Summary

1. This submission offers observations on some, but not all, of the questions raised in the Committee’s call for evidence. It makes the following main points:
   a. A large range of issues relating to the role and conduct of referendums in the UK deserve detailed attention. A comprehensive review would be desirable.
   b. Direct democracy should complement, not replace, representative democracy in the UK. Referendums should foster participatory rather than populist democracy. These points have implications for how referendums are conducted, which are developed below.
   c. Whatever the legal status of referendums, they are in practice treated as binding. This is problematic if they are not conducted fairly, so efforts should focus on improving that conduct. The question of minimum thresholds is related to this. Such thresholds can be meaningful – and potentially desirable – even where referendums are not legally binding.
   d. The Committee is right to be concerned about the length of the ‘purdah’ period: in the EU referendum, the Venice Commission’s guidelines on the conduct of referendums were breached. A longer controlled period would be needed to overcome this.
   e. It would be wholly wrong, however, to tackle this source of weakness in the conduct of the campaign without tackling others. In particular, the degree of misinformation and the quality of debate during the campaign are matters of serious concern. The existing system of regulation of referendums in the UK is seriously lacking in this regard.
   f. At present, we cannot offer definite recommendations on how the quality of referendum debate could best be raised: further research is needed. There are, however, many options, many of which are already used in other countries. We set some of these out below.

Introduction

2. The Committee’s inquiry is very welcome. Referendums have come to play an important part in democracy in the UK in recent years. Debates over their future role and conduct have been intensified by the experience of the EU referendum, and will remain strong. A large range of issues relating to the role and conduct of referendums deserve attention. The legislation underpinning the conduct of referendums (the Political Parties, Elections and Referendums Act (PPERA) 2000) is now sixteen years old. It has stood the test of time well in some respects: notably, the UK leads the world in the quality of procedures for determining the wording of referendum questions. But there are also important weaknesses and gaps. A comprehensive review would be desirable. The Committee’s inquiry offers a useful step in that direction.

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2 I am grateful to Professor Meg Russell and Professor Robert Hazell for their comments on an earlier draft of this submission.
3. Many key questions – including some of the questions asked in the Committee’s call for evidence – cannot be answered confidently given our current knowledge. The observations below are therefore preliminary. The Constitution Unit is seeking to conduct further research in this area, which we hope may inform future policy-making.

4. I will here address some, but not all, of the questions in the call for evidence. I begin with comments on the role and purpose of referendums, drawing out implications also for the question of minimum thresholds. Then I consider the campaign: specifically, the length of the so-called ‘purdah’ period. Finally, I turn to the regulatory system for referendums, arguing that the key weakness in the existing system is its failure to tackle misinformation or raise the quality of debate. I highlight several ways in which this could be addressed. I do not address the questions relating to electoral administration or post-referendum planning.

The Role and Purpose of Referendums

5. Referendums are now part of democracy in the UK. They were first used (beyond the local level) in the 1970s. Since the mid-1990s, actual referendums, promises to hold referendums, and statutory requirements to hold referendums in certain circumstances have become much more frequent. The experience of the EU referendum has emboldened some to argue for more referendums, while others feel thoroughly bruised and would prefer to reassert parliamentary control. How these contrasting forces will pan out is uncertain. But it appears likely that referendums will continue to be called from time to time.

6. Referendums (and direct democracy in general) should complement, not replace, representative democracy. The democratic ideal is not that the majority always gets its way, but that the community as a whole comes together and seeks ways forward that reasoned reflection suggests can best advance the interests of all. This requires deliberation, which is difficult to achieve in the context of a referendum campaign. Achieving quality deliberation is challenging in representative democracy too, but the parliamentary policy-making process is designed to ensure that careful thought does take place. On the whole, therefore, unless the quality of referendum campaigns can be substantially improved, a parliament should put to referendum only proposals that it is content itself to endorse.

7. There is, however, reason to think that the quality of referendum campaigns could be improved. We should see referendums as belonging to a participatory rather than a populist conception of democracy: about encouraging people to get together in a process of thinking carefully about decisions relating to the future of the community, rather than simply about aggregating individuals’ views, however these might have been formed. We set out below some ways in which it might be possible to shift referendums in this direction.

