

Tamsin Black

**WHY ARE YOU ASKING ME? A CRITICAL ANALYSIS
OF REFERENDUM USE IN NEW ZEALAND**

Faculty of Law

Victoria University of Wellington

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Abstract:

This paper asks why people use, and when they should be using, government-initiated referendums in New Zealand. Referendums deal with contentious and polarising topics that command the public's attention. Amongst the media fanfare, it is easy to forget to ask whether the government should be holding a referendum in the first place. Citizens in a representative democracy elect politicians to make decisions on their behalf. Those politicians are accountable to voters and can commission expert advice on decisions that benefit New Zealand. In contrast, decision-making via referendums reduces political accountability, is vulnerable to elite control and is a process easily hijacked by hyper-partisan interest groups. Arguments in favour of referendums justify their use, but only to an extent. This paper argues that referendum use should be limited to constitutional issues that require assent by the people to be considered legitimate. This limitation would protect the accountability and legitimacy of the country's political system and retain New Zealanders' faith in democracy.

I Introduction

At the 2020 general election, New Zealanders will be able to vote in two government-initiated referendums on the divisive topics of legalising euthanasia and recreational cannabis. At face value, this appears to be the perfect manifestation of democracy, with the Government allowing almost every adult New Zealander to directly influence the government on issues that matter to them. The referendum on euthanasia will be binding. If more than 50% of voters in the referendum answer “Yes” to the question “Do you support the End of Life Choice Act 2019 coming into force?”, the Act will automatically become law.¹ By contrast, the referendum to reform the use of recreational cannabis is only “indicative”. A majority vote in support of the draft Cannabis Legalisation and Control Bill will not result in recreational cannabis automatically becoming legal. Even if more than 50% of people vote “Yes”, it will

¹ “End of Life Choice Referendum” (6 September 2020) <[referendums.govt.nz](https://www.referendums.govt.nz/)>.

merely be an indication of the people's wishes and the incoming government can choose to introduce the Bill or not.²

Both these subjects are morally contentious and have complex policy and economic implications. They are topics on which intelligent and well-informed people disagree. This begs the question – why is the government asking citizens to decide on these issues, when Parliament is elected to make decisions on voters' behalf? While referendums appear to give power to the people, this is primarily based on the long-discredited assumption that perfect democracy occurs when every member of society can decide for him or herself on an issue – so-called “direct democracy”.³ This is not necessarily the case. Evidence has shown that even imperfect representative systems achieve better outcomes than direct democracy, because representatives are elected to make decisions for the common good of the public.⁴ For instance, before proposing these referendums, Parliament took expert advice from the Ministry of Justice, the Ministry of Health and an array of other experts, deciding on balance that the two issues could feasibly become part of our law.⁵ The public do not necessarily have the same opportunity to hear unbiased, educated opinions in this way before voting “yes” or “no”.

Referendums in democratic systems like New Zealand, where Parliament reigns supreme, are hard to justify when the results can be ignored by the government with no legal consequences. This paper will use the cannabis and euthanasia referendums as a starting point to analyse whether sufficient justification for the use of government-initiated referendums in New Zealand's system of representative democracy exists. It

² “Cannabis legalisation and control” (6 September 2020) <referendums.govt.nz>.

³ Richard Ekins 'The Value of Representative Democracy' in C. Charters and D. Knight (eds), *We the People(s): Participation in Governance* (Wellington: Victoria University Press 2011) at 29.

⁴ At 29.

⁵ For example, for the End of Life Choice Bill, the Select Committee Submissions & Advice includes the Final Report of the Justice Committee and the Ministry of Justice and Ministry of Health Departmental Reports. For the Cannabis Legalisation and Control Bill, submissions will be made during the Select Committee process if the Government decides to enact the Bill. For an example of already produced advice, see the Office of the Prime Minister's Chief Science Advisor “Legalising cannabis in Aotearoa New Zealand: What does the evidence say?” (2019).

will draw on the literature on government-initiated referendums, as well as their use in comparative jurisdictions, to determine what place, if any, government-initiated referendums have in New Zealand's unwritten Constitution.

A. Overview

Part I briefly describes New Zealand's system of representative democracy, and how the types of referendums used in New Zealand fit within this wider system. It then analyses what the principle of Parliamentary sovereignty means for current and successive governments, and for accountability generally, when considering the outcomes of referendums. This is followed by a comparative analysis of the use of referendums in the United Kingdom, as an alternative to the New Zealand approach and as a basis for possible reform.

Part II looks at how government-initiated referendums affect representative democracy and outlines the major arguments as to why representative democracy is preferable to more direct forms. It argues that the value of representative democracy is that it allows elected representatives to act for the common good.⁶ This still holds if it diverges from the will of the people, because the legitimacy of law and government does not stem from its direct responsiveness to what people want.⁷ Part II then analyses arguments for and against referendums in a democracy. Referendums can add value by providing authority for constitutional decisions and increasing public engagement in democracy. Nevertheless, an over-use of referendums, even within a representative system, can weaken democracy. If used inappropriately, referendums can allow governments to avoid political accountability, because it is impossible to hold a majority of voters accountable for a bad decision.⁸ Non-binding referendums further weaken the legitimacy of the government by lessening public trust if the decision of the referendum

⁶ Richard Ekins, above n 3, at 29.

⁷ At 30.

⁸ Edward Willis "Are public referendums the right way to make law?" (28 January 2020) The University of Auckland Politics and Society <<https://www.thebigq.org>>.

is not acted on.⁹ While referendums are not without benefits, this Part concludes that because representative democracy is better able to secure the common good than direct democracy, referendums should be reserved only for matters of the highest constitutional importance, when public affirmation through a referendum is necessary.

Part III looks at exactly what parameters should exist for government-initiated referendums in New Zealand, and uses the previous Parts as a foundation to argue that it is inappropriate to put the issues of legalising euthanasia and recreational cannabis to a referendum. While the majority of the public have an opinion on these contentious issues, the complexity of the policy arguments means that a decision about their legality is better addressed by the public's elected representatives than the public themselves. This is not to discredit the public's ability understand the issues, but evidence suggests that good decisions are more likely to result from deliberative democracy.¹⁰ This argument can be extended to other government-initiated referendums, save those of the highest constitutional importance. Even then, as Brexit has illustrated, such referendums must be clearly thought through and have large public information campaigns behind them, and they should always be binding.

The final proposed framework builds on the recommendations from the Report on Referendums in the United Kingdom,¹¹ published by the House of Lords Select Committee on the Constitution in 2010 (the House of Lords Committee), with changes to reflect the New Zealand context and referendum results in the intervening decade since the report was published. It also briefly looks at alternative ways non-constitutional issues could be decided.

⁹ Sionaidh Douglas-Scott "Brexit, Article 50 and the Contested British Constitution" (2016) 79 *Modern Law Review* 1019 at 1023.

¹⁰ Richard Ekins, above n 3, at 35.

¹¹ Constitution Committee Twelfth Report "Referendums in the United Kingdom" HL Paper 99, Session 2009–10.

1 *A note on terminology*

A referendum is a form of direct democracy, and bypasses representative democracy by allowing every enrolled voter to vote on issues directly.¹² However, the distinction between direct and representative democracy has been described as an “oversimplification”¹³, because a referendum depends on the existing hierarchy for its legal effects when used within a representative government.¹⁴ Stephen Tierney argues that, in practice, direct and representative systems operate in parallel, because referendums are “constrained to operate within mainstream representative democracy, subordinate to the second-order rules that provide them with their normative competence”.¹⁵ For example, the outcomes of a referendum are subject to both the legislature and the courts.¹⁶ Mendelsohn and Parkin use the term “referendum democracy” as a way to think of the “use, possible use and threatened use” of referendums as fully integrated within a wider representative, liberal democratic system.¹⁷ They argue that the dichotomy between direct and representative democracy is misleading for two reasons. First, because as Tierney says, it ignores the integration of referendums into representative systems.¹⁸ Secondly, because the notion of direct democracy implies that voters have more input than they really do, given how their vote has already been influenced by elites and electoral law.¹⁹ It is more useful to analyse referendums by looking at the benefits and drawbacks of referendum use *within* the

¹² Edward Willis, above n 8.

¹³ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2012) at 14.

¹⁴ At 14.

¹⁵ At 14.

¹⁶ At 14.

¹⁷ Matthew Mendelsohn and Andrew Parkin *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (eds.) (Palgrave Basingstoke 2001) at page 1.

¹⁸ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, above n 13, at 14.

¹⁹ Matthew Mendelsohn and Andrew Parkin, above n 17, at 1.

representative system. This paper takes this approach, using the term “referendum democracy” from Mendelsohn and Parkin.²⁰

II The Place of Referendums in a Representative Democracy

A New Zealand’s system of democracy

Before analysing the use of referendums within New Zealand, it is important to understand the political context in which they operate. New Zealand is a representative democracy. Every three years, enrolled voters elect Members of Parliament (MPs) in a general election to sit in Parliament and govern the country on their behalf.²¹ MPs are elected through the mixed member proportional (MMP) system of voting, which means that Parliament comprises MPs who reflect the party choices of enrolled voters.²² This close alignment between voters and their representatives is maintained by a general election every three years.²³

2 Parliamentary voting

While both government and citizen initiated referendums are used occasionally, the vast majority of contested matters in New Zealand are resolved in Parliament through the enactment of legislation or through action taken under the authority of accountable ministers. Each MP “has the dual role of representing the people’s views to the House and the Government, and of representing the actions of the House and the Government to the people”.²⁴ Parliamentary debate is the main way that MP’s carry out this representative function. Most of the time, MPs vote in accordance with the collective

²⁰ At 1.

²¹ Most individuals over the age of 18 are able to vote. 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.

²² Edward Willis, above n 8.

²³ Edward Willis, above n 8.

²⁴ New Zealand Parliament “Parliament Brief: What is Parliament?” (21 March 2014) <www.parliament.nz>.

stance of the party to which they belong but, occasionally, individual MPs may have significantly different personal beliefs on the issue in question. In this instance, the Speaker may determine that the House should treat a decision as a conscience issue.²⁵ Until the first 'party' government was elected in 1891, all votes in the House of Representatives were, in a sense, conscience votes.²⁶ Since then, controversial 'moral' issues are typically treated as conscience votes. Recent subjects that have been treated as conscience issues are same-sex marriage, the drinking age, gambling laws and prostitution law reform.²⁷

This paper's focus is on referendums, not conscience votes. However, it makes sense to consider both in conjunction because of their similar function in dealing with controversial issues. Conscience votes are similar in some ways to a referendum because they allow MPs to decide on issues according to their personal values, rather than those of their party. However, conscience votes do raise issues about accountability.²⁸ MPs are typically elected *because* they belong to a party that has certain values. Conscience issues may be introduced mid-term and are therefore not often included in parties' election manifestos.²⁹ The removal of party whips during conscience votes also allows list MPs to make a decision which an electorate cannot subsequently hold them accountable for.³⁰ It can therefore be argued that conscience votes distort the electoral contract.³¹ However, Lindsey notes that this argument loses strength if MPs are viewed as "trustees of the public good", rather than a representatives

²⁵ New Zealand Parliament "A matter of conscience: voting on conscience issues" (13 December 2017) < www.parliament.nz >.

