
STATES OF JERSEY



REFERENDA: REVIEW OF PROCEDURES

Presented to the States on 17th June 2014
by the Privileges and Procedures Committee

STATES GREFFE

REPORT

Introduction

On 22nd January 2014 the States adopted a proposition lodged by Deputy R.G. Le Hérissier of St. Saviour ([P.153/2013](#)) entitled ‘Referenda – revised procedures’.

The proposition was not prescriptive about the nature of changes to procedures that should be brought forward, and the terms of the proposition were as follows –

“THE STATES are asked to decide whether they are of opinion –

to request the Privileges and Procedures Committee to review the current provisions of the Referendum (Jersey) Law 2002 and to bring forward proposals, with appropriate amendments to the Law if necessary, to define more clearly the conditions that may be applied to the holding of any future referendum.”

In his accompanying report, Deputy Le Hérissier set out the type of issues that he wished the review to cover –

“This proposition calls on PPC to precisely define the terms on which a referendum will be held. It is conceivable that there would be different conditions for different referenda. If so, the Law will need to be rewritten to allow for such terms to be defined on each occasion. For example, if the referendum represents the final step in decision-making, it should be binding. That will then beg the question (as with all referenda) of what the acceptable threshold is in terms of turnout and in terms of the percentage vote for the favoured option. This also begs the further question of how questions are phrased. There were serious concerns about the structuring of the questions in the last referendum and whether they conformed with best practice in terms of clarity, and whether they were over-complex.”

Having considered this matter, PPC believes that there are 4 main issues that need to be considered in relation to the holding of referenda, namely: (i) should a referendum be ‘binding’? (ii) should there be a minimum turnout threshold? (iii) how should referendum questions be framed? and (iv) how should campaigns be funded? This report discusses each of these 4 issues in turn, but does not consider the broader question of the nature of the issues that are appropriate for a referendum, as that is a matter of political judgment in each case. The purpose of this report is simply to address how a referendum could be organised once the political decision has been taken that one should be held.

1. Should a referendum be binding?

Deputy Le Hérissier’s proposition was lodged in the aftermath of the States’ decision not to implement the ‘Option B’ reform that was the winning option in the April 2013 referendum once the second preference votes had been allocated in accordance with the method agreed in the Referendum Act. Following the rejection of the legislation to implement Option B, there have been suggestions by some that any future referendum in Jersey must be made ‘binding’.

It is important at the outset to state clearly that if a further States debate is required to implement the outcome of a referendum, it would be impossible to make the referendum binding. In any matter before the Assembly, all members must remain free to vote as they see fit and it would be impossible, and totally inappropriate, for any mechanism to be put in place to ‘force’ States members to vote in a particular way. As happened with the April 2013 referendum, members are entitled to interpret the result of the referendum in any way in which they see fit, and to make political judgments which take into account matters such as the level of turnout and the size of the majority for the winning option. It is simply not possible therefore to bring forward amendments to the Referendum (Jersey) Law 2002 to state that any referendum held in Jersey will be binding.

If there is a desire to ensure that the outcome of a referendum will be implemented, the only way to achieve this aim is to ensure that the referendum follows a decision by the States to pass the necessary legislation to implement the outcome, subject to subsequent approval in the referendum. This would mean that no further States debate would be needed after the referendum, and the referendum would then become the deciding factor in whether or not implementation of the matter concerned went ahead or not.

A method of this type was used in the UK in relation to the 2011 referendum on the Alternative Vote (AV). On that occasion, the UK Parliament passed legislation, the Parliamentary Voting System and Constituencies Act 2011, which effectively made all the necessary statutory provisions for the introduction of AV, and contained a commencement provision requiring the Minister to either: (i) make a commencement Order if the referendum result was in favour of AV; or (ii) make an Order to repeal the relevant sections of the Act if it was not. In practice, this meant that Parliament passed the Act with commencement being entirely dependent on the referendum result without further parliamentary debate. The relevant parts of the UK commencement provision were in the following terms –

“8 Commencement or repeal of amending provisions.

