If there are more than two options on the ballot paper in a constitutional referendum, the outcome should be decided by: |                          |
| <b>Question 8b</b>   | <b>Mark X in one box</b> |
|  |                          |
| "First past the post"  |                          |
| "PR STV"   |                          |

**Question 9- Implementation of Referendum outcome**

**Please Mark X in one box below.**

|  | <b>Mark X in one box</b> |           |
|--|--------------------------|-----------|
| <b>Question 9</b>  | <b>Yes</b>               | <b>No</b> |
| Do you agree that, in principle, the Oireachtas and the Government should give effect to the outcome of a referendum within 5 years? |                          |           |

**Question 10- Enhancing voter turnout in Referendums**

**Please vote in respect of each of the initiatives by marking X in one box for initiative a) to k)**

| <b>Question 10</b> |  |   |           |
|--------------------|--|---|-----------|
|                    | Which, if any, of these initiatives do you think should be introduced to try to increase voter turnout:    | <b>Please indicate in relation to each initiative if you think it should be introduced by marking X</b> |           |
|                    |  | <b>Yes</b>  | <b>No</b> |
| a)                 | Early voting in the weeks before the poll  |   |           |
| b)                 | Extended voting over a number of days  |   |           |
| c)                 | Weekend voting   |   |           |
| d)                 | Online voting  |   |           |
| e)                 | Wider availability of postal voting  |   |           |
| f)                 | The ability to vote at any polling station in the State  |   |           |
| g)                 | Automatic inclusion of all eligible voters on the electoral register                                       |   |           |
| h)                 | Compulsory voting  |   |           |
| i)                 | Lower the voting age to 16   |   |           |
| j)                 | Allow voting by otherwise eligible voters, who are resident outside the state, for no more than five years |   |           |
| k)                 | Greater provision of voter education on Referendums  |   |           |

## C. Citizens' Initiatives

### Question 11

| <b>Question 11</b>   |   |           |  |
|--|---|-----------|--|
| Which, if any, of the following types of citizens' initiatives do you consider should be provided for?                               | <b>Please indicate in relation to each initiative if you think it should be introduced by marking X</b> |           |  |
|  | <b>Yes</b>  | <b>No</b> |  |
| a) A citizens' initiative to put a constitutional referendum proposal to the people  |   |           |  |
| b) A citizens' initiative to put a legislative change proposal to the people (including enacting, changing or repealing legislation) |   |           |  |
| c) A citizens' initiative to put an item on the agenda for decision by the Oireachtas  |   |           |  |

*Transcript of*

**Ballot Paper Deliberations,  
Finalisation and Voting on Sunday**

14 January 2018

**STRICTLY PRIVATE AND CONFIDENTIAL**

**THE CITIZENS ASSEMBLY**

**EXCERPT OF MEETING RE**

**THE EIGHTH AMENDMENT OF THE CONSTITUTION**

**HELD ON SUNDAY, 14TH JANUARY 2018**

**AT**

**GRAND HOTEL, MALAHIDE**

**FEEDBACK AND Q&A FROM MEMBERS**

I hereby certify the following to be a true and accurate transcript of my shorthand notes of the evidence in the above-named matter.

---

**APPEARANCES**

**THE CITIZENS ASSEMBLY: MS. JUSTICE LAFFOY, CHAIRPERSON  
MS. SHARON FINEGAN, SECRETARY**

**TRINITY COLLEGE: DR. ORAN DOYLE  
PROF. RACHAEL WALSH**

**DUBLIN CITY UNIVERSITY: PROF. ROBERT ELGIE  
PROF. KEVIN RAFTER**

**UNIVERSITY COLLEGE CORK: DR. THERESA REIDY**

**QUEENS UNIVERSITY: PROF. JOHN GARRY**

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## **FEEDBACK AND Q&A FROM MEMBERS**

**CHAIRPERSON:** Now, we will start the question and answer sessions on the draft ballot paper. Before we do, I have a few comments to make. First of all, I want to draw your attention to your Expert Advisory Group who are here to answer questions which may arise. We have Oran Doyle and Rachael Walsh from Trinity College, they're the lawyers, and then we have the political scientists, we have Robert Elgie and Kevin Rafter from DCU, Theresa Reidy, whom you heard giving a very interesting presentation yesterday, from UCC, and John Garry from Queens University Belfast. So, we couldn't have a better range of experts to answer your questions.

Before we go into the questions, we're going to adopt an approach we adopted on the last occasion and which we felt worked very well. That is, I am going to go around the tables and I'm going to ascertain from the facilitator, from each facilitator the questions on which there is consensus; in other words, agreement at the relevant table. So I just want to emphasise, if there is agreement, you all understand that. If there is an agreement, let me know what question there is agreement on. I will call out the table and the facilitators needn't explain that they're facilitators, we all know that.

After I have gone around the 14 tables, the secretariat will do a tally of how many questions there is consensus on and we will put those questions to a vote to ensure that everybody is happy that we regard those questions as having been agreed.

So, I will start the process with table 1. Any agreement on any question?

**FACILITATOR TABLE 1:** Yes, table 1 is happy with Question 1, 3, 4, 5, 6, 7, 9 and 11.

**CHAIRPERSON:** Okay, very good. Table 2?

**FACILITATOR TABLE 2:** There is consensus of the citizens on table 2 with questions 1, 3, 4, 5, 6, 7 and 11.

**CHAIRPERSON:** Very good. Then table 3.

**FACILITATOR TABLE 3:** Table 3 is happy with questions 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11.

**CHAIRPERSON:** 10 and 11, thank you very much. Table 4?

**FACILITATOR TABLE 4:** Table 4 are happy with questions 1 to 8 through and 11.

**CHAIRPERSON:** Thank you very much. Now, table 5.

**FACILITATOR TABLE 5:** The citizens at this table are happy with questions 1, 2, 3, 4, 6 and 7.

**CHAIRPERSON:** Very good, thank you very much. Table 6?

**FACILITATOR TABLE 6:** Good morning, Judge. The citizens at Table 6 have consensus on questions 1, 3, 4, 5, 7, 8, 10 and 11.

**CHAIRPERSON:** Very good, thank you very much. Table 7?

**FACILITATOR TABLE 7:** The citizens at Table 7 are

broadly satisfied with 2, 3, 4, 6, 7, 8 and 11.

**CHAIRPERSON:** Thank you very much. Table 8, please.

**FACILITATOR TABLE 8:** The citizens on Table 8 are happy with questions 1 to 7 inclusive, 10 and 11.

**CHAIRPERSON:** Thank you very much. Table 9?

**FACILITATOR TABLE 9:** The citizens at Table 9 are happy with questions 1, 2, 3, 6 and 7.

**CHAIRPERSON:** Thank you very much. Table 10?

**FACILITATOR TABLE 10:** The citizens at this table are happy with questions 2, 3, 4, 6, 8 and 11.

**CHAIRPERSON:** Thank you very much. Table 11?

**FACILITATOR TABLE 11:** The citizens at Table 11 are happy with questions 1 through 7 inclusive and question 10.

**CHAIRPERSON:** Thank you very much. Table 12?

**FACILITATOR TABLE 12:** The citizens at Table 12 are happy with questions 1, 3, 4, 5, 6, 7, 9 and 11.

**CHAIRPERSON:** All right. Then Table 13?

**FACILITATOR TABLE 13:** The citizens at this table are happy with questions 2, 3, 4, 5, 6, 7, 8, 10 and 11.

**CHAIRPERSON:** Thank you very much. And Table 14?

**FACILITATOR TABLE 14:** The citizens at Table 14 are happy with questions 1, 2, 6 and 11.

**CHAIRPERSON:** 1, 2, 6 and 11?

**FACILITATOR TABLE 14:** Yes.

**CHAIRPERSON:** Thank you very much. All right. We're going to have to do a little bit of tallying.

Needless to say, there isn't absolute consensus on any

question. In relation to questions 3, 4, 6 and 7, there are one or two sort of queries. In relation to question 1, there have been three dissents, if I may put it that way. We consider that the rest of the questions do need to be considered.

So, could I ask you if, generally speaking, you will agree to the current format of questions 1, 3, 4, 6 and 7. We'll put them up on the screen so that you'll see them. Questions, 1, 3, 4, 6 and 7.

Now, a show of hand to show that you are agreeable to those questions in their current format and we won't have to discuss them. Well, that's a huge majority, a huge majority. So, then what I propose to do is regard those questions as agreed upon and we'll now go on to the remainder of the questions. We will start with question 1. I will put question 1 up on the screen.

**MS. FINEGAN:** No, 1 is agreed.

**CHAIRPERSON:** Sorry, 1 is agreed. Question 2. Who has a query in relation to question 2? Table 3, yes, could you just outline the concern briefly?

**FACILITATOR TABLE 3:** Table 2 suggest a follow-on from question 2, which would be in the following wording:

*"Should it be an offence to publish inaccurate or false information about a referendum during the referendum campaign?"*

**CHAIRPERSON:** All right.

**FACILITATOR TABLE 1:** Table 1 have a follow on question as well, we think it should follow on from question 2, which is:

*"Do you think that the Referendum Commission should be obliged to use its expertise proactively to disseminate information in user friendly manner?"*

**CHAIRPERSON:** Right. Any other? Yes.

**FACILITATOR TABLE 12:** Table 12 would propose an amendment to question 2, in that, in order to preserve the independence of the Referendum Commission, rather than being obliged to give its view, the question would be amended to read:

*"... obliged to clarify significant matters of factual or legal dispute."*

**CHAIRPERSON:** Yes. Any other?

**FACILITATOR TABLE 6:** The citizens at Table number 6, they had some issue regarding the wording of question number 2, some citizens suggested perhaps the removal of "obliged" and the insertion of the word "permitted". Some other citizens raised queries about how realistic the question was, especially in relation to monitoring social media.

**CHAIRPERSON:** Yes, very good. Table 2.

**FACILITATOR TABLE 2:** The citizens at Table 2 would

like an amendment to question 2, they think it should read:

*"Do you think the Referendum Commission should be obliged to respond to significant matters?"*

Et cetera.

**CHAIRPERSON:** Respond to significant matters, yeah. All right. Any other table? All right, Table 9, yes.

**FACILITATOR TABLE 9:** Sorry, a very small point. In the show of hands that was just done, the implication was that there was nothing wrong with question 7 and there's actually a typo on it, I just wonder could it be removed?

