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The Franchise in Irish Unification Referendums

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ABSTRACT

The Belfast / Good Friday Agreement provides that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, north and south. Assuming a referendum in each jurisdiction, who should be allowed to vote? Whether a constitutional amendment or replacement referendum is used in the south, the franchise is likely to be that already stipulated in the existing Constitution. The franchise for the referendum in the north is far less

* This is a revised version of a paper prepared for the Working Group on Unification Referendums on the Island of Ireland. We are grateful for very helpful comments from Robert Hazel, Alan Renwick and Alan Whysall. In incorporating these comments, errors of interpretation may well have crept in, for which we apologise in advance. This article is not endorsed by, nor does it necessarily represent the views of, members of the group.

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straightforward. This article explores the legal constraints or soft-law guidelines that are relevant to the franchise in each jurisdiction, potential issues that arise from tensions between the two franchises, and possible resolutions. We argue that the Agreement does not constrain the franchise in the north, beyond the vague requirement that ‘the people of Northern Ireland’ are the relevant electors. Ultimately, we recommend that either the existing Assembly or Westminster franchise be followed, rather than constructing a new franchise specifically for any unification referendum.

INTRODUCTION

The Belfast / Good Friday Agreement (hereafter ‘the Agreement’) provides that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, north and south. The Agreement emphasises that this right must be achieved and exercised with and subject to the agreement and consent of ‘a majority of the people of Northern Ireland’. This provision is amplified in Section 1 of the Northern Ireland Act 1998, using language mandated by the Agreement: the consent of a majority of the people of Northern Ireland is to be expressed ‘in a poll held for the purposes of this section in accordance with Schedule 1.’ It is our view that a referendum would also be legally required in the south, as certain amendments would need to be made to the Irish Constitution in order to allow the newly unified state to meet continuing obligations under the Agreement.¹ Assuming referendums are held on both sides of the border, therefore, who should be allowed to vote?

The franchise for the referendum in the south is a relatively straightforward issue. If a constitutional amendment referendum were held, the franchise would already be stipulated by the existing Constitution. In the unlikely event that a referendum were held to replace the existing Constitution as a means of giving the south’s consent to unification, a new franchise could be designed, although the past experience of constitutional replacement suggests that the existing franchise would be used. The franchise for the referendum in the north is far less straightforward, owing to the lack of guidance in the

¹ For the basis of this view, see Alan Renwick *et al.*, *Interim Report of the Working Group on Unification Referendums on the Island of Ireland* (UCL, 2020), chapter 4.

Northern Ireland Act 1998. Schedule 1 specifies that an order directing the holding of a poll ‘shall specify...the persons entitled to vote.’ No further guidance regarding the franchise is set out in the Act. Nor is there any other existing legislation defining the franchise for a referendum on Northern Ireland’s constitutional status.

The issue of who ‘the people’ are is not just some technical question, but one that goes to the heart of the idea of consent in the Agreement. Sir Ivor Jennings was correct when he said that the apparently sensible rallying call of ‘Let the people decide’ was problematic ‘because the people cannot decide until someone decides who are the people’.² In practical terms, the theoretically-loaded term of ‘the people’ boils down to the question of who should be entitled to vote in a unity referendum. The purpose of this article is to explore any legal constraints or soft-law guidelines that are relevant to the franchise in each jurisdiction, potential issues that arise from tensions between the two franchises, and possible resolutions.

This article is divided into four main parts. Part 1 considers what principles may be derived from existing sources on who should be able to vote: we first consider whether the Agreement, unlike the Northern Ireland Act 1998, specifies who should be allowed to vote in Northern Ireland, concluding that it does not, beyond the vague requirement that ‘the people of Northern Ireland’ are the relevant electors. We consider what guidance is provided by European and international human rights law as to who has the right to vote in referendums, concluding that the principles are broadly clear, but that there is considerable discretion within these principles as to what system to adopt. We set out some ‘soft law’ recommendations and guidance prepared by influential European and international organisations. In Part 2, we first describe the evolution of the concept of the ‘people of Northern Ireland’, before turning to consider the United Kingdom practice on the franchise for referendums in the past. In Part 3, we describe, somewhat more briefly, the issues that are relevant in deciding who might vote in a unification referendum in Ireland that can be derived from the foregoing. Finally, in Part 4, we step back from the detail of the previous analysis, and set out arguments for and against two possible options for determining who should be able to vote in a Northern Ireland referendum held under Schedule 1 of the Northern Ireland Act 1998.

² Sir Ivor Jennings, *The approach to self-government* (Cambridge, 1956), 55–56.

PART 1: GENERAL PRINCIPLES

The 'people of Northern Ireland' in the Agreement

The Agreement's provisions dealing with consent and a referendum on Irish unification refer to 'the people of Northern Ireland'. The Agreement is clear in one respect: that it is for the people of Ireland alone to decide on whether unification should come about. This is set out in Article 1, paragraph (ii) of the British-Irish Agreement, the Agreement between the two governments.³ This forecloses any question of the peoples of the whole of the United Kingdom having a say on whether Irish unity is to come about. Holding a UK-wide referendum, in which a majority of the UK would be required to vote in favour of unity before it could come about, would constitute a clear breach of the UK's international law obligations under the Agreement.

That issue aside, does the Agreement help further in indicating who 'the people of Northern Ireland' are for the purpose of determining the franchise for a future unity referendum? We can suppose that the phrase 'the people of Northern Ireland' is intended to capture those who have some deep connection to Northern Ireland, but it is unclear of what that deep connection might consist. Does it, for example, refer to all people born in Northern Ireland, irrespective of where they currently reside and irrespective of whether they have any clear remaining links? This approach might be characterised as essentially 'ethnic' and has echoes in the Agreement's reference to the freedom to choose whether to be Irish or British or both as a 'birthright'. Or does the reference to 'the people of Northern Ireland' refer instead to those who currently lawfully reside in Northern Ireland irrespective of where they are born? This approach might be characterised as pluralist, envisaging that the political community of Northern Ireland is one that encompasses current residents who may have had no historic connection with it. The approach has echoes in those parts of the Agreement that refer to measures that transcend the two ethno-national communities. Our view is that the Agreement is neutral on these issues.

Some have argued that the Agreement is far from neutral, however, and that it does, indeed, set out in some detail who should be allowed to vote in a unity referendum. The argument relies on the definition of 'the people of

³ This states that the two governments: '(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, north and south, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland...'

