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**OF DEMAGOGUES AND DICTATORS? THE
REDEMPTION OF CONSTITUTIONAL
REFERENDA IN NEW ZEALAND**

Submitted for the LLB(Honours) Degree
LAWS520: Comparative Constitutionalism

Faculty of Law
Victoria University of Wellington
2017

Abstract

Referenda have been strongly criticised in recent years. Western liberal democracies are fixated on representative democracy, with elections as the pinnacle of democratic participation. However, political apathy and voter dissatisfaction are pressing problems. This paper argues that referenda can be a democratically legitimate method for major constitutional change. The problems canvassed in the literature and witnessed in recent examples, such as “Brexit”, are merely problems of practice not principle. To redeem constitutional referenda, a comparative approach is adopted to analyse the referendum methods used in New Zealand, Australia, Ireland, Switzerland and the United Kingdom. From this assessment, a model provision is developed that should guide the process for any major constitutional referendum in New Zealand. It injects a dose of direct, participatory and deliberative democracy into our representative system, thereby improving the democratic legitimacy of constitutional referenda.

Keywords

referenda—constitutional referendum—democracy—legitimacy—constitutional change.

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I Introduction

Western liberal democracies are fixated on representative democracy. As a result, elections have become the pinnacle of democratic participation. However, political apathy is a pressing problem in democratic societies.¹ Voter dissatisfaction suggests elections are insufficient and there has been increased demand for further participation in decision-making outside of the election cycle. One mechanism for achieving this is the referendum:²

For some it is an almost intuitive assumption that referendums represent an ideal model of democracy; they give a directly determining voice to the demos in a way that captures neatly both the people's collective, popular sovereignty, and the political equality of all citizens.

However, referenda have also been subject to a plethora of academic and public criticism. They have fallen out of favour with politicians and citizens; particularly where the expected or desired result is not achieved. This paper seeks to counter these critiques and demonstrate that constitutional referenda are a valuable tool for major constitutional change.³ If executed correctly, constitutional referenda, whereby citizens can vote directly on a specific issue regarding constitutional change or development, can add legitimacy to constitutional decisions.⁴

This paper is not suggesting that constitutional referenda are the *most* democratically legitimate method for amending a constitution. Instead, the counterfactual is our system of representative democracy and responsible government, which overwhelmingly focuses on elections as the main mechanism for participation. Currently, elected representatives are permitted to decide the outcome of any issue, including those involving major constitutional questions, on the basis of an ordinary majority.⁵ This diminishes trust in the decision-making process as reform is conducted in a necessarily partisan manner. This paper will argue that a purely representative system lacks democratic legitimacy when used to decide major constitutional issues.

¹ Gabriel A Almond and Sidney Verba *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton University Press, Princeton, 1963) at 162.

² Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2012) at 19.

³ Major constitutional issues and major constitutional change will be used interchangeably.

⁴ Tierney, above n 2, at 3; and AV Dicey "The Referendum" (1894) 23 *National Review* 65 at 65.

⁵ Excluding Electoral Act 1993, s 268.

A Approach

This paper focuses on the use of referenda for major constitutional issues, as they provide the greatest opportunity for democratic legitimacy to be realised. It will assume that major constitutional issues can be distinguished from ordinary constitutional amendments and change.⁶ Part II introduces the general critiques aimed at referenda. Part III establishes the framework for democratic legitimacy, which will be used to assess referendum mechanisms employed in various jurisdictions. Part IV looks at New Zealand's constitutional setting and various uses of referenda through the lens of democratic legitimacy developed in Part III. A comparative approach will be undertaken in Part V to evaluate whether there are other methods that New Zealand ought to incorporate. These lessons lead to a discussion in Part VI which assesses what should be incorporated into any provision to ensure the greatest measure of legitimacy. Part VII will propose a model provision. The objective of this paper is to produce a provision which maximises the efficacy of referenda to redeem their use for major constitutional issues in New Zealand.

II The Abstracted Critiques

The core criticisms of referenda boil down to concerns over the ill-informed electorate; the deliberative and participatory deficit; elite control; the lack of accountability and responsibility; and the tyranny of the majority.⁷ To present a model for constitutional referenda, these critiques need to be addressed and remedied insofar as that is possible.

A The Ill-Informed Electorate

Arguably, the utility of referenda is conditional on a well-informed populace.⁸ An ill-informed electorate may have a negative impact on political engagement and “may even

⁶ See Jon Elster “Forces and Mechanisms in the Constitution-Making Process” (1995) 45 *Duke LJ* 364 at 366; Joel I Colón-Ríos *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge, Oxford, 2012) at 10; BS Frey “Direct Democracy for Transition Countries” (Institute for Empirical Research in Economics, University of Zurich, Working Paper no 165, 2004) at 18; Stephen Tierney “Constitutional Referendums: A Theoretical Inquiry” (2009) 72 *MLR* 360 at 373; Andrew Arato “Dilemmas Arising from the Power to Create Constitutions in Eastern Europe” (1993) 14 *Cardozo L Rev* 661 at 669–670.

⁷ See Tierney, above n 2 at 23; and Stephen Tierney “The Scottish Independence Referendum: A Model of Good Practice in Direct Democracy?” in Aileen McHarg and others (eds) *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press, Oxford, 2016) 53 at 54.

⁸ Carol Harlow “Power from the People? Representation and Constitutional Theory” in Patrick McAuslan and John F McEldowney (eds) *Law, Legitimacy and the Constitution* (Sweet & Maxwell, London, 1985)

increase disillusionment with the political process”.⁹ Jason Brennan argues that people tend to be “ignorant and irrational” about politics.¹⁰ It is unclear whether people are giving informed consent to an issue put to a referendum.¹¹ Brennan stipulates that there is a palpable *rational ignorance* whereby the costs of acquiring information (ie time and effort) outweigh the expected benefits. Thus, people do not attempt to seek out the relevant information.¹² This further leads to a confirmation bias, whereby citizens tend to accept information that supports their pre-existing views and reject evidence which suggests otherwise.¹³

Extrapolating from this, referenda could be used as a mechanism to fuel populist whims. Where there is insufficient deliberation and information, citizens can be more readily swayed by propaganda or influenced by money, power and persuasive personalities.¹⁴ There can be significant peer pressure. It is arguable, therefore, that “politicians are better able to make decisions on behalf of the people”.¹⁵ In this sense, referenda are not simply “impractical”, they are also “dangerous” as people make ill-informed choices.¹⁶ For major constitutional issues this critique is even more pertinent as the margin of error is more serious and potentially more severe ramifications.¹⁷ The requirement to encapsulate an undoubtedly complex issue in a simple and coherent question is also problematic.¹⁸ There is a question as to whether citizens possess the capacity or competence to reach informed decisions in referenda.¹⁹ However, citizens’ lack of information cannot solely be ascribed

62 at 79; and Jason Brennan “Brexit, Democracy, and Epistocracy” (June 24 2016) Princeton University Press Blog <blog.press.princeton.edu>.

⁹ Unlock Democracy “Submission to the House of Lords Constitution Committee on Referendums in the United Kingdom” (4 January 2010).

¹⁰ Jason Brennan *Against Democracy* (Princeton University Press, Princeton, 2016) at ch 2.

¹¹ At ch 4.

¹² At ch 2.

¹³ At ch 2.

¹⁴ Peter Eavis “‘Brexit’ and the Risks of Democracy” *The New York Times* (online ed, New York, 23 June 2016).

¹⁵ Tierney, above n 6, at 367–368.

¹⁶ At 367–368.

¹⁷ At 368.

¹⁸ Eavis, above n 14; and Unlock Democracy, above n 9.

¹⁹ Tierney, above n 2, at 29.

to political apathy.²⁰ Voters cannot be blamed for ignorance where information is not provided to them in an accessible and accurate manner.

B The Participatory and Deliberative Deficit

The ill-informed electorate critique suggests that the decision in a referendum vote is merely an aggregation of “pre-formed wills” with limited deliberative engagement.²¹ The referendum is merely a conduit through which opinions are presented, without any responsiveness to debate and alternative perspectives.²² It is not a “consensus-building” exercise,²³ as the basic referendum procedure merely asks for a ‘yes’ or ‘no’ vote on a proposal with no requirement for deliberation.²⁴ The power of citizens in this situation is akin to a “veto power”, rather than being able to meaningfully inform the process and agenda.²⁵ As it stands, the traditional model for referenda results in mere aggregative decision-making with little room for further participation and deliberation by voters.²⁶

It ought not to be forgotten, however, that our elected representatives may also be criticised for the decisions they reach, regardless of their access to information and deliberation.²⁷ The lack of citizen engagement in constitutional politics may not be due to incompetence and incapacity, nor is it necessarily a result of the ignorance and apathy of the electorate. Dissatisfaction and disengagement may also be attributed to a critique of how representative democracy operates.²⁸ Furthermore, citizen disengagement with the electoral process and voting requirements is not suggestive of total detachment. New modes of participation are utilised instead; such as participation in non-governmental

²⁰ Will Brett “It’s Good to Talk: Doing Referendums Differently After the EU Vote” (Electoral Reform Society, September 2016) at 8.

²¹ Tierney, above n 2, at 23.

²² Tierney, above n 2, at 28; and Joel Colón-Ríos “The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform” (2010) 48 *Osgoode Hall LJ* 199 at 236.

²³ Tierney, above n 2, at 29.

²⁴ Robert Goodin *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press, Oxford, 2008) at 1.

²⁵ Dietrich Conrad “Limitation of Amendment Procedures and the Constituent Power” (1996–1997) 15–16 *The Indian YB Int’l Affair* 375 at 405.

²⁶ Tierney, above n 2, at 36.

²⁷ At 30.

²⁸ At 32.

organisations and social movements.²⁹ Participation without the means for engagement is futile—the “ambition to take part deliberatively must be matched by opportunity”.³⁰

C Elite Control

A further criticism is the role that the ‘elite’ have in dictating the process. In this paper, the use of ‘elite’ refers to government. It is argued that referenda can be used as the “Pontius Pilate” of representative government: they allow officials to “wash their hands” of responsibility for contentious issues.³¹ For government-initiated referenda, elites have the power to initiate the referendum, set the question and determine the procedure.³² Without strict controls, referenda may be abused for political advantage.³³ Manipulation of this kind is said to be prevented with regards to ordinary legislative decision-making through the institutions and procedures in place.³⁴ In theory, this could be a valid argument. However, the execution of representative democracy is not without its faults. The independent judgment of elected officials can be manipulated and there is a growing accountability gap—perhaps associated with the aforementioned growing political apathy.³⁵

D Lack of Accountability and Responsibility

A further risk is that referenda can interfere with a government’s ability to govern, encourage “reactive” decision-making and do not adequately safeguard minority interests.³⁶ They are costly and “blunt and crude” devices which “blur the lines of accountability and responsibility”.³⁷ Citizens are merely required to consent (or not) to the proposed changes, which can lead to an expression of support or disapproval of the current government.³⁸ A referendum reduces avenues for government accountability: citizens

²⁹ At 32.

³⁰ At 36.

³¹ Richard Katz *Democracy and Elections* (Oxford University Press, Oxford, 1997) at ch 7.

³² Tierney, above n 2, at 24.

³³ Peter Leyland “Referendums, Popular Sovereignty and the Territorial Constitution” in Richard Rawlings, Peter Leyland and Alison Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, Oxford, 2013) 145 at 147.

³⁴ Tierney, above n 2, at 24.

³⁵ At 25; and John S Dryzek and Patrick Dunleavy *Theories of the Democratic State* (Palgrave Macmillan, Basingstoke, 2009) at 207–209.

³⁶ Caroline Morris “Improving Our Democracy or a Fraud on the Community?” (2004) 25 Stat L R 116 at 118.

³⁷ Royal Commission on the Electoral System “Towards a Better Democracy” [1986–1987] IX AJHR H3 at [7.30].

³⁸ Colón-Ríos, above n 22, at 236.

cannot be held accountable for decisions that they apply to themselves. However, knowing that the result will be subjected to public scrutiny—more so than ordinary law-making—can incentivise people to be more careful with how they cast their vote.

E Tyranny of the Majority

Aggregative decision-making fails to account for the intensity of preferences in a diverse society. Where a decision put to a referendum affects one group more than others there is a risk that their interests will be undermined in a majority vote. In 2009, a popular referendum initiative in Switzerland led to the prohibition of the construction of minarets, towers or mosques. Whilst the government issued a counter-proposal stating such a ban was unconstitutional, it was approved by 57.5 per cent of voters, with a turnout of 53.76 per cent.³⁹

However, the concern of minority protection is not unique to the use of referenda for constitutional issues. Notwithstanding the implementation of proportional representation, parliamentary decision-making results in an aggregative vote requiring an ordinary majority for the proposal to pass.⁴⁰ This can lead to detachment from minority interests. Irrespective of the concern for minority protection, we must also be alive to the fact that a minority veto may replace “the tyranny of the majority with the hegemony of the minority”.⁴¹ This concern will be addressed further in Part VI.