- (1) The Minister must make an order bringing into force section 9, Schedule 10 and Part 1 of Schedule 12 (“the alternative vote provisions”) if—
 - (a) more votes are cast in the referendum in favour of the answer “Yes” than in favour of the answer “No”, and .
- (...)
- (2) If more votes are not cast in the referendum in favour of the answer “Yes” than in favour of the answer “No”, the Minister must make an order repealing the alternative vote provisions.”

In Jersey it has not been customary for enactments to be brought into force by ministerial Order, and commencement is normally either by an Appointed Day Act or through a provision that the Law will come into force a given number of days after registration in the Royal Court or, in some cases, on a specified date. There is, however, no reason why a commencement provision could not be drafted that related to the outcome of a referendum. The manner in which the referendum would be made ‘binding’ would therefore be as follows.

The States would consider the proposal in question and would pass legislation to enact the change. The States would also pass a Referendum Act agreeing to hold a referendum on the proposal on a specified date. The primary legislation to give effect to the proposal would contain a commencement provision which specified that the legislation would come into force on a specified day (or a specified period of time after the referendum), provided that the proposal had been supported by a majority in the referendum. (In the interests of good order, the legislation could also contain a related provision to provide that the legislation would expire and therefore never come into force a certain time after the referendum if the proposal was not supported.)

Proceeding in this way would mean that the referendum was, in practice, the final part of the implementation process, and it would also mean that a majority of States members had agreed in advance to pass the necessary legislation, thereby avoiding the possibility of a proposal being supported in a referendum that was not supported by a majority of the Assembly. Giving the electorate the certainty that the outcome would automatically be implemented may encourage turnout and avoid any concern that the voice of the public would be ignored by the Assembly.

This method does, of course, give States members no ‘fall back’ if the result of the referendum is close or if the turnout is extremely low, unless some additional measures are put in place to dictate a certain required majority or turnout threshold.

Recommendation 1

As stated above, it would not be possible for the Referendum (Jersey) Law 2002 to be amended to make every referendum binding, but PPC recommends that in general a referendum should not be held in Jersey unless the States have already passed the legislation required to implement the proposal with a commencement provision which links the coming into force of the legislation to a ‘Yes’ vote in the referendum. In this way the referendum would, in practice, be binding and the public would be reassured that the referendum result would be implemented.

2. Should there be a turnout threshold?

The 2 referenda that have been held to date in Jersey under the Referendum (Jersey) Law 2002 have been merely advisory and, in both cases, States members have been free to make their own political judgments in the light of their personal assessment of the result. The number of voters and the size of the majority for the winning option have therefore been no more than 2 additional factors that States members have taken into account when deciding what proposals should be taken forward.

In any referendum that was purely advisory and that required further States debates for implementation, it would be somewhat nonsensical to specify a pre-determined turnout threshold, as States members cannot be forced to take account of, or to ignore, the referendum result on the basis of the level of turnout. The furthest that it is realistically possible to go is to specify that the sponsoring Minister or Committee be ‘requested’ not to pursue implementation of a particular proposal if the turnout or majority in favour is less than a given amount.

If the system of passing the legislation in advance as described in section 1 above was used, it may be appropriate to add conditions to the commencement provision relating to turnout and/or size of majority. States members may understandably be uneasy

about passing a Law that will automatically come into force if supported by a majority in a referendum, only to find that there is then only a 10% turnout and that the proposal is supported by only 51% of those voting.

The risks of attaching a turnout threshold can nevertheless be illustrated by the example of the referendum held on 1st March 1979 on Scottish devolution.

The 1979 referendum was held following the enactment by the UK Parliament of the Scotland Act 1978, which provided for the establishment of a Scottish Assembly. Using a method similar to that described in section 1 above, the Act contained a commencement provision which made the coming into force of the Act dependent on the outcome of a referendum held in Scotland. During the passage through Parliament of the legislation, the Labour M.P. George Cunningham promoted an amendment that was adopted, which specified that the Act would not come into force unless supported by at least 40% of Scotland's total registered electorate, rather than by a simple majority.

