Briefing

The Electoral Commission

European Union Referendum Bill
House of Lords Report Stage (Day 1) Briefing

17 November 2015

Introduction

This briefing sets out the Electoral Commission's views on amendments tabled ahead of the first day of Report Stage of the European Union Referendum Bill in the House of Lords on 18 November.

We have not commented on all amendments tabled in relation to this Bill, and the absence of comment does not imply that we support them. In particular, decisions on the franchise for the referendum and on the level for spending limits for campaigners are important issues for Parliament to decide on, although the Commission will comment on the practical implications and workability of any amendments to the Bill in these areas where needed.

This briefing covers amendments relating to:

- The timing of the referendum
- Entitlement to vote in the referendum
- Restrictions on the circumstances in which regulations can be made to amend
- Campaigning and financial controls
- Section 125 of the Political Parties, Elections and Referendums Act 2000 (PPERA)
- Fines in case of breach of Section 125 of PPERA

Our comments at this stage relate solely to the provisions currently set out on the face of the Bill. However, if the Bill is significantly amended during its progress through Parliament, the detail of such changes will need to be carefully considered. We will continue to brief on the Bill and any relevant amendments that are tabled as the Bill progresses through Parliament. All briefings will be available on our website here.

The Electoral Commission's role in referendums

The Electoral Commission has specific responsibilities and functions in relation to the delivery and regulation of referendums held under the Political Parties, Elections and Referendums Act 2000 (PPERA), which applies to any referendum Bill brought before the UK Parliament unless specifically stated otherwise.

Our responsibilities under PPERA include:

- Commenting on the intelligibility of the referendum question.
- Registering organisations or individuals who want to campaign in the referendum.
- Considering and approving applications for designation as the lead campaign group for each referendum outcome.
- Making grant payments to the approved designated organisations.
- Monitoring spending on referendum campaigning, in line with the referendum spending limits imposed by PPERA.
- Providing advice and guidance on the rules to campaigners.
- Monitoring and securing compliance with campaign donation, loan and spending controls.
- Reporting on the administration of the referendum and referendum campaign spending.

The Chair of the Commission, or a person the Chair appoints, is the Chief Counting Officer for the referendum and responsible for certifying the outcome of the referendum.

Clause 1: Timing of the referendum

Amendment 1 tabled in the name of Lord Hamilton of Epsom would require draft regulations specifying the date of the referendum to be laid before Parliament at least 16 weeks before the proposed polling date, and would require the polling date to be at least 10 weeks after the regulations are made.

As set out in our briefing issued ahead of Day 1 of Committee Stage of the Bill in the House of Lords, **the Electoral Commission supports this amendment.**

Our experience of administering and regulating referendums in the UK since 2004 has shown that campaigners and electoral administrators need time to prepare themselves properly to follow the detailed rules which Parliament has specified.

We continue to recommend that best practice for future referendums is that all legislation should be clear (whether by Royal Assent to a Bill or the introduction of regulations to Parliament for approval) at least six months before it is required to be implemented or complied with by campaigners, the Chief Counting Officer, Counting Officers or Electoral Registration Officers. We therefore support this amendment, although we note that this minimum period would be less than the six months that we have recommended.

Clause 2: Entitlement to vote in the referendum

Recent media reports have indicated that the Commission believes there must be 12 months between legislation passing through Parliament to change the franchise and the first electoral event to which this applies. This is not the case. **The Commission has**

been consistently clear that a change to the franchise is a matter for Parliament and that we will advise on the practical implications of any such change.

It is important that Parliament is aware that if the annual canvass does not fall before the electoral event that a franchise change applies to, a key opportunity is missed to get the new group of voters registered. This does not mean, however, that other options are not available to help get as many voters as possible on the register in the available timeframe. Although the scale of the challenge presented by some of these options should not be underestimated – and it must be borne in mind that every voter is now required to register themselves individually – this does not mean that steps cannot be taken to reduce the risks presented by them with proper planning and funding.

We will further advise Parliament of any risks relating to voter registration if the franchise is changed and what is being done to address these as part of our briefing when the proposed date of the referendum is announced. The briefing below sets out the key points that would need to be considered in relation to the amendments that are scheduled for debate on the franchise.