F Recent Examples

Recent examples of government-initiated referenda demonstrate that there is an increasing disconnect between the potential value of referenda and the procedures actually employed. The 2015–2016 flag referendum in New Zealand, whilst not a major constitutional issue, was criticised for its poor timing, cost and detachment from reality.⁴² Turkey, whilst possessing a different constitutional structure to New Zealand, recently utilised a constitutional referendum resulting in a shift from a parliamentary system to an executive

³⁹ Swiss Federal Chancellery “People’s vote from 27.09.2009” (3 October 2017) <www.admin.ch>.

⁴⁰ Tierney, above n 2, at 40.

⁴¹ At 41.

⁴² See Elections “Referendums on the New Zealand Flag” <www.elections.org.nz>; (12 March 2015) 703 NZPD 2217; and “Taxpayers face \$25 million bill even if old flag stays” *The New Zealand Herald* (online ed, Auckland, 30 October 2014).

presidency.⁴³ The proposal succeeded with a mere 51.1 per cent majority.⁴⁴ This referendum was criticised for a lack of equality, biased media coverage and the curtailment of fundamental freedoms culminating in an unbalanced presentation of information to the public.⁴⁵ The Turkish State was accused of suppressing the ‘no’ campaign and of engaging in illegal overseas campaigning. The legal framework was considered inadequate to ensure a genuinely democratic process.⁴⁶

The 2016 referendum in the United Kingdom on whether to leave or remain in the European Union (“Brexit”) was also severely criticised. Citizens were asked “should the United Kingdom remain a member of the European Union or leave the European Union?”⁴⁷ The repercussions were not perceived to be properly understood by the general public.⁴⁸ The end result was a mandate of 51.9 per cent to leave the European Union.⁴⁹ However, given voter turnout, this translated into a mere 37.5 per cent of eligible citizens supporting the initiative.⁵⁰ It is important to note that much of the criticism of Brexit was on the basis that the outcome was ‘wrong’. These are political issues that will always be contested, regardless of the result. Nonetheless, the severe backlash following Brexit is a useful backdrop to the issue discussed in this paper: can constitutional referenda ever be considered a democratically legitimate means to change a constitution?

G Summary

Facing multiple criticisms, referenda were once branded a “splendid weapon for demagogues and dictators”.⁵¹ These examples and critiques suggest that either referenda

⁴³ “Recep Tayyip Erdogan gets the power he has long wanted—at a cost” *The Economist* (online ed, London, 22 April 2017).

⁴⁴ Saim Saeed “Turkey announces official referendum results” *Politico* (online ed, Brussels, 28 April 2017).

⁴⁵ International Referendum Observation Mission *Republic of Turkey – Constitutional Referendum, 16 April 2017: Statement of Preliminary Findings and Conclusions* (Organisation for Security and Cooperation in Europe, 17 April 2017) at 1–2.

⁴⁶ At 1 and 4.

⁴⁷ Gov.uk “EU Referendum” <www.gov.uk>.

⁴⁸ Brennan, above n 8.

⁴⁹ The Electoral Commission “EU Referendum Results” <www.electoralcommission.org.uk>.

⁵⁰ Kenneth Rogoff “Britain’s Democratic Failure” (24 June 2016) Project Syndicate <www.project-syndicate.org>.

⁵¹ (22 March 1975) 888 GBPD HC 314.

are fundamentally anti-democratic and ineffective, or that they are not being utilised in an appurtenant manner. A number of assumptions underpin the above critiques:

- referenda are government-initiated with a small turnaround for the vote to be held;
- a confusing issue with poor framing is put in front of apathetic and indifferent voters; and
- citizens are unwilling to inform themselves and deliberate upon the matter.⁵²

This paper challenges these critiques. The concerns are not problems of principle, instead they are reflective of current practice regarding referenda.⁵³ Referenda expose views not expressed or represented at general elections and need to be part of a society founded upon representative democracy.

III Building a Framework of Democratic Legitimacy

The benchmark against which constitutional amendment provisions should be measured is legitimacy. Whilst it engenders an intuitive reaction as to its definition and is often referred to in the literature, legitimacy is rarely distinctly defined. This paper will embrace a definition of legitimacy as “a reservoir of goodwill that allows people to maintain confidence in institutions’ long-term decision-making”.⁵⁴ A lack of legitimacy encourages detachment and non-participation, creating a “vicious cycle of ever-decreasing trust and disengagement”.⁵⁵ This paper will specifically adopt a framework of *democratic* legitimacy. The procedure adopted for constitutional referenda should be held in accordance with democratic principles to ensure trust and confidence in the decision reached.

A Democratic Legitimacy

The definition of democracy adopted will inform perspectives as to whether a referendum is consistent or inconsistent with democratic processes. Vernon Bogdanor argues that:⁵⁶

⁵² Tierney, above n 7, at 60.

⁵³ Stephen Tierney “Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox” (2013) 12 Election Law Journal 508 at 509.

⁵⁴ Sarah Kerkin ““Here there be Dragons: Using systems thinking to explore constitutional issues” (PhD Dissertation, Victoria University of Wellington, 2017) at 42; James Gibson, Gregory Caldeira and Lester Kenyatta Spence “Why Do People Accept Public Policies They Oppose? Testing legitimacy theory with a survey-based experiment” (2005) 58(2) Pol Res Q 187; and David Easton *A Systems Analysis of Political Life* (Wiley, New York, 1965) at 273.

⁵⁵ Kerkin, above n 54, at 66.

⁵⁶ Vernon Bogdanor *The People and the Party System* (Cambridge University Press, Cambridge (UK), 1981) at 93.

[T]he arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but a logical consequence of accepting a democratic form of government.

Whilst emphatically articulated, Bogdanor's statement is conditioned on an important assumption: there exists a settled definition of democracy. However, there are many competing, overlapping and complementary conceptions of democracy which may form the framework for any constitutional system.⁵⁷ At its most fundamental level, democracy means "rule by the people". It may be equated with majority rule and it is "almost axiomatic" that it requires popular participation.⁵⁸ Democratic participation must afford equal treatment to all citizens.⁵⁹ Democracy serves a twofold role: a "factual role in deciding which substantive solution to adopt" and "a legitimating role in allowing that solution to be in some way acceptable".⁶⁰

Democratic legitimacy demands a combination of representative, direct, participatory and deliberative democracy.⁶¹ As aforementioned, it is not the intention of this paper to fundamentally alter New Zealand's constitutional and legal framework. Instead, working within existing boundaries, the aim is to produce a statutory provision for referenda that affords the greatest democratic legitimacy in achieving major constitutional change. This paper now addresses each of these conceptions of democracy to ultimately inform the framework for democratic legitimacy by which referenda provisions will be assessed. For now, this discussion is intentionally abstracted so as not to predetermine the outcome of the analysis in Parts IV, V and VI.

1 Representative democracy

Most modern democracies employ a form of representative democracy.⁶² In New Zealand, the electoral process determines which individuals enter Parliament and are permitted to exercise public decision-making power on behalf of citizens.⁶³ Given its widespread use,

⁵⁷ John Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at 4.

⁵⁸ Colón-Ríos, above n 6, at 60.

⁵⁹ Royal Commission on the Electoral System, above n 37, at [14].

⁶⁰ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 14.

⁶¹ See Tierney, above n 2, at 42.

⁶² Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 14.

⁶³ Geddis, above n 60, at 16.

representative democracy is practically becoming synonymous with democracy itself.⁶⁴ To some minds, it is the only feasible form of democracy in modern societies.⁶⁵

This is a relatively weak form of democracy as it limits citizen engagement, a far cry from the original Athenian model. However, the modern universality of the franchise and the exponential increase in population size may explain its prominence. Furthermore, there is a growing divide between the people, politicians and accountability.⁶⁶ Delegated responsibility has increased for a number of reasons. First, citizens are too busy to engage with political activities and have insufficient resources to have the capacity to participate. Second, representative democracy ensures that there can be accountability for the decisions reached. Third, enlightened politicians may “correct the misrepresentations” of the majority on individualised issues.⁶⁷

Representative democracy, as used in the ordinary politics of New Zealand, is increasing the divide between elected officials and the electorate itself. There are limited and inaccessible avenues for accountability and responsibility. The infrequency of elections raises concerns about their efficacy as a method for the accountability of elected representatives.⁶⁸ If democracy merely comprises elections, then participation and deliberation is lost. In David Van Reybrouck’s terms, there is increased suffering from “Democratic Fatigue Syndrome”—a crisis of legitimacy and efficiency characterised by:⁶⁹

... low voter turnout, high voter turnover, declining party membership, governmental impotence, political paralysis, electoral fear of failure, lack of recruitment, compulsive self-promotion, chronic electoral fever, exhausting media stress, distrust, indifference and other persistent paroxysms ...

Van Reybrouck posits that Western representative democracies are in crisis because it is “assume[d] that the representation of the people in a formal consultative organ is

⁶⁴ Tierney, above n 2, at 19.

⁶⁵ Katz, above n 31, at ch 5; and Tierney, above n 53.

⁶⁶ David Van Reybrouck *Tegen Verkiezingen* (De Bezige Bij, Amsterdam, 2013) (translated ed: Liz Waters (translator) David van Reybrouck *Against Elections: the Case for Democracy* (The Bodley Head, London, 2016)) at 5.

⁶⁷ Maija Setälä “On the Problems of Responsibility and Accountability in Referendums” (2006) 45 Eur J Pol Res 699 at 709.

⁶⁸ Harlow, above n 8, at 81.

⁶⁹ Van Reybrouck, above n 66, at 16.

inextricably bound up with elections”.⁷⁰ Consequently, representative democracy is insufficient for democratic legitimacy to transpire.

2 *Direct democracy*

Direct democracy involves the personal participation of eligible citizens in public decision-making at the end of the process. This has necessarily become diluted given the emphasis on representative democracy and rendered somewhat equivalent to the referendum.⁷¹ Each eligible citizen must have an equally weighted vote. On its own, this form of democracy can leave much to be desired. James Madison argued that it gives effect to the “tyranny of the majority”.⁷² If it is merely equated to the use of referenda, as currently used, citizen participation amounts to ticking boxes and stipulating a ‘yes’ or ‘no’ vote. Direct democracy usually operates in tandem with representative democracy.⁷³ On its own, direct democracy does not serve to remedy the fears alluded to in Part II.

3 *Participatory democracy*

Political apathy in significant sectors of the citizenry is obnoxious to democracy ... Participation attenuates the abyss between government and society, felt even in working democracies, which makes government alien and aloof.⁷⁴

A participatory theory of democracy requires the active involvement of citizens in decision-making processes.⁷⁵ Participatory democracy is aimed at maximising government *by* the people. Overall, participatory democracy increases legitimacy through addressing the “desires” of the people, educating the populace and ensuring acceptance of the outcome.⁷⁶ Ideally, participation will increase citizens’ “appetite and aptitude” for engagement.⁷⁷ For participation to be meaningful, it needs to be “institutionally embedded” and incorporated

⁷⁰ At 37.

⁷¹ Colón-Ríos, above n 6, at 62.

⁷² Attributed to James Madison *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (The Federalist Papers, 8 February 1788).

⁷³ Tierney, above n 2, at 13.

⁷⁴ Carlos Santiago Nino *The Constitution of Deliberative Democracy* (Yale University Press, New Haven, 1996) at 154.

⁷⁵ Carole Pateman *Participation and Democratic Theory* (Cambridge University Press, London, 1970) at 43; and Katz, above n 31, at ch 5.

⁷⁶ Pateman, above n 75, at 79; and Katz, above n 31, at ch 5.

⁷⁷ Allan Hutchinson and Joel Colón-Ríos *What’s Democracy Got To Do With It? A Critique of Liberal Constitutionalism* (Osgoode Hall Law School, Comparative Research in Law and Political Economy Research Paper 29, 2007) at 36.

into the procedural requirements.⁷⁸ Further, each citizen needs an equal opportunity to participate.

4 *Deliberative democracy*

Deliberative democracy entails the addition of meaningful conversation to legitimise the process and outcome.⁷⁹ Where there is disagreement, citizens ought to reason together to transform preferences and reach a mutually acceptable decision.⁸⁰ Deliberative democracy requires a forum for discussion: it is a form of collective decision-making, inclusive of all citizens, where an “open and reflective” discussion guides the process.⁸¹ It serves to remedy the pitfalls of aggregative decision-making. Because deliberative democracy demands “reciprocity, publicity, and accountability”, it is better than alternative forms of democracy at identifying the shared concerns and injustices that people face and confronts them with more acceptable solutions.⁸²

For deliberative democracy to be meaningful, certain criteria need to be met. First, there must be provision of adequate information.⁸³ Second, fairness—people must give proper consideration to the issues and respect all competing perspectives.⁸⁴ It should be an inclusive, cooperative, open-minded and reflective procedure with informed citizens.⁸⁵ A core element to all of this is the equality of citizens.⁸⁶ It should seek to account for majority *and* minority interests.⁸⁷ The outcome ought to be informed consent.⁸⁸

⁷⁸ Van Reybrouck, above n 66, at 112.

