

***THE FUTURE OF OUR SHARED ISLAND: A PAPER ON THE
LOGISTICAL AND LEGAL QUESTIONS SURROUNDING
REFERENDUMS ON IRISH UNITY***

*Mark Bassett and Colin Harvey
Constitutional Conversations Group*

A. Overview

1. The debate on Irish unity has intensified. Brexit is only one part of this, as more people question the merits of the existing constitutional arrangements. The focus is now shifting to constitutional conversations about how the island is shared in the future, and the timeframe for what is often referred to as a “border poll”. The difficulty remains that there are several unanswered questions about the process, as many interventions understandably concentrate on the merits of this option. We believe that the debate around the referendums must be normalised as momentum builds towards setting out a precise timeframe. In this paper our intention is to examine logistical and legal questions that have thus far been neglected.
2. This paper is therefore drafted with two principal considerations in mind:
 - i. How can referendums on Irish unity be achieved?
 - ii. How can they be won?

B. Good Friday Agreement (GFA)

3. The relevant provisions of the GFA provide as follows:

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

- (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;*
- (iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland’s status as part of the United Kingdom reflects and relies upon that wish; and that*

it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

- (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;*

These constitutional matters are at the core of the British Irish Agreement that forms the international legal framework (binding on both states) that will shape the discussion of unity referendums and will also speak to what follows.

C. Overview of “Border Poll”

4. When people use the term “border poll” they are referring to the question of whether Northern Ireland will remain within the United Kingdom or join a united Ireland. Although it is widely used and adopted, we question how helpful it is in capturing the complexity of this constitutional conversation. It is, of course, a debate about the existence of the border, but it will also be a significant island-wide discussion about how we share this island in the future. In considering the logistical aspects of this process thought might be given to the adoption of more inclusive and nuanced terminology.
5. The principles and mechanisms are set out in the GFA and have been given effect in domestic law through the Northern Ireland Act 1998 and the new versions of articles 2 and 3 of *Bunreacht na hÉireann*.

D. Decision Makers

6. It can be said that the most faithful interpretation of what was agreed by the two governments and the political parties in the GFA, with respect to the right to Irish self-determination, was that there will be *concurrent referendums* in both jurisdictions, and thus subject to the differing traditions, rules and processes in each. For example, Ireland has a much more extensive history of holding referendums, with a clear and established process for any constitutional referendum.

GFA Referendums of 1998

7. Concurrent referendums took place on the 22nd May 1998 across the island of Ireland. The two electorates were asked to consider the outcome of the multi-party negotiations which culminated in the Good Friday Agreement of April 1998.
8. In Northern Ireland the question was posed in the following form:

“Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?”

9. In Ireland the question was posed in the following form:

“Do you approve of the proposal to amend the Constitution contained in the under mentioned Bill? (Nineteenth Amendment of the Constitution Bill, 1998”

As can be seen, the questions posed were different, and they had distinct legal consequences in each jurisdiction. In the north, the outcome amounted to a direction to the United Kingdom Government to propose primary legislation in Westminster to implement the GFA. Parliament duly enacted the Northern Ireland Act 1998. This statute was later described as having “constitutional status” – *Robinson v. Secretary of State for Northern Ireland and others* [2002] UKHL 32. In Ireland, articles 2 and 3 of *Bunreacht na hEireann* were amended to remove the territorial claim to the whole of the island of Ireland. The entry into force of the British-Irish Agreement (the bilateral treaty that provides the international legal underpinning for this political agreement) was conditional on key steps being taken by both states.

10. The critical point, however, is that the referendums were essentially the same in substance. The electorate was being asked to endorse or reject a new constitutional arrangement. A rejection in either jurisdiction would have meant an immediate continuation of the status quo. No doubt, this would have prompted renewed efforts to find consensus but this too would, inevitably, have had to find approval in both jurisdictions by way of concurrent referendums.
11. There could have been no internal solution for Northern Ireland that would have acquired comparable democratic legitimacy. Similarly, any unilateral amendment of the Irish Constitution would only have had limited capacity to bring about a new constitutional dispensation.
12. From a nationalist/republican viewpoint, at least, the endorsement of the GFA by way of an all-island vote in 1998 could rank alongside the December 1918 vote for an independent Irish republic. From a unionist/loyalist viewpoint, at least, the referendum had the twin credentials of approval by a majority in Northern Ireland and the enactment of primary legislation by the UK’s “sovereign parliament”. The principle of consent was also recognised in the Republic’s constitution. The clear all-island endorsement of these arrangements gives the GFA a legitimacy that is democratically formidable and that includes the precise mechanisms for constitutional change. There are formidable reasons to conclude that the approach to this process (before, during and after) must be shaped by the GFA.
13. As noted above, in its international legal manifestation, the GFA also offers a *normative* framework for the unity conversation: there are provisions in the GFA that are clearly intended to continue to have relevance in the event of Irish unity and the principles are of fundamental significance to guiding the approach. This will not be, and it should not be, a “blank page” discussion.

