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# The Rules for Holding Referendums on Irish Unity

A RESPONSE TO ‘THE PERILS OF REFERENDUMS:  
A REVIEW’ BY MATT QVORTRUP

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In spite of its dramatic title, Matt Qvortrup’s review of the University College London led *Interim Report* from the *Working Group on Unification Referendums on the Island of Ireland* is measured and thoughtful. The *Interim Report* itself is an important contribution to understanding the process by which referendums may be called and held on the creation of a united Ireland. Given that this topic is potentially divisive, it is commendable that both the report and Qvortrup’s discussion of it are comprehensive and dispassionate.

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In Qvortrup's opinion, the usefulness of the report, and its capacity to be viewed as unbiased, is enhanced by the fact that the working group of experts who produced it were from different countries, backgrounds and political perspectives. The structure of the report emphasises that it is a contribution to an ongoing debate, rather than the final word, by the distinction it makes between those issues where the Good Friday Agreement (hereafter referred to as 'the Agreement') and relevant legislation is clear about how referendums should be held, those issues on which the working group has a definite opinion based on international best practice, and those issues where more research and debate are needed.

Qvortrup engages with the report by enlarging on the international experience of constitutional referendums, and by criticising the report's discussion of the basis on which a referendum could be called. The review has a detailed discussion on the challenges of regulating online advertising and campaigning and the lack of an adequate legal framework to tackle this in Ireland and the UK. This adds an important dimension to the *Interim Report* discussion on campaign laws.

In terms of the issues that are already defined by agreement or law, Matt Qvortrup's review makes it clear that the key point in the *Interim Report* is that the Agreement provided for a single referendum in each jurisdiction and that the threshold for each to pass is a majority, that is 50% + 1 of those who vote. The report also argues why this is the best option. In its authors' view the 50% + 1 threshold was fundamental to the Agreement (para 11.18), as reaching this agreement in 1998, including the power-sharing executive, would not have been possible if any other threshold had been proposed. The report also argues that in a referendum of this type a simple majority is a 'requirement of the underlying principle of equal treatment of the options on the ballot paper' (para 11.19). Matt Qvortrup's review supports and strengthens this argument by discussing the international experience, where a simple majority is the most common approach in equivalent referendums. As part of this discussion, Qvortrup's review might have highlighted that the *Interim Report* believes that the choice on the ballot paper for future referendums has to be a binary one between a United Ireland or remaining in the UK, and that no other options should be on the ballot paper. The *Interim Report* is also clear that the creation of a United Ireland would be a result of this first ballot and would not be dependent on subsequent referendums dealing with the detail of a new constitution. Under the Agreement, if referendums are passed in each jurisdiction,

the two governments are committed by international treaty to legislate for it. Based on international best practice the *Interim Report* sets out three possible options for the order in which the holding of referendums, and the working out of the details of a new United Ireland, including the referendums on a new constitution could take place. However, the *Interim Report* is also clear that the question of how these issues are finally approached should not overrule the requirement for an initial referendum in each jurisdiction, as defined by the Agreement.

One aspect of the *Interim Report* of which Qvortrup is critical is its discussion on the rules that would trigger the calling of a referendum and the circumstances in which this may take place. He argues that:

[i]n the report the authors spend a fair bit of energy on analysing what might be meant by ‘evidence of election results’ and ‘opinion polls’. This seems at best optimistic, and at worst borders on mild naïveté

According to the Good Friday Agreement the British secretary of state may call a referendum at any time, provided no such poll has taken place within the preceding seven years. However, they are legally required to call one if a majority for unification appears in their judgement to be ‘likely’. The Irish government has no role in this decision to call a referendum in Northern Ireland—though if a referendum is passed in Northern Ireland, then one must be held in Ireland, and it is assumed that in practice this will be on the same day. While Qvortrup is correct to emphasise that calling a referendum in Northern Ireland will be a political decision and the Agreement is vague on how a judgement will be made on what constitutes a ‘likely’ majority, nonetheless, as the *Interim Report* argues, this does not give a secretary of state total freedom to ignore evidence. As the duty to call a referendum is set out in law, the courts have a role in deciding if there is compelling evidence that a majority would vote in favour of a United Ireland. In the Raymond McCord Court of Appeal judgement, the court ruled that this duty arises even if it is not in the public interest to direct the holding of a border poll.<sup>1</sup> This supports the *Interim Report’s* view that there is a need for further research to analyse and understand the diverging results of different opinion polls in Northern

<sup>1</sup> Available at: <https://judiciaryni.uk/sites/judiciary/files/decisions/Raymond%20McCord%E2%80%99s%20Application%20Border%20Poll.pdf> (accessed 20 March 2021).

Ireland, even if the ultimate decision on calling a poll will be political, rather than technical.<sup>2</sup>

The *Interim Report* is an essential point of reference for future discussions and Matt Qvortrup's review is a useful discussion that will also serve to bring the report itself to a wider audience.

Read Matt Qvortrup,  
'The Perils of Referendums: A Review',  
<https://doi.org/10.3318/ISIA.2021.32b.16>

<sup>2</sup> See also Eileen Connolly and John Doyle, 'Brexit and the changing international and domestic perspectives of sovereignty over Northern Ireland', *Irish Studies in International Affairs* 30 (2019), 217–33.