**CHAIRPERSON:** Yes.

**MS. FINEGAN:** We've got that.

**FACILITATOR TABLE 9:** That's sorted, sorry, grand, okay.

**CHAIRPERSON:** Thank you very much for that. There is the odd hawk eye up here. Very good. We will go back to question 2. I'd like to hear the views of maybe Kevin and Robert and Theresa on them.

**PROF. ELGIE:** So, just to begin, the Commission is already committed to give its view. So, the reason why the word "obliged" is there is to actually make it an obligation rather than just a choice, so that was why the word "obliged" is there.

**CHAIRPERSON:** Any other observations?

**DR. REIDY:** I think we could probably say that "give

its view" instead of "clarify a response", we were probably going for plain English rather than any --

**CHAIRPERSON:** Yeah.

**PROF. ELGIE:** And we thought it was a stronger direction rather than "clarify" or "respond".

**CHAIRPERSON:** Yes.

**PROF. WALSH:** I might just and, "clarify" a concern that I would have would be that it presupposes that it's possibly to give clarity on a particular issue.

**CHAIRPERSON:** Yes.

**PROF. WALSH:** And some of the issues that we have seen in the past and may see in the future on referendums may not be amenable to straightforward clarity being provided by the Referendum Commission. So that would be a concern I would have about the use of the word "clarity".

**CHAIRPERSON:** Yes, if the Commission gives its view, it's not necessarily right or wrong, so I think that is a proper approach. Any other observations from the Expert Advisory Group?

**PROF RAFTER:** In relation to the second issue, in relation to the Referendum Commission acting proactively in a user friendly manner, we did hear from Mark Brennock yesterday how the Referenda Commission over different campaigns has evolved and developed its approach and that it has been proactive. I think in recent campaigns we talked about the role of the Chair, the individual Chair. I suppose in a sense, taking Question 1, where there is a permanent electoral

commission and that that is in place rather than a commission being set up specifically for an individual campaign, given if there is a permanent electoral commission in place, that proactivity will be there. So, in our discussions we dealt with that issue. "User friendly manner", I think again Mark Brennock did deal with that yesterday and that's the reason why it's not there as an explicit question.

**CHAIRPERSON:** Yes. What about the add-on proposed by Table 3, to create an offence.

**PROF. RAFTER:** I think the difficulty there is the cut and thrust of a campaign, what one side believes is a legitimate position the other side may believe is grossly inaccurate, and who is going to adjudicate on that? It can become very complex and detailed, particularly with a three or four-week campaign and getting to the courts and getting a determination on that. As it is, even within the context of the Broadcast Code and broadcast legislation where a complaint arises during a referendum campaign, it's not possible to adjudicate, and we've seen that in the past, where determinations are long past polling day.

**CHAIRPERSON:** Yes.

**PROF. RAFTER:** I think there will be difficulties. I don't think we spend a huge amount of time yesterday on this particular issue and I think it may be that it is something to reflect in a final report that it was a matter raised, but I'm not sure, one, the practicalities, but secondly, whether we did in our

discussions yesterday and from the experts that you heard from, delve enough into the implications of legislation of this order.

**CHAIRPERSON:** Yes. Anybody else have an observation?

**DR. DOYLE:** Just in relation to that one as well, it would probably have a significant chilling effect on the willingness of people to participate in referendum campaigns, I know I certainly wouldn't canvass if I were concerned that somebody who disagreed with me could report me to the police for saying something that was false. It hopefully wouldn't be false but you're still putting yourself at risk of criminal prosecution. I certainly wouldn't write anything in the newspapers saying what I thought a Constitutional amendment might result in, in case I turned out to be wrong and somebody reported me to the police for saying something false in a campaign. So, I think having a criminal offence on anything has sort of ripple out consequences in terms of how people behave.

The other point that came up in terms of the distinction between "obligation to give its view" and "obligation to respond to", it's a matter for you which wording you want to use. I think respond to probably is more proactive, which is maybe what you wanted to achieve. It perhaps ties into the concern that one table raised about how realistic it is to monitor social media. And the way the question has been phrased and the what's behind is the idea that some

issues come to the fore in a campaign from different places and if a significant dispute emerges about them, that's when the Commission should be getting involved, rather than having to get involved in something where somebody may have said something which is perhaps incorrect but it hasn't become a significant issue, it hasn't become a matter of dispute.

**CHAIRPERSON:** Yeah.

**DR. DOYLE:** So, that's what's trying to be done with the question but, of course, you might want to sort of ramp up the question to make it more proactive and more obligatory on the Commission, and I think putting in "respond", to do that, if that's what you're trying to get at.

**CHAIRPERSON:** I think there's an observation from Table 3.

**FACILITATOR TABLE 3:** Yeah, just to clarify, we weren't actually talking about like canvassers or people out having conversations like actually physically talking, we were more trying to get at like campaign materials, where one part of a campaign is putting up a poster that has something inaccurate or non factual. We're not trying to get at, you know, what one side might do to be inaccurate, it's trying to get at people putting up posters as part of a campaign but state something that is just blatantly a lie or not a fact, that there should be something or maybe somebody should play some role to ensure that that can't happen, that people are informed correctly when they're, you know, going to

vote and you've a referendum. So not when people are canvassing or stuff like that, just kind of campaign materials that in the public view.

**PROF. WALSH:** On that, I think if that's your key concern, I would hope that the question in relation to the role of the Referendum Commission and an obligation in respect of intervention on the part of the Referendum Commission could deal with those kinds of never prominent public instances of clear factual inaccuracy.

**CHAIRPERSON:** Yeah.

**PROF. WALSH:** I think the wording of what's suggested in terms of an offence seems to go further and there would be implications for individual commenting, participation in social media in relation to campaigns et cetera, that would be broader reaching than probably what you want to do if that's your concern. So, my suggestion would be, the role of the Referendum Commission, if you keep the obligation aspect there, would ensure that that could be captured.

**CHAIRPERSON:** Yeah. Does anybody else want to comment on question 2?

**PROF. WALSH:** Sorry, Judge, there was just one other one I noted.

**CHAIRPERSON:** Yes.

**PROF. WALSH:** I know one of the tables had suggested the other direction, which was removing "obligation" and replacing it with "permission", "permitting the Referendum Commission".

**CHAIRPERSON:** Yes.

**PROF. WALSH:** We had discussed that in light of Mark Brennock's presentation yesterday. What we had hoped to capture in the question was the idea that though the identification of significant matters of dispute, that would allow the Referendum Commission to identify the emergence of those major issues rather than requiring it to respond to every comment or every statement issues in relation to a referendum campaign. So, there was an attempt to mediate a little bit between those two positions in the question as crafted.

**CHAIRPERSON:** Yes. Do you all understand the views that have been expressed? No further questions on that? Sorry, Table 1.

**MEMBER TABLE 1:** Sorry, I know we're just talking about words now at this stage, but I think "give its view" is a stronger statement than "respond", that would be my opinion. The Referendum Commission can respond in whatever way it likes in the future as regards a factual or a legal dispute. The response might be "we've no comment". I would like them to be obliged to give its view, I like the way Question 2 is phrased presently.

**CHAIRPERSON:** I'm inclined to think there's an implication in response, that there has to be a question, so that wouldn't be sufficiently regulatory. Well, I think I'll put Question 2 in its current form to the members now and could I see a show of hands? All right, so Question 2 goes in its current form.

Now, the next one is Question 5, so we'll put Question 5 up. Yes, we'll start with Table 3.

**FACILITATOR TABLE 3:** Table 3 would like the following inserted at the end of Question 5:

*"... and high net worth private individuals."*

**CHAIRPERSON:** And high net worth?

**FACILITATOR TABLE 3:** Private individuals.

**CHAIRPERSON:** Private individuals. Very good. Anybody else with a view? Table 7.

**FACILITATOR TABLE 7:** The citizens at Table 7 would like the wording to include:

*"The prohibition of anonymous donations."*

**CHAIRPERSON:** To?

**FACILITATOR TABLE 7:** Include:

*"The prohibition of anonymous donations."*

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 5:** The citizens at Table 5 would just like to also agree with that, that they would like a part put in in terms of anonymous donations, for a complete ban on that.

**CHAIRPERSON:** A complete ban on anonymous donations, yes. Table 10.

**FACILITATOR TABLE 10:** The citizens at this table agree that wording should be inserted at the end of the question to the effect of "*.. and individuals.* "

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 10:** Then have also said that the question should address the abolition of anonymous donations.

**CHAIRPERSON:** All right, yeah. Very good. Anybody else? Yes.

**FACILITATOR TABLE 9:** The citizens at Table 9 are suggesting the deletion of the words "*... give consideration to...* ", and replace them with "*... develop and effectively implement...* "

**CHAIRPERSON:** Well, you have considered what I said in the explanation, about why we use that format?

**FACILITATOR TABLE 9:** Yes.

**CHAIRPERSON:** You have considered that? Very good, very good. Anything else?

**MEMBER TABLE 9:** Just on that point, about replacing "*give consideration*" with "*should develop and effectively implement.* " It would be my hope that the Oireachtas would consider any of the recommendations, so, rather than recommending that they consider it, we recommend that they do something and then they consider that. I just think it's a stronger recommendation.

**CHAIRPERSON:** Yes.

**MEMBER TABLE 9:** I think it would be better for the Assembly to vote on that.

**CHAIRPERSON:** Very good. I mean, I understand the

reasoning all right. We will probably hear everyone's views on this one. Kevin, what do you feel?

**PROF. RAFTER:** In relation to the use of the word "individual", that is already captured in the regulations, where if somebody is donating they have to register, but we've discussed this maybe in our context last night, that that was being captured through campaign groups, but in order to provide clarity, we discussed it this morning, we were happy for the wording to be changed for registered political parties, campaign groups and individuals, to capture the issues that have come down.

**CHAIRPERSON:** Yes.

**PROF. RAFTER:** But just to reassure you that that is already in place.

**CHAIRPERSON:** Yes. So, you recommend adding the word "individuals" after campaign groups, yes.

**PROF. RAFTER:** Yes, so we've already discussed that. Just in relation to anonymous donations, just to be aware of the implications of what you're proposing, that would also mean that any groups or parties that are organising raffles, you know, any sort of church gate collection or any sort of fundraising, and where the individual is donating less than €100, so it could be a €5 raffle ticket, the group would have to capture the name and details of that individual. So there are practical implications. When the legislation was being introduced in the first instance in the late 1990s, the issue of the threshold of the €100 level, that is the

reason why it is there, is to avoid, I suppose, the unnecessary bureaucracy around organisations having to capture for low level fundraising activities. So there is an implication wider I think than probably your deliberations, but that may be the direction of travel that you wish to go. So, that's the two main issues.