Northern Ireland’ in Annex 2 of the British-Irish Agreement, which states that the ‘people of Northern Ireland’ means ‘all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence’. Since it is a ‘majority of the people of Northern Ireland’ whose consent is required to authorise unification, the argument is that the franchise is effectively those identified in Annex 2. On this basis, C.R.G. Murray and Aoife O’Donoghue conclude that the franchise issue is already determined, and that this interpretation of who constitutes ‘the people of Northern Ireland’ in the Agreement is binding in international law.⁴ This conclusion, if correct, would have very considerable significance. The authors state: ‘Its terms have the literal effect of excluding from this franchise people resident in Northern Ireland but born outside it, regardless of connections or citizenship. Many people who voted on the [Agreement] in 1998 would, ironically, have no right to vote in a reunification referendum if its franchise was constructed on this basis.’ Murray and O’Donoghue are not alone in adopting this position.⁵

We do not consider the argument that Annex 2 applies to be legally well-founded. In brief, the provision defining ‘the people of Northern Ireland’ in Annex 2, quoted in the previous paragraph, refers to the criteria that should be used to determine citizenship, not the franchise. The text of Annex 2 needs to be considered. It states in full (emphasis added):

ANNEX 2

Declaration on the Provisions of Paragraph (vi) of Article 1 in Relationship to Citizenship

The British and Irish Governments declare that it is their joint understanding that the term ‘the people of Northern Ireland’ in paragraph

⁴ C.R.G. Murray and Aoife O’Donoghue, ‘Life after Brexit: operationalising the Belfast/Good Friday Agreement’s principle of consent’ (2019) 42 (1), *Dublin University Law Journal*, 147–189: 182.

⁵ See John Doyle and Eileen Connolly, ‘The effects of Brexit on the Good Friday Agreement and the Northern Ireland peace process’, in Cornelia-Adriana Baciú and John Doyle (eds), *Peace, Security and Defence Cooperation in Post-Brexit Europe: Risks and Opportunities* (Springer, 2019), 79–95: 80; John Doyle and Eileen Connolly, ‘Brexit and the Northern Ireland Question’, in Federico Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford, 2017), doi:10.1093/oso/9780198811763.003.0007.

(vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

It is clear, therefore, that the Declaration applies only to paragraph (vi) of Article 1, which states that the two Governments:

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

The explicit limitation of the Declaration in Annex 2 as relating to paragraph (vi) is highly significant in two respects. First, it is clear that, in specifying that the Declaration refers to paragraph (vi), ordinary canons of interpretation mean that it does not, therefore, relate to paragraphs (i), (ii), and (iv) of Article 1, which deal with the unification referendum.⁶ This is re-emphasised in the text of Annex 2 itself—there are two references to paragraph (vi) alone, and it is specified that the Annex's declaration is 'for the purposes of giving effect to *this* provision', referring to paragraph (vi). No convincing argument exists as to why Annex 2 should spill over into these other provisions in the Agreement.

Second, the explicit limitation of the Declaration as relating to paragraph (vi) reinforces the interpretation that the Declaration relates explicitly (and only) to citizenship, not to the franchise. Annex 2 of the British-Irish

⁶ These state that the two governments:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland; (...)

(iv) affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in Sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

Agreement states that it is a 'Declaration on the Provisions of Paragraph (vi) of Article 1 *in Relationship to Citizenship*'. The natural meaning of the title to the annex is that it was included with a view to delimiting more precisely the entitlement to citizenship—rather than the franchise, which is not mentioned.

That the rationale for Annex 2 is clearly a citizenship-related rationale (only) is further supported by the fact that the wording in Annex 2 approximates very closely to the UK and Irish citizenship provisions that applied in 1998, when the Agreement was concluded. The (Republic of Ireland's) Irish Nationality and Citizenship Act 1956 (as amended) extended automatic Irish citizenship to all born on the island of Ireland. Those in Northern Ireland either had to declare themselves to be Irish citizens or have their parents so declare them.⁷ Section 1(1) of the (United Kingdom's) British Nationality Act 1981 granted citizenship to those born in the UK provided his/her mother/father was a British citizen or 'settled in the UK'. The purpose of the Annex thus appears to be to attempt to foreclose arguments that there could be an international law obligation on either the UK or Ireland to extend citizenship to people in Northern Ireland more widely than each state already had. The Annex seems fairly clearly a device for restricting entitlements to citizenship (so that, for example, those born in England, though resident in Northern Ireland, should not simply by virtue of their residence be able to claim Irish citizenship). By fixing this with reference to the law in 1998, any argument that there was an indefinite obligation for the citizenship laws of each country to track the other was foreclosed. The fact that this definition is meant to speak to citizenship but not the franchise is reinforced by the absence of any age limitation. If the argument were correct that the definition of 'the people of Northern Ireland' in Annex 2 defined the franchise for a unification referendum, then children of all ages would have an entitlement to vote.

In contrast, the Annex's Declaration did not reflect the *franchise* requirements at that time—as we have seen, those who were able to vote in the referendum on the Agreement itself included many who would not have been able to vote were Annex 2 to have been applied to the franchise in 1998. For example, individuals who were born in Dublin in 1918 before the foundation of Northern Ireland would have been ineligible under the Annex 2 requirements, despite living in Belfast from 1922, yet were in fact included in the franchise for the Agreement referendum in 1998. Applying the Annex

⁷ There was no parentage requirement in Irish citizenship law at the time although this was later introduced in 2004 following a constitutional amendment.

to the franchise would clearly have been a major policy inconsistency. If it had been intended to constrain the franchise in future referendums on constitutional matters in Northern Ireland, it might have been expected to feature in the Agreement itself. And some parties would certainly have objected to the exclusion from the franchise of persons born in Ireland, and not in Northern Ireland.

International and European human rights obligations

In referring to ‘the people of Northern Ireland’ exercising their consent to a change in the constitutional status of Northern Ireland, Article 1 of the Agreement, as we have seen, refers to the principle in international human rights law of the ‘self-determination’ of ‘peoples’. Does this help towards identifying who the ‘people of Northern Ireland’ are? In general, the answer is ‘no’. In that context, the question of who the ‘peoples’ are that are accorded the right to self-determination has proven deeply problematic. Joshua Castellino has referred to ‘the subjective and highly politicized nature of the determination of “peoples”’, in this context.⁸ It is not surprising, therefore, that in the main international law has consistently avoided articulating broad, general principles as to who are ‘the people’ that have the right to self-determination.

The right to vote and to participate in free elections is recognised under most of the major global human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of Migrant Workers, and the UN Convention on the Rights of Persons with Disabilities, in addition to the European Convention on Human Rights. Other regional human rights instruments also protect the right to vote and to participate in free elections.