Republic of Ireland

14. The procedure for holding a referendum in the Republic of Ireland is governed by article 46 of the constitution, and Referendum Acts. In short, the proposal must be approved by both houses of the Oireachtas (or deemed to be passed), submitted to and approved by the electorate and signed into law by the President.
15. Consequently, it can be said, in purely legal terms, that the decision to propose a referendum on unity lies with the Oireachtas, while the approval or rejection of the unity proposal rests with the electorate.
16. To date there have been 37 proposals to amend the constitution. All have been supported by the Irish Government. The political and practical reality is that any referendum on Irish unity will have to receive support from an Irish government. Given the matters raised in this paper, and associated discussions, the Irish Government would have to undertake the required preparatory work, including in dialogue with the British Government, on the process. There would be a particular responsibility on the Irish Government to provide clarity and certainty about the implications of a vote for unity. This does not negate the significance of civic dialogue about the constitutional future or community-level initiatives, but it is to suggest that such an exercise will require government-level resourcing and support. Forcing people into early positions on substantive issues, in advance of the necessary preparatory work, simply pre-empts the outcome of proposed dialogue. There is an urgent and pressing need for the Irish Government to establish an institutional mechanism to take this work forward.

Northern Ireland

17. At the present time, in the UK the procedure for holding a referendum is principally governed by the Political Parties, Elections and Referendums Act 2000. In accordance with the common law and constitutional principle of the legislative supremacy of the Westminster Parliament, they are advisory and cannot bind Parliament.
18. In respect of a referendum on Irish unity in the north the position appears somewhat distinctive. In the draft clauses/schedules for incorporation in British legislation of the GFA the UK Government agreed to the following:

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.
19. That undertaking binds the UK Government in international law to facilitate Irish unity (by laying *agreed proposals* before Parliament) should such a preference be expressed in a referendum in this jurisdiction. It has also been enacted in section 1(2) of the Northern Ireland Act 1998. But it must be noted that the principle of parliamentary supremacy holds, and the obligation is to put proposals to Parliament that “may be agreed” between both governments (indicating that extensive discussions would either follow such a vote and/or would have been agreed in advance of the vote). The nature of the proposals to be put to the Westminster

Parliament arguably should not be left to negotiation between both governments. These are matters that should be worked out in advance of any vote so that people will be clear what the precise implications will be.

20. In Northern Ireland, the manner in which a referendum on Irish unity would be facilitated, and the form it would take, is less certain. The relevant statutory provisions are found in the Northern Ireland Act 1998. This legislation was the UK's response to the obligations it assumed under the GFA.

21. Section 1 and Schedule 1 are set out below:

1. Status of Northern Ireland.

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Schedule 1: Polls for the Purposes of Section 1

1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

4(1) An order under this Schedule directing the holding of a poll shall specify—

(a) the persons entitled to vote; and

(b) the question or questions to be asked.

(2) An order—

(a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences); and

(b) may apply (with or without modification) any provision of, or made under, any enactment

22. The High Court recently considered these provisions in judicial review proceedings in *An Application for Judicial Review by Raymond McCord* (GIR 10679). The applicant had contended that the failure of the Secretary of State to have in place a policy which sets out the circumstances in which a border poll would be called was unlawful. The application was dismissed. In summary, the court held:

- There was no wide-ranging public law principle which required that a decision maker given statutory powers is bound to produce and publish a policy establishing how the power would be exercised.
 - Schedule 1 paragraph 1, Northern Ireland Act 1998 confers on the Secretary of State a general discretionary power to call a poll (even where she is not of the view that it is likely that a majority of voters would vote for a united Ireland).
 - Pursuant to Schedule 1 paragraph 1(2) the Secretary of State is under *a duty* to call a poll if it appears to her that a majority would be likely to vote for a united Ireland.
 - Within the scope of her discretion, decision making by the Secretary of State requires political assessment and a degree of flexibility. It is for the Secretary of State to decide what matters should be taken into account.
23. Therefore, in purely legal terms the decision to call a poll lies at the discretion of the Secretary of State for Northern Ireland subject to public law principles that arise around section 1(2) Northern Ireland Act 1998.
24. Notable in this judgment, however, is the distinction drawn between the *broad discretionary power* of the Secretary of State to call a poll (for a variety of reasons) and the *duty* to do so if it appears likely that a majority of voters would vote for a united Ireland. The judgment suggests, for example, that there would be nothing to prevent the Secretary of State initiating a poll with respect to a “no-deal Brexit” even where the principal issue was continuing membership of the EU (in a unified Ireland). In other words, the Secretary of State is not confined exclusively to evidence with respect to support for Irish unity.
25. The date of the poll, the question to be asked and the franchise of those entitled to vote will be determined by the Secretary of State in an order pursuant to schedule 3. This leaves the option of setting a timeframe and date that gives sufficient space for the necessary preparatory work to be done.

