

HOUSE OF LORDS
MINUTES OF EVIDENCE
TAKEN BEFORE
THE SELECT COMMITTEE ON THE CONSTITUTION

REFERENDUMS INQUIRY

WEDNESDAY 6 JANUARY 2010

PROFESSOR DAVID BUTLER and PROFESSOR ROBERT HAZELL
PROFESSOR MICHAEL SAWARD and PROFESSOR GRAHAM SMITH

Evidence heard in Public

Questions 1 - 38

USE OF THE TRANSCRIPT

1. This is an uncorrected and unpublished transcript of evidence taken in public and reported to the House.
2. The transcript is not yet an approved formal record of these proceedings. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk to the Committee.
3. *Members* who receive this for the purpose of correcting questions addressed by them to witnesses are asked to send corrections to the Clerk to the Committee.
4. *Prospective witnesses* may receive this in preparation for any written or oral evidence they may in due course give to the Committee.

WEDNESDAY 6 JANUARY 2010

Present

Goodlad, L (Chairman)
Norton of Louth, L
Quin, B
Shaw of Northstead, L

Witnesses: **Professor David Butler**, Emeritus Professor, Nuffield College, University of Oxford, and **Professor Robert Hazell**, Director, Constitution Unit, University College London, examined.

Q1 Chairman: Professor Butler and Professor Hazell, can I very warmly welcome you to the Committee and thank you very much for coming to join us, particularly in the light of the extremely inclement weather conditions, and I know, David, you in particular have come all the way from Oxford through the snow. We are being broadcast, so could I ask you please, as if it were necessary, formally to identify yourselves for the record and then, if you want to make a brief opening statement before we have our questions, please do so.

Professor Butler: I am David Butler, a Fellow of Nuffield. I have in the past written three books about referendums and helped, with Robert Hazell, to run a committee that looked into the working of referendums. The only thing I would like to say about the work that I did, a lot of which I have forgotten, is that I started by making a list of every referendum that had taken place at the nationwide level in the history of the world, and this actual list changed my expectations a great deal. Firstly, I discovered that referendums were not ground-breaking, where you have one and then more and more and more. In many cases, the third referendum came longer after the second referendum than the second referendum came after the first, but what was striking was that, virtually speaking, every democratic country in the world has had a referendum. The only exceptions are the United States, which of course has had an

incredible number of referendums at the state level, but has not had one at the national level, India, Japan and Israel. Every other country you would think is respectably democratic has tried it and very often they have tried it only once or twice. The countries which have had lots of referendums, with two exceptions, are dictatorships getting plebiscites judged by themselves. The two exceptions are Switzerland, and actually Liechtenstein as well which have done a great deal by referendums, as you well know, and the other one is Australia which has compulsory voting and is required to have a referendum on anything affecting federal state relations, as you well know, my Lord Chairman. I just wanted to draw attention to those. The last point is that a very small proportion of referendums end up fifty-fifty and usually the outcome is pretty predictable. There are some very important ones, as you obviously know, that have been fifty-fifty, but that has not been the norm.

Q2 Chairman: Thank you very much indeed, David. Professor Hazell?

Professor Hazell: I am Robert Hazell, Professor of Government and the Constitution and Director of the Constitution Unit at University College London. If I may, I will make one brief opening remark, which complements, I hope, quite neatly that of David Butler's, but I will confine myself to referendums in the UK. As everyone knows, these were unknown in Britain until 35 years ago, the first referendums being held in the mid-1970s, a referendum in Northern Ireland on whether they should remain part of the United Kingdom or unify with the Irish Republic, known then as a 'border poll', and the only nationwide referendum held in Britain's constitutional history in 1975 on the renegotiated terms of accession to the European Community and, since then, there have been – I have not added them up – a dozen or so referendums. Can we deduce whether there is yet any doctrine in the UK about the use of referendums? I do not think we can yet form an overarching or complete doctrine. They have been held so far on constitutional matters, but we cannot yet say that a referendum is required for any major constitutional change. If that had been the doctrine, then I would argue that we

should have held a referendum on the Human Rights Act 1998 which incorporated the European Convention on Human Rights, and we should also have held a referendum on the major reform of the House of Lords that took place in 1999. At best, I think we can venture a partial doctrine that referendums are required for devolution, for a constitutional change whereby the Westminster Parliament delegates legislative power to a subordinate legislative body, so referendums were held in Scotland, in Northern Ireland and in Wales before their devolved assemblies were established in the late-1990s, and referendums were held here in London before the establishment of the Greater London Authority, and in the North East a failed referendum in 2004 on the Government's proposal for a North East Regional Assembly. The latter two were not legislative bodies, but referendums were deemed to be desirable. I would finish by saying that there is now a kind of reciprocal doctrine in relation to those devolved institutions. Many people would argue that a referendum would be required before the Scottish Parliament were abolished or before its powers were severely altered because the Scottish Parliament has, as it were, a popular mandate from the people of Scotland as well as a legislative mandate from this Parliament through the Scotland Act 1998.

Q3 Chairman: Thank you both very much indeed for extremely stimulating introductions to this inquiry. Could I begin by asking an impossible question where we would be most interested in your views as to what, if any, constitutional principle you both think should govern the decision to hold future referendums?

Professor Butler: I would quote Austen Chamberlain: "‘Unconstitutional’ and ‘constitutional’ are terms used in politics when the other fellow does something you don't like"! I am an extreme pragmatist about this. Referendums have sometimes been a very good political device and saved this country and other countries problems and they have legitimised things that were going to happen, but I do not think I have any universal principle to offer which makes something a constitutional issue, and I would not diverge significantly from

what Robert said a moment ago about the sorts of situations when it might be politically expedient to have such a referendum, but I do not think it is ----

Q4 Chairman: When you say that you would not diverge significantly, how would you diverge?

Professor Butler: Well, there are quite a large number of things which might fall under his categories which would be *de minimis*. I think it is absolutely crazy for the Conservatives to say that any further change of relations with Brussels should be subject to a referendum because of course so many of the changes in relation to Brussels may be absolutely trivial and entirely in our interests, non-controversial. If you follow literally the thinking that any change involves a referendum, you are getting yourself into a lot of bureaucracy and nonsense.

Professor Hazell: I agree with David Butler. Trying to express the answer in the language of constitutional principle and taking my opening remarks a little bit further, we could ask: is a referendum required whenever Westminster delegates legislative power? In my first answer, I talked about delegation to subordinate legislative bodies, the devolved institutions, but we might equally ask the question when Westminster delegates legislative power to a superior, supra-national body, like the European Parliament. There clearly has been no established doctrine so far that, in those circumstances, a referendum is required. We have had four or five European Treaties which have significantly adjusted the balance of powers between the Member States and the institutions of the European Union without a referendum being held in the UK, save in 1975 on the terms of accession. The Conservative Party, in a speech delivered by David Cameron on 4 November after the Lisbon Treaty became fact, has set out its new policy on Europe and one element in that is a commitment to pass a law, if they are elected to form the next Government, which would be passed by Westminster declaring that any future European Treaty could not be entered into by the United Kingdom without a national referendum. It is a separate issue whether such a statute would be binding on future

Parliaments, but there is also the issue that David Butler has raised about whether a national referendum would be required in relation to all future EU Treaties, however small. For example, if there is a new Accession Treaty with, I think, Croatia, being possibly the next likely applicant Member State, would a national referendum be required to approve the Accession Treaty in relation to Croatia? No doubt these are the issues which will get debated here possibly by this Committee as well as in this House if a Bill is introduced after the next election to this effect.