⁷⁹ John Morrison “Models of Democracy: From Representation to Participation” in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th ed, Oxford University Press, Oxford, 2007) 134 at 137.

⁸⁰ Amy Gutmann and Dennis Thompson *Democracy and Disagreement* (The Belknap Press of Harvard University Press, Cambridge (Mass), 1996) at 1.

⁸¹ Tierney, above n 6, at 377; and Brennan, above n 10, at ch 3.

⁸² Gutmann and Thompson, above n 80, at 349.

⁸³ Ron Levy “Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change” (2010) 34 MULR 805 at 815.

⁸⁴ At 818.

⁸⁵ Ron Levy and Graeme Orr *The Law of Deliberative Democracy* (Routledge, Oxford, 2017) at 22–23.

⁸⁶ At 26.

⁸⁷ At 27.

⁸⁸ At 26.

Deliberative democracy is procedurally demanding. Deliberative democratic practices cannot deliver total legitimacy due to the inability of all people to deliberate upon all issues.⁸⁹ The above criteria for deliberative democracy are suggestive of its theoretical existence “far from reality”.⁹⁰ In reality, it is often utilised on a micro-scale.⁹¹ This leads to legitimacy concerns: why should citizens outside of the deliberation “confer legitimacy upon” the agreement reached?⁹² Furthermore, there is a danger of group polarisation, whereby groups of “like-minded people move one another to increasingly extreme positions”.⁹³ This is especially pertinent in heterogeneous societies where compromise may be unattainable and further relates to the aforementioned confirmation bias.

This form of democracy rejects the traditional referenda structure.⁹⁴ Direct democracy is insufficient for the attainment of legitimacy and cannot account for pluralism. A referendum reveals “people’s gut reactions”, whilst a form of deliberation will reveal “enlightened public opinion”.⁹⁵ A core objection to referenda is that they are “inherently incompatible with the democratic needs of a diverse multicultural society”.⁹⁶ This is not true. Referenda can be formulated to meet the standards of deliberative democracy. We will see how this could be realised in Part VI.

5 *Mutually exclusive?*

Constitutional referenda represent, at the minimum, a mixture of direct and representative democracy.⁹⁷ However, in order to really be considered democratically legitimate, there needs to be an injection of participatory and deliberative democracy. It is not sufficient, for

⁸⁹ John Parkinson “Legitimacy Problems in Deliberative Democracy” (2003) 51 *Pol Stud* 180 at 181; John Parkinson *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, Oxford, 2006) at 2.

⁹⁰ Michael Huemer *The Problem of Political Authority: An Examination of the Right to Coerce and the Right to Obey* (Palgrave Macmillan, New York, 2013) at 62.

⁹¹ See Ireland example discussed in Part V.

⁹² John Parkinson *Deliberating in the Real World*, above n 89, at 2; and John Dryzek “Legitimacy and Economy in Deliberative Democracy” (2001) 29 *Pol Theory* 651 at 656.

⁹³ Cass R Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, New York, 2001) at 19; and Daniel Bell “Democratic Deliberation: The Problem of Implementation” in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, New York, 1999) 140 at 146.

⁹⁴ Sunstein, above n 93, at 17.

⁹⁵ Van Reybrouck, above n 66, at 124.

⁹⁶ Tierney, above n 6, at 380.

⁹⁷ At 372.

the attainment of democratic legitimacy, for a singular form of democracy to be preferred to the exclusion of all others. These conceptions are not mutually exclusive.

B The Framework

For constitutional change to be considered legitimate, it must be achieved through democratic procedures consistent with popular participation.⁹⁸ From the above discussion there are four repeated features to account for: participation, deliberation, informed consent and equality. Further to this, there should be an infusion of transparency. If decision-makers know that their actions will be seen and judged by electors, there is likely to be better compliance with constitutional rules and norms.⁹⁹ Transparency in the context of constitutional referenda means a clear regulatory framework outlining the procedure to be adopted, thereby reducing the scope for elite control. The democratic legitimacy of each referendum approach discussed in Parts IV and V will be assessed primarily by reference to the following factors:

- Deliberation;
- Participation;
- Informed consent;
- Equality; and
- Transparency.

Each provision will be assessed on the degree to which it accords to these democratic ideals, thereby establishing the democratic legitimacy of the procedure adopted. This framework will be used to establish a model provision that maximises democratic legitimacy and mitigates the concerns raised in Part II. The criticisms of referenda articulated at the start of this paper are errors of practice, not principle. Incorporating more participatory and deliberative elements into the process could increase the political competence of the people, remove aspects of elite control and limit the possibility of a tyranny of the majority.¹⁰⁰ This framework will now be used to assess existing referenda arrangements in New Zealand and compare our approach to other jurisdictions.

⁹⁸ Colón-Ríos, above n 6, at 108.

⁹⁹ Kerkin, above n 54, at 136.

¹⁰⁰ Setälä, above n 67, at 717.

IV New Zealand's Use of Referenda

A Constitutional Setting

New Zealand is a representative democracy without a written constitution. All of the constitutional rules and norms are not contained in a single accessible document that is more difficult to change than ordinary laws.¹⁰¹ Constitutional change in New Zealand often takes place as a “pragmatic and practical response to events”.¹⁰² The change is slow-moving and reactive: “New Zealand’s constitutional development has always been based on consensus, never revolution”.¹⁰³ The core norms “essential” to the character of our constitution are representative democracy, parliamentary sovereignty, the rule of law, judicial independence and constitutional conventions.¹⁰⁴ The system of representative democracy does not allow much room for legitimate deliberation and participation.

Constitutional literacy in New Zealand is poor. As a generalisation, we “do not take great interest in constitutional matters”.¹⁰⁵ There have been multiple requests for improved civics and citizenship education but meaningful change has not occurred.¹⁰⁶ Most citizens over the age of 18 can vote.¹⁰⁷ Eligible citizens do not need to demonstrate the capacity to cast an informed vote.¹⁰⁸

There are three existing methods for the use of referenda in New Zealand: government-initiated referenda, s 268 of the Electoral Act 1993, and the Citizens Initiated Referenda Act 1993 (CIR Act). Additionally, in *A Constitution for Aotearoa New Zealand (Constitution Aotearoa)*, Sir Geoffrey Palmer and Andrew Butler propose a codified, supreme law constitution which would include the use of a referendum as one of two means

¹⁰¹ Geddis, above n 60, at 16.

¹⁰² Silvia Cartwright *The Role of the Governor-General* (Victoria University of Wellington, NZCPL Occasional Paper No 6, 2001) at 15.

¹⁰³ At 15.

¹⁰⁴ Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22(4) NZULR 565 at 580.

¹⁰⁵ Constitutional Arrangements Committee *Inquiry to review New Zealand’s existing constitutional arrangements* (August 2005) at 5; and Joseph, above n 62, at 148.

¹⁰⁶ See Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation* (November 2013) at 98.

¹⁰⁷ See Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010; Electoral Act 1993, s 74; and protected by New Zealand Bill of Rights Act 1990, s 12.

¹⁰⁸ Whether this is a good idea will be discussed in Part VI.

for the amendment of any of the provisions of the written Constitution.¹⁰⁹ The CIR Act is the only innovative method—the other methods enshrine the procedural status quo. The following section will outline these four methods for referenda and highlight the preliminary concerns that these methods raise.

B Government-Initiated Referenda

Government-initiated referenda are not regulated. At any time, the Government may choose to send an issue to a referendum and the procedure will be built around it. Accordingly, this method entails genuine fears for elite control, lack of deliberation, information and reduces the accountability and responsibility of the government.

One of the more recent examples of a government-initiated referendum in New Zealand was called by the National Government as part of their 2008 election campaign. The vote pertained to whether New Zealanders wished to keep the Mixed Member Proportional (MMP) system for voting. The date for the referendum was announced on 20 October 2009, giving voters approximately two years' warning.¹¹⁰ This referendum was held in conjunction with the 2011 general election and had a voter turnout of 73.5 per cent. The Electoral Commission presented advertising campaigns, a DVD and an “interactive toolkit” to inform voters on the various voting systems before the election.¹¹¹ It is unclear how many voters this reached.

Although resoundingly criticised,¹¹² the flag referendum held in 2015–2016 implemented worthwhile democratic procedures. The Government implemented a two-stage procedure that is more open to a deliberative process. With more time to discuss the options and engage in wide scale debate across social media platforms, citizens had time to inform themselves and others. The referendum was conducted by postal vote.¹¹³ The first vote, held between 20 November and 11 December 2015, asked voters to rank their preferences for the alternative flag.¹¹⁴ The second vote pitted the first placed flag from the initial vote against the current flag. For the first question, 48.78 per cent of voters participated. This

¹⁰⁹ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at art 116.

¹¹⁰ Simon Power “MMP referendum to be held at 2011 election” (press release, 20 October 2009).

¹¹¹ “Referendum Public Information and Resources” Electoral Commission <elections.org.nz>.

¹¹² See Elections, above n 42; (12 March 2015) 703 NZPD 2217; and “Taxpayers face \$25 million bill even if old flag stays” *The New Zealand Herald* (online ed, Auckland, 30 October 2014).

¹¹³ In accordance with the Referenda (Postal Voting) Act 2000.

¹¹⁴ “Referendums on the NZ Flag” Electoral Commission <elections.org.nz>.

increased to 67.8 per cent for the second question.¹¹⁵ In the end, the current flag was retained. The low engagement is perhaps symbolic of the issue, championed by then Prime Minister John Key, not resonating with citizens. It represented a divide between the Government and the electorate.

Irrespective of the process adopted, the lack of clarity over the procedure due to the ad hoc regulation of each government-initiated referendum necessitates the conclusion that these lack democratic legitimacy. They do not provide transparency for voters and do not, on the whole, account for deliberation and informed consent bar the two-stage process adopted for the flag referendum.

C Electoral Act 1993

Section 268 of the Electoral Act 1993 singularly entrenches some of the core provisions (the “reserved provisions”) of the Electoral Act 1993 and s 17(1) of the Constitution Act 1986. Had the 2011 MMP referendum resulted in a vote for a changed voting method, s 168 of the Electoral Act 1993, a reserved provision, would have been amended per s 268. Section 268 highlights two important ideas about the procedural requirements for referenda: the lack of guidance with regards to the process and whether a referendum result can bind Parliament. First, it does not provide any information as to the method and process for voting. It would be an ad hoc process to be arranged if and when the issue arose. It merely retains the status quo of murkiness, suggesting this is a tool capable of manipulation by elites. Second, the use of single entrenchment raises the question of whether the provision is capable of amendment or repeal such that Parliament could achieve in two steps by ordinary majority what in one step requires a 75 per cent super-majority. Fortunately, this provision has never been tested in such a manner. The orthodox view is that this is a “conventional rather than legal” protection for the reserved provisions.¹¹⁶ Extrapolating from this, it raises the question as to whether Parliament, as the supreme power in New Zealand, can bind itself to the result of a referendum.¹¹⁷

D Constitution Aotearoa

Related to s 268 of the Electoral Act, the proposed written constitution by Geoffrey Palmer and Andrew Butler presents a procedure for constitutional amendment requiring either a

¹¹⁵ See “First Referendum on the New Zealand Flag Final Result” (15 December 2015) Electoral Commission <electionresults.govt.nz>; and “Second Referendum on the New Zealand Flag Final Result” (30 March 2016) Electoral Commission <electionresults.govt.nz>.

¹¹⁶ Joseph, above n 62, at 130.

¹¹⁷ At 142.

75 per cent majority in the House of Representatives or a referendum whereby 50 per cent of voters support the proposed change.¹¹⁸ This is essentially copied and pasted from s 268 of the Electoral Act 1993. Palmer and Butler state an expectation that major constitutional issues will be subject to a referendum.¹¹⁹ However, there is no mention of the process required for a referendum other than its containment in an Act of Parliament. There are no participation, timeframe or informational requirements and nor do they define “major constitutional issues”. This omission needs to be understood within the purpose of the project to produce a supreme and entrenched constitution. To greater fulfil the aims of this project, however, there ought to be increased infusion of deliberative democracy. This is not to say that these procedures ought to be constitutionally enshrined, merely that there should be an accompanying piece of legislation dictating the procedure to be adopted.

