CITIZENS, ASSEMBLE! RETHINKING THE LEAD UP TO REFERENDUMS IN NEW ZEALAND

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"The human being is in the most literal sense a political animal, not merely a gregarious animal, but an animal which can individuate itself only in the midst of society."

-Karl Marx, *Grundrisse.*

INTRODUCTION

When we talk about infrastructure, we normally mean things like roads, water systems and power networks. Rarely do we include democracy in these discussions. Yet, just like physical infrastructure, democracy needs to be maintained to ensure it does not break down.[1] Unfortunately, the democratic infrastructure that sees elected representatives deciding law and policy in the name of the populace at large has not been updated since the 19th century. It is now rusting and needs to be repaired. The best way to repair our failing democratic infrastructure is to meaningfully include those that for too long have been neglected; citizens. Of course, this seems like a strange fix when democracy's literal translation is "rule by the people".[2] But in recent decades citizens have been put into a kind of democratic exile through a minimalist model of democracy, an alienating economic system and an increase in political polarisation largely fuelled by political elites.

Just as we cover up potholes on roads or replace our water pipes, we need to offer solutions to our crumbling democratic infrastructure. Working under the umbrella of deliberative democracy, various countries and provinces have experimented with different models of citizen participation. Ranging from large-scale citizens' assemblies and participatory budgeting procedures to smaller citizens' juries or community deliberation programmes, these models offer a promising solution to our current democratic woes. However, these models will only ever signal the start of a reinvigoration of democracy and need to be phased in alongside current democratic procedures. Consequently, this dissertation will argue that New Zealand should begin by supplementing our referendums with citizens' assemblies and will outline the law's role in facilitating this important first step.

Chapter I describes the context in which we find ourselves. This context is one shaped by a distinctly minimalist model of democracy and a neoliberal order that has weakened common bonds of citizenship and a sense of collective identity. The chapter ends by introducing the

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[1] Max Rashbrooke *Government for the Public Good* (Bridget Williams Books Ltd, Wellington, 2018) at 283.

[2] Garrett Brown, Iain McLean and Alistair McMillan *A Concise Oxford Dictionary of Politics and International Relations* (4th ed, Oxford University Press, Oxford, 2018).

way in which world leaders have sought to bring citizens closer to the democratic process through referendums.

Chapter II outlines the conventional debate around referendums before critiquing them from a deliberative democratic perspective. Among other things, referendums as they currently exist do not encourage deliberation and voters often approach them using informational shortcuts.

Chapter III introduces the concept of deliberative democracy, its normative underpinnings and responds to some common critiques of the theory. This chapter provides the theoretical justifications for introducing citizens' assemblies into New Zealand's referendum processes.

Chapter IV outlines the concept of citizens' assemblies and provides two case studies to explain how they could be implemented in New Zealand alongside referendums.

Chapter V considers some problems with supplementing citizens' assemblies with referendums before going on to explain both why referendums are needed and how they can be run more intelligently. This chapter also outlines the current legal framework governing referendums in New Zealand.

Chapter VI outlines New Zealand's limited experience with citizens' assemblies and proposes a legislative model as to how citizens' assemblies could be implemented to run alongside our referendums.

This dissertation does not offer a complete panacea for the state of democracy. It does, however, provide a way we can begin to reorder and reinvigorate our democracy through much needed law reform.

CHAPTER I: BACKGROUND CONTEXT

I *Our Democratic Model*

Our distinctly minimalist model of democracy concentrates heavily on voting.[3] Otherwise known as aggregative democracy, it is based on the simple counting of votes and relies on an instrumentalist understanding of politics that assumes we are rational, knowledgeable beings striving only to maximise our fixed self-interest.[4] Under this model, the political process is simply a forum for those who wish to have their interests enacted into law, with the common good defined as the aggregation of these competing private interests.[5] This highly individualistic and instrumentalist account of citizens' roles is part of a system where there is generally little opportunity for the public to participate meaningfully in policy processes. We are asked every now and then to cast a vote at general or local election and we sometimes vote in a referendum. If we do decide to vote at an election or on a referendum issue, we arrive at the ballot box, tick a box and return home. While we may have perhaps talked to a few people at work or home about the issue, our model does not *require* us to deliberate or justify our decisions to anyone, as the act of voting is a purely private exercise and something we can do without involving other people.[6]

Of course, this description of civic participation is not true for everyone. Many people do justify their political views to other people and deliberate on certain issues, whether it be in front of others or online. In other words, many citizens' experiences with democracy are not simply at the ballot box. Yet, these people tend to be in the minority and for the majority of people who lead busy lives, voting in general elections or in referendums is the extent of their involvement in the democratic process. This is not because the majority of citizens are

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[3] Robert E. Goodin *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford University Press, New York, 2008) at 1.

[4] Alen Toplisek *Liberal Democracy in Crisis: Rethinking Resistance under Neoliberal Governmentality* (Palgrave Macmillan, Cham, 2019) at 29-30.

[5] The Harvard Law Review Association "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats" (1994) 107 HLR 1401 at 1402.

[6] John Parkinson "Legitimacy Problems in Deliberative Democracy" (2003) 51 Pol. Stud. 180 at 181.

incompetent or do not care, it is that our institutions are not enabling.[7] It has only been in recent decades that this minimalist, aggregative model of democracy has come under attack and the criticisms levelled at existing democratic mechanisms come at a time where many established democracies are suffering from what David Van Reybrouck terms "Democratic Fatigue Syndrome".[8]

II *The State of Democracy*

Reybrouck's theory suggests that our distinctively liberal model of democracy and citizen participation is fatigued and in need of restoration. Things such as low voter turnout, declining party membership, political paralysis and distrust of political elites are all symptoms of this syndrome and can be traced back to our current model of democracy that does not encourage citizen participation.[9] Reybrouck is then far from being the only scholar to criticise the state of democracy worldwide. Scholars such as James Fishkin and Jane Mansbridge have also argued that there is a "democratic recession" and suggest "democracy is under siege",[10] while others have likened the current state of democracy to "democratic backsliding".[11] Perhaps the most sobering statistic showing a loss of faith in democratic norms though comes from a study published in the Journal of Democracy.[12] This global study asked people, including New Zealanders, how essential they thought it was to live in a democracy and New Zealand's results broadly followed the global trend. Compared to around 70 percent of people born before World War Two, just 30 percent of millennials thought it was essential to live in a democracy.[13] Tellingly, the study also found that there is growing scepticism towards liberal institutions in

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[7] James Fishkin *Democracy When the People Are Thinking: Revitalising Our Politics Through Public Deliberation* (eBook ed, Oxford Scholarship Online, 2018) at 209.

[8] David Van Reybrouck *Against Elections* (Seven Stories Press, New York, 2018).

[9] Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 242.

[10] James Fishkin and Jane Mansbridge "Introduction" (2017) 146 Daedalus 6 at 7.

[11] Nicole Curato, Marit Hammond and John Min *Power in Deliberative Democracy: Norms, Forums, Systems* (Palgrave Macmillan, Cham, 2019) at 13.

[12] Roberto Stefan Foa and Yascha Mounk 'The Signs of Deconsolidation" (2017) 28 Journal of Democracy 5.

[13] At 6. The study defines millennials as people born after 1980 and before 1996.

general and a growing acceptance of more authoritarian, "strong leader" interpretations of democracy.[14]

III *The Impact of Neoliberalism*

The liberal or aggregative model of democracy is not entirely to blame for this general loss of faith in democracy. The ability of world governments to respond to popular demands and involve regular citizens in decision making processes has been severely constrained by the dominant narrative of our times; neoliberalism. As an economic system, neoliberalism is premised on the assumption that "the social good will be maximised by maximising the reach and frequency of market transactions" and attempts to "bring all human action into the domain of the market".[15] Neoliberal models of governance stress that the market is a more desirable regulator of human action than governments because markets foster diversity, privilege the actions of individuals, and do not rely on a small group of bureaucrats to make decisions for the rest of society.[16] Because governments have become more responsive to markets which tend to be outside of popular control, they have steadily reorientated their resources away from serving broad needs towards serving the needs of smaller but more influential groups.[17]

Consequently, politics has become a "tightly controlled spectacle" in which citizens' ability to oversee democratic processes and influence public affairs is stunted by a favouring of big corporate interests.[18] Neoliberalism also sustains itself through a mythology of rugged individualism, which creates an atmosphere of fierce competition where we are constantly

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[14] At 6.

[15] David Harvey *A Brief History of Neoliberalism* (Oxford University Press, New York, 2005) at 3.

[16] Alessandro Bonanno *The Legitimation Crisis of Neoliberalism: The State, Will-Formation, and Resistance* (Palgrave Macmillan, New York, 2017) at 154.

[17] Rashbrooke, above n 1, at 48.

[18] Colin Crouch *Post Democracy* (Polity Press, Oxford, 2004) at 4.

pitted against each other in all spheres of social life.[19] This individualist pathology coupled with the well-documented increases in inequality and social fragmentation has resulted in a weakening of the demos and common bonds of citizenship.[20] The consequence of both these features is a general loss of common purpose and a tendency to face problems with either passivity or anger. Unfortunately, we have recently seen anger dominate. Both the 2016 Brexit referendum and Donald Trump's election in the United States are widely seen as a reaction to a neoliberal order that has accelerated with the end of the Cold War.[21]

IV *New Zealand's Democracy*

Is New Zealand's democracy affected by these growing trends? Some commentators suggest there appears to be little evidence of a general loss of faith in liberal democracy in New Zealand.[22] These scholars point to the fact that 79.1 percent of enrolled voters cast a ballot at the 2017 election and Parliament as an institution enjoys relatively high approval rates.[23] New Zealand also currently sits at fourth place in the Economist Intelligence Unit's democracy index.[24] From a purely formal or institutional standpoint, these statistics indicate New Zealand's democracy is generally robust. However, those who argue that there is little evidence of a loss of faith in liberal democratic norms in New Zealand do not account for the alienating effects neoliberalism has had on New Zealand's democracy and rely on factors or statistics that generally paint an inaccurate picture. Since the 1980s when New Zealand was used as a

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[19] George Monbiot *Out of the wreckage: a new politics for an age of crisis* (Verso, London, 2017) at 20. See also Noam Chomsky *Hopes and Prospects* (Haymarket Books, Chicago, 2010) at 89 where Chomsky argues "the very design of neoliberal principles is a direct attack on democracy."

[20] Phil Parvin "Is Deliberative Democracy Feasible? Political Disengagement and Trust in Liberal Democratic States" (2015) 98 The Monist 407 at 414.

[21] Hugh Gusterson "From Brexit to Trump: anthropology and the rise of nationalist populism" (2017) 44 Journal of the American Ethnological Society 209 at 210.

[22] See Andrew Geddis and Marcelo Rodriguez Ferrere "New Zealand: The State of Liberal Democracy" in Richard Albert and others (eds) *2017 Global Review of Constitutional Law* (I CONnect-Clough Center for the Study of Constitutional Democracy, Boston, 2018) 199 at 200.

[23] At 200.

[24] The Economist Intelligence Unit "Democracy Index 2018" The Economist
<https://www.eiu.com/topic/democracy-index>.

neoliberal laboratory of sorts, successive governments have been increasingly less responsive to citizens and more responsive to the demands of business. The most visible illustration of this is the "revolving door" that has been in full swing in New Zealand over the last 30 years, where politicians and Prime Ministers such as John Key, Jenny Shipley and Bill English have seamlessly entered the private sector after their stint in public life.[25]

There are, however, far more tangible effects of successive governments being more responsive to the demands of business than its citizens and discouraging reliance on the state. For example, income inequality has increased dramatically,[26] successive governments have introduced strict social security reforms,[27] our tax system is no longer particularly progressive[28] and the powers of unions have been severely weakened.[29] The result of all this is a profound sense of alienation from the political system. Not surprisingly, if politics is no more than a "tightly controlled spectacle" where the interests of the majority of citizens are frequently ignored, there is little motivation to participate or trust those in power.[30] Even after the Labour-NZ First government vowed to resist the neoliberal order in New Zealand,[31] New Zealanders' belief that all views are heard equally and fairly, and that the government will do

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[25] Dr Bryce Edwards "An unprotected and risky revolving door" *newsroom* (online ed, New Zealand, 9 April 2018).

[26] Statistics New Zealand "Income Inequality" (September 2016) <http://archive.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-progress-indicators/Home/Social/income-inequality.aspx>.

[27] Louise Humpage *Policy change, public attitudes and social citizenship: does neoliberalism matter?* (eBook ed, Bristol University Press, 2015) at 115. These reforms have generally enhanced the work obligations for the unemployed and have been justified through neoliberal discourses of individual responsibility.

[28] Tax Working Group *Future of Tax: Recommendations* (New Zealand Government, 21 February 2019) at 29. Compared to in other OECD countries, there is not a significant increase in tax rates across the income deciles in New Zealand.

[29] Rae Cooper and Robyn May "Union revitalisation in Australia and New Zealand, 1995-2005" (2005) 30 NZJER 1 at 13. The Employment Contracts Act 1991 signaled the start of this weakening.

[30] Crouch, above n 18, at 4.