Q5 Baroness Quin: I was interested in what Professor Butler said about not really seeing a universal principle here, but more seeing referendums as a good political device. I can understand the reason why you say that, but it is quite, I think, a hard thing to explain to the public that it is a good political device rather than a matter of constitutional principle. I wondered also whether or not you had any views on whether a referendum should refer to a fairly straightforward question, or whether it could be on something rather complex? Obviously, this was an issue that was raised at the time of the Lisbon Treaty, which was a long, complicated Treaty with some bits in that some people would like and some bits in that people would not like, but even some of the devolution referendums have been about a range of complex powers, and I just wondered if you had any thoughts about whether or not a referendum should be really on something fairly simple where there is a 'yes' and a 'no' alternative, or whether it is appropriate to use them in these other situations? At least in 1975, it was a sort of 'yes' and 'no' question about whether Britain should accept the arrangement with the EU or not.

Professor Butler: But the Treaty of Rome, as you know better than anyone here, is an extraordinarily complex Treaty, and I think the issue is fairly simple. I think the Scottish and Welsh referendums, although they did deal with obviously very complex and detailed matters which affect individual people in the countries concerned, the issue was really, simply

speaking, simplifiable and straightforward. I think certainly a referendum has to be on a relatively simple issue. I think you get into great trouble even when countries have tried triple-question referendums or quadruple-question referendums and you get into tangles about what is meant and possible litigation. I do believe really that referendums, certainly as we live in Britain at the moment, are only going to happen when the Government of the day wants it or it would be too embarrassing because of past promises to get out of it, but normally they will have it because they think they are going to win it and they will not have it if they are not going to win it, they will just dodge the issue, so it is a matter, as we live at the moment, of straight politics. If we had got to a written constitution, we might get ourselves entangled, as the Irish got entangled and they were the only country out of 29 that actually had a referendum on Lisbon or the revised Lisbon and, on the whole, governments do not want to have referendums with unexpected outcomes and they will play politics to avoid it. Occasionally, they have a referendum in some countries and quite a number of referendums have been on moral issues which cut right across ordinary party lines, and abortion and divorce issues and even the issue of driving on the right or left have been things where Government just wanted to cop out of making the decision and, in some cases, did not really care much about the answer. I do think it really ought to be thought of as overwhelmingly the straight business of politics at the heart of the referendum, whatever one may think in general, moral terms about the desirability to consult the people.

Professor Hazell: May I add just two remarks. I think it can be more than just a political device. It can be an important legitimising mechanism and it can be a protective device. If you think of the long-guaranteed, bipartisan policy in relation to Northern Ireland, the people of Northern Ireland had been told since 1973, and it is in the Northern Ireland Constitution Act of that year, that Northern Ireland will not be unified with the Irish Republic, save with the consent of the people in Northern Ireland in a referendum, a so-called 'border poll'. I

think you can view that as an important protective device for the people of Northern Ireland and it was not a policy put together to get over some party split here at Westminster. Referendums can also be important, I think, as vehicles for public education. I think the people of Scotland, Wales and Northern Ireland became a lot more aware about the proposals for their devolved assemblies than if they had been created simply by passing statutes here at Westminster because they were required or they were invited themselves to vote on the issue. Your second question was about multi-option referendums. They can sometimes be held successfully to invite people to express a preference between several options, and the best example I can think of is in New Zealand where they contemplated a change to the voting system in the early-1990s and the first referendum held in 1992 offered the people of New Zealand, from memory, five or six alternative voting systems and they were invited to vote for a preferred system which then was put in a subsequent referendum the following year, 1993, in a binary referendum as a run-off against the existing voting system, so I think you can hold preferential referendums of that kind to get a kind of indicative view from the public about what their preference might be. This may become a live issue in Scotland where, you will all know, the current SNP Government wants to hold a referendum on independence, but they have made it clear in public statements that they would not be averse to a referendum which included other options, and they have said that they would like the proposals of the Calman Commission on further powers to the Scottish Parliament to be capable of being formulated as an alternative option. That is, in effect, a challenge that they have made to the parties who set up the Calman Commission.

Q6 Chairman: Thank you very much. Could I just follow up what Professor Butler said about governments holding referendums on questions only when they think they are going to carry the day, a ‘nonny’ rather than a norm question. In the case of Australia, as Professor Butler knows, since 1991 there have been, I think, 48 referendums put by the Government to

the electorate, of which only eight have resulted in a positive response, which rather gives a lie to the proposition that governments only put referendums to the electorate when they know they are going to get the result they want. Is there any feel that you both have as to what people in general feel about referendums, as to whether they want them or whether they would prefer to leave it to parliamentary democracy?

Professor Butler: I am sceptical about there being any widespread demand to go to the Swiss model of putting lots of referendums to the public, and we have evidence of the rapid decline in turnout there. Australia is a different matter because, since 1920 or so, they have had compulsory voting and, therefore, they have had 90 per cent turnouts in referendums, including one of the oddest ones that they felt they had to have which was a constitutional change when they were enfranchising Aborigines in 1966 and they got a 90 per cent 'yes' vote and the highest votes you have had in a democracy where a referendum was put. I think some of the Australian history of mandatory things and relations with the states which have led to promises of referendums being made without any serious hope of their being carried, they are a good warning of a more general point about referendums, that essentially they are conservative instruments, on the whole, where there is a scepticism about change or change in defiance of the system as a whole. We did a detailed analysis when we were working on this in the 1970s in the American Enterprise Institute and really there was quite strong evidence, if you took the sensible democracies of the world that had had referendums, that the general trend was of it being cautionary, people being slightly frightened of the devil they did not know, and I think this applies in Australia particularly where it was easy, in most cases, to build up some particular states, the small states, against the big states which led to defeated referendums. There was actually quite a number where defeated referendums had a majority for them, but they were defeated by four small states being frightened of two big states.

Q7 Lord Norton of Louth: Is it not the case that there is a difference between what people want and what they do? We know from surveys in this country when people are asked, “Do you favour referendums?” that an overwhelming majority say yes and, when you hold referendums, quite a lot stay at home. The evidence of referendums around the world shows that people generally will turn out to vote in greater numbers for candidates than they will in referendums, so therefore is there not an issue with actually getting people to turn out when they actually are faced with a referendum?