Reticence in laying down firm principles on the extent and meaning of who ‘the people’ are in the context of self-determination extends also to a general propensity for international human rights law not to interfere with national decisions as to who should be allowed to vote in elections,

⁸ Joshua Castellino, ‘International law and self-determination’, in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and secession in international law* (Oxford, 2014).

a reticence that is clearly demonstrated by the European Court of Human Rights (‘ECtHR’) in numerous decisions concerning the interpretation of Article 3 of Protocol 1 of the European Convention on Human Rights (‘ECHR’). While in general supporting the right to universal suffrage, the Court accords a broad ‘margin of appreciation’ (subject to supervision by the ECtHR) to states as to what restrictions they may place on this right. The citizenship requirement for the right to vote or to be elected has never been questioned in the case-law of the Court, for example, and the requirement of a certain period of residence has also been considered legitimate.⁹ The question of minimum age has not been addressed by the Court. Provided exclusions and limits on the franchise pursue a legitimate aim, and are non-arbitrary and proportionate, i.e. provided the state can justify on objective grounds an exclusion from voting, the restriction will be allowed to stand.

It was on the basis that the United Kingdom could not articulate proportionate, non-arbitrary justifications for the blanket ban on voting by incarcerated prisoners that the ECtHR held that such a ban was inconsistent with the ECHR.¹⁰ Following the *Hirst v UK (No 2)* ruling delivered in 2006, there was a long-running standoff between the UK and the ECtHR, which was (at least partially) settled in 2017, when the UK government announced a change in policy, and this change was welcomed by the Council of Europe. The UK government stated that it would ‘change its policy and guidance to prisons to make clear that prisoners can register to vote, and can vote, while released on temporary licence. Most prisoners eligible to vote under this proposal would likely be on short sentences, and will have been granted temporary release, primarily for employment-related reasons.’¹¹ The UK Note stated that prisoners entitled to vote would include those on remand, those committed to prison for contempt of court or for default in paying fines, and those released on temporary licence or home detention curfew. We would expect that a similar group of prisoners would also be permitted to vote in future referendums, although the ECHR provisions do not formally apply to referendums.

⁹ *Polacco and Garofalo v Italy*, 15 September 1997, DR 90-A (European Commission on Human Rights).

¹⁰ *Hirst v United Kingdom*, (2006) 42 EHRR 41.

¹¹ David Lidington, Statement to the House of Commons, November 2017, volume 630. Available at: <https://hansard.parliament.uk/commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing> (accessed 7 April 2021).

Soft-law recommendations

The right to vote and the right to have a democratic government have both been supported by extensive guidelines on electoral monitoring produced by a variety of regional bodies, including the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), the Office for Democratic Institutions and Human Rights (ODIHR), the Organisation of American States (OAS), and the African Union. The Venice Commission's Code of Good Practice on Referendums may be thought to be particularly relevant.¹² The Code recognises that the right to vote 'may...and indeed should, be subject to certain conditions', and considers which restrictions are to be considered valid: regarding age, 'the right to vote must be subject to a minimum age but must be acquired, at the latest, at the age of majority'; regarding nationality, a 'nationality requirement may apply...however, it would be advisable for foreigners to be allowed to vote in local referendums after a certain period of residence'; regarding residence, 'a [habitual] residence requirement may be imposed' and 'a length of residence requirement may be imposed on nationals solely for local or regional referendums', but 'the requisite period of residence should be reasonable and, as a rule, should not exceed six months'; regarding citizens residing abroad, 'it is desirable that the right to vote be accorded' to them.

We shall see subsequently that the Venice Commission also recommends that the franchise is set well in advance of any referendum. These remain recommendations, however, and do not create legal obligations. Nevertheless, other things being equal, we would expect that greater legitimacy would derive from the adoption of franchise rules that are consistent with these principles.

PART 2: PREVIOUS UK AND NORTHERN IRELAND PRACTICE

Antecedents of 'the people of Northern Ireland'

The history of the constitutional guarantee provisions may be thought to be illuminating in attempts to understand what 'the people of Northern Ireland' means. The guarantee on the constitutional status of Northern Ireland was originally introduced in the Ireland Act 1949. This affirmed that Northern Ireland

¹² European Commission for Democracy Through Law (Venice Commission), Code of Good Practice on Referendums, CDL-AD(2007)008rev-cor Or. Fr., particularly at para 1.1.

would not cease to be part of the United Kingdom without the consent of the parliament of Northern Ireland, which existed from 1921 to 1972. Following the collapse of the Northern Ireland government and parliament in 1972, it was decided that consent to the constitutional status of Northern Ireland should henceforth be a matter for the public, voting in a poll, rather than the Northern Ireland parliament (and, reflecting this principle, a border poll was held in 1973).

The Northern Ireland Constitution Act 1973 repeated the 1949 Act provision word for word, but at the end omitted ‘the consent of the Parliament of Northern Ireland’ and substituted the formulation ‘the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1 to this Act’. The Northern Ireland Act 1998 is to the same effect (except that it refers to ‘a majority’ rather than ‘*the* majority’ of the people of Northern Ireland, perhaps in order to head off the close association between ‘the majority’ and unionism in the minds of many at that time).¹³

Franchises in previous UK referendums

The Law Commissions have described the law setting out the franchises and entitlement to vote for different elections in the UK as ‘layered, fragmented and complicated’,¹⁴ and the same can be said concerning the franchise for referendums. This is so because the framework for referendums set out in the governing legislation for referendums, the Political Parties, Elections and Referendums Act 2000, does not make provision for who is entitled to vote in any individual referendum. This has the effect that further legislation is always required to provide for the holding of any particular referendum within that framework. Appendix 1 sets out the franchise requirement adopted for every UK referendum.

The legislation passed to establish previous referendums shows a considerable degree of consistency in specifying who may vote in these referendums. Leaving aside the rather marginal issue of Members of the House of Lords being able to vote, and the running controversy over prisoner-voting (discussed above), nearly all simply specify that those eligible to vote in the referendum are those who are eligible to vote in Westminster Parliamentary elections, devolved Assembly/Parliament elections, and/or local authority elections. In other words, the bulk of referendums in the UK have been conducted in the

¹³ Indeed the Agreement committed the United Kingdom to enacting legislation that followed the language of the 1973 Act in these respects.

¹⁴ Law Commission, Scottish Law Commission, Northern Ireland Law Commission, *Electoral Law: A Joint Interim Report* (2016), para 4.2.

past under one or other existing election suffrage requirement, rather than different franchise requirements constructed for the referendum.

These requirements share several elements, in addition to residence: first, they exclude from the franchise those who have not yet reached the age of 18, except in Scotland (and, now, Wales); second, they include in the franchise UK citizens, those who are resident Irish citizens and Commonwealth citizens.

The rationale for the Scottish approach to the referendum franchise was explored in a Consultation Paper issued by the Scottish government in 2010.¹⁵

Following the precedent of the 1997 referendum, eligibility to vote will be based on that for Scottish Parliament and Scottish local government elections. That means that those resident in Scotland will be eligible to vote (with the exception of citizens of non-Commonwealth and non-EU countries). *This is in line with the internationally accepted principle that the franchise for constitutional referendums should be determined by residency, and with the Scottish Government's view that sovereignty lies with the people of Scotland.*¹⁶

Some of those who would not be able to vote in other elections were included for the purposes of the Scottish referendum. This is important in two respects. First, EU citizens would be permitted to vote under the 2020 Act in Scotland, even though the United Kingdom has left the European Union.