E. Arguments for Irish Unity

26. Arguments for Irish unity may have to adopt distinct arguments in both jurisdictions. There are two different audiences that will require persuasion.

Republic of Ireland

27. In the Republic, some of the arguments employed could seek to rely on the values in the Constitution and the achievements of the State. We acknowledge and accept that the State is a long way from achieving full respect for human rights and equality, for example. However, arguments which seek to denigrate the Constitution or the State and suggest that this is a “blank page” discussion are likely to be unattractive. It is arguable that a majority of the target audience is proud of the State and the Constitution – that should be noted and it should be harnessed not challenged. This would not, however, prevent discussion about further reform, for example, in the areas of human rights and equality and how to ensure that British identity is fully respected in the new dispensation. In fact, the GFA provides the ideal basis for doing just this: the Agreement contains an impressive commitment

to human rights, equality, social justice and respect for identity that should inform fully the approach to Irish unity and the new constitutional arrangements.

28. Irish unity remains a constitutional goal in *Bunreacht na hEireann*. The preamble states:

“... And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.”

29. The objective of Irish unity was described as a “constitutional imperative” by the Supreme Court in *McGimpsey v. Ireland* (1990) 1 IR 110. That phrase was used to describe the original incarnations of articles 2 and 3, interpreted in the light of the constitution as a whole.
30. It has been said that the non-binding preamble sits uneasily with the terms of the new articles 2 and 3 on the question of reunification. However, the description of unity has never been expressly overruled by the courts nor, does it seem, disavowed by any Irish government. The Tánaiste has, for example, indicated that he would like to see a united Ireland in his political lifetime.
31. The replacement of the original articles 2 and 3 of *Bunreacht na hEireann* means that the “Nation” is now defined in terms of *its people*. The national territory, previously described as consisting of the whole island, its islands and territorial seas, is no longer defined. The citizenship regime, as expressed in both the Constitution itself and the Citizenship Acts, is not limited to the territory of the State. The establishment of north-south bodies are a further example of the Constitution’s recognition of the possibility of reunification.
32. We acknowledge that there is an opportunity to initiate a new constitutional conversation around any such vote and one that is radical and far-reaching. In particular, such an approach would have merit in the context of reassuring all communities in the north about Irish unity. However, we would also highlight reasons to be cautious. Members of the Oireachtas, and the electorate in the Republic, hold the Constitution *and the GFA* in high regard. Arguments which highlight the virtues, values and principles of both those documents are likely to be persuasive to these audiences. A position that demonstrates that unity is consistent with, and furthers the values of the Constitution and GFA, should be adopted. This is, of course, an option and an outcome that the GFA fully anticipates because Irish unity is one logical consequence of basing constitutional status on the principle of consent.
33. That is not to disregard the other important factors (such as economics, health provision, education, employment, reform of the State’s institutions and potential for politically motivated violence), which will influence the Oireachtas and the electorate in the Republic in their support for or opposition to unity. However, the Constitution is the contract which binds together all Irish citizens. In this context, there is a constitutional and historical argument which could be effective. *Bunreacht na hEireann*’s foundational values, and recent direction of travel in favour of

progressive rights, should be utilised to advocate for unity. There is much more work to do, but the direction of travel could prove appealing to a generation in the north who seek progressive change.