²⁶ Deirdre McKeown and Rob Lundie "Free Votes in Australian and Some Overseas Parliaments" Current Issues Brief no.1 2002-03 (27 August 2002) Parliament of Australia <aph.gov.au>.

²⁷ New Zealand Parliament "A matter of conscience: voting on conscience issues" (13 December 2017) < www.parliament.nz >.

²⁸ <https://www.mz.co.nz/national/programmes/the-house/audio/2018670140/when-mps-go-with-their-gut-what-is-a-conscience-vote>

²⁹ David Geoffrey Lindsey "Conscience voting in New Zealand" (PhD thesis submitted for the Doctor of Philosophy in Political Studies, University of Auckland, 2011) at 84.

³⁰ At 84.

³¹ At 84.

who have been delegated authority from electors.³² This argument will be explored further in the following section, in relation to the purpose of referendums in a representative government. Whether conscience votes should be used in conjunction with, or instead of, referendums will also be revisited at the end of this paper.

B Government-initiated Referendums in New Zealand

Referendums are the only form of direct democracy used in New Zealand besides general and local body elections. Referendums can be initiated by the government or by citizens.³³ Government-initiated referendums are promoted by the government and can be held with a general election, at a stand-alone poll or by postal vote.³⁴ The government is required to pass legislation to enable the referendum to be held, unless the referendum is conducted by postal vote under the Referendums (Postal Voting) Act 2000, and the wording of the referendum question is decided as part of this legislative process. The legislation will also contain rules for advertising that supports or opposes the possible outcomes of the referendum, including caps on spending.³⁵ Besides some specific matters in s 269(1) of the Electoral Act 1993,³⁶ there is no statutory requirement for compulsory referendums to be held and no legal mechanism to force a government to decide an issue through a referendum.

1 Government-initiated referendums in the past century

Referendums are not widely used in New Zealand. Over the past 70 years there have been ten government-initiated referendums, half of them on electoral matters. History

³² At 84.

³³ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, Wellington, LexisNexis New Zealand, 2014) at 309.

³⁴ New Zealand Electoral Commission “Referenda” online: New Zealand Electoral Commission <elections.nz >.

³⁵ New Zealand Electoral Commission “Referenda”, above n 34.

³⁶ Section 268 restricts the amendment or repeal of certain provisions of sections of the Electoral Act 1993 and stipulates a process for doing so.

shows that government initiated referendums in New Zealand have been “sporadic” and “almost random in terms of the topics involved”.³⁷ The first was held in 1858, where the government used referendums to create new provinces.³⁸ Since then, referendums have been held in 1911 and 1989 on the prohibition of alcohol sales, and in 1949 and 1967 on the mandatory six o’clock closing of pubs. There have been five “constitutional” referendums on Terms of Parliament and the voting system since World War II,³⁹ and five others on off-course betting, compulsory military training, a compulsory retirement savings scheme and on changing the flag.⁴⁰ It is hard to determine a theme from these issues. For instance, there has not been another referendum on a moral issue since 1989. Recent issues such as the legalisation of prostitution and recognition of same-sex marriage has seen MP’s assent to legislation through a conscience vote. Similarly, not all constitutional matters have been put to a referendum, with important decisions including abolishing the upper house of Parliament in 1950, and reducing the voting age from 21 to 18 in 1971, being decided by ordinary legislation. Andrew Geddis, in 2014, summarised this history as revealing “a somewhat ad hoc approach, with little by way of governing principle to determine when one will be held”.⁴¹ The only clear connection between these topics is that they reflect a view that the government at the time thought these issues were more appropriate for the people to decide, rather than their elected representatives.

2 *Binding vs. non-binding*

Binding referendums occur when Parliament has already passed relevant legislation that will be voted on, and which contains a clause that triggers the Act into law if a

³⁷ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* Wellington, LexisNexis New Zealand 2014; 2nd edition at at 324.

³⁸ At 324.

³⁹ There were two referendums on whether New Zealand should stay at the three-year maximum Term of Parliament, held on 23 September 1967 and 27 October 1990, and were three held in 1992, 1993 and 2011 on the MMP system.

⁴⁰ These occurred in 1949, 1949, 1997, 2015 and 2016 respectively.

⁴¹ Andrew Geddis, above n 37, at 312.

majority of voters assent to it. For example, the 1993 referendum asked New Zealanders to decide between an MMP and a First Past the Post (FPP) system of government, with 53.9% voting for MMP. The results of this meant that the Electoral Act 1993, which had already been passed, became law. In a non-binding (or indicative) referendum, the outcome will have no legal effect on Parliament. Parliament must pass legislation after the referendum to turn the result into law, if a majority of MPs want that outcome. In such cases, referendums risk being seen as nothing more than particularly burdensome opinion polls.

No referendum is truly binding due to the principle of parliamentary sovereignty, which is one of the most important features of New Zealand's uncodified Constitution. The orthodox definition of parliamentary sovereignty advocated by A.V. Dicey states that Parliament "can make and unmake any law" and nobody can "override or set aside the legislation of Parliament".⁴² This means that even in the case of a government-initiated binding referendum, where the enabling legislation has already been passed, no legal mechanism can stop a successive government undoing the legislation or passing legislation contrary to the wishes expressed in the referendum. It can therefore be argued that all referendums in New Zealand are essentially non-binding. The relative benefits of binding vs non-binding referendums will be further explored in part four.

C The Citizens Initiated Referenda Act

The other style of referendum available in New Zealand is a citizen-initiated referendum (CIR), which was introduced by the Citizens Initiated Referenda Act 1993. While CIRs will not be the focus of this paper, a basic knowledge is useful in understanding the landscape of participatory democracy in New Zealand. The CIR Act was enacted in the same year that the MMP referendum was passed.⁴³ A CIR is initiated by a member of the public or group submitting a proposal to the Clerk of the House of Representatives, who will then advertise the proposed referendum question asking for

⁴² Malwina Anna Wojcik "Power to the People: The Rise of Referenda in Poland and the United Kingdom" (2019) 10 QMLJ 69, at 74.

⁴³ Andrew Geddis and Caroline Morris "All Is Changed, Changed Utterly - The Causes and Consequences of New Zealand's Adoption of MMP" (2004) 32 Fed L Rev 451 at 473.

input on the wording.⁴⁴ Once the wording is finalised, the proposer has 12 months to get 10% of enrolled voters to sign a petition in support of the referendum.⁴⁵ Citizen-initiated referendums in recent years have included the much-criticised referendum initiated by the New Zealand Professional Firefighters' union on reducing the number of professional firefighters,⁴⁶ and the corporal punishment referendum.⁴⁷

The 10% threshold requirement makes it hard to trigger a CIR, and the fact that the result is indicative only means the government will be under no legal obligation to act on it. For example, in the 2009 referendum on corporal punishment, 87.4% of voters answered no to the question: "Should a smack as part of good parental correction be a criminal offence in New Zealand?" However, the government did not change anti-smacking laws.⁴⁸ As Geddis points out, the non-binding nature of CIRs "raises real questions as to their point and purpose".⁴⁹ One critic has called the CIR "an expensive form of opinion poll."⁵⁰ Dr Helena Catt, a former New Zealand Electoral Commissioner, said that the CIR Act is "probably the best example of how not to run referenda in the world ... I do not think there is a single part of that legislation that works well".⁵¹ Its weaknesses have led some scholars to suggest the legislation should be

⁴⁴ Section 9.

⁴⁵ Section 15.

⁴⁶ "Government Ministers ... described it as a waste of public funds. The Prime Minister called for questions arising from industrial disputes to be excluded from referenda held under the CIR Act. Opposition MPs claimed that the Government's cynical attitude toward the referendum demonstrated its lack of commitment to direct democracy." As cited in Gabriela Wehrle "The Firefighters' Referendum - Should Questions Arising from Industrial Disputes Be excluded from Referenda Held under the Citizens Initiated Referenda Act 1993" (1997) 27 Victoria U Wellington L Rev 273 at 274.

⁴⁷ "NZ Referendum on Child Discipline 2009" (21 August 2009) <Yesvote.org.nz>

⁴⁸ Matt Burrows "Cannabis Referendum: What is it, when is it, where each party and the public stands" (8 July 2020) <www.newshub.co.nz>.

⁴⁹ Andrew Geddis, above n 37, at 317.

⁵⁰ Caroline Morris, in her submission to the House of Lords Committee, above n 11, at 32.

⁵¹ At 32.

abolished.⁵² This paper will not discuss CIRs further, as the purpose of the scheme, and the mechanisms through which they are initiated, differs from government-initiated referendums. However, many of the arguments against using government-initiated referendums also apply to CIRs.

D Government-Initiated Referendums in the United Kingdom

The last piece of background information necessary for an analysis of New Zealand's use of government-initiated referendums is the use of referendums in the United Kingdom. Much of the relevant scholarship on referendums is based on the United Kingdom's experience, and its historical use provides an interesting comparison due to our similar constitutional arrangements. This part will provide a necessary background for section four, which draws on the House of Lords Select Committee on the Constitution's recommendations for when referendums should be used in the United Kingdom to create a framework for New Zealand.

1 Historical use

The use of referendums in the United Kingdom has been very sparing,⁵³ and this lack of direct democracy is mostly attributed to the rise of the Westminster Parliament as the supreme legislative body.⁵⁴ As in New Zealand, the principle of Parliamentary sovereignty means that referendums are not legally binding because no Parliament can prevent a future Parliament from amending or repealing legislation.⁵⁵ In the words of

⁵² See for example Bridget Fenton and Andrew Geddis "Citizens initiated referenda" (2009) 334 NZLJ at 336, as cited in Jack Trevella "Citizens, Assemble! Rethinking The Lead Up To Referendums In New Zealand" LLB (Honours) Research Paper, University of Otago - Te Whare Wānanga o Ōtāgo, 2019 at 15.

⁵³ Stephen Tierney, 'Popular Constitutional Amendment: Referendums and Constitutional Change in Canada and the United Kingdom' (2015) 41 Queen's LJ 41 at 43.