A number of amendments have been tabled to change the franchise for the referendum on the UK's membership of the European Union, including: extending the franchise to 16- and 17-year-olds; extending the franchise to all British citizens living outside the UK, or to British citizens living in other EU member states; extending the franchise to citizens of other EU member states who live in the UK; and removing the franchise from non-British citizens resident in the UK.

If the Bill is amended to change the franchise for the referendum, significant further work would be required in the period between Royal Assent to the Bill and the deadline for applications to register to vote:

- Parliament would need to debate and approve detailed regulations to enable Electoral Registration Officers (EROs) to determine applications and add newly enfranchised electors to the register.
- The UK Government would need to change the online electoral registration website (www.gov.uk/register-to-vote) and approve new registration forms to allow newly eligible people to apply to register to vote.
- EROs, the Electoral Commission and campaigners would need to make sure newly eligible people know how and when to apply to register to vote.

It is particularly important that any newly eligible electors know what action they have to take before the deadline for applications to register to vote ahead of the referendum. Without effective plans for informing and encouraging registration, newly eligible people may not be able to take advantage of any rights which Parliament has extended to them for the referendum.

Changing the franchise for the referendum would also have an impact on the definition of those entitled to donate money to referendum campaigners, which would need to be reflected in the detailed regulatory framework for donations and spending by referendum campaigners.

We have set out below some of the specific practical areas that will need to be addressed should Parliament decide to change the franchise for the referendum.

Extending the franchise to 16- and 17-year-olds

The experience of changing the voting age for some polls in Scotland has demonstrated the benefits of early certainty about the legislation. The legislation to lower the voting age to 16 for the September 2014 Scottish Independence Referendum was clear more than a year before the referendum. This meant that EROs in Scotland were able to target 15- to 17-year-olds at the same time as carrying out the annual canvass of households between October 2013 and March 2014. This was supported by Electoral Commission advertising activity across Scotland targeted at 15- to 17-year-olds, and activity carried out by schools, youth workers and youth organisations across Scotland. It is also worth remembering that the change in the franchise for the Scottish referendum took place under the previous system of 'household registration', so it was possible for other people in the house, such as parents or guardians, to register the newly enfranchised 15- to 17-year olds.

Legislation to lower the voting age for Scottish Parliament and local government elections in Scotland was in place ahead of the 2015 annual canvass of households, almost a year before the May 2016 Scottish Parliament elections. This means that EROs in Scotland have been able to target 15- to 17-year-olds as part of their scheduled annual household canvass activities during this summer and autumn and plan work with educational establishments at the start of the new academic year to bolster this. We do not yet know what the full effect of this activity has been.

While the date of the referendum remains unknown, it will be difficult for EROs, the Electoral Commission, educational establishments, campaigners and others to plan the activities that will be required to effectively target and encourage any newly enfranchised electors to register to vote. If the referendum is held before the next annual canvass of households which is due to begin in July 2016, EROs will not have been able to take advantage of the opportunity to communicate directly with newly enfranchised 15- to 17-year-olds who would be eligible to participate in the referendum.

If there is no canvass to build from when targeting this group, a separate registration initiative, led by EROs and supported by the Electoral Commission, would need to be planned for and delivered in England, Wales and Northern Ireland in the period of time before the referendum to inform and encourage newly eligible electors to register to vote. The activity required in Scotland would be less significant, because EROs would be able to build on the work currently being carried out to register 16- and 17-year olds in advance of the May 2016 Scottish Parliament elections.

This would need to be reinforced by significant public awareness activity at both the national and local level. Political literacy initiatives may also be needed, as would targeted work in schools and other educational institutions to help get the message out to these groups quickly. Additional funding would also be needed to make sure that these activities could be delivered by EROs, the Commission and other relevant bodies.

Extending the franchise to all British citizens living outside the UK

At present UK citizens living outside the UK are only eligible to register to vote as an overseas elector if they have been included in a UK electoral register within the last 15 years. In order to enable newly enfranchised overseas electors to vote at the referendum, further work would be required to identify which Counting Officers would be responsible for administering postal or proxy voting arrangements.