Second, the age at which a person is eligible to vote was reduced to 16 in the 2014 referendum, and this has been continued in the 2020 Act. The 2013 Scottish Referendum Act's inclusion of 16- and 17-year-olds, however, pre-empted a more general change in this regard to the Scottish local government franchise that was already in the works. The 2020 Referendum Act, which also includes 16- and 17-year-olds, is now consistent with the local government franchise.

The rationale for the Scottish government's approach to the question of age was explored in a Consultation Paper issued by the Scottish government in 2010.¹⁷

¹⁵ *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper* (Scottish Government, 2010), para 2.6 (emphasis added).

¹⁶ Emphasis added.

¹⁷ *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*.

2.11. The Scottish Government's view is that the voting age should be reduced to 16 for all elections. Denying 16- and 17-year-olds the vote risks them becoming disengaged from the political process at the very point society expects them to take on rights and responsibilities such as getting married or serving in the armed forces. Reducing the voting age to 16 would encourage participation by young people in Scotland's democratic processes and will give them a voice on matters that affect them.

2.12. The principle of lowering the voting age enjoys wide support. The Liberal Democrats and Green Party support lowering the voting age, as do all of the major youth organisations in the UK. Other countries are also starting to consider this issue. For example, in 2007, Austria became the first member of the European Union to adopt a voting age of 16 for all purposes, and Germany and Switzerland have lowered the voting age in certain elections. Jersey, Guernsey and the Isle of Man also have a voting age of 16.

2.13. The Health Boards (Membership and Elections) (Scotland) Act 2009 was the first piece of Scottish legislation to allow for those aged 16 or over to vote in elections. The pilot Health Board elections are due to take place in Fife and Dumfries and Galloway on 10 June 2010. The Labour Party, Liberal Democrats and Green Party all supported these proposals when they were put before the Scottish Parliament.

Both the inclusion of those aged 16 to 17 and the inclusion of EU citizens are controversial. The reduction in age has been seen by some as attempting to maximise a vote in favour of independence, in that younger voters in Scotland appear to consistently support Scottish independence in larger proportions than those who are older. The same might be said as regards EU citizens, whose inclusion is also controversial because even before the UK exited the EU, EU citizens were not eligible to vote at UK Parliamentary elections, and were also excluded in the 2016 Brexit referendum because the franchise for that referendum broadly reflected the franchise for Parliamentary elections.¹⁸

¹⁸ European Union Referendum Act 2015, Section 2.

PART 3: FRANCHISE ISSUES IN UNITY-RELATED REFERENDUMS IN IRELAND

The Irish Constitution, if not amended or entirely replaced after unification, would place Ireland in breach of its international law obligation, under the Agreement, to guarantee political equality to people in Northern Ireland without requiring them to become Irish citizens. For this reason constitutional change by referendum would be required at the moment of unification. There are two possibilities: a referendum to amend the 1937 Constitution, which would be bound to the existing franchise; and a referendum to enact a new constitution, for which a franchise would have to be constructed. We shall consider how the current constitutional amendment franchise is constructed, before assessing the political likelihood of this franchise being changed for a unification referendum.

Article 47 of the Irish Constitution provides that the franchise for a referendum to amend the Constitution consists of those *citizens* who have the right to vote at an election for members of Dáil Éireann. The franchise cannot be extended to non-citizens without a referendum.¹⁹ Article 16 provides that all citizens without distinction of sex who have reached the age of 18 years and who have not been disqualified by law and comply with the provisions of electoral law shall have the right to vote in Dáil elections. The current legislative provisions governing Dáil elections are found in the Electoral Acts 1992–2017. The Oireachtas could amend these provisions, within the parameters of Articles 16 and 47, which would in turn alter the franchise for any referendum to amend the Constitution. For present purposes, however, we shall assume that no relevant amendments will be made.

Section 8 of the Electoral Act 1992 provides that a person must be ordinarily resident in a Dáil constituency in order to vote. Section 11(3) provides that a person shall be deemed not to have given up ordinary residence if she intends to resume residence within 18 months of giving it up; a written statement to that effect shall be accepted as a correct statement in the absence of evidence to the contrary. Section 11(1) prevents a person being registered in two registration areas. However, being registered to vote in another country does not affect one's registration status in Ireland. Voting must be in person, save for certain prescribed and limited groups. Among the groups who may

¹⁹ *Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] IR 268.

vote otherwise than in person at a polling station are the following: diplomatic staff stationed abroad and their spouses (who are deemed to be ordinarily resident in the state);²⁰ members of An Garda Síochána or the Defence Forces;²¹ people with disabilities;²² prisoners; and those temporarily absent from their home constituency on polling day by reason of employment, occupation, or education.²³

The current constitutional amendment franchise in the south is constructed differently in several respects from any of the franchises used in Northern Ireland or the United Kingdom more generally. We shall return to the significance of these differences below. Utilisation of the existing amendment franchise therefore complicates any attempts to design the franchises in both jurisdictions in tandem. Nevertheless, we consider it politically likely that the existing amendment franchise would be used for any unification referendum. First, for the last replacement referendum—the plebiscite to enact the 1937 Constitution—the electorate was the same as for Dáil elections in the Irish Free State.²⁴ So there is no guarantee that the franchise for a replacement referendum would be any different from the franchise for an amendment referendum. Second, notwithstanding the suggestion of then Taoiseach Leo Varadkar in 2017 that unification might require a new constitution, it is more likely that any new constitution would be adopted following a post-unification constitution-making process rather than at the moment of unification itself. Enacting a new constitution at the moment of unification would greatly increase the number of issues to be addressed prior to unification, at a time when any involvement from political unionism would be close to inconceivable. It is therefore far more likely that unification would occur through an amendment referendum. Third, while it would be possible to change the amendment franchise before such a referendum, this would itself of course require a constitutional amendment. One condition in the Venice Commission Code is that the franchise for referendums should not be altered less than 12 months before the referendum takes place. It is difficult to imagine that there would be political will to sponsor a referendum to amend the franchise either while unification referendums are

²⁰ Electoral Act 1992, s12.

²¹ Electoral Act 1992, s14.

²² Electoral Act 1992, s82.

²³ Electoral (Amendment) Act 2006.

²⁴ Constitution of Ireland 1937, Article 62(1); Plebiscite (Draft Constitution) Act 1937. The plebiscite took place on the same day as the Dáil general election.

a remote prospect or when they are an immediate prospect, such that the franchise amendment might become a proxy debate about unification itself.

For all of these reasons, the political reality is that it will fall to those designing the Northern Ireland franchise to have regard to the franchise in the south, rather than the other way around, if it is considered to be important that differences between the unity referendum franchises north and south should be avoided.