⁵⁴ At 44.

⁵⁵ Malwina Anna Wojcik, above n 42, at 83.

Martin Loughlin, Parliamentary democracy under the Westminster model “establishes government of the people and for the people but not by the people”.⁵⁶

Robert Hazell notes that though referendums in the United Kingdom have up to now been on constitutional matters, it is not possible to say that major constitutional change requires confirmation through a referendum. This is because referendums were not held on such issues as the Human Rights Act 1998, the 1999 reform of the House of Lords, the Freedom of Information Act 2000 or the establishment of the Supreme Court.⁵⁷ Overall, there is a lack of consistency with regards to subject matter, which is similar to New Zealand’s experience. Although referendums have been uncommon in past centuries, their use in Britain is on the rise,⁵⁸ and the Brexit referendum has dominated political and social discourse for the past five years. Loughlin argues that the increased resort to referendums in the United Kingdom is a symptom of the changing relations between Parliament and the people.⁵⁹ Loughlin gives the European Union Act 2011, the Scotland Act 2016 s.1 and Wales Act 2017, s.1 as recent examples which require change to be made via a referendum. He argues that in this respect, the Brexit referendum was not a major shift, but “merely reinforced a general trend” towards popular sovereignty.⁶⁰

⁵⁶ Martin Loughlin “The British Constitution: Thoughts on the Cause of the Present Discontents” (2018) 16(1) *New Zealand Journal of Public & International Law* at 17.

⁵⁷ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at page 25.

⁵⁸ Neil Johnston Referendums (House of Commons Library, Briefing Paper 7692, 31 August 2016) as cited in Martin Loughlin, above n 56, at 17.

⁵⁹ For instance, the European Union Act 2011 required any further transfers of competences to the EU to be approved by both Parliament and to be affirmed in a referendum of the British people. From Martin Loughlin, above n 56, at 17.

⁶⁰ At 17.

2 *Legal basis and enforcement*

A referendum in the United Kingdom can only be held once enabling legislation is passed to give it legal authority.⁶¹ If Parliament intends to bind itself by the result, it should explicitly state so in the enabling legislation. This has never been done.⁶² However, the government has previously consented to be bound by the result of a referendum. The White Paper on the EEC (European Economic Community) Referendum stated that “the Government agreed to be bound by the verdict of the British people”.⁶³ Similarly, the policy paper regarding the process of withdrawal from the EU acknowledged that there exists “a democratic duty to give effect to the electorate's decision”.⁶⁴

The English common law courts can review the constitutionality of a referendum's procedure but are otherwise constrained from reviewing the substance of the referendum. In the recent high-profile case of *Miller*, the High Court emphasised that a referendum “can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is in the referendum legislation in question”.⁶⁵ In the Supreme Court, Lord Neuberger stressed that ministerial statements regarding the binding character of the referendum “are not law: they are statements of political intention”.⁶⁶ Where the result requires a change, and no existing statute has provided for that, Lord Neuberger clarified that “the change in the law must be made in the only way in which

⁶¹ Feng Lin and Daniel Alati “From Occupy Central to Democracy: Is a Referendum for Hong Kong Feasible and Desirable?” (2016) 10 AsJCL 259 at 270.

⁶² House of Commons, European Union Referendum Bill 2015-16 (Briefing Paper Number 07212, 3 June 2015) at 25.

⁶³ Lord President of the Council, The Referendum on United Kingdom Membership of the European Community White Paper Cmnd 5925, 26 February 1975) at [6].

⁶⁴ HM Government, The Process of Withdrawing from the European Union, (Cm 9216, 29 February 2016), para 2.1, as cited in Feng Lin and Daniel Alati, above n 61, at 270.

⁶⁵ *Miller and Santos v. Secretary of State* [2016] EWHC 2768 (Admin) at para. 105–6.

⁶⁶ *R (on the application of Miller and Dos Santos) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [119]. He went on to say ‘Further, such statements are, at least normally, made by ministers on behalf of the United Kingdom government, not on behalf of Parliament’.

the United Kingdom constitution permits, namely through Parliamentary legislation”.⁶⁷ The United Kingdom’s “referendum democracy” is therefore very similar to that of New Zealand.

III How Government-Initiated Referendums Affect Representative Democracy

New Zealand’s democratic system is sound and not in urgent need of reform. New Zealand currently sits at fourth place in the Economist Intelligence Unit’s democracy index,⁶⁸ and New Zealanders are relatively highly engaged in the democratic process compared with other liberal democracies. Nevertheless, a “growing disenchantment and disconnect”⁶⁹ with the system has been noted. Since 1984, New Zealand’s electoral turnout has dropped consistently, from 93.7% of enrolled voters in 1984 to only 79.1% of enrolled voters in 2017 participating in the general election.⁷⁰ Engagement in referendums is even lower, with only 45.1% of voters casting a vote in the 2013 referendum on selling state assets⁷¹ and 67.8% of eligible voters casting a vote in the 2016 second flag referendum.⁷² One possible area that affects public trust and engagement in democracy is the way in which New Zealand uses referendums.

A What is the Purpose of Representative Democracy?

Representative democracy allows large numbers of people to live together cohesively in a way that furthers the interest of society in general. It is not possible for all members

⁶⁷ Miller, above n 65, at [121].

⁶⁸ The Economist Intelligence Unit “Democracy Index 2019” The Economist.

⁶⁹ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* Wellington, LexisNexis New Zealand 2014; 2nd edition at 12.

⁷⁰ Statistics New Zealand “Voter turnout” (October 2014). See also New Zealand Electoral Commission “2017 General Election” <elections.nz>.

⁷¹ New Zealand Electoral Commission “Citizens Initiated Referendum 2013 Final Result” (17 December 2013) <www.electionresults.govt.nz>.

⁷² New Zealand Electoral Commission “Second Referendum on the New Zealand Flag Final Result” (30 March 2016)

of New Zealand to congregate either physically or virtually to decide what laws should govern them. Even if that was possible, the group would “be far too large to deliberate intelligibly and to act together rationally”.⁷³ Direct participation from every member of society is only possible in a very small community, where each person can be held accountable for how they vote and is publicly answerable for it.⁷⁴ In a whole country, Parliament can be viewed as a community with this capacity. It is a body that is capable of fact-finding, deliberation and reasoned choice. For these reasons, representative democracy has been described as “the least objectionable default method” of government.⁷⁵ Winston Churchill’s description of representative democracy is fitting when he suggested that “democracy is the worst form of Government except for all those other forms that have been tried from time to time”.⁷⁶

Edmund Burke was one of the most prominent advocates of representative parliamentary democracy.⁷⁷ In his view, the “only interest”⁷⁸ of Parliament should be “to reach a well-informed and independent judgment for the common good”.⁷⁹ Richard Ekins describes the common good as “the peaceful condition needed for the benefits of social life and to avoid the burdens of contention”.⁸⁰ This requires both “negative coordination” (avoiding strife and intentional harm) and “positive coordination” (such as building roads or having a functioning economy).⁸¹ He explains why citizens are not the best people to determine the common good: in referendums and elections, the

⁷³ Richard Ekins, above n 3, at 38.

⁷⁴ At 43.

⁷⁵ Andrew Geddis, above n 37, at 8.

⁷⁶ Winston S Churchill, House of Commons, 11 November 1947.

⁷⁷ Malwina Anna Wojcik, above n 42, at 74.

⁷⁸ Edmund Burke, 'Speech to the Electors of Bristol, 3 Nov. 1774', in Philip B Kurland and Ralph Lerner (eds), *The Founders' Constitution*, vol 3 (The University of Chicago Press 1987) 447, as cited in Malwina Anna Wojcik, above n 42, at 74.

⁷⁹ At 74.

⁷⁹ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, chapter one.

⁸⁰ Richard Ekins, above n 3, at 32.

⁸¹ At 32.

public vote mainly in their own self-interest, choosing the option that will be most beneficial to them or their family.⁸²

Matters decided by elected representatives are complex and expert advice is often required before issues can be understood and deliberated on. Such questions can be inextricably connected to other complicated policy issues and most members of the public would not have the time, the expertise or the desire to directly resolve every issue that Parliament considers. In addition, it is not merely that elected representatives have more time and expertise to deal with the matters before them; they may also be more detached and objective, and be able to see how issues are interrelated.⁸³ This view involves seeing parliamentarians as ‘trustees’ of the public good, rather than delegates for the electorate. Lindsey elaborates that “as a trustee, MPs’ political mandate comes not from continual reference to the electors but the exercise of individual judgement on the basis of members’ personal integrity”.⁸⁴

For all these reasons, it makes sense to hand the task of law-making over to full-time representatives, chosen by the people, whose performance is evaluated every three years through a general election. However, Tierney points out that this “contrast between an ignorant electorate and an enlightened parliament acting as the conduit for informed and disinterested public reasoning” is not always played out in reality.⁸⁵ Parliament will not always act for the common good, and voters are not as selfish or ignorant as the literature suggests. This dichotomy of views is illustrated in the different referenda policies of political parties.⁸⁶ As we will see, for certain issues it makes sense, and can even enhance democracy, to hand over decision-making power to the people.

⁸² At 32.

⁸³ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at, 48.

⁸⁴ David Geoffrey Lindsey, above n 29, at 85.

⁸⁵ Stephen Tierney “Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox” *Election Law Journal* (2013) 12(4) 508 at 511.

⁸⁶ Lindsey elaborates that “The delegate model of representation reflected in the referenda policies of NZ First and United Future can be contrasted with the trustee model of those who believe MPs have been elected to make decisions using their own integrity”. David Geoffrey Lindsey, above n 29, at 201.

Choosing when to use referendums is therefore a careful balancing act, for multiple reasons.

1 *Referendums can undermine representative democracy...*

Referendums can undermine representative democracy by weakening political accountability. Putting an issue to a popular vote means that responsibility for the decision lies outside the government, even if the government proposed it and crafted the result. There is no way to hold the lawmaker to account because it is impossible to discipline a majority of voters.⁸⁷ They cannot be voted out of Parliament, for example. Another issue for referendums when used within a representative democracy is the obligation on a subsequent government in the event a referendum passes, or even when it does not. It is unclear whether it would still be legitimate for a subsequent government to pass the law that was the subject of a failed referendum. If the referendum is to act as a method of checks and balances, then its result must be respected, to give it political and legal credibility.⁸⁸

Non-binding referendums are particularly worrisome. In 2018, the United Kingdom Constitution Unit's Independent Commission on Referendums reported that pre-legislative, or non-binding referendums, are highly problematic,⁸⁹ because proposals put to a referendum must be clear and voters must know what will happen if there is a vote for change.⁹⁰ For instance, the aftermath of the Brexit referendum illustrated that no one, possibly including even the government that proposed it, properly understood the significance of the "leave" vote prevailing.⁹¹ This same situation could occur with the New Zealand vote on the Cannabis Bill, as voters are asked to assent to a Bill that could well change through the Parliamentary process. In relation to the Cannabis Bill, Andrew Little MP made the argument that because no current Parliament can bind a

⁸⁷ Edward Willis, above n 8.