E Citizens Initiated Referenda Act 1993

The CIR Act contains 59 sections and has been characterised as “deceptively straightforward”.¹²⁰ It is our most innovative form of democratic participation. The Act provides for petitions to be presented to the House of Representatives requesting an indicative referendum on an issue.¹²¹ In gathering signatures for the petition, citizens may engage in a discussion about the merits of a proposal—a deliberative component to the process. The Clerk of the House, an independent public servant, publishes the proposal in *The New Zealand Gazette* and determines the final wording of the question.¹²² The promoter of the petition must gather the signatures of ten per cent of eligible voters within twelve months.¹²³ There are a number of procedural requirements governing this process, including the specific form requirement and the authentication of the signatures by the Clerk of the House.¹²⁴ If successful, the petition is then presented to the Speaker of the House and the Governor-General sets the date or voting period.¹²⁵ The referendum is then held as an electoral poll or by postal voting.¹²⁶ The outcome does not bind the government and there are subject-matter and expenditure limits. There is a \$50,000 spending limit on

¹¹⁸ Palmer and Butler, above n 109, at art 116.

¹¹⁹ At 22–23 reflecting the expectation of the report by the Royal Commission on the Electoral System, above n 37.

¹²⁰ Morris, above n 36, at 121.

¹²¹ Sections 3 and 5.

¹²² Sections 7–11.

¹²³ Sections 6, 18 and 19.

¹²⁴ Sections 4, 12, 18 and 19.

¹²⁵ Section 21 and 22.

¹²⁶ Sections 22–22AB and 24–24A.

promoting or opposing a petition and the subject cannot be one that is covered by the Electoral Act 1993 or was previously subject to a citizens initiated referenda.¹²⁷ The existence of expenditure limits negate the possibly negative or manipulative influence of wealth.

The turnout for citizens initiated referenda has varied considerably.¹²⁸ The first, held in 1995, on the number of full time professional firefighters, resulted in 27 per cent of eligible citizens participating in the referendum. The 1999 referendum on reform of the justice system had a turnout of 84.8 per cent and resulted in the Sentencing Act 2002. The August 2009 referendum on “smacking as part of good parental correction” had a turnout of 56.09 per cent. The amendment to the Crimes Act to remove this as a defence for assault had already passed in Parliament. The most recent example is the 2013 referendum on the sale of state owned enterprises. The Government proceeded with the sales, regardless of 67.3 per cent of participating voters saying they did not support the proposal with a voter turnout of 45.07 per cent.¹²⁹

The purpose of the CIR Act to improve citizen engagement is admirable but its execution is flawed. It was once criticised as having “fallen into desuetude”.¹³⁰ The structure of the Act suggests systematic bias against referenda: the outcome is non-binding, the signature threshold is high,¹³¹ and there are significant time constraints.¹³² The lack of assistance provided to petitioners has led to poorly phrased questions being subjected to significant restructuring by the Clerk.¹³³ Past practice suggests that the results have not had any real impact on policy.¹³⁴

The ability of the electorate to make an informed decision is impeded by the lack of any requirement for information to be provided to citizens.¹³⁵ The Cabinet Manual advises against Government comment.¹³⁶ The Act provides no prohibition on the kinds of questions

¹²⁷ Sections 2–4 and 42. See also the Long Title of the Act.

¹²⁸ See “Referenda” (4 August 2016) Electoral Commission <elections.org.nz>.

¹²⁹ “2013 Citizens Initiated Referendum” Electoral Commission <www.elections.org.nz>.

¹³⁰ Morris, above n 36, at 117.

¹³¹ Bridget Fenton and Andrew Geddis “Citizens Initiated Referenda” [2009] NZLJ 334 at 334.

¹³² Citizens Initiated Referenda Act 1993, s 22AA.

¹³³ Morris, above n 36, at 123; and Fenton and Geddis, above n 131, at 335–336.

¹³⁴ Geddis, above n 60, at 319.

¹³⁵ Morris, above n 36, at 133.

¹³⁶ Cabinet Office *Cabinet Manual 2017* at [7.138].

that may be asked, outside of conflict with the ambit of the Electoral Act 1993.¹³⁷ The only deterrence to potentially “frivolous” questions is the \$500 proposal filing fee.¹³⁸ Nonetheless, biased and emotive questions have been posed to the public: the anti-smacking referendum presupposed that a “smack” was part of “good parental correction”.¹³⁹ The Rt Hon David Lange MP criticised the Act at its introduction stating that it is “actually a fraud on the community for the Government to ask for its opinion when the Government has said that it will not necessarily follow that opinion”.¹⁴⁰ This criticism may also apply to all other forms of referenda in New Zealand.

The CIR Act was introduced as a response to concern that governments were “unresponsive to the electorate” and had “lost their trust”.¹⁴¹ It represents a commitment from Parliament to allow for greater citizen engagement and democratic participation. The allowance for citizen initiation alleviates concerns over elite control and the independence of the Clerk of the House in reframing the question also mitigates this concern. However, there are two crucial flaws in the Act’s design: it is not legally binding¹⁴² and the timeframe is limited. There is no obligation for Parliament to respond to a referendum conducted under the CIR Act. The only time period in the Act is the requirement that a referendum be held within twelve months of the petition being presented to the House.¹⁴³ This is in conjunction with no requirement for information to be published to aid public knowledge and understanding of the issue.¹⁴⁴ A deliberative element is missing. However, direct democracy in the form a citizen led initiative is commendable. The threshold requirements for the petition suggest that this is likely to be representative of an issue that is resonating with the general public—perhaps unlike some government-initiated referenda.

F Legitimacy

There are a number of legitimacy concerns raised by the various procedures by which a referendum can be held in New Zealand. Given our unwritten constitutional structure, we

¹³⁷ Citizens Initiated Referenda Act 1993, s 4.

¹³⁸ *Egg Producers Federation of NZ v Clerk of the House of Representatives* HC Wellington CP128/94 20 June 1994 at 6.

¹³⁹ “Final Result by Electorate for the Citizens Initiated Referendum 2009” (25 August 2009) Elections <www.electionresults.govt.nz>.

¹⁴⁰ (10 March 1992) 522 NZPD 6707.

¹⁴¹ Morris, above n 36, at 119.

¹⁴² Discussed in Part VI.

¹⁴³ Citizens Initiated Referenda Act 1993, ss 22AA.

¹⁴⁴ Citizens Initiated Referenda Act 1993, ss 22AA–22AB.

must note that these procedures are not limited to major constitutional issues and have not often been used for purely constitutional issues. The Electoral Act and *Constitution Aotearoa* are the only two mechanisms which limit the use of referenda as the relevant provision sits within a focused Act. A citizen or government-initiated referendum could be held on any issue and they are therefore open to the whims of the electorate and the government respectively.

The first issue is uncertainty. There needs to be a proper supporting framework that outlines the procedure in the period prior to the vote. The lack of regulation controlling the process for a referendum to be undertaken risks undermining democratic legitimacy—it opens citizens to the caprice of officials who may manipulate the process to ensure a particular outcome. At a minimum, there ought to be a requirement that information about the referendum and the campaigns are provided to citizens to ensure informed consent. The CIR Act is the closest New Zealand has to a legal control over the timing and subject of referenda but this is still imperfect. For other forms of referenda, it is entirely foreseeable that the government could hold a snap referendum or unduly elongate the process to manipulate the outcome. There is limited transparency with regards to the process, until the government announces what it has chosen to adopt. Quite simply, New Zealand is fortunate that the process has not been severely abused in the past.

The second issue relates to engagement. Nowhere is there a suggestion of a deliberative component, save for the potential for deliberative engagement in the collecting of signatures for a CIR Act petition. Furthermore, the only example with significant voter turnout is the 2011 MMP referendum, which was held in conjunction with an election. Tying in with the transparency concerns, the lack of informative campaigns (excepting those undertaken by the Electoral Commission) means there is likely to be a lack of informed voters making a reasoned decision on the basis of accurate information. The problems condense into to a lack of procedural regulation, culminating in little engagement and ill-informed citizens. From a perspective of democratic legitimacy, representative and direct democracy are clearly present. Participatory democracy is given some effect through the CIR Act. Deliberative democracy is ignored.

V *Comparing Constitutional Referendum Requirements*

The CIR Act is an innovative statutory mechanism that provides an opportunity for citizen driven direct democracy. However, its execution is imperfect. *Constitution Aotearoa* and the Electoral Act have maintained the status quo with the referendum requirements and have not attempted to alleviate the concerns with the existing framework. These approaches

would benefit from adapting successful mechanisms implemented in other countries. Four approaches will be described here: Australia, Switzerland, Ireland and the United Kingdom. Each has something interesting to offer in terms of democratic legitimacy.

A Australia

Section 128 of the Australian Constitution provides that for any proposed constitutional amendment a majority of electors must vote in favour of the change, in addition to a majority vote in at least four out of the six States.¹⁴⁵ Before this step, the proposed law must pass through the Houses of the Commonwealth Parliament. This requirement provides an opportunity for information about the impact to be provided to the electorate.¹⁴⁶ There have been forty-four referenda in Australia to amend the Constitution. Eight have succeeded. The difficulty in passing a proposal is perhaps due to the double referendum requirement, put in place to prevent the “tyranny of the majority”. This provision, which has arguably hindered the success of campaigns, is inapposite to the unitary State of New Zealand as Australia has a federal system. Given the emphasis on representative democracy in Australia, referenda tend to be selectively used for issues which elected representatives do not have the authority or inclination to change.

Voting in referenda is compulsory and the obligation is described in law as a “duty” upon the citizen.¹⁴⁷ The Referendum (Machinery Provisions) Act 1984 (Cth) (the Referendum Act) contains certain requirements limiting the spending on campaigns. The government may provide funds to the Australian Electoral Commission to provide “information relating to, or relating to the effect of, the proposed law”.¹⁴⁸ Section 11(4) of the Referendum Act provides that the Commonwealth cannot “expend money in respect of the presentation” of the arguments for either side, except in relation to the specific exemptions. This section prevents the Government from disbursing money to campaign for a particular side to the referendum in an attempt to sway voters. However, the emphasis on neutrality can be at the expense of all necessary information being provided to voters. It represents a barrier to spending on education campaigns and, problematically, there are no restrictions to the same extent on state and territorial governments, political parties, interest groups or

¹⁴⁵ Commonwealth of Australia Constitution Act 1901 (Cth), s 128.

¹⁴⁶ See “1999 Referendum” (24 January 2011) Australian Electoral Commission <www.aec.gov.au>.

¹⁴⁷ Referendum (Machinery Provisions) Act 1984 (Cth), s 45.

¹⁴⁸ Referendum (Machinery Provisions) Act 1984 (Cth), s 11(4)(b).

individuals.¹⁴⁹ This is an “overly strict” impediment to public education and is “unsuited to a modern campaign environment”.¹⁵⁰

Furthermore, the Referendum Act makes it unlawful to “mislead” voters.¹⁵¹ The onus to become informed is primarily on the citizens themselves.¹⁵² The High Court of Australia has previously stated that a referendum requires an informed decision of the people. Government and Parliament may only intervene to ensure the capacity of the people to do so.¹⁵³

Section 11(2) of the Referendum Act provides that where arguments in favour and against the proposed law have been forwarded to the Electoral Commissioner (within a certain time period), these must be compiled into a pamphlet to be sent to voters no later than 14 days before the voting day for the referendum.¹⁵⁴ The pamphlet will contain these arguments and the proposed textual alterations to the Constitution. The “official pamphlet” is the primary method by which the law ensures citizens have the capacity to make an informed vote on the day of the referendum. It was first used in 1912 when then Prime Minister Andrew Fisher stated that there:¹⁵⁵

... can be nothing worse for a country than to expect the people in it to vote for or against the alteration of their Constitution without knowing what they are doing.

However, it is not without its flaws. First, it is not compulsory. In practice, it has been “undermined by the prevalence of adversarial and misleading statements” and a failure to “convey the basic facts”.¹⁵⁶ Moreover, it need only be sent to citizens fourteen days before the vote, when it is almost too late to have any impact on voters. The provision of the ‘yes’ and ‘no’ campaigns, without neutral information untainted by bias, renders the pamphlet incapable of truly informing voters. The pamphlet should provide basic and accurate

¹⁴⁹ Paul Kildea and Rodney Smith “The Challenge of Informed Voting at Constitutional Referendums” (2016) 39 UNSWLJ 368 at 380.

¹⁵⁰ At 381.

¹⁵¹ Referendum (Machinery Provisions) Act 1984 (Cth), s 122.

¹⁵² Kildea and Smith, above n 149, at 384.

¹⁵³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁵⁴ Referendum (Machinery Provisions) Act 1984 (Cth), s 11(2).

¹⁵⁵ (16 December 1912) 51 CPD HR 7156.

