

European Union Referendum Bill House of Commons Report Stage & Third Reading Briefing

4 September 2015

Introduction

This briefing sets out the Electoral Commission's views on amendments tabled ahead of Report Stage and Third Reading of the European Union Referendum Bill in the House of Commons on 7 September.

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:

- Application of section 125 of the Political Parties, Elections and Referendums Act 2000
- Franchise
- Spending limits for political parties
- Timing of the referendum
- Campaigning and financial controls

Members of Parliament have been sent already the Commission's briefing on the referendum question, which can also be found on our website [here](#). **We welcome and support amendment 23, tabled in the name of Secretary Philip Hammond, which would give effect to our recommended question wording.**

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.

A significant number of detailed technical amendments were tabled on Wednesday 2 September, and we have therefore had only a very limited time to review them. We will continue to review the amendments to ensure they are workable in practice and we will highlight any specific concerns in our briefings in advance of further Parliamentary consideration of the Bill in the House of Lords. 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 PERA 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 PERA.
- 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.

The application to the referendum of section 125 of the Political Parties, Elections and Referendums Act 2000

New Clause 10 and **Amendment 53**, tabled in the name of Secretary Philip Hammond, would apply, with modifications, section 125 of PERA for the purposes of the referendum on the UK's membership of the European Union; and would also provide a power for UK Ministers to further modify the application of section 125 by regulations, following consultation with the Electoral Commission.

A number of other amendments, including **New Clauses 5 and 6** (including further amendments to New Clause 6 tabled in the name of Bernard Jenkin and others), **Amendment 78**, tabled in the name of Sir William Cash and Steve Baker and **amendment 4**, tabled in the name of Harriet Harman and others, also seek to apply section 125 for the purposes of the referendum on the UK's membership of the European Union.

We welcome the Government's commitment to reinstating the principle of the restrictions set out in section 125, in New Clause 10, and we continue to think it is important that the restrictions on the ability of governments to use public funds

to put forward campaign arguments should apply during the 28 days preceding polling day. Further, consistent with our recommendation made following the Scottish independence referendum, governments should not undertake paid for advertising (including government referendum material delivered to households) during the whole of the referendum period.

We therefore continue to support the application of the full provisions of section 125 of PPERA for the purposes of the referendum on the UK's membership of the European Union, and we welcome amendments 4 and 78, and New Clause 5, which would give effect to this.

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. We are aware, however, that the UK Government has expressed particular concern about managing what can reasonably be regarded as 'day-to-day' EU business, as distinct from referendum campaign activity, under the provisions of section 125 as they would apply without modification. There has not yet been sufficient time for us to fully consider the detailed implications of the Government's proposals to modify the application of section 125 for the purposes of this particular referendum (as would be provided by amendment 53). We will listen carefully to the Government's case, and we remain ready to work with the Government to consider further how this specific concern could be addressed.

We are also concerned that the regulation-making powers which would be provided for by New Clause 10 could be used to exclude a wide range of materials from the scope of the restriction in section 125 of PPERA. **The UK Government should explain in more detail how it would expect to use these powers. Our view is that, if Parliament accepts this new clause, its use 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 will consider carefully any arguments and approach that the Government sets out at Report Stage and if Parliament chooses to accept this amendment will set out our views further when the Bill enters the House of Lords.

It is important that voters, campaigners and others involved in the referendum have confidence in the rules and that they are seen as fair and transparent. It is essential, therefore, that any changes to the scope of the statutory restrictions on the ability of governments to use public funds to put forward campaign arguments **should be made well before the start of the restricted period of 28 days before polling day.**

New Clause 10 would also require the UK Government to consult the Electoral Commission before making any regulations to amend the restrictions in section 125 of PPERA. Again, there has not yet been sufficient time for us to fully consider the implications of this new role for the Commission, but we would expect the Government to set out clearly and publicly its approach and rationale for excluding any materials from the scope of section 125 before making any regulations. We would publish any views on the draft regulations before Parliament debated them.

Clause 2: Franchise

A number of amendments would extend or revise the franchise for the referendum, including **Amendments 17, 18 and 19** tabled in the name of Harriet Harman and others, **Amendments 20 and 21** tabled in the name of Mike Gapes, **Amendment 24** tabled in the name of Secretary Philip Hammond, and **Amendments 7, 8, 9 and 10** tabled in the name of Alex Salmond and others.

Proposals for changes to the franchise for the referendum are important issues for Parliament to decide on, and we will comment on the practical implications and workability of any amendments to the franchise.

The Commission's view is that any changes to the franchise for the referendum on the UK's membership of the European Union should be clear in sufficient time to enable all those who are eligible, to register and participate in the referendum. It is important that Electoral Registration Officers have sufficient time to plan to include all those entitled to register to vote through the annual household canvass (which normally takes place between September and December each year), and also to plan and deliver public awareness activities including political literacy initiatives.

We therefore reiterate our previous recommendation, set out in our report on the September 2014 Scottish independence referendum, that legislation extending the franchise is clear (whether by Royal Assent to a Bill or the introduction of regulations to Parliament for approval) at least six months before the beginning of the annual household canvass. Should any amendments be made that amend the franchise for the referendum, for instance to enable 16 and 17 year olds to participate, further legislative provisions may also be needed, such as to enable additional canvass activity to take place depending on the timing of the poll.

Spending limits for political parties

NC11 tabled in the name of Sir William Cash would impose an expenditure limit on the cumulative total amount that political parties can spend during the referendum period.

The Commission does not support this amendment.

One of the Commission's principles in relation to campaigns for well-run referendums is that there should be no barriers to campaigners putting forward arguments for any of the possible outcomes.¹

¹ This means that it should be easy to register as a permitted participant and to take part in campaigning, the rules that govern campaign spending and fund-raising activity should be clear and fair, and the process for designating lead campaign organisations for each outcome (and consequent distribution of public funds and access to the media) should be easy to understand, and accepted as fair.

The Bill currently provides for any registered party with a share of the vote below 5% at the most recent UK Parliamentary general election to have a spending limit of £700,000; the same as most other registered campaigners. The amendment would result in those parties with less than 5% share of the vote having a spending limit below that level.

This amendment would adversely impact the ability of registered political parties with a low percentage share of the vote at the 2015 UK Parliamentary general election to effectively campaign at the referendum.

As we set out in our advice on the spending limits for the Scottish independence referendum in 2014,² 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.

Clause 1: Timing of the referendum

Amendment 15 tabled in the name of Harriet Harman and others, and **Amendment 12** tabled in the name of Secretary Philip Hammond and others, would ensure that the referendum poll could not be held on 4 May 2017. **Amendment 6** tabled in the name of Alex Salmond and others would prevent the referendum being held on the same day as local government elections in England, Scotland, Wales or Northern Ireland.

The Electoral Commission supports these amendments.

In both our House of Commons Second Reading and Committee Stage debate briefings we set out our view that a referendum on the UK's membership of the European Union should not be held on the same day as the polls which will take place on 5 May 2016 or any other scheduled polls. This would include local government elections scheduled to be held in May 2017.

It is important that voters and campaigners are able to engage fully with the issues which are relevant at these elections. It is also important that any debate about the UK's membership of the European Union takes place at a time that allows the full participation of voters and campaigners, uncomplicated by competing messages and activity relating to other scheduled elections.

Schedule 1: Campaigning and financial controls

Amendment 1 tabled in the name of Sir William Cash and others would ensure that the referendum period would last for a minimum of 16 weeks. **Amendment 34**, tabled in the

² Electoral Commission advice on spending limits for the Scottish independence referendum http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf

name of Secretary Philip Hