REFERENDUMS IN THE UK AND PLEBISCITES IN AUSTRALIA: WHEN TO SEEK THE VIEWS OF THE PEOPLE?

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Introduction

Advisory referendums have been held in the United Kingdom and Australia from time to time. Most recently in the UK, the public voted on the question whether the UK should 'remain a member of the European Union or leave the European Union'.[1] The result in favour of leaving the European Union (EU) did not bind Members of Parliament (MPs) in a vote on any bill put before the parliament concerning the UK's membership of the EU,[2] nor it did not bind the executive.[3]

In Australia in 2015, the Liberal-National coalition government proposed an advisory referendum – often referred to as a 'plebiscite' in Australia – on the question whether the law should 'be changed to allow same-sex couples to marry'.[4] The legislation authorising the plebiscite was defeated in the Senate and the public vote did not take place. After the Plebiscite (Same-Sex Marriage) Bill 2016 failed to pass through the parliament, the government, through an exercise of executive power, authorised the Australian Bureau of Statistics to conduct a 'postal survey'.[5] Had the plebiscite proceeded, its result would not have bound MPs in any subsequent parliamentary vote concerning same-sex marriage. Similarly, MPs were not bound by the result of the postal survey.

There are two common features of these public votes in the UK and Australia: they were *discretionary* and *advisory* in nature. In both cases, parliament had the necessary legislative

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1 *European Union Referendum Act 2015* (UK) s 1(4).

2 Specifically, MPs were not bound by the referendum result in passing the *European Union (Notification of Withdrawal) Act 2017* (UK), which provided the Prime Minister with power to notify the EU under Article 50(2) of the Treaty on European Union of the UK's intention to withdraw from the EU.

3 The Prime Minister was not *required* to give notice to the European Council pursuant to Article 50(2) of the Treaty on European Union by virtue of the referendum vote.

4 Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) cl 5(2).

5 The survey did not require legislative approval: *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017).

power to implement the proposed reform, but still referred the issue to a public vote. The decision to conduct these public votes rested largely with the executive.

It is important at the outset to clarify terminology. The term 'advisory referendum' is used in this article to describe the process by which parliaments have referred to the electorate questions that parliament had authority to determine itself, and in respect of which the result is *not* self-executing, nor strictly binding on Parliament – i.e. popular votes which are *discretionary* (as to whether they are held), and *advisory* (as to the result). Such a process is commonly referred to as a 'plebiscite' in Australia. By contrast, a referendum process is mandated by the *Australian Constitution* where a constitutional change is proposed. If both houses of the Australian Parliament vote in favour of an amendment to the *Constitution*, a referendum must be held in accordance with s 128 of the *Constitution*, and the result is self-executing. I refer to these votes as 's 128 referendums'

The recent experiences with advisory referendums in Australia and the UK raise important questions about their use. Why do governments refer some issues but not others to advisory referendums? Within a system of representative government, which issues are most appropriate to be referred to an advisory referendum?

Part 1 of this article examines the circumstances in which governments in Australia and the UK have used advisory referendums. A comparison between these two countries is helpful, particularly from an Australian perspective. While the parliamentary systems of each country are similar, the issue of when to use advisory referendums has been given greater consideration in the UK, with an unwritten constitution (and the absence of any equivalent to s 128 of the *Australian Constitution*). In this first part of the article I identify that there are four common justifications, three of which are grounded in political expediency. The fourth is where the advisory referendum provides special legitimacy to the proposed reform. It is this final justification that is the focus of this article.

In Part 2 of the article I argue that in this fourth category – where the referendum provides special legitimacy for the reform – the use of an advisory referendum can serve to promote or further the values underpinning representative democracy. Part 2 also identifies the sorts of reforms that are apt to be put to an advisory referendum on the basis that the advisory referendum may provide legitimacy for the reform. In this part of the article I identify three broad categories of reform where the underlying principles of representative government

support the use of advisory referendums: changes to the parliament; changes to the electoral process; and changes to the franchise.

Part 3 examines these three broad categories in further detail, identifying the types of issues that fall within these categories in parliamentary democracies such as Australia and the UK.[6]

1. The Use of Advisory Referendums in the UK and Australia

In this part of the article I examine the historical use of advisory referendums in the UK and Australia. I then identify four common justifications for the use of advisory referendums, drawing upon the historical use of referendums in Australia and the UK as well as a review of advisory referendums more generally.

A. The History of Advisory Referendums in the UK and Australia

(i) UK

Advisory referendums have been used infrequently in the UK. There have only been three national advisory referendums. The first was held in 1975 on whether the UK 'should stay in the European Community (the Common Market)'.[7] The vote came about after a split within the governing Labour Party and it was hoped that the referendum would end internal party tensions.

The second national advisory referendum was held in 2011 as a result of the coalition agreement between the Conservatives and Liberal Democrats. The 2010 election resulted in a hung parliament and, to secure the support of the Liberal Democrats, the Conservatives offered the Liberal Democrats an advisory referendum on the introduction of the alternative vote method as part of the coalition agreement.[8] The advisory referendum asked the voters whether the 'first-past-the-post' voting system should be replaced with an 'alternative vote' system for House of Commons elections.[9]

The third national advisory referendum was the 2016 vote on whether the UK should remain in the EU.[10] Like the 1975 referendum, the Brexit referendum was driven by internal party

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6 This article considers the place of advisory referendums in the system of parliamentary democracy as it presently exists. Whilst there are arguments that the concept of parliamentary democracy ought to be expanded to include more public participation, those arguments are beyond the scope of this article.

7 *Referendum Act 1975* (UK).

8 See 'Conservative Liberal Democrat Coalition Negotiations; Agreement Reached' (11 May 2010) <http://www.conservatives.com/~/media/Files/Downloadable%20Files/agreement.ashx?dl=true>.

9 *Parliamentary Voting System and Constituencies Act 2011* (UK) s 1.

10 See above nn 1–3 and accompanying text.

politics. Prime Minister David Cameron's promise in 2013 to hold the Brexit referendum if the Conservatives won the 2015 election was 'an attempt to douse the Eurosceptic surge within the Conservative party'.[11]

Thus, each of the three national advisory referendums was driven at least in part by internal party or coalition politics.

There have been 11 other advisory referendums of significance held in the UK. Of these, eight have dealt with issues of independence and devolution in Northern Ireland,[12] Scotland,[13] and Wales.[14] These referendums were limited to the relevant constituent country as opposed to a national vote across the whole of the UK. The other three advisory referendums dealt broadly with issues relating to mayors and regional assemblies.[15] These referendums were each held in England and were limited to the geographical area affected by the proposed reforms.

Thus, advisory referendums at a national and constituent country level in the UK have broadly dealt with 'constitutional issues'. That is, issues dealing with sovereignty, independence, devolution and methods of election.

In the UK, there has been growing support and consensus surrounding the use of advisory referendums on 'constitutional issues'.[16] In the UK in a 2010 report, the House of Lords Select Committee on the Constitution suggested that if advisory referendums were to be used, they should be limited to 'fundamental constitutional issues'. While not intending to create an exhaustive list, the Committee suggested that 'fundamental constitutional issues' included proposals:

> to abolish the Monarchy; to leave the European Union; for any of the nations of the UK to secede from the Union; to abolish either House of Parliament; to change the electoral system

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11 Nicholas Watt, Patrick Wintour and Tom Clark, 'David Cameron Offers Olive Branch on EU Referendum as Ukip soars', *The Guardian* (online), 14 May 2013 <https://www.theguardian.com/politics/2013/may/13/david-cameron-eu-ukip>.

12 *Northern Ireland (Border Poll) Act 1972* (UK); *Northern Ireland (Entry to Negotiations, etc) Act 1996* (UK).

13 *Scotland Act 1978* (UK); *Referendums (Scotland and Wales) Act 1997* (UK); *Scottish Independence Referendum Act 2013* (Scot).

14 *Wales Act 1978* (UK); *Referendums (Scotland and Wales) Act 1997* (UK); *Government of Wales Act 2006* (UK) and The National Assembly for Wales Referendum (Assembly Act Provisions) (Counting Officers' Charges) Order 2010.

15 See *Greater London Authority (Referendum) Act 1998* and *Regional Assemblies (Preparations) Act 2003*. In 2012 a number of referendums were held in local council areas to determine whether to introduce directly-elected mayors.

16 See Independent Commission on Referendums, *Report of the Independent Commission on Referendums* (July 2018) 65. See also above n 35.

> for the House of Commons; to adopt a written constitution; and to change the UK's system of currency.[17]

As the Committee acknowledged, it might be difficult to develop a definitive list and to define precisely what is a 'fundamental constitutional issue'.[18] One might even question whether a change to the currency is necessarily a 'fundamental constitutional issue'. Central to determining what might constitute a fundamental constitutional issue is an examination of the relationship between referendums and representative democracy. I return to this issue in Part 2 of the article.

(ii) Australia

In the Australian context, where the *Constitution* already provides a referendum mechanism for constitutional amendment,[19] there is a question as to what extent additional public votes – that is, advisory referendums – should be used. Unlike in the UK, the use of advisory referendums in Australia has extended beyond 'constitutional issues'.[20]

Three national advisory referendums have been held since Australia's federation. The first two (in 1916 and 1917) dealt with the issue of conscription during the peak of the First World War. The conscription referendums were a function of internal party politics: there was division within the governing Labor Party over whether the government should introduce conscription.[21]

The third advisory referendum was held in 1977, on the question of which song should be Australia's national anthem.[22]

Most recently the proposal for an advisory referendum on the issue of same-sex marriage emerged in an effort to resolve tensions within the governing Liberal-National coalition. Ultimately, holding an advisory referendum was adopted as coalition policy (although the

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17 House of Lords, Select Committee on the Constitution, 'Referendums in the United Kingdom' (HL Paper 99, 12th Report of Session 2009-10) 49 [210].

18 Ibid 48–9 [206], [210].

19 As explained above at page 2.

20 At a state level in Australia, advisory referendums have been held more frequently and have often dealt with contentious local social issues: Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *Public Law Review* 117, 119–21; Anne Twomey, 'Plebiscites and Referenda' (2015) 89 *Australian Law Journal* 832, 834.

21 *Conscription During the First World War, 1914-18*, Australian War Memorial <https://www.awm.gov.au/articles/encyclopedia/conscription/ww1>; *Conscription Referendums, 1916 and 1917 – Fact Sheet 161*, National Archives of Australia < http://www.naa.gov.au/collection/fact-sheets/fs161.aspx>.

22 *Australia's National Anthem – Fact Sheet 251*, National Archives of Australia <http://www.naa.gov.au/collection/fact-sheets/fs251.aspx>.

advisory referendum was never held, and instead a postal survey was conducted). The advisory referendum was being used as a 'shield' by some members of the Liberal-National coalition, allowing the matter to be deflected from the parliament.[23]

Since the same-sex marriage postal survey there have been calls for further public votes on policy issues in Australia. The Leader of the Opposition, Bill Shorten, has promised an advisory referendum on Australia becoming a republic if he wins the next election.[24] There have also been demands from Australian MPs for public votes on the banning of the wearing of a burqa in public,[25] and placing a cap on immigration and limiting 'non-European' immigration.[26] This renewed interest in advisory referendums in Australia calls for some consideration of the use of referendums in Australia beyond those required for constitutional amendment (i.e. s 128 referendums).

B. Four Common Justifications for Advisory Referendums

A review of the historical use of advisory referendums in Australia and the UK, as well as a review of the use of referendums more generally,[27] reveals four common justifications for their use. These justifications are not mutually exclusive and, in some cases, there will be more than one reason for deploying an advisory referendum.

First, advisory referendums are used when there is internal division within government. Rather than causing greater political divide or tension within the governing party or coalition, the issue is put back to the people.[28] As I explain above, this is when advisory referendums have been used previously both in the UK and Australia. Secondly, advisory referendums have also been used in some jurisdictions where a minority government does not have the numbers in the parliament and a public vote would give the government a mandate to legislate on the issue.[29]

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23 Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37 *Melbourne University Law Review* 255, 282. See also Bogdanor, above n 35, 34, 69.

24 Bill Shorten (speech delivered to the Australian Republication Movement, 29 July 2017) http://www.billshorten.com.au/speech_australian_republic_movement_melbourne_saturday_29_july_2017.

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 2017, 7293, (Pauline Hanson).

26 Plebiscite (Future Migration Level) Bill 2018.

27 See Laurence Morel, 'The Rise of Government-Initiated Referendums in Consolidated Democracies' in Matthew Mendelsohn and Andrew Parkin, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan, 2001) 47; Matt Qvortrup, *A Comparative Study of Referendums — Government by the People* (Manchester University Press, 2nd ed, 2005) 104–5.

28 Laurence Morel, above n 27, 53–6.

29 Ibid 56–9.

In these two situations, the advisory referendum is being used where there is a blockage or impasse either within the governing party (or coalition) or the parliament. The use of referendums in these circumstances is not limited by subject matter, but is instead driven by politics. There may, in theory, be alternative mechanisms for resolving these blockages: for example, internal division within a party could be resolved by a 'free vote' or 'conscience vote' for all members of that party. However, for political or tactical reasons this option might not be desirable or preferable, although technically possible.

Thirdly, advisory referendums have been used to isolate a particular issue 'with the aim of removing the divisive issue from [a forthcoming] electoral campaign'.[30]

The use of advisory referendums in these three situations is grounded in political expediency. In each case, the advisory referendum serves a practical purpose.

There are concerns about the use of advisory referendums in these circumstances – i.e. where the reason for holding the referendum is one of political expediency. First, there is the concern that a referendum can be deployed such that the majority can override minority rights,[31] which is certainly a risk with public votes on issues such as same-sex marriage, immigration caps for 'non-European' immigration and banning the burqa in public. Second, more frequent use of referendums on substantive policy issues runs the risk of undermining or side-stepping the parliamentary process.[32]

As against these concerns, it might be argued that parliament's power includes the power to refer questions back to the electorate. Further, advisory referendums may serve an important practical function when controversial issues cannot be resolved through the party-political process. Finally, concerns about the overuse of advisory referendums must be tempered with the acknowledgement that parliaments in Australia and the UK have, in fact, used advisory referendums only infrequently.

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30 Ibid 56.

31 House of Lords, Select Committee on the Constitution, 'Referendums in the United Kingdom' (HL Paper 99, 12th Report of Session 2009-10) 17. Whether this concern is borne out in practice is perhaps another question: see David Altman, *Direct Democracy Worldwide* (Cambridge University Press, 2011) 44–48; David Butler and Austin Ranney, 'Theory' in David Bulter and Austin Ranney (eds), *Referendums Around the World — The Growing Use of Direct Democracy* (MacMillan, 1994) 11, 20.

32 House of Lords, Select Committee on the Constitution, 'Referendums in the United Kingdom' (HL Paper 99, 12th Report of Session 2009-10) 20; Independent Commission on Referendums, *Report of the Independent Commission on Referendums* (July 2018) 65.

A further justification for the use of advisory referendums is to grant special legitimacy to a government proposal.[33] As Vernon Bogdanor has noted, '[t]here are some issues of such fundamental importance that a parliamentary verdict is by itself insufficient to ensure legitimacy'.[34] Advisory referendums on 'fundamental constitutional issues' in the UK have been deployed (at least in part) for this reason.

It is this final justification for the use of advisory referendums that I explore further in the following parts of this article. This justification is distinct from the other reasons for holding an advisory referendum. While an advisory referendum is being used in the other circumstances as a political tool, this justification for the use of advisory referendums suggests that there are some issues that will benefit from an advisory referendum *even if* there is sufficient support within the parliament for the reform. One challenge is to identify such issues. In Part 2 of the article I seek to identify the types of issues that might benefit from a grant of special legitimacy through the use of advisory referendums by examining the nature of representative government.

2. Referendums and Parliamentary Democracy

While the rationale for advisory referendums on 'fundamental constitutional issues' has been examined elsewhere, the question remains: what might constitute a 'fundamental constitutional issue'.[35] This part of the article seeks to address that question through an examination of the principles underlying representative government.

In representative democracies such as the UK and Australia, legislative power is vested in the parliament. In Australia, s 1 of the *Australian Constitution* provides that the 'legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives'. In the UK, the power of the parliament has increased over time. After the Glorious Revolution in 1688, the passing of the Bill of Rights in 1689 and the Acts of Union in 1707, the royal prerogative was restricted and legislative power rested with the UK Parliament.[36]

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33 Laurence Morel, above n 27, 60–2.

34 Vernon Bogdanor, *The New British Constitution* (Hart, 2009) 185.

35 See, eg, Vernon Bogdanor, *The People and the Party System* (Cambridge University Press, 1981) 72-4; Eoin Daly, 'A Republican Defence of the Constitutional Referendum' (2015) 35 *Legal Studies* 30; Stephen Tierney, 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72 *Modern Law Review* 360; House of Lords, Select Committee on the Constitution, 'Referendums in the United Kingdom' (HL Paper 99, 12th Report of Session 2009-10).

36 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) ch 7.

Parliament can pass laws on any topic within the scope of its power. In Australia, the grant of the Commonwealth legislative power is largely defined by ss 51 and 52 of the *Australian Constitution*. In the UK, the orthodox position has been that parliament is supreme and can pass laws on any topic it chooses.[37] There is no general legal requirement for parliament to seek the opinion of the people on any proposed legislation by way of an advisory referendum in either jurisdiction.[38]

In order to identify the circumstances in which an advisory referendum is consistent with representative government, it is helpful first to consider the essential features of representative government. A fundamental principle of representative government is that the parliament is composed of representatives elected by the people. The representative's authority comes from receiving the support of their electorate.[39] As John Stuart Mill explained, 'The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution must reside somewhere'.[40] Whether members of parliament are viewed as representing those in their electorate or the people as a whole,[41] their authority ultimately stems from receiving the support of their electorate. The extent of that authority is addressed further below.

A further fundamental principle is that the parliament ought to exercise its law-making power, and ought not to delegate that power to another body or person. In his *Second Treatise of Government*, John Locke stated, 'The Legislative cannot transfer the Power of making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others.'[42] Understanding representative government in this way means that, at

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37 *R (Jackson) v Attorney General* [2006] 1 AC 262, 274; *British Railways Board v Pickin* [1974] AC 765, 782. However, in *Jackson* Lord Steyn raised the question of whether this 'classic account' of parliamentary supremacy was 'out of place in the modern United Kingdom': at 302. See also Mark Elliot and Robert Thomas, *Public Law* (Oxford University Press, 3rd ed, 2017) 228–254.

38 One exception to this general principle is that in Australia there is a requirement for any change to the Australian flag to be 'submitted to electors': *Flags Act 1953* (Cth) s 3(3).

39 Mark Elliott and Robert Thomas, *Public Law* (Oxford University Press, 2nd ed, 2014) 157.

40 John Stuart Mill, *On Liberty, Unitarianism and Other Essays* (Oxford University Press, 2015) 235.

41 Edmund Burke, for example, was very much of the view that elected representatives represent the nation or public as a whole, rather than just their electorate: see Edmund Burke, 'Speech at the Conclusion of the Poll' in *Political Tracts and Speeches of Edmund Burke* (W. Whitestone, 1777) 354.

42 John Locke, *Second Treatise of Government* (Oxford University Press, first published 1690, 2016 ed) 141.

least at a political level, legislative power is conferred by the people and entrusted in the parliament. As Locke explained:

> To this end it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, *with this trust*, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature.[43]

Locke's analysis raises two important points. The first is that the parliament ought not delegate its law-making powers. But secondly, he acknowledges that alteration to the law-making power in itself might require the consent of the people.

Importantly, when Locke speaks of not delegating legislative power, he is referring to not delegating power *to another person or institution*, as opposed to not referring an issue related to the scope of the law-making power *back to the people*:

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.[44]

As identified above, it is fundamental to the concept of representative government that the authority of representatives stems from the electorate. Drawing from Locke, whilst that authority ought not to be delegated, it *is* appropriate to seek the consent of the electorate where the reform affects the basis upon which the authority was granted.

Advisory referendums on issues relating to the exercise of legislative power – in other words, the scope of the authority of parliament – are entirely consistent with Locke's conception of the law-making power of the legislature being a delegated power of the people. Drawing upon Locke's analysis, Bogdanor explained:

> Voters, it might be said, entrust MPs as agents with legislative powers, but they give them no authority to transfer those powers, to make radical alterations in the machinery by which laws are to be made. Such authority, it may be suggested, can be obtained only through a specific mandate, that is, a referendum. The referendum, therefore, could be argued to be in accordance with, rather than in opposition to, basic principles of liberal constitutionalism.[45]

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43 Ibid 135 (emphasis added).
44 Locke, above n 42, 141.
45 Bogdanor, above n 34, 189.

Thus, Bogdanor suggests that referendums of questions relating the 'alteration of the machinery by which laws are to be made' might be seen to sit comfortably with parliamentary democracy. The 'radical alteration to the machinery by which laws are to be made' might include radical changes to the structure, processes and powers of the parliament.

I would suggest that the category of circumstance in which it is appropriate to seek the consent of the electorate is broader than that proposed by Bogdanor. Specifically, I would suggest that it is appropriate – and consistent with the concept of representative government – for the electorate's consent to be sought where a reform affects the basis upon which the authority was granted by the electorate.

What, then is the basis on which the electorate grants authority to its representative? The people vote for their preferred representative knowing the structure of the parliament and the scope of the power of the parliament. In a parliamentary democracy, if the people are not satisfied with decisions parliament has made, they can elect different representatives and change the composition of the parliament at the next election.[46] Future parliaments are not bound by previous parliaments and can repeal legislation of a previous parliament.[47] Implicit in the conception of representative government that exists in the UK and Australia is the expectation that the parliament will continue to exist and that it will exercise its law-making function.

I would argue, therefore, that there are two further areas of reform where an advisory referendum might be necessary to provide special legitimacy. These reforms extend beyond what Bogdanor described as changes to 'the machinery by which laws are to be made' to matters relating to fundamental changes to the electoral process or the franchise.

First, central to the parliamentary democracies in both countries is the holding of periodic elections.[48] Voters do not entrust MPs indefinitely with legislative power; the voter has the right to change their representative at the next election. In other words, voters confer authority

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46 John Hart Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press, 1980) 78.

47 However, as Goldsworthy explains, parliament may pass laws creating 'alternative' or 'restrictive' procedures for passing legislation: see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 176. In Australia, the High Court has held that restricting the way in which parliament passes legislation by the use of 'manner and form' provisions is permissible: *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394. In the UK, the question whether the Parliament can enact such binding 'restrictive' procedures remains open: see *R (Jackson) v Attorney General* [2006] 1 AC 262, 319. See also Elliot and Thomas, above n 37, 240-1.

48 The UK has had maximum parliamentary terms since 1694: *Meeting of Parliament Act 1694* (6 & 7 Will & Mary c 2). In Australia the maximum term for the House of Representatives is three years: see *Australian Constitution* s 28.

only for a limited period of time. Fundamental changes to the electoral process – for example, changes to the voting process – might well be seen to undermine the voter's ability to exercise their choice at subsequent elections. Fundamental changes to the electoral processes might include not only changes to the voting processes, but also changes to the electoral term.

Secondly, the authority to legislate is given to representatives by the electorate *as it exists at a particular election*. To make a fundamental change to the franchise is to alter (and potentially undermine) that grant of law-making power from the people to the legislature. The authority to make fundamental changes to the franchise may, therefore, provide grounds for a referendum.

Thus, I would argue that each of these areas of reform lies outside the authority given to MPs by voters. Therefore, where a reform is proposed in either of these areas, an advisory referendum may be necessary to provide it with special legitimacy.

In this Part of the article I have broadly identified three areas of reform where the underlying principles of representative government support the use of advisory referendums. As Bogdanor has noted previously, advisory referendums on questions relating to the machinery by which laws are to be made might be entirely consistent with representative democracy. Alteration to the law-making process might include changes to the power, structure or processes of parliament. In this part of the article I have argued that there are a further two areas of reform in which an advisory referendum on those reforms might also sit comfortably with representative democracy: changes to the electoral process and changes to the franchise. In the following part of the article I examine these categories further, identifying the types of issues that might fall within these areas of reform.

3. Framework for the Use of Advisory Referendums

Having identified three broad areas in which advisory referendums might be consistent with representative democracy, in this part of the article I examine the types of issues that fall within those categories in parliamentary democracies such as Australia and the UK.

A. Changes to the Parliament

A change to the parliament may fall broadly into one of two categories: changes to the structure or processes of the parliament and changes to the scope of the legislative power of the parliament.

(i) Changes to the Structure or Processes of Parliament

As I explained above, putting questions regarding fundamental changes to the structure or processes of the parliament back to the people in an advisory referendum may sit comfortably with the underlying principles of representative government. Voters, in granting legislative power to the parliament, provide no authority to make radical alternations to these structures or processes.

Changes to the processes of the parliament could include, for example, altering the processes for dealing with deadlocks between parliamentary chambers,[49] or altering the quota needed to pass legislation from a simple majority to a supermajority.[50] Structural change could include, for example, the abolition or major restructure of a house of parliament.[51]

Another change that relates to both the structure and process of the parliament would be the abolition of the monarchy (thereby removing the Crown-in-Parliament). While the monarch's role within the legislative process is largely ceremonial – giving assent to a Bill before it becomes law – this is not always the case in the exercise of the 'personal prerogatives' (or 'reserved powers'). In Australia, the Governor-General has on one occasion exercised power to dismiss the Prime Minister and dissolve parliament.[52]

The abolition of the monarchy might also have broader implications for the legislature and the balance of power between the executive and legislature. For example, removing the Crown-in-Parliament and replacing it with a US-style presidential system – where the President can object to legislation and send it back to the legislature for reconsideration – would have implications for the legislative process.[53]

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49 For example, the *Parliament Act 1911* provides that the House of Commons can override the House of Lords: see see *Parliament Act 1911*, 1 & 2 Geo 5, c 13, s 2(1) as amended by the *Parliament Act 1949*, 12, 13 & 14 Geo 6, c 103. In Australia, there is provision in the *Constitution* for a parliament to be dissolved and an election held where the government is unable to have its legislation passed by the Senate (often referred to as a 'double-dissolution election'): see *Australian Constitution* s 57.

50 Or, where a supermajority was required, reducing this to a simple majority. By 'supermajority' I mean some quota of the parliament that is higher than just a simple majority.

51 For example, reforming the House of Lords: see Mark Ryan, 'A Referendum on the Reform of the House of Lords (2015) 66 *Northern Ireland Legal Quarterly* 223.

52 See George Winterton, '1975: The Dismissal of the Whitlam Government' in HP Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229-261.

53 In the USA, if the President sends a bill back to Congress, a two-thirds majority of both the House of Representatives and Senate is then required for the bill to become law: see *United States Constitution* art I, § 7.