⁸⁸ Malwina Anna Wojcik, above n 42, at 84.

⁸⁹ Leah Trueblood "More Good Days for Democracy: The Report of the Independent Commission on Referendums" (18 July 2018) U.K. Const. L. Blog <<https://ukconstitutionallaw.org>>

⁹⁰ Leah Trueblood, above.

⁹¹ The Economist "Who said Brexit was a surprise?" (24 June 2016) <economist.com>.

future Parliament, the difference between a binding and non-binding referendum is immaterial – a new government would always have the opportunity to ignore the referendum result if it chose.⁹² But this ignores the reality of Parliamentary politics.⁹³ It is much easier to not do something than to repeal a bill already activated by a law change.⁹⁴

It can be argued, however, that it is highly unlikely a government would ignore the will of the people when it has been so clearly expressed through a government-initiated referendum. This point was discussed extensively by submitters to the House of Lords Select Committee on the Constitution's inquiry into "the role of referendums in the United Kingdom's constitutional experience".⁹⁵ Vernon Bogdanor explained that "a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse the decision of the people".⁹⁶ Dr Andrew Blick similarly stated that "the political pressure upon a government seeking to ignore the outcome of a referendum would be immense".⁹⁷ However, evidence from other jurisdictions suggests that it may be politically feasible for a government to ignore referendum results. Following the July 2015 referendum in Greece, the Greek government undertook tough austerity measures, even though the people had voted against these by a 20% majority. When the referendum on the Lisbon treaty produced a result unfavourable to the Irish government, another referendum was held to achieve the desired outcome.⁹⁸ While it would be unlikely for the government to act contrary to the electorate's wishes as expressed in a referendum, it is not impossible.

⁹² Henry Cooke "The Cannabis Referendum and why it isn't binding" (7 May 2019) Stuff.co.nz.

⁹³ Henry Cooke, above n 92.

⁹⁴ Henry Cooke, above n 92.

⁹⁵ Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, at chapter one.

⁹⁶ At 47.

⁹⁷ At 111.

⁹⁸ Sionaidh Douglas-Scott, above n 9, at 1023.

2 *...But they can also complement representative democracy*

On the other hand, referendums can have a legitimising function by demonstrating that a policy has the support of the public and can give a decision “democratic weight”.⁹⁹ This has been referred to as the symbolic function of referendums. Tierney asserts that referendums could be seen as “‘pure democracy’ ... unmediated by representatives; a symbolic reminder that democratic authority finds its legitimacy in the consent of the people”.¹⁰⁰ This function is particularly pertinent when referendums are used as a mechanism to decide constitutional issues. Mendelsohn and Parkin argue that referendums provide greater legitimacy than alternative procedures when used as a means of ratification for constitutional change “while simultaneously allowing a people to symbolically affirm its status as a sovereign political community”.¹⁰¹

Referendums can also complement representative democracy by promoting voter education and enhancing citizen engagement. Voting in a referendum is one of the most obvious examples of such engagement. Jonathan Boston proposes that this is the “democratic case” for using referendums, which sees them as a “vital complement and supplement to the institutions of representative democracy”.¹⁰² This argument has it that referendums provide a direct mechanism through which the public can express its will, and therefore enable a “more informed, engaged, and active citizenry”.¹⁰³ However, the argument is weakened by the fact that many policy issues cannot be reduced satisfactorily to a simple binary question, so a referendum is often not the most effective way to promote democratic participation.

3 *Referendums are prone to elite influence*

⁹⁹ Dr Eoin O’Malley, School of Law and Government, Dublin City University, in his submission to the House of Constitution Committee “Referendums in the United Kingdom”, above n 11, at 129.

¹⁰⁰ At 48.

¹⁰¹ Matthew Mendelsohn and Andrew Parkin, above n 17, at 10.

¹⁰² Jonathan Boston “Questioning Referenda” *The Dominion Post* (online edition, Wellington, 14 February 2019).

¹⁰³ Jonathan Boston, above n 102.

Mendelsohn and Parkin describe how another problem with the theoretical basis of referendums is that it does not link up with their actual use by governments.¹⁰⁴ In practice, referendums are used strategically by governments “to persuade voters to ratify the position favoured by the referendum’s sponsor”, rather than to give voters the power to make their own decisions.¹⁰⁵ Referendums can be used by political elites to set the agenda and define choices,¹⁰⁶ which Tierney coins “the elite control syndrome”.¹⁰⁷ Voters must make their decisions with relatively little information, forcing them to rely on political messaging. Although government-initiated referendums may occasionally occur through political pressure, they are usually proposed by the government of the day. David Butler succinctly summarised these issues in his submission to the House of Lords Select Committee on the Constitution, when he commented that a referendum is:¹⁰⁸

...only going to happen when the Government of the day wants it or when it would be too embarrassing (because of past promises) to get out of it. Normally they will have a referendum because they think they are going to win it and they will not have it if they are not going to win it. They will just dodge the issue. It is a matter ... of straight politics.

In a 2009 paper on strategic timing in direct democracy, Marc Meredith showed the potential power “agenda-setters” also have to time referendums with elections to select voters “that will be more favourable toward their policy interests”.¹⁰⁹ He gives the example of how leading up to the 2004 presidential primaries, it could be predicted that the “contested Democratic presidential primaries would be more competitive than their uncontested Republican counterparts”. The “agenda-setters” could therefore expect

¹⁰⁴ Matthew Mendelsohn and Andrew Parkin, above n 17, at 2.

¹⁰⁵ At 2.

¹⁰⁶ At 4.

¹⁰⁷ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, above n 13, at 15.

¹⁰⁸ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 16.

¹⁰⁹ Marc Meredith “The Strategic Timing of Direct Democracy” (2009) 21(1) *Economics & Politics* 159 at 175.

voters in the primaries to be more liberal than voters in the general election, and time a referendum accordingly.¹¹⁰

4 *The deliberation deficit*

Another issue with referendums identified by Tierney is what he refers to as “the deliberation deficit”. In Tierney’s view, referendums encourage aggregative rather than deliberative decision-making, because of an “in-built tendency of the referendum process merely to aggregate pre-formed wills”.¹¹¹ This argument relates to the issue of the public generally lacking the ability to make informed and complex policy choices, which is compounded when there is no opportunity for meaningful deliberation. An example of this occurred in California in 1978. During a relatively prosperous economic time, a public petition followed by a referendum forced the state to cap property taxes at 1 per cent of the value of real property.¹¹² This cap later severely constrained the state’s revenue-raising abilities during periods of economic crisis. Ron Levy argues that cases like this illustrate how subsequent generations can be bound to, and severely burdened by, decisions they had no say in.¹¹³ Had this decision been made by politicians rather than through a referendum, it seems likely there would have been more thought given to how the restriction could encumber future generations, and the political actors responsible for the decision could be held to account.

Referendums can also in practice be about something other than the issue in question. This phenomenon was illustrated most clearly by the 2016 flag debate, which became a political issue. Which way many people voted was heavily influenced by whether or not they liked Prime Minister John Key, the leader of the National Party, who

¹¹⁰ At 174.

¹¹¹ Stephen Tierney “Constitutional Referendums: The Theory and Practice of Republican Deliberation”, above n 13, at 23.

¹¹² *Proposition 13* (1978).

¹¹³ “Second Referendum on the New Zealand Flag Final Result” (30 March 2016) Electoral Commission.

¹¹³ Ron Levy “‘Deliberative voting’: reforming constitutional referendum democracy” (2013) P.L. 555 at 564.

personally supported changing the flag. A study into New Zealand's flag referendums found that National Party supporters were more likely to shift from opposing a flag change to supporting it, while Labour Party supporters were more likely to shift from supporting to opposing a change.¹¹⁴

5 *Referendums are blunt and crude devices, and can have a damaging effect on minority groups...*

Referendums often fail to deal well with complex issues. Ekins points out that Yes/No questions have an “incapacity to frame proposals and consider how various proposals relate to one another”.¹¹⁵ The possibility of only answering Yes or No means the outcome is heavily shaped by how is proposed.¹¹⁶ In 1986, the Royal Commission on the Electoral System issued a report on the state of New Zealand's electoral system. While the Commission acknowledged that referendums can have benefits in terms of legitimising and restraining democratic government, and extending popular participation, the Commission cautioned against the use of referendums to solve complex policy issues and concluded that “in general, initiatives and referenda are blunt and crude devices which need to be used with care and circumspection.”¹¹⁷

Referendums favour majoritarianism. Tierney argues that referendums can consolidate even simple majoritarian decision-making “at the expense of, and potentially imperilling, minority and individual interests.”¹¹⁸ In addition, inequality in civic competence is one of the serious problems with direct democracy. The capability of voters depends on the level of education of the voter and the complexity of the text

¹¹⁴ Nicole Satherley and others “If They Say “Yes,” We Say “No”: Partisan Cues Increase Polarization over National Symbols” (2018) 29 *Psychological Science* 1996 at 2006.

¹¹⁵ Richard Ekins, above n 3, at 4.

¹¹⁶ At 40.

¹¹⁷ New Zealand, Royal Commission on the Electoral System ('RCES'), Report of the Royal Commission on the Electoral System: Towards a Better Democracy (1986), 175, as cited in Andrew Geddis and Caroline Morris, above n 43, at 474.

¹¹⁸ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, above n 13, at 23.

submitted to the vote.¹¹⁹ Evidence suggests that referendums, when used as a form of direct democracy, favour more educated citizens.¹²⁰ Furthermore, referendums can be used as a conservative device, because the status quo is likely to be reinforced. For instance, in Switzerland, women were not given the vote until 1971 because male voters had rejected votes for women in a referendum in 1959.¹²¹

6 *...But they can be effective in some circumstances*

In summary, referendums can undermine representative democracy and disadvantage minority groups. Serious issues arise around the ability to distil complex policy issues to a Yes/No referendum question, and further issues arise around voter education and competence. However, there are a significant number of counter arguments to these points. While reducing an issue to a binary question makes a referendum a blunt instrument, Cheneval and El-Wakil argue that this has advantages: namely, it enables public discussion between Yes and No campaigns to have a clear and easy to understand structure.¹²² Further arguments were provided by advisors to the House of Lords committee on referendums. Professor Gallagher suggested that, if pushed too far, “the arguments highlighting the supposed incompetence of voters to decide on specific policy issues ... can become an argument against allowing people to vote at elections”¹²³. Jenny Watson, Chairman of the Electoral Commission, considered that

¹¹⁹ Michael Gallagher and Pier Vincenzo Uleri (eds) *The Referendum Experience in Europe* (St Martin's Press, New York, 1996) 198, as cited in Ben Goshik “You're The Voice – Try And Understand It: Some Practical Problems Of The Citizens Initiated Referenda Act” (2003) 34 *VUWLR* at 722.