¹⁵⁶ Kildea and Smith, above n 149, at 379.

information in a neutral manner.¹⁵⁷ The information should not be “adversarial rhetoric”.¹⁵⁸ One advantage is that it may be published online and distributed via email, as opposed to being sent by post.¹⁵⁹

1 The referendum on the Republic of Australia

The Australian People’s Constitutional Convention arose from the Constitution Convention (Election) Act 1997 (Cth) which was passed in anticipation of the 1999 referendum on whether Australia ought to become a republic. It was convened by the Government from 2–13 February 1998 as an experiment on deliberative democracy. The Convention was tasked with overseeing the process for the referendum. The engagement of the broader electorate was successful.¹⁶⁰ However, the Government retained considerable control over the process. The Convention had 153 delegates. Half were popularly elected and the remainder were appointed by the Government. Of those appointed, 40 were Members of Parliament in the Commonwealth and state Parliaments and 36 were representative of groups across civil society. The election of the other half was conducted through a non-compulsory postal vote which perhaps favoured the middle class with the time and means to participate in the process.¹⁶¹ Over 45 per cent of eligible voters participated in this election process. This dynamic served to ensure that there were “expert” delegates who could inform the elected individuals. However, selecting people on the basis of their identities and interests could have also altered the dynamic of the Convention—the individual must always bear in mind the reason for their appointment and who they are meant to represent, rather than consider the interests of the public in general.¹⁶²

The Convention was tasked with addressing three issues:¹⁶³

- whether Australia should become a republic;
- which republic model ought to be put to the electorate to consider against the status quo (a constitutional monarchy); and
- the time frame and circumstances under which any change could be considered.

¹⁵⁷ At 393.

¹⁵⁸ George Williams and David Hume *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, Sydney, 2010) at 261.

¹⁵⁹ Referendum (Machinery Provisions) Act 1984 (Cth), ss 11(2)(c) and 11(4)(ac).

¹⁶⁰ See generally Tierney, above n 2.

¹⁶¹ At 195.

¹⁶² At 195.

¹⁶³ At 201.

This is an interesting combination of issues. The powers of the Convention were merely advisory but the advice was treated as politically binding.¹⁶⁴

The full proposal (in Bill form) was able to be scrutinised by voters. This included the process as to how the future Australian President would be elected or selected. The Referendum Act allowed the government to spend money (\$20 million) on public information activities in the lead up to the referendum. The Electoral Commission provided neutral information documents to each voter alongside the official pamphlet. The official pamphlet was created by two ten-person teams from the Convention. The public education campaign was conducted before the official pamphlet was distributed, ostensibly so the public was more generally informed on the background before reading the biased campaign proposals in the official pamphlet. The proposal was ultimately rejected by 55 per cent in the general vote.¹⁶⁵

Irrespective of the outcome, this process raises some interesting ideas around participation and deliberation. Australia does not use a form of citizens initiated referenda, however the Convention was used to help frame the issue to be put to the public, as opposed to Government or Parliament dictating the question and change. Prior framing by a Convention-type body can add legitimacy to the referendum process as citizens feel they have more control and are not merely responding to the will of the elite. The process extended the opportunity for deliberative elements to the referendum: in electing people to the Convention, during the Convention, the debates and voting on the proposal.¹⁶⁶

Furthermore, the Convention was implemented in the context of a representative democracy. Consequently, the appointment of particular individuals makes sense: an election of all 153 delegates may not have created a group representative of all interests in society. A structured element to the appointment procedure can mitigate fears about majority dominance. Likewise, elected representatives may not have sufficient knowledge or expertise on the issue(s) to be discussed and may feel bound by their election platform, rather than engaging in true deliberation and transformation of preferences.¹⁶⁷

¹⁶⁴ At 207.

¹⁶⁵ At 218.

¹⁶⁶ Williams and Hume, above n 158, at 27.

¹⁶⁷ At 27.

An unfortunate aspect to the Convention was that there was no educative or hearings phase allowing interaction between Convention members and the public. Information was passed along as the issue arose and citizens outside the process could not offer contributions. There should be, and was not, a connection between micro and macro-level deliberation. Additionally, participants must be able to access sufficient information to maximise deliberation. An informed deliberative process requires education.¹⁶⁸ Interestingly, there has been criticism over allowing the Convention to frame the issue to be put to citizens. There is concern that allowing them to do so skews the “balance of power” from the representative government to a small group.¹⁶⁹ The counter to this is that framing of the question by the executive can hardly be considered a neutral exercise. If the concerns over a Convention controlling the question are valid, this must be put into perspective: the alternative is the Government choosing the question, which is not a better proposition.

2 *Legitimacy*

Australia has been described as “constitutionally speaking ... the frozen continent” due to its inability to successfully reform the Constitution via a referendum.¹⁷⁰ Constitutional referenda have not often been successful. There are a multitude of reasons put forward to explain this. Some suggest it is because the voters are ignorant of the Constitution and the proposed change or are “inherently averse” to change.¹⁷¹ Alternative explanations relate to cross-party support and elite control.¹⁷² The concern over the constitutional education of citizens about the Constitution is not readily rectified in a country as large as Australia.¹⁷³ A simple explanation for the reticence to change is that the referenda are government-initiated, so they often entail increasing the powers of the Commonwealth—something citizens are rightly wary of.¹⁷⁴ However, the success or failure of a referendum is not determinative of the legitimacy of the process.

¹⁶⁸ Tierney, above n 2, at 215.

¹⁶⁹ At 207.

¹⁷⁰ Geoffrey Sawyer *Australian Federalism in the Courts* (Melbourne University Press, Melbourne, 1967) as cited in George Williams, Sean Brennan and Andrew Lynch *Blackshield and Williams: Australian Constitutional Law and Theory: Commentary and Materials* (6th ed, The Federation Press, Leichhardt, 2014).

¹⁷¹ At 1341.

¹⁷² Helen Irving “The Republic Referendum of 6 November 1999” (2000) 35 *Australian Journal of Political Science* 111 at 112.

¹⁷³ Greg Craven “Referenda, Plebiscites and Sundry Parliamentary Impedimenta” (2005) 20(1) *Australasian Parliamentary Review* 79 at 83.

¹⁷⁴ Williams and Hume, above n 158, at 101.

The concerns with the Australian constitutional referenda procedure are the proliferation of biased information, lack of transparency and few opportunities for participation. The current legal arrangements are not conducive to active engagement by all citizens. The 1999 referendum is an anomaly whereby the government was proactive in ensuring deliberation. However, this is not the status quo. Whether this will become the new norm is yet to be tested. There are two main concerns: the role of the government in initiating and framing the process and the education of citizens. At the very least, the Convention represents a deliberative step forward for Australia vis-à-vis New Zealand. However, the CIR Act is more progressive than the Australian Constitution in permitting citizens to initiate the process.

Moreover, there is a divide between micro and macro-level deliberation. The official pamphlet, whilst an innovative tool, is used too late and too controversially in the process to really ensure an informed vote. Nevertheless, it is an interesting idea that has not been seen in New Zealand. If New Zealand adopted this process, legislation should ensure the information campaign is more neutral and implemented earlier in the process. The micro-level Convention is also something not utilised in New Zealand, however, it was perhaps too abstracted from the macro-level in Australia to maximise legitimacy. Likewise, there is a concern that the Government had too much control over this process. In the circumstances of the 1999 referendum this was because it was the initiative and innovation of the Government. This suggests that to alleviate this concern, it needs to tie in with the citizens initiated referenda approach of New Zealand.

B Ireland

Article 46 of the Constitution of Ireland 1937 requires that an amendment shall be initiated in Dáil Éireann (the lower House) as a Bill and shall, upon having been passed or deemed to have been passed by both Houses of the Oireachtas (Parliament), be submitted to a referendum. Article 47 requires an ordinary majority of voters to support the proposal for it be successful and enacted into law. This is similar to the Australian approach, albeit less procedurally demanding. However, Ireland has recently engaged in a shift towards more deliberative democracy.

1 *The Convention on the Constitution*

In 2012, the Convention on the Constitution was established. It was a forum of randomly selected, representative Irish citizens.¹⁷⁵ The Convention was comprised of 100 members: 66 ordinary citizens selected at random by a survey company, 29 members of the Irish parliament, four members of the Northern Ireland Assembly and an independent chairperson. One legitimacy concern was related to the use of a representative model which limited the equal opportunity of citizens to participate. Furthermore, the body tasked with achieving a representative selection allowed nominations for participation.¹⁷⁶ This undermined the diversity of the Convention, lessening its deliberative potential.¹⁷⁷ However, the balance between the elites and laypeople was effectively struck, with fears that politicians would dominate the process not being realised.¹⁷⁸ Therefore, the hybrid process, also witnessed in the Australian experience, is perhaps a successful tool for micro deliberation to maximise efficiency, representativeness and knowledge.

The Convention was tasked with considering the Constitution, ensuring its appropriateness for the 21st century and presenting recommendations for amendment to the Oireachtas. The specific terms of reference were dictated by the Government but the Convention retained an open-ended mandate to consider “such other relevant constitutional amendments that may be recommended by it”.¹⁷⁹ If the recommendations were accepted, they were to be presented to the wider public in a referendum in accordance with art 46.¹⁸⁰ The intention was to encourage deliberation and publicity for the political reform agenda and stimulate citizen involvement.¹⁸¹ In the end only two of the Convention’s 18

¹⁷⁵ See “The Convention on the Constitution” An Coinbhinsiún ar an mBunreacht The Convention on the Constitution <www.constitution.ie>.

¹⁷⁶ Eoin Carolan “Ireland’s Constitutional Convention: behind the hype about citizen-led constitutional change” (2015) 13 *ICON* 733 at 742.

¹⁷⁷ At 742. See also H  l  ne Landemore “Deliberation, Cognitive Diversity, and Democratic Inclusiveness: an epistemic argument for the random selection of representatives” (2013) 190 *Synthese* 1209.

¹⁷⁸ David Farrell “Constitutional Convention ‘brand’ is in jeopardy: The Convention produced nine reports. Four of these have yet to be debated in the Oireachtas” *Irish Times* (online ed, Dublin, 17 March 2015).

¹⁷⁹ See “Convention – Terms of Reference” (July 2012) An Coinbhinsi  n ar an mBunreacht The Convention on the Constitution <www.constitution.ie>.

¹⁸⁰ Constitution of Ireland 1937, art 46.

¹⁸¹ David M Farrell, Eoin O’Malley and Jane Suiter “Deliberative Democracy in Action Irish-Style: the 2011 We the Citizens Pilot Citizens’ Assembly” (2013) 28 *Irish Political Studies* 99 at 100.

recommendations for constitutional change were put to referendum: same sex marriage and the age of eligibility for presidential candidates.¹⁸²

There is again an issue with balancing micro and macro-level participation and deliberation. The Convention had the authority to set the issues to be discussed and whilst the broader public could make submissions, there was no criteria against which these could be judged.¹⁸³ The “inequality of access and influence of the Convention’s agenda” stemming from its lack of transparency has been criticised as significantly undermining “its descriptive and deliberative legitimacy”.¹⁸⁴

The apparent success of this experiment spurred the establishment of the Citizen’s Assembly in 2016 to consider both political (climate change and abortion) and constitutional issues (fixed term Parliaments and the procedure for referenda).¹⁸⁵ It was treated as a non-political forum for the examination of ethical and moral issues. Interestingly, this Assembly was comprised of 99 randomly selected Irish citizens and no appointed politicians. The Government has not committed to a referendum on accepted recommendations, leaving the outcome in the hands of the elite.

2 *Legitimacy*

The statistical representation used to appoint members to the 2012 Convention undoubtedly encourages inclusiveness but can come at the expense of minority voices with a particular interest in the issue. Nevertheless, it was an interesting test of deliberative democracy at a time where citizens feel disconnected from politics. Ireland has since been characterised as “a country that trusts its citizens rather than fearing them”.¹⁸⁶ The lack of guidance around the mandate of the Assembly is controversial, however, this issue would not arise in the context of a referendum convention as the terms of reference should be clearly defined. The most important missing element is inclusivity: the broader public had limited avenues for participation.

¹⁸² Harry McGee “Only two proposals for Constitution referendum” *Irish Times* (online ed, Dublin, 26 January 2015).

¹⁸³ Carolan, above n 176, at 744. See also An Coinbhinsiún ar an mBunreacht The Convention on the Constitution “Ninth Report of the Convention on the Constitution: Conclusions and final recommendations” (March 2014).

¹⁸⁴ Carolan, above n 176, at 745.

¹⁸⁵ Dáil Éireann *Resolution Approving Establishment of the Citizens’ Assembly* (July 2016).

¹⁸⁶ Joe Humphreys “Why Ireland’s citizen’s assembly is a model for Europe” *The Irish Times* (online ed, Dublin, 27 November 2016).

C Switzerland

Analogous to the CIR Act, a citizen-proposed amendment to the constitution in Switzerland (a federal popular initiative) requires the collection of 100,000 signatures within eighteen months and, if successful, a referendum whereby the proposal will succeed if there is a majority in both the general votes and the cantons.¹⁸⁷ The federal Parliament may put a counter-proposal to the electors at the same time. If the federal Parliament's proposal leads to the petition being withdrawn, then only the counter-proposal is put to vote at a referendum.¹⁸⁸ The same process is required for government-initiated changes.¹⁸⁹ The double majority requirement is akin to the procedure required in Australia and, once again, is inapposite to New Zealand as a unitary State.