In Australia, the *Constitution* establishes the parliament,[54] and changes to the structure and processes of parliament or the scope of the legislative power of Parliament would require amendment to the *Constitution* and therefore a s 128 referendum. However, advisory referendums on constitutional issues might still have a role to play in Australia. Their potential use may be illustrated by the s 128 referendum in 1999 on whether Australia should become a republic. A specific republican model was put to the Australian people and rejected. One of the challenges in the Australian republican debate was agreeing on the preferred model for a republic. As Williams and Hume noted, 'Australians wanted an Australian head of state, but were not sure about the model on offer'.[55] In a s 128 referendum the question put to the people is binary; it is simply a question of whether the people accept or reject the proposed constitutional amendment as stated. Greater flexibility can be employed with an advisory referendum. If Australia were to revisit the issue of becoming a republic, a *series* of questions could be put to the people in an advisory referendum: the public could be asked whether they were in favour of becoming a republic *in principle*; and, if multiple republican models were being considered, the public could also be asked to indicate which would be their preferred option, perhaps even ranking the alternatives.[56] Once the people's preferred option was ascertained, a constitutional amendment could be proposed via the process set out in s 128 of the *Constitution*. There might, therefore, still be a role for advisory referendums in Australia even where a s 128 referendum is ultimately required.[57]

(ii) Changes to the Powers of the Parliament

Equally, putting a change to the scope of parliament's power back to the people may sit comfortably with representative democracy. In casting their vote at an election, the voter knows the scope of the legislative power of the parliament and the MP is left to represent the people on the issues that fall within the competence of the parliament. To expand or curtail the scope of the power of the parliament is to expand or curtail the scope of the representation.

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54 See *Australian Constitution* ch I.

55 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) 194.

56 See above n 24.

57 Williams and Hume, above n 55, 249-50, 257–8.

In Australia, the scope of the legislative power of the Commonwealth Parliament is defined within the *Constitution* and any amendment would require a s 128 referendum, which would make an advisory referendum in this area unnecessary.

In the UK, the devolution of legislative power to parliaments in Wales, Scotland and Northern Ireland has been put to the people in an advisory referendum.[58] Advisory referendums of this nature are consistent with the principles developed in this article because devolution involves a change in the legislative power of the UK Parliament.

To hold an advisory referendum on the question whether the UK should leave the EU might be justified on the basis that leaving the EU alters the law-making process and the powers of the UK parliament. As a majority of the Supreme Court noted in *R (Miller) v Secretary of State for Exiting the European Union*, the *European Communities Act 1972* (UK) 'provided for a new constitutional process for making law in the United Kingdom'.[59] The majority went on to state that the Act 'effectively operates as a partial transfer of law-making powers … by Parliament to the EU law-making institutions'.[60] Leaving the EU would alter the law-making processes, as the repeal of the 1972 Act would reverse this transfer of power and be a significant change to the powers of the UK Parliament. Similarly, the 1975 advisory referendum on whether the UK should remain a member of the European Economic Community (EEC) was also consistent with these guiding principles and might have had similar consequences for the UK had it been successful.

Interestingly, an advisory referendum was not held prior to the enactment of the 1972 Act. Under the guiding principles I advance in this article, it could have been appropriate to hold an advisory referendum at that time. Equally, since 1972 the UK has entered into a number of treaties in relation to its membership of the EU that have altered the legislative power of the UK Parliament and there might have been sound justifications for additional advisory referendums prior to the UK entering into these treaties.[61] However, the absence of advisory referendums in these circumstances can be explained in part by a lack of understanding of the implications that these international agreements would have on the UK's domestic legal

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58 See above nn 12–14 and accompanying text.

59 [2017] UKSC 5, [62] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge) ('*Miller*').

60 [2017] UKSC 5, [68].

61 Bogdanor has noted that perhaps there is an argument that a referendum could have been held on the Single European Act 1986 and Maastricht Treaty 1992 given that they involve a major transfer of legislative power: see Bogdanor, above n 34, 189.

system. As the majority of the Court noted in *Miller*, 'it is fair to say that the legal consequences of the United Kingdom's accession to the EEC were not fully appreciated by many lawyers until the *Factortame* litigation in the 1990s'.[62] The fact that there were potentially other occasions when an advisory referendum could have been held under the principles I propose raises the question whether *every* matter that falls within these three areas (changes to the parliament, the franchise and the electoral process) should be referred to an advisory referendum. I address this question later in this article.

Equally, in some circumstances a change in currency in the UK might involve a change in the scope of legislative power. For example, if the adoption of another currency (such as the Euro) resulted in the parliament no longer having legislative power with respect to fiscal policy, then this might justify an advisory referendum.

B. Changes to the Electoral Process

In a representative democracy voters dissatisfied with the performance of their representative can vote for a different candidate at the next election. However, if the electoral process is set out in legislation, the parliament could amend the process in a manner that favours the incumbent government, thereby making its re-election easier. As I explained above, such conduct might sit uncomfortably with the operation of representative government, and the use of an advisory referendum might therefore give greater legitimacy to a proposed fundamental change to the electoral process.

Alterations to the electoral process could include, for example, changes to the voting method, changes to the process for enrolment and casting a vote, changes to the process by which electoral boundaries are determined, or alterations to the parliamentary term (that is, the time period between elections). The 2011 referendum in the UK on changing the voting method from 'first-past-the-post' to 'alterative vote' was one such example of a proposed fundamental change to the electoral process.

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62 [2017] UKSC 5, [60].