**CHAIRPERSON:** Yes. All right. Any other observations?

**PROF. WALSH:** One thing that you might want to consider if there is the consensus, that you do want to do something on anonymous donations but you were concerned about the point that Kevin has raised, is whether you think, you know, giving consideration to reducing the threshold for anonymous donations lower than the current 100 limit is something that would help get towards some of your concerns, if you're persuaded by Kevin's concern about that.

**DR. DOYLE:** I suppose the other, in terms of develop and effectively implement first and give consideration to, of course it is slightly odd when all of the recommendations are just for consideration to explicitly say that there's an area to be considered, but still may sort of make sense in the context of what the explanation was and the Chair's feeling that there hadn't been enough information about how the spending limits might interact and intersect with donation limits. But that, if you do feel that you have heard enough about it and want to change it, then it can be changed, but that's just the reasoning behind it.

**CHAIRPERSON:** Have we a question? Yes, Table 10.

**FACILITATOR TABLE 10:** The citizens at Table 10 aren't satisfied that that would address their concerns at all. The issue that they see is potential abuse of the anonymous donation system, whereby some party could essentially give what is effectively an unlimited amount of money in €100 increments in the current system. A proposal to get around the issue with the bureaucracy around smaller donations for smaller activities would be that it could potentially be limited to -- the abolition of anonymous donations could be limited to referendum issues.

**CHAIRPERSON:** Table 2.

**MEMBER TABLE 2:** I agree with that point about the anonymous donations and I think we discussed it a lot at our Table 2, but I do think that's why we recommended the system of spending limits, so even if one person anonymously donates €1 million with €100 notes, if every campaign group and political party can only spend the same amount of money, then it doesn't really matter where it comes from, that's where the spending limit -- in terms of addressing that, I mean if everyone can only spend €1,000, then does it matter if one person donated it or not and the spending limits might be able to kind of overcome that.

**CHAIRPERSON:** Any observations?

**PROF. RAFTER:** It's just worth clarifying that under the current legislation and regulations, there is a limit on what one individual can donate in a calendar year. So, that is in place to capture the issue that you're

dealing with. It may be that you just want to remove the whole principle of anonymous donations and, if so, we need to look at the wording.

**CHAIRPERSON:** Yes, Table 3.

**MEMBER TABLE 3:** Sorry, just to clarify about the individuals' donations, my understanding from yesterday and in general was that if an individual donated to a particular party or interest group, it was limited, but if an individual wanted to use their money to sort of do their own campaign or their own spending, that that was unlimited. Am I wrong on that?

**PROF. RAFTER:** No, because, as was said by the previous contributor on Table 2, because of the spending limit, it doesn't matter what your net wealth is and you're limited in terms of what you can spend in a campaign, there's a spending limit, a contribution limit.

**CHAIRPERSON:** Yes.

**DR. REIDY:** But if you were a wealthy private individual and you were inserting yourself into the campaign and campaigning actively, you would have to register as a third party.

**CHAIRPERSON:** Yes. Table 5.

**FACILITATOR TABLE 5:** Just in relation to those points, some of the citizens at this table brought back the point of, if it's anonymous how do you know how much they've spend per annum?

**DR. REIDY:** There's an obligation on the individual giving the money as well as on the individuals receiving the money. So, the rules apply in both

directions.

**FACILITATOR TABLE 5:** Sorry, they're still saying, but if it's anonymous, it comes back to the word "anonymous". They're not anonymous if they're saying what they've given.

**CHAIRPERSON:** Are we left, if I may put it this way, with one issue arising from Question 5, and that's anonymous donations? I just want to clarify that we're happy with the inclusion at the end of Question 5 of:

*"... referendum campaigns for registered political parties, campaign groups and individuals".*

Does that satisfy the first point made and could I have a show of hands on that? Very good, it does. Then in relation to Question 5, we will consider the anonymous donation points. We will take a break a little later and we'll consider that. So that takes care of that for the moment.

**MS. FINEGAN:** Table 9.

**CHAIRPERSON:** Yes.

**MEMBER TABLE 9:** I may have missed something, I don't know, but we put forward a change of the wording and it seems to have been ignored, I don't know have I missed something.

**CHAIRPERSON:** Oh, yes, develop and give effect rather than consider.

**MEMBER TABLE 9:** Give consideration.

**CHAIRPERSON:** We'll consider that as well.

**MEMBER TABLE 9:** That will be put in, yeah.

**MS. FINEGAN:** That's in 5.

**CHAIRPERSON:** It is in 5, yes. We've said give consideration and the suggestion is that it should be that the Oireachtas will develop and implement.

**MEMBER TABLE 9:** Effectively implement, yes.

**CHAIRPERSON:** Will we put that to the members or do we need to think about it further? We'll put that to the members.

*"... should develop and effectively implement a system of spending limits in referendum campaigns for registered political parties, campaign groups and individuals."*

Well, could I have a show of hands? Now, there is an outstanding issue, the anonymous donations, but could I have a show of hands in relation to that terminology. Very good, so we agree to that.

We will move on then to Question 8. I will hear the observations on Question 8. Table 8.

**FACILITATOR TABLE 8:** The citizens on Table 8 were in agreement with the first part of the question in terms of its wording but would like you to consider extending the question so it will read as follows:

*"Do you think that it is a good idea to use*

*multi-option voting in referendums, yes or no? If answer yes, select one of the following:*

A. *First past the post.*

B. *PR-STV.*

C. *Another. "*

**CHAIRPERSON:** First past the post?

**FACILITATOR TABLE 8:** PR.

**CHAIRPERSON:** PR, oh, yeah.

**FACILITATOR TABLE 8:** And C, another.

**CHAIRPERSON:** Right. Table 11.

**FACILITATOR TABLE 11:** Thank you, Judge. The citizens at this table, Table 11, felt that the question would benefit from providing greater clarity. What is the question intended to achieve? Thank you.

**CHAIRPERSON:** Well, I did specifically this morning refer to the slide, Michael Marsh's slide, I don't know whether any of you looked at it, against and for, I think it was, which might be somewhat enlightening but we'll consider that. Table 5.

**FACILITATOR TABLE 5:** Judge, the citizens at this table are looking to replace the word "use" with "allow".

**CHAIRPERSON:** Yes. Table 1.

**FACILITATOR TABLE 1:** Thank you. Table 1 are suggesting a part B to Question 8:

*"Do you think that it is a good idea to use proportional representation as part of multi-option in*

*referendums?"*

**CHAIRPERSON:** All right, very good. Table 2.

**FACILITATOR TABLE 2:** The citizens at Table 2 think the text should be changed to read:

*"Do you think that multi-option voting in referendums should be introduced?"*

**CHAIRPERSON:** Should be introduced. I see Table 9. I see quite a few hands up.

**MS. FINEGAN:** 12 first maybe.

**CHAIRPERSON:** All right, 12.

**FACILITATOR TABLE 12:** The citizens of Table 12 have two issues with Question 8. First of all, there was a concern that it should be phrased in a more punchy and stronger fashion, being simply:

*"Should multi-option voting in referendums be permitted?"*

Secondly, an issue arose at the table whereby though members thought they had understood the question, when it came to discussion they realised that actually there was confusion as to the exact meaning of the question and, as such, there was a request that just the actual meaning of the question be clarified once more.

**CHAIRPERSON:** I suspected that might happen and that's why I referred you specifically to that slide. It's

not actually addressed in Michael Marsh's paper, we asked him at a later time to address it and that's why he has dealt with it in that slide. So, to look at that may be of assistance. Yes, Table 14.

**FACILITATOR TABLE 14:** Thank you, Judge. A citizen at this table has stated that they would only support this if it was PR based and that this option doesn't exist in the question as it is. They would also like clarity on if multi-option is currently prohibited in Ireland.

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 9:** The citizens at this table echo the comments previously stated. One, clarification on exactly what is meant by multi-option voting.

**CHAIRPERSON:** Yeah.

**FACILITATOR TABLE 9 :** And secondly in relation to what are the options available, first past the post, et cetera, in relation to if the choice is yes?

**CHAIRPERSON:** I think that's everybody, is it? We'll hear from John first of all.

**PROF. GARRY:** A couple of comments.

**CHAIRPERSON:** I mean, you will have learned that I am not surprised that you had difficulty understanding what it meant, I had difficulty myself this morning.

**PROF. GARRY:** Yes, certainly the question can be improved in part because I came up with the wording of the question. I agree with a lot of the comments that have been made.

At one level there's a tension between should the question say something like this should be done, or should it be allowed to be done. I think what

we probably want to get to is, should it be allowed to be done, should it be permissible? So, not that it should always happen, whatever it is.

**CHAIRPERSON:** Yes.

**PROF. GARRY:** But if there are circumstances in which multi-option voting could be a good idea, then it should be possibly permissible. So, in other words, we'd recommend the word "allowed" or "permissible" rather than "should".

The second tension is between, well, what does it actually mean in the most simple terms if you walk in to vote in a referendum, instead of a choice between one thing and another thing, there's a choice between one thing, another thing and a future thing. There's a list of more than two things on the ballot paper that are in front of you. So, in a very, very simple definition, typically there's two options in a referendum, if it's multi-option there's a range of options.

Crucially, how does the result get arrived at? I quite like Table 8's iteration of this, which was shared to some extent with the other tables, which is, if you have multi-option voting, which is basically there's more than two options, then as a decision making mechanism you can either go for, first past the post, whoever gets the most votes wins, or, what we're more used to here, like in Irish presidential elections, for

example, you'd rank order the options in order of your preference and then a winner would emerge like that, like in an Irish presidential election. So, I think what might be quite neat is, as Table 8 suggests, do you want this thing? Then here's the choice for making a decision out of it. So, I think, Oran, that captures our thoughts?

**CHAIRPERSON:** Yes, Oran, please.

**DR. DOYLE:** I think that does just add -- there was a question, is it currently prohibited? Our view is, yes, it's not explicitly prohibited on the Constitution but the clear method that the Constitution lays down for referendums requires a text to be approved by the Dáil, by the Seanad and then by the people and it has to be the same text, which wouldn't be the case in this. So we think that you would need a constitutional change to do it, with some saying, of course, that it shouldn't done, but that would be necessary.