PART 4: ASSESSING THE OPTIONS FOR A UNITY REFERENDUM IN NORTHERN IRELAND

Adopting the existing franchise used for elections to the Northern Ireland Assembly

Reflecting further on the practice described in Part 2, a somewhat more specific principle may be said to be identifiable. A principle that seems to have become embedded in determining a referendum franchise in the UK is that the referendum franchise should, in general, be the same as the franchise for legislative elections taking place over the same area as the given referendum. So, UK-wide referendums use the UK parliamentary franchise, while Scottish and Welsh referendums use the franchise for the Scottish Parliament and Welsh Assembly. The London referendum of 1998 and the North East referendum of 2004 used the local government franchise on essentially the same principle, as do local referendums. Although the Scottish referendums appear to deviate from that principle, in providing for different rules as regards age, that appearance is, as we have seen, misleading.

So, if this established UK practice is followed, there are two potential models available for the franchise for a unity referendum in Northern Ireland: the franchise for Northern Ireland constituencies in Westminster Parliamentary elections, or the somewhat more expansive franchise in Northern Ireland Assembly elections (which is the same as that for Northern Ireland District Council elections). In either case, questions about the voting age, enfranchisement of certain foreign nationals, etc. would not arise, since the question of whether a particular category of possible electors should be able to vote would be answered by referring to the existing Northern Ireland Assembly or Westminster Parliament franchise.

As between the Westminster Parliament and the Northern Ireland Assembly models, there are strong arguments that the Assembly franchise is

the most appropriate, and that in the absence of specific factors relating to a unification referendum, the franchise for any referendum in Northern Ireland should be the franchise for the Assembly. (Appendix 2 sets out the various franchise requirements currently adopted in UK Parliamentary, Northern Ireland Assembly, and Northern Ireland District Council elections.)

The use of the Northern Ireland Assembly franchise for a unification referendum in Northern Ireland could be said to reflect better the historical evolution of the constitutional-status referendum in Northern Ireland. We have seen that the use in statute of the formulation, the ‘people of Northern Ireland,’ has a history prior to 1998, and is not restricted to the mentions in the Agreement. Neither the 1973 Act nor the 1998 Act defined the ‘people of Northern Ireland,’ as might be expected if the phrase were intended to limit in a significant way the franchise. Instead, as we have seen, paragraph 4 of Schedule 1 to the 1998 Act simply empowers the secretary of state in the order directing a poll to specify the persons entitled to vote. It might be argued that the switch from ‘the Parliament of Northern Ireland’ to ‘the people of Northern Ireland’ strengthens an argument that the referendum franchise should reflect the Assembly franchise, as being closest to the old Northern Ireland Parliamentary franchise.

This approach would also be consistent with the report of the Independent Commission on Referendums. This report explores the main competing views on referendum franchise setting, and concludes:

The franchise for future referendums should be specified in standing legislation. For UK-wide referendums, the franchise should be the same as for elections to the House of Commons (with the addition of members of the House of Lords who are entitled to vote in local elections). For referendums in Scotland, Wales, or Northern Ireland, the franchise should be the same as for, respectively, the Scottish Parliament, Welsh Assembly, or Northern Ireland Assembly. For regional or local referendums, the franchise should be the same as for local elections in the corresponding area. The Commission recognises that deviations may exceptionally be necessary, as in the case of the inclusion of Gibraltarians in the 2016 EU referendum.²⁵

²⁵ Independent Commission on Referendums, 69–70, available at: <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/independent-commission-referendums> (7 April 2021).

Potential arguments against the use of the Assembly franchise

The general principle suggested above, that the referendum franchise should be the same as the franchise for Assembly elections taking place over the same area as the given referendum, has a significant counter example. The precedent of the 1998 Agreement referendum is somewhat at odds with this general principle, having adopted the Westminster franchise qualifications. That the Northern Ireland Negotiations (Referendum) Order 1998 used the UK parliamentary franchise as its starting point does look like a deviation from the principle. It is unclear why precisely the 1998 referendum did not simply use the local government franchise, which became the basis for the Assembly election franchise, but the most significant effect of the different franchise was to exclude EU citizens who were not either Irish or UK citizens. Opting for the current Assembly franchise rather than that of the UK parliamentary elections is therefore of considerable significance in determining whether EU citizens would be able to vote.

That said, there is a complication. Following the UK's withdrawal from the EU, the United Kingdom may seek to amend the local government franchise in Northern Ireland to exclude EU citizens from eligibility (although at the time of writing this has not yet occurred). If such an amendment were to take place, and the Assembly franchise continued to be the same as that for local government, then EU citizens would no longer have the right to vote or stand for the Assembly (unless Irish citizens). However, any such move by the UK government may fail on the basis of a plausible argument that Article 2 of the Protocol preserves EU citizens' rights vis-à-vis local government elections. Article 2 prevents the diminution of rights that existed prior to Brexit that feature in the 1998 Agreement and that also had EU law underpinnings—criteria that apply to EU citizens' voting rights in local council elections, but not Northern Ireland Assembly elections. Even if the Article 2 argument were successful as regards local government elections, the UK government would still be able to take away the rights of EU citizens vis-à-vis the Assembly, breaching the convention that the Assembly franchise mirrored the local government franchise. If a change were made to the Assembly franchise in this way, the choice between the Assembly franchise and the parliamentary franchise would no longer be critical in determining the participation or otherwise of EU citizens, because in either case they would be excluded.

That complication aside, are there other specific factors relating to a unification referendum that argue for more flexibility in the construction of the franchise than would be permitted were the Northern Ireland Assembly or the Westminster Parliamentary franchise to be adopted? One consequence is, of course, that deviations from the existing franchise would not be permitted. This would have the effect that, unless the franchise were altered for the Assembly/Parliamentary elections, the voting age would remain at 18, and the existing limited ability of prisoners to vote would be replicated in any referendum. The advantage of simply adopting the status quo would also be its disadvantage, leading to less flexibility. Whether this would lead to more or less political contentiousness is an open question.

Another counterargument to simply accepting the application of the Assembly/Parliamentary franchise arises from the requirement in the Agreement that ‘it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination...’. It is arguable that this requires the determination of who should be included within the category of ‘the people of Northern Ireland’ to be in the hands of the ‘people of Northern Ireland’, currently represented in the Northern Ireland Assembly, and that the Assembly should be able to construct its own tailor-made franchise, as opposed to the secretary of state simply defaulting to the Westminster-approved status quo approach. Not to allow the Assembly to be able to specify its preferences in this respect could be said to introduce an ‘external impediment’. In that case, there might be a stronger argument for changing the referendum franchise—say, to include 16- and 17-year-olds—if most Northern Ireland elected representatives supported such a change. The problem is that under the Northern Ireland Act 1998 the Assembly does not control the franchise for Northern Ireland elections—the franchise is an ‘excepted’ matter, meaning that the Northern Ireland Assembly may not legislate on it.²⁶ If the Assembly expressed its collective preference by Resolution, however, it would seem advisable that the secretary of state should accept this, and legislate a different franchise.

