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Constitutional Homework for Constitutional Change

A RESPONSE TO ‘LET “THE PEOPLE” DECIDE:
REFLECTIONS ON CONSTITUTIONAL CHANGE AND
“CONCURRENT CONSENT”’, BY COLIN HARVEY

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In Colin Harvey’s paper, ‘Let the “the people” decide’, the core issue that is being examined is how to formulate the appropriate question to capture what the people should decide on. From the perspective of both sides of the border, the 1998 Good Friday Agreement has already been the subject of popular vote. In Ireland, this resulted in a referendum on the amendment of Articles 2 and 3 of the Constitution. This was to move the constitutional framing from pending reintegration to emphasising peace, diversity and consent. The aim was to remain the same, with the possibility of a united Ireland at some point in the future, but the softening of the language and focus on peace and consent showed that words matter. Words will matter in any potential referendum question.

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Professor Harvey's article looks directly at how the democratically expressed wish to unite Ireland may be effectively communicated and the process required to achieve this, rather than at the particular question that may be asked. Arguably this is more important than what may appear on the ballot papers, as the deliberative processes that lead to that ballot must also be democratic and recognise the shared traditions bringing us to the moment of an all-island vote. Even though the constitutional language has changed to a process of inclusion rather than imposition, the concept of a united Ireland has continued but at a faster pace than ever before. The lessons learned in the 1998 Agreement must be brought to any possible referendum.

The confluence of circumstances, not only with Brexit but the wider 'constitutional turbulence' of the state of the Union of the United Kingdom, has brought the island of Ireland to a point at which such questions are now mainstream. Brexit has become a catalyst for the developing momentum behind this issue, but it was one that was gradually gaining traction even before the Brexit vote. One major aspect picked up in Professor Harvey's article is the need for deliberative engagement on the issues that will frame any referendum. The political failings of the Brexit vote, in particular the lack of long-term planning that should have been in place before the referendum, highlight the danger of an 'ask questions and flesh out with policy later' approach. Agreeing with Professor Harvey's doubts on using an 'in principle referendum', and looking at the previous work of deliberative referendum bodies in Ireland, there is a strong argument to use such forums in the formulation of the referendum question and landscape when they have been used well in previous constitutional questions. The use and benefit of deliberative assemblies in advance of any vote to give a shape to pathways and policy is clear. From the Irish constitutional perspective, the example of the Citizens' Assembly in Ireland can be used as a template, in particular, in its deliberations around repealing the 8th Amendment. Like the issue of a united Ireland, there were many voices on both sides with strong traditions and views—these can be heard using deliberative assemblies. This would also give a sense of purpose and direction to any vote and a sense of inclusion.

The management of the process leading up to any referendum is mentioned by Professor Harvey. The north has a well-managed and long-standing Electoral Commission. In spite of Ireland having a long history of referendums, the creation of the Referendum Commission is only an ad hoc body for each referendum. Ireland has yet to create its own electoral management body, but one has been proposed in the long-awaited Electoral Reform Bill

which is currently before the Oireactas. The proposed Electoral Commission would take over the work in this area as a permeant body. This is a welcome development. That it is envisaged to have wider powers on online advertising¹ could have particular ramifications for any interference or influence from within or outside of the island in any potential referendum on the question of a united Ireland.

In summary, Professor Harvey puts forward strong arguments for proper planning and research for a possible referendum. Good arguments are made for what can and what is needed to be done but a well-informed process of constitutional change, especially with the use of deliberative bodies, can add to this process of informed constitutional homework.

¹ General Scheme of the Electoral Reform Bill 2020, Part Four, available at: <https://www.gov.ie/en/publication/34cf6-general-scheme-of-the-electoral-reform-bill-2020/> (22 June 2020).