We did play around with a couple of different wordings but I think this might be one, I think if there's ways in which -- I think a lot of the questions converge on pretty much the same point, as John has said, and we can put together those into a wording and come back to you with two questions, one focusing on that and the other on the mechanism of PR or whatever, the political scientists will give us the correct term for what it should be in the context when you're only choosing one option.

**CHAIRPERSON:** Right. Very good. When we break we will consider that, that's Question 8. Now, where are we going next. 9, Question 9. Question 9 is up on the screen. I'll start here with Table 8.

**FACILITATOR TABLE 8:** Thank you, Judge. There was a general discussion around the table as regards Question 9, there were both queries and objections to the insertion of "in principle" in the question. You did reference earlier on that you'd had a conversation in relation to this last night. I just felt that that wording ought to be removed. Additionally, there was a query as to, if the question stayed as it was and the answer was ultimately yes, what would potentially happen if the Oireachtas failed to implement such a thing in the stated time period, what kind of implications would there be for the Houses of the Oireachtas if they failed to put into effect something?

**CHAIRPERSON:** So, you're saying, how could it be enforced?

**FACILITATOR TABLE 8?:** Absolutely.

**CHAIRPERSON:** Yes. Tell me this, you're suggesting that the words "in principle" be taken out?

**FACILITATOR TABLE 8:** That's correct.

**CHAIRPERSON:** All right, very good. Table 4.

**FACILITATOR TABLE 4:** The citizens at the table just question why five years?

**CHAIRPERSON:** Yeah, that's a good question. Have you any suggestion instead of five years?

**FACILITATOR TABLE 4:** Well, three years, yeah.

**CHAIRPERSON:** Three years?

**FACILITATOR TABLE 4:** Hm-hmm.

**CHAIRPERSON:** Right, right. Table 7.

**FACILITATOR TABLE 7:** The citizens at Table 7 would like to know also why five years, but they didn't have a suggestion as to another time frame.

**CHAIRPERSON:** Right, that's a reasonable question, believe me.

**FACILITATOR TABLE 7:** They also wanted clarification about what is the longest time frame it took from when a referendum was held to when the Constitution was amended, excluding the 1979 vote on the Seanad? So how long has it taken to implement a vote, they'd like to know from the panel. What was the longest time frame?

**CHAIRPERSON:** Right. Table 10.

**FACILITATOR TABLE 10:** The citizens at this table are also of the opinion that five years is far too long.

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 10:** We suggest two years maximum.

**CHAIRPERSON:** All right.

**FACILITATOR TABLE 10:** Two terms of the Government.

**CHAIRPERSON:** Yeah, it could be, depending what happens on the 3rd and 4th of March. What did we come up with, are we still with the two years? All right, yeah.

Thank you very much. Table 6.

**FACILITATOR TABLE 6:** In respect to the citizens at Table number 6, I think all the citizens had difficulty with the inclusion of the words "in principle".

**CHAIRPERSON:** All right.

**FACILITATOR TABLE 6:** They are suggesting the removal of the words "in principle". One citizen had difficulty with the five years, they had difficulty more so about putting an actual time limit on it and felt that it could be quite difficult to regulate and just be used in principle. They didn't have an alternative, however.

**CHAIRPERSON:** Right, right. We'll go to Table 11. All right, Table 9.

**FACILITATOR TABLE 9:** The citizens at Table 9 agree with the other tables in terms of the deletion of "in principle".

**CHAIRPERSON:** All right. Table 12. 11, sorry, I'm getting all confused.

**FACILITATOR TABLE 11:** Thank you, Judge. The citizens at this table, in relation to Question 9, had a point of clarification. There has also been a request to put in an additional question in section B. The point of clarification is, just to clarify that the words "to give effect" is the same as "implement".

**CHAIRPERSON:** Well, I think --

**FACILITATOR TABLE 11:** Can I give you the additional question?

**CHAIRPERSON:** Yeah.

**FACILITATOR TABLE 11:** An additional question within section B will be:

*"Should referendums be decided on the basis of a qualified majority?"*

**CHAIRPERSON:** Well, I don't think that Question 9 would be the appropriate place for that addition. Yes, Table 2 or Table 5? Table 5, yes.

**FACILITATOR TABLE 5:** Judge, the citizens at this table just had two queries in relation to Question 9. The first one being, what happens after five years if it hasn't been effected? Then secondly, does the word "should" mean "must" in this context?

**CHAIRPERSON:** Yeah, well it does. Table 2.

**FACILITATOR TABLE 2:** The citizens at Table 2 would like the wording changed to "within three years".

**CHAIRPERSON:** Three years, yeah, okay. Very good. We're back to Table 11, are we, or 14 is it? 14, yes. Thank you.

**FACILITATOR TABLE 14:** Thank you, Judge. Two citizens at Table 14 expressed an issue over the use of five years, one has suggested for it to be changed to two years and another had suggested that it would read "to the lifetime of a government."

**CHAIRPERSON:** The lifetime of the government, yeah. Very good. Table 1.

**MEMBER TABLE 1:** It's just a question about the Seanad referendum, why was it not -- if it went to a referendum and the decision was made by the people, why did the Government or any government implement that? Are they not obliged? What's the purpose in the exercise then of going to the people if they're not going to do what people want them to do?

**CHAIRPERSON:** Well, I think that seems to be all the questions. Sorry, Table 6.

**FACILITATOR TABLE 6:** Sorry, Judge. One of the citizens at our table raised a query about the inclusion of an actual time limit. I might just pass the microphone over to one of the citizens, he can put the question to the panel, just to get their comments.

**CHAIRPERSON:** All right, okay.

**MEMBER FROM TABLE 6:** Good morning. All I wanted to suggest was that rather than a five year limit or a limit being tied to the lifetime of a particular Dáil, that the business of legislating for the referendum would be permanently inserted onto the business of the Dáil, that it could not be removed from the business of the Dáil until it had been legislated for, so that it would put a formal structure on a moral obligation to legislate for the -- like the 40 year old referendum that has not been legislated for is something that comes up but it's not on the formal business of the Dáil. I think that's what I wanted to say.

**CHAIRPERSON:** Very good. I don't know, does anybody know why the Seanad issue hasn't been dealt with? Was it just that they have so much other business to do.

**DR. REIDY:** It was kind of overtaken by other events in the sense that the question of the Constitution of the Seanad and the roles that it has had have really been subject to a persistent debate for kind of --

**CHAIRPERSON:** Yeah, and then we had the referendum on

abolition.

**DR. REIDY:** Yes, so the '79 referendum was partly overtaken by other changes within the educational sector relating to the creation of new universities.

**CHAIRPERSON:** Yeah.

**DR. REIDY:** And then there is the persistent debates about the overall structure of the Seanad as well. So, a number of reports were subsequently commissioned that touched on these types of issues. It's become a live issue again since the Seanad abolition referendum didn't pass.

**CHAIRPERSON:** Failed, yeah.

**DR. REIDY:** And a report was produced by the franchise section of the Department of the Environment, there's a paper on the books at this stage that it is for consideration. So, it's really more events overtaking it.

**CHAIRPERSON:** Okay, overtaking, all right.

**DR. REIDY:** Rather than a deliberate intention to not implement it.

**CHAIRPERSON:** Yeah. Kevin, do you have a view.

**PROF. RAFTER:** It's just worth pointing out as well, it is an exception if you look at the list of referendums that you have in the past where there hasn't been action, and it isn't that it is being ignored totally, as Theresa said, it's been a component of an ongoing debate about Seanad reform or changing the Seanad and how it does its work and that it wouldn't be dealt with in isolation, so it would be done as part of reforming

the Seanad, but obviously it is a long period of time for implementing the will of the people.

**CHAIRPERSON:** It certainly is.

**PROF. RAFTER:** But if you look at the list, it's still worth bearing in mind, most referendum results where there is "passed" are implemented speedily by the Oireachtas, if legislation is required from the referendum outturn.

**CHAIRPERSON:** Well, then I think, am I correct in saying, that we're left with two issues then, the inclusion of the expression "in principle", and secondly, the time factor, whether there should be a time factor and if there should, what it should be. Does that summarise it?

**PROF. RAFTER:** The reason we came with the five years is because it's the lifetime of the Oireachtas or of the Dáil, and that's the reason it shows the five year period and for no other reason.

**DR. REIDY:** I suppose it's worth saying as well though, tying it to the term of a government, governments fall mid term and can be replaced.

**CHAIRPERSON:** Yes.

**DR. REIDY:** You know, we had three governments in 18 months in the 1980s.

**CHAIRPERSON:** That's right.

**DR. REIDY:** So tying it to the lifetime of a government could be quite difficult or could create scenarios that would be problematic. So, tying it to a fixed term would be more workable.

**CHAIRPERSON:** Yes.

**DR. DOYLE:** Yes, I think there's one or two other points. I think was a question that we found the most difficult to try to formulate, for a number of reasons.

**CHAIRPERSON:** Yes.

**DR. DOYLE:** One of the questions from one of the tables was, what was the longest time it took for a constitutional amendment to be made after a vote of the people.

**CHAIRPERSON:** Yes.

**DR. DOYLE:** Well, I think that maybe reflects a slight misunderstanding, in that in this case the constitutional amendment was made, so the text relating to the elections for the Seanad is in the Constitution and it just says:

*"Provision may be made by law for election in a different way."*

So, the choice was to put in a provision which allowed law to be passed but didn't require law to be passed. So that has always been done in that sense. That's why we chose the language of "give effect to" rather than "implement", because we thought that "implement" might be understood in that simply narrower sense, that there's an obligation on the President after the vote has been passed and validated to sign the constitutional amendment into law and that implemented might mean in that narrow sense, as with "give effect

to", because what we felt you were looking for was that there's some sort of political commitment involved implicitly within the vote and that "give effect to" could relate to that.

**CHAIRPERSON:** Yes.

**DR. DOYLE:** But I think where we felt it was getting difficult is that in a sense you're cutting across what the actual amendment might be. So if a principle like this were to apply in respect of the Seanad referendum, why on the one hand would you have an amendment which says "provision may be made by law", but then have a different rule somewhere else, saying that well, "may" there actually means must be made by law within a period of whatever number of years. So that another way of dealing with this issue would be when amendments are passed, that each amendment should say what it wants to achieve and then that would be it, rather than having this separate principle about giving effect.

**CHAIRPERSON:** Yes.

**DR. DOYLE:** So I think that was why we were finding it a little bit difficult, that's probably why the words "in principle" are in there, was because of this sort of vagueness around it. Also, I another reason why we had "in principle" there was, we had a concern, well, perhaps a government might be elected on a campaign to repeal that amendment to the Constitution and get, as I say, a strong majority on a general election on the basis of what it was going to do but would still be under an obligation to give effect to it even though

they're planning to repeal it within a year or two.