[31] Michael Daly "Winston Peters wants 'today's capitalism' to regain its 'human face'" *stuff* (online ed, New Zealand, 20 October 2017).

what is right for New Zealand remains eerily low.[32] New Zealanders also appear to be less willing to engage in the democratic process than they were before these sweeping neoliberal reforms. Since 1984, New Zealand's electoral turnouts have consistently dropped from 93.7% to around 80% today.[33] The turnouts for referendums have been even worse, with just 45.07% of voters casting a vote in the 2013 referendum on selling state assets[34] and just 67.8% of eligible voters casting a vote in the 2016 second flag referendum.[35] All these statistics indicate that New Zealand's faith in liberal democratic norms is waning.

Even if people disagree with the effects neoliberalism has on democratic life, a recent report has indicated that there are storm clouds on our "democratic horizon" for another reason.[36] The report notes that identity politics has grown in New Zealand since we adopted the MMP voting system and its capacity to "formalise and reify the fracture lines of identity groups as the basis for political action" means finding shared ground and emphasising a "common humanity" becomes much harder.[37] Yet, searching for a common humanity is difficult in modern politics even without the added factor of the MMP voting system. "Post-truth", or the growing mistrust of facts offered by established institutions has come to characterise political systems and the shameless denial of objectively verifiable facts by political elites have begun to shape public opinion.[38] Because charismatic leaders are increasingly harnessing social

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[32] Simon Chapple and Kate Prickett *Who do we trust in New Zealand? 2016-2019* (Institute for Governance and Policy Studies, 2019) at 10. Although trust in the government has risen since 2017, it remains tentative.

[33] Statistics New Zealand "Voter turnout" (October 2014) <http://archive.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-socialindicators/Home/Trust%20and%20participation%20in%20government/voter-turnout.aspx>. See also New Zealand Electoral Commission "2017 General Election" < https://elections.nz/democracy-in-nz/historical-events/2017-general-election/voter-turnout-statistics-for-the-2017-general-election>.

[34] New Zealand Electoral Commission "Citizens Initiated Referendum 2013 Final Result" (17 December 2013) https://www.electionresults.govt.nz/2013_citizens_referendum/>.

[35] New Zealand Electoral Commission "Second Referendum on the New Zealand Flag Final Result" (30 March 2016) <https://www.electionresults.govt.nz/2016_flag_referendum2/>.

[36] Simon Chapple *Building Democratic Resilience* (The NATO Science for Peace and Security Programme, September 2018).

[37] Above.

[38] The power to shape political messages has also been strengthened through the rise of 'deep-fake' technology, which involves the wholesale creation of incredibly realistic but manufactured audio and video. For a discussion

media in particular to polarise and distort debate, it is hard to find considered commentary and often means information is presented in overly simplistic terms.[39] When political debate is presented through stark (and often false) dichotomies, and when wild emotion replaces rationality, the potential for our politics to foster consensus and deliberation is undermined.[40] The symptoms of post-truth politics are less pronounced in New Zealand than overseas countries, but we are certainly not immune from its effects.[41]

Although we may be happy to rely on formal indicators such as democratic indexes or the approval rates of Parliament to determine the strength of our democracy, this does not necessarily mean we should be complacent. Political elites face a growing dilemma: they can either put a matter to a public vote and ignite the angry voices of populism or rely on widely distrusted politicians to usher in legislation that appears to be out of touch with the public's concerns.[42] Increasingly, elites from around the world are opting for the former and using direct forms of democracy such as referendums to decide major policy issues.[43] Often though, referendums do not provide sufficient information processing measures for morally and technically complex issues and, as a result, citizens tend to withdraw from the reasoning process.[44] The next section will outline the conventional debate around referendums before critiquing them from a deliberative democratic perspective.

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on the effects this technology has on our shared sense of reality and democracy generally see Robert Chesney and Danielle Keats Citron "21st Century-Style Truth Decay: Deep Fakes and the Challenge for Privacy, Free Expression, and National Security" (2019) 78 Maryland Law Review 882.

[39] Alison Young "Populism and the UK Constitution" (2018) 71 Current Legal Problems 17 at 35.

[40] At 37.

[41] See for example Toby Manhire "Ardern's New Zealand election bid punctured by post-truth politics" *The Guardian* (online ed, Auckland, 23 September 2017) for an analysis of how the National Party claimed there was a $11.7 billion hole in Labour's fiscal projections throughout the 2017 general election despite not one economist supporting this.

[42] Fishkin, above n 7, at 3.

[43] Between 1972 and 2015 a record 1,846 national referendums took place across the world: Luibomir Topaloff "The Rise of Referendums: Elite Strategy or Populist Weapon?" (2017) 28 Journal of Democracy 127 at 129.

[44] See generally Robert Dahl *Democracy and its critics* (Yale University Press, New Haven, 1989).

CHAPTER II: REFERENDUMS

I *The Attraction*

Referendums are undoubtedly a theoretically attractive way of deciding matters of public importance. By operating on a simple majoritarian basis, each individual is given maximum power to give their consent (or not) to a new set of norms that will bind them for many years.[45] Especially in the case of binding referendums, citizens can wrestle the power of decision back from elected representatives who can so often be captured by special interests and decide a matter directly. In this sense, referendums fundamentally disrupt the system of representative democracy and can serve as a corrective for the potential democratic deficit created by allowing representatives to make decisions for us.[46] As manifestations of direct democracy, referendums can also offer greater democratic legitimacy. The renowned British constitutionalist A.V. Dicey claimed referendums are the only institution that can give effect to a doctrine "which lies at the basis of English democracy - that a law depends at bottom for its enactment on the consent of the nation as represented by its electors."[47] Essentially, referendums can bring people closer to the law-making process by promoting a sense of ownership over their democratic system.[48] Giving people more voice is, at least on the surface, a promising remedy to the current crisis of democracy.

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[45] Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2012) at 19.

[46] Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 306. See also Maija Setala *Referendums and Democratic Government: Normative Theory and the Analysis of Institutions* (Palgrave Macmillan, London, 1999) at 161 where referendums are described as having a "strong normative appeal" due to their ability to produce more legitimate decisions than ones made in the parliamentary process.

[47] AV Dicey *A Leap in the Dark* (John Murray, London, 1911) at 189-90 as cited in Matt Qvotrup "Introduction: Theory, Practice and History" in Matt Qvotrup (ed) *Referendums Around the World* (Palgrave Macmillan, Cham, 2018) 1 at 6.

[48] Simone Chambers "Making Referendums Safe for Democracy: A Call for More and Better Deliberation" (2018) 24 Swiss Political Science Review 305 at 306.

II *Conventional Critiques*

Despite the theoretical attractiveness of referendums, they currently leave much to be desired in practice. Conventional criticism of referendums tends to focus on the power elites have to decide whether to hold a referendum and how this can be used insidiously. As the House of Lords Select Committee on the United Kingdom's Constitution concluded, referendums often take place "frequently as a tactical device rather than on the basis of constitutional principle."[49] After all, except in the case of citizen-initiated referendums, it is leaders or governing parties that generally decide whether to hold a referendum, when it will be, and the wording of the question. As Mendelsohn and Parkin argue, elites often do not use referendums as normative commitments to encourage public participation, but to ratify a decision that has already been made.[50] In other words, rarely do elites opt to hold referendums in the expectation they might lose.[51]

Generally, no governing party or leader will want to put an issue to a referendum unless they are confident that the result will be favourable to them or at least will not reflect badly on their legacy if they lose it. We can, however, point to various recent instances like Brexit or the flag referendum in New Zealand where the result has gone against a government's or leader's preference to show that, although some referendums are strategically motivated, this does not necessarily mean referendums are infallible tools of the governing elite or that their democratic credentials are reduced. Although elites may want a particular outcome, they are not guaranteed to receive it simply by holding a referendum. Even if leaders do use referendums strategically, the wider population is still able to vote on the issue and if it was always going to succeed then putting it to the people simply furnishes the proposal with a stronger basis of legitimacy.

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[49] House of Lords Select Committee on the Constitution *Referendums in the United Kingdom* (12th Report of Session 2009-10) at 48 as cited in Young, above n 39, at 37.

[50] Matthew Mendelsohn and Andrew Parkin "Introduction: Referendum Democracy" in Matthew Mendelsohn and Andrew Parkin (eds) *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave Macmillan, New York, 2001) 1 at 3.

[51] Lawrence LeDuc "Referendums and deliberative democracy" (2015) 38 Electoral Studies 139 at 140.

The fact referendums give the wider population decision-making power attracts criticism too, as many see them as a way to grant legitimacy to majoritarian decisions. This common critique suggests that while the concept of "majority wins" may be instinctively attractive, its practical implications are not. Described by the 1986 Royal Commission as "blunt and crude devices", many argue that referendums can lead to the "tyranny of the majority" whereby minority voices are swamped under the tide of popular opinion.[52] By privileging majoritarian decisions, referendums tend to be "zero-sum" games in that the victory for the majority means the loss for the minority.[53] However, this conventional critique of referendums is weakened by recent experience where the majority of voters have actually voted to advance the interests of a minority of people.

For example, the majority of voters in Ireland voted to repeal the Eighth Amendment that criminalised abortions despite it only directly affecting a minority of the population and a majority of Australian voters approved a change to the law to allow same sex couples to marry.[54] Both these examples illustrate that the majority's decision will not always be "tyrannical" or oppressive as this critique of referendums suggests. As Geoffrey de Q. Walker argues, it is too simplistic to suggest that because it is the majority and therefore a sort of "common herd" that they will always be wrong or foolish.[55] While these conventional criticisms of referendums remain relevant in some instances, deliberative critiques of referendums are less focused on how they can be used strategically or to subordinate minority interests but instead focus on the inability of referendums to promote careful and considered decisions from voters.

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[52] The Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986) at 175. See also at 175 The Commission states that larger groups can use referendums as vehicles for "the expression of popular prejudices, to curb special programmes for disadvantaged minorities, or to enforce their own cultural dominance."

[53] Topaloff, above n 43, at 127.

[54] The relevant minorities in these instances were pregnant women wanting to end their pregnancies and those in same-sex relationships.

[55] Geoffrey de Q. Walker *Initiative and Referendum: The People's Law* (Centre for Independent Studies, St. Leonards, 1987) at 83.

III *The Deliberative Critique*

Because referendums are often centred around a stark yes-no binary, they tend to bring out a familiar set of political pathologies.[56] For one, the debate is often constructed through staunch dichotomies in that you are either for or against the proposal, meaning the complexities of issues are skipped over. Compounding this is the fact that bringing citizens closer to the decision-making process does not necessarily mean meaningful deliberation will follow. Referendums tend to privilege impulsive reactions over careful reasoning,[57] and they give voters little opportunity to pause from their ordinary pursuits and reflect, let alone deliberate, on the question posed.[58] Instead, voters tend to use short cuts to help them find their own positions on complex issues. Especially in the case of government-initiated referendums where a leader or particular government is associated with the issue, these short-cuts can lead voters to cast judgment on them rather than the issue itself. Sometimes, short-cuts can also lead voters to simply vote in anger, regardless of the question that has actually been posed. In fact, the question can become a secondary matter while the vote becomes a simple proxy for all the issues over which citizens have been denied actual choice.[59] The 2016 referendum on whether the United Kingdom should leave or remain in the European Union illustrates this.

That the Brexit referendum and the ensuing negotiations have been dubbed a "shambles" is unsurprising.[60] Specifically, the Brexit process proved the potential of referendums to de-emphasise compromise building and reflection but privilege the non-accountable free

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[56] Ron Levy "Deliberative Voting: Realising Constitutional Referendum Democracy" (2013) 3 Public Law 555 at 557.

[57] The Harvard Law Review Association "Making Ballot Initiatives Work: Some Assembly Required" (2010) 123 Harv L Rev 959 at 960.

[58] Fred Cutler and others "Deliberation, information and trust: the British Columbia Citizens' Assembly as agenda setter" in Mark E. Warren and Hilary Pearse (eds) *Designing deliberative democracy: the British Columbia Citizens' Assembly* (Cambridge University Press, Cambridge, 2008) 166 at 166.

[59] Monbiot, above n 19, at 151.

[60] #Brexitshambles has become a popular hashtag on social media and is now widely used to describe Brexit in a general sense. The hashtag gained further popularity with the recent unlawful prorogation of Parliament by Prime Minister Boris Johnson.

expression of mass preferences.[61] Despite having little experience with direct democracy and no guidance from political parties as to which alternative to choose, citizens were thrown a monumental question. Groups of elites, particularly within the Leave campaign who had influential media ties, were able to drown out the neutral commentary with vicious anti-European Union, anti-immigration sentiments.[62] The Leave campaign were also able to construct the debate as one of 'us, the people' against the political establishment or the corrupt, pro-European elite.[63]

In the absence of informed opinion, voters were largely left to use the informational short cuts they had constructed to decide the matter. Tellingly, a study conducted before the referendum found that only 16% of voters felt they were "very well informed" or "well informed" about the issue at hand.[64] Consequently, holding a referendum has not been a way to settle the European question and provide a conclusive answer but has instead opened up a "constitutional Pandora's box."[65] Because of the misinformation and general lack of considered debate, the crucial question of what leaving the EU amounted to was left unanswered. Does it, for example, mean a complete withdrawal from the Union? Or does it mean staying within the single market and customs union? These unresolved questions make it clear that the Brexit referendum could have been run far more intelligently to ensure voters felt more informed.

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[61] Claus Offe "Referendum vs. Institutionalised Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision" (2017) 146 Daedalus 14 at 22.

[62] Brian Cathcart "Don't Forget the Role of the Press in Brexit" (29 July 2016) Open Democracy <https://www.opendemocracy.net/en/opendemocracyuk/dont-forget-role-of-press-in-brexit/>.