¹²⁰ Craig Joseph Press *The Case for Binding Citizens Initiated Referenda in New Zealand* (MPP Research Paper, Victoria University of Wellington, 2000) 10, 29 and David B Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 14, as cited in Ben Goshik, above n 119, at 722.

¹²¹ Peter Kellner, in his submission to the House of Lords Constitution Committee “Referendums in the United Kingdom”, above n 11, Q43.

¹²² Francis Cheneval and Alice El-Wakil “The Institutional Design of Referendums: Bottom-Up and Binding” (2018) *Swiss Political Science Review* 24(3) 294 at 298.

¹²³ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 121.

“most things can be explained and distilled down to a reasonably simple premise”.¹²⁴ Michael Wills MP agreed that:¹²⁵

...complex technical issues can with effort, hard work, rigour, intelligence be distilled down to certain key principles and choices ... it would be a terribly retrograde step to take the view that some issues are just too complicated to bother the people’s heads with.

An oft cited example of a successful referendum on a complicated topic was the 1992 and 1993 New Zealand referendums on electoral reform.¹²⁶ In these instances, there was an initial Yes/No question followed by a multi-option question. Where multi-option questions are used, the public education campaign is critical, and the design of the ballot paper is particularly important.¹²⁷ In the 1993 example, the government set up an independent educational body to run “a year-long, very well-funded, independently-run education campaign”.¹²⁸ Helena Catt elaborates on why this campaign was successful. As well as a booklet with clear graphics, there were TV ads, radio and TV debates, and talks at local community groups. In addition to the independent body, there were interest groups campaigning for both the status quo and for MMP.¹²⁹ When well-organised and funded, referendums can mitigate any possible harm to the democratic system.

7 Referendums can settle an issue and act as a protective device

Several contributors to the Constitution Committee Report on Referendums in the United Kingdom argued that a positive feature of referendums is their ability to settle a

¹²⁴ Memorandum by Professor Michael Gallagher, Professor of Comparative Politics, Department of Political Science, Trinity College Dublin, as part of the Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11.

¹²⁵ Michael Wills in his submission to the Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 238.

¹²⁶ Dr Helena Catt in her submission to the Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 77.

¹²⁷ At 77.

¹²⁸ At 163.

¹²⁹ Dr Helena Catt, above n 126, at 77.

debate on a controversial issue.¹³⁰ Peter Kellner, the President of research group YouGov, gave the example of the 1975 referendum on membership of the European Community as settling the issue for a generation because “the opponents of British membership accepted that verdict for a period and without the referendum it might have been re-opened”.¹³¹ Similarly, Professor Gallagher referred to the outcome of the Irish referendum on divorce in 1995, when divorce was approved very narrowly and then “ceased overnight to be a political issue... in a way that they would have been very unlikely to do had the decision been made by Parliament alone”.¹³² Moreover, referendums can make it difficult to reverse a policy that had demonstrable public support, and can be one of the ways that Acts of Parliament can “effectively be entrenched”.¹³³ This is because once endorsed in a referendum, it becomes politically difficult to repeal a measure without a further referendum.¹³⁴

As referendums are increasingly used to get popular consent for constitutional changes, it becomes more difficult for the government to make changes without holding a referendum.¹³⁵ This is what Boston describes as the “constitutional case” for referendums. He argues that the people, rather than elected representatives should decide significant constitutional matters. This is because MPs “have a vested interest in the rules of the game” and cannot be trusted to consider the public interest. Boston gives the example that letting MPs decide how they are elected, or how long they serve, is risky.¹³⁶

¹³⁰ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 14.

¹³¹ At 45.

¹³² At 124.

¹³³ At 14.

¹³⁴ Unlock Democracy’s submission to the Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at page 18.

¹³⁵ Professor Bognador in his submission to the Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at 74.

¹³⁶ Jonathan Boston, above n 102.

8 *Conclusion on the benefits and drawbacks*

When used to resolve appropriate issues, referendums have the power to complement representative democracy, to settle an issue and to be a protective device. The public being engaged and having input in the democratic process is undeniably valuable. In some constitutional situations, assent of the people via a referendum is close to a requirement for the result to be legitimate. For instance, A.V. Dicey, a well-known advocate for Parliamentary supremacy, claimed referendums are the only institution that can give effect to a doctrine “which lies at the basis of English democracy - that a law depends at bottom for its enactment on the consent of the nation as represented by its electors.”¹³⁷ It can further be argued that most of the issues outlined above are “problems of practice not principle”¹³⁸ and therefore can be corrected by good design and regulation of the referendum process.¹³⁹

The risk to democracy does not come from citizens’ direct participation but from a structure that leaves the process “open to elite control in a way that representative democracy is not”.¹⁴⁰ Thus, the challenge in referendum design is to reduce the possibility for elite control while encouraging public reasoning and education. This can be achieved through a variety of instruments including legal controls, guidelines, conventions and regulation. Regulation can occur at the constitutional level, through a specific piece of legislation for a specific referendum, or through a general statute for referendums that is not entrenched but provides general rules.¹⁴¹ The options for legal regulation will be discussed in the following part, using the euthanasia and cannabis referendums to illustrate why non-constitutional issues are inappropriate topics for referenda, and to outline other design issues that could have been avoided.

¹³⁷ A.V. Dicey (1911) *A Leap in the Dark*, London, John Murray, 2nd Edition, pp. 189–190, as cited in Matt Qwortup “A Tale of Two Referendums” (2015) *The Constitution Society*.

¹³⁸ Stephen Tierney “Using Electoral Law to Construct a Deliberative Referendum”, above n 85, at 508.

¹³⁹ At 508.

¹⁴⁰ At 515.

¹⁴¹ At 515.

IV How Should Government-Initiated Referendums Be Used?

This section looks at the subject matter of the 2020 referendums, the reason these issues were put to a referendum, and whether this was the most appropriate course of action. It then attempts to define “constitutional issues” and asks whether a requirement for constitutional issues to be decided via referendum should be codified, or if the requirements of each individual referendum are best outlined in the specific enabling legislation. The second section considers whether referendums should ever be non-binding. The third section looks at the crucial elements of referendum design that should be incorporated into all referendums, from the decision on question wording and the setting of the election date, to how best educate the public about the issue and what rules should exist around campaign spending. It considers how non-constitutional issues should be decided and whether there is a place for conscience votes.

A Subject Matter

The purpose of the proposed Cannabis Legislation and Control Bill is to regulate and control the use and sale of cannabis in New Zealand, with the intent of reducing harm from cannabis use to both individuals and the wider community.¹⁴² Before proposing a referendum, the government arranged for expert panels to consider cannabis issues and provide advice.¹⁴³ These came to the conclusion that it would not be a major public health or criminal concern to legalise recreational cannabis.¹⁴⁴ Why then, did Parliament not simply pass the Bill in the usual way, or put it to a conscience vote? The most likely answer is because it would have been politically risky. By opting to put the issue to a referendum, the Government avoided polarising the voting base with a contentious topic, and avoided having to take political responsibility for the decision,

¹⁴² Cannabis Legislation and Control Bill (2020) Part 1 cl 5 s 4.

¹⁴³ Hon Andrew Little “Proactive Release- 2020 Cannabis Referendum material for public release (3 December 2019) At [49] under “Consultation”.

¹⁴⁴ Office of the Prime Minister’s Chief Science Advisor “Evidence Summary- Legalising Cannabis: What does the evidence say?” (2020).

while appearing to “give the people a voice”.¹⁴⁵ The result is that responsibility for the decision shifts from the Government to the people, weakening political accountability.¹⁴⁶

Similarly, if the Government did not want Parliament to pass the End of Life Choice Bill in the ordinary manner because it felt it was a moral issue, it could have chosen to treat it as a conscience issue. However, it did not. This was not because the Government wanted to give the decision over to the public and engage in direct democracy. Rather, it was because coalition partner New Zealand First made its support dependent on a referendum being inserted into the End of Life Choice Bill.

These examples illustrate the arbitrariness of contentious issues being decided via referendum. Neither legalising recreational cannabis nor allowing euthanasia are constitutional issues. So when should the government put issues to a referendum? And what is a “constitutional issue”?

1 *Defining constitutional issues*

Determining a “constitutional matter” is not straightforward because there is no single document that comprises the constitution of New Zealand. The elements of the constitution are instead contained in several Acts of Parliament, such as the Legislature Act 1908, the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 and the Electoral Act 1993, together with other sources including the Treaty of Waitangi, decisions of the courts, and unwritten traditions and conventions.¹⁴⁷ The norms essential to the character of New Zealand’s constitution are representative democracy, parliamentary sovereignty, the rule of law, judicial independence and constitutional conventions.¹⁴⁸

¹⁴⁵ Edward Willis, above n 8.

¹⁴⁶ Edward Willis, above n 8.

¹⁴⁷ On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government. Rt Hon Sir Kenneth Keith, 1990, updated 2008 and 2017.

¹⁴⁸ Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22(4) NZULR 565 at 580.

In 2018, Sir Geoffrey Palmer and Andrew Butler published “Towards Democratic Renewal” in which they proposed a codified, supreme law constitution (Constitution Aotearoa).¹⁴⁹ The authors proposed the use of a referendum as one of two means of amending the provisions of the written constitution.¹⁵⁰ In addition, Palmer and Butler state an expectation that major constitutional issues will be subject to a referendum.¹⁵¹ However, Constitution Aotearoa omitted to define “major constitutional issues”; nor did it outline participation, timeframe or information requirements for the proposed referendum.¹⁵² An adequate definition must distinguish between a routine constitutional issue and a constitutional issue so fundamental that it requires a referendum be held to resolve it.¹⁵³ This requires a degree of subjectivity.

2 *Constitutional statutes*

A possible starting point is to define a constitutional statute.¹⁵⁴ *Thoburn v Sunderland City Council* held that statutes can be divided into “ordinary” and “constitutional”. Laws LJ proposed that:¹⁵⁵

...a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

¹⁴⁹ Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018).