I think those were the issues that we just sort of grappled with, just found it really difficult to come up with a proposal on this that would respond to -- I think there's only one clear example, so of the 29 constitutional amendments there have been, only in the Seanad referendum has something as clear as this happened. There are other issues, I think, around the Children's Referendum and that was delayed until 2015 coming in and there should be some legislation after that and I think some of that legislation hasn't happened yet. So maybe it is happening again.

**CHAIRPERSON:** Yeah.

**DR. DOYLE:** But that referendum does say, the Children's Rights one already says:

*"Provision shall be made by law."*

**CHAIRPERSON:** Yes.

**DR. DOYLE:** So, at some point that's already taken care of itself. So, there was just an awful lot around this that we found difficult to present in any question recommendation that would clearly achieve something.

**PROF. WALSH:** I might just pick up the other question that was coming through on this, was, I think, the consequences if this was adopted as per the current wording of Question 9, of a failure to adhere to what it's anticipating. I think in using the words "in

principle" we were trying to capture the fact that consequences for this kind of a principle would be complicated, we're obviously dealing with political actors here, changes of government, changes in balances of power within the Oireachtas, all of which bring a significant level of uncertainty and contingency as to whether these proposals will be acted on, notwithstanding Kevin's point that, you know, almost always they are.

If this was to be adopted as a constitutional principle, for instance, you could have the difficult situation of the courts being called upon to order the Oireachtas to adopt a particular form of legislation, which would be complex and problematic from the perspective of the ordinary relationship as we understand it between the courts and the political parties. So those are just things to consider and fed into the wording as we put it.

**CHAIRPERSON:** Is the position clearer? In light of what you have been told, would you be inclined to agree to this, including the words "in principle" and the five years. Obviously, if this were to come to pass, an awful lot of work would have to be done in terms of considering the drafting, the implications and everything, but the objective is to get the message across that if an amendment is sanctioned in a referendum that it should be done. Isn't that really what it's about? Could I ask, would you be inclined to

agree with the wording having regard to the explanations you have been given and the clarity that has been offered? I will ask for a show of hands. Is there a majority? I think there probably is. A show of hands. I'm terribly sorry, what I've asked is that having regard to the clarification that has been given, the explanation you've been given, would you be prepared to accept question nine in its current form. That's basically what I'm asking and I've asked for a show of hands on that.

**MS. FINEGAN:** That's a majority.

**CHAIRPERSON:** What?

**MS. FINEGAN:** That's a majority.

**CHAIRPERSON:** I'm told it's a majority, any dispute about that? Will we do a count?

**MS. FINEGAN:** Yes.

**CHAIRPERSON:** Yes. As I say, hands up high please.

**MS. FINEGAN:** I'm counting 63 members in favour and there is 84 in the room so that's a majority.

**CHAIRPERSON:** Right. We will regard that as passed. Now the next one is ten.

**MS. FINEGAN:** Table 12.

**CHAIRPERSON:** Can we put it on the screen. Yes, table 12.

**FACILITATOR TABLE 12:** The citizens at Table 12 had three additional options that they wanted in question ten.

**CHAIRPERSON:** All right, yes.

**FACILITATOR TABLE 12:** These were handed up during the

discussion.

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 12:** The first is in terms of, there should be a cut off point across all media for the publication of opinion polls.

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 12:** As it was felt that the impression of being a certain outcome would reduce turnout. There was the second addition is that 16 year olds should be permitted to vote arising from Professor Marsh's paper and thirdly that voting and the principles of voting and the practicalities of voting be added to the CSPE course in terms of education in schools. The question as handed up stated Transition Year, the Table would like to change that to CSPE.

**CHAIRPERSON:** Yes. All right.

**MS. FINEGAN:** Table 10?

**CHAIRPERSON:** Yes, Table 10.

**FACILITATOR TABLE 10:** The Citizens at this table had a question about F on the ballot paper.

**CHAIRPERSON:** That's the ability to vote at any polling station in the State, yes.

**FACILITATOR TABLE 10:** That's correct Judge and the question was, would this include foreign embassies and they also had a number of proposals for things that should be added. One is to extend the grace period when being out of the State to 18 months to five years. Provision for better transport for elderly and disabled people to polling stations and the facility within

second level, the school system, to inform new and future voters about the system and the importance of voting.

**CHAIRPERSON:** Yes, yes.

**MS. FINEGAN:** Table 11.

**CHAIRPERSON:** Table 11.

**FACILITATOR TABLE 11:** Thank you Judge. The Citizens at this table just wanted to check will you be addressing the proposed additional question that they had asked to be included in this Section, Section B? It was, should referendums be decided on the basis of a qualified majority. That's not by way of an amendment, it is an additional question.

**CHAIRPERSON:** Yes. You raised it in the context of question nine and I suggested that question probably wasn't it's appropriate home as it were.

**FACILITATOR TABLE 11:** I think the Citizens at the table are agreed on that. It's that it is an additional question not that it wasn't an amendment.

**CHAIRPERSON:** All right. Yes an additional question.

**PROF. ELGIE:** Could I just ask you do you have any suggestions to what is meant by the qualifying majority in this case?

**CHAIRPERSON:** Yes. Yes.

**FACILITATOR TABLE 11:** One suggestion is a 60/40.

**CHAIRPERSON:** And that relates to all referendums is it? The proposal is that --

**FACILITATOR TABLE 11:** -- that's right.

**CHAIRPERSON:** All right. Very good. Yes well we will

deal with that as a separate question.

**MS. FINEGAN:** Table one.

**CHAIRPERSON:** Table one please.

**FACILITATOR TABLE 1:** Thank you. One of the Citizens at Table 1 had a query for the panel as to whether they believed that the inclusion of postal and online voting would increase the incidence of voter fraud.

**CHAIRPERSON:** Yes.

**MS. FINEGAN:** Table seven.

**CHAIRPERSON:** Table seven.

**FACILITATOR TABLE 7:** The Citizens at Table seven would like clarification on and to change the wording of 10d first of all. The wording changed to 'technology based' as opposed to online voting. 10e, they'd like to know what groups can current avail of postal voting. 10g, if there is automatic inclusion on the electoral register would there be a provision to opt out and they'd like an extra part of that, g, the Commission should take responsibility for updating and maintaining the electoral register.

**CHAIRPERSON:** Say that again.

**FACILITATOR TABLE 7:** The Commission should take responsibility for updating and maintaining the electoral register.

**CHAIRPERSON:** Is there any logic for the suggestion in relation to paragraph G, that you would be able to opt out of the register?

**FACILITATOR TABLE 7:** The citizens would just like to know can you opt out? Is there a provision for it?

**CHAIRPERSON:** Well you needn't vote.

**FACILITATOR TABLE 7:** Is it a legal requirement that you have to be on the electoral register.

**CHAIRPERSON:** Okay, well we will deal with that.

**MS. FINEGAN:** Table two.

**CHAIRPERSON:** Yes, Table two.

**FACILITATOR TABLE 2:** The Citizens at Table two would like an addition to read, lower the voting age to 16.

**MS. FINEGAN:** Table six.

**CHAIRPERSON:** Table six.

**FACILITATOR TABLE 6:** The Citizens at Table six, they are happy with the wording of the question, they too suggestion the reduction of a voting age to 16 years of age.

**CHAIRPERSON:** 16 all right.

**MS. FINEGAN:** Table nine.

**CHAIRPERSON:** Table nine.

**FACILITATOR TABLE 9:** The Citizens at this table have two suggestions, one has already been mentioned lowering the voting age to 16.

**CHAIRPERSON:** Yes.

**FACILITATOR TABLE 9:** And the second addition is, to increase resources committed to educate the electorate and promote greater understanding of referenda.

**CHAIRPERSON:** Yes.

**MS. FINEGAN:** Table 14.

**CHAIRPERSON:** Table 14.

**FACILITATOR TABLE 14:** Thank you Judge. A Citizen at Table 14 stated that they can't say a preference of

which option that feels most important in this question and another citizen is seeking clarify on how the results in this section would be calculated and expressed concern over the overlap of options.

**CHAIRPERSON:** Well we are not going for most important on this one, you just indicate by an 'x' whether you favour that particular and we will do a count. I thought I made that clear this morning. We do a count in relation to each element.

**MS. FINEGAN:** So each one that receives a majority in favour will become a recommendation of the Assembly.

**CHAIRPERSON:** So it is a just a straight forward count in relation yes or no in relation to each element just to see does it attain a majority.

**MS. FINEGAN:** Table five.

**CHAIRPERSON:** Which table now.

**MS. FINEGAN:** Table one then.

**CHAIRPERSON:** Table five?

**MS. FINEGAN:** Go on five.

**FACILITATOR TABLE 5:** Judge, some of the Citizens at this table are looking for an additional option for bi-annual fixed dates. One of the citizens instead of the word dates would like the word 'months'. So, bi-annual fixed dates or bi-annual fixed months in terms of when they vote. So to have an actual specified date.

**CHAIRPERSON:** And then we have Table four, I think, yes. The last one yes.

**FACILITATOR TABLE 4:** The Citizens at Table 4, it's

similar to what has been suggested at other tables, to reduce the age to 16 and to include educational information for the campaign.

**CHAIRPERSON:** All right. Yes. So we have quite a few issues there. The 16 age --

**DR. REIDY:** That was discussed at the Constitutional Convention.

**CHAIRPERSON:** Yes.

**DR. REIDY:** And it was passed by a majority there and it is on the agenda of the Government. So I suppose a further recommendation could be made on that, could be made on that but that exists already as a distinct recommendation.

**CHAIRPERSON:** Yes, we could possibly, we could do it as an ancillary recommendation that the recommendation of the Convention be --

**DR. REIDY:** So voting is already on the CSP curriculum and CSP is a compulsory subject for all students.

**CHAIRPERSON:** Yes.

**DR. REIDY:** There is also politics and society subject which has been introduced at the leaving cert level. That's an optional subject so students can take that if they choose and that's being rolled out across the country already so those exist in principle so there could be a recommendation for greater political education.

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** And just I suppose the only other thing, is that in relation to political education the Department

of the Environment do run occasional campaigns --

**CHAIRPERSON:** Yes.

**DR. REIDY:** Within their purview. So you could enhance that or it could become an enhanced role in a permanent electoral commission.