[63] Sara Hobolt "The Brexit vote: a divided nation, a divided continent" (2016) 23 Journal of European Public Policy 1259 at 1266.

[64] Josiah Mortimer "People feel left in the dark about the EU referendum debate" (7 March 2016) Electoral Reform Society <https://www.electoral-reform.org.uk/people-feel-left-in-the-dark-by-the-eu-referendum-debate/>.

[65] Offe, above n 61, at 22.

IV *The New Zealand Experience*

Fortunately, New Zealand's experiences with referendums have not been frustrated by the same levels of polarisation and misinformation as characterised the Brexit debacle. Perhaps this is because the New Zealand public has not had to directly answer a question related to our national sovereignty, or perhaps it simply reflects New Zealand's comparatively respectful political culture. However, just because we have not been gripped by a Brexit-style referendum campaign does not necessarily mean our processes are watertight and insulated from the problems discussed above. One study into New Zealand's 2015-6 flag referendums found that they largely became a vote on John Key himself. The study found that National Party supporters were more likely to shift from opposing a flag change to supporting it while Labour Party supporters were more likely to shift from supporting to opposing a change.[66]

The warning signs have already begun to emerge in relation to the upcoming referendum into the legalisation of recreational marijuana too. Whether it be inflammatory news articles,[67] the emergence of hyper-partisan interest groups,[68] or politicians refusing to publicly debate each other about the merits of the proposal,[69] the possibility that voters will head to the voting booths without having at the very least considered alternative viewpoints remains high.[70] There

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[66] Nicole Satherley and others "If They Say "Yes," We Say "No": Partisan Cues Increase Polarization Over National Symbols" (2018) 29 Psychological Science 1996 at 2006.

[67] See for example Mike Hosking "Legalising cannabis makes no sense" *The New Zealand Herald* (online ed, New Zealand, 23 May 2019) and Kate Hawkesby "Cannabis referendum - be careful about what and who you are voting for" *The New Zealand Herald* (online ed, New Zealand, 18 July 2019).

[68] The partisan group 'Say Nope to Dope' has emerged and have published briefing sheets that link marijuana use with issues such as family violence. See Say Nope to Dope "Family Violence and Child Abuse" <https://saynopetodope.org.nz/family-violence-child-abuse/>.

[69] Earlier this year National MP Paula Bennett refused to debate Green MP Chloe Swarbrick, the Green party's drug law reform spokesperson, on two occasions. See Zane Small "Paula Bennett on why she won't debate Chloe Swarbrick" *Newsbub* (online ed, New Zealand, 14 May 2019).

[70] The Prime Minister has asked the Chief Science Advisor to create a short and unbiased summary of the evidence for the harms and benefits of legalised cannabis to help inform the public in the lead up to the referendum. The summary will only be available on the Chief Science's Advisor's website and it is unclear if the government will take further steps to educate the public. See Office of the Prime Minister's Chief Science Advisor "Public facing advice on Cannabis" (23 July 2019) < https://cpb-ap-

is little point in waiting until our referendums become beset by hyper-partisanship and false information to change our processes. As Andrew Butler and Geoffrey Palmer argue, taking democracy for granted or thinking "she'll be right" imperils its future.[71] If we do wait, our democracy may become characterised by what Jeffrey Isaac calls a "persistent and noxious immobilism".[72] To avoid this, we should begin by embracing the idea of deliberative democracy. The next part will introduce the concept of deliberative democracy as it relates to citizens' assemblies before outlining and responding to some of the criticisms of it.

se2.wpmucdn.com/blogs.auckland.ac.nz/dist/6/414/files/2019/07/Terms-of-Reference-Cannabis-June-2019-.pdf>.

[71] Palmer and Butler, above n 9, at 248.

[72] Jeffrey Isaac *Democracy in Dark Times* (Cornell University Press, Ithaca, 1998) at 3. This can also be referred to as a stasis. At 3, Isaac contends that this immobilism is characterised by "insecurity, meanness, and a deterioration of anything remotely resembling a genuinely democratic political culture or civic equality."

CHAPTER III: DELIBERATIVE DEMOCRACY

I *An Overview*

Increasingly, democracy is being seen as more than a simple episodic aggregation of individual preferences. In what has been described as the deliberative turn, liberal conceptions of democracy that treat individuals as self-interested maximisers are slowly being replaced by arguments grounded in the concept of deliberative democracy. Above all, deliberative democracy assumes citizens are not passive subjects to be ruled but autonomous beings who need to meaningfully take part in the governance of their own societies.[73] While deliberative democracy can take different forms, citizens' assemblies belong to a model that necessitates genuine, non-illusory dialogue between randomly selected ordinary citizens sustained over a period of time.[74] Under this model, a decision of public importance will only be legitimate if preceded by authentic deliberation where people reflect on their own values and preferences in a non-coercive fashion.[75] It is assumed that because only well-reasoned arguments will win out in an ideal speech environment, prejudiced or uninformed views will not find favour amongst other citizens and powerful or arbitrary opinions can be rejected.[76] Further, by re-routing democratic governance through longer and more complex paths, the effects of political polarisation and hyper-partisanship can be softened without sacrificing democratic legitimacy.[77]

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[73] Amy Gutmann and Dennis Thompson *Why Deliberative Democracy?* (Princeton University Press, Princeton, 2004) at 3.

[74] Ron Levy "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34 Melbourne University Law Review 805 at 821.

[75] John Dryzek *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, Oxford, 2000) at 76. See also Jurgen Habermas *Between Facts and Norms* (MIT Press, Cambridge, 1996) at 449 where Habermas argues that the "modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject."

[76] Jurgen Habermas *Moral Consciousness and Communicative Action* (MIT Press, Cambridge, 1990) as cited in Curato, Hammond and Min, above n 11, at 28.

[77] Levy, above n 74, at 810.

Deliberative democracy's value lies in the fact that it recognises political opinions are fluid and open to change rather than being fixed and immovable. Instead of assuming our existing, vote-centric democratic procedures are intrinsically valuable, deliberative democrats focus on the various benefits of getting people to vocalise their opinions. Accommodating for conflict and difference is valued, as it is through confronting these that groups and individuals are able to revise, change or justify their decisions.[78] In this sense, deliberative democracy gives an adequate account of human interdependency[79] and ensures we place ourselves in the context of others and their concerns.[80] By emphasising the presence of others and encouraging people to gather and debate, deliberative democracy presents a timely and well needed counter-narrative to our current system which privileges the self-maximising and largely unaccountable individual. Ultimately, deliberative democracy recognises that, as social beings, we require others to help shape our own views.[81] As Simone Chambers puts it, "human life is indeed group life, but our groupishness is mediated through, and constituted by, communication, not voting."[82]

Deliberative democracy only emerged relatively recently as a distinct field of theoretical inquiry, but it has its practical roots in antiquity. Many of the modern manifestations of deliberative democracy echo the ancient Athenian institution of the boule or council, which was composed of 500 randomly selected citizens[83] that met on a daily basis to oversee the affairs of the state and to prepare and write legislation.[84] Aristotle was the first to acknowledge the value of public discussion and justification over that of experts, claiming that "the many…

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[78] Amadine Crespy "Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict" (2014) 62 Political Studies 81 at 84.

[79] Setala, above n 46, at 58.

[80] Benjamin Barber *Strong democracy: participatory politics for a new age* (University of California Press, Berkeley, 1984) at 127 and 187-189.

[81] By suggesting humans are interdependent, deliberative democracy also challenges the Cartesian assumption that we are self-contained or self-sufficient beings currently prolific throughout many Western societies.

[82] Simone Chambers "Human Life is Group Life: Deliberative Democracy for Realists" (2018) 30 Critical Review 36 at 45.

[83] Citizen did not carry its contemporary meaning and excluded women, slaves and foreigners.

[84] Patrick Fournier and others *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (Oxford University Press, New York, 2011) at 10.

can when joined together be better - not as individuals but all together - than those who are best."[85] Although the value of deliberation continued to be recognised after the ancient Greeks, it tended to come from elitist theorists suspicious of the general population. For example, despite John Stuart Mill advocating for "government by discussion", he argued that this discussion should be carried out by an intellectual elite.[86]

It was not until the latter half of the 20th century, and through the writings of Jurgen Habermas, John Rawls and James Fishkin that the intellectual foundations of modern deliberative democracy were laid. One commentator now suggests that it would be hard today to find a democratic theorist that does not subscribe to deliberative democracy's key thesis that democracy's legitimacy and authority derives in large part from the deliberation that precedes decision making.[87] Although deliberative democracy became central to democratic theory, legal scholars were initially slow to join the deliberative trend. "Cross pollination" between election law and deliberative democracy was rare, if not non-existent.[88] The juridification of politics throughout liberal democracies since the 1960s has changed this and has meant more legal scholars are turning their attention to how legal norms set the ground rules and influence political decision making.[89] Some legal scholars are also exploring the relationship between deliberative democracy and more conventional areas of law.[90]

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[85] Aristotle *Politics* (University of Chicago Press, Chicago, 1984) at 1281a42-b as cited in James Wilson "Deliberation, Democracy, and the Rule of Reason in Aristotle's "Politics"" (2011) 105 The American Political Science Review 259 at 260.

[86] Dale E. Miller "John Stuart Mill's Moral, Social, and Political Philosophy" in William Mander (ed) *The Oxford Handbook of British Philosophy in the Nineteenth Century* (Oxford University Press, Oxford, 2014) 366 at 378.

[87] Robert Talisse "New Trouble for Deliberative Democracy" (2017) 12 The Ethics Forum 107 at 108.

[88] Ron Levy "The Law of Deliberative Democracy: Seeding the Field" (2013) 12 Election Law Journal 355 at 371.

[89] Ron Levy and Graeme Orr *The Law of Deliberative Democracy* (Routledge, Taylor and Francis Group, Oxon, 2017) at 5.

[90] See for example, David Ponet and Ethan Leib "Fiduciary Law's Lessons for Deliberative Democracy" (2011) 91 Boston University Law Review 1249 and Glen Staszewski "Political Reasons, Deliberative Democracy, and Administrative Law" (2012) 97 Iowa Law Review 849 where the author argues that the transparency of administrative decisions could be improved through the use of deliberative democratic principles.

II *Dissecting Deliberative Democracy*

As a normative project, deliberative democracy rests on several claims regarding the value of deliberation. The first of these is centred around the actual act of deliberation. To some, especially those in the liberal or instrumentalist tradition, deliberation is fruitless because we can never approach it neutrally. According to this approach, deliberation always occurs against a backdrop of goals we have already constructed for ourselves.[91] Deliberation is therefore simply a process of trying to meet our desired result and has no real impact on us as individuals. Deliberative democrats reject this rational choice inspired account of deliberation and suggest deliberation is an inherently social process that can have a transformative effect on people's opinions.[92]

Encapsulated by Jurgen Habermas' theory of "communicative rationality" which sees human rationality as a necessary outcome of successful communication, deliberation in this context emphasises the ability of uncoerced dialogue to reveal the better argument.[93] Throughout these discursive encounters, people are not expected to make a decision until the very end point of the process[94] because, as a dialogical process that necessarily involves cooperation and coordination, people's opinions are subject to rational change.[95] The fact that regular citizens are not expected to "tow the party line" like politicians and because we do not have an interest in re-election means we are more likely to change our opinions in deliberative process than politicians in more formal settings.[96]

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[91] Robert Talisse "Deliberation" in David Estlund (ed) *The Oxford Handbook of Political Philosophy* (Oxford University Press, New York, 2012) 204 at 208.

[92] Andrew Smith *The Deliberative Impulse: Motivating Discourse in Divided Societies* (Lexington Books, Plymouth, 2011) at 2.

[93] Jurgen Habermas *The Theory of Communicative Action* (Beacon Press, Boston, 1984) at 285-288.

[94] At 285-6, Habermas contrasts "strategic action", where individuals act to maximise their self-interest with "communicative action" where they remain open to finding out their interests.

[95] James Bohman *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press, Cambridge, 1996) as cited in Stephen Elstub *Towards a Deliberative and Associational Democracy* (Edinburgh University Press, Edinburgh, 2008) at 27.

[96] Crespy, above n 78, at 83.

But why is having citizens deliberate with these consequences desirable? Firstly, most political issues are unavoidably collective in nature; rarely do we have to make decisions that will only affect ourselves. It therefore makes sense for us to at least carefully consider the effects of certain proposals on other people. More fundamentally, by submitting our opinions to critical scrutiny, we can generally accept that 'better' decisions will be made. Legal theorist Daniel Oliver-Lalana has suggested that the better the argumentation and underlying reasoning is, the better the resulting law will be.[97] Essentially, Oliver-Lalana suggests that we cannot divorce outcome from process in law-making. Through the deliberative process, citizens are exposed to a wide range of opinions which they are able to test and deliberative democrats argue that when put in public, deliberative environments, people must put forward intelligible reasons that can generally be accepted by all.[98]

There is, of course, no fixed definition of what amounts to an intelligible reason, although deliberative democrats suggest that arguments entirely grounded in self-interest are hard to justify to a group of people, especially when the group is reflective of the population at large. Further, through hearing other viewpoints and having to justify your own in acceptable ways, the deliberative process can serve as a filtering mechanism for various forms of ignorance or reasoning steeped in prejudice. Instead of only consulting their own self-interest, the deliberative process obliges people to take broader and more encompassing views of issues. When this happens, and when laws have been formed from rational argumentation, people are more likely to believe in their legitimacy.[99] Consequently, even if people disagree with the end result, they are more likely to accept it if they know their views have at least been fairly considered throughout the process.[100]

The deliberative process is also increasingly being seen as epistemically valuable. The argument here focuses on deliberation's potential to open up uncertainty by encouraging opinions to be

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[97] Daniel Oliver-Lalana "Foreword Towards a Theory of Legislative Argument" (2010) 4 Legisprudence 1 at 4.