34. The achievement of unity on the island of Ireland would make the State a more admirable democracy – one which overcame, in a peaceful and democratic manner, the unjust limitations originally placed on it by the Anglo-Irish Treaty of December 1921. This is a constitutional enterprise of such historic proportions that it should appeal to all in public life who want to leave a legacy that will resonate down the years. This is the opportunity to bring the principal division on this island to an end through constitutional, democratic and peaceful means.
35. Every nation has an idea of itself. This is formed, in large part, by familiarity with its history, institutions, relations with other states and contemporary and past politics. This can be seen most obviously in the frequent reference to ideals in the US political debate and the citation of various quotes from previous British Prime Ministers with respect to current issues. They may be criticised as inaccurate (deluded even) but they can excite the public imagination and should not be dismissed.
36. Michael Collins and Éamon de Valera remain divisive figures in Irish history. Any fair assessment of their lives and contribution should recognise both their virtues and vices and their achievements and failures. Members of the Oireachtas and the wider electorate in the Republic could be receptive to arguments which appeal to that sense of history.
37. The description by Michael Collins of the Treaty as “not the ultimate freedom that all nations desire and develop to, but the freedom to achieve it” is one which resonates with a large proportion of our target audiences – the Oireachtas and the electorate in the Republic. To present unity as a furtherance of that pragmatism could be attractive.
38. The creation of *Bunreacht na hEireann* by de Valera’s government is widely, if not universally, seen to have been a good thing for the State. It established institutions, fundamental rights protected by the courts and a method of direct participation, in the form of referendums that have served the State well to date.
39. There is no appetite for wholesale changes to it within the Republic. It allows for important changes to the character of the State without undermining the constitutional system, which enjoys widespread backing. It was drafted, adopted and maintained by a previous electorate, with eventual unity in mind. It can be said that the current electorate has inherited a constitutional system fit for purpose, admired abroad and ready to meet the challenges and opportunities presented by Irish unity. This can be overstated, and there are challenges that remain, but unity can be achieved and advanced within the context of the existing Constitution (as amended fully to reflect the new legal and political realities).
40. Reunification should be presented as a vindication of the Constitution rather than an unacceptable risk to its stability. With significant caveats, it might be said (for these purposes) that the Constitution, and the institutions created by it, have been a success. They are sufficiently robust and capable of delivering peace and prosperity for a shared island.

41. In the Republic, Irish unity can be presented as an objective which is consistent with the past endeavours of both Collins and de Valera, and all those who made a contribution, and also one capable of delivering for a new Ireland - now and in the future. Each generation has the task of preserving the benefits of the Constitution while adapting it to their own changing circumstances. The fundamental values remain the same while the manner in which contemporary challenges are met with change. The proposal to reunite Ireland could be portrayed as an indicator of the success and confidence of the State, not a threat to it. Such a stability and continuity reinforcing argument may be particularly significant in winning support for such an enterprise in the Republic.
42. It can be said that a preference for unity, obtained in accordance with articles 2 and 3 and the GFA, sits alongside, and does not contradict, respect for the principle of consent.
43. The Irish Government's responses to the recent parliamentary questions on unity are a disappointment. If they do reflect current government policy, they reveal a problematic approach to the question. The responses fail to appreciate the role of the Irish Government as co-guarantor of the GFA, unity as a constitutional objective and the promises that accompanied the replacement of articles 2 and 3.

Speaking at Arbour Hill on the 26th April 1998 Taoiseach Bertie Ahern said the following of the impact of the GFA on constitutional status of the north:

"Its constitutional future, whatever about its past, will rest and rely entirely and exclusively upon the principle of consent. The British government are effectively out of the equation, and neither the British parliament nor people have any legal right under this agreement to impede the achievement of Irish unity if it had the consent of the people North and South, not that I believe the vast majority of British MPs or people would wish to do so.

"Our nation is and always will be a 32-county nation. Antrim and Down are, and will remain, as much a part of Ireland as any Southern county. But we also recognise a plurality of traditions."

This approach can also be detected in the Taoiseach's address to the British Houses of Parliament on 16th May 2007:

"The Agreement has delivered peace and promise to Ireland by accommodating the rights, the interests and the legitimate aspirations of all. It represents the triumph of common interests over inherited divisions. It is not an end of history. But it is a new beginning.

It is an unchallengeable consensus on how any future change in the status of Northern Ireland will be effected: only with consent freely given, and with full respect for the rights of all traditions and identities on the island."

44. There should be nothing that is divisive about raising this question for any Irish government that is firmly committed to the principles and institutions of the GFA. If the constitutional status of this region genuinely rests on "the principle of

consent” then testing it (by asking people) should not be an outrageous proposition. That is the precise and agreed compromise at the heart of the GFA; the formula was worked out over decades. In the specific context of a possible no-deal Brexit, it is fair and reasonable to raise one obvious and already anticipated solution. If it is “dangerous”, then constitutionalism never prevailed in this region, and people were misled in 1998.

Northern Ireland

45. The position in Northern Ireland is somewhat different. At the heart of the GFA is the acknowledgment by the two governments and the political parties that each of the two constitutional positions are equally legitimate. The north will remain a constituent part of the United Kingdom as long as, *but only as long as*, a majority of the people of Northern Ireland support that status.

46. Section 1(v) of the Constitutional Issues of the GFA notes that the two Governments:

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

47. The task of the current, and all future British governments, is to facilitate the democratic aspirations of the majority of the people in the north. It is required to adopt and maintain a “rigorously impartial” position with respect to the governance of Northern Ireland as a logical outworking of the principle of consent.