If the changes are made an extensive public awareness campaign would be needed. As well as its own public awareness campaign the Commission would work with the Foreign and Commonwealth Office to use the networks provided by its consulates and embassies to reach UK citizens living overseas. We would also work with a range of other partner organisations that helped us deliver a significant increase in overseas electors ahead of the UK General Election.

Extending the franchise to all British citizens living within the EU

In addition to the practical challenges of communicating with British citizens overseas set out above, extending the franchise for the referendum to all British citizens living within the EU would mean that eligible citizens would have to provide proof of residence within the EU. EROs would need to be satisfied that they are living in the EU, rather than elsewhere in the world. It is not clear how such proof could be provided and verified by EROs.

Extending the franchise to citizens of EU member states who have lived in the UK for more than five years

Extending the franchise for the referendum to citizens of EU member states who have lived in the UK for more than five years would mean that eligible citizens would have to make a declaration or provide proof of their length of residence in the UK. EROs would need to contact all potentially eligible electors, who are already included in electoral registers for local government elections, to require them to provide such a declaration or proof of their entitlement to be registered for the referendum. It is not clear how such proof could be provided and verified by EROs.

Removing the franchise from non-British or Irish citizens resident in the UK

In addition to British citizens, some non-British citizens are currently entitled to be registered and vote in UK Parliamentary elections: citizens from Commonwealth countries and the Republic of Ireland who are resident in the UK and have leave to remain. Electoral registers do not currently identify which entries relate to citizens from the Republic of Ireland or Commonwealth countries.

In order to remove the franchise for the referendum from non-British or Irish citizens resident in the UK, EROs would need to check other records they hold to identify citizens from Commonwealth countries in order to remove them from the register for the referendum.

Schedule 1: Campaigning and financial controls

Amendment 9 tabled in the name of Baroness Anelay of St Johns would ensure that the referendum period must be at least 10 weeks long, ending with the date of the poll. **Amendment 20 tabled in the name of Lord Hamilton of Epsom** (in relation to Clause 6) and **Amendment 8 tabled in the name of Lord Willoughby de Broke** would also have the same effect.

The Electoral Commission supports these amendments.

The Bill currently provides for the length of the referendum period to be specified in secondary legislation after Royal Assent. Unless it is modified by referendum legislation, PPERA provides for a minimum 10-week referendum period, comprising a period of up to six weeks for potential lead campaigners to apply and be appointed by the Electoral Commission followed by a minimum four-week period before polling day.

Based on the Commission's experience of regulating the rules for the Scottish Independence Referendum in 2014, we recommended an alternative approach to the timetable for appointing lead campaigners should the legislative timetable allow – we recommended that the appointment should take place shortly *before*, rather than during the first six weeks of, the referendum period. This would provide clarity earlier for voters and campaigners and for the lead campaigners to be in place shortly before the majority of the regulatory controls come into force. This would allow for a shorter total duration of the subsequent referendum period, for example, a six week designation period and a subsequent 10 week referendum period. The Bill was amended at House of Commons third reading to de-couple the start of the designation process from the start of the referendum period to allow for this.

These amendments would provide for a minimum 10 week referendum period. As under PPERA, this would enable the referendum period to be set at 16 weeks if designation was not to take place before the start of the referendum period, thus providing for a minimum 10 week post-appointment period. In our view, this would go some way to giving designated lead campaign groups the time needed to get their messages to voters, including to plan and effectively use free mailing and TV broadcasts.

Amendment 10 tabled in the name of Lord Willoughby de Broke would provide that the period for designating lead campaigners must commence at least six weeks before the start of the referendum period.

The Electoral Commission supports this amendment.

The Bill was amended in the House of Commons at Report Stage to give the Government the power, subject to approval by Parliament, to enable to the process to appoint lead campaigners to start before the beginning of the referendum period.

As set out above, based on the Commission's experience we have recommended that the appointment of lead campaigners should take place shortly *before*, rather than

during the first six weeks of, the referendum period. This would provide clarity earlier for voters and campaigners, and for the lead campaigners to be in place shortly before the majority of the regulatory controls come into force. This amendment would give effect to that recommendation.

Amendment 11 tabled in the name of Lord Hannay of Chiswick, would allow the Electoral Commission to designate a lead campaigner on only one side of the referendum debate if it is not able to designate lead campaigners for both outcomes.