The result of the referendum, held in March 1979 on the question: "Do you want the Provisions of the Scotland Act 1978 to be put into effect?" was as follows –

Yes	1,230,937	51.62% of those voting
No	1,153,500	48.38% of those voting

The turnout was 63.8% but the number of those voting 'Yes', even though they were in a narrow majority, fell well short of the specified threshold of 40% of registered voters, as the 1,230,937 represented only 32.9% of registered voters. As a result, despite receiving a majority of votes in a 63.8% turnout, the Act was automatically repealed, with political fallout both in Scotland and in the remainder of the UK. In Scotland a campaign was launched in Glasgow on 7th March 1979 under the slogan "Scotland said Yes" to protest against the 40% rule which the campaigners believed was unfair. The campaign also investigated in depth the methods of electoral registration in Scotland in an attempt to show that it would, in practice, have been almost impossible to achieve the 40% requirement. The outcome of the referendum also led the Scottish National Party to withdraw its support for the Callaghan Labour Government, which fell shortly afterwards in a vote of no confidence.

In Jersey it is well known that turnout is extremely low, and in the last 4 Island-wide elections the number of voters and the percentage turnout has been as follows –

	Number of voters	% turnout
2013 Referendum	16,779	26.2%
2011 Senatorial	28,218	45.6%
2010 Senatorial (by)	15,543	26.3%
2008 Senatorial	24,338	44.1%

In making a comparison with the 40% rule put in place for the 1979 Scottish referendum, it is of interest to note that Senator Sir P.M. Bailhache, who obtained the

largest ever number of votes in an Island-wide election, still only received a vote from 28.3% of the registered electorate.

If it was decided to put in place a threshold for a Jersey referendum, it would be necessary to consider carefully what that should be. Percentage turnout is, by definition, directly related to the number of registered electors, and any discrepancies in the accuracy of the electoral registers will affect the percentage. A more sensible approach may therefore be to make a requirement for a specified actual number of voters to vote rather than relying on a percentage. It would nevertheless be difficult to assess what number should be specified. If the number was unrealistically high when compared to all recent elections in Jersey it might, in practice, be extremely unlikely that the threshold would be reached, and that could cause difficulties if a large majority of those voting supported one particular option. If, on the other hand, a much lower, and possibly more realistic, threshold was imposed, it might be seen by many as somewhat meaningless. An achievable figure, particularly in a referendum that was not held alongside a 'general' election, would probably need to be well below a 50% turnout.

An alternative, or additional, type of threshold that could be used, relates to the size of the majority voting in favour. In an important constitutional issue it might be seen to be appropriate to require a greater than 50% majority for the 'Yes' vote to prevail, but this approach is also not without difficulties. If, say, a requirement for a 60% majority was imposed, how would those voting 'Yes' feel if the result was 59.9% Yes and 40.1% No? A real example of this happening occurred in Gambia in 1965, when a two-thirds majority requirement was imposed in a referendum on whether the country should become a republic. The proposal received a significant degree of support, with 65.85% of those voting supporting the proposal, but nevertheless it could not be implemented because the two-thirds majority threshold that had been imposed was not reached. Electors in Jersey are currently used to a traditional 'first past the post' system, and imposing an additional hurdle for the Yes vote to prevail may be unacceptable to many voters.

Recommendation 2

If a threshold was considered appropriate, the only manner in which it could be imposed would be to include it in the relevant legislation passed before the referendum as described in section 1, but with the commencement of the legislation dependent not only on a 'Yes' vote, but also on a certain threshold being met. PPC does not, however, recommend that thresholds should be used, as the examples above show how they can lead to unintended consequences.