**CHAIRPERSON:** Yes.

**DR. REIDY:** It would be standard in other countries that the election management board would engage in extensive political education campaigns throughout the entire electoral cycle. So related to all types of elections and referendums and then just the political education as well. Voter fraud -- well especially in relation to the U.K. there were lot of discussions about how postal voting and the way it was operated could lead to greater fraud but the Electoral Commission has looked at that in some considerable detail and in general there isn't evidence to kind of back up the claims that were made but postal voting, you know, is very tightly regulated so certainly there are safeguards that could be put in place in relation to that.

Online voting is only used extensively in Estonia for the entire electoral cycle and there's a two stage verification process and it's a very secure process and there has been extensive work done on that. So, I mean, I suppose you have to say that the more opportunities and ways you can give to voters to vote, in principle of course it will always increase the ways

in which it could be manipulated but in practice where we've seen this done in other countries, there isn't any evidence to suggest that there is widespread fraud taking place. In relation to online voting --

**CHAIRPERSON:** Yes the technology, the terminology.

**DR. REIDY:** We often distinguish between the use of technology in polling stations. So for example, electronic voting machines which have some what of a coloured history in this country but are used extensively. So that would be voting by technology. Probably more and it is something that's on the agenda in Northern Ireland, where its more discussed there is that you would have online -- or sorry that you would have optical scanning machines for counting the ballots in the polling stations so that when you would go into the polling station you would vote by paper and then you would insert your ballot into a machine which would be an optical scanning device which would read the ballot paper and that would expedite the counting process. There would still be a paper record of all of the voting --

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** -- so there are different variances there.

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** So you could add it in as an addition but it would change how votes would be counted rather than increase opportunities to enhance turnout.

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** Sorry, I'm not sure if I'm making that very clearly. It wouldn't encourage more people or discourage people as a general rule the evidence -- it would just change how the ballots were counted. So you might get an election result quicker but its not something that could be recommended in any belief that its going to enhance turnout.

**CHAIRPERSON:** And do you think online is the more appropriate for what we are trying to get across to increase turnout? That online is the more appropriate expression.

**DR. REIDY:** It would certainly make it easier for voters under certain circumstances and they would be able to vote from home or vote from anywhere that they were in the State in a particular time. So they are quite different things and they would probably have different outcomes.

**CHAIRPERSON:** I think we have a query from Table nine, do we? Or Table Five.

**MEMBER TABLE 9:** Sorry Dr. Reidy you were making comments about the further education, the point we were trying to make with the extra option for this question -- we don't disagree with anything that you said and we actually I think came to a consensus yesterday along the same lines but the driving behind our extra option and the word education is in specific reference to a referendum education for the electorate on a given referendum as opposed to generic political education for the masses, if you know what I mean.

**DR. REIDY:** So you could add in an addition, I think we had --

**MEMBER TABLE 9:** The wording that -- might explain it or if it doesn't you can tell me. 'Increase resources to the commission to further educate the electorate for any given referendum'. So it's referendum specific as opposed to general political education is what we were trying to get at.

**PROF. GARRY:** Just on that, you could change the word education for information. So more resources to enhance the information that citizens have. That would just get away from that problem.

**DR. REIDY:** And sorry somebody wanted the postal voting provisions, do you want me to give those?

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** So postal voting is available for full time members of the defence forces, members of the gardaí and an Irish diplomat or his or his spouse posted abroad and then it is also available for people with a physical illness or disability, students who are in full time education. If you were unable to vote at your polling station because of your occupation and the last one is if you were unable to vote at your polling station because you were in prison as a result of an order of a court. So they are quite restrictive and you have to apply in advance --

**CHAIRPERSON:** Yes, yes, yeah. But I mean generally what we have put in question ten is very general, wider availability of postal voting because that would

require a lot of consideration. The actual, sort of principles which would apply, how it would be regulated would require a lot of consideration and we obviously are not equipped to deal with that and we certainly haven't the time.

**MS. FINEGAN:** There was a question about whether -- number F, the ability to vote at any polling station in the State would include foreign embassies.

**CHAIRPERSON:** Yes.

**DR. REIDY:** I mean at the moment it doesn't and I suppose that's a question that's tied into emigrant voting rights which is a whole other --

**CHAIRPERSON:** Yes, yes.

**DR. REIDY:** -- strand of discussion which again was actually dealt with at a previous convention and again there is a working paper before the Dáil at the moment. One of the committees is actually looking at the principles around emigrant voting rights. So it's certainly under consideration and it is something that is tied into another strand of conversation about extending voting right.

**CHAIRPERSON:** Very good. So, yes sorry, yes.

**CITIZEN TABLE 9:** Sorry  
one question and one comment. It seems  
to be implied in some of the questions on this question  
that to prevent the likes of voter fraud and everything  
that we'd need some kind of national voter database as  
opposed to a constituency by constituency one. So that  
was the comment and the question was, if a number of  
tables have suggested it, would it be worthwhile for us

to have on the ballot about lowering the voting age?

**CHAIRPERSON:** About?

**MS. FINEGAN:** Lowering the voting age.

**CHAIRPERSON:** Yes. Yes well it has already been addressed by the convention on the constitution -- alright okay, well we can put it on. Okay, we will put the -- so -- yes, I'll just ascertain your views on that. If we were to add an additional element into question ten which was to reduce the voting age to 16, how many would be in favour of that? All right, well we will work out the wording.

**MS. FINEGAN:** Yes.

**CHAIRPERSON:** John do you have a --

**PROF. GARRY:** There was also one question relating to the automatic inclusion of eligible voters --

**CHAIRPERSON:** Yes.

**PROF. GARRY:** And there was a concerned whether there could be an opt in or opt out, I mean one way to get around that would be to have two, to add an addition question and the first one would be automatic inclusion of all eligible voters on the electoral register and you can't opt out of it and the second one would be, the same thing, but you can opt out if you want. If you'd really like to kind of have that on the ballot.

**FACILITATOR TABLE 7:** I think it more around clarification about the repercussions of not voting. If voting is compulsory are you automatically included in the register, is there repercussions or consequences for not voting.

**DR. REIDY:** In countries where automatic registration happens it is just a facilitation measure. You are put on the register, it is entirely at the decision of each individual voter whether they choose to take up that franchise or not. So it is quite different from compulsory voting.

**CHAIRPERSON:** Yes, your name is put on the register and as I said previously, you needn't vote if you don't feel like it.

**DR. WALSH:** I think we just missed part of the question from Table 9 which was in respect of online voting etcetera and the need for some identification, the political scientists may be able to tell you a bit more about the why but our understanding is that, yes, once you move into the realm of online voting, voting at any polling station in the State, in those circumstances and a usual control and safeguard is the requirement of some kind of formal identification from birth that would track you location wise. Whether that's a distinctive one connected to voting or a general national ID card, it varies I think from jurisdiction to jurisdiction but the political scientists may have more detail for you on that.

**CHAIRPERSON:** All right. I will try and sort of ascertain where we are now in relation to this question, question ten -- what?

**PROF. RAFTER:** There was a question about cut off point for opinion polls.

**CHAIRPERSON:** Yes, yes, yes.

**PROF. RAFTER:** I think it is worth mentioning, like obviously there are prohibition on opinion polls in a number of States. It is challenging and in particular given the overlap between the Irish and the UK media markets.

**CHAIRPERSON:** Yes.

**PROF. RAFTER:** Well if you were to, if it were possible, to introduce prohibition, time limited prohibition a number of days before polling in a referendum on the publications of people by Irish media, there is nothing to stop a UK based or a non Irish or a media organisation outside the jurisdiction from commissioning and publishing the results of an opinion poll and obviously that can be disseminated then through social media and other online -- back into -- you can't put a blackened wall to stop the information leaking into the Irish market. So there are specific market based challenges and technological challenges to putting in a prohibition on opinion polls. It has been discussed here previously. We had a brief conversation about it last evening. We are also of the view that it hadn't been given sufficient airing yesterday with the deliberations but it has been discussed previously here and the challenges that would exist to introduce such a ban have been discussed.

**PROF. WALSH:** Just one other that we haven't commented on which was the suggestion for bi annual fixed dates or months for the holding of referendums, obviously it is for you to consider I suppose the question is would

presumably be facilitative so it wouldn't be required that those dates be used for a referendum if there wasn't one on the agenda in political terms. I presume the idea would be that you would be identifying dates for a potential referendum if one was to be held in each year on a fixed basis is that what you were contemplating? Sorry I don't think -- we had a brief discussion about this earlier we saw any major problem with it as a facilitative mechanism if that's something the room generally --

**DR. DOYLE:** I think the only -- again its to vote on but the only potential issue is that it might delay the holding of referendums if the wording weren't ready by the time that it came around you then couldn't have it a week later than planned, you'd have to wait six months to have it potentially.

**CHAIRPERSON:** Well there are a lot of remaining issues. I don't know what the best way of dealing with it is. Yes?

**DR. WALSH:** It is suggested in the first instance the views are canvassed, in relation to, I know there was an additional question about qualified majority for referendums. It would be good to know if there is consensus on that before we think about drafting something on that as well.

**CHAIRPERSON:** I just want to deal with question ten now. We are going to add on the 16 year limit --

**MS. FINEGAN:** We voted on that already.

**CHAIRPERSON:** What?

**MS. FINEGAN:** We voted on that already, that's agreed.

**CHAIRPERSON:** And we voted on that, it's agreed. Are there any other remaining issues of sufficient importance not to -- agreed to question ten in its current form - yes --

**CITIZEN TABLE 9:** Just what Dr. Doyle was saying about delaying a referendum if the wording isn't ready, it could either be an ancillary recommendation, that the Oireachtas would endeavor to hold referendums on fixed dates or within fixed months but that its not -- so they don't make it a binding thing if they take action on that recommendation but that they would endeavor to

--

**CHAIRPERSON:** What do you think of that?

**DR. DOYLE:** I'm just, not sure at that point how much is being achieved by us.

**CHAIRPERSON:** Yes -- so am I to take it that the general view is that we shouldn't go there? Yes, yes. All right. So -- we are at twenty past 12, my God, we are running out of time. In relation to question 10 we are going to add the -- you've already agreed to the addition of that element in relation to the 16 year age limit -- I want to -- subject to that addition being included, would you agree to question 10 in its current form, how many would?

**MS. FINEGAN:** That's definitely a majority.

**CHAIRPERSON:** Yes, that's definitely a majority. I know somebody has a question, who is it?

**FACILITATOR TABLE 10:** The Citizen's at Table 10 want to



ensure that the Assembly considers the extension of the grace period when being out of the state from 18 months to five years.