48. This approach is consistent with the text of the Joint Declaration on Peace: Downing Street Declaration of 15th December 1993. Paragraph 4 provided as follows:

“The Prime Minister, on behalf of the British Government, reaffirms that they will uphold the democratic wish of the greater number of the people of Northern Ireland on the issue of whether they prefer to support the Union or a sovereign united Ireland. On this basis, he reiterates, on the behalf of the British Government, that they have no selfish strategic or economic interest in Northern Ireland.”

49. In the recent past there have been numerous statements by some members of the British Parliament and the UK Government which would seem, on their face at least, to undermine this essential feature of the GFA. These statements continue to be a cause for concern, we believe they reflect a widespread misunderstanding of the basic principles of the GFA.

50. During the Scottish independence referendum, the position of the UK Government was firmly in favour of the Union. The question of whether a British government would campaign in favour of the Union in Northern Ireland is uncertain.

51. On the 29th March 2017, in response to a parliamentary question on the issue, the British Prime Minister said the following:

“... as our manifesto made clear, we have a preference that Northern Ireland should remain part of the United Kingdom, and we will never be neutral in expressing our support for that.”

52. Unionist politicians will, of course, expect the British Government of the day to support the union. This is understandable and would be consistent with the approach to Scotland in 2014.

53. What might prompt a unity referendum in the near future? Keeping in mind the level of discretion noted above around the duty to hold a vote, it is suggested that the most important factors which could induce a British government to propose a referendum on unity are:

- Hard / no deal Brexit
- Nationalist majority in Assembly elections
- Consistent opinion polls in favour of unity
- (With caveats) census results which demonstrate significant (if not decisive) demographic change
- Majority of NI residents are Irish citizens
- Centenary of establishment of Northern Ireland
- Irish government publicly calling for concurrent referendums and either expressly or impliedly accusing the British Government of frustrating Irish self-determination

54. A “hard/no deal Brexit” would, in our view, present a compelling argument for a vote on the constitutional future. In such a scenario, it is plausible to argue that any Secretary of State would be minded to believe (on the basis of current evidence) that it is at least likely a majority in the north would opt for Irish unity (as a way of remaining in the EU).

55. While arguments about the past success of the State may be helpful in the Republic, it is suggested that arguments which focus on the past are unlikely to be persuasive in the north. The focus should be on *future opportunities* rather than past failures. Irish unity should become the common-sense choice for anyone seriously contemplating a socially justice and prosperous future.

56. Statements which deride or dismiss the record of Northern Ireland as one of economic decline, political failure and social conflict need to be approached with caution. While these will affirm the views of those who already see the north as a “failed entity”, they will do little to persuade those open to a different constitutional future (and who see the region in more positive terms). Equally problematic is the tendency to speak of unity as inevitable. That position encourages complacency and suggests people are already confronted with an end point over which they might have little say. Similarly, arguments which focus on the history of the Republic (noted above) are unlikely to be attractive in the north. Historical arguments about the Constitution in the south that might be appealing would hold little persuasive value in the north (in fact there is likely to be a tension here between those who see the promise of significant constitutional change as an incentive to the north). There are good reasons to base any campaign on myth busting about the south, and making the case for the social and material wellbeing of current and future generations.

Winning arguments in the north are likely to include a firm commitment to respect and protection for existing identities combined with a formidable sense that unity is the sensible choice for all those interested in a more prosperous, successful and progressive future on this island and within the EU.

57. Progressive arguments which could make Irish unity more attractive to Northern Ireland electorate:

- Membership of the European Union
- Socio-economic benefits of a unified Ireland, within the EU compared with UK as a third country
- Safeguarding of identity, equality and human rights (our island as a “rainbow nation”)
- Greater participation in national government than is currently the case
- British constitutional politics highly unpredictable, divisive and against the basic interests of most in the north: simply will not have the interests of Northern Ireland in mind

F. Right to Vote

58. The question of who gets to vote in each of the concurrent elections is a significant and neglected one. It is likely that the franchise will differ between the two jurisdictions. It is expected, for example, that the franchise in the north will be broader and there will be much more debate over it.

Republic of Ireland

59. Irish electoral law operates separate franchises for distinct elections, which are in some respects inter-related. There are different voting categories that reflect considerations of citizenship, residency and education. They are (i) Dáil electors, (ii) Presidential and Constitutional Referendum electors; (iii) European Parliament electors; (iv) local electors; and (v) Seanad electors.

60. Each electoral franchise has a separate legal basis, a distinct character and seeks to achieve different objectives. The franchise does not align completely or neatly with any of the predominant principles of granting political rights in a democracy.