Professor Butler: I think there is a lot to be learned from looking back at the 1975 referendum here where there was nearly a two to one vote in the opinion polls for saying no to Europe and then the Government switched and said, “Please do vote yes in March” and it ended up by being two to one yes when it came round to June with the whole of the establishment being on the side of a ‘yes’ vote. The public can be fairly volatile and that is the reputation and, what I might otherwise slip into saying, why have referendums when you can have opinion polls and you know what the answer is going to be before you start, but in fact there are quite a number of referendums, and Ireland has produced several, where what looked like happening two months before did not happen on the day, and the 1975 referendum in Britain is an extreme case of that.

Professor Hazell: I would only add that I think, to some extent, these are self-limiting. There is a high risk for any government in embarking on a referendum, a risk to its reputation if it does not get the result which it seeks or expects, and there is also a cost, we should remember. A national referendum costs about the same as holding a general election and I believe the cost of that is now about £120 million, so these are not things which any government would embark on lightly.

Q8 Chairman: I will just observe that, amongst others, I participated, because I was then a Member of the House of Commons, in the 1975 referendum campaign. I had a number of

public meetings in village halls round my constituency and I had phone-ins which were unheard-of in those days, the first time really it had ever happened, and practically nobody participated in the meetings or phone-ins at all. The *Private Eye* front cover was of an elderly couple in deckchairs on Blackpool beach with handkerchiefs over their heads, fast asleep, with the headline, “The great debate begins” and yet, as you say, there was a two to one, quite big turnout by today’s standards. How do we account for that?

Professor Butler: Well, there is always the difficulty on almost any subject that there is an articulate minority who care about it, but there is a huge inarticulate majority who do not give a damn. I think Europe was a big enough issue and it did get a 66 per cent turnout and a 60 per cent ‘yes’ vote, so it is quite a good example of what can be done and what can happen. Underlying all of these things, each time I try to find an answer I think of the exceptions and how different the story is and I am so pragmatic about it, that referendums have worked so well in so many countries as convenient ways of solving or putting finesse to a particular issue that is decided in a referendum and that has settled the matter for them, but the variations in procedure, style and the detailed rules of the game are very great indeed. This morning, I rather guiltily went back to the PPERA, the Referendums Act of 2000, and I was struck that it did not seem to be very real, and how that would get deciphered, if we did decide to have a referendum on Europe or human rights or anything like this, you would actually go to the 15 clauses or so that are in the PPERA and you would find it would not be a description of what was actually going to be happening there out on the ground, it would not be a good guidepost at all.

Professor Hazell: I would only offer one comment in terms of the current regulatory structure set out in the 2000 Political Parties, Elections and Referendums Act, and that is in relation to the proposed controls on campaign spending. This is the one major issue where the Commission, of which David Butler and I were both members, the Commission on the

Conduct of Referendums, which reported in 1996, differs in its main proposals for the regulation of referendums by comparison with the statutory regime put in place in 2000. Our Commission thought that, although it might be desirable to have spending controls, in practice it was almost certainly not feasible because in a referendum the campaigning groups for yes or for no are ephemeral bodies; they are set up simply to campaign in that referendum and afterwards they disappear. It is, therefore, very difficult to get regulatory purchase on such bodies and that is a big contrast with controlling campaigning spending in elections where the political parties, at least the major political parties, are permanent or semi-permanent organisations who hope to be fighting the next election and the next election after that and you can get regulatory purchase on those bodies because they continue in existence. It has not yet been properly tested in a national referendum, where some big money might be put out in support of one side or the other, whether the Electoral Commission will be able effectively to control the campaign spend on both sides.

Q9 Baroness Quin: I just wondered, following what was being said earlier, if there were any statistics about how often the result of referendums have disappointed the people who brought them in? I think it was Professor Butler who said that governments tended to resort to referendums if they thought they were going to win them, but there actually seemed, it occurred to me, to be an awful lot of examples where the result has gone the other way. I suppose, even with the European referendum in 1975, that the keenest proponents of that referendum initially were those who hoped that there would be a ‘no’ vote rather than a ‘yes’ vote, so I just wondered if there were any statistics on that? The other point that I also wanted to raise is arising from what was said about the relationship of referendums to opinion polls because, if I think of, for example, the referendum in the North East, there had been a lot of opinion polls in previous years which had shown support for a regional assembly, even though the actual referendum result was very strongly against. I just wondered if you both

felt that referendums had the danger of ossifying a situation when representative democracy is more capable of being flexible and responsive to a very strong change in public mood, whereas a previous referendum result ties you down for quite some time?

Professor Butler: Three examples hit me immediately as you asked the question. One is de Gaulle in 1969 who had a referendum on devolution, lost the referendum and resigned, and you could argue that perhaps he was getting near to the age when he wanted to resign, but it was definitely the referendum there. Secondly, of course you have got the referendums in France and Holland in 2005, Holland's first ever referendum, which made the crucial difference to the first Lisbon Treaty. In both cases, it was a shock to the incumbent Government when almost all good men and true in both countries went for the 'yes' vote and they were stumped by the electorate. Obviously, it is a dangerous area to go into and people do get it wrong because it does not follow the ordinary rules. People going into the polling booth are remarkably free from party constraints. There may be a strong party lead and they may be good loyal party people, but at the same time they are free to do what they like. It is like a free vote in the House of Commons when unexpected things can happen if you genuinely let people loose.

Professor Hazell: I would only add that yes, there is a very big difference between opinion polls and referendums, so to those who ask, "Why have referendums when we can hold opinion polls?" opinion polls are, on the whole, pretty shallow and the public give off-the-cuff answers which are cost-free. In a referendum, they are voting for real and that concentrates the mind, so I think the instance you quite correctly cited of the North East Regional Assembly, where the opinion polls suggested that it might be narrowly carried and on the day four to one voted against, is not the only example where the real result has been different from what the opinion polls suggested.

Q10 Lord Shaw of Northstead: A basic question must surely be: is the referendum really compatible with the UK's system of parliamentary democracy? If it is, if so, in what way should the referendum be used as part of such a system? For example, if it is decided that a referendum is wanted and is suitable, should some of the parliamentary procedures dealing with the motion be gone through before the final vote is taken by way of referendum?

Professor Butler: Well, all of the referendums we have had have actually been on the basis of legislation, I think I am right in saying, specific legislation laying down that this should happen, but I think it is quite compatible with parliamentary democracy, and the example I could offer is Australia. Australia has a decent parliamentary democracy very much modelled on British ideas and it has had 48, or whatever it is, 47 referendums in its history. People cite referendums as anti-parliamentary. In Britain, Attlee and the most recent one in a flamboyant statement Reggie Maudling in 1975 did not give a damn about the referendum, it was unparliamentary and it was unpopular. It is rather interesting that in the last ten or 15 years the referendum has been taken for granted, not an alien thing, because it was seen by quite a lot of people as an alien thing 30/35 years ago and it has now become part of the vocabulary of politics. "Let's have a referendum" is a cry that any party that is in opposition is likely to fling up when it does not like something that is happening.

Q11 Lord Shaw of Northstead: But would you have, say, a series of debates and perhaps some of the procedures in Parliament before the final vote were taken by the country?