**CHAIRPERSON:** Will we consider that in the break as a special question? How does the room -- does the room have a view about us considering that? Put up your hands for those who think it is not necessary to have a separate question. That we won't do that suggested change.

**CITIZEN TABLE 10:** The reason I'm asking this question is that last year when we had the marriage equality referendum, that a lot of people came back to Ireland to vote in it and there were massive campaigns and it was wonderful and everybody was very excited about it but according to the constitution, unless our legislation, if you've been out of the country for 18 months you are not entitled to vote. So I'm just concerned that if any very difficult referendum comes up in the near future that young people who have gone away for their education, probably education purposes, whose extension maybe more than 18 months will be ineligible to vote and it is a very important issue for them. So that's the only reason I bring it so that if there's any petition then to challenge the result of any future referendum this may become one of the issues so that's why I'm bringing it up.

**CHAIRPERSON:** Theresa do you have a view on that?

**DR. REIDY:** Well emigrant voting rights are being considered in a parallel process at the present time

but that doesn't preclude the room here making a decision on it but it is on the political agenda that's the only thing I can really add to it.

**CHAIRPERSON:** All right. What I'll ask is, do the Members want to include an additional question on that? How many want to include it?

**MS. FINEGAN:** It should be made clear, you wouldn't have to vote in favour of it, its just to include a question on the ballot paper.

**CHAIRPERSON:** All right. There seems to be a majority. We will put in an additional question but it will be an additional question. We will have to word the question and I'm going to leave question ten there -- question 11, I just want to deal with question 11. There were only three comments in relation to question 11 and given that we have used up so much time and we are going to be here all day by the looks of things, I'm going to ask you to indicate whether you will accept question 11 in its current form at the moment. All right then, question 11 is passed. So we will rise now.

We have indicated that we will deal with the -- what's the expression, majority -- qualified majority -- we will consider that because it has been raised and I think what was suggested was 60/40 or something like that. Do any of the other Members have any views on that before we rise to consider the questions?

**MEMBER TABLE 2:** Sorry if we had a qualified majority, there

are many referenda in the last 20 years that would not have passed --

**CHAIRPERSON:** Right.

**MEMBER TABLE 2:** -- for instance the divorce referendum --

**CHAIRPERSON:** Yes.

**MEMBER TABLE 2:** -- and so on, children's rights.

So I would

leave the situation as it is really.

**CHAIRPERSON:** Anybody else have a view on it?

**MEMBER TABLE 9:** Along similar lines --

**CHAIRPERSON:** So sticking with the simple majority.

**MEMBER TABLE 9:** Yes but if we adopted a qualifying majority would it open previous referendum result for challenges?

**CHAIRPERSON:** No, no, no. It would only apply prospectively not retrospectively. Yes, table 7.

**MEMBER TABLE 7:** It's a ridiculous suggestion, you can't have a situation where a minority of people can win a referendum.

**CHAIRPERSON:** Yes. All right. I'll ask for a show of hands as to who wants to include that question. How many? A show of hands of those who do not want it includes. All right well that's the majority. So that takes care of that. So we will rise now and we will consider the outstanding issues. How long? You are getting a fifteen minute coffee break now, so enjoy as we go and do some work.

**COFFEE BREAK.**

**THE SESSION RESUMED AFTER A SHORT BREAK: FINALISATION**



**AND AGREEMENT ON WORDING OF BALLOT PAPER INCLUDING  
EXPLANATION OF ANY AGREED AMENDMENTS.**

**CHAIRPERSON:** Very good. We have spent the last, I don't know how long, 20 minutes was it, considering the remaining issues and I'm just going to set out what we propose -- it's your decision in the heel of the reel as they say. First of all, the first question was question five and we propose that question five be added to meet the situation in relation to anonymous donations and the wording you'll see it is up in the screen:

*"Do you think that anonymous donations to registered political parties and campaign groups should be prohibited".*

So that's the additional -- yes --

**SPEAKER FROM FLOOR:** [Inaudible].

**CHAIRPERSON:** We haven't specified that and that was, I think it is true to say, that was a deliberate decision. I'm right on that?

**PROF. RAFTER:** Yes because effectively if anonymous donations are being made to political parties are you going to allow them in for election campaigns and not for referendum campaigns. So we have deliberately in

this question not specified, for practical purposes.

**CHAIRPERSON:** Yes. So we had agreed the original wording of what is now Section 5(a) -- all right -- don't worry. So Section 5 becomes Section 5(a) and we've incorporated the amendments, *"should develop and effectively implement"* and we've added on the individuals at the end. So that will now be 5(a) and you've seen 5(b) and do you agree to the inclusion of 5(b), I'd like a show of hands. Yes, well that is decided on. Thank you very much.

Then we go to question 8 and we are splitting question 8 and you will see 8(a) there:

*"Do you think it should be permissible to have more than two options on the ballot paper in a constitutional referendum?"*

And then 5, sorry 8(b):

*"If there are more than two options on the ballot paper in a constitutional referendum, that outcome should be decided by first past the post or PRSTV"* - maybe put a space between the PR and the STV it might look better and did the question go up?

**MS. FINEGAN:** Pardon?

**CHAIRPERSON:** No, that's fine. All right, I'll just go through that again. If there are more than two options on the ballot paper, this is at a referendum, in a

constitutional referendum the outcome should be decided by, "*first past the post*" and we've put that in inverted commas as you'll see and PR STV, that's proportional representation single transferrable vote because that was the terminology I think that came from Table 12 was it? No Table 10?

**MS. FINEGAN:** Table 8.

**CHAIRPERSON:** Table 8, I was getting confused yes and we haven't added as you will see the third which was another - that's far too vague. So 8(a):

*"Do you think it should be permissible to have more than two options on the ballot paper in a constitutional referendum?"*

And the consequences of that is, if there are more than two options on the ballot paper in a constitutional referendum, the outcome should be decided by either 'first past the post' or proportional representation single transferable vote.

So, do you want question 5 split like that and that -- sorry question 8 I should say, question 8, do you want the question 8 split and the additional 8(b) included, could I have a show of hands please. Very good thank you very much.

**MEMBER TABLE 5:** Do you think you could use the multi optional voting in referendums. If you vote 'no' that you don't think it's a good idea --

**CHAIRPERSON:** Yeah.

**MEMBER TABLE 5:** -- you really can't vote for 8(a) and

8(b). **CHAIRPERSON:** Well not necessarily. You may have a view on that, you may vote 'no' but you still may have a view if the majority votes 'yes' what should happen. **CITIZEN:**

Okay, okay.

**CHAIRPERSON:** Yes. We've had that in other ballots, haven't we? Frequently, yes -- very good. Now I'll move on to question 10. We are adding three, it's getting longer and longer! We are adding three further, I've been using the word elements -- the main question is:

*"Which if any of these initiatives do you think should be introduced to try and increase voter turnout?"*

And then we are adding, lower or should we say 'lowering', *"lower the voting age to 16. Allow voting by otherwise eligible voters who are resident outside the State for no more than 5 years"*. That deals with the point that was raised and to try and cover the other point: *"Greater provision of voter education on referendums"* - would you go back to the old question 10. Would lowering this -- it's all right as it is -- allow greater provision -- all right.

Sharon has suggested that it would be appropriate that if I asked you to vote on each of the additions separately. So that's what I'll do. Now a show of

hands please as to whether we should include (i), that's lower the voting age to 16. Well that's certainly a majority.

Then paragraph (j), allow voting by otherwise eligible voters who are resident outside the State for no more than five years. Show of hands please, very good. That's in favour of as well. In favour of inclusion.

And the final one (k), greater provision of voter education on referendums. Again that will be included.

So essentially that takes care of everything, except just as we rose there half an hour ago, some body, I think from Table 9 raised a point of clarification with Theresa in relation to question 11 and I'm going to ask Theresa to address that if she would.

**DR. REIDY:** It's just to confirm that the three options covered all of the options that were discussed in the presentation yesterday. So it covers constitutional change, legislative change and also veto of legislation both rejective and aggregative.

**CHAIRPERSON:** Is that satisfactory? All right. Table 9, yes?

**MEMBER TABLE 9:** Sorry this might amount to nothing, I think there was a typo on Question 10, that's not in the slide, you can't see it on the screen but on the printed draft that we first got, there was options (a) to (h) and above it had it 'put an x in the box from

(a) to (f). That's readjusted I presume?

**CHAIRPERSON:** Yes.

**CITIZEN TABLE 9:** Grand okay.

**CHAIRPERSON:** You've amended that, have you?

**MS. FINEGAN:** Yes I have, yes.

**CHAIRPERSON:** Thank you very much for mentioning that. All right, well I think that's it. I think we have a ballot paper.

**MS. FINEGAN:** Yes.

**CHAIRPERSON:** With 11 questions and some questions split.

[APPLAUSE]

**MS. FINEGAN:** So what we will do now is -- just the technical part for us is just printing off the ballot paper. We've about half of it printed already, what was agreed before we took the break. It will just take us a few minutes to do it. I know lunchtime was schedule for now, but if you wouldn't mind handing on to cast your vote before you go for lunch. The other thing is that according to our rules we need four people to observe the counting, when the counting takes place, so if I could ask for four volunteer members to do that.

**CHAIRPERSON:** Hand up from Table 1.

**MS. FINEGAN:** Denise and yes thank you.

**CHAIRPERSON:** Table 3.

**MS. FINEGAN:** Great, okay, that's great. So we will talk to you about doing it on a rotation so you can have a break but just to say, so we will have the

ballot paper as quickly as possible. We will set up the desks in the normal way and you'll be directed to the correct Table for you to collect your ballot paper and register and so on and we hope to do it as quickly as possible. So maybe less than 10 minutes I think before the ballot paper is available. Thanks.

**BREAK FOR PRINTING OF BALLOT PAPER.**

**MS. FINEGAN:** Sorry if I could have your attention. If I could just ask you to use this time or remind the Members to use this time to fill our your surveys. That would be really helpful, thank you.

**MS. FINEGAN:** Can I have your attention please. The ballot papers are now ready so you can proceed to the Registration Desk to cast your vote. If I can ask just if any of you have places to go or you are under pressure for time, if you could make yourselves known and just jump to the top of the queue and I'd appreciate if fellow Members would help their fellow Members out on that one. I'd be very grateful. Thanks.