[98] Amy Gutmann and Dennis Thompson *Democracy and disagreement* (Harvard University Press, Cambridge, 1996) at 129.

[99] Jan Sieckmann "Legislative Argumentation and Democratic Legitimation" (2010) 4 Legisprudence 69 at 72-3.

[100] Rashbrooke, above n 1, at 269. Because citizens' assemblies reflect the wider population, people can be sure that their views or at least 'people like them' have been able to express their opinions on the issue.

either tested or justified and serve as a mechanism to clarify potential differences or misunderstandings.[101] Through confronting this uncertainty, we are also able to question established assumptions and paradigms, thus recognising the fallibility of the existing consensus.[102] Andrew Smith argues that most moral change happens through social interaction, and when people present disconfirming evidence that we rarely seek out on our own accord.[103] In this respect, the knowledge producing potential of deliberative processes is diametrically opposed to the debate that occurs in legislatures. There, politicians are often having to doggedly support their parties' established positions on issues, and rarely are they able, indeed willing, to change their positions on issues after hearing convincing arguments from opposing sides. Yet, under conditions of transparency and reciprocity fostered by deliberative procedures, this is a real possibility.[104]

Another benefit of deliberative institutions is the free and open dialogue that occurs within them, something which has been described as a "tonic for an alienated citizenry."[105] Research shows that where the public will has been distorted through elite manipulation and spin doctoring, citizens' assemblies in particular can expose and dispel myths that so often plague democratic will-formation.[106] The assumption is that as epistemic agents engaged in a process of reflection and proper inquiry, participants are committed to the idea that the truth is publicly accessible and available.[107] By fostering the exchange of evidence and reasons, deliberative spaces essentially serve a "truth-tracking" function.[108] Obviously deliberative democratic procedures cannot rid the world of all disinformation, especially where some powerful elites remain willing to lie in public spaces to advance their own agendas. Nor can they ensure all voters will test their own opinions in a dialogical process. Deliberative democracy, in the model

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[101] Anne Elizabeth Stie *Democratic Decision-Making in the EU: Technocracy in Disguise?* (Routledge, Oxon, 2013) at 24.

[102] Curato, Hammond and Min, above n 11, at 163.

[103] Smith, above n 92, at 72.

[104] Fabienne Peter "Pure Epistemic Proceduralism" (2008) 5 Episteme 33 at 51.

[105] R.S. Ratner "Communicative rationality in the Citizens' Assembly and referendum processes" in Warren and Pearse (eds), above n 58, 145 at 145.

[106] Simon Niemeyer "The Emancipatory Effect of Deliberation: Empirical Lessons from Mini-Publics" (2011) 39 Politics and Society 103 at 107 and 112.

[107] Smith, above n 92, at 75.

[108] Smith, above n 92, at 77.

I will advance further below, can though create a body of well-informed citizens capable of taking the lead in shaping public decisions which can then resist the elite manipulation that is plaguing our democracies.

III *Deliberative Democracy's Potential for New Zealand*

Deliberative democracy also has the potential to make New Zealand's law-making procedures more receptive to, and accommodating of, tikanga Māori. As a result of the colonial process which marginalised Māori customary practices, our current large-scale decision-making procedures do not reflect tikanga Māori. A study by Research New Zealand found that a factor contributing to the comparatively low-levels of Māori participation in the political process is that some Māori feel alienated from the Pākehā system.[109] Deliberative democracy offers an opportunity to change this. The decentralised nature of deliberative procedures - or the way in which power is dispersed throughout a deliberative group - closely follows Māori legal traditions where rangatira must develop strong engagement skills in order to maintain their legitimacy.[110] Decision making by Māori in the civic context also generally involves large public gatherings, where face to face participation is central.[111] Collaboration and the voicing of different opinions lie at the heart of rūnanga and hui, with both forums allowing people to participate meaningfully in decisions.[112]

Deliberative democracy can therefore serve two useful roles in the New Zealand context. Firstly, it can help ensure many Māori do not feel as alienated and distanced from our decision-making procedures as many currently do. Secondly, deliberative democracy can help forge a distinctively New Zealand approach to democracy; one that values tikanga and reflects Māori

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[109] Research New Zealand *The participation and engagement of Māori in decision-making processes and other government initiatives* (Electoral Commission, 2006) at 12. At the 2017 general election, the turnout of electors in the Māori electorates was 66.7%: Electoral Commission *Report of the Electoral Commission on the 2017 General Election* (Electoral Commission, April 2018) at 1.

[110] Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Maori Law* (Victoria University Press, Wellington, 2016) at 67, 70.

[111] Mamari Stephens "To Work out their own Salvation: Maori Constitutionalism and the Quest for Welfare" (2015) 46 VUWLR 905 at 915.

[112] At 922-3.

decision-making traditions. The fact that deliberative procedures closely align with Māori traditions also implicitly responds to a criticism of deliberative democracy that it valorises the bourgeois public sphere and its exclusionary styles of speech.[113] This critique suggests that deliberative democracy favours dispassionate, logical debate - something traditionally only practiced by white, educated males.[114]Along with mischaracterising what deliberative democracy values, the critique does not account for how deliberative democracy can actually be *more* reflective and inclusive of indigenous cultures, particularly ones with strong oral traditions such as Māori.

IV *Criticisms of Deliberative Democracy*

Despite these benefits of deliberative democracy, many remain sceptical of the idea. Ian Shaprio for example suggests deliberation is often a waste of time and can amount to "collective fiddling while Rome burns."[115] These critics of deliberative democracy often start from the troubling assumption that ordinary citizens are simply too disinterested or incompetent to fulfil the promises of deliberative democracy. This criticism has become known as the "public ignorance objection" and has found favour with many.[116] Richard Posner has labelled deliberative democracy "unrealistic" and a "pipe dream hardly worth the attention of a serious human" as ordinary people have little interest in complex policy issues, let alone having to deliberate on them.[117] Christopher Achen and Larry Bartels follow Posner's suit, suggesting that deliberative democratic procedures attempt to force the public into doing things "it does not want to do, is unable to do, and has too much sense to do."[118] As well as

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[113] Curato, Hammond and Min, above n 11, at 37.

[114] See for example Iris Young *Inclusion and Democracy* (Oxford, Oxford University Press, 2000) at 39, where Young claims that the "speech culture of white, middle-class men tends to be more controlled, without significant gesture and expression or emotion."

[115] Ian Shapiro "Optimal Deliberation?" in James Fishkin and Peter Laslett (eds) *Debating Deliberative Democracy* (Blackwell Publishing, Oxford, 2003) 121 at 121.

[116] Robert Talisse "Does public ignorance defeat deliberative democracy?" (2004) 16 Critical Review 455 at 456.

[117] Richard Posner *Law, Pragmatism, and Democracy* (Harvard University Press, Cambridge, 2003) at 107 and 163.

[118] Elmer E. Schattschneider *The Semisovereign People: A Realist's View of Democracy in America* (Holt, Rinehart and Winston, New York, 1960) as cited in Christopher Achen and Larry Bartels *Democracy for Realists: Why Elections do not produce Responsive Government* (Princeton University Press, Princeton, 2016) at 302.

being somewhat patronising of the ordinary citizen, these claims lack empirical bite by failing to consider the evidence (discussed below) from several citizens' assemblies where citizens have proven that, when given the opportunity, they are willing to participate and learn.

There are stronger critiques of deliberative democracy that do not rely on troubling characterisations of the average citizen. One of these is that deliberative democracy attempts to take the largely beneficial (and inevitable) competitive or "rough and tumble" aspects out of politics.[119] Ian Shapiro argues it is impossible to create deliberative institutions because competition is "the lifeblood of democratic politics" as it structures politics around argument and struggle which, in turn, advance knowledge and good public policy.[120] Shapiro is perhaps right to suggest deliberative democracy is somewhat utopian as although deliberative democrats may like to think that people will regard the interests of others when forming their own views, this is often not the case. Politics can be highly adversarial, and because people tend to define themselves in opposition to other people, they are regularly willing to fight for their interests.[121] Yet, argument and struggle is just as capable of occurring in deliberative environments. The only difference in deliberative environments is that participants are not as combative and focused on 'winning' as Shapiro may like. People remain free to define themselves in opposition to other people and construct their views accordingly, but at some point they will have to justify to a group why this is more desirable than, say, an approach which does not rely on forging distinctions between 'us' and 'them'.

Shapiro's stronger argument uses the example of a couple that attend marriage therapy to highlight how deliberation may produce adverse consequences, such as a widening and not narrowing of divisions.[122] Shapiro contends that the hypothetical couple will probably begin therapy with a mutual commitment to resolving their issues in a co-operative and constructive manner, but once honest exchange begins, it may expose underlying and perhaps intractable

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[119] See for example Russell Hardin "Deliberation: *Method, Not Theory*" in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, Oxford, 1999) 103 at 112.

[120] Ian Shapiro "Collusion in Restraint of Democracy: Against Political Deliberation" (2017) 146 Daedalus 77 at 82.

[121] Zsuzsanna Chappell *Deliberative Democracy: A Critical Introduction* (Palgrave Macmillan, Hampshire, 2012) at 168.

[122] Shapiro, above n 115, at 123.

differences with the result being a worsening in the relationship. A citizens' jury held on the topic of euthanasia at the University of Otago in 2018 over three days supports Shapiro's assertion. The fact the jurors were unable to come to any agreement on the issue is telling in itself, but crucially, a summary of the experiment notes that following the deliberative process four jurors changed their position to strong opposition and six jurors moved from uncertainty or moderate support to strong support.[123]

This widening of divisions that occurred indicates that deliberation can counter-productively increase dissent, as participants begin to realise how strongly they feel about an issue or just how different their views are from other peoples'.[124] More generally, the citizens' jury on euthanasia may simply reflect the state of our politics. Although the participants throughout the Otago study remained civil, Robert Talisse has argued that deliberative democracy in practice is vulnerable to divisiveness and uncivility, the twin pathologies that have come to characterise modern politics.[125] However, while deliberation certainly has the ability to spiral into meaningless argument and divide people even further, there are examples of citizens deliberating on controversial issues in constructive and respectful ways. As will be discussed below, topics such as abortion have been put to randomly selected citizens to deliberate on with great success. Many of these examples show that, when carefully structured and sustained over a period of time, deliberation does not have to replicate a married couple bickering at marriage therapy.[126]

Related to the criticism that deliberation can lead to increased dissent is the idea of group polarisation. Group polarisation is the process by which individuals engaged in deliberation

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[123] University of Otago "Otago University-led Citizens' Jury highlights complexity around euthanasia debate" (24 May 2018) < https://www.otago.ac.nz/news/news/otago687186.html>.

[124] It could also indicate that confirmation bias was at play in that, having selected information which aligns with their preconceived views, the participants felt surer of their position than they did previously.

[125] Robert Talisse, above n 87, at 110.

[126] It is also important to note that the Otago example was a *citizens' jury* and was held over just three days, whereas the citizens' assemblies discussed below often took place over several months and allowed the participating members to constantly reflect on their views in a timely and gradual manner. Citizens' juries also involve significantly less people than citizens' assemblies.

tend to move further away from their antecedent dispositions and towards a relatively more extreme position on the issue at hand.[127] The result of this process is a decrease in individual viewpoints and a convergence on a single point.[128] Since the deliberative turn, Cass Sunstein has researched the impact group polarisation can have on deliberation and argues that groups polarise as a result of the individuals within the group immersing themselves in "epistemic enclaves" or environments where people simply hear echoes of their own voice.[129] To Sunstein, one of the main drivers of group polarisation is a concern for preserving one's reputation.[130] People may either speak out or remain silent at the expense of expressing what they really think to avoid being marginalised in the group.[131]

Stanley Fish has also been critical of this marginalisation that can occur in deliberative environments. Fish contends that the deliberative democratic agenda is disingenuous in that it simply attempts to rationalise liberal or egalitarian policy preferences.[132] The consequence of this is a peremptory exclusion of views that do not align with the liberal program.[133] Fish argues that when deliberative democrats advocate for 'rational' arguments finding favour in a group, they have defined rational or what amounts to a 'good' reason in such a way that makes it congruent with their own ways of thinking.[134] Absent any universal standard for determining what amounts to a 'good' reason in a pluralistic society, Fish suggests that deliberative democrats attempt to substantively characterise a good reason as one that is characterised by diffidence and a mild scepticism.[135]

The consequence of predetermining what counts as a good reason is that arguments steeped in religious beliefs or views considered to be 'extreme' are discounted as provincial opinions

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[127] Cass Sunstein "The Law of Group Polarisation" in Fishkin and Laslett (eds), above n 115, 80 at 83.

[128] Cass Sunstein "Deliberative Trouble? Why Groups Go to Extremes" (2000) 110 Yale Law Journal 71 at 86.

[129] Cass Sunstein *Republic.com 2.0* (Princeton University Press, Princeton, 2007) at 13.

[130] Sunstein, above n 127, at 83.

[131] At 83.