PPC believes that a better alternative is to recommend that a referendum should only be held in Jersey on the same day as a general election, unless there are very compelling reasons why it is not possible to wait for the next election. If a referendum is held on the same day as the general election, the turnout will be approximately the same as for the election of States members, and as no threshold is applied in a public election it would be curious to suggest that a referendum held on the same day was not a valid representation of public opinion. It is, to illustrate this, of note that in the Central European Time referendum in 2008 there was a 43.4% turnout (which was only marginally less than the 44.1% turnout in the senatorial elections held on the same day), whereas the turnout in the reform referendum in April 2013 was only 26.2%.

3. How should referendum questions be framed?

The 2013 referendum on electoral reform in Jersey has been criticized by some for containing choices and not being based on a single Yes/No question.

Referenda with multiple choices are not unprecedented, and a number of multiple-choice referenda have been held across the world in recent years: for example, in Sweden in 1957 on alternative pension plans and in 1980 on nuclear energy, and in Andorra in 1982 on the electoral system.

A relatively complex referendum was held in New Zealand in 1992 on the electoral system. In Part A, voters were asked to vote for the present system, or to vote for a change to the voting system. In Part B, they were asked which one of the specified 'reform options' they preferred if there was to be a change. Voters could vote on both parts or on only one. Those voting for the present system in Part A were also able to indicate their preferred reform option in Part B. If a majority opted for first-past-the-post in Part A, then that would settle the issue. The ballot paper was broadly as follows –

Part 1	
Please put a cross in the circle beside the statement you agree with. Your vote will still count if you choose not to vote in Part 2.	
I vote to keep the present voting system (First Past The Post)	O
I vote to change the voting system	O
Part 2	
If you voted against changing the voting system in Part 1, you can still vote in Part 2.	
If New Zealand were to change to another voting system, which voting system would you choose?	
Mixed Member Proportional (MMP)	O
Preferential Voting (PV)	O
Single Transferable Vote (STV)	O
Supplementary Member System (SM)	O

The referendum, despite its complexity, did lead to a clear result, as some 84.7% of voters supported a change in the Part 1 question; and a clear majority, some 70%, then supported the option of Mixed Member Proportional voting in Part 2. It is nevertheless clear that the referendum could have led to a very unclear result if the votes in Part 2 had been spread more evenly between the options with no option getting an overall majority.

It recognised internationally that, where possible, a simple Yes/No question will enable more meaningful campaigns to be run, and will lead to a clearer result. It is important that any question asked is clear and not leading, and appropriate advice should be taken from experts before finalising any referendum question.

Recommendation 3

PPC recommends that any future referendum should be held on a single Yes/No question with appropriate expert advice being sought on the wording of the question, and with preliminary rigorous testing of the draft question through methods such as public focus groups, before the required Referendum Act is debated.

4. Funding referenda

Two issues arise in relation to the funding of referenda: (i) whether there should be a limit on expenses; and (ii) whether public funding should be made available for individual campaigns for or against the referendum question.

The 2 issues are linked by the need to find some mechanism to designate official campaign groups in a referendum. Unlike a public election, where the candidates can be clearly identified by name after nomination meetings, those campaigning in a referendum may be individuals, informal groups of individuals, political parties, charities, lobby groups or, quite often, groups specifically established for the referendum to campaign for one particular outcome.

In the United Kingdom the designation and regulation of campaign organisations in a referendum is undertaken by the Electoral Commission. Its role in the case of a referendum is governed by the provisions of Part VII of the Political Parties, Elections and Referendums Act 2000 and includes –

- designating lead campaign organisations;
- giving grants to lead campaign organisations;
- regulating campaign spending and donations.

When a referendum is called, a ‘referendum period’ is designated by the Commission. During this period, restrictions on campaign expenditure and publicity will apply. From day 1 of this period, the Commission will register those who intend to spend more than £10,000 campaigning, who will be known as ‘permitted participants’.

Once registered, these campaigners can apply to become a lead campaign group known as the ‘designated organisation’ for one side of the debate. Four weeks into the referendum period, the Commission will decide whether to nominate ‘designated organisations’. The Commission must designate lead campaigners for both sides or not at all.