Professor Butler: I think so. I find it hard to imagine an issue coming up that would not be a matter of parliamentary discussion and debate. Anyway, as we now stand at the moment, there is no provision for a referendum and a referendum would actually require primary legislation, and it may be that you are going to recommend some primary legislation which would allow Government to switch on a referendum like that and have it in a few weeks' time, as they are apparently doing at the moment in Iceland, but we are not there yet and I

cannot conceive that there would be a great parliamentary row if anybody tried to shunt through a referendum by standing order.

Q12 Chairman: What we recommend is going to reflect your evidence.

Professor Hazell: I agree that a referendum is perfectly compatible with representative democracy. As David has said, no referendum can be held in the UK without legislation, so, in effect, the elected representatives pass a law saying that they want a referendum to be held. In terms of your second question about whether a referendum should be pre- or post-legislative, I do not think there can be a universal firm answer. I argued in the mid-1990s in relation to devolution that the referendum should be a pre-legislative one and I did so, in particular, looking at the context in Wales where in the first devolution referendum held in 1979 the people of Wales had voted by approximately four to one against the then proposed Welsh Assembly, and it had taken an inordinate amount of parliamentary time and political capital on the part of the then Labour Government to get the Wales Act on to the statute book. I thought that, if a new Labour Government wanted to revisit devolution, it should, in the case of Wales at least, first ask the people of Wales whether they were interested in devolution, and that is why I strongly recommended a pre-legislative referendum, which was held in 1997 on the basis of a White Paper, and I would argue that the White Paper was sufficiently detailed that those people in Wales who bothered to read the White Paper had a clear idea of the main proposals for the Welsh Assembly.

Q13 Lord Shaw of Northstead: Was that White Paper fully discussed in the Houses of Parliament?

Professor Hazell: Your legal adviser may be able to help us; he is a much greater expert on Wales than I am. The legislation, and it was, I think, the first Bill passed by the new Labour Government in 1997, authorising that the referendums went through within a couple of

months was probably passed in June, the White Paper was published in July and the referendum was held in September, so the text to the White Paper probably was not available during the parliamentary debates about the referendum.

Chairman: “Exhaustive” would not be the word that sprang to mind!

Q14 Lord Norton of Louth: If we come on to the practice of referendums, the ones that we have now held, the one national one and then the sub-national ones, in terms of the actual application did we get anything wrong and did we get anything particularly right in terms of best practice in relation to referendums?

Professor Butler: I was not around in Wales or Scotland significantly in those more recent cases, but I was very much around in the 1975 referendum and there we were, in a sense, lucky in that we did have the legislation idea umbrella groups and there was an umbrella group which was very much a tripartisan group of people for the established parties. Then there were the breakaway one or two Conservatives, Neil Martin and so on, and quite a number of Labour people, including seven members of the Labour Cabinet in the ‘anti’ umbrella. The ‘pro’ people had all the great and good on their side and they spent a little over £3 million, whereas the ‘antis’ spent £150,000, I think, of which £100,000 was state funds that they got and they raised nearly £50,000, if I remember rightly, on their own merit from one or two trade unions and one or two private individuals, and that inequality stuck very hard in their minds. Pat Nairne and I ran a conference 20 years after the 1975 referendum. At the indignation of Jack Jones and Tony Benn and other people who had been on the minority side, the unfairness for it stuck very deep in their minds and there was great bitterness that here was this total inequality between £3 million and £150,000 in the actual campaigning, but at least they did more or less stick together, though they had some difficulties. Some people would not speak to Enoch Powell, but Enoch Powell was in the ‘anti’ umbrella group and some people in the ‘anti’ umbrella would not step on the same platform as Enoch, but they did

actually manage to have two umbrellas which did more or less work as covering so that the BBC did not have any difficulty in deciding the two sides to the referendum, but, if there are many sides to a referendum, it can be enormously complicated. There are some troubles going on at the moment about debates between leaders and minor parties being represented. I think that, if you had a referendum where there was a wide diversity of people on one side who did not get on with each other, they would be claiming their own separate slots on the air and you might get a great deal of negative litigation.

Professor Hazell: May I briefly add that in relation to all the devolution referendums held in the late-1990s, they of course were held before the Political Parties, Elections and Referendums Act of 2000 and before the Electoral Commission came into being, so the Act had to prescribe the rules for the conduct of the referendum, the appointment of a chief accounting officer and the like, so the honest answer is that we have not properly tested in a big referendum the machinery of the 2000 Act. I think I am right that the only referendum that has been held where the Electoral Commission was required to supervise it was the North East referendum in the autumn of 2004 and, from memory, the one difficulty that I remember being reported was identifying campaigning groups on either side because the Electoral Commission is empowered under the 2000 Act to make grants to help finance the ‘yes’ and the ‘no’ campaigns and, for that purpose, they, therefore, have to identify one umbrella body on each side of the argument. I cannot remember, Lady Quin might be able to help, on which side they had a difficult decision to make.

Q15 Baroness Quin: I think it was the ‘no’ side initially.

Professor Hazell: Thank you. There were two candidate groups, as it were, both applying to the Electoral Commission for funding. From memory, I think the funding in question was £135,000, so these were not large grants. In the national campaign on a much more high-profile or controversial issue, let us postulate entry into the single European currency on

which, incidentally, all major political parties have a commitment that a referendum will be held if the Government ever wanted to take us into the euro, you can imagine it would be more difficult potentially for the Electoral Commission, and we come back to the issue again about controlling campaign expenditure because there would be possibly very large private donations funding one or the other campaign. I hope this Committee might ask the Electoral Commission themselves both about the experience in 2004 and about how prepared they feel for any future referendums.

Q16 Lord Norton of Louth: So is there any way we can address it because David Butler mentioned the massive disparity in funding in the campaigns in the one national referendum we had and I think there was a similar disparity, was there not, in Wales in terms of the funding there between the 'yes' and 'no' campaigns, so the 2000 Act was designed to try and address the problem, but, from what you were saying earlier, you do not think the 2000 Act is actually adequate?

Professor Hazell: No, I think it is important and I support the provisions in the 2000 Act which provide for the making of grants from public funds to give each campaigning umbrella body a minimum sum of campaigning money. Where I am not confident about the provisions is that there are detailed provisions enabling the Electoral Commission to regulate campaign expenditure and, because, as I said earlier, by definition, the campaigning bodies will be ephemeral, it will be quite difficult through legal mechanisms and subsequent legal enforcement to control the expenditure by bodies which may have gone out of existence.

Professor Butler: I am ignorant of the details of Irish law, but what is remarkable in the Irish story is that in the first referendum a leading, flamboyant, rich man charged in and moved opinion really quite substantially in the opinion poll evidence and got a 'no' vote. He crashed in again in the second referendum and had no impact at all. I do not know what the regulation is and what would prevent effectively that kind of intervention. It is the definition of what is

a campaign activity, what happens in the press and so on and how far the Electoral Commission can start censoring what is in the press.

Q17 Baroness Quin: I just wanted to know if either of you wanted to add anything about your knowledge of the international experience of referendums, and are there any cases that we should consider as either good or bad examples in the use of such referendums?