[132] Stanley Fish "Mutual Respect as a Device of Exclusion" in Stephen Macedeo (ed), above n 119, 88-102.

[133] At 96.

[134] At 95.

[135] At 95.

unworthy of robust deliberation. In reality, they are rendered as such not because of the quality of the argument but their conservative nature. Fish's critique is an issue for deliberative democrats because it perhaps exposes deliberative democracy's political programme. That is, if deliberative democracy is simply a way to institutionalise more liberal or progressive views, it could be seen as profoundly anti-democratic and mendacious. Equally, if deliberative processes are not truly neutral or universally acceptable, then any claim that the decisions they produce deserve general acceptance fails. Deliberative institutions cannot simply become mediums through which liberal-leaning policy preferences are legitimised at the expense of silencing opposing or conservative viewpoints. Fish and Sunstein's concerns can, however, be dealt with and minimised in practice.

Group polarisation can be avoided by ensuring participants are exposed to a range of both expert and lay viewpoints. Organisers of citizens' assemblies ensure the experts that speak to members do not all share the same views. Also, the fact that citizens' assemblies are made up of randomly selected citizens means that there will naturally be a range of viewpoints that can be expressed in the smaller discussion groups, making it harder for clusters of like-minded people to form. Further, Fish's concern that deliberative procedures advance progressive agendas is perhaps less relevant in practice than it is in theory. Deliberative democrats do tend to be more progressive in their political outlooks, but this does not necessarily mean actual deliberative practices will be too.

Organisers of citizens' assemblies do not demand, for example, that the participants only put forward 'rational' reasons and that religious or extreme viewpoints should not be accepted. As Simon Niemeyer has recently claimed, "deliberative theory valorises reasoning, but it does not seek to tell citizens how to think by imposing external judgemental criteria."[136] Deliberative democrats simply argue that people participating in deliberation tend to respond better to views that are framed in ways that the majority and not a select few can accept. And if Fish is concerned with deliberative procedures advancing a progressive agenda, it is unclear how this

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[136] Simon Niemeyer "Intersubjective Reasoning in Political Deliberation: A Theory and Method for Assessing Deliberative Transformation at Small and Large Scale" (working paper, Centre for Deliberative Democracy and Global Governance, 2019) at 10.

is any more concerning than people expressing views in non-deliberative environments that are intolerant or exclusionary, such as the anti-immigration rhetoric that permeated throughout the Brexit campaign.

Another valid line of attack is to focus on the power governments and local authorities have had to strategically establish deliberative bodies, set their agenda and decide what force the outcomes of deliberation should yield. This power currently constitutes the "Achilles heel" [137] of deliberative bodies and has led some critics to suggest that deliberative bodies such as citizens' assemblies could run the risk of becoming assimilated to broader political institutions and lose their independence.[138] At the point citizens' assemblies become top-down processes managed by elites, they lose their critical edge and transform into soft power instruments as opposed to being used as a way to constrain power through discursive participation.[139] Although the intention of governments and local authorities may not always be improper, a citizens' assembly can nonetheless be seen as a reflection of a government's priorities and an indicator as to what issues they are comfortable with off-loading on to citizens.[140]

For example, according to John Ferejohn, the creation of the BC Citizens' Assembly was a partisan manoeuvre implemented partly to ensure some form of proportional representation would become the state's electoral system, as the Liberal Party was supposedly angered over previous election results that saw them receive less seats than they would have under a proportional system.[141] It was politicians in Ireland too who had the power to decide whether an Assembly would be set up, what issues it would look at and, perhaps most crucially, what

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[137] Graham Smith and Maija Setala "Mini-Publics and Deliberative Democracy" in Estlund (ed), above n 91, at 307.

[138] Michael Neblo *Deliberative Democracy between Theory and Practice* (Cambridge University Press, New York, 2015) at 182-3.

[139] Anna Freschi and Vittorio Mete "The Political Meanings of Institutional Deliberative Experiments: Findings on the Italian Case" (2009) 3 Sociologica 1 at 41.

[140] Curato, Hammond and Min, above n 11, at 75.

[141] John Ferejohn "Conclusion: the Citizens' Assembly model" in Warren and Pearse (eds), above n 58, 192 at 197.

force its recommendations would have.[142] The consistent role elites have had to both establish and shape the roles of citizens' assemblies may therefore undermine the spirit of deliberative democracy, as it reinforces the idea that citizens by themselves cannot be trusted. Yet, just because citizens' assemblies have to be established by political elites does not necessarily undermine their democratic worth, as citizens can (and do) remain critical throughout these processes. Also, having elites establish citizens' assemblies is essentially unavoidable, except if, and as I will outline below, a citizens-initiated referendum is proposed.

Perhaps the most intuitive criticism of deliberative bodies is that they require a large amount of trust. Deliberative methods of decision-making bypass mass deliberation by only allowing for a small group of citizens to become well-informed about an issue. While these citizens hear from experts in the field and debate with others to construct their own well-reasoned views, the wider public are left with the regular information channels and are, at least theoretically, expected to trust the decision reached by their fellow citizens. Cristina Lafont equates this expected trust with "blind deference."[143] Although many people may have no problem with somewhat blindly following the recommendations of their better-informed but nonetheless un-elected citizens, this will not be the case for everyone. There will be people who are uneasy about simply trusting fellow and unaccountable citizens, especially if they are perceived to have become complicit within the political establishment. For example, after the BC Assembly, Dennis Thompson noted that the members "began as ordinary citizens but ended as nascent experts" and risked creating a gulf between them and ordinary citizens.[144]

However, the intellectual gap that emerged between the participating citizens and those they were supposedly representing is not a great cause for concern. The majority of voters, Thompson contends, will trust their fellow citizens as they will recognise the participating members are "not so different" from them and would have decided like they would have in

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[142] Dimitri Courant "The Curious Institutionalisation of Deliberative Democracy: The Irish Citizens' Assemblies and the Future of Democratic Innovation" (paper presented to European Consortium for Political Research General Conference, Hamburg, August 2018) at 10.

[143] Cristina Lafont "Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-publics Shape Public Policy?" (2015) 23 The Journal of Political Philosophy 40 at 52.

[144] Dennis Thompson "Who Should Govern the Governs?" in Warren and Pearse (eds), above n 58, 20 at 47.

the circumstances.[145] This suggests that although the participating citizens become experts, voters will still see them as regular citizens that have simply become more informed about an issue and not as individuals that have metamorphosised into political or institutional elites. A study completed following the British Columbian Citizens' Assembly seems to confirm Thompson's assertion.[146] This study found that a large proportion of the voters were happy to vote in accordance with the Assembly's recommendations as they knew that the participating citizens were broadly representative of the population, had heard all views on the issue and had received the best evidence.[147]

In this sense, citizens' assemblies can serve as "facilitative trustees" or trusted information proxies that help other citizens make good judgments and compensate for their scarce cognitive resources.[148] But showing that the general population will trust the citizens participating still does not respond to a more instinctive response to deliberative bodies; that the participating citizens are still largely unaccountable to the wider citizenry. Warren argues that the normative requirements for democratic accountability increase when representation is involuntary.[149] Yet, participants in deliberative bodies face no formal accountability mechanisms such as elections or recalls and are simply called upon through random selection. This begs the question: how then can deliberative methods of decision-making claim to be legitimate?

In principle at least, deliberative bodies draw their legitimacy from the random selection processes and the expectation that they represent a sample of the general population.[150] In fact, because deliberative bodies are randomly composed with a view to ensuring a snapshot of the

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[145] At 47.

[146] Cutler and others "Deliberation, information, and trust: the British Columbia Citizens' Assembly as agenda setter" in Warren and Pearse (eds), above n 58, 166-191.

[147] At 187.

[148] Mark Warren and John Gastill 'Can Deliberative Mini-publics Address the Cognitive Challenges of Democratic Citizenship?" (2015) 77 The Journal of Politics 562 at 568.

[149] Mark E. Warren "Citizen representatives" in Warren and Pearse (eds), above n 58, 50 at 60. In BC, citizens could only opt out of being represented in the assembly if they moved province.

[150] Fournier and others, above n 84, at 148.

population is created, they tend to be far more representative than legislatures.[151] Further, the general public will always have the ultimate say on whether to adopt the recommendations of the deliberative body. This is where the public can hold the participating members to account, albeit indirectly. The critique that deliberative bodies lack democratic accountability is also only relevant if we define accountability in its traditional sense - that is, entirely through elections.

Warren suggests that "discursive accountability" is just as important and an area where deliberative bodies perform well.[152] Throughout the BC Citizens' Assembly, participating members, knowing that they were representing something far bigger than themselves, established representative or conduit roles for themselves, guided by the fact that their mandate was to provide a proposal in the interests of "the people of BC."[153] For example, some members actively organised public hearings to hear from their 'constituents', were interviewed by local media outlets, or even attached home-made billboards to their vehicles to advertise public meetings.[154] These examples illustrate that although Assembly members may have been unaccountable in a traditional sense, they nonetheless created representative roles for themselves. The next section will introduce the concept of citizens' assemblies and provide two case studies to show how they could be run in New Zealand.

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[151] At 148.

[152] Warren, above n 149, at 62. Discursive accountability refers to the way in which members were incentivized to develop and represent discursive arguments and positions.

[153] At 65.

[154] Hilary Pearse "Institutional Design and Citizen Deliberation" in Warren and Pearse (eds), above n 58, 70 at 76.

CHAPTER IV: CITIZENS' ASSEMBLIES

I *What are Citizens' Assemblies?*

Although designs vary across countries, citizens' assemblies or mini-publics can generally be defined as institutions in which a "broadly inclusive and representative sub-group of an affected population engage in structured deliberation [on one or several issues] enabled by independent facilitation."[155] The central feature of citizens' assemblies is their near-random composition, with organisers using demographic quotas such as age, gender, and ethnicity to ensure the assembly is representative of the entire population. Central to the entire process is the chair of the assembly, who generally does not have any substantive expertise in the topic of deliberation which helps alleviate any concerns that chairs may bring any of their preconceptions to the process.[156] Chairs are also the public face of the assembly, they manage the budget and more generally guide the work of the assembly.[157] They also tend to have proven leadership skills and are often well-respected individuals.[158] As well as the participating members, citizens' assemblies typically involve various governance bodies.

An impartial co-ordinating group is generally charged with running the random-selection process as well as inviting the experts, stakeholders and the facilitators.[159] It is helped in this task by an advisory board, who develop the actual criteria for the selection of the expert/stakeholder panel.[160] This panel is generally a mixture of experts, stakeholders and rights-holders who brief the assembly from a range of perspectives.[161] A facilitation team is

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[155] Matthew Ryan and Graham Smith "Defining Mini-Publics" in Kimmo Gronlund, Andre Bachtiger and Maija Setala (eds) *Deliberative mini-publics: involving citizens in the democratic process* (ECPR Press, Colchester, 2014) 9 at 20.

[156] Fournier and others, above n 84, at 30.

[157] At 29.

[158] For example, the Chair of the recent Citizens' Assembly in Ireland was the Honourable Mary Laffoy, a former Supreme Court Judge: The Citizens' Assembly "Fact Sheet" <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/CA-Fact-Sheet-June-2018.pdf>.

[159] Extinction Rebellion "The Extinction Rebellion Guide to Citizens' Assemblies" (25 June 2019) rebellion. earth <https://rebellion.earth/wp/wp-content/uploads/2019/06/The-Extinction-Rebellion-Guide-to-Citizens-Assemblies-Version-1.1-25-June-2019.pdf> at 8.

[160] At 8.

[161] At 8.

appointed by the co-ordinating group, and one facilitator is generally placed at one table along with assembly members.[162] Facilitators ensure that discussions at tables are not dominated by a few people and that everyone has a chance to speak.[163] Finally, an oversight panel ensures the entire assembly process complies with the pre-determined standards and can be made up of citizens, government representatives, experts in deliberative processes or other stakeholders like NGOs.[164]

Perhaps the critical stage for the entire process is the selection phase, which happens through sortition. Stratified random sampling is used to ensure that the assembly itself broadly reflects a population's demographic split. Sub-populations based on gender, age, ethnicity, geography and any other demographics are created from voting lists, and the percentage of assembly seats reserved for a sub-population will reflect the population at large.[165] Once a sample of individuals has been created, those people who have been randomly selected are sent a letter informing them of their selection and asks them whether they are willing to participate in the assembly. In BC, around 7.4% of people positively responded to the letter by indicating that they would come to a selection meeting.[166] Those that do respond and attend a selection meeting are briefed on their obligations as members and told that no prior knowledge of the subject of the assembly is required.[167] In BC, names were then drawn from a hat to determine the citizens that would participate.[168]

The next part will introduce the BC and Irish Citizens' Assemblies to show how an assembly could be run in New Zealand and what we can learn from them in order to create a successful New Zealand model. These Assemblies have been chosen as BC and Ireland have similar

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[162] At 9.

[163] At 9.

[164] At 9.

[165] At 15.

[166] Fournier and others, above n 84, at 32. This was obviously a poor response rate from BC citizens and the causes of this are unknown. The BC citizens' assembly was 15 years ago though, and given citizens' assemblies are becoming more popular, we would hopefully see a better positive response rate in New Zealand.

[167] At 33.

[168] At 33.

population sizes to New Zealand and both assemblies preceded referendums as they would under the model proposed for New Zealand below.