The consequences of adopting the Northern Ireland Assembly franchise specifically would be that three areas of tension would arise with the franchise that would be adopted for a constitutional amendment referendum in

²⁶ ‘Elections, including the franchise, in respect of the Northern Ireland Assembly, the European Parliament and district councils’ are excepted matters, Northern Ireland Act 1998, Schedule 2, paragraph 12(1).

Ireland. First, Irish citizens resident in Northern Ireland would be able to vote in a referendum in Northern Ireland, but British citizens resident in Ireland would not be permitted to vote in a constitutional amendment referendum in Ireland (unless they were also Irish citizens). Second, prisoners could vote without restriction in Ireland, but not in Northern Ireland. Third, there would be no prohibition—at least as a matter of Irish law—on someone voting both in a constitutional amendment referendum in the south and a unity referendum in the north. Steps could be taken in the south to address these issues, but this would not be straightforward. The first area of tension could only be addressed by a prior amendment referendum. The second two areas of tension could be addressed by legislation, but it is most unlikely that the Oireachtas would wish—either generally or for the specific purpose of these referendums—to withdraw the franchise from prisoners. Furthermore, given how the referendum franchise is derivative of the Dáil franchise, it would not be constitutionally permissible to construct legislation that would remove the right to vote in a unification referendum from those also registered to vote in Northern Ireland without also limiting their right to vote in Dáil elections. We think it unlikely that the Oireachtas would wish to make such a general limitation of the Dáil franchise.

Developing a franchise specific to a unity referendum

In the absence of simply adopting an ‘off the shelf’ approach to the referendum franchise, there appear to be at least seven issues about the franchise in a Northern Ireland unity referendum which the secretary of state would be required to decide upon from scratch: (a) Age—what should be the minimum age to qualify as a voter? (b) Residence—should there be any requirement that a voter must be currently resident in Northern Ireland, and if so for how long? (c) EU citizens—should EU citizens be permitted to vote, and if so under what conditions? (d) Irish citizens—should the franchise be extended to those who are Irish citizens who would otherwise qualify? (e) Prisoners—should those serving prison sentences be prohibited from voting? (f) Commonwealth citizens—should the franchise be extended to those who are citizens of a Commonwealth country who would otherwise qualify? (g) Should a prohibition be introduced on people voting in unification referendums on both sides of the border?

Existing practice elsewhere could support the inclusion of the widest view of each of these categories, but equally, existing practice elsewhere could

support a much narrower franchise. With the exception of (c), (d), and (e), neither approach is likely to fall foul of existing international law or international and European human rights law. As regards the inclusion of EU citizens, a difficult question arises as to Article 2 of the Ireland-Northern Ireland Protocol to the Withdrawal Agreement, which prevents the diminution of rights. Could excluding EU citizens be considered such a diminution? Permitting EU citizens to vote in referendums was not required under EU law (which required EU citizens to be permitted to vote only in local government elections); as such, this would appear to be a weak argument. As regards prisoner voting, the implications of the ECtHR's pronouncements would no doubt be revisited, but the application of the Convention to referendums seems unlikely to be reopened by the Court.

The issue of Irish citizens resident in Northern Ireland who are not also British citizens being able to vote in a unification referendum in the north has given rise to some recent controversy. We have seen that the franchise for the 1998 Agreement and the Brexit referendums did include this group among those qualified to vote. The provisions in the Common Travel Area Memorandum of Understanding (MoU) concluded between the Irish government and the UK government in 2019 guaranteed the continuation of reciprocal voting rights between the UK and Ireland. Referendums are not mentioned in the MoU, but the implications of that omission are unclear. In March 2019, some months before the MoU was concluded, then secretary of state for Northern Ireland, in answer to a parliamentary question, suggested that the UK government may not plan to accord Irish citizens voting rights in UK referendums: 'The voting rights which will continue to be enjoyed by British and Irish citizens are reciprocal. British citizens may vote in local and parliamentary elections in Ireland but not Presidential elections or referendums. This reciprocal right is reflected in the voting rights of Irish citizens living in the United Kingdom.'²⁷ This statement is potentially significant, but ambiguous. On one reading, it appears to mean that the UK government thinks that, in the Northern Ireland referendum in 1998 and the Brexit referendum in 2016, Irish citizens who were not otherwise British citizens were not entitled to vote; that this exclusion was based on a policy permitting Irish citizens to vote only on the basis of reciprocation. On an alternative reading, the secretary of state's view may be that whatever the situation in the past,

²⁷ 13 March 2019, available at: <https://questions-statements.parliament.uk/written-questions/detail/2019-03-08/230086> (7 April 2021).

the only voting rights that Irish people will have in the UK in the future will be reciprocal ones, and that since British citizens resident in Ireland are not permitted to vote in Irish referendums, Irish citizens would not in future be permitted to vote in UK referendums.

If the first reading is adopted, it is incorrect in two significant respects. It is incorrect that past UK practice was to exclude Irish citizens from voting in UK referendums, but it is also incorrect in suggesting that British citizens are always excluded from the franchise for referendums in Ireland. While it is correct that British citizens are not included in the franchise for *constitutional* referendums, they have been included in the franchise for other referendums, notably those to establish elected mayors in Cork, Limerick, Galway and Waterford in 2019.²⁸ If the second reading is adopted, then the statement is ‘only’ incorrect on this second ground. Whichever reading is adopted, the statement of the secretary of state does raise a concern: that the UK might *in future* introduce such a reciprocity condition. In our view, that would be an unfortunate development and would cast doubt on the legitimacy of the referendum given previous UK practice. It would also, in our view, breach the obligation in the 1998 Agreement that the sovereign government in Northern Ireland must exercise its powers with rigorous impartiality on behalf of all the people in the diversity of their identities, founded on the principle of full respect for, and equality of, political rights. Adhering to the general principle we have articulated above—preferring either the Northern Ireland Assembly or the Westminster franchise for any future unity referendum in Northern Ireland—would avoid this problematic exclusion of Northern Ireland-resident Irish citizens who are not also British citizens from voting in a unity referendum.