Professor Butler: I can answer that in relation to one particular question which we suggest you raise, which is conditional majorities. There are quite a wide variety of rules in Denmark and in Weimar Germany of what happens. In Weimar Germany, it had to be a positive vote of, I think, more than 50 per cent of the electorate and the thing to do if you are a negative person is to say, “Don’t vote” because a non-vote is equivalent to a vote in those circumstances, and there are slight variations in the thresholds in Denmark. There is one technical question that comes if you have thresholds and that is: what is the electorate? I remember arguing with John Smith about this in 1978 that the real electorate is, we know, bogus really. The electoral register represents only about 90 per cent of the electorate and about ten per cent of the names are dud names anyway, so what is the electorate? What about people who are plurally registered and so on? You have got to get your stuff very accurately done if you have thresholds brought into the argument.

Q18 Baroness Quin: Could I also follow up on something that I asked earlier which Professor Hazell replied to, which was referendums and opinion polls and refer to the Irish example which Professor Butler talked about a few minutes ago where obviously a second referendum was held, but only a very short time after the first referendum. Professor Hazell, in his reply to me, seemed to indicate that people really focused on the subject at the time of the referendum and, therefore, in a way, the referendum result is more valid than an opinion poll, but this seemed to be an example where then opinion shifted subsequently, not because

of changes in the Lisbon Treaty, but because of the climate whereby suddenly the Irish electorate felt they would rather be part of this larger organisation than, at a time of financial turbulence, being outside that organisation or causing difficulties for that organisation. What does this mean in terms of what we think about referendums? Is it not rather cynical to simply hold a second referendum a short time after the first to try and get a different result, or is this completely valid if public opinion has genuinely changed?

Professor Butler: I think it can change and is meant to change. I think in Ireland the establishment was saying, “Vote yes” the first time, but did not much bother about it. They took for granted that they were going to win the first time and, when they lost, they were shaken and they pulled their fingers out and really got going on the second referendum, put money and effort into it and won by even more than they expected to.

Q19 Chairman: Professor Hazell, the final word?

Professor Hazell: If it is a final word, may I briefly say something about future referendums, and, forgive me, this is changing the subject a little bit. As a small piece of homework for this session, I tried to check what the commitments are of the major political parties in relation to future referendums and it is worth noting, I think, that all the political parties have given commitments to hold referendums on certain topics. Taking them in order and starting with the Labour Party, there are, in effect, commitments to future referendums already on the statute book in terms of Wales where the Government of Wales Act 2003 requires that there should be a referendum before primary legislative powers of a comprehensive kind are conferred on the National Assembly for Wales. In relation to Irish unification, there is a longstanding commitment, which I referred to, first enacted in the Northern Ireland Constitution Act of 1973. Also, there is provision at local level, which we have not discussed, for a referendum before any local authority decides to have a directly elected mayor, and that is in the Local Government Act 2000. In terms of future commitments, the Labour Party has

a longstanding commitment that there will be no change to the voting system at Westminster without a national referendum, and that was in the 1997 Manifesto, the 2001 Manifesto and the 2005 Manifesto, it has a longstanding commitment, which we have touched on, not to enter into the European single currency without a referendum, and it had a commitment not to ratify the proposed EU Constitutional Treaty, when it was still called a 'Constitutional Treaty' before it became the 'Lisbon Treaty'. In terms of the Liberal Democrats, they too have commitments for a referendum before entering into the euro and for any change to the voting system, and they have a longstanding commitment that there should be a referendum before adopting a written constitution, which is longstanding Liberal policy. The Conservatives also have a commitment that we should not enter the euro without a referendum, and that was first given by John Major in 1996, they have this new commitment to legislate, to pass a law requiring a national referendum before the UK should ratify any future EU Treaty, and they have a commitment in their policy documents on local government to try to hold, I assume they would be, simultaneous referendums in eight or ten major cities on elected mayors, and that is in a Conservative document of last year, 2009, called 'Controlled Shift'. In that same document, they have a pledge to give people the power to instigate referendums on local issues and, therefore, in effect, to open up the possibility of citizens' initiatives in local government, but we have not touched on local government yet in this session and you may not want to open that issue up now.

Q20 Chairman: Well, Professor Butler and Professor Hazell, can I, on behalf of the Committee, thank you both very much indeed for being with us and for the evidence that you have given, and express the hope that we may keep in touch during the further course of this inquiry, if we may, to draw further on your wisdom. Thank you very much indeed.

Professor Butler: Can I just say how nice it is to have been at a meeting where nobody has used the solecism of 'referenda'!

Witnesses: **Professor Michael Saward**, Professor of Politics, Open University, and **Professor Graham Smith**, Professor of Politics, Centre for Citizenship, Globalisation and Governance, University of Southampton, examined.

Q21 Chairman: My Lords, can I welcome on your behalf Professor Saward and Professor Smith to the Committee. We are being broadcast, so may I ask you, if you would be so kind, to identify yourselves formally for the record and then, if you wish to make a brief opening statement, please do so, otherwise we will go straight into questions.

Professor Saward: I am Michael Saward. I am a Professor of Politics at the Open University and prior to that at the Royal Holloway, University of London. I am mostly a democratic theorist and that does not mean I do not know about the real world of referendums, but I have written a number of books and articles on democracy which deal with issues of direct democracy and referendums in principle as much as in practice.

Professor Smith: My name is Professor Graham Smith. I am a Professor of Politics at the University of Southampton. Again, I do a lot of work on the innovations in democratic practice, mixing empirical material and theoretical material.

Q22 Chairman: Could I begin by asking what you think the key constitutional issues, as opposed to technical or legislative issues, are that we should be addressing in the inquiry that we are starting today? What are the key constitutional issues, in your perception?

Professor Saward: In a sense, the question could be understood for me in two interestingly different ways. One is whether constitutional issues are the only or the prior issues that might be considered the subject of future referendums, a topic that dominated the conversation that has just occurred, and the other is the constitutional provisions which might exist for future referendums, and it seems to me that they are quite interestingly related, but quite separate questions. On the first one very briefly, clearly constitutional issues, which I think can be

defined and, if you want me to come back to that, we can do so, it is tricky, but it can be done, they are the prime candidates, but not the only candidates if you were looking for a consistent and legally established procedure by which future referendums might be held. Particularly difficult and cross-party ethical and moral issues are a second category. Major party or manifesto policy commitments may be more controversial, the third category, and a fourth one, it seems to me, might be initiated issues if something like some form of citizens' initiatives were in place. They are on a kind of sliding scale of controversial nature, I suspect, and, as I suggest, I think those issues can be defined. On the different question of which constitutional issues need to be considered, it seems to me you can boil that down to the question: would this Committee be interested in ultimately concluding or recommending that referendums, perhaps not just for constitutional issues, were a good way to advance the state of UK democracy into the future? It could be the case, it could be argued, that the UK is behind not just Switzerland, the obvious case, but Denmark, the Netherlands, the US in terms of the states and many others in terms of the depth of its democratic practice, and there could be a case here not for saying that governments pragmatically decide when it suits their parties to decide when to hold referendums, but to take this legally out of the hands of political parties or government managers and put it on a more consistent and more independent basis, so that would seem to me to be the, as it were, master constitutional issue. Behind that is the suggestion that the UK Constitution does not just evolve and there is not just, as it were, constitutional case-law that evolves, but there are positive decisions that could be made about the shaping of future provision for referendums more generally and consistently.