61. In summary, it cannot be said to follow the “all-contributing” or “all subjected” principles, since many of those residents in the State, but who do not hold Irish or British citizenship (or EU citizenship where relevant), are excluded despite their being subject to taxation and state regulation of their behaviour. Neither is it consistent with the “stakeholder” principle, which supposes that those who hold a special allegiance to the state should participate in democratic life, since non-resident citizens are largely excluded.

62. The categories are as follows:

- Dáil electors - all Irish and British citizens resident in the State, registered and not excluded by the Electoral Acts. Non-resident citizens are excluded. Residents without citizenship are excluded.

- The second category of voters, Presidential and Constitutional Referendum electors, is the most restrictive list. Article 12 of the constitution, together with the Electoral Acts, limits the franchise for the Presidential election to Irish citizens currently resident within the jurisdiction of the State. Those British citizens who are resident in the Republic and who are Dáil electors are not permitted to participate. The large number of Irish citizens who are not Dáil electors, including those residents in Northern Ireland, are excluded. It should be remembered that British citizens resident in the Republic of Ireland were not permitted to vote in the 1998 referendum.
- The vote in EP elections is available to all EU citizens resident in the State.
- The vote in local elections is extended to all those residents in the State and registered in accordance with the relevant legislation. At the present time this franchise cannot be used to amend the constitution.

A referendum on extending the franchise for presidential elections is to be held later this year. The proposal has not yet been published but if passed it will extend the right to vote to all Irish citizens regardless of place of residence.

63. Consequently, the franchise for a referendum on Irish unity is almost certain to be restricted to Irish citizens. So, eligibility to vote will be distinctive in both jurisdictions (a position that informs our earlier analysis about the arguments to be adopted north and south). British citizens, citizens of member states of the European Union and citizens of other states residing in the Republic will be excluded. Those under the age of 18 will not be included unless there is a constitutional amendment to provide that right.

Northern Ireland

64. Within the United Kingdom there also separate franchises.
65. Pursuant to the Representation of the People Act 1983, the right to vote in a UK general election is available to those who have registered to vote and are:
- 18 years of age or over on polling day
 - British, Irish or qualifying Commonwealth citizens
 - Resident at address in the UK (or registered as an overseas voter)
 - Not be disqualified from voting
66. All other persons resident in the UK are excluded. This includes European Union citizens.
67. To vote in a Northern Ireland Assembly election a person must be registered to vote in Northern Ireland and be:
- 18 years of age or older on polling day
 - British, Irish, qualifying Commonwealth citizen or citizen of the European Union
 - Resident at an address in Northern Ireland (or registered as an overseas voter)
68. The right to vote in European Parliament elections is governed by European Parliamentary Elections Act 2002. Individuals must demonstrate that they are:

- 18 years or over on polling day
- British citizen, a qualifying Commonwealth citizen or a citizen of the European Union including Irish citizens
- Resident at an address in the UK (or registered as an overseas voter)
- Not subject to any legal incapacity to vote (such as casting a vote in another member state)

69. All other persons resident in the UK are excluded.

70. With respect to (local, regional and national) referendums there has been some inconsistency in the franchise.

- | | |
|--|-----------------------|
| - 1973 Northern Ireland referendum: | Westminster franchise |
| - 1975 European referendum: | Westminster franchise |
| - 1998 GFA referendum: | Westminster franchise |
| - 1997 Scottish devolution referendum: | Westminster franchise |
| - 1999 Welsh devolution referendum: | Westminster franchise |
| - 2011: Alternative vote referendum: | Westminster franchise |
| - 2016 Brexit referendum: | Westminster franchise |

71. A different approach was used in the Scottish independence referendum. This followed an agreement between the devolved and central governments. The Scottish Independence Referendum (Franchise) Act (2013) allowed those registered to vote in the European Parliament and local elections to cast a vote. In addition, a register of young voters, those resident in Scotland and aged 16-17, was established.

72. Paragraph 4(1) (a) of the Northern Ireland Act 1998 provides that the Secretary of State shall determine who shall be entitled to vote.

The Agreement makes liberal use of the term “people of Northern Ireland” including for the voting/self-determination clauses. It is defined solely in relationship to the citizenship provisions of article 1(vi). It states:

“The British and Irish Governments declare that it is their joint understanding that the term ‘the people of Northern Ireland’ in paragraph (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 a reasonable implication of that specific restriction that “the people of Northern Ireland” for the purpose of a unity referendum should be given a wide interpretation, and could even include all persons who are resident in the jurisdiction.

73. It seems likely that the right to vote in the north will be a contested matter. One argument will be that the right to vote should be available on the same criteria as that of voting in British general elections and the GFA referendum. Another argument (given the scale of the impact on all those living in the north) could be that the right to vote must be extended to the greatest number of people resident in the jurisdiction.