The Electoral Commission supports the principle of this amendment, which reflects recommendations that we made following previous referendums. However, it is important that this amendment is only considered alongside the overall package of benefits available to designated campaigners in order to balance the reduced incentive to make a tactical decision against applying for designation, whilst not artificially creating a one-sided campaign. There are potential implications for broadcasters who have told us of their concern that they would need to consider how they could meet their obligation to impartiality if they were required to show a referendum broadcast for only one side of the debate.

PPERA provides for the Commission to designate lead campaigners either for both outcomes or not at all. In addition to the benefits of being a registered campaigner, lead campaigners will be entitled to a spending limit of £7m, campaign broadcasts, free mailing, a publicly funded grant, and access to public meeting rooms.

Following the 2011 referendums we recommended that steps should be taken to reduce the potential advantages of the current PPERA designation model for a prospective lead campaigner to decide against applying for designation – for example if a campaigner sees a tactical advantage in not seeking designation to frustrate the other side's access to the additional campaigning benefits.

The Scottish Government addressed this recommendation for the independence referendum by adapting the PPERA designation model to provide for us to designate for only one outcome. If a lead campaigner were to have been designated for only one outcome at the independence referendum then they would have been entitled to all the benefits of designation with none available to those campaigning for the other outcome.

In our view, this approach was appropriate in the specific circumstances of the independence referendum to reduce the risk of a tactical decision not to apply for designation. This was because there were well-established, high profile and well-funded campaigners on each side of the debate. However, in other circumstances, there may be a greater risk of those campaigning for a particular outcome being seen as having too great an advantage if they are the only ones supported by the benefits of designation.

The Wales Act 2014 also provides for the Electoral Commission to designate a lead campaigner on only one side of the debate for a future referendum on the income tax

raising powers of the National Assembly for Wales, and would also allow modifications to be made to the assistance available to designated organisations.

Amendment 12 tabled in the name of Lord Forsyth of Drumlean would provide for the Electoral Commission to set a total spending limit for the lead campaigner and political parties campaigning for each outcome.

The Electoral Commission does not support this amendment.

As set out at the beginning of this briefing, the Commission's view is that decisions on the level for spending limits for campaigners are important issues for Parliament to decide on.

In addition, in practice, it is not possible for spending limits to create a completely level playing field between campaigners at elections or referendums, because:

- There can be no certainty that there will be equal resources on each side, whatever the limits that apply, and

- The number of participants on each side should not be artificially limited by the rules – all those that have arguments to make and who are eligible to register should be able to make them.

Amendment 13 tabled in the name of Lord Hamilton of Epsom would insert a new clause to provide that EU institutions must not incur referendum expenses and that permitted participants must not accept donation from EU institutions.

The Electoral Commission does not support this amendment.

As we said in our House of Lords Committee Stage Day 2 briefing, the Commission's view is that the institutions of the EU, including the European Commission, should adhere to the same rules that apply to governments across the UK under the PPERA referendum regime and that they should not, for example, undertake any paid-for advertising activity during the referendum period. However, we also recognise that we have no regulatory powers that could be utilised directly against these institutions if they do undertake such activity, given both their non-UK status and protection from such regulatory activity as international governmental bodies.

We have therefore written to the UK Government to suggest that it would be helpful for Ministers to secure a voluntary agreement from the institutions of the EU that they will adhere to the same principles that will apply to governments across the UK during the referendum period, including the restrictions which will apply during the final 28 days before polling day under Section 125 of PPERA. We suggested that it would be helpful for any such agreement to be published so that voters and campaigners can be informed about its existence in the build up to the referendum.

In respect of the proposed requirement that permitted participants must not accept donations from EU institutions, PPERA already provides that registered campaigners are only able to lawfully accept donations over £500 from certain 'permissible' sources. In general, the permissibility rules provide that funding can only be accepted by registered campaigners from certain UK-based sources. There are also rules and offences related to using permissible donors as agents to circumvent the rules.

Amendment 14 tabled in the name of Lord Jay of Ewelme would prohibit the use of impermissible funds to meet referendum expenses.

The Electoral Commission strongly supports the principle behind this amendment, which seeks to clarify that referendum campaigners cannot use donations from impermissible sources, regardless of when the donation is received.