Switzerland is unique for its sheer magnitude of direct democracy on both legislative and constitutional issues. The shortcoming is voter fatigue, leading to citizen disengagement and poor voter turnout. The ambit of the Swiss provision goes beyond major constitutional issues. As of October 2017, Swiss citizens will have had the opportunity to vote on three dates in 2017 encompassing seven different issues, including the federal decree on food security, 2020 pension reforms, an overhaul of the corporate tax code to attract international business and easier naturalisation of third generation immigrants.¹⁹⁰ The voter turnout has varied between 42 and 47 per cent.¹⁹¹ The power of citizens in Switzerland is remarkable and perhaps too extensive.¹⁹² Whilst an ideal model for legitimacy in the sense of direct democracy, it is at the expense of representative democracy and more deliberative models. However, it is an example of how citizen initiated change could work at the constitutional level and raises fewer concerns about elite control and manipulation.

D United Kingdom

The constitutional arrangements of the United Kingdom, most analogous to those of New Zealand, have been criticised as failing to emphasise “democratic values and popular participation”.¹⁹³ Therefore, it makes sense that the United Kingdom has a comparatively

¹⁸⁷ Federal Constitution of the Swiss Confederation 1999, art 138 and 139.

¹⁸⁸ Royal Commission on the Electoral System, above n 37, at [7.9].

¹⁸⁹ Federal Constitution of the Swiss Confederation 1999, art 140.

¹⁹⁰ Swiss Federal Chancellery “People’s vote from 12.02.2017” (19 September 2017) <www.admin.ch>; Swiss Federal Chancellery “People’s vote from 21.05.2017” (19 September 2017) <www.admin.ch>.

¹⁹¹ Swiss Federal Chancellery “People’s vote from 12.02.2017”, above n 190; Swiss Federal Chancellery “People’s vote from 21.05.2017”, above n 190.

¹⁹² See example provided at Part II(E).

¹⁹³ Robert Blackburn “Enacting a Written Constitution for the United Kingdom” (2015) 36 Stat L R 1 at 5.

fraught history with constitutional referenda vis-à-vis the above jurisdictions with written constitutions which emphasise broader citizen engagement. Brexit is a prime example where we have witnessed the extensive debate about whether voters were truly informed going into the Brexit referendum. All referenda in the United Kingdom are government-initiated and the Government decides whether they are binding. There is prima facie considerable scope for elite control of this process. Referenda are utilised on an ad hoc basis at the “convenience of the government”.¹⁹⁴ This discretionary power may therefore be used to “augment the power of government” as opposed to limiting it.¹⁹⁵ However, it has been argued that there is now a constitutional convention whereby a referendum is to be held on major constitutional issues.¹⁹⁶

Despite the broader concern that citizens cannot initiate referenda in the United Kingdom, there is extensive regulation of the process. The Political Parties, Elections and Referendums Act 2000 provides for the establishment of two official campaigns for the two sides to the referendum question that can apply for the same level of public funding.¹⁹⁷ The Act further restricts the money that can be donated and spent on the campaign.¹⁹⁸ With regards to the framing of the question, the Act delegates a supervisory function to the Electoral Commission. The Commission is tasked with considering the wording of the question and must publish a statement of its views on the intelligibility of the question.¹⁹⁹ In the past, the Commission has convened focus groups to determine what ordinary citizens actually understand.²⁰⁰ The groups test the question empirically and assess its effectiveness. Parliament, however, has the final say on the wording. These procedural controls limit the scope for manipulation.

The legitimacy concerns are with the initiation and framing of the referendum. It is all at the behest of the Government. There is no allowance, necessarily, for participatory and deliberative democracy. The citizens have very limited power—except to vote. However, there are interesting controls over the general process which do limit the extent to which the Government can influence the referendum.

¹⁹⁴ At 14.

¹⁹⁵ House of Lords Constitution Committee *Referendums in the United Kingdom* (HL Paper 99, April 2010) at [70].

¹⁹⁶ Vernon Bogdanor *The New British Constitution* (Oxford, Hart Publishing, 2009).

¹⁹⁷ Political Parties, Elections and Referendums Act 2000 (UK), s 109–110.

¹⁹⁸ Political Parties, Elections and Referendums Act 2000 (UK), pt VII, ch 1.

¹⁹⁹ Political Parties, Elections and Referendums Act 2000 (UK), s 104(2).

²⁰⁰ Tierney, above n 53, at 517.

E Summary

The above assessment of four constitutional amendment processes via referenda teaches us a substantial amount about the variety of procedures and approaches to the democratic legitimacy of constitutional change. For New Zealand, there are some important lessons. First, the framing and setting of the question is an opportune moment for citizen participation. The conventions held in Australia and Ireland bear witness to this. It should not be solely for the government to initiate a referendum and implement micro-level deliberation, as this is not necessarily an authentic expression of the democratic will. Our use of citizens initiated referenda, similar to Switzerland, is a useful starting point. Second, there is a question as to the best method for constructing the deliberative element at the micro-level. Ireland and Australia have rather different experiences with interesting outcomes and perceptions of legitimacy. Third, the importance of legal regulation for transparency and clarity. A clear and accessible outline of the procedure to be followed before the moment of direct democracy with the ‘yes’ or ‘no’ vote can greatly enhance legitimacy as it minimises elite control and can be utilised to increase participation and deliberation. With regards to the latter point, there are a variety of mechanisms through which these ideals can be achieved. Fourth, there are considerable concerns over how to ensure that all citizens cast informed votes. The Australian approach is impressive in theory but flawed in execution with respect to this. These flaws may easily be rectified. Comparatively, the United Kingdom approach does not help citizens participate in an informed and effective manner. These lessons will now be applied in the construction of a model provision.

VI Developing a Model Provision

This paper now seeks to redeem constitutional referenda. This is achieved through an evaluation of conceptual and practical perspectives. This Part will first address whether a referendum can bind the State.²⁰¹ Second, the optimal procedure to be adopted to ensure participation and well-informed voters will be discussed (ie deliberative democracy as part of democratic legitimacy). Third, threshold issues will be evaluated—namely, the number of participants required and the voting requirement for a proposal to be successful. Fourth, procedural regulation will be canvassed. The intention is to mitigate the concerns raised with referenda in Part II by diffusing control of the process, reducing unpredictability and ensuring democratic legitimacy as defined in Part III, which should all contribute to an accepted result.

²⁰¹ See Bogdanor, above n 196, at ch 7.

A *Binding Nature of the Referendum*

Constitutional referenda implicate the central relationship between the people and the State. One issue is whether the people can bind government or Parliament. There are two perspectives here: first, whether a citizens initiated referendum can bind Parliament and, second, whether government can bind itself (and Parliament) to the result of a government-initiated referendum. This involves a consideration of the role sovereignty has to play in modern society.

Competing conceptions of sovereignty can influence whether referenda are seen as a valid tool for constitutional change and development. The orthodox doctrine of parliamentary sovereignty, as per Dicey, means Parliament can “make or unmake any law whatever”.²⁰² Referenda are not a valid limitation on the powers of Parliament. They are merely indicative and treated as politically binding, as opposed to legally binding. Once considered inviolate, there has been more recent literature suggesting that this is not the case. Manner and form or procedural restrictions, which merely alter the way in which Parliament can *make* legislation, are valid. From this perspective, whilst the courts do not have the “power to consider the validity of properly enacted laws”,²⁰³ the courts can consider whether the law was properly enacted.²⁰⁴ Consequently, a “reconstructed” form of parliamentary sovereignty supports the conclusion that a referendum is a valid legal tool which may bind Parliament to the outcome.²⁰⁵ Parliament is capable of redefining its legislative procedures.²⁰⁶

New Zealand politicians and academics have tended to favour the prevalence of parliamentary sovereignty. The predecessor to s 268 of the Electoral Act 1993, s 189 of the Electoral Act 1956, was also not reserved or protected from ordinary amendment. It was

²⁰² Albert Venn Dicey *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 36.

²⁰³ *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330 quoted in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157.

²⁰⁴ See for example *Attorney-General v Trethowan* [1932] AC 526 (PC). For New Zealand based academic literature on this point see Claudia Geiringer “The Dead Hand of the Bill of Rights – Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament’s Power to Legislate?” (2007) 11 Otago L Rev 389; and FM Brookfield “Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach” (1984) 5 Otago L Rev 603. There is some question in New Zealand as to whether there are substantive limits to Parliament’s legislative function. However, this question cannot yet be considered settled. See *R (Jackson) v Attorney-General (UK)* [2005] UKHL 56, [2006] 1 AC 262; and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA).

²⁰⁵ Joseph, above n 62, at 575.

²⁰⁶ At 577.

singularly entrenched. This was a purposeful omission. Legally, Parliament would have the ability to amend s 189 or s 268 to exempt one of the reserved provisions or remove the procedural requirement and then implement the desired amendment to one of the provisions. Parliament could achieve in two steps what politically, if not legally, cannot be done in one. At the time the 1956 Act was passed, it was stated that Parliament “cannot bind successive Parliaments, and each successive Parliament may amend any law passed by a previous Parliament”.²⁰⁷ This philosophy was carried over into the 1993 Act but is not consistent with the preponderance of modern academic thought. The extensive case law and articles, from within and outside New Zealand, accepting the legality of procedural restrictions on Parliament should prevail.²⁰⁸

Furthermore, orthodox parliamentary sovereignty is paradoxical: “Parliament is all-powerful, yet powerless to limit its power”.²⁰⁹ As summarised by Blackburn:²¹⁰

... present claims for ‘parliamentary sovereignty’ operating in a constitutional vacuum are out of time and belong to the political conflicts between the Crown and Parliament in the 17th century. It is an untenable doctrine today that there should be no constitutional limitations at all upon what parliamentarians can do or legislate about ... however repugnant, totalitarian, or unpopular.

The sovereign power of Parliament is inconsistent with the power of the people in a democracy. A binding referendum reflects democratic legitimacy and requires a principled justification with more “cachet” than parliamentary sovereignty.²¹¹ If sovereignty is truly in the hands of Parliament, then society cannot truly be a democracy of government by the people. The arguments surrounding parliamentary sovereignty are esoteric and inaccessible to laypeople. If citizens were enlightened as to this debate, it would be rightly contested. It is incompatible with modern standards of accountability and government by, and for, the people. Accordingly, whilst parliamentary sovereignty can accept legally binding referenda, the better conception of sovereignty is popular sovereignty. The sovereign power resides in the people. A referendum, encompassing the direct engagement of people

²⁰⁷ (26 October 1956) 310 NZPD 2839.

²⁰⁸ See *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*, above n 203 at 330 quoted in *Shaw v Commissioner of Inland Revenue*, above n 203, at 157; *Attorney-General v Trethowan*, above n 204; *Geiringer*, above n 204; and *Brookfield*, above n 204.

²⁰⁹ Joseph, above n 62, at 538.

²¹⁰ Blackburn, above n 193, at 5.

²¹¹ Penelope J Brook, Tyler Cowen and Alexander Tabarrok *An Analysis of Proposals for Constitutional Change in New Zealand* (New Zealand Business Roundtable, September 1992) at [5.15].

in a law-making process, is representative of the power of the people: democratic legitimacy is dependent on the role the people have to play, particularly in a constitutional setting. The people must be the “ultimate source of legal power” within the system.²¹² Correctly understood, the referendum serves as an expression of popular sovereignty whereby the people collectively govern themselves on a constitutional issue.²¹³

To ensure democratic legitimacy, all branches of government ought to be forced to respond to popular demand.²¹⁴ The issues around efficiency and worthiness of the cause are not raised where referenda are used for major constitutional issues. A constitutional referendum ought to bind the State. Distinctions between the three branches of government are unnecessary and unhelpful. Parliament is subject to the law,²¹⁵ in accordance with the rule of law and has an obligation to respond and implement the required changes. The government must support this. The judiciary has an obligation to uphold and enforce all changes and results. To make a distinction between any branch and whether they can be bound is artificial. Principled distinctions can be debated in theory but, in practice, it is simply infeasible to suggest that the people are incapable of binding the elites employed or elected to represent the interests of the State. In reality, an ordinary citizen would be confused by their apparent incapacity to bind their representatives. For both popular sovereignty and democratic legitimacy to be realised, the State must be bound by any referendum result.

B Participation and Deliberation

Majoritarian voting does not, *prima facie*, allow for the realisation of inclusivity, cooperation and informed consent.²¹⁶ Democratic legitimacy requires the participation and deliberation of all voters. However, this is hard to realise in practice and is not reflected in current constitutional reform methods. It is utopian and fallible.²¹⁷ Deliberative democracy must be careful to not perpetuate existing inequalities, particularly with regards to

²¹² Tierney, above n 2, at 12–13.

²¹³ Richard Rawlings, Peter Leyland and Alison Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, Oxford, 2013) at 145.

²¹⁴ Royal Commission on the Electoral System, above n 37, at [7.19].