In the UK, the term of the Parliament is defined by statute,[63] which raises the issue of Parliament extending the length of its own term.[64] An advisory referendum on the extension of the parliamentary term would potentially protect and thereby enhance representative government, particularly when the proposed amendment would affect the length of the *current* parliamentary term, as the public voted at the previous election on the basis of electing a representative who was to represent them for a known period of time. This 'known period' might be a fixed term (as is now the case in the UK) or for a maximum period (as is the case in Australia).[65]

A further example of a change to the voting method where an advisory referendum could have been used (but was not) was the Senate voting reform in Australia in 2016. The change in voting procedure for the Australian Senate was made by legislative amendment and did not *require* a s 128 referendum.[66] The effect of the change in voting method was that it was possible to limit the flow of preferences, as the voter did not need to rank each and every candidate. This change was expected to favour the major political parties and disadvantage independent Senators (and 'micro parties'),[67] who relied heavily on the flow of preferences to gain the necessary 'quota' to be elected.[68]

Previously, voters in an Australian Senate election could vote 'below the line' by numbering each and every candidate on the ballot paper, or vote 'above the line' by placing a '1' next to the party or group that they preferred. If a voter chose to vote 'above the line', the preferences would then be allocated in accordance with that party or group's preference on the group voting ticket. Both methods had the effect that a vote would continue to flow down the preferred list of candidates until it supported a candidate who could make quota – that is, a vote would never

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63 *Fixed-term Parliaments Act 2011* (UK) s 1. Prior to the *Fixed-term Parliaments Act 2011*, the *Septennial Act 1715*, 1 Geo 1, Stat 2, c 38 originally set the maximum duration of the Parliament at seven years. This was amended by the *Parliament Act 1911*, 1 & 2 Geo 5, c 13 to reduce the maximum term to five years.

64 During World War I and II the UK Parliament passed a number of pieces of legislation delaying elections and extending the parliamentary term. However, extending the term of the Parliament does need the consent of the House of Lords: see *Parliament Act 1911*, 1 & 2 Geo 5, c 13, s 2(1); *R (Jackson) v Attorney General* [2006] 1 AC 262, 284, 290, 295, 307, 319, 322, 327.

65 See respectively *Fixed-term Parliaments Act 2011* (UK) s 1 and *Australian Constitution* s 28.

66 *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1.

67 Stephanie Anderson, 'Micro Parties Keep Fighting as Senate Voting Reforms Threaten to Wipe Out Major Party Alternatives', *ABC News* (online), 14 March 2016 <http://www.abc.net.au/news/2016-03-15/how-senate-voting-regorms-could-wipe-out-microparties/7246732>.

68 Heath Aston, 'Coalition Could Clean Up in Senate if Vote Reform Deal is Finalised', *The Sydney Morning Herald* (online), 17 February 2016 <http://www.smh.com.au/federal-politics/political-news/coalition-could-clean-up-in-senate-if-vote-reform-deal-is-finalised-20160216-gmvpqz.html>.

be exhausted, and would always be counted towards the quota of an elected Senator. The Senate voting reforms allowed voters to preference as few as 12 candidates below the line or 6 parties or groups above the line. On both voting 'above' and 'below' the line after the reform, a vote could be exhausted (and would be unless the voter chose to number all candidates below the line, which is rarely done).[69]

While the reform had support from both major parties, it is possible to envisage a situation where, had there been a greater restriction on preferencing candidates, an advisory referendum on Senate voting reform might have been desirable to give the government the special legitimacy needed to implement such a reform (despite that bipartisan support). For example, the case for an advisory referendum might be stronger had the reform removed the ability to preference all candidates 'below the line' or removed the ability to preference candidates altogether (i.e simply requiring the voter to nominate 6 candidates where 6 Senators are to be elected). The question of where to draw the line between circumstances where an advisory referendum is desirable and where it is unnecessary is addressed in Section D below.

C. Changes to the Franchise

Reducing the franchise would alter one important aspect of representative government: a portion of the public who voted at the last election is no longer represented in the parliament. This could occur, for example, by capping the voting age or excluding certain groups of people (such as prisoners) from voting.

In Australia, some changes to the nature of the franchise would require constitutional amendment (and a s 128 referendum). Specifically, the High Court has found that there is a limit on the Commonwealth's power to reduce the franchise implied from the text of the *Constitution*, which requires that the House of Representatives and the Senate must be 'directly chosen by the people'.[70] In *Roach v Electoral Commissioner*, Gleeson CJ explained that 'universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people'.[71] Gleeson CJ went on to note that 'disenfranchisement of any group of adult citizens on a basis that does not constitute a *substantial reason* for exclusion

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69 For an explanation of the 2016 Senate voting reform see *Counting the Votes for the Senate* (15 February 2017) Australian Electoral Commission <http://www.aec.gov.au/Voting/counting/senate_count.htm>.

70 *Australian Constitution* ss 7 and 24.

71 (2007) 233 CLR 162, 174.

from such participation would not be consistent with choice by the people'.[72] While the Court has held that a complete ban on prisoners voting offends this implied right to vote, the Court has upheld legislation removing from the electoral roll those prisoners who are serving a sentences of three years or more.[73] Consequently, in Australia there will be some instances where a reduction of the franchise would require a s 128 referendum. However, there might still be changes to the franchise that would not require a constitutional referendum, and in these circumstances an advisory referendum could be appropriate.

While the question of *expanding* the franchise in Australia would not require a constitutional referendum, that question could also form the basis for an advisory referendum.[74] Referendums on questions of expanding the franchise may also sit comfortably with representative democracy. Fundamental expansions of the franchise dilute the votes of existing voters. The legislative power of the parliament is founded on the trust of the electorate. As Lord Hope in *Jackson* explained, parliamentary sovereignty 'is built on the assumption that parliament represents the people who it exists to serve' and the political reality is that it 'depends upon the legislature maintaining the trust of the electorate'.[75] Diluting the vote of existing voters may, in some circumstances, undermine or dilute that trust.