II *The BC Citizens' Assembly*

The BC Citizens' Assembly was established in 2004 to examine the province's electoral system and to potentially recommend a new system. The Assembly's formal Terms of Reference stated that it was to "assess models for electing Members of the Legislative Assembly and issue a report recommending whether the current model for these elections should be retained or another model should be adopted."[169] The motive for establishing a citizens' assembly came from extremely disproportionate election results in BC in both 1996 and 2000.[170] Despite having won more of the popular vote in 1996, the Liberal Party received fewer seats in the legislature than the New Democratic Party.[171] In 2000, the Liberal Party won more of the popular vote but the New Democratic Party's 21.6% of the vote translated into only two legislative seats, while the Green Party's 12.4% of the vote delivered no seats at all.[172]

These results largely confirmed a pre-existing perception that the electoral system needed to change and provided the Premier at the time, Gordan Campbell, with a good reason to fulfil his campaign promises and announce the creation of the Citizens' Assembly.[173] After extensive preparation, including a report that laid the foundations for the BC Assembly, a bill was passed that ensured any recommendation of the Assembly would go to a public referendum at the next general election.[174] As Warren and Pearse note, the BC Assembly represented the first time a government had empowered a body of citizens to "redesign fundamental political institutions."[175]

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[169] Citizens' Assembly on Electoral Reform "Terms of Reference and Duties of the Chair"
<https://citizensassembly.arts.ubc.ca/resources/terms_of_reference.pdf>.

[170] Mark E. Warren and Hillary Pearse "Introduction: democratic renewal and deliberative democracy" in Warren and Pearse (eds), above n 58, 1 at 8.

[171] At 9.

[172] At 9.

[173] Fournier and others, above n 84, at 23.

[174] At 24.

[175] Warren and Pearse, above n 170, at 6.

The Citizens' Assembly consisted of 160 members, including one man and one woman from each of BC's 79 provincial electoral districts and two Aboriginal representatives.[176] The entire process took 11 months and was divided into the three phases of learning, consultation and deliberation.[177] The learning phase took place over six weekends and members were introduced to a variety of electoral systems through lectures, written materials and a web-based discussion forum where members could create threads on specific topics.[178] The process moved between open plenary sessions and discussion groups consisting of around 10-15 Assembly members.[179] The plenary sessions were open to the general public and the learning materials Assembly members received were also publicly available through the Assembly's website.[180] The learning phase appeared to be incredibly successful in educating the members. Before the Assembly began, members were asked "how informed about electoral systems do you feel?". On the 0-10 scale the average response was 4.3, while after the learning phase the average response from members was 9.11.[181] Members also reported major changes in both their interest and knowledge of politics generally.[182]

Following the learning phase, the public consultation phase began. Members of the public were invited to attend public hearings to share their views on the electoral system and what needed to change. Advertisements were placed in local newspapers as well as at schools, universities libraries and on the Assembly's website.[183] The public consultation phase saw panels consisting of four to sixteen assembly members attend around 50 public hearings scattered around the province.[184] Over 350 citizens made formal presentations to the Assembly

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[176] Citizens' Assembly on Electoral Reform "Citizens' Assembly in Action"

<https://citizensassembly.arts.ubc.ca/public/inaction.htm>.

[177] As above.

[178] Warren and Pearse, above n 58, at 11.

[179] Citizens' Assembly on Electoral Reform *Making Every Vote Count: The Case for Electoral Reform in British Columbia* (December 2004) at 66.

[180] At 67.

[181] At 68.

[182] At 68.

[183] At 71.

[184] Warren and Pearse, above n 58, at 11.

members and around 3000 people participated more generally throughout these hearings.[185] At the larger hearings, the Assembly members first introduced themselves and a short video presentation providing an overview of the Assembly itself and the main electoral systems was shown.[186] Members of the public were also given fact sheets that summarised information on, amongst other things, majority and plurality systems and the single transferable vote system.[187] After the introductory material, a panel system was used which saw Assembly members listening to the formal presenters and then asking any questions they had.[188] Once the Assembly members had finished, members of the public could ask questions of the presenter and share their views.[189] Public hearings were not the only way the public could get involved. For example, the Citizens' Assembly also received 1,603 written submissions through their website.[190]

The last stage of the Citizens' Assembly was a deliberation phase spread over six weekends.[191] Here, the Assembly members were able to reflect on what they had heard and prioritise the core values they believed an electoral system should represent.[192] To help them do so, research staff gave the members an overview of all the electoral systems and the consequences of adopting each one of them.[193] Members then collapsed into discussion groups to determine what values they wished to see expressed in a voting system.[194] The Assembly's top ranked goals of an electoral system were: that it should incorporate effective local representation, that it should translate vote shares into seat shares in a proportionate manner, and that the ballot should provide for greater voter choice.[195] These values led the Assembly towards single

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[185] Citizens' Assembly on Electoral Reform, above n 176, at 77.

[186] At 73.

[187] At 73.

[188] At 73.

[189] At 73.

[190] At 77.

[191] Warren and Pearse, above n 58, at 11.

[192] Alan Renwick *After the Referendum: Options for a Constitutional Convention* (The Constitution Society, London, 2014) at 69.

[193] Citizens' Assembly on Electoral Reform, above n 176, at 90.

[194] At 90.

[195] At 91.

transferable vote systems (STV) and mixed member proportional systems (MMP), which they analysed and discussed in turn.[196] After extensive deliberation, a secret ballot was held that asked Assembly members which system they preferred and the STV system won by a vote of 123-31.[197] This vote was followed by two more votes, each establishing that (1) the Assembly did not want to retain the current First-Past-the-Post system and that (2) the Assembly wanted to recommend the STV system to the people of BC in a referendum.[198]

The Citizens' Assembly released the Final Report and confirmed the question that would be put to referendum before dissolving.[199] The question asked of BC citizens was "Should BC change to the BC-STV electoral system as recommended by the Citizens' Assembly on Electoral Reform?" The proposal received 57.7% of the vote and therefore did not meet the supermajority threshold of 60% that the legislature had previously put in place.[200] Because of the close result, the government decided to hold a second referendum on the same issue in 2009 but this time the proposal received only 39%.[201] Critics of citizens' assemblies or deliberative democracy more generally may point to this result as an indication that voters are unwilling to trust the recommendations of their fellow citizens. In this sense, the Assembly might simply have exposed the underlying problem with citizens' assemblies; that they only involve a small handful of citizens and do not actually improve overall voter knowledge and competence. There were though, several structural reasons as to why the BC Assembly ultimately failed to translate their final recommendations into concrete policy.

The threshold set for the referendum that decided whether to adopt the Assembly's recommendations was 60%. If a regular 50% threshold had been in place, the Assembly's recommendations would have been implemented. Campbell Sharman argues that this high threshold was perhaps the reason why politicians were willing to cede control over this critical

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[196] At 91.

[197] At 93.

[198] At 93.

[199] Warren and Pearse, above n 58, at 12.

[200] Fournier and others, above n 84, at 8.

[201] At 8.

issue to ordinary people as any change was unlikely.[202] More fundamentally, voters generally did not know about either the Assembly or its recommendations. This is important because after the 2005 referendum, one study found that of the voters that voted in favour of electoral change, many of them were influenced by the fact that a group of randomly selected citizens working independent of government and political parties supported the change and were willing to trust them.[203] Equally, voters who knew about the Citizens' Assembly were more likely to vote in favour of reform than those who did not.[204] But why did many voters not know about the Assembly or its recommendations?

Firstly, the media coverage was poor. In the six weeks leading up to the 2005 referendum, there was on average 0.81 articles published each day in newspapers across BC relating to the different electoral systems.[205] Even then, the majority of these articles tended to lack basic information or simply highlighted that there will be a referendum question on STV v MMP.[206] Secondly, the Citizens' Assembly was dissolved after the decision-making phase. Instead of going on to share what they had learned about electoral systems with their local communities and encouraging voters to follow the Assembly's recommendations, the members of the Citizens' Assembly simply went back to their regular lives. In other words, the process lacked a fourth, promotional phase. A well-funded voter-education phase would have ensured more voters better understood what the Assembly was and what they were actually proposing.[207] Crucially, a fourth phase would have helped bridge the informational gap between the Citizens' Assembly and the wider voting public. Instead, the process relied on people either accessing the Assembly's website to keep up to date or the media to publicise the Assembly and its recommendations. The Citizens' Assembly held in Ireland from 2016-2018 performed much better in these and other respects.

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[202] Campbell Sharman "Citizens' Assemblies and Parliamentary Reform in Canada" (paper presented to the Australian Parliament, Canberra, March 2006).

[203] Fred Cutler and others "Deliberation, information and trust: The British Columbia Citizens' Assembly as agenda setter" in Warren and Pearse (eds), above n 58, 166 at 186-188.

[204] Fournier and others, above n 84, at 132.

[205] At 137.

[206] At 138.

[207] The Harvard Law Review Association, above n 57, at 966.

III *The Irish Citizens' Assembly*

Ireland has become somewhat of a poster child for democratic innovation and has been described as a world leader in linking deliberative democracy with direct democracy.[208] The Irish Citizens' Assembly established in 2016 represents the first time a nation voted in favour of recommendations crafted by a citizens' assembly.[209] Following the 2016 Irish general election, the New Partnership Government took office with a programme containing a commitment that it would establish a "Citizens' Assembly within six months and without participation by politicians, with a mandate to look at a limited number of key issues over an extended period of time."[210] In July 2016, the House of Oireachtas subsequently agreed on the Assembly's terms of reference which contained the issues the Assembly would look at, its formal structure and the process that would be followed after the Assembly delivered its recommendations.[211] The Assembly was asked to consider a range of issues, but this part will only focus on how it examined the Eighth Amendment to the Irish Constitution (which related to abortion).[212]

The Assembly itself consisted of 99 randomly selected citizens,[213] and sex, age, social class and region were the four demographic targets used to stratify the selections.[214] Meetings of the Assembly took place over one weekend every month and broadly followed the same structure as the BC Assembly. For example, following a presentation from an expert or invited speaker, members broke off into smaller groups managed by a facilitator to discuss what they had heard

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[208]   David Farrell, Jane Suiter and Clodagh Harris "Systematising constitutional deliberation: the 2016-2018 citizens' assembly in Ireland" (2019) 34 Irish Political Studies 113 at 119.

[209]   Daniela Vancic "Face to face with the citizens of the Irish Assembly" (12 March 2019) Democracy International <http://www.democracy-international.org/face-face-citizens-irish-assembly>.

[210] The Citizens' Assembly "Establishment of the Assembly" <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/Background/>.

[211] As above.

[212] As above. The Assembly also considered Ireland's ageing population, its response to climate change, the manner in which referenda are held and fixed term parliaments.

[213] As above.

[214] Farrell, Suiter and Harris, above n 208, at 116.

and to hear people's views.[215] Although the speakers were generally medical, legal or ethical experts, the Assembly also heard several personal testimonies from a number of women about their experiences with crisis pregnancy organisations or abortions in general.[216] Many Assembly members said afterwards that they were deeply affected by these stories, especially after hearing many Irish women had to travel to the United Kingdom to have an abortion.[217] After the roundtable-type discussions, a question and answer session was held where the facilitators asked questions of the experts composed by the citizen members.[218] At the conclusion of the process, an indicative vote on the different proposals was held. Members voted in favour of holding a national referendum on the issue and 87.3% of Assembly members voted to repeal the Eighth Amendment, while 64% of members voted for abortion 'without restriction as to reason' up to 12 weeks.[219]

The Assembly's recommendations for each issue were then compiled into individual reports that were sent to a joint committee of the House of Oireachtas for consideration.[220] The Government agreed to a referendum on the Eighth Amendment and the Assembly's report served as a "road map" for the parliamentary committee to help it provide more detailed recommendations on the legislation that would be put to the public.[221] The vote of the Citizens' Assembly closely resembled the referendum result, with 66.4% of voters voting in favour of repealing the Eighth Amendment.[222] This was a monumental result in one of only two countries in the European Union to have an almost complete ban on abortion.[223] So why was the Irish Citizens' Assembly successful in effecting actual change?

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215 The Citizens' Assembly, above n 210.

216 Farrell, Suiter and Harris, above n 208, at 116.

217 Ronan McGreevy "Why did Citizens' Assembly take liberal view on abortion?" *The Irish Times* (online ed, Ireland, 30 June 2017).

218 The Citizens' Assembly, above n 210.

219 Jane Suiter "Deliberation in Action - Ireland's Abortion Referendum" (2018) 9 Political Insight 30 at 31.

220 The Citizens' Assembly, above n 210.

221 Suiter, above n 219, at 32.

222 Courant, above n 142, at 10.

223 Suiter, above n 219, at 31.

IV *The Irish Success Story*

The Citizens' Assembly managed to take a controversial issue away from politicians and put it back into the hands of the electorate. In comparison to the BC Assembly, 66% of voters were well informed about the Irish Assembly and the fact that regular citizens played a role in actually shaping the recommendations that parliamentarians acted upon provided a strong sense of democratic legitimacy.[224] Irish citizens have perhaps sardonically described the Citizens' Assembly as an "unbeatable process that would have helped the whole Brexit process", one which allowed a "more nuanced discussion of the issue" that was not dominated by the black and white mantras from political parties, and one which helped people "listen, understand and develop empathy for those who planned to vote the other way."[225]

Again in contrast to the BC experience, the media played an important role in publicising the Assembly and its findings. Ireland's national television channel, newspapers and internet sites all comprehensively covered the Assembly to the point that, as one Irish citizen claimed, "unless you stuck your head in the clouds, you could not avoid hearing or reading about the Assembly."[226] The media's coverage meant that the Assembly's considered and reasoned information dominated the debates leading up to the referendum, allowing voters to reach a more complete understating of the issues. Indeed, one study concluded that the establishment of the Citizens' Assembly before the referendum contributed to the overall deliberative nature of the referendum throughout the wider population.[227] Crucially, the study found that people who voted in favour of change tended to be more aware of the Assembly than those that voted against change.[228]

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[224] Suiter, above n 219, at 32.