¹⁵⁰ Palmer and Butler propose extending s 268 of the Electoral Act to require either a 75 per cent majority in the House of Representatives, or 50 per cent of voters support in a referendum to amend the constitution. Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at art 116.

¹⁵¹ Georgia Whelan “Of Demagogues And Dictators? The Redemption Of Constitutional Referenda In New Zealand” (2017) VUWLR at 17.

¹⁵² At 17.

¹⁵³ At 87.

¹⁵⁴ Malwina Anna Wojcik, above n 42, at 84.

¹⁵⁵ Laws LJ in *Thoburn v Sunderland City Council* [2003] Q.B. 151 at para 50, as cited in Wojcik, above, at 84.

These two criteria could be used to define a constitutional matter.¹⁵⁶ However, because not every constitutional issue requires a referendum, the criteria would be too broad for the purposes of determining whether or not to hold one. The House of Lords Constitution Committee recommended that in the United Kingdom, Parliament should be the judge of which issues are the subject of referendums.¹⁵⁷ In New Zealand too, it could be left to Parliament to determine on a case-to-case basis, without need of a strict definition. However, some guidelines would be useful, as discussed in the next section.

3 *Examples of constitutional issues*

Helpful guidance was provided by the House of Lords' Select Committee on the Constitution in its report on referendums. In its first report, the Committee stated that to determine whether an issue is of constitutional significance it should ask whether an issue raises, "an important question of principle about a principal part of the constitution".¹⁵⁸ This is a useful test to determine first, whether an issue is of fundamental constitutional significance and second, whether a referendum is therefore appropriate.¹⁵⁹ They went on to give some examples – these included abolition of the Monarchy, leaving the EU, secession, abolition of either House of Parliament, changing electoral system for the House of Commons, adoption of a written constitution and changing of the United Kingdom's system of currency.¹⁶⁰

An example of such a constitutional issue in New Zealand could be extending the Parliamentary term to longer than three years. In fact, the Constitutional Advisory Panel, in their 2013 report on the constitution of New Zealand, noted that any change to a longer term should be accomplished by referendum rather than by way of a special

¹⁵⁶ Malwina Anna Wojcik, above n 42, at 84.

¹⁵⁷ At 213.

¹⁵⁸ House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, para 27.

¹⁵⁹ Para 118.

¹⁶⁰ Para 118.

majority in Parliament.¹⁶¹ Currently, either a referendum or the support of over 75% of MPs are required if proposed amendments affected section 17 of the Constitution Act 1986.¹⁶² The Panel concluded that:¹⁶³

...given the importance placed on voters' power to choose representatives, a referendum to gain the consent of the people is likely to be considered more legitimate than Parliament giving itself a longer term through a special majority in Parliament.

A benefit of focusing referendums on important constitutional cases is that it could help protect New Zealanders from "reform fatigue".¹⁶⁴ In Australia, where only 8 out of 44 national referendums have succeeded, research has found that those who have lived through a series of failed referendums "are no longer particularly interested in whether the Constitution protects or encroaches on their rights and freedoms, nor whether it meets their contemporary needs".¹⁶⁵ The current New Zealand Government should have considered this before deciding to hold two referendums alongside a general election.

4 *Is legislation required?*

It is compulsory to hold referendums on constitutional matters in many jurisdictions, and this mandate is usually contained in the countries' constitutional documents. In Switzerland, a referendum must be held on any amendment to the Constitution.¹⁶⁶ This is enshrined in a number of provisions in the Federal Constitution of the Swiss

¹⁶¹ Constitutional Advisory Panel "Report on the Constitution of New Zealand" (2013) At 57.

¹⁶² At 64. Section 268 of the Electoral Act 1993 restricts the amendment of certain provisions, one of them being the length of a parliamentary term.

¹⁶³ At 62.

¹⁶⁴ Ashleigh Mills, "Rights and Freedoms under the Australian Constitution: What Are They and Do They Meet the Needs of Contemporary Australian Society?" (2019) 93 ALJ 655 at 656.

¹⁶⁵ George Williams "Thawing the Frozen Continent" (2008) 19 Griffith Review 11, as cited in Ashleigh Mills, above n 164, at 656.

¹⁶⁶ "The Swiss Confederation: A Brief Guide 2020" (2020) The Federal Chancery of The Swiss Confederation < www.bk.admin.ch > at 1.

Confederation relating to the use of binding referendums at the federal, cantonal and municipal levels.¹⁶⁷ In Australia, approval through a referendum is the only way that The Constitution of Australia can be amended, and voting in referendums is compulsory for enrolled voters.¹⁶⁸ This provision is contained in s 128 of the Constitution of Australia.

A generic piece of legislation governing referendums has previously been proposed in New Zealand, but the Electoral and Justice Committee believed that it was important for Parliament to be able to debate each referendum.¹⁶⁹ The main reason for not having the issues set out in legislation is because, as discussed, it is impossible to adequately define a “fundamental constitutional issue”,¹⁷⁰ and it would consequently be impossible to create a comprehensive list.¹⁷¹ While it is possible to draft legislation that requires constitutional referendums, but leaves it to Parliament to determine whether an issue requires a “constitutional” referendum on a case by case basis, a future Parliament would not be bound [bound to do what?]. This is the difficulty that comes with having an unwritten constitution. Rather than having specific legislation, it seems more appropriate for there to be a constitutional convention that referendums are held on important constitutional issues, thereby becoming ingrained in the New Zealand Constitution while retaining some flexibility. Once the government decides to put an issue to referendum, it can outline all the other requirements for the specific referendum in its enabling statute, which it did for the euthanasia and cannabis referendums in the Referendums Framework Act 2019. This gives the government flexibility and allows Parliament to debate each issue.

¹⁶⁷ At 3.

¹⁶⁸ Section 128 of the Constitution of Australia.

¹⁶⁹ Justice and Electoral Committee Inquiry into the 2011 General Election (April 2013) at 49. The Committee was also concerned that if a general Act was introduced, the only oversight would come from the Regulations Review Committee, which it did not consider to be sufficient.

¹⁷⁰ Justice and Electoral Committee Inquiry into the 2011 General Election (April 2013) at 49.

¹⁷¹ Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at para 111 page 222.

Even if referendum use is reserved exclusively for constitutional matters, risks remain around exclusive elite control and the lack of opportunity for citizens' deliberation that is not overwhelmed by partisan campaigning.¹⁷² Tierney notes that it is therefore fundamental for systems using constitutional referendums to regulate how and when a referendum is to be triggered, and to have detailed provisions in law to help facilitate the process.¹⁷³ Of particular importance is to decide in advance whether a referendum will be binding or not.

B. Binding or Non-Binding?

There is no sound justification for a non-binding referendum on an issue such as legalising cannabis. The main reason it is not binding is because Parliament would have been pushed for time to pass the legislation before polling day. Taking a short-cut allowed the government to honour their coalition promise to the Green Party of holding referendum during their term, at the expense of good constitutional practice.

Andrew Little, the MP responsible for the Bill, has argued that the referendum is "binding" because every party in the Government has committed to honouring the result by passing the draft legislation.¹⁷⁴ This is incorrect. The current Government, if re-elected, has not ruled out making changes to the law as it goes through the select committee process. In fact, a Cabinet paper released alongside the referendum identified the risk that the legislation "could be changed significantly by the next Parliament or Government before it is enacted".¹⁷⁵ The fact that the cannabis

¹⁷² Stephen Tierney "Using Electoral Law to Construct a Deliberative Referendum", above n 85, at 523.

¹⁷³ At 523.

¹⁷⁴ Hon Andrew Little "New Zealanders to make the decision on cannabis referendum" (press release, 7 May 2019).

¹⁷⁵ Office of the Minister of Justice. Proactive release: 2020 Cannabis referendum. Date of issue: 7 May 2019.

referendum is not binding has been heavily criticised. Hon Tim Macindoe summarised the situation by saying:¹⁷⁶

New Zealanders don't know now, and probably won't for some time, exactly what they're voting for, because even if they make a particular decision, they can't even be sure that it will be binding. It will then presumably go to a select committee after we have a referendum result, and then it could change. Well, that is an insult to the voters of New Zealand. That is an outrage, constitutionally.

The cannabis referendum illustrates the difficulties with non-binding or indicative referendums. However, there is debate about whether government-initiated referendums should always be binding or whether some flexibility in the regime would be beneficial.

1 *Government-initiated referendums should almost always be binding*

Cheneval and el-Wakil argue that "voters should know what they vote on, with the consequences it has, and these consequences are clearer if it is determined ex ante that the positive or negative result of a referendum vote is legally binding".¹⁷⁷ In addition to the possibility of confusion from indicative referendums, it has been argued that if the government can ignore the result at its discretion, then the "empowering nature of the referendum for non-elected actors is cancelled".¹⁷⁸

Some arguments in favour of indicative referendums are that it wastes parliamentary time to pass legislation that might not be voted for,¹⁷⁹ and that a non-binding decision can still inform parliament's decision on the legislation by providing an indication of

¹⁷⁶ (2 December 2019) 743 NZPD (Referendums Framework Bill — Third Reading, Hon Tim Macindoe).

¹⁷⁷ Francis Cheneval and Alice El-Wakil, "The Institutional Design of Referendums: Bottom-Up and Binding" (2018) *Swiss Political Science Review* 24(3) 294.

¹⁷⁸ At 294.

¹⁷⁹ Vernon Bognador in his submission to the House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, at Q 83.

the people's wishes.¹⁸⁰ It has also been argued that binding referendums can “create the illusion of irreversibility that impedes mass deliberation”.¹⁸¹ However, binding vs non-binding is not necessarily in itself a determinant of whether “good” or “bad” deliberation will take place. Chambers gives the example of how the 2015 Irish referendum on marriage equality was binding, while the 2015 Brexit vote was not,¹⁸² and suggests that when it comes to big questions that will fundamentally change the constitution, “a very rough rule of thumb” should be that “high quality debate should outweigh decisiveness”.¹⁸³ She argues that referendums can be a catalyst for complex questions that “require a national conversation”.¹⁸⁴ In these cases, it may not be imperative that the referendum is binding.

On the basis that referendum questions should be as clear as possible, indicative referendums should only be used in cases where the referendum triggers negotiations whose ultimate outcome is unclear, or when discussion would be inhibited by a binding referendum. New Zealand should follow the advice of the United Kingdom's Independent Commission on Referendums, which advocated for a “very strong presumption for the use of post-legislative referendums,”¹⁸⁵ and where this isn't possible, recommended that white papers be published in advance of voting day.¹⁸⁶ This would ensure that people know exactly what they are voting for. However, the “bindingness” of the cannabis referendum is not the only procedural issue with the 2020 referendums.

