



Submission to the Constitution Committee of the House of Lords Inquiry on *Referendums in the UK's Constitutional Experience*

Summary

The Institute of Welsh Affairs would be pleased to expand on the points made in this submission, which are summarised below.

1. It is the view of the IWA that the definition of what are the constitutional issues which justify a referendum has become grossly over-extended. In particular, we do not believe that the changes proposed to the legislative powers of the National Assembly, as set out in the Government of Wales Act 2006, are of sufficient significance to merit a referendum.
2. We would argue that, given the inconsistencies of practice across the United Kingdom, it is time set in legislation what types of constitutional innovation do justify a referendum. We suggest it should only be major issues of democratic principle.
3. It is anomalous that the standard framework for referendums enacted in PPERA should only apply to referendums authorised by Westminster statute. We believe that the same rules should apply in all referendums across the United Kingdom.
4. We believe that referendums should not be treated as a quick fix for the perceived problems of local government. Improving the effectiveness of representative democracy could be better achieved by giving greater powers to local councils.

Geraint Talfan Davies, IWA Chair

John Osmond, IWA Director

Glyn Mathias, Wales Electoral Commissioner 2001-2008

Introduction

- 1.1 The Institute of Welsh Affairs published a report on referendums prior to the referendum on devolution for Wales in 1997. Its recommendations included, inter alia, the establishment of a referendum commission and that the polls in Scotland and Wales be held on separate dates.
- 1.2 Since then, both the political and legislative landscape has significantly changed. The National Assembly for Wales was established in 1999; the Political Parties, Elections and Referendums Act 2000 (PPERA) created a standard framework for the conduct of referendums, and the passage of the Government of Wales Act 2006 has established the conditions under which the National Assembly may acquire increased law-making powers and for a referendum to take place before those further powers can be granted.

Referendums on Constitutional Issues

- 2.1 Over the last four decades, the idea of referendums has been superimposed on the system of representative democracy that we have in the United Kingdom. The theoretical rationale for such referendums as a constitutional tool has been that the issue at stake would so change the nature of that representative democracy that the people should be asked directly if that is what they want. The practical reasoning, however, has often been more to do with political calculation.
- 2.2 We would argue that, as a result, the definition of what are the constitutional issues which justify a referendum has been grossly over-extended. In particular, it is our view that the changes proposed to the legislative powers of the National Assembly, as set out in the Government of Wales Act 2006, are not sufficiently significant to merit a second referendum in little more than a decade. The Assembly already has some powers of primary legislation, and the proposed change would serve only to change the way in which those powers are acquired and operated. This is not a proposal which should require a referendum. It is going to be immensely difficult to formulate a referendum question which accurately conveys this narrow issue to the voters. How a question is formulated can heavily influence the outcome, as the All Wales Convention noted in its recent report.
- 2.3 We entirely understand that the requirement for a referendum is written into the Government of Wales Act 2006 and there can be no going back on that. It would be impossible to rewrite recent political history and cancel the requirement for a referendum. However, it should act as a warning that the threshold of what is considered a constitutional issue demanding a referendum is now too low.