²¹⁵ *Shaw v Commissioner of Inland Revenue*, above n 203, at [13].

²¹⁶ Ron Levy “Deliberative Voting: Realising Constitutional Referendum Democracy” (2013) PL 555 at 557.

²¹⁷ Russell Hardin “Deliberation: Method, Not Theory” in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, New York, 1999) 202 at 228.

marginalised groups in society.²¹⁸ Participation and deliberation should be achieved at both the micro-level, with a select group of people, and the macro-level, where all eligible voters should have the means to participate and deliberate in a meaningful way. These methods can alleviate the aggregative and majoritarian criticism of referenda, as well as voter ignorance and elite control.²¹⁹ Democratic legitimacy demands that a referendum incorporates opportunity for deliberation.

1 Informed consent

If we take the view that democracy is the paradigmatic form of conflict resolution, whereby a society airs its differences and comes to a conclusion in the absence of coercion or fear, then some obligation must lie with government to provide, or at least facilitate, a means to debate the issues. Otherwise, the resultant decision rests on sand.²²⁰

Democratic legitimacy requires that citizens are properly and accurately informed about the issue.²²¹ When left to the whims of the general media this is unlikely to be achieved. Major constitutional issues are not often simple. Their implications can easily be misrepresented and misunderstood. Nonetheless, Kildea and Smith have argued that the knowledge required to cast an informed vote on a constitutional issue is no more onerous than that required in a general election.²²²

To an extent, the casting of an informed vote is “a matter of individual choice”.²²³ However, this is influenced by the information made available to voters and its accessibility. Legal regulation can play an important role here. A simple way to improve the access to information is to require a Bill to be published by the House of Representatives which clearly articulates all the changes that will be made should the process be successful. This is akin to the Australian process. However, to reduce the concern of elite control, this ought to come after a micro-level deliberative process.²²⁴ Once

²¹⁸ Kevin Olson “Legitimate Speech and Hegemonic Idiom: The Limits of Deliberative Democracy in the Diversity of its Voices” (2011) 59 Pol Stud 527 at 528.

²¹⁹ Tierney, above n 2, at 185; and Ron Levy “The Deliberative Case for Constitutional Referenda” (2017) 16 Election Law Journal 213 at 214.

²²⁰ Morris, above n 36, at 132.

²²¹ Levy, above n 216, at 563.

²²² Kildea and Smith, above n 149, at 372.

²²³ At 376.

²²⁴ Discussed later in this section.

micro-level deliberation has occurred, an information package ought to be sent to voters. This could be done by post and published extensively online. As an alteration to the official pamphlet utilised in Australia, the neutral information about the constitutional issue should be forefront, with the arguments of the ‘yes’ and ‘no’ campaigns of secondary importance. Both sides of the argument should still be sent to voters. If only the neutral information is sent to voters, it leaves citizens to take it upon themselves to find the arguments, likely fulfilling the confirmation bias concerns. This should alleviate the concerns raised by past use of the official pamphlet in Australia. The neutral information ought to be developed by the Electoral Commission. The Commission should also oversee the construction of the ‘yes’ or ‘no’ campaign arguments included in the package to prevent inaccuracies and overly emotive or biased language. A further requirement is allowing sufficient time for electors to inform themselves: a snap referendum is not conducive to informed voting.²²⁵

2 Macro-level participation

Ensuring, let alone regulating for, the deliberative participation of all eligible voters is unrealistic. Merely ensuring access to valuable information can help encourage deliberation between citizens on their own initiative. There are methods, however, of increasing deliberativeness at the voting stage of the referendum. One such method proposed in the literature is the implementation of scaled referenda.²²⁶ This would require voters indicating support for constitutional reform options on a “sliding quantitative scale”, requiring voters to evaluate the various costs and benefits to inform their choice.²²⁷ Scaled referenda have not been utilised and it is not hard to see why: it is impractical and it is unclear how the information on normative values would really feed into the change to be undergone should the campaign to alter the constitutional provision succeed. For example, how would an Australian citizen determine the extent to which they would like to see Australia change from a constitutional monarchy to a Republic? How does this work on a scaled basis?

Alternatively, before selecting ‘yes’ or ‘no’ at the ballot, voters could be asked about the values informing their choice. Voters could be asked to rank the values that should underlie the constitutional reform. As a hypothetical, voters in the Brexit referendum could have been first asked to identify the values informing their decision, for example whether they wanted to remain part of the single market or instead preferred a “hard Brexit” and then

²²⁵ Kildea and Smith, above n 149, at 377.

²²⁶ Levy, above n 216, at 570–572.

²²⁷ At 570–572.

would have been asked to tick ‘yes’ or ‘no’. This serves two purposes: first, it would ensure voters are making an informed choice by forcing them to think before they vote and, second, it would inform Parliament as to the intention of voters and preferences informing voters’ decisions. In the Brexit example, this could have led to the Government pursuing a “soft Brexit” as opposed to their “hard Brexit” approach. This would, ostensibly, provide government with information about what form the change should take.²²⁸ With the requirement for the micro-level assembly or convention, however, this would likely be superfluous. A value-based approach would be hard to execute and administer effectively.

As a form of macro-level deliberation before voting, Bruce Ackerman and James Fishkin propose a “Deliberation Day” whereby a national holiday will be established to allow a concentrated deliberative effort:²²⁹

It will be held two weeks before major national elections. Registered voters will be called together in neighbourhood meeting places, in small groups of fifteen, and larger groups of five hundred, to discuss the central issues raised by the campaign. Each deliberator will be paid \$150 for the day’s work of citizenship. To allow the rest of the workaday world to proceed, the holiday will be a two-day affair, and every citizen will have the right to take one day off to deliberate on the choices facing the nation.

The authors posit that Deliberation Day will result in a “more attentive and informed” public.²³⁰ Whilst this idea is discussed in the context of a Presidential election in the United States, it is conceivable that this concept could apply to major constitutional issues where there is only one proposal to be discussed. It would necessitate the deliberation of all voters and facilitate informed voting. This is, however, a costly proposal. Further, given New Zealand’s constitutional culture, it is unclear whether the people would support such a “holiday”. The idea should be asterisked and saved for further discussion. The dichotomy between reality and theory is at present too large to propose a “Deliberation Day” in New Zealand.

Any attempt to regulate for macro-level deliberation is difficult. Instead, the emphasis should be on providing opportunities for participation. Any legislation should be focused on ensuring citizens have the means to initiate their own deliberation—including access to accurate information and the provision of sufficient time to understand and debate the issue.

²²⁸ At 572.

²²⁹ Bruce Ackerman and James Fishkin *Deliberation Day* (Yale University Press, New Haven, 2004) at 3.

²³⁰ At 3.

One means to facilitate this is by removing this possibility for postal voting which could hinder deliberative conversation.

3 Micro-level participation

A form of micro-level deliberation can be modelled on the Australian and Irish methods. Where the referendum has been initiated by the government or a petition of citizens, the issue ought to be put to a Constitutional Convention for general framing of the issue and setting of the question. The information to be provided to the general electors will be crafted by the Convention, as was seen in the Australian Constitutional Convention. The question will also be drafted by the Convention, with a review of its intelligibility conducted by the Electoral Commission. The Convention should pass on their ideas about the form the proposed change should take to the House of Representatives. The House will then produce a Bill on the basis of this advice which will be published for the general public. The Bill does not need to be approved by the Convention. The perspective of the House ought to prevail at this point to give effect to representative democracy. Legislation should incorporate this phase of the process as a compulsory element to the referendum.

Legitimacy at a micro-level is hard to achieve as the Convention operates to the exclusion of wider society. However, this fear can be alleviated through the appointments process. The Australian nomination and election process is not to be preferred here, as it works on a necessarily majoritarian basis and can lead to the underrepresentation of minorities. Instead, the Irish approach of appointing a statistically representative group from the electoral roll should be utilised to ensure a smaller scale group broadly representative of society in general; including on the basis of age, gender, geographic location and ethnicity. However, no one should be allowed to nominate themselves or others for this position as the Convention needs to operate on a nonpartisan basis. Random selection is the best way to achieve “descriptive representation”.²³¹ To mitigate public apathy and unwillingness to participate, there ought to be remuneration provided for the time and travel dedicated to the Convention. This could be calculated by reference to the minimum wage and hours dedicated to the Convention and would need to be accounted for in the Budget.

The number of delegates required will necessarily depend on the general population at the time of the referendum but 70 is a worthy starting point to ensure a combination of representativeness and efficiency. In addition to these 70 delegates, 30 further officials should be appointed to the Convention in a bipartisan manner by the House of

²³¹ Hélène Landemore “Inclusive Constitution-Making: The Icelandic Experiment” (2015) 23 *Journal of Political Philosophy* 166 at 177.

Representatives. These appointed delegates should be experts on the matter: a mixture of public servants, including the Chief Justice, the Solicitor-General, the President of the Law Commission, the Clerk of the House of Representatives, the Chair of the Waitangi Tribunal, the Ombudsman and the Justice and Electoral Select Committee.²³² The remainder of the thirty shall be made up by academics. It is not easy to decipher the best mechanism through which a Convention ought to be constituted and much academic ink has been spilt on this issue. Furthermore, the distinction between representative individuals and officials is necessarily arbitrary. The proportions and total number are not set in stone. The Convention should meet for two consecutive weeks and should be transparent as possible, publishing discussions and decisions as frequently as possible to allow for outside input. The Convention should be receptive to outside input.²³³ The above is merely a recommended starting point, which may be altered.

4 Conclusion

The aim of deliberative and participatory measures is to encourage inclusivity and prevent marginalisation.²³⁴ Popular consent, more than mere majoritarian preference, legitimises the reform.²³⁵ The aim of this section has been to respond to the concerns of education and poor deliberation. It is important to note that legal regulation can only go so far in facilitating deliberation, much will depend on the circumstances, the alacrity of the government officials and the general public and media.²³⁶ Regulation can merely enable the neutrality of information and provide a forum for the exchange of ideas.

C Intensity of Preferences and Threshold Requirements

Majority rule is pragmatic but problematic. It merely aggregates votes, to the exclusion of the intensity of voters' preferences.²³⁷ The quantitative method of tallying votes does not necessarily account for the strength of opinion that voters may hold. Moreover, it facilitates the potential for tyranny of the majority and the marginalisation of minority factions in society, as was seen in the 2009 Switzerland referendum on minarets.²³⁸ A referendum,

²³² See Palmer and Butler, above n 109, at art 117.

²³³ See further discussion in Landemore, above n 231.

²³⁴ Iris Marion Young "Justice, Inclusion, and Deliberative Democracy" in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, New York, 1999) 288 at 297.

²³⁵ Levy, above n 216, at 556.

²³⁶ Tierney, above n 53, at 519.

²³⁷ See Brennan, above n 10, at ch 1.

²³⁸ See Part II(E).

improperly regulated, can “suppress the deep diversity” in society.²³⁹ Constitutional amendment is commonly achieved through one of two methods: either it must be passed by a super-majority in the House of Representatives, or a simple majority in a referendum. The super-majority is utilised to safeguard the constitution from governmental domination and misuse of power.²⁴⁰ By this logic, the same concern can be applied to an ordinary majority vote of society as voter turnout can be poor and may impede the validity (or acceptance) of the result. A referendum may not always be appropriate for particular issues. There is, *prima facie*, no room to compromise and account for the intensity of preferences.

First, it must be noted that the above discussion of deliberative requirements can aid in mitigating the concerns raised in this section. Second, there are further precautions that may be undertaken. To remedy the issue of voter apathy and poor turnout, the referendum could be held alongside a general election. The problem this raises is that it will cause the referendum issue to be associated with the general election campaign and a particular party platform: it could become “entangled” with election issues and divert focus from the election.²⁴¹ Alternatively, it could be relegated by the contest between the political parties or a political controversy. It is perhaps better that the date of the referendum is left to the decision of the Electoral Commission. It may be beneficial to hold the referendum alongside a general election or separate from it depending on the issue to be resolved.

A solution to the intensity of preferences and majority tyranny concerns is that some constitutional issues could be excluded from the referendum process for change. This solution could be problematic as it might “further alienate people from constitutional politics”, exacerbating the concern of political apathy and general disengagement.²⁴² An example of issues that could be exempt from referenda in New Zealand could be the divisive issues of Te Tiriti o Waitangi and the Māori seats in Parliament. This would be a feasible option if there were not already mechanisms proposed above to ensure citizen deliberation. Furthermore, it is not especially clear why these issues should instead be left to the House of Representatives to debate and resolve. The knowledge and expertise of these members *vis-à-vis* the voters educated by the official information package is not exceptional enough to justify this omission. Ensuring democratic legitimacy, through the deliberative and participatory measures outlined above, renders this solution unnecessary.

²³⁹ Tierney, above n 6, at 375.

²⁴⁰ Royal Commission on the Electoral System, above n 37, [7.33].