Professor Smith: I have not got much more to add to that actually. I would agree with Mike that the primary focus in terms of on constitutional issues is key and particularly those issues where the issue is one which would affect the practices of Parliament itself. There is always a worry that Parliament makes decisions about its own practice, and I am thinking about

electoral systems and those sorts of things. I think those things which, if you like, constitute the House itself can be problematic if left to politicians who obviously have particular interests in that way, so anything which changes the dynamic and the relationship between the people and those who are elected, I think, are absolutely crucial issues for it. Also, I agree with Mike that it depends what you mean. 'Referendums' is often used as an overarching term to include things like popular referendums and initiatives, and wrongly in some ways, but it does depend upon what the scope of your interest is. If you are just talking about the kinds of referendums that we have held in this country, then we just carry on pretty much the way we have been doing things. If you are looking at trying to change that division of labour between citizens and the elected politicians and others, then you are going to have to really think through quite carefully the implications for the constitutional arrangements for that.

Q23 Lord Shaw of Northstead: If we look at this, basically is a referendum really compatible with the UK system of parliamentary democracy? If it is, and obviously yes, of course it is, in what ways would a referendum be used as part of such a system? For example, could parliamentary procedure be evolved in such a way that, after the processes of Parliament have been produced and carried out, the final decision should be left to some form of referendum?

Professor Saward: As you predict, my answer would be there is no incompatibility. Language matters here. If the question is, is parliamentary sovereignty - a key term, of course, in the UK - compatible with direct democracy, the answer you are more likely to get is "no", but you mention parliamentary democracy and, putting it at its most general, the way to deepen democracy is to make it more direct, to bring people into more decisions just as a statement of principle, and the clearest institutional way in which to render the compatibility is to place parliamentary debates and, indeed, political parties at the core of a referendums initiating and campaigning process. The US states, for example, often get into difficulty and

worry keenly about the bypassing of legislative processes by initiative and referendum rules and the ways in which those are practised. There is absolutely nothing that is not avoidable about that. It would be difficult to conceive in the UK of a consistent and legally-based basis for referendums in the future which did not put parliamentary debates at their core, which did not conduct key referendum votes once Parliament had done its work which gave Parliament and, indeed, parties the key role in the conduct of campaigns within such a referendum. This would be quite compatible with practice in a number of the smaller European democracies. There are different rules, hugely varied rules, but neither in the case of Parliament nor any other case I can think of is there any necessary incompatibility between parliamentary representation, indeed representative democracy more generally, and this particular form of practice of direct democracy. Can I add one rider to that? There is a lot of representation going on in any form of direct democracy, above all referendums. The 2000 Act, which was part of the conversation you just had, as Professor Hazell pointed out, talks about umbrella groups which may receive a certain amount of public funding. These are representative groups; they are just different sorts of representatives. Representative politics, as it were, in a more complex way maybe runs right through any referendum campaign.

Professor Smith: I have a terrible feeling that I am going to spend most of this session saying, “I agree with what Michael just said”.

Professor Saward: Disagree with me!

Professor Smith: I will try and think of something to disagree with. As now structured there are no problems at all because we have got a system for running referendums. Of course, Switzerland still has a parliament and a representative democracy, it just extends the scope of citizen participation. Countries which make more use of popular votes still have parliaments, still have legislatures, they do not disappear, it is just that they rearrange the constitutional furniture.

Q24 Baroness Quin: On the international examples, are there examples that either of you would commend to us in terms of countries which have seemingly clear and good rules about when and how referendums should be held? Similarly, are there ones that you feel are bad examples of referendums?

Professor Smith: I think it is incredibly difficult because the constitutional arrangements are so different between countries. It depends where the direction of travel is. If it is towards some of the things that Michael was alluding to, the idea that there might be opportunities for citizens to initiate, then of course there is an enormous difference between going to California or Switzerland, they do things completely differently and, therefore, have a massive effect on the way that politics occurs in those places. One thing I would say which might get lost in this is one example of a process that I found particularly interesting is in British Columbia. That is helpful because it is a Westminster-style country and they do not use referendums that often at state level. They decided that they needed to change the electoral system and that it could not be left in the hands of politicians to decide what the referendum question should be so they established a year long Citizens' Assembly of 160 randomly selected citizens who then learnt about electoral issues and put forward a proposal which then went to referendum. I quite like that idea of, "Oh, yes, we have got a political problem, we need to change the electoral system", but then saying, "and it's not necessarily the politicians who should decide what the choice is, we are going to hand that over to a different body". It is those sorts of things that one should look at, the imaginative mixing of a referendum with other democratic innovations. Very often when we think about things like the campaigns we get very much focused on the "yes" and the "no" sides, but why are we not thinking about how we think about structured debate within society as a whole. I think the British Columbia example is interesting because it is so different.

Q25 Baroness Quin: On the Californian example, which you also mentioned, can I ask what each of you think of that as a practical example of citizens' initiative? I understand that for good or bad it has only left about a quarter of the state's budget under the control of elected representatives. Is that a good thing or not? What do you feel about this?

Professor Smith: I think California is at the extreme end. It is interesting when you look at what happens in Switzerland because in California successful propositions go straight to a vote bypassing the legislature completely and in Switzerland there is a period of reflection by the legislature itself and bringing in the proponents just to see whether they can find agreement before a vote happens if agreement is not found. One of those policies you can see tends to swing a lot and the other is quite stable. There are some problems with the way the Californian system is structured, I must admit, but there are some pretty poor legislatures as well which make bad fiscal decisions. Let us compare like with like.

Q26 Chairman: Can I ask brief a supplementary to your previous question, Lord Shaw, when Professor Saward said that he could define "constitutional issues", which should trigger a referendum? I wonder if the Professor would like to elaborate on what such "constitutional issues" would be.

Professor Smith: I think what I said was that it is possible to define it. It would be possible for this Committee to think very carefully about how to define it. In principle it is definable. The place I would start to define it - now I am choosing my words particularly carefully - is to suggest that constitutions are essentially about rules and rights which have generality, in other words they are not confined to specific polity domains. There will always be grey boundaries around that, but it is possible to make some more specific than that statement about what constitutes a constitutional issue and what does not.

Q27 Lord Norton of Louth: I remember we had these very good debates when the 2000 Bill was going through and there was a proposal that there should be referendums on constitutional issues when we raised the problem of how to define it. It was then refined to issues of first class constitutional significance, and then the question was what was the difference between second class and first class. Even if you take your definition, you lead to what you might call practical problems because some of those could be low-level rules where you might put it to a referendum and nobody bothers to vote. How do we refine it in a way where we have got a definition that, if you like, is operational or could be operational in terms of an actual referendum?