- 2.4 As a further example of that threshold becoming progressively lower, we would cite a recent speech by the Justice Secretary, Jack Straw on the arguments for and against a separate Welsh jurisdiction arising from an increasing legislative competence for the National Assembly. The Justice Secretary was opposed to such a development, and he argued that it was such a large and ambitious project that there “would be an expectation for it to be approved by a referendum”. It defies belief that such a technical issue could be construed as being of sufficient constitutional importance to merit a referendum.
- 2.5 A further concern is the lack of consistency by the Westminster government on the issue. The Calman Commission has proposed significant alterations to the powers and functions of the Scottish Parliament, including new powers to raise taxes. These changes are arguably of greater importance than what is proposed for the National Assembly for Wales, but, so far as we know, it is not currently being suggested that they should be subject to a referendum.
- 2.6 It would be difficult to try to anticipate the politics of future generations, but we feel it is necessary to attempt to define what types of constitutional issues might merit a referendum. We would advocate that PPERA be amended to include a clause providing such a broad definition. It could be along the lines that any referendum on a constitutional change should apply only to truly major issues of democratic principle – change that alters fundamentally the nature of the state. At the very least, this might provide a benchmark against which the demand for a referendum could be judged.
- 2.7 Ultimately, what constitutes a major change in these terms will always be a matter for political judgment. However, it is likely that such a change will either involve a basic alteration of the structure of the state’s institutions, such as occurred when Britain entered the Common Market in 1973, or the creation of completely new institutions, as obtained when the devolved institutions were proposed in Wales and Scotland in 1997. When set against these innovations it can be seen that changing the internal arrangements of the European Union or the further development of the devolved institutions are of a lesser order of magnitude. Such evolutionary change of existing structures cannot be said to be a point of principle to the same extent as presented by completely new ventures. Evolutionary change is a constant.

Application of Referendum Rules

- 3.1 The introduction of a standard framework for referendums in PPERA applies only to referendums authorised in statutes enacted at Westminster. Referendums arising from legislation in the National Assembly or, for that matter, in the Scottish Parliament, are not subject to PPERA rules. There is a

presumption here that referendums not arising from Westminster statute are somehow not as important. This is a presumption which we would refute.

- 3.2 Under the terms of the Government of Wales Act, the Welsh Assembly Government may hold a poll “for the purpose of ascertaining the views of those polled about whether or how any of the functions of the Welsh Ministers.....should be exercised”. It is left to Welsh Ministers to make provision, by order, for any such poll. The rules governing the referendum or poll could therefore be decided by a Government minister commanding a relevant majority in the Assembly. It might well be the case that such a minister would not be impartial as to the outcome of that poll, and we would prefer to make any referendum authorised by the National Assembly subject to the same PPERA rules as referendums authorised by Westminster.

In Scotland the SNP government has proposed a referendum on Scottish independence in 2010. Because it will be based in Scottish, not Westminster, legislation, the PPERA rules will not apply. We understand that the Scottish government is therefore proposing to legislate for a separate Scottish Referendum Commission and a separate system of referendum rules, which may or may not replicate the rules which apply at UK level. The issue of independence for Scotland has consequences for the whole of the UK, and it does therefore seem anomalous that a separate Scottish set of rules needs to be created in order to run that referendum. In Wales, the proposed referendum on further powers for the Assembly will be subject to PPERA rules, because it is based in an Act of the Westminster parliament. Our 1997 report, anticipating the formation of the Electoral Commission, recommended that, at the very least, such a Commission “should ensure that the same rules apply in all referendums.”

Community Polls

- 4.1 There is an honourable tradition in Wales of settling divisive issues by local referendums or polls. The series of polls held on a county by county basis from the 1960s onwards on the issue of Sunday licensing are a case in point. We would argue that provision for such polling should only be made where an issue is so divisive that locally elected representatives cannot resolve it. We would not advocate a system whereby citizens can trigger referendums themselves. That would risk further undermining the role of democratically elected bodies.
- 4.2 Over the last decade, Westminster legislation has encouraged the holding of mayoral referendums with the stated aim of reinvigorating local government. One such poll was held in Ceredigion in 2004. In fact, however, the poll was called because of discontent over the local authority’s housing plan rather than the structure of the council. The turnout of 36% was higher than in most equivalent polls in England, but still fell short of what could be described as

public enthusiasm. It is doubtful whether the structure of local government is a suitable issue for decision by public vote. We should seek to improve the effectiveness of representative democracy by restoring powers to local councils and considering more seriously proposals for local income tax or the introduction of proportional representation. Referendums should not be and would not be a quick fix.

- 4.3 The other feature of community polls is the absence of any standard framework of rules. In community polls, there is no provision, for instance, for postal voting and no provision to ensure the question is fair. Whereas it would not be appropriate to apply the full panoply of rules which apply to national referendums, there should be some basic regulations to ensure a level-playing field.