8. If the conduct of referendums could be improved in this way, there could be a case for strengthening their role in the democratic system – perhaps including the introduction of referendums initiated by citizen petition.

The Bindingness of Referendum Results

9. Some referendums in the UK have been post-legislative and therefore binding in the sense that the legislation would automatically come into force if the vote was in favour or lapse if it was against. Others – as the EU referendum – have been legally only advisory. In practice, however,
all have been treated as politically binding. Given what we have said above, this is problematic if the campaign has not supported thoughtful consideration of the issues.

10. One way to address that is through the use of minimum thresholds. The UK is highly unusual in the ease with which major constitutional changes can be pushed through. A minimum support threshold above 50 per cent could raise the bar and would be particularly appropriate if parliament again felt minded to call a referendum offering a change that it does not itself support.

11. The concept of a threshold may appear odd for a referendum that is, in any case, only advisory. But it can be meaningful: there could, for example, be a requirement that government bring forward legislation in the event that the threshold is met. This may usefully create the expectation that, if the threshold is not met, the vote will be treated as genuinely advisory.

12. Where a referendum is held on a broad but as-yet ill-defined principle – such as Scottish independence or Brexit – it is democratically wrong to suggest that the political community must remain bound to follow the principle once the details are worked out, no matter what the details may be. Such a referendum could bind parliament and government to work up detailed proposals, but no more than that. Depending on the case, a second referendum once details have been agreed could be appropriate.

The Campaign

13. Turning to the Committee’s questions regarding the campaign, I will address only the first, relating to the length of the period controlled by s. 125 of PPERA (the so-called ‘purdah’ period). The Venice Commission’s Code of Good Practice on Referendums states that ‘Equality must be ensured in terms of public subsidies and other forms of backing.’ This is not binding – and is, in fact, widely violated – but it provides a useful point of reference. The regulated period of four weeks was much shorter than the actual period of intense referendum campaigning. This meant that the government was able to use public funding to promote its side of the argument during the effective campaign period, notably through the leaflet sent in April to all households. This violates the principle stated by the Venice Commission.

14. It would be wrong, however, to address this source of inequality without tackling others. Analysis by Loughborough University’s Centre for Research in Communication and Culture, for example, shows that press coverage of the referendum was strongly skewed against the government’s position: once it is weighted for circulation, 80 per cent of newspaper coverage that expressed a view favoured leaving the EU. Questions of fairness need to be viewed in the round.

15. Great care needs to be taken in the design of restrictions on publicly funded bodies to ensure that valuable independent voices are not silenced. The UK Statistics Authority, for example, was able to comment on the use of statistics in the EU referendum campaign before the controlled period. Once that period had begun, it was subject to the s.125 restrictions. Yet, as

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we suggest below, we should want the functions carried out by the UK Statistics Authority in the EU referendum to be enhanced in future referendums, not diminished.

The Regulatory System for Referendums

16. Widespread concerns have been expressed about the conduct of the referendum. The Treasury Committee excoriated both campaigns for making misleading claims.\(^7\) The Conservative peer and constitutional expert Professor the Lord Norton of Louth has said, ‘We need to take action, not to trigger another referendum but to address what rules should apply on future occasions, not only in terms of when to hold a referendum but in terms of the means by which information is provided to electors.’\(^8\) Misleading statements took a variety of forms. Some claims were outright false. Others presented uncertain forecasts as facts. Others still were true on a strict reading, but plainly designed to leave a false impression.