[225] Caroline Bannock "Transparency and fairness: Irish readers on why the Citizens' Assembly Worked" *The Guardian* (online ed, Ireland, 22 January 2019).

[226] As above.

[227] Alan Renwick and Michela Palese *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (The Constitution Unit, March 2019) at 196.

[228] At 196. The authors state at 196 that correlation does not necessarily prove causation and that further research is being conducted to fully determine if voters were actually swayed by the Assembly's recommendations. The study also does not appear to have taken into account education or socio-economic status, which may have influenced the results.

V *The Impact of Citizens' Assemblies on the Populace*

This finding supports evidence from elsewhere that citizens' assemblies can play a fundamental role in fostering a wider deliberative environment and actually affect the views of non-participating citizens. For example, one study found that even in a highly polarised political setting, Oregon voters improved their factual policy knowledge when exposed to a statement written by a citizens' assembly.[229] The knowledge they gained from other citizens that had deliberated on the topic meant voters were less reliant on their own partisan motivated reasoning and pre-existing commitments to help them decide which way to vote.[230] Research from Sean Ingham and Ines Levin has also indicated that voters are increasingly ready to treat findings from deliberative bodies as informative signals on a national scale.[231]

Although Ingham and Levin's study could not conclusively suggest that voters will always revise their opinions in response to the findings of a citizens' assembly, it did note that some participants may not have been as willing to trust the views of their fellow citizens because they did not know enough about the "source of the signal."[232] This suggests that if regular voters know more about the composition of citizens' assemblies, how they are run and how they arrive at their decisions, then they may be more willing to follow the signals of citizens' assemblies. Therefore, in order for citizens' assemblies to be institutionalised effectively, steps must be taken to educate the public about the assemblies themselves. The next chapter will outline the troubles associated with combining citizens' assemblies and referendums before outlining New Zealand's current legal framework governing referendums.

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[229] Kristinn Mar and John Gastil "Tracing the Boundaries of Motivated Reasoning: How Deliberative Minipublics Can Improve Voter Knowledge" (2019) 0 Political Psychology 1 at 2.

[230] At 16.

[231] See Sean Ingham and Ines Levin "Effects of Deliberative Minipublics on Public Opinion: Experimental Evidence from a Survey on Social Security Reform" (2018) 30 International Journal of Public Opinion Research 51-at 76. This study tested the influence of deliberative mini-publics on public opinion by exposing one group of participants to the findings of a mini-public about social security reform while a control group received no information at all.

[232] At 76.

CHAPTER V: ASSESSING THE FIELD

I *The Stage is Set*

Clearly, the idea of citizens' assemblies fits the zeitgeist.[233] As citizens (and some politicians) become aware of the how the minimalist model of democracy plays out in practice, they are increasingly asking for public decision-making to be more deliberative and inclusive in nature.[234] In justifying the April 2019 decision to establish a citizens' assembly in Scotland, Constitutional Relations Secretary, Michael Russell, claimed that "citizens' assemblies are becoming an established way for mature democracies to engage with complex and contested issues on an inclusive, informed, and respectful basis."[235] Yet, despite being well established in democratic theory, citizens' assemblies still tend to be used sporadically and have not yet made the final step to becoming a regular part of a country's political life. In other words, there appears to be issues with the macro-political "uptake" of citizens' assemblies.[236] As Claudia Landwehr notes, the more influential deliberative democracy becomes, the more expectation there is that it will make "explicit its suggestions regarding institutionalisation."[237]

The goal is therefore to map out a normatively defensible institutional role that citizens' assemblies can play in our wider democratic architecture. The starting point for this goal must be representative democracy. Citizens' assemblies cannot simply replace representative institutions, but they can serve as valuable adjuncts to familiar features of the democratic

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[233] Renwick, above n 192, at 114.

[234] In 2019, citizens' assemblies have been announced to take place in the United Kingdom and in Scotland. In the United Kingdom, a citizens' assembly will be established to look at the fastest and fairest ways to reduce the UK's carbon emissions, while in Scotland a citizens' assembly will be established to look at three questions relating to Scotland's future.

[235] Scottish Government "Citizens' Assembly of Scotland" (26 June 2019)
<https://www.gov.scot/news/citizens-assembly-of-scotland-1/>.

[236] Robert Goodin and John Dryzek "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics" (2006) 34 Politics and Society 219.

[237] Claudia Landwehr "Discourse and Coordination: Modes of Interaction and Their Roles in Political Decision-Making" (2010) 18 The Journal of Political Philosophy 101 at 101.

process like referendums.[238] As discussed in part one, referendums are an imperfect way of making large-scale decisions as they can easily be captured by a familiar set of political pathologies. But as the BC and Irish experiences showed, referendums preceded by citizens' assemblies can help ensure the public approach voting day with, at the very least, an awareness of what a representative sample of their fellow citizens have learnt and decided. There is still little research on how regular voters can be influenced by the deliberations of a select few citizens, but the research that does exist suggests that when exposed to the findings of deliberative bodies, regular voters increase their knowledge of the particular issue and approach the vote in a much more informed way.[239] If citizens' assemblies can have this effect, then they offer a timely antidote to elite-driven and often contradictory political discourse.[240]

II *The Mission*

The mission then becomes how we should combine referendums with citizens' assemblies or, to put it another way, how we should make direct democracy more deliberative. Ron Levy refers to the requirement for a referendum coupled with robust deliberation as "a uniquely onerous double-requirement."[241] Levy is right to refer to it as onerous because at first blush combining a citizens' assembly with a referendum seems paradoxical. If we accept that for a decision to be legitimate it must be preceded by informed, non-coercive deliberation through citizens' assemblies, how can it make sense to then put the issue to a large-scale referendum where these features are absent? Why would we put the carefully crafted recommendations of a citizens' assembly to the voting public who have not been able to deliberate in the same ways as the assembly members? This model seems to run the risk of undermining the work of the assembly and simply proving the critics' point that citizens' assemblies are a waste of time because their conclusions will not be shared by the wider, non-deliberating public.

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[238] Goodin, above n 3, at 269.

[239] See Mar and Gastil, above n 229, and Ingham and Levin, above n 231.

[240] See James Druckman and Kjersten Nelson "Framing and Deliberation: How Citizens' Conversations Limit Elite Influence" (2003) 47 American Journal of Political Science 729-45 for a study on how deliberation enhances opinion quality and eliminates elite framing influence.

[241] Levy, above n 56, at 557.

However, John Parkinson argues that referendums allow citizens to give a wider social act of consent to recommendations of citizens' assemblies.[242] Although referendums can never achieve the same deliberative levels as the assemblies, they are a necessary and legitimating part of the process. Referendums do not necessarily have to spiral into Brexit-style campaigns either. As shown in Ireland and to a lesser extent in BC, recommendations from the assemblies, indeed the citizens themselves, can drive the referendum campaigns and create a much more informed and less polarising environment. When the media publicises assemblies and when, as I will argue, the process includes a fourth promotional stage, referendums actually can become more deliberative. In this way, deliberative democracy transforms from being a theoretical orientation used to undermine and critique direct democracy into a tool that can be used to better our practices of direct democracy.[243] The role of the law in this context is therefore to guarantee or institutionalise the right conditions required for its production.

III *The Current Framework*

Before we can consider how to implement citizens' assemblies in New Zealand, we need to understand the current legal framework governing referendums. There are two ways a referendum can take place in New Zealand. The first way is through a government-initiated referendum, where the government of the day decides that a particular issue for whatever reason should be dealt with by the public rather than Parliament. There is no general Act governing government-initiated referendums which means each referendum takes places under its own separate statute. Provided Parliament passes the appropriate legislation, the government of the day can therefore shape the referendum process as it pleases.

The second way a referendum can be held is through the citizens-initiated process. Unlike government-initiated referendums, the process for holding all citizens-initiated referendums is specified in the Citizens Initiated Referenda Act 1993 ('the Act'). As the long title of the Act makes clear, a citizens-initiated referendum will only ever be indicative in nature.

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[242] John Parkinson 'Deliberative Systems' in Andre Bachtiger and others (eds) *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, Oxford, 2018) 432 as cited in Rashbrooke, above n 1, at 275.

[243] Ethan Leib "Can Direct Democracy Be Made Deliberative?" (2006) 54 Buffalo Law Review 903 at 924.

Consequently, the only legal requirement following the outcome of the referendum is for the Minister of Justice to inform the House of Representatives of the result.[244] This means that citizen-initiated referendums essentially amount to no more than "glorified opinion polls" of those people who voted, with governments free to simply ignore the results.[245] And this is exactly what governments have done; not one of the five citizen-initiated referendums to have been held in New Zealand has resulted in substantive policy change.

The citizens-initiated referendum's democratic character is further undermined by the amount of power that is vested in the Clerk of the House of Representatives. Although not allowed to change the actual question, the Clerk is empowered to determine the final wording of the question[246] after consulting the person who submitted the proposal and anyone else the Clerk "thinks fit".[247] While it is important to ensure clear and precise questions are asked, giving an unelected person the power to finally determine the wording of a question under an Act which is clearly there to empower regular citizens to put a matter to a public vote is troubling. From these weaknesses we can see that although the idea of a citizens-initiated referendum sounds appealing, the legislation undermines any potential for citizens to effect real change through its processes. Its weaknesses have even led some scholars to suggest we should simply remove the legislation from our statute books.[248]

Incorporating citizens' assemblies alongside citizens-initiated referendums may therefore not only be futile in that they do not result in tangible change but might actually see citizens' assemblies become associated with a largely ineffectual democratic process. Yet, just because citizens-initiated referendums as they currently exist are problematic does not necessarily mean we should remove them altogether. The legislation exists, and it can (and should) be improved

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[244] Citizens Initiated Referenda Act 1993, s 40(3).

[245] Geddis, above n 46, at 321.

[246] Citizens Initiated Referenda Act 1993, s 11.

[247] Citizens Initiated Referenda Act, s 9.

[248] See for example Bridget Fenton and Andrew Geddis "Citizens initiated referenda" (2009) 334 NZLJ at 336 who argue that keeping the Act on the statute books is like "keeping a poorly preforming team member on the benches, in the hope that one day he or she will perform well enough to get game time" and that the CIR process is simply not a useful "part of our democratic process".

through the inclusion of citizens' assemblies to ensure the legislation fulfils its purpose of resolving voter disenchantment and re-establishing public confidence in our political system.[249] The inclusion of citizens' assemblies would ensure we can put the 'citizen' back into the citizens-initiated referendum process. Ultimately, it would be a sad indictment on our democracy if a piece of legislation that sought to re-establish public confidence in our political system was removed from the statute books.

Citizens-initiated referendums can be improved without making them binding too, which would arguably be impossible under New Zealand's current constitutional arrangements.[250] The next chapter will outline New Zealand's limited experience with citizens' assembles before presenting a legislative model that could be used to combine citizens' assemblies with referendums in New Zealand.

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[249] Ben Goschik "You're the Voice - Try and Understand It: Some Practical Problems of the Citizens Initiated Referenda Act" (2003) 34 VUWLR 695 at 726.

[250] Legislating for binding citizens-initiated referendums would conflict with parliamentary sovereignty as it would require a current Parliament to bind a future Parliament. And even if Parliament did decide to introduce binding citizens-initiated referendums, there would be nothing to stop a future Parliament from simply repealing the legislation. The only way citizens-initiated referendums could become binding would be if New Zealand completely reordered its constitutional structure and adopted a supreme constitution that prevented Parliament from repealing any such legislation with a simple majority or that allowed the courts to strike down acts of Parliament that were unconstitutional.

CHAPTER VI: A LEGISLATIVE MODEL

I *New Zealand and Citizens' Assemblies*

New Zealand has had little to no experience with citizens' assemblies, which is strange considering our heightened levels of community and relatively small population and geographic space.[251] In 2007 the Green Party proposed to establish a citizens' assembly to look at the Electoral Finance Bill, as it felt politicians with vested interests should not consider legislation directly concerning them.[252] The project never took flight, but the responses to the proposal were intriguing insofar as they are perhaps an indication as to how some politicians would respond to the idea again. For example, National MP Wayne Mapp claimed that a citizens' assembly was not needed because "everyone in this Chamber is a citizen. Every person here has been elected. It is an assembly."[253] Tim Grosser, also a National MP, questioned the capacity of ordinary citizens to deal with such matters and claimed the proposal to establish a citizens' assembly would be "an absolute disaster."[254] In 2018 the idea of a citizens' assembly was again floated, but this time to supplement the referendum on the legalisation of cannabis. The only official reason given for not going ahead with a citizens' assembly was that there was not enough time to work through the detail and the proposed legislation.[255]

II *The Referendums Act*

To ensure citizens' assemblies become a meaningful part of New Zealand's political life and are not used on an ad hoc basis, they need to be incorporated into legislation and given a formal status. To be effective, citizens' assemblies also need to be seen as a natural part of our referendum processes, especially citizens'-initiated referendums. A Referendums Act would help clarify and outline the roles of citizens' assemblies and, more importantly, determine when

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[251] Janine Hayward "Citizens Assemblies and Policy Reform in New Zealand" (2013) 9 Policy Quarterly 70 at 74.