D. Where to draw the line?

As noted earlier, there have been occasions on which a reform within the three broad areas I identify has *not* been put to an advisory referendum. For example, and as discussed above, the 2016 Senate voting reform in Australia was simply legislated for by parliament, and in the UK, advisory referendums were not held in respect of the UK's entry into the EEC, nor its entry into various EU treaties that have altered the legislative power of the UK parliament. An advisory referendum was not strictly necessary in any of these cases.

The question then arises: in what circumstances will an advisory referendum be desirable within the three areas I have identified? In other words, where ought the line to be drawn

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72 Ibid (emphasis added).

73 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 182, 204–5.

74 For example, lowering the voting age or expanding voting eligibility beyond citizens. In Australia, eligibility to vote is limited to Australian citizens (and 'persons (other than Australian citizens) who would, if the relevant citizenship law had continued in force, be British subjects within the meaning of that relevant citizenship law and whose names were, immediately before 26 January 1984'): *Electoral Act 1918* (Cth) s 93.

75 *R (Jackson) v Attorney General* [2006] 1 AC 262, 310.

between changes which may simply be legislated for by parliament, and changes which ought to be put to an advisory referendum?

Obviously, the first step would be to identify whether the proposed law or reform involves a fundamental constitutional change. I suggest that reforms within the three broad areas I identify in this article may provide a helpful starting point for identifying such changes. The question whether to hold an advisory referendum is then, ultimately, a question of political judgment.

The exercise of this judgment may, in part, be a question of degree. For example, as explained above in the context of Australian Senate voting reform, it may be said that the 2016 reforms were not sufficiently substantial to put to the electorate. On the other hand, if the reforms had been more extensive, the case for an advisory referendum would have been stronger. Thus, the *significance* of the proposed reform, and the *seriousness* of the consequences, may be relevant to the question whether to hold an advisory referendum.

Beyond that, it may also be relevant to consider whether an advisory referendum is desirable for the purposes of garnering a mandate for a particular reform, having regard to the nature of the reform and the political climate. Wherever there is a fundamental constitutional issue, an advisory referendum may provide special legitimacy to a proposed reform. However, there are some proposed reforms where it might be particularly desirable or advantageous to secure a public mandate. For example, as identified earlier, changes to the franchise, or to the term of parliament, or to the voting process, could be perceived as advantaging one party, or could be said to be 'self-serving' by the current government or parliament. In these circumstances, the government, or parliament, may benefit from seeking a public mandate for the proposed change. In these circumstances an advisory referendum might play an important check on the government and the parliament from any actual or perceived manipulation to the system of representative government.[76]

An example of a situation where a public mandate might have been advantageous – had the political climate been different, or if the reform was more extensive – was the 2016 Senate voting reform. As explained above, the change was expected to favour the major parties. As such, it had bipartisan support, and was easily legislated for by parliament. The changes were relatively uncontroversial. However, had the changes been more extensive, and/or controversial, or the subject of sustained criticism, it may have been desirable for parliament to

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[76] Daly, above n 35, 36.

have conducted an advisory referendum. Such a referendum would serve to avoid any suggestion that parliament had simply acted in a 'self-serving' manner, or that the major parties had legislated to entrench their own power. This would serve the public interest in maintaining public confidence in the institution of parliament.

Conclusion

While the question of when to hold advisory referendums in the UK has been given considerable attention, their use in Australia has been given limited consideration. However, the recent public vote on same-sex marriage in Australia has led to calls for further advisory referendums, and as such the issue warrants further examination. In both the UK and Australia, there are no clearly defined criteria against which the appropriateness or desirability of advisory referendums may be assessed. Whilst it may be appropriate to have a degree of flexibility in relation to the circumstances in which an advisory referendum may be called, identifying the types of issues that sit most comfortably with the workings of a system of representative government may assist in ensuring they are used in a manner which is consistent with representative government.

In this article I have argued that there are times when an advisory referendum may play an important role in providing special legitimacy for a proposed reform. I have identified three broad areas where advisory referendums sit comfortably with the underlying principles of representative government: fundamental changes to the parliament, the electoral process and the franchise. In these instances, advisory referendums may be used to grant special legitimacy to the reform because, while the parliament might have the legal power to make such changes, these changes might undermine or sit uncomfortably with the underlying assumptions upon which the system of representative government is based. Ultimately, within these three categories, it would be for the executive and the parliament to determine which issues go to a public vote. The more significant the change, the greater the value of a public vote in providing the necessary legitimacy to enact the proposed reform. The significance of the proposed reforms as well as the seriousness of the consequences of the reform will both be important factors to consider when deciding whether an advisory referendum is desirable.

Advisory referendums on reforms within the three areas I have identified can play an important role in enhancing representative government. They can provide a check on parliament's power where there is risk of abuse of power (or a perception of it) and other accountability

mechanisms might be at their weakest.[77] They might also assist in circumstances where there is perception that the government is acting in its own self-interest and therefore might aid in maintaining trust between the electorate and its representatives.

[77] Where changes are being made to the very system of representative government, it might be that those changes weaken political accountability. An advisory referendum might provide an additional layer of accountability in circumstances where political accountability is being diminished. An analogy can perhaps be drawn here to the role that courts can play in circumstances where political accountability is weak. Cf Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' [2009] (Winter) *Bar News* 30, 37.