17. The question of how the quality of debate during referendum campaigns can be improved must be addressed. At present, we cannot offer definite recommendations: this is an issue on which the Constitution Unit hopes to conduct further research in the near future. What we can say, however, is that many methods are successfully applied in other countries: it would be wholly wrong to suppose that the problem is too complex and nothing can be done. These methods can be placed in four broad categories:

a. **Identifying and highlighting misleading claims.** In some places, an independent body – such as the Electoral Commission in New Zealand and the Referendum Commissions in Ireland – can speak out when campaigners make false claims and call on them not to repeat those claims. A similar role was taken on in the EU referendum by the UK Statistics Authority, and, overall, the referendum was the most ‘fact-checked’ ever.\(^9\) While such interventions have been effective elsewhere, however, they had limited effect in the UK. The UK Statistics Authority’s role was limited in scope and ad hoc. Fact-checking was often poorly integrated into wider media coverage. In part, it is likely that this reflected the broadcasters’ interpretation of their duty to maintain ‘due impartiality’, which favoured a particular understanding of balance, to the detriment of accuracy. In part, it also reflected the very partisan nature of British newspapers.

b. **Regulating claims.** Moving beyond simple ‘naming and shaming’, false or misleading statements can be legally banned and those who knowingly make them can, if they persist, be punished. In the UK, truthfulness of most forms of advertising – but not political advertising – is policed by the Advertising Standards Authority. There is legitimate squeamishness about applying a similar approach in the political realm. But this is done, in respect of at least some statements, in some other jurisdictions. In California, for example, a pamphlet is sent to all registered electors before any vote, which includes, alongside official information, statements from each of the campaigns. The whole pamphlet is opened to public examination before it is sent out, and anyone can seek judicial review of its content. The courts have, at least once, ordered the deletion of campaigners’ arguments because they were false or misleading.\(^10\) This does not apply to other

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\(^7\) House of Commons Treasury Committee, *The Economic and Financial Costs and Benefits of the UK’s EU Membership* (HC 122), 27 May 2016, pp. 6–22.

\(^8\) HL Debs vol. 773, col. 2088, 6 July 2016.


advertising, but it may be expected to have some ripple effect. In Oregon, there is a similar but much broader provision: campaigners can be sued for making false claims in any campaign materials.\textsuperscript{11}

c. **Providing impartial information.** Given legitimate concerns over wide-ranging regulation, interventions designed to improve voters’ capacity to interpret the claims that are made may be preferable. One approach is to provide solid, impartial information. In the 2011 AV referendum, the Electoral Commission provided its own descriptions of the two electoral systems, whereas in the EU referendum, it simply gave each of the campaigns a page to present their arguments. In some other cases, much more detailed impartial information is provided. In the New Zealand electoral system referendum of 2011, for example, the Electoral Commission commissioned experts to produce detailed guidance. This not only described the systems, but also suggested criteria that might be used to judge between them, and set out how each system performed against these criteria. Alongside text, it included DVDs and an online ‘interactive toolkit’, and the experts also spoke at public meetings across the country.\textsuperscript{12} A similar function was performed in the EU referendum by the UK in a Changing Europe projected, funded by the Economic and Social Research Council and based at King’s College London.\textsuperscript{13} This had traction, but was limited by its lack of official status.

d. **Encouraging thoughtful engagement.** Going further still, the fourth approach seeks not just to provide impartial information, but also encourages voters to engage thoughtfully with the issues. The Electoral Reform Society, partnering with several universities, sought to trial this in a small way in the EU referendum by building an online tool to help groups organise their own events to discuss the issues.\textsuperscript{14} A different approach is taken in Oregon: a panel of 24 citizens selected randomly to be representative of the state’s population meets over five days to hear from campaigners and experts, discuss among themselves, and produce a one-page statement. This is then included in the information pamphlet sent to all voters.\textsuperscript{15} Research shows that voters pay more attention to the citizens’ panel statements than any other part of the pamphlet and that many voters feel this material helps their decision on how to vote.\textsuperscript{16}

18. As indicated above, I am not in a position at this stage firmly to recommend any of these approaches for the UK. I simply point out that multiple promising options are available and deserve further analysis.

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\textsuperscript{11} ORS 260.532.
\textsuperscript{12} Much of this material is still available on the New Zealand Electoral Commission’s website: http://www.elections.org.nz/events/past-events/2011-referendum-voting-system.
\textsuperscript{13} http://ukandeu.ac.uk/
\textsuperscript{14} http://www.betterreferendum.org.uk/
\textsuperscript{15} For recent examples, see the relevant pages of the 2012 pamphlet: http://sos.oregon.gov/elections/Documents/pamphlet/2012/general-book6.pdf.