74. It is suggested that the preference should be for a more generous franchise than that contained in the Representation of the People Act 1983. We suggest that the right to vote in the referendum should be guided by the inclusive approach adopted in Scotland for the independence referendum. This would, for example, mean all resident EU citizens as well as young people in the north (16+) would have a say in a constitutional future that would involve continuing EU membership.
75. The exclusion of EU citizens (other than British & Irish citizens) from the 2016 Brexit franchise, and the limitations placed on the voting rights of British citizens outside of the State, were particularly unattractive features of that vote. These two constituencies were, perhaps, the most severely affected by the prospect of UK withdrawal from membership.
76. There is a strong argument for ensuring the most inclusive and generous franchise possible, particularly given the impact on everyone resident in Northern Ireland as well as the consequences for younger people. As we note, above, this is likely to be contested, so working out a clear position at an early stage will be vital.

G. Wording of the Proposals

77. At its most basic this might be on the question whether to leave or remain. However, it does raise the issue of whether people will be asked to vote on anything substantive or whether at this stage all that is being asked is one simple question (note in the north, the GFA question relating to the Agreement). Experience would suggest it might be helpful for people to know what they are voting for or against. Therefore, a coalition of those seeking unity (not just the Irish Government) could helpfully agree a common platform spelling out what a vote for unity will mean.
78. The question in both jurisdictions will, by necessity, differ. However, consideration should be given to allowing the “same answer” in both jurisdictions, if possible. This would allow for consistency and reinforcement of messaging.
79. The 1998 concurrent referendums posed different questions but were, it is submitted, clearly understood in both jurisdictions as “yes” for the GFA and “no” for opposition to the GFA. The same approach should inform the unity referendum: we suggest a scenario where “yes” signifies unity and “no” signals the status quo.

Republic of Ireland

80. The procedure for amendment to the Constitution is set out in articles 46 and 47 *Bunreacht na hEireann*.
81. A bill to amend the constitution must be initiated in the Dáil, and can at least in theory, be proposed by any TD. The usual practice has been for the Attorney General and cabinet to approve the wording and then submit it to Dáil.
82. Two amendments to the Constitution are worthy of further consideration. The first was the 3rd amendment to the Constitution in 1972. It allowed the State to accede to membership of (what was then) the European Communities. What is now article 29.4.6 provides:

6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by— i the said European Union or the European Atomic Energy Community, or institutions thereof, ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or iii bodies competent under the treaties referred to in this section, from having the force of law in the State

83. Membership of the Communities affected all the branches of government – executive, legislative and judicial. The effect of the amendment was to create a licence for the State to accede to the Treaties and confer on that provision a higher status than other, possibly conflicting, provisions of the Constitution. This was a more effective way of ensuring Irish membership of the Communities than would have been the case if a number of different separate amendments were proposed. They could have resulted in conflicting responses from the electorate.
84. A comparable amendment could be adopted for changing the current articles 2 and 3 of the Constitution. This would obviate the need for multiple questions to be posed, permit legislation to reform State institutions to accommodate unification and avoid the possibility of conflicting provisions.
85. The second amendment that offers assistance was the 19th amendment in 1998, which endorsed the GFA. The electorate approved the reform of articles 2 and 3 in May of 1998. The approval allowed for a delay in implementation. The formal amending did not take place until 2nd December 1999 when the Taoiseach signed the relevant declaration. The delay with respect to implementation was to await the establishment of a power-sharing executive.
86. The possibility of a referendum on unity, dependent on the result in the north, could be replicated. It could record the willingness of the electorate in the south to agree to unification, and the constitutional changes that would necessarily accompany it, but allow for implementation to occur at a future date.
87. It is not wise to suggest the exact wording of the new articles 2 and 3, but they would need to include the following features (and note also what we say above about the continuity of the GFA protections):
- Higher status given to the new articles allowing them to take precedence over any (possibly) conflicting provisions
 - Proclamation that Ireland was a united, independent State
 - Robust protection for differing national identities on the island, with specific recognition of the importance of British unionism
 - Robust human rights and equality guarantees
 - Equal status for British citizens
 - Maintenance of the citizenship provisions
 - Maintenance of the references to the Irish Diaspora
 - Allowance for the continuation of the northern institutions
 - Allowance for the continuation, subject to the constitution, of NI laws
 - Allowance for the delayed implementation of the new articles

Northern Ireland

88. The form of the question posed in the north will be influenced by:

- The language used in the GFA
- Paragraph 4(1)(b) of the Northern Ireland Act 1998
- Discretion of the Secretary of State for NI
- Political agreement amongst the parties in NI
- Approval/acceptance by the UK Electoral Commission (amendments were suggested and adopted in both the 2014 and 2016 votes)
- (possibly) the question posed in the Republic