As regards (a), (b), (f), and (g), where legal constraints seem to be minimal, these choices have both ideational and practical stakes. At the ideational level, we have seen that residency requirements emphasise a less ethnic understanding of ‘the people of Northern Ireland.’ Prohibiting people voting in referendums on both sides of the border would characterise the referendums as an act of self-determination on the part of a pre-existing people rather than the consent of two separate peoples to a new state. In this regard, it is worth noting that double-voting is prohibited in elections to the European Parliament:

²⁸ Local Government Act 2019. These votes were labelled ‘plebiscites’ but that was probably due to a concern that the Constitution might exhaustively determine the parameters for ‘referendums’. The different label is not relevant to the comparison of practices across the two countries, but if it were, any difficulties could just be avoided by relabelling ‘referendums’ as ‘plebiscites’.

even if entitled to vote in more than one member state, an elector may only vote once.²⁹ This supports the view that double-voting may be considered inappropriate in a unitary process—even where that process is conducted in different jurisdictions—but does not answer the question of whether unification referendums on both sides of the border should be viewed as a unitary process. At the practical level, people under the age of 18 and EU citizens are probably more likely to support unification, although the divergence in opinion poll and survey evidence about people’s attitudes to a united Ireland makes it difficult to predict with confidence how such demographic variations would affect the vote. It would be difficult for the secretary of state to make any of these decisions without them being analysed as to whether they assist the pro-unification or pro-Union vote. This might count as another factor in favour of following the existing Assembly franchise.

If the existing Northern Ireland Assembly/Parliamentary franchise is not adopted, there is, however, a further complication. As we saw above, the Venice Commission Code of Good Practice on Referendums considers that the franchise for referendums should be established in general, not *ad hoc*. It states: ‘The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law’.³⁰ This is intended to prevent tinkering with the franchise to suit a particular vote.³¹ If the secretary of state were to follow best practice, therefore, any changes in the franchise should be brought in more than one year before any referendum and ideally should be general, i.e. not uniquely for the purpose of a unification referendum.

CONCLUSION

We suggest that the most sensible approach to the franchise issue is likely to be to adopt a Venice-informed presumption against departure from the

²⁹ Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, Article 9 as inserted by Council Decision (EU, Euratom) 2018/994 of 13 July 2018, Article 1(3).

³⁰ Venice Commission Code of Good Practice on Referendums, Section II.2.

³¹ This is made more explicit in the recent Parliamentary Assembly of the Council of Europe report on referendums (paragraphs 6, 27, 51 and 52), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=25231&lang=en> (7 April 2021).

existing franchise model that operates in the area where the referendum will take place, tempered with a willingness to depart from that model for strong reasons, provided any changes are introduced well ahead of any referendum. In practical terms, there seems a pretty clear choice that the secretary of state must make: whether to adopt the existing Assembly/Parliamentary franchise or develop a new franchise. If a new franchise is developed, then the secretary of state will have difficult choices to make as to how to tweak the ordinary rules, with differences between north and south emerging as issues of particular sensitivity: prisoners being able to vote in the south but not (with limited exceptions) in the north; Irish citizens being able to vote in the north, while British citizens may not vote in the south (unless they are also Irish citizens); and the potential for some voters being able to vote in both the north and the south. It would be reasonable to consider that the discrepancies identified are not sufficiently serious to justify departing from the existing substantive franchise requirements, but equally it would be reasonable to consider that they do. It is clear, however, that the degree to which divergences are accepted will impact on the legitimacy of the entire process. It would be sensible to take into account whether there are clear, practical problems that would arise from divergences in the franchise, but thus far, we have been unable to identify any such problems.³² Beyond this practical point, however, the issue of what are 'sufficiently serious' divergences appears to us to be a classic political question, and one that we do not seek to influence one way or the other. The purpose of this article has been to inform the political debate that must take place on these issues, and sooner rather than later.

Read Responses to this paper from
Conor Casey,
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C.R.G. Murray,
doi: <https://doi.org/10.3318/isia.2021.32b.21>; and
Cheryl Saunders,
doi: <https://doi.org/10.3318/isia.2021.32b.20>

³² Whichever choice is made, however, the challenge of simultaneous referendums north and south would warrant a level of cross-jurisdictional coordination on procedural issues even though that requires some departure from existing standards.

APPENDIX 1:

Franchise requirements for the principal national or regional referendums held in the United Kingdom

Northern Ireland (Border Poll) Act 1972, Section 1(1)(a) Referendum Act 1975, Section 1(3)	<p>‘Those entitled to vote on the poll shall be those who would be entitled to vote on polls held on that date at a general election to the Parliament of Northern Ireland.’</p> <p>‘Subject to subsection (5) of this section [relating to voting by members of, and spouses of those serving in, the armed forces], those entitled to vote in the referendum shall be—(a) the persons who, at the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency, and (b) peers who at that date would be entitled to vote as electors at a local government election in any electoral area.’</p>
Scotland Act 1978, Schedule 17, para 2	<p>‘Those entitled to vote in the referendum shall be—(a) the persons who, at the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency in Scotland; and (b) peers who at that date would be entitled to vote as electors at a local government election in any electoral area in Scotland.’</p>
Wales Act 1978, Schedule 12, para 2	<p>‘Those entitled to vote in the referendum shall be—(a) the persons who, at the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency in Wales; and (b) peers who at that date would be entitled to vote as electors at a local government election in any electoral area in Wales.’</p>
Referendums (Scotland and Wales) Act 1997, Section 1(3)	<p>‘Those entitled to vote in the referendum shall be the persons who, on the date of the referendum, would be entitled to vote as electors at a local government election in any electoral area in Scotland.’</p>
Referendums (Scotland and Wales) Act 1997, Section 2(3)	<p>‘Those entitled to vote in the referendum shall be the persons who, on the date of the referendum, would be entitled to vote as electors at an election for a county council or county borough council in Wales.’</p>

<p>Northern Ireland Negotiations (Referendum) Order 1998, Section 4(1)</p>	<p>‘Those persons entitled to vote in the referendum shall be—(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency in Northern Ireland, except any person registered in pursuance of an overseas elector’s declaration under Section 2 of the 1985 Act, and (b) those peers who, on that date, would be entitled to vote as electors at a local election in any local government district there.’</p>
<p>Greater London Authority (Referendum) Act 1998, Section 2(1)</p>	<p>‘Those entitled to vote in the referendum shall be—(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a local government election in any London borough, and (b) the persons who, on that date, would be entitled to vote as electors at a ward election by virtue of Section 6(1)(b) of the City of London (Various Powers) Act 1957 (persons resident in wards of the City).’</p>
<p>Regional Assemblies (Preparations) Act 2003, Section 4</p>	<p>‘(1) A person is entitled to vote in a referendum held in a region in pursuance of an order under Section 1 if on the date of the referendum he is entitled to vote at the election of councillors for any electoral area in the region. (2) A person is entitled to vote in a referendum held in a county area of a region in pursuance of an order under Section 2(2) if on the date of the referendum he is entitled to vote at the election of councillors for any electoral area in the county area.’</p>
<p>Government of Wales Act 2006, Schedule 6, para 1(1)</p>	<p>‘The persons entitled to vote in a referendum held by virtue of Section 103(1) are those who would be entitled to vote in a general election of Assembly members if one were held on the date of the poll at the referendum (as to which see Section 12).’ Section 12 provides: ‘(1) The persons entitled to vote at an election of Assembly members (or of an Assembly member) in an Assembly constituency are those who on the day of the poll—(a) would be entitled to vote as electors at a local government election in an electoral area wholly or partly included in the Assembly constituency, and (b) are registered in the register of local government electors at an address within the Assembly constituency.’</p>

Parliamentary
Voting System and
Constituencies Act
2011, Section 2(1)

‘Those entitled to vote in the referendum are—(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency, and (b) the persons who, on that date, are disqualified by reason of being peers from voting as electors at parliamentary elections but—(i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain, (ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or (iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of Section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom).’