²⁴¹ At [7.29].

²⁴² Tierney, above n 2, at 241.

To further ensure democratic legitimacy and provide more power to the minority, a threshold requirement for participation or the outcome could be imposed. The referendum may require a two-thirds or 75 per cent majority to be effective or require the participation of a certain proportion of eligible voters. Imposing a threshold could enhance deliberation by encouraging “the building of broader consensus” before votes are cast.²⁴³ However, the threshold is not capable of being set at an objective number that is justifiable over and above any other number. A higher threshold, for either participation or result, would encourage abstention as a strategic option to prevent the success of the change.²⁴⁴ It “rewards impercipient”.²⁴⁵ Abstention would become equivalent to a ‘no’ vote, however, this is the case no matter the approach adopted. The referendum process ought to be “unifying” instead of “divisive”.²⁴⁶ A higher threshold would encourage abstention and a refusal to participate or deliberate. Considering the examples of voter turnout provided in this paper, a higher threshold could be unattainable. Instead, we ought to rely on the deliberative measures to remedy the concerns raised in this section.

Compulsory voting is another mechanism by which we can afford legitimacy and encourage participation, however, this has never been used in New Zealand. To test the efficacy of this measure it should be used for general elections first. It is not particularly democratic to force participation.

In summary, further regulation to remedy fears of majoritarian domination and the imbalance with respect to the intensity of peoples’ preferences is not justifiable. Excessive regulation is not beneficial—there is a balance to be struck. The mechanisms suggested to encourage participation and deliberation, particularly the role of education, ought to contribute to alleviating these concerns. Political engagement can “produce fraternity and fellow feeling”.²⁴⁷ A permissible solution is the decision whether or not to hold a referendum in conjunction with a general election.

D Regulation

The regulation of a referendum should be contained in ordinary legislation and not within the provisions of a written constitution. A constitution should not be so prescriptive—it

²⁴³ At 275.

²⁴⁴ At 267.

²⁴⁵ At 294.

²⁴⁶ At 281.

²⁴⁷ Brennan, above n 10, at ch 1.

will only lead to difficulties in future and could inhibit constitutional change and development. There are three relatively minor matters that should be regulated to safeguard the referendum process: the timeframe, the question setting and the financing of campaigns. This section has been influenced by the United Kingdom Political Parties, Elections and Referendums Act 2000.

The spending limit ought to be set by the Electoral Commission, who will possess the power to allocate public funds to the campaigns. The amount assumed by this paper has been taken from the CIR Act.²⁴⁸ This rule will apply to private individuals, Government and Parliament. Furthermore, the Electoral Commission must be allocated public money to spend on educational initiatives, including the aforementioned information package to be sent to households. This will need to be approved in advance by the Budget. The Electoral Commission will serve another function in monitoring the intelligibility of the question set to the people. Whilst a Convention should be in charge of drafting the question,²⁴⁹ as opposed to the legislature, guidance and oversight by independent experts would be beneficial. The Commission should be guided by the criteria adopted by the Council of Europe which guides the referendum processes of its 47 member states.²⁵⁰

The timeframe will depend on the issue, but at the very minimum it ought to be held no earlier than twelve months from announcement that a referendum has been initiated. However, the more contentious and complex the issue, the longer the period before voting should be. A proportional approach should be achieved. The statutory framework could provide for a minimum but no maximum. The timeframe should be set by the Electoral Commission to avoid Parliament purposefully elongating the period to avoid the issue or obtain a preferred outcome. If a referendum requires a quicker turnaround, then Parliament could amend the provision or enact a special provision to accommodate this as needed.

Whilst relatively minor issues compared to some of the above discussions in this Part, these methods of legal regulation serve to add legitimacy to the process. The regulation of these aspects will enhance the democratic nature of the process, improve transparency and protect referenda from abuse.

²⁴⁸ Citizens Initiated Referenda Act 1993, s 42.

²⁴⁹ As discussed in Part VI(B)(3).

²⁵⁰ See European Commission for Democracy through Law (Venice Commission) *Guidelines for Constitutional Referendums at National Level* (Council of Europe, CLD-INF (2001) 10, July 2001) at 3.

VII *The Model Provision*

The following provision serves as a starting position to maximise the democratic legitimacy of referenda as a method for enacting major constitutional change, implementing the procedural methods recommended in Part VI and those accepted in Part V. As New Zealand has an unwritten constitution, the method could be applied to the core statutes currently encompassing the basis of our constitutional structure. For example, it could be used to guide changes to the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 and the reserved provisions in the Electoral Act 1993. This is not intended to be a definitive or exhaustive list. It should govern the amendment provision in *Constitution Aotearoa* for changes proposed to any of the provisions exempt from the emergency provision,²⁵¹ or any other written constitution we are likely to adopt in future.

1 Referendum to be held for major constitutional issues

- (1) Proposed changes to [the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 and the reserved provisions listed in s 268 of the Electoral Act 1993] must be put to a vote of the people.
- (2) A vote may be called by:
 - (a) The government; or
 - (b) A petition of the people.
- (3) When a vote is called by a petition of the people, the Clerk of the House of Representatives must be satisfied that it has been signed by not less than 10 per cent of the eligible electors.²⁵²
- (4) [The procedural requirements for the petition of the people are contained in the Citizens Initiated Referenda Act 1993.]
- (5) Once a vote has been called by the government or by a petition of the people, the proposal or proposals for change must be presented to the House of Representatives.
- (6) The House of Representatives shall then call a Constitutional Convention according to the requirements in section 2.

2 Constitutional Convention

- (1) The House of Representatives must make the necessary arrangements to establish a Constitutional Convention.
- (2) The Constitutional Convention comprises 100 members.

²⁵¹ Palmer and Butler, above n 109, at art 118 which excludes arts 81, 82, 85, 87, 95, 96 and 100–102.

²⁵² Citizens Initiated Referenda Act 1993, s 19(4).

- (a) Thirty of those members are members by virtue of their office—the Chief Justice, the Solicitor-General, the President of the Law Commission, the Clerk of the House of Representatives, the Chair of the Waitangi Tribunal, the Ombudsman and the Justice and Electoral Select Committee.²⁵³ The remainder of the thirty shall be made up by academic experts appointed by the Electoral Commission.
- (b) Seventy of those members will be a representative group appointed to the Convention. Statistics New Zealand shall oversee their appointment on the basis of gender, ethnicity, age and geographical location.
- (3) If one of the members in 2(a) cannot attend, they may nominate a representative to attend on their behalf.
- (4) The Constitutional Convention will be convened for a period of two consecutive weeks.
- (5) The Constitutional Convention will have the following mandate:
 - (a) to provide the House of Representatives with ideas for the achievement of the proposed change;
 - (b) to establish the wording of the question to be put to the electors; and
 - (c) to prepare an information pamphlet to be sent to electors.

3 The Electoral Commission²⁵⁴

- (1) The proposal of the Constitutional Convention must be submitted to the Electoral Commission for an independent review.
 - (a) The Electoral Commission shall consider the intelligibility of the question.
 - (b) The Electoral Commission will submit their findings to the Constitutional Convention for consideration.
- (2) The Electoral Commission will set the spending limit for the referendum campaign in accordance with section 6.

4 Distribution to electors of the proposal and arguments²⁵⁵

- (1) The information constructed by the Constitutional Convention shall be printed and distributed by the Electoral Commission no later than one month before the voting day for the referendum.
- (2) This pamphlet shall contain the arguments together with a statement showing the textual alterations and additions proposed. It shall comprise:

²⁵³ Palmer and Butler, above n 109, at art 117(2).

²⁵⁴ Political Parties, Elections and Referendums Act 2000 (UK), s 104(2).

²⁵⁵ Referendum (Machinery Provisions) Act 1984 (Cth), s 11(2).

- (a) A neutral statement introducing the proposed change and how it will be effected;
 - (b) An argument in favour of the proposed law, consisting of not more than 2,000 words, authorised by the Constitutional Convention; and
 - (c) An argument against the proposed law, consisting of not more than 2,000 words, authorised by the Constitutional Convention.
- (3) The House of Representatives must publish a draft Bill incorporating the proposed change according to the recommendations of the Constitutional Convention in section 2(5)(a).

5 Date of referendum²⁵⁶

- (1) Within two weeks from the date the findings of the Constitutional Convention have been presented to the House of Representatives, the Governor-General must make an Order in Council appointing the date on which the referendum is to be held under this Act.
- (2) The date appointed under s 4(1) for holding the referendum under this Act must be a date no less than 12 months after the date on which the referendum was initiated per section 1.

6 Limits on expenditure²⁵⁷

- (1) Every person commits an offence and is liable on conviction to a fine not exceeding \$20,000 who, either alone or in combination with others:
 - (a) Knowingly spends, on advertisements published or broadcast in relation to an indicative referendum petition, more than \$50,000; or
 - (b) Knowingly spends, on advertisements promoting one of the answers to the precise question to be put to voters in a referendum (whether those advertisements are published or broadcast or both), more than \$50,000.

7 The result to bind the State

- (1) Proposals under section 1(1) that are submitted to the vote of the people shall not be repealed or amended unless the proposal for the amendment or repeal has been carried by a majority of the valid votes cast at a poll of the electors of the General and Māori electoral districts.²⁵⁸
- (2) The result shall bind the State.

²⁵⁶ Citizens Initiated Referendum Act 1993, s 22.

²⁵⁷ Citizens Initiated Referendum Act 1993, s 42; Political Parties, Elections and Referendums Act 2000 (UK), pt VII, ch 1.

²⁵⁸ Electoral Act 1993, s 268; Palmer and Butler, above n 109, at art 116.

This provision is a recommendation that affords greater democratic legitimacy to major constitutional change than either a vote in the House of Representatives (simple or super majority) or the other referenda provisions that have been described in this paper. Clear regulation of the process adds transparency. This is not a provision that may be abused by governmental elites. Deliberative democracy is legislated for at the micro-level via the Constitutional Convention and encouraged through indirect mechanisms, such as the time period in s 5(2), for the macro-level. Citizens should have the means, namely the time and access to information, to participate and deliberate. The official information pamphlet ensures voters can inform themselves without succumbing to confirmation biases. A representative Constitutional Convention ensures equality. This provision should hinder the potential for majoritarian tyranny by providing for participatory and deliberative democracy—citizens will have a greater understanding of the issue and the arguments. Allowing for citizen, as well as government, initiated referenda furthers the participatory nature of the process. This provision has adapted worthwhile aspects from the referenda processes mentioned in this paper. However, further discussion about the efficacy of each provision is encouraged. In particular, the signature threshold in s 1(3) requires further consideration. The provisions, to be enacted into law, will also require further drafting to ensure all the procedural elements and general legislative requirements are incorporated (for example, the eligibility of citizens to vote and resource allocation).

VIII Conclusion

New Zealanders tend to be rather reticent to change.²⁵⁹ As a broad generalisation, we are reactive rather than proactive. However, disengagement with constitutional issues is not something we ought to be ignoring. Representative democracy has become inextricably linked with elections and does not maximise democratic legitimacy. Power needs to remain with the people. In theory, constitutional referenda appear to be an admirable mechanism to mitigate this concern and encourage engagement. However, as a result of the procedures used for referenda coupled with poor education of citizens, their utility is not being maximised. In their current form in New Zealand and overseas, referenda are undoubtedly a superficial mode of engagement.

The aim of this paper has been to provide a mechanism through which referenda for major constitutional issues can be considered democratically legitimate. The intention has not been to frustrate our system of representative democracy. Rather, working inside this framework, the model provision injects a dose of direct, participatory and deliberative

²⁵⁹ See discussion in Part IV(A).

democracy to improve the constitutional and political aptitudes of citizens and increase acceptance of the result.

Major constitutional issues tend to address the normative values that people possess—which are not necessarily of such a “complex and abstract nature” that people are incapable of casting an informed vote.²⁶⁰ The same concerns about citizens’ competence apply to votes cast at a general election. The response to this concern, however, has never been to resort to non-democratic alternatives.²⁶¹ Consequently, “it seems intuitively plausible that a referendum, carefully tailored to meet the specificities of a particular society, can help bring a populace together in a deliberative, constitutional moment”.²⁶² For democratic legitimacy to be realised, there needs to be ownership of the process and effective means for participation and deliberation, alongside equality, informed consent and transparency. The episodic nature of constitutional change renders the “success of novel forms of democratic engagement” more feasible.²⁶³ This paper has sought to accomplish this by incorporating these elements of democratic legitimacy into a model provision that ought to guide future major constitutional change in New Zealand.

²⁶⁰ Kildea and Smith, above n 149, at 399.

²⁶¹ Tierney, above n 2, at 301.

²⁶² Tierney, above n 6, at 382.

²⁶³ Colón-Ríos, above n 6, at 2.

Word count: the text of this paper (excluding title, abstract, table of contents, footnotes and bibliography) comprises exactly 14,954 words. This includes 26 words from a substantive footnote.

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