‘Designated organisations’ can qualify for an expenditure limit of £5,000,000 for a UK-wide referendum. They can also qualify for certain publicly-funded assistance, including –

- free postal distribution of one piece of referendum literature to each household or elector;
- TV referendum campaign broadcasts;
- equal grants of up to £600,000 for a UK-wide referendum (to be determined by the Electoral Commission);
- free use of public rooms for meetings.

The operation of these rules in practice can be illustrated by reference to the Alternative Vote system referendum that was held across the UK in May 2011.

The referendum period ran from 16th February 2011 until the referendum on 5th May 2011.

Two lead campaign groups were designated by the Commission as ‘designated organisations’ –

- ‘Yes in May 2011’;
- ‘No to AV’.

The Electoral Commission set a maximum level of available public funding for the designated organisations of £380,000, but the amounts actually allocated were £140,457 for the Yes campaign and £146,432 for the No campaign. This money was used for establishing, operating and staffing campaign offices (for example equipment, rent, staff and utilities).

The total declared expenditure by the 2 designated organisations was £2,139,741 for ‘Yes in May 2011’ and £2,598,194 for ‘No to AV’. The only other significant declared campaign expenditure was by the Conservative Party, which spent £660,785.

In Eire, where there have been a number of referenda in recent years, particularly because any proposed amendments to the Irish Constitution have to be approved in a referendum, there is a specific Referendum Commission. The role of the Commission, which is established under the Referendum Act 1998, is to explain the subject matter of referendum proposals, to promote public awareness of the referendum, and to encourage the electorate to vote at the poll. It is an independent body chaired by a former member of the High Court or the Supreme Court, or by a serving member of the High Court. The Chairman is appointed by the Chief Justice at the request of the Minister for the Environment, Community and Local Government. There are 4 *ex officio* members, namely –

- The Clerk of Dáil Éireann;
- The Clerk of Seanad Éireann;
- The Ombudsman;
- The Comptroller and Auditor General.

The Commission has no role in putting the arguments for and against referendum proposals, and its main role is to provide public information during the referendum campaign. The Commission can appoint ‘Approved Bodies’, but these do not receive public funding. Approved Bodies may appoint agents to attend at the issue and opening of postal ballot papers, at polling stations and at the count.

In order to become an approved body, an applicant must –

- be a body established in the State, governed by written rules and having a membership of not less than 300;
- have an interest in the referendum and have a name which does not closely resemble the name of a political party registered in the Register of Political Parties.

In the reform referendum campaign held in Jersey in April 2013, defined campaign groups did emerge for the 3 options, and this enabled the publicly-funded website and leaflet to households to contain statements from all 3 groups. It was clearly fortunate that these campaign organisations emerged as 3 united groups for each option, as it was clear at the time of the referendum that, in the absence of any statutory body similar to the UK or Irish Commission, there would have been no-one in Jersey with the authority to define which campaign group had ‘official’ status for the website and leaflet.

If campaign funding was to be regulated for future referenda in Jersey, it would be necessary for new legislation to be enacted to create the necessary framework to establish a body with the necessary authority to approve designated campaign groups and, if considered appropriate, to allocate public funding to these groups. The legislation could also contain provisions relating to the regulation of expenditure by campaign groups during the referendum campaign.

It could be argued that introducing legislation of this nature would be disproportionate in a small island where referenda are unlikely to be held frequently, and where it is also improbable that any campaign group would be willing to spend excessive amounts to influence the outcome. In addition, there is currently no public funding made available to candidates in a public election, and it could be argued that it would therefore not be appropriate for public money to be given directly to campaign groups in a referendum, even though there would undoubtedly need to be a publicly-funded information campaign about the referendum.

PPC would value views on the merits of introducing legislation to regulate referendum funding, and will give this aspect further consideration in due course once it has consulted more widely.