Scottish
Independence
Referendum
(Franchise) Act
2013, Section 2(1)

‘A person is entitled to vote in an independence referendum if, on the date on which the poll at the referendum is held, the person is—(a) aged 16 or over, (b) registered in either—(i) the register of local government electors maintained under Section 9(1)(b) of the 1983 Act for any area in Scotland, or (ii) the register of young voters maintained under Section 4 of this Act for any such area, (c) not subject to any legal incapacity to vote (age apart), and (d) a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the European Union. (2) For the purposes of this Act, a person is, on any date, subject to a legal incapacity to vote if the person—(a) would be legally incapable (whether by virtue of any enactment or any rule of law) of voting at a local government election in Scotland held on that date, or (b) is legally incapable, by virtue of Section 3, of voting in an independence referendum held on that date.’ Section 3 provides: ‘(1) A convicted person is legally incapable of voting in an independence referendum for the period during which the person is detained in a penal institution in pursuance of the sentence imposed on the person.’

European Union
Referendum Act
2015, Section 2(1)

‘Those entitled to vote in the referendum are—(a) the persons who, on the date of the referendum, would be entitled to vote as electors at a parliamentary election in any constituency, (b) the persons who, on that date, are disqualified by reason of being peers from voting as electors at parliamentary elections but—(i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain, (ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or (iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of Section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom), and (c) the persons who, on the date of the referendum—(i) would be entitled to vote in Gibraltar as electors at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised, and (ii) fall within subsection (2).

(2) A person falls within this subsection if the person is either—(a) a Commonwealth citizen, or (b) a citizen of the Republic of Ireland.

Referendums
(Scotland) Act
2020, Section 4

‘A person is entitled to vote in the referendum if, on the date on which the poll at the referendum is held, the person is—(a) aged 16 or over, (b) registered in the register of local government electors maintained under Section 9(1)(b) of the Representation of the People Act 1983 for any area in Scotland, (c) not subject to any legal incapacity to vote (age apart) [at a local government election in Scotland], and (d) a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the European Union.’ A relevant citizen of the EU is defined to mean ‘a citizen of the Union who is not a Commonwealth citizen or a citizen of the Republic of Ireland’.

APPENDIX 2:

Franchises in Northern Ireland elections

	Northern Ireland Assembly	Northern Ireland District Council	United Kingdom Parliamentary elections in Northern Ireland
Principal legislation	Northern Ireland Assembly (Elections) Order 2001, Article 4	Elected Authorities (Northern Ireland) Act 1989 (as amended), Section 1	Representation of the People Acts
Principal features of franchise	Same as for Northern Ireland District Council elections: A person is entitled to vote at an Assembly election in a constituency if on the day of the poll he would be entitled to vote as an elector at a local election in a district electoral area wholly or partly comprised in that constituency.	The following can vote provided they are aged 18 or over on polling day, are registered to vote, and are not otherwise legally excluded for voting: ¹ • British or Commonwealth citizens ² who are resident in Northern Ireland • Citizens of the Republic of Ireland who are resident in Northern Ireland ³	The following can vote provided they are aged 18 or over on polling day, are registered to vote, and are not otherwise legally excluded for voting: ⁶

¹ For example: a person reported by an election court as being personally guilty of a corrupt or illegal practice; a convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained.

² The definition of a 'Commonwealth' citizen includes citizens of British Crown dependencies and British overseas territories. A 'qualifying' Commonwealth citizen is someone who has leave to enter or remain in the UK, or who doesn't require that leave.

³ Irish citizens resident in Northern Ireland can vote in all elections and will be unaffected by Brexit, as part of an existing reciprocal arrangement between Ireland and the UK.

Northern Ireland Assembly	Northern Ireland District Council	United Kingdom Parliamentary elections in Northern Ireland
	<ul style="list-style-type: none"> • Citizens of other European Union (EU) countries who are resident in Northern Ireland⁴ • Electors must have been resident in Northern Ireland during the whole of the three-month period prior to the election • Service and Crown personnel serving overseas in the armed forces or with Her Majesty's Government • Homeless people can register using a declaration of local connection • Some residents of mental hospitals and remand prisoners • Members of the House of Lords as long as they are aged 18 or over on polling day⁵ 	

⁴ Reciprocal voting rights for EU citizens in the UK, and UK citizens living in the EU, did not form part of the Withdrawal Agreement. The UK intends to agree reciprocal arrangements with EU Member States on a one-by-one basis. Maltese and Cypriot citizens similarly enjoy voting rights on the basis of their status as Commonwealth citizens. It appears to be envisaged that legislation will need to be amended to remove voting rights from EU citizens for local elections but it would appear that the right of EU citizens to vote in local elections only is preserved by Article 2 of the Ireland-Northern Ireland Protocol.

⁵ Members of the House of Lords are ordinarily excluded from the franchise for UK parliamentary elections.

⁶ For example: a person reported by an election court as being personally guilty of a corrupt or illegal practice; a convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained.

Northern Ireland Assembly	Northern Ireland District Council	United Kingdom Parliamentary elections in Northern Ireland
		<ul style="list-style-type: none"> • British or Commonwealth citizens⁷ who are resident in the UK • Citizens of the Irish republic who are resident in the UK⁸ • Electors must have been resident in Northern Ireland during the whole of the three-month period prior to the election • British nationals living overseas are entitled to vote for up to 15 years after moving abroad. • Service and Crown personnel serving in the UK or overseas in the armed forces or with Her Majesty's Government • Homeless people can register using a declaration of local connection • Some residents of mental hospitals and remand prisoners⁹

⁷ The definition of a 'Commonwealth' citizen includes citizens of British Crown dependencies and British overseas territories. A 'qualifying' Commonwealth citizen is someone who has leave to enter or remain in the UK, or who doesn't require that leave.

⁸ Irish citizens resident in Northern Ireland can vote in all elections and will be unaffected by Brexit, as part of an existing reciprocal arrangement between Ireland and the UK.

⁹ A convicted person is ineligible to vote during the time that he or she is detained in a penal institution in pursuance of his or her sentence or unlawfully at large when he would otherwise be so detained, as are offenders detained in mental hospitals.