**VOTING COMMENCED.**

**ANNOUNCEMENT OF RESULTS, CONCLUDING REMARKS AND REFLECTIONS FROM THE CHAIR:**

**CHAIRPERSON:** Good afternoon everybody. We have the votes counted now and they will be going up on screen as I go through it but I just want to say first of all, that we did a specific note on voting for the purposes of this weekend and its on the website if anybody is interested in it. I just wanted to mention that.

Now, I'm going to start with and I'm about to give the results as you know of the voting and I'm going to start with Question 1 and Question 1 is on the screen now and the number of eligible voters was 84, the number of votes cast 84, no invalid votes. So the total valid poll was 84 and I'll now tell you what the question was, Question 1:

*"Do you think the functions of the Referendum Commission should be carried out by a permanent electoral commission?"*

And the 'yes' option there were 79 votes, that is 94% and the 'no' option five votes, 6%.

Question 2, that question was:

*"Do you think the Referendum Commission should be obliged to give its view on significant matters of factual or legal dispute that arise during a referendum campaign in the public domain, including on social*

*media?"*.

And once again 84 eligible voters. There was one invalid vote on this occasion and the total valid poll was 83 and the result was, those who voted for the 'yes' option numbered 78, that's 94% and the 'no' option 5 and that's 6%.

Going on to Question 3, that question is:

*"Do you agree with the current position where the government is not permitted to spend public money to advocate on one side only of a referendum campaign?"*

Once again 84 eligible voters, one invalid vote and the total valid poll was 83 and the result in favour of 'yes', a yes response, 72 votes, that's 87%, 'no', 11 votes that's 13%.

Then going on to Question 4. That question is:

*"Do you think the government should provide money to both sides equally in referendum campaigns?"*

Again 84 eligible voters. No invalid votes so a total valid poll of 84 and the two options, 'yes' and 'no', those in favour of 'yes', 57 votes that's 68% and those in favour of 'no', 27 votes that's 32%.

Question 5(a):

*"Do you think the Oireachtas should develop and effectively implement a system of spending limits in referendum campaigns for registered political parties, campaign groups and individuals?"*

Again the number of eligible voters 84, no invalid votes, so the total valid poll was 84 and those who voted 'yes', in favour of the 'yes' option, 82 votes, that's 98% and 'no', 2 votes that's 2%.

Question 5(b):

*"Do you think that anonymous donations to registered political parties and campaign groups should be prohibited?"*

And again we had 84 eligible voters but there was one invalid vote. So the total valid poll was 83. Those who voted 'yes', 60 votes, 72%. 'No', 23 votes that's 20% (28% was actual result).

Question 6:

*"Do you think that it is a good idea to have more than one referendum on unrelated issues at the same time?"*

The number of eligible voters, 84, no invalid votes so

the total valid poll was 84 and those who voted 'yes', 67 votes or 80%. 'No', 17 votes at 20%.

Going on to Question 7:

*"In the event that there is more than one referendum on related issues at the same time, what do you think should be the maximum number of referendums?"*

And once again we had 84 eligible voters. No invalid vote so therefore the total valid poll was 84. Now I'll read through each of the options. The first one was, *"that there should be no more than two referendums at the same time"*, there were 35 votes in favour of that. That is to say, 41.7% and that ranked first.

*"There should be no more than three referendums at the same time"*, and there was 34 votes there and the percentage was 40.5% and that ranked second and you'll notice that there was just the difference between the two was just one vote and that's why we have set out the percentages as we have done.

And then finally, *"there should be no upper limit on the number of referendums held at the same time"*, and there were 15 votes for that option. That represents 17.9%.

Question 8(a):

*"Do you think it should be permissible to have more than two options on the ballot paper in a constitutional referendum?"*

And again the number of eligible voters was 84 and the total valid poll was 84 and those who answered 'yes', 64 votes or 76%. 'No', 20 votes 24%.

Then Question 8(b):

*"If there are more than 2 options on the ballot paper in a constitutional referendum, the outcome should be decided by..."* and there are two options given there, *"first past the post and PR STV"* and the 'first past the post' gained 40 votes or 48% and the second PR STV 44 votes or 52% and there were 84 valid votes in relation to this question. I should perhaps say that we had intended putting 'first past the post' in inverted commas and also PR STV, in other words proportional representation single transferrable vote also in inverted commas but you see the result is quite clear.

Then Question 9:

*"Do you agree that in principle the Oireachtas and the government should give effect to the outcome of a referendum within five years?"*

There were 84 eligible votes and a total valid poll of 84. Those who voted 'yes' 75 in other words 89%. Those who voted 'no', 9, 11%.

And then Question 10 is a rather long question:

*"Which if any of these initiatives do you think should be introduced to try and increase voter turnout?"*

And there are options from (a) to (k). There were some invalid votes so what I will do I will read the valid poll and then I'll read the 'yes' and 'no' in relation to each element of this question.

So the first element is:

*"Early voting in the weeks before the poll":* In other words that is an initiative which would be introduced to try and increase voter turnout. So that initiative, early voting in the weeks before the poll there were 81 valid votes of which 45 or 56% were for yes and 35 or 44% were for 'no'.

The second element:

*"Extended voting over a number of days":* Again the valid poll was 81, 40 votes 'yes' that's 49% and 41 votes 'no' that's 51%.

And then the third, "*weekend voting*", 83 was the valid poll on this occasion and interestingly 83 votes on the 'yes' side which was 100%.

Then next, "*online voting*", the valid poll was 81, 57 votes for 'yes' in other words 70% and 24 votes for 'no' 30%.

The next element is, "*wider availability of postal voting*": 83 valid votes, 69 of which were in favour of 'yes' and that's 83% and 14 for 'no' and that's 17%.

The next element is: "*The ability to vote at any polling station in the State*", the valid poll was 83, 74 in favour, in other words 'yes', so that represents 89% and 9 'no' and that's 11%.

The next element is: "*Automatic inclusion of all eligible voters on the electoral register*", the valid poll on this occasion was 80 votes and 12 or 15% voted 'yes' and 68 or 85% voted 'no'.

I'm sorry -- I read that incorrectly. I'll just -- it was 78 voted 'yes' that's 95% and 4 voted 'no' that's 5%.

The next is, "*compulsory voting*" and there were 80 valid votes of which 12 voted 'yes' that's 15% and 68

voted 'no' that's 68%.

Then the next element is: *"Lower the voting age to 16"*. There were 83 valid votes, 66 votes or 80% for 'yes' and 17 votes or 20% for 'no'.

And then the next element is: *"Allowing voting by otherwise eligible voters who are resident outside the State for no more than 5 years"*. And there were 84 valid votes of which 65 or 77% were for the 'yes' option and 19 or 23% were for the 'no' option.

And then the final element of this question is: *"Greater provision of voter education on referendums"*. And the valid poll was 82 of which 79 voted yes and that represents 96% and 3 voted 'no' that represents 4%.

And then the final question is Question 11:

*"Which if any of the following types of citizens initiatives do you consider should be provided for?"*

And there were 84 valid votes for this and the first is: *"A citizens initiative to put a constitutional referendum proposal to the people"* and there were 7 invalid votes in relation to this so the valid poll was 77 of which 53 or 69% voted yes and 24 or 31% voted 'no'.

The second is: *"A citizens initiative to put a legislative change proposal to the people including enacting, changing or repealing legislation"*. On this occasion the valid poll was 78 of which 54 or 69% voted 'yes' and 24 or 31% voted 'no'.

And then the final aspect of this is: *"A citizens initiative to put an item on the agenda for decision by the Oireachtas"* and the valid poll was 78 of which 65 voted 'yes' that's 83% and 13 voted 'no' that's 17%.

So that's the result of the poll and those results will constitute the Assembly's recommendations to the Oireachtas. So that's that and I just wanted to wind up, I just want to say a few words before I bring this meeting to a close.

Throughout this weekend we've considered the way in which referendums are held in Ireland from the historical position to the legal regulation of campaigns, to voter turnout, super referendums, repeat referendums, citizens initiatives and direct democracy. We have made important recommendations in all of these areas and those are the recommendations based on the voting which took place this afternoon and I have no intention of boring you by repeating the vote again. It's all there and it will be on the website. Is it on the website now? Yes. It's on the website now but in

any event, what I want to do at this stage is to advise you of the next steps. The Members have made recommendations through the vote on the ballot. I will now fulfil the next step of the terms of reference. In other words I will aim to finalise the report. The report of the Assembly on this topic and furnish it to the Houses of the Oireachtas as soon as possible.

The Secretariat will communicate the contents of the report and the date it will be submitted to the Houses of the Oireachtas to the Members in advance. So you will see it in advance.

And I just want to briefly say a lot of thank yous because we got an awful lot of assistance this weekend. Yesterday we were lucky to have received presentations from speakers which really informed us about this particular topic and the speakers were all experts on the topic and I think anybody who was here would have appreciated the quality of the presentations we got.

Secondly, there's the Expert Advisory Group, they have provided great direction to the Secretariat and to myself on this topic and as always I'm extremely grateful for all their work and guidance and I can tell you they did work hard over this weekend, no more than the rest of us.

And then I also just want to mention, I think they are

gone at this stage but I do want to mention the Facilitators and the Note Takers who again worked very hard and they brought their special skills to the task and I'm very happy that we continue to benefit from their presence.

And of course most of all I want to say thank you to the Members. I'm really delighted that so many of you have returned in 2018 to see this process through. Your dedication and enthusiasm has not diminished since we began this process with the first weekend meeting in November 2016. Many of you travel long distances to be with us and I realise that this travel and devotion of time is not easy.

I'm also delighted to have met so many new Members this weekend. We've welcomed 13 new Members only recently recruited all of whom without hesitation agreed to come along this week and I'm really grateful for that.

So to everybody that I've just mentioned, many thanks and I want to say a particular thanks to the Secretariat, our own staff and the people who come from the Department of the Taoiseach to assist us at these occasions. They give us a great service and I'm truly grateful.

Now, to conclude we will meet again for the last time on 3rd and 4th March to consider the final topic that

is, Fixed Term Parliaments. As I think I mentioned yesterday, the submission process is now open on that topic and it will remain open until 12 noon on the 23rd February. The Secretariat will soon again start publishing the submissions, as soon as they come in we will put them on the website and anyone who is interested may log onto the website to read them in their own time.

And I look forward to seeing you all again in a few weeks time and before calling the weekend to a close I'm glad to say we did finish up on time and most of you will be home in time for Dancing with the Stars!

Slán abhaile.

**END OF CONFERENCE**