Professor Saward: To take one step back, the role of this Committee could well be to come up with a stipulative definition of precisely that with a number of riders and a number of those riders could be illustrative examples of what would fall within that category. You mentioned the work around the 2000 Act and you may well have done that kind of work in some detail then, but it seems to me that particular question cannot be advanced unless there is a strong stipulative definition either to agree with or partially or wholly argue against. I do not mean to duck the question at all; I am not a legal scholar so I am a little bit careful with the question. This is an enormous opportunity for this Committee to put something up about where the boundaries of such issues may reasonably be thought to lay and see what reasonable or other objections or amendments to those others may put forward.

Q28 Lord Shaw of Northstead: Dealing with the question of who initiates a referendum, the inference has been that, in fact, governments initiate them very often when they are in an awkward spot and do not want to take the decision themselves. It has come up that there were instances of other people initiating them. How, in fact, would that work in this country? To me it seems appalling if Parliament was to be bypassed in a way by the setting up of another authority, possibly with a committee and so on, with debates ensuing and all the rest of it, to

decide as to whether or not there should be a referendum. That surely is not being suggested by anybody, is it?

Professor Saward: I am not so sure. Not many weeks ago in a speech at my university David Cameron talked a good deal about the citizens' initiative. He may well have intended that to be around local government issues, but it seemed to me he left the door a little open on that as to whether it might involve national issues in his mind or at some point. In direct response, citizens' initiative, sometimes CIR - citizens' initiative and referendum - where it is used around the world uses different threshold requirements, so a certain percentage of the electorate, for example, or a certain specified number of hundreds of thousands, whatever it may be, of signatures on the appropriate form gathered in the appropriate way need to be provided.

Professor Smith: In the appropriate time.

Professor Saward: In the appropriate time under specific legal rules to trigger a vote. On the second part, and this goes right back to the issue, does it not, of not bypassing or undermining existing institutions of representative government ---

Q29 Lord Shaw of Northstead: Yes.

Professor Saward: --- there is no reason in principle, and I know that is often a phrase used to escape an issue, why an initiative may not initiate or trigger under a set pattern of law a parliamentary debate prior to, or perhaps even instead of or in conjunction with in some way, a popular vote in the form of a referendum. In other words, there is nothing about the institution of the citizens' initiative which necessarily says it cannot be used in conjunction with or to prompt or to help set the agenda of parliamentary procedures.

Professor Smith: In answer to your question that no-one is surely suggesting this, lots of people are suggesting it. It is mostly being suggested for local government.

Q30 Lord Shaw of Northstead: You talked about somebody in the public initiating this.

Professor Smith: Yes, that is right. Not somebody, a lot of people.

Q31 Lord Shaw of Northstead: Even so, that should siphon through to somebody in Parliament doing it, should it not?

Professor Smith: Not in all systems.

Q32 Lord Shaw of Northstead: I want to deal with our system.

Professor Smith: In our system we do not have anything like it so we will be making the rules up as we go along in that sense.

Q33 Lord Shaw of Northstead: Would you recommend it?

Professor Smith: I would be one of those people you probably would not be very pleased with. I would recommend that you had something that allowed the citizens to initiate and I would probably go along with Michael that what it initiates is another question. It could initiate debates within the House, but one of the problems with those sorts of initiatives is they often get lost in a committee somewhere. The danger here is that people are looking for democratic innovations, democratic change that will be meaningful and then they get cold feet and you say, "Well, we are going to have an initiative but it will only generate a debate in a select committee" or something and then typically it becomes a worthless piece of institutional architecture. You have got to think quite carefully about how far you want to go and why you are going there. There is a criticism of the current political culture in this country that there are not the opportunities for citizens to participate in politics, but the citizens' initiative is surely one of the options available for making that possibility of meaningful participation occur.

Professor Saward: Just one quick rider to that. The Swiss situation is highly distinctive in many ways and if there is a form of direct democracy it is being practised almost certainly in some form in Switzerland. It is interesting that the initiative process in Switzerland is dominated by the mainstream political parties. This has been suggested not least by Ian Budge, who has written a key book about the potential for referendums and initiative in the UK, who has put across that especially minority parties in Parliament, but not only them - and this is where the pragmatic self-serving, as it were, political side of it perhaps comes back into the picture - if there is an initiative and referendum process in place they will attempt to use it. For example, if a minority party in a legislature feels that its issue is not going to get the airing it wants on the floor of the House then it may well want to use the initiative and referendum process to trigger a debate even if it does not actually trigger a referendum. The parties are absolutely crucial as to which issues are discussed. The Swiss case is distinctive, but not so distinctive that it is well outside the possibilities for the UK on this topic. In answer to your initial question of who initiates, often it will be established political party figures, parties themselves officially, as it were, minor parties wishing to have an impact on the agenda as well as - I do not know if I am reading this into your thoughts - potentially rogue figures from outside the political system.

Q34 Lord Shaw of Northstead: Say it is a powerful body within the Parliament, the point is that Parliament is governed by the Government and they have the majority. I was imagining that you thought there would be another authority outside which would decide “That is the subject of a referendum” and it ought to take place and then the Government has to follow by carrying out the proceedings.

Professor Saward: It seems to me the strengths of the referendum for the UK, and arguably elsewhere, are strengths of conjunction. In other words, how they work in conjunction with established democratic institutions. The weaknesses, and this is true of the initiative of a

referendum, are weaknesses of isolation, whether they are practised here or elsewhere: are they compatible with what we do already, compatible with existing core democratic institutions, above all Parliament? This is a good example of where that principle and fact kicks in. It would not be impossible, and the American states have done it in many of the states, to construct the system that you are concerned about whereby the legislature effectively does get bypassed by a certain kind of initiative process, but that is optional and it is arguable - Graham and I might disagree slightly on this, I am not sure - in the case of the UK constitutional traditions around these and related issues it would not make sense, and I would argue it would not make sense to construct such a system which would threaten to bypass parliamentary debate or procedure.

Professor Smith: I think it is highly unlikely to happen. What I see as the best arrangement for democratic polity is we are where we are now and I agree with Michael that we are not going to see that kind of initiative emerge any time soon. Interestingly, both parties are playing with this idea at local government level. Apparently at local government level you can mess around as much as you like, but in national politics that has always got to be parliamentary sovereignty. It is not your concern but it is an interesting insight.

Q35 Baroness Quin: Earlier on, and I think you were listening to the earlier session that we had, Professor Butler seemed to be saying that he saw referendums essentially as a political device rather than as a sort of point of constitutional principle. I do not want to distort what he said. Can I take it that each of you think that there should be actual rules about the role that referendums should play in our society and the circumstances in which they should be called.

Professor Saward: Yes, that is certainly how I feel. Your legal adviser would know much better than I, but presumably a very interesting particular type of Act of Parliament could bring about a principled and consistent basis on which referendum, and perhaps initiative and

referendum, could be established for the UK. Professor Butler is a very eminent expert on these issues and had been very much involved as an expert, and in some ways as an expert participant, in the key referendums, for example the ones in the 1970s, that the conversation was on earlier. The experience of the past is absolutely relevant. The experience of the past is that the referendum has been a political tool which has been used or seen as something that could be used pragmatically by parties and party leaders in often sticky political positions. That remains an interesting and germane fact to these conversations but it does not get away from the point that, yes, you could have a consistent, more principled legally established basis for the referendum at least.