89. Examples of the question posed in previous referendums are set out below:

- 1973: Do you want Northern Ireland to remain part of the United Kingdom? or Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?
- 1997: I agree / disagree there should be a Scottish parliament?
- 1997: I agree / disagree that a Scottish parliament should have tax varying powers?
- 1998: Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?
- 2011: Do you want the United Kingdom to adopt the "alternative vote" system instead of the current "first past the post" system for electing Members of Parliament to the House of Commons?
- 2014: Should Scotland be an independent country?
- 2016: Should the United Kingdom remain a member of the European Union or leave the European Union? (Remain or Leave)

90. It is suggested that those in favour of unity should prioritise the following elements in support or opposition to the question proposed

- Single question rather than multiple questions to be preferred
- Question which allows for "yes" vote in favour of unity

H. Endorsement by the Electorate

91. The power of amendment to the Irish Constitution is unlimited. Article 46.1 allows any provision to be amended, whether by way of variation, addition or repeal. Unlike many other European states, however, any amendment requires approval by the people in a referendum.

92. *Bunreacht na hEireann* is clear on the threshold required for amendment to the constitution. Article 47.1 provides:

“Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.”

93. The position is clear in Irish law: A majority of votes cast is sufficient.
94. Referendums in the United Kingdom have demonstrated different thresholds for endorsement. Generally, it has been a majority of votes cast. However, the Scottish devolution referendum of 1979 contained an *additional condition* that required a minimum of 40% of the total electorate to vote in favour.
95. The threshold for approval in Northern Ireland should simply be a majority of votes cast. This has been the approach adopted in recent referendums. The introduction of a minimum requirement could be criticised as anti-democratic and inconsistent with the express terms of the GFA, it would suggest that the exercise was being illegitimately prejudged in favour of one option.
96. The suggestion by the Taoiseach, in October 2017, that a majority in the north of more than 50% plus 1 would be required for endorsement of a united Ireland should be disregarded. It is simply incorrect.

I. Towards Irish Unity

97. There is clear merit in ensuring careful planning and preparation for this significant constitutional exercise. The next phase of the discussion must include a better sense of what people are being asked to vote for or against. This argument is occasionally deployed as a way to avoid this conversation entirely; our approach is different. There is an obligation on those making the case for unity to offer a coherent and persuasive view of what the future will hold for the north in these new arrangements, and what it will mean for the south. Those voting in these referendums must have a clear idea about the consequences of their decision. There is no reason why such preparatory work cannot commence now, and we acknowledge the work that has already been done. It should be recalled that “events” could take over (particularly in the context of Brexit), so sensible planning would be wise. If the UK did exit the EU without a deal, there is evidence that a majority in the north might consider Irish unity. That cannot be ignored, as it would indicate that the existing “sovereignty arrangements” were redundant (as consent for remaining in the UK would be *de facto* absent). Here it should be noted that the Irish Government was so effective in the Brexit negotiations precisely because it had anticipated and planned for a “leave” vote. Such governmental level preparation would not prevent a more participatory and inclusive constitutional conversation on the island – with work in the south being as vital and efforts in the north. However, in our view, preparations should start now, and be led by the Irish Government in parallel with civil society conversations.
98. In considering this, it should be recalled that the north would be joining a pre-existing state (within the EU) whose constitution anticipates reunification, and in the context of an international agreement that guarantees continuity of protection.

It is possible to exaggerate the logistical and practical challenge of achieving this objective: this will simply not be a “blank page” constitutional conversation. Tensions do exist. There are those who view the reunification conversation as an opening for radical and transformative change. In this view, a vote for unity should be consent to a different and new Ireland; a fresh start for the island. The other view is more conservative: achieving effective reunification would be enough of a task without also re-opening existing constitutional arrangements in a major way. These tensions will need to be discussed as part of the planning and preparation and this is likely to generate quite a debate. Whatever view is taken of this, there is a strong and persuasive case for ensuring that proposals contain robust guarantees for rights, equality and identity in the context of reunification in the spirit of the Agreement’s vision of these safeguarding measures.

99. It is our view that the basic normative principles to guide the process are already there, and that there is an unhelpful tendency to suggest that everything is “up in the air” or “up for grabs”: full respect for the GFA indicates that this is not the case.
100. Too many discussions of Irish unity frame it as a distant aspiration. It never seems to be the right time to talk about it. In this paper we reject that approach. There is an increasingly urgent and pressing need to enter a preparation and planning phase. This paper is a tentative contribution to that island-wide conversation. If the GFA really does underpin the new relationships, then no one need be anxious about this invitation to a conversation about how we share this island in the future.