[252] At 73.

[253] (6 December 2006) 644 NZPD 13615.

[254] (6 December 2006) 644 NZPD 13622.

[255] Laura Walters "Binding cannabis referendum in 2020" *Newsroom* (online ed, Wellington, 18 December 2018).

they would be engaged. A generic piece of legislation governing referendums has been proposed before, but the Electoral and Justice Committee believed that it was important for Parliament to be able to debate each referendum.[256]

A general Act would still allow Parliament to debate the details of each referendum, the only difference would be that the Act would contain general provisions that would serve as the ground rules around the use of citizens' assemblies and how they should be established and selected.[257] The Act could maintain the two separate processes for initiating a referendum and citizens' assemblies could conceivably be incorporated into both processes. Citizens' assemblies would, however, be triggered or engaged differently depending on what type of referendum it was.

III *Citizens-Initiated Referendums*

Under the citizens-initiated process, citizens' assemblies would be mandatory and could play an important role in helping to determine the final question (taking this task away from the Clerk of the House) and leading the public debate on the issue. The model could look something like this: a person or group who wants to promote an indicative referendum would submit their proposed question to the Clerk along with the prescribed fee. Instead of the Clerk then making the proposal public and determining the wording of the final question, the promoter could then have a 12-month period to gather the required 10 percent of signatures from enrolled voters. The current restrictions around advertising would still apply, meaning

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[256] Justice and Electoral Committee *Inquiry into the 2011 General Election* (April 2013) at 49. The Committee was also concerned that if a general Act was introduced, the only oversight would come from the Regulations Review Committee, which it did not consider to be sufficient.

[257] For example, the Act would provide a framework for things such as how members should be selected, what experts should be invited and where the assembly will meet. Parliament would still be able to debate issues such as the timing of the referendum and, as is outlined below, whether a citizens' assembly should take place at all for government-initiated referendums. A general piece of legislation governing referendums would also avoid Parliament having to pass specific legislation every time there is a government-initiated referendum.

no person alone or in combination with others could knowingly spend more than a set amount on publicising their proposal.[258]

If the required number of signatures were collected, the Clerk would follow their normal procedures. Firstly, the Clerk would ensure the requisite number of signatures has been collected[259] and select a statistically representative sample to scrutinise and give to the Electoral Commission to check against the electoral rolls.[260] Once the Electoral Commission confirms how many signatures of this representative sample are valid, the Clerk would then apply that proportion to the petition as a whole,[261] and if sufficient signatures have been obtained, certify the petition is correct and give it to the Speaker of the House.[262] It is at this point the current process would change. The Speaker would present the petition to the House and, instead of the government then deciding when and how the referendum would be held,[263] the Speaker would declare that a citizens' assembly is to be established in accordance with the new Act's general provisions.

The role of the citizens' assembly would be twofold. Firstly, it would be required to set the precise referendum question.[264] As with other citizens' assemblies, experts could educate the assembly on the importance of wording and how to construct referendum questions. The goal here would be to ensure the assembly avoids proposing questions like the one asked in 1999, which was convoluted and did not invite a simple yes/no answer, let alone its loaded

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[258] The Citizens Initiated Referenda Act 1993, s 42(a) currently sets this amount at $50,000. This figure has not changed since 1993 and would need to be adjusted for inflation.

[259] Citizens Initiated Referendum Act, s 16.

[260] Section 19(2).

[261] Section 19(4).

[262] Section 18(1)(a).

[263] Section 22(2).

[264] Setting the question before deliberating on the substantive issues would mean the Assembly could focus squarely on producing a suitable referendum question before deliberations on the actual issue begin. Having a question already in place before the deliberations begin will also help focus the Assembly's work at the learning, deliberation and consultation phases.

phrasing.[265] Once the assembly has constructed a question, deliberated on it, and held a vote, the question could be released to the public. Crucially, no public authority or figure would hold a type of veto power over the question. Ideally, the question would be released well before polling day to allow both the public and the assembly to come to terms with the issues and engage in debate.

The assembly's second role would be to deliberate and engage with the public, which it would do right after it had set the question. The assembly could follow the structure of the BC Assembly or the Irish model and divide the process into the three stages of learning, public consultation and deliberation. The learning phase would need to be live streamed to ensure members of the public could tune in whenever they wished and perhaps even comment or ask their own questions through a discussion website. Crucially, a fourth, promotional stage should be added. This stage would involve assembly members holding public meetings around the country on the referendum issue to ensure the wider public is able to deliberate and engage with the issue too. Assembly members would present their recommendations to their local constituencies and generally explain how they came to their conclusions. These public meetings should be accompanied by information sheets similar to the ones produced throughout the BC consultation phase and would be distributed throughout the country outlining what the assembly was, how it was formed, and the assembly's final recommendations.

IV *Government-Initiated Referendums*

The role of citizens' assemblies would be similar for government-initiated referendums, but with a few crucial changes. Unlike with citizens-initiated referendums, governments should have scope to choose when a citizens' assembly will accompany a government-initiated referendum. In practice, this would mean that once the government had announced that a referendum will take place, the Referendum Act would mandate that the government has to put before Parliament a motion to consider whether a citizens' assembly should be held prior

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[265] The question asked was: "Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?"

to the vote.[266] If Parliament voted to trigger a citizens' assembly, the Act's general provisions would then guide how the assemblies should be selected and run. Citizens' assemblies should not be mandatory for government-initiated referendums because they require a lot of planning and work best when they are asked to deliberate on certain issues.

Traditionally labelled conscience issues lend themselves well to a citizens' assembly process, as do the sorts of topics we do not want politicians themselves deciding such as our voting system. These are usually issues that people care about deeply or are simply controversial enough that they tend to dominate public life for a time. If established to look at these issues, citizens' assemblies will start from a good place; that is, the public will usually be engaged already, and the assembly will not have to spend time trying to convince people that they should care more about a certain issue. It is also unclear why politicians should necessarily decide conscience issues, especially considering they are freed from the shackles of party discipline.

Of course, MPs have been elected by the population to do an important job that regular people do not want to do. Yet, they have also been elected because they belong to a party that has its own values and principles, and often not because of their personal views on conscience issues.[267] When politicians are able to have recourse to their own views on a conscience issue, many do so in a way that conflicts with the views of those that elected them. Speaking on the topic of abortion reform, ex MP Richard Prebble claimed that parliamentarians had "no mandate to make a decision" because they were selected not because of their views on abortion, but because their parties thought they would make good members of Parliament.[268]

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[266] Essentially, this would mean citizens' assemblies become a mandatory relevant consideration for governments to consider before they hold a referendum. If for whatever reason the government did not think a citizens' assembly would be appropriate for a particular issue, they would have to justify why this is so to the House.

[267] MP's views on conscience issues do not receive much attention at election time, as party policies tend to dominate. It is not until a conscience vote is held that many constituents find out a MP's personal views on a particular issue.

[268] (31 May 1978) 417 NZPD 4980-81. See also the Royal Commission's report above, n 52, at 177 which states that "parliamentarians do not find them [conscience votes] easy to deal with. MPs can face the dilemma whether they should vote on them according to their own private moral views, or according to the majority view (if any) within their constituency."

Further, conscience votes leave the population in a state of liminality, as they often do not know which way the MPs will vote. As David Lange claimed, the outcome of conscience votes is often a "shambles, a kind of legislative lottery."[269] By holding citizens' assemblies on conscience issues, this lottery and the deficit or mismatch created between politicians and citizens when the former vote on conscience issues could be avoided.

The other fundamental change for government-initiated referendums would be the inclusion of politicians in the citizens' assembly itself. Instinctively, adding politicians to a process with ordinary citizens may seem problematic and against the spirit of deliberative democracy. After all, the deliberative movement has gained momentum in recent years because politicians themselves are contributing to the loss of faith in democracy. And of course, there is a danger that the politicians may dominate the process, leading the citizens to simply submit to them. However, Ireland's Constitutional Convention of 2013 showed that this danger can be managed through careful facilitation and when the assembly staff ensure every person's view is heard.[270] In that instance, 66 citizens joined 33 members of Parliament in deliberating on eight specific topics and, according to David Farrell, the politicians made every effort not to steal the limelight and always encouraged the citizen members to speak.[271] But the question remains: why should politicians feature in the process at all?

Firstly, politicians will help bring the citizens' assembly, its deliberations and its recommendations into the public eye. A key failure of the BC Assembly was that it did not include politicians and so it was difficult to engage the public in the entire process.[272] Because

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[269] David Lange "Lawmaking and Political Process" (1995) 245 NZLJ at 247.

[270] Including politicians in citizens' assemblies would mean some MPs could not carry out their regular work for a significant period of time. This could potentially affect select committees, local constituencies and the other important work MPs do. Finding ways to ensure we do not simply rob one institution of what it needs to function effectively to support another one would be crucial. Holding the citizens' assemblies on weekends may avoid some of these issues but if citizens' assemblies become a regular part of our democratic processes, this is an issue we would have to manage.

[271] David Farrell "Deliberative democracy, Irish style" (2014) 34 Inroads 110 at 114. Note that this was the Irish Constitutional Convention and not the Citizens' Assembly in 2016.

[272] Michael Pal "The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions, and the Law of Democracy" (2012) 38 Queens Law Journal 259 at 279.

politicians naturally attract media attention, it is more likely that the assembly itself will receive greater public attention; this can only be a good thing as it will hopefully get people talking about the assembly itself and its findings. Secondly, if politicians abstain from the entire process as they did in BC, it is easier to pass off citizens' assemblies as no more than ineffectual focus groups. Including politicians in the process will imbue it with a greater sense of authority and allow citizens to view the assembly as an institution that is to be taken seriously. Adding politicians may also relax the concern discussed earlier about the lack of democratic accountability and legitimacy citizens' assemblies may suffer from when it is solely citizens participating.

V *Nature of the Recommendations*

While the recommendations from a citizens' assembly in a citizens-initiated referendum could go straight to a referendum, the Referendums Act would still have to outline what force the recommendations from a citizens' assembly would have for a government-initiated referendum. One approach would be to give citizens' assemblies final authority on what will be put to the public. A provision in the Act could state that if a citizens' assembly is held before a referendum, its recommendations must be put to the wider public without any further involvement from the government or Parliament. This was the case in BC, although the Government passed a specific bill before the Citizens' Assembly process started that said any recommendations from the Assembly would be put directly to a referendum. This approach is preferable as it would give the citizens' assembly some 'teeth' and would ensure politicians are unable to pick and choose what to put to a referendum.

The other and perhaps more conservative approach is to give the recommendations of a citizens' assembly provisional authority in the sense that they are still subject to approval. In Ireland, the recommendations of the Assembly were sent to a parliamentary joint committee who used them as a road map for fleshing out the legislation that would be put to the public, but the ultimate decision to hold a referendum came from the Government. It would have taken an incredibly brave government to decide not to hold a referendum in light of the Assembly's overwhelming support for one, but this would nonetheless remain a possibility under this option. Given the trepidation shown by New Zealand's parliamentarians towards

citizens' assemblies in the past, the conservative approach may be more realistic.[273] A provision in the Referendums Act could simply state that, following a citizens' assembly, Parliament must *consider* the recommendations of the assembly.[274]

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[273] If the recommendations of the citizens' assembly had to go back to Parliament, it could also signal the start of a new symbiotic, dialogical relationship between citizens and representatives in relation to referendums and would avoid leaving representatives out of the process altogether.

[274] This would ensure the recommendations of the citizens' assembly are given some recognition and force MPs to at least engage with what a random selection of citizens decided. As in Ireland, a parliamentary select committee could be established to consider the recommendations of the citizens' assembly and produce a report that is then put before the House to debate and for the government to consider.

CONCLUSION

For too long we have neglected our democratic infrastructure and the effects are showing. People are losing faith in democratic norms because they have been excluded from politics and decision-making. Realising that citizens need to be more involved in the democratic process, leaders around the world have been increasingly turning to referendums to decide important issues. Yet, under our current minimalist model of democracy that privileges the private act of voting and not deliberation, referendums have simply become mechanisms for people to express their anger at political establishments. Equally, constrained by an economic model that champions the rugged individual, citizens have no incentive to listen and deliberate with others on important issues. After all, this is an ideology which, at its core, champions the idea that "there is no such thing as society."[275]

However, citizens around the world are steadily weakening this assumption and are demanding that they take part in the governance of their own societies. Increasingly, deliberative democratic procedures like citizens' assemblies are being used to bring citizens closer to the decision-making process and to counter some of the pathologies that have begun to characterise modern politics. Citizens' assemblies are not the magic bullet that will miraculously reinvigorate democracy or soften the impacts of neoliberalism. They will, however, give citizens more confidence in democracy and allow us to put the 'demos' back into democracy.

Just like we repair roads and our water systems, it is time to repair our democracy. Citizens' assemblies are a much-needed addition to our democratic infrastructure and would allow us to create a distinctively New Zealand form of democracy. There is much more to democracy than simply casting a vote every now and then, and our referendum laws need to reflect this. We can no longer rely on the Kiwi adage of "if it ain't broke, don't fix it" because 'it' is broken, and we need to fix it.

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[275] The Guardian "Margaret Thatcher: A life in quotes" (8 April 2013)

<https://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes>.

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