¹⁸⁰Peter Browning in his submission to the House of Lord's Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, p 115.

¹⁸¹ Francis Cheneval and Alice El-Wakil, above n 177, at 301, citing Simone Chambers (2001) at 247.

¹⁸² Simone Chambers “Making Referendums Safe for Democracy: A Call for More and Better Deliberation (2018) 24(3) Swiss Political Science Review 305 at 309.

¹⁸³ At 308.

¹⁸⁴ At 308.

¹⁸⁵ Leah Trueblood, above n 89.

¹⁸⁶ House of Lord's Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, Recommendation 19.

B Process Requirements and Design

Constitutional referendums are significant not only in subject matter, but because they change how ordinary politics is thereafter conducted.¹⁸⁷ It is therefore of the utmost importance that the process is well designed. There is also a need to “agree on the basic constitutional rules of the game” before referendums can be used for constitutional amendments, to avoid the result being contested.¹⁸⁸ This section outlines what some of these requirements should be, and argues why the design of the 2020 referendums is flawed.

C The Wording

One issue with the design of both 2020 referendums was that the wording of the questions was decided by Cabinet, rather than by Parliament. This “opacity of decision making”¹⁸⁹ means that New Zealanders, through their elected representatives in Parliament, did not get the opportunity to engage with the process of deciding the wording of the questions, which has been shown to be very influential on the outcome of referendums.¹⁹⁰

A bigger problem with the wording of both referendums is that there is no requirement for voters to have read the End of Life Choice Act or the Cannabis Legalisation and Control Bill before casting their ballot. Nor is there any way to ensure that voters will know what changes are being proposed. Without that knowledge, the wording of both referendum questions gives voters little clue to what exactly they are voting on. The Government assumes, with no apparent evidence, that voters will come to the polls having read the respective Act and Bill or at least having informed themselves on both topics. Based on this hopeful assumption, the Government has made little attempt to

¹⁸⁷ Stephen Tierney "Constitutional Referendums: A Theoretical Enquiry" (2009) 72(3) M.L.R. 360 at 361.

¹⁸⁸ Matthew Mendelsohn and Andrew Parkin, above n 17, at 10.

¹⁸⁹ (2 December 2019) 743 NZPD (Referendums Framework Bill — Third Reading, Chris Penk).

¹⁹⁰ Steven Brocklehurst “EU Referendum: does the wording of the question matter” (online ed, BBC Scotland, 27 May 2015).

provide information or engage voters in any form of deliberative democracy.¹⁹¹ The Government is putting “power in the hands of the people” without attempting to engage them in a meaningful discussion. The wording of the euthanasia referendum has been further criticised for using neutral language.¹⁹² The question, “do you support the End of Life Choice Act” manages to completely avoid the terms “euthanasia” and “assisted suicide”, which regardless of whether you support the Act or not, is the purpose of the proposed legislation.

1 *Question-setting framework*

As these examples demonstrate, question-setting presents an opportunity for elite control, if the executive can frame the question in a way that promotes a particular outcome.¹⁹³ Tierney suggests that:¹⁹⁴

Either a specific law for one referendum or a general referendum law can provide for how a referendum question is to be set and can require that this be set out in the particular enabling statute, guaranteeing a role for the legislature in framing the law and by implication in scrutinizing any question set by the executive.

While a statute for each individual referendum can help eliminate elite control in question-setting, it will not necessarily ensure that the question is well phrased. The Electoral Commission should have input into making the question easy to understand. However, Tierney points out that an intelligible question will not alone ensure popular engagement.¹⁹⁵ If there is a lack of interest in the issue itself, the intelligibility of the

¹⁹¹ A one-page information brochure for each referendum was sent to enrolled voters in July, as part of the Electoral Commission's enrolment update mail out, and impartial information is available on a government website. “Referendum information in accessible formats” (2020) <referendums.govt.nz>.

¹⁹² Bob McCoskrie, the National Director of Family First NZ, argued it completely avoids the issue on partisan website rejectassisted-suicide.org.nz. Hon Tim Macindoe, criticised the referendum, saying “the question we are being asked will not reflect the nature of the issue”. (2 December 2019) 743 NZPD (Referendums Framework Bill — Third Reading, Hon Tim Macindoe).

¹⁹³ Stephen Tierney “Constructing a Deliberative Referendum”, above n 85, at 516.

¹⁹⁴ At 517.

¹⁹⁵ At 518.

question will not have a huge effect in increasing public interest. This needs to be considered in the Government's assessment of whether a particular issue should go to a referendum at all.

D Turnout

Voter turnout at a referendum is often used as a barometer of how seriously the electorate takes an issue.¹⁹⁶ The result from a referendum with a low turnout is usually seen as less legitimate than the result of a referendum with a higher turnout. One avenue open to legislators is to set a threshold for voter turnout in order for the outcome to be valid. However, the United Kingdom House of Lords Committee recommended that there should be a general presumption against the use of voter turnout thresholds and in their report, committee members gave multiple reasons for that position. Professor Butler made the point that turnout thresholds are problematic because in circumstances where a non-vote is equivalent to a "no", the "no" side can defeat a proposal simply by encouraging people to stay at home.¹⁹⁷ The House of Lord's Select Committee did recognise that there may be exceptional circumstances where a threshold would be appropriate.¹⁹⁸ For example, Tierney and others have argued that a vote on "big constitutional issues" may need to pass a threshold in terms of voter turnout, to give the result legitimacy.¹⁹⁹ Given that neither the cannabis or the euthanasia referendums are constitutional matters, it is appropriate that there are no participation thresholds.

¹⁹⁶ House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, at 180.

¹⁹⁷ Professor Butler for the House of Lord's Constitution Committee", above n 11, Q 17.

¹⁹⁸ the House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, Recommendation no 22 at para 189.

¹⁹⁹ Tierney Q97 House of Lords, Professor Saward and Professor Graham Smith agreed at P 15 and Q38 of the House of Lord's report respectively.

However, should the turnout be low in either or both referendums, they will risk claims of illegitimacy if the results are close.

1 *Double majorities*

Similar to voter turnout, a clear majority in a referendum is seen as more legitimate than a narrow victory.²⁰⁰ Some governments will therefore impose requirements for a “double” or “super” majority, but this can make it very difficult to get things through.²⁰¹ This is demonstrated by the difficulty of achieving constitutional reform in Australia. Section 128 of the Constitution of Australia provides that a proposed amendment must start as a bill, and must usually be passed by an absolute majority in both Houses of the Commonwealth Parliament.²⁰² The bill is then submitted to a referendum, where the proposed alteration must be approved by a “double majority”. That is a national majority of voters in the states and territories, and a majority of voters in a majority of the states (at least 4 out of six states).²⁰³ As stated above, Australians have rejected most proposals for constitutional amendments.²⁰⁴ Noting the difficulty of the referendum process, then Prime Minister Robert Menzies declared in 1951, “the truth of the matter is that to get an affirmative vote from the Australian people on a referendum proposal is one of the labours of Hercules.”²⁰⁵ Besides the issue of “reform fatigue”, this has been widely attributed to the difficulty of achieving a double majority.²⁰⁶ It is not in New Zealand’s interests to make it almost impossible to achieve constitutional reform.

²⁰⁰ At 180.

²⁰¹ Stephen Tierney for the House of Lord’s Constitution Committee, above n 11, Q 86.

²⁰² Although in certain circumstances, a proposed amendment can be submitted to a referendum if it is passed on two separate occasions by only one House of the Parliament. “Referendums and Plebiscites” (3 July 2020) Parliamentary Education Office <peo.gov.au>.

²⁰³ Australian Electoral Commission “What Are Referendums and Plebiscites?” (9 September 2015) <www.aec.gov.au >.

²⁰⁴ “Referendums and Plebiscites”, above n 202.

²⁰⁵ John Craig *Australian Politics: A Source Book* (Harcourt Brace, Sydney, 1993), at page 39.

²⁰⁶ John Craig, above n 206, at page 39.

2 *Supermajorities*

Supermajorities (where a referendum result must receive a specified proportion greater than 50 per cent of the votes cast)²⁰⁷ have been deemed inherently anti-democratic, breaching the "one vote, one value" principle.²⁰⁸ An exceptional situation given by Tierney where a supermajority may be appropriate is in divided societies such as Northern Ireland,²⁰⁹ where a simple majority, if composed almost entirely of the majority community, might not be thought sufficient. Tierney warned, however, that "referendums are particularly dangerous ... in divided societies" and possibly best avoided in such situations.²¹⁰ This situation could possibly occur in New Zealand, where the future of the Māori seats in Parliament is both a constitutional and a minority question.

In conclusion, New Zealand should not have voter thresholds or majorities in the majority of situations. It would be up to the government to decide if an issue was of such constitutional importance that a threshold would be necessary, or that a minority group is at risk. The requirements could then be set out in the enabling legislation. The hope would be that by implementing well-planned and executed education campaigns, turnout would be high enough that a threshold requirement would not be necessary.

E Timing

There must be an adequate time period between the announcement of a referendum and voting day to allow proper discussion among, and deliberation by, voters. This is where a dedicated enabling statute for a particular referendum is helpful – the time it takes to pass a statute through the House means there is time for a public conversation and

²⁰⁷ Professor Saward for the House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, Q 38 at page 184.

²⁰⁸ Q38 at 184.

²⁰⁹ At 188.

²¹⁰ Stephen Tierney in his submission to the House of Lord's Constitution Committee Twelfth Report "Referendums in the United Kingdom", above n 11, at question 97.

consideration of the issue.²¹¹ A bigger issue with timing, as discussed above, concerns the ability of the Executive to call a referendum at a time which influences voters to vote a certain way.²¹² A way to mitigate this possibility of elite exploitation is to give the Electoral Commission responsibility for the timing of the referendum. This would need to be a decision made by the Executive in the enabling statute but would be a responsible move and increase transparency around the referendum process.

The House of Lords committee recommended that referendums should not be held on the same day as General Elections,²¹³ and should as much as possible be free-standing events, kept separate from regular representative democracy.²¹⁴ This avoids the risk that either the referendum, or the General Election, is drowned out by other issues. This advice is sound, as the 2020 referendums in New Zealand have received relatively little media attention in the midst of a general election and a global pandemic.²¹⁵ The committee recommended that for the same reason there should be a presumption against holding referendums on the same day as other elections but that this should be judged on a case-by-case basis by the Electoral Commission.²¹⁶ While holding referendums at the same time as elections can reduce costs and possibly increase turnout,²¹⁷ the balance of the evidence was against holding referendums on the same day as General Elections.²¹⁸ While it is convenient to hold multiple votes on the same day, New Zealand should keep referendum voting separate from other issues when possible – a policy which would be easier to adhere to if there were fewer referendums.