Donations to 'permitted participants' at a referendum (campaigners that have registered with the Electoral Commission because they have spent, or intend to spend, more than £10,000) must only be accepted from specified permissible sources. In general, the permissibility rules provide that funding can only be accepted by referendum campaigners from certain UK-based sources. These sources include for example, someone on a UK electoral register, trade unions or companies carrying on business in the UK. They do not include donations received from foreign sources.

Having considered in detail the application of these donation controls for the referendum on the UK's membership of the European Union, it is not clear that they would apply to donations received before a campaigner registers with us as a permitted participant. Campaigners are only required to register as permitted participants once they spend over £10,000 during the 'referendum period'. The regulated referendum period will be specified in secondary legislation yet to be laid, and we expect the referendum period to be at least 10 weeks prior to the poll (it was 16 weeks for the 2014 Scottish referendum).

The most significant effect of this is that – without clarification of the law – there would not be proper controls on the sources of funding a campaign organisation receives before it registers as a permitted participant. These funds could then be used for campaigning during the referendum period up to polling day. While we recognise that many campaigners would choose voluntarily to accept donations only from permissible sources, it would not be possible to guarantee that all campaigners will.

It is important that the law is clarified to avoid the risk described above. We have offered to work with the Government before Third Reading to help develop the associated technical changes to the Bill that would be necessary to put the principle of this amendment into practice.

Clause 6: Restrictions on the circumstances in which regulations can be made to amend Section 125 of the Political Parties, Elections and Referendums Act 2000

Amendment 18 tabled by Lord Hamilton of Epsom would restrict the circumstances in which the UK Government could make regulations to modify Section 125 of the Political Parties, Elections and Referendums Act 2000 (PPERA) for the purpose of the referendum on the UK's membership of the European Union.

Section 125 places restrictions during the 28 days immediately before polling day on the publication of promotional material about referendums by Ministers, government departments, local authorities and certain other bodies in receipt of public funds. We also recommend that governments should not undertake paid-for advertising (including government referendum material delivered to households) during the whole of the referendum period.

It is important that restrictions on the ability of governments to use public funds to put forward campaign arguments should apply during the 28 days preceding polling day. We have not identified problems with the workability of Section 125 of PPERA applying to governments at previous referendums, and so we think that it should be workable in relation to this referendum.

As set out in our briefing issued ahead of Day 2 of Committee Stage consideration of the Bill in the House of Lords, our view remains that the scope of any regulations to exempt activity from being prohibited under Section 125 should be limited only to managing any potential restrictions on the conduct of 'day-to-day' EU business that the Government is concerned could be affected by Section 125. **We welcome the confirmation provided by Ministers during the third day of the Committee stage debate on the Bill in the House of Lords that the UK Government has no plans to bring forward any regulations to provide exemptions from Section 125.**

After clause 6: Fines in case of breach of Section 125 of PPERA

Amendment 21 tabled by Lord Forsyth of Drumlean would provide for the Electoral Commission to impose a monetary penalty in the event of a proven breach of Section 125 of PPERA.

The Electoral Commission does not support this amendment as it is not clear how this significant change to our role and powers would work in practice. It is also worth noting in respect of any system of regulation in this area that any fines levied by the Electoral Commission are currently returned to the Treasury's Consolidated Fund.

However, we do welcome the apparent intention behind the amendment, to clarify the sanctions which could be applied in the event of a breach of Section 125. The Commission has noted previously that there are no sanctions associated with the

restrictions on central and local government spending in PPERA. Following the 2011 referendums, we suggested to the Government that there would be benefit in clarifying the scope of the restrictions that applied to the publication of promotional material in Section 125 PPERA, including what sanctions, if any, should apply to breaches. This might involve, for example, civil sanctions (fines) for individuals who were found to have breached Section 125, and criminal offences consistent with the approach set out elsewhere in PPERA.

We note that during the third day of Committee Stage debate on the Bill, Ministers set out the UK Government's view that a breach of Section 125 could be subject to judicial review. We also note that there are other regulatory regimes that would be engaged should there be a breach including, for example, the Ministerial and Civil Service Codes which would be engaged should any allegations be made about the UK Government.

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