Professor Smith: As the Referendum Act exists at the moment it can be nothing else than a political tool. Just read the legislation: it requires other Acts of Parliament in order for it to be. I would prefer to see something like a constitutional referendum where there were certain issues where a referendum was required on significant issues and we can debate that. That was something we were discussing earlier, what those issues should be. One of the problems here is that the referendum is left in the hands of the Government basically. I think that is a problem to either ignore or to bring in as it suits its purpose. That is not a misuse of the referendum because that is a power for the Government, but it is not the only way to use a referendum.

Q36 Baroness Quin: Do you have any thoughts about the types of questions and issues that referendums should cover within the constitutional umbrella? I am going back to what I was asking earlier in a way. It seems to me that one of the traditional values of representative democracy is that representatives are elected to carry out detailed scrutiny work of treaties, or whatever it is, and submitting something like the Lisbon Treaty to the public is almost against that kind of principle because you are talking about such a complicated, long document. It is not that people are incapable of understanding it, not at all, but what is representative

democracy about if it is not about electing people to carry out that kind of detailed scrutiny work on behalf of the electorate.

Professor Saward: There are two or three really key issues in there. One is the issue of complexity and this is very important. There are some issues technically, constitutionally or , so complex that they cannot be, amongst other things, boiled down to a simple “yes” or “no” option. This is putting it too simply, but we are short of time. I would say that is not the case. There is not an issue where you could not locate something very like a “yes” or “no” principle at the core of it. That is an answer to one issue in there. The Australians, whose experience was discussed a moment ago in some details, in recent days, literally have revisited the public information aspect of the way referendums are conducted nationally in Australia. They felt, not least in the light of new communications technology and so on, that what they have done so far has been strongly inadequate. They are looking at YouTube and Twitter and providing public information, levels of funding for public information around specific referendum campaigns. They felt they had not got that right, in spite of, it seems to me - I am not an expert on the detail of this - a good deal of attention in Australia to how the public has been informed before. Complexity, yes, but can it be boiled down to a matter of principle? I would say yes almost all the time. Public information processes need to be adequate to the task of complex issues and, yes, absolutely there is a lot of creative work to be done there, it seems to me. I feel a bit inadequate on this question. It was the one we were discussing earlier, in a sense, on how do you define the boundaries of what is a constitutional issue, for example, and what is not. I am not sure I can provide more that is helpful. Again, a stipulative definition would be helpful. I would start with things like rules and rights and their generality, not specifically applicable to any given policy area, such as health, education, environment and so on. Any significant shift in the formal location of political authority - that is a mouthful - something like that would need to be at the core of it. Lord Norton, from

the comments a moment ago, I suspect you have probably been through all of these options and others in the context of the work a few years ago. Again, there is no such neutral definition out there. Is that a blockage or is that something interesting? No, that is an opportunity, for example, for this Committee to press what it would want to stipulate.

Q37 Lord Norton of Louth: I have two points that are not particularly related. Just on this point about principle, you say you could resolve it in terms of a “yes/no” vote on an issue and boil it down to a principle where you could argue “yes/no”. Is there not a problem though that there may be other principles which people could agree to which then conflict with the principle that is being put? For example, if you had a referendum on “Should we protect privacy, have a privacy law?” there is a good chance people may vote “yes” rather than “no”, but if you had a separate referendum on “Should the freedom of the press be protected?” you would probably get a “yes” vote and you have then got the problem of resolving those two. The problem is you might just have a referendum on one and not the other, so there is that issue of principle. The question I was going to ask about process is very different and relates to what you were saying at the beginning. There is what do you hold a referendum on, but then there is the process by which you hold the referendum, and you were saying that we ought to think about rules that should govern it. Taking the point about the 2000 Act not being a generic referendums Act providing necessarily the rules and procedures, from a procedural point of view is there anything that is obviously missing that you would recommend in substantive terms, for example should it be a threshold requirement or anything of that sort?

Professor Smith: There is an interesting question about the question in the existing Act. The Electoral Commission is consulted, but it is not clear what happens if the Electoral Commission thinks it is a very bad question. It could send it back to the secretary of state and the secretary of state could say, “The Electoral Commission thinks it is a very bad question,

let's carry on with my very bad question". You could still do that. There is something in there about ensuring that the question is fair and that needs to be done independently and that has not been resolved adequately. Again, that is something about taking the power away from a secretary of state, I imagine. That was one thing that struck me.

Q38 Lord Norton of Louth: The original draft of the Bill did not even have a requirement to consult the Electoral Commission; it was only because I moved an amendment.

Professor Smith: I was glad to see it was there. In terms of thresholds, Michael had more to say about this. I do not think you can stipulate a threshold generally - this may be a point of disagreement, I do not know - it depends on the type of issue. Just to go back to a slightly earlier question: if we are going to have, for example, two different types of referendums, one which is a constitutional referendum where if you want to make a change on that a referendum has to occur then we might think about thresholds for those sorts because they are going to be questions of a certain type; but if it is the more occasional referendum, and I imagine both things would still exist, we are not suddenly going to go to only constitutional referendums, then that would be more issue-specific. Certainly concurrent majorities make some sense. The difficulty of having 50 per cent or 60 per cent is a difficult judgment to make in terms of an overall concern. There is a concern, for example, in this country that if a referendum went through and it was the South East that voted en bloc, we would have to have some sort of regional concurrent majorities going on. That would be my sense of it, but I would have to do more work on thinking about that.

Professor Saward: I would be happy to say something on the threshold. It seems to me that the question of the threshold can be understood in two quite separate ways: in terms of turnout and in terms of voter percentage. In terms of specifying the percentage of the vote, say 60 per cent for the sake of argument before a "yes" vote beats a "no" vote in a given referendum - I will jump to the chase on this - I think such stipulations are undemocratic almost in principle.

They bias the option that favours the status quo over the option for change, they render votes in the referendum unequal, whereas one vote, one person, one value is fundamental to any democratic practice. They are the two main reasons. However, I think it is much more defensible on grounds that I do not have time to spell out, but on democratic grounds, to have turnout thresholds: for the sake of argument you need at least 50 per cent of the electorate, not setting aside Professor Butler's concern about the Electoral Roll. Different countries do this in different ways, but I would suggest as a guide somewhere between 50 per cent of the electorate and the possibly higher figure of the turnout in the previous General Election would be roughly the kind of figure that often gets cited in debates and could be the one to play with. You would not want to set those thresholds too high as to render the referendum process theoretical rather than practical. It seems to me that they are the core issues.

Chairman: Professor Saward and Professor Smith, can I thank you both very much on behalf of the Committee for joining us on this wintry day and for the evidence that has given us an enormous amount to think about. Thank you very much indeed.