²¹¹ Stephen Tierney “Constructing a Deliberative Referendum”, above n 85, at 519.

²¹² At 518.

²¹³ At 216.

²¹⁴ Stephen Tierney in his submission to the House of Lord’s Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at page 51.

²¹⁵ See Yvette McCullough “Referenda campaigners say Covid-19 disrupted plans” (11 June 2020) RNZ <www.radionz.co.nz>, and Andrew McRae “Voters may be overwhelmed by both referendums and election – analyst” (14 November 2019) RNZ <www.radionz.co.nz>.

²¹⁶ At paragraph 145.

²¹⁷ At [22]-[23].

²¹⁸ At [23].

F Education Campaigns

It is critical that clear, independently-provided public information campaigns precede a referendum in order for the result to be legitimate. Chambers explains that this is because “one dimension of legitimacy is the quality, accessibility, accuracy and truthfulness of information circulating in the public sphere”, and therefore the conditions of deliberation can weaken the claims to legitimacy of the outcome.²¹⁹ For example, the legitimacy of Brexit has been questioned due to the flood of misinformation and “fake news” that was disseminated on social media.²²⁰ An outcome with weak claims to legitimacy is at greater risk of being manipulated by elites. In New Zealand, the Electoral Commission is tasked with running politically-neutral education campaigns in the lead up to a referendum.²²¹

1 Education provision

It is important the Commission is well-resourced to ensure that quality, un-biased and easy-to-understand information reaches as many voters as possible. United Kingdom based pressure group Unlock Democracy has asserted that the quality of public information is key to the success of a referendum, and warns that:²²²

If the public education campaign is not properly resourced or is seen to be biased, the referendum campaign is unlikely to have a positive effect on political engagement and may even increase disillusionment with the political process.

²¹⁹ Simone Chambers, above n 182, at 310.

²²⁰ Nathaniel Persily “Can Democracy Survive the Internet?” (2017) *Journal of Democracy* 28 (2): 63–76, as cited in Simone Chambers, above n 182, at 310.

²²¹ Electoral Act 1993 4C.

²²² Unlock Democracy in its submission to the House of Lord’s Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, at page 18.

It has also been argued that proper provision of information is a key factor if the referendum is to be deliberative.²²³ The model provided by the 1992-3 electoral reform referendums in New Zealand has been seen as a gold standard for information provision before a referendum.²²⁴ A notable feature was having an independent body provide information and run the public education process. This should be implemented in any future referendums New Zealand has, to prevent partisan groups controlling the discourse, and to ensure people understand what they are voting for.

For the 2020 referendums, the Electoral Commission sent all enrolled voters neutral information pamphlets on the euthanasia and cannabis referendums in the months leading up the referendum, in addition to running a website, running advertising campaigns and putting up billboards to raise awareness. Nevertheless, there is a high possibility that citizens will vote on election day without having considered alternative viewpoints, and instead having received information from hyper-partisan interest groups.²²⁵ For instance, the partisan group “Say Nope to Dope” has been publishing briefing sheets linking marijuana use to family violence, driving offences and brain malaise.²²⁶ Similarly, the Drug Foundation is running a “Vote Yes” campaign, publishing information about how legalising marijuana will free up police time, put controls on cannabis and boost taxes for the government.²²⁷ Like the cannabis referendum, the euthanasia campaign has seen the emergence of partisan groups. “Yes for Compassion” and “Reject Assisted Suicide” are the two campaigns leading either side of the debate.²²⁸ It is easy to see how a voter could end up confused and easily

²²³ Professor Tierney in his submission to the House of Lord’s Constitution Committee Twelfth Report “Referendums in the United Kingdom”, above n 11, Q 90.

²²⁴ At para 167.

²²⁵ The partisan group ‘Say Nope to Dope’ has emerged and have published briefing sheets that link marijuana use with issues such as family violence. See Say Nope to Dope “Family Violence and Child Abuse”.

²²⁶ See Say Nope to Dope “Family violence and child abuse”, “Driving stoned will put everyone at risk”, and “Brain War”.

²²⁷ The Drug Foundation “Vote Yes: Cannabis Control Bill” (2020) <www.drugfoundation.org.nz>.

²²⁸ See Yes For Compassion <www.yesforcompassion.org.nz> and Reject Assisted Suicide <rejectassistedsuicide.org.nz>.

swayed in these circumstances. While partisan groups form an important part of the public discussion and can give valuable insights, they should not be the only voices.

2 *Campaigning rules*

In addition to education provision, fair funding and spending rules can go some way to creating a level playing field for the competing campaigns. The legal framework for the 2020 referendums is a sound example of this. The framework is contained in the Referendums Framework Act 2019, which contains provisions to govern the conduct of referendums held alongside the 2020 general election.²²⁹ The Act, among other things, sets out rules for campaigning. For example, it applies the same three-month rule prior to referendums as is the case for general elections,²³⁰ and holds that the name and address of an advertiser must be published alongside the advertising.²³¹ There is also a limit on spending.²³² These provisions prevent a well-funded lobby group distorting the debate, and should be included in the legal framework for each referendum. If the government follows a sound policy-based procedure for every referendum, from setting the referendum question right through to voting day, some of the issues with referendums discussed in part three will be mitigated, if not avoided altogether.

G How Should Non-Constitutional Issues Be Decided?

The aim of this paper is not to decide how parliamentary decisions are best made. However, in arguing that referendums should not be used for non-constitutional issues, the question naturally arises as to how such issues should be decided instead. The obvious options are via a normal parliamentary whipped vote, or via a conscience vote. The sort of issues that have been put to referendums in the past have typically been the kinds of issues that are also put to conscience votes. However, whether the use of conscience votes should be increased is debatable.

²²⁹ Referendums Framework Act 2019 (2019/71), s 4.

²³⁰ Section 42.

²³¹ Section 52.

²³² Section 45.

1 *Should conscience votes be used for non-constitutional issues?*

A compelling reason to not increase the number of conscience votes is because it would “demand massive changes in the processes of representation and decision making” in Westminster-style parliaments.²³³ McKeown and Lundie argue that “strong party discipline is largely accepted as necessary to ensure stable parties and government”.²³⁴ The traditional collective approach of parties is additionally beneficial because it leads to parties “searching for solutions that both are popular and practical”.²³⁵

Conscience votes also differ from referendums in that a conscience vote is “not absolutely free”.²³⁶ Australian political scientist Professor John Warhurst suggests that while conscience votes appear to give MPs total freedom to vote however they like, in practice “parliamentarians are never free, in any meaningful sense of that term, to do whatever they like. They are never really free from their community responsibilities or from their personal values or from their political parties”.²³⁷ Observations of voting patterns in the New Zealand House of Representatives and in the British Parliament have shown that “members tend to act in accordance with caucus decisions as part of their covenant with the electorate”, and that “the suspension of the whip on such votes does not diminish the primacy of party in structuring the outcome”.²³⁸

²³³ Patrick Malcolmson and Richard Myers, *The Canadian regime: an introduction to Parliamentary Government in Canada*, 2nd edition, Broadview Press, 2002, p. 138, as cited in Deirdre McKeown and Rob Lundie “Free Votes in Australian and Some Overseas Parliaments” Current Issues Brief no.1 2002-03 (27 August 2002) Parliament of Australia <aph.gov.au>.

²³⁴ Anthony Mughan and Roger M. Scully, 'Accounting for change in free vote outcomes in the House of Commons', *British Journal of Political Science*, vol 27 issue 4, Oct 97, p. 640, as cited by Deidre McKeown and Rob Lundie, above n 26.

²³⁵ David Geoffrey Lindsey, above n 29, at 89.

²³⁶ John Warhurst, 'There is no such thing as a free vote', *The Canberra Times*, 12 April 2002, as cited in Deidre McKeown and Rob Lundie, above n 26.

²³⁷ John Warhurst, above n 236.

²³⁸ David McGee, *Parliamentary Practice in New Zealand*, GP Publications, second edition 1994, p. 73, and Anthony Mughan and Roger M. Scully, 'Accounting for change in free vote outcomes in the House of Commons', *British Journal of Political Science*, vol 27 issue 4, Oct 97, p. 640, as cited by Deidre McKeown and Rob Lundie, above n 26.

There are also similar arguments against the use of conscience votes to arguments against referendum usage. The complexity of issues such as cannabis legalisation are too complex for most individual citizens, including individual MPs, to comprehensively evaluate.²³⁹ PhD student David Geoffrey Lindsey drew the conclusion that because there is “no unifying principle ring-fencing the subjects of conscience votes from other types of votes”, it is “... difficult to avoid the conclusion that either all issues should be treated with conscience votes or no issues need be so treated”.²⁴⁰ All issues being treated as conscience issues would require New Zealand to adopt an entirely different Parliamentary system, which is both unneeded and unrealistic. Conscience votes appear to add little value, and indeed may detract, from our current system. Any procedure that circumnavigates or reduces the importance of accountability and legitimacy in a democracy needs strong justification for existing. It is arguably beneficial to force parties in parliament to take a stand on controversial issues, even if this may polarise the party’s voting base. MPs are elected and paid to make these sort of decisions: if they are not willing to, questions need to be asked of their value and purpose in New Zealand’s system.

V Conclusion

Government-initiated referendums should be an exception in a legal and political landscape dominated by Parliamentary democracy. Their over-use carries great risks to the legitimacy of representative democracy. New Zealand must be careful in how it approaches and uses government-initiated referendums, and should follow a consistent, principled and pre-determined process rather than using them in an ad-hoc way that depends on what best suits the politicians of the day.

This paper has attempted to outline a process for referendums. Most importantly, they should be used only for constitutional issues, with the government of the day determining what counts as a constitutional issue. A political process as important to

²³⁹ David Geoffrey Lindsey, above n 29, at 89.

²⁴⁰ David Geoffrey Lindsey, above n 29, at 233.

democracy as a referendum needs to be designed and carried out in a highly-principled manner, following constitutional best practice. A structured educational campaign run by an independent body should precede the day of voting, and there must be strict limits on campaign spending. If possible, referendums should not be held on the same day as each other, or on the same day as general elections. The use of thresholds should be treated with similar caution. Non-constitutional issues should ideally be decided through normal parliamentary votes, not conscience votes. By taking these steps, the government will help protect representative democracy while enhancing voter engagement and participation – increasing the legitimacy of the system without reducing its accountability.

VI Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 11,861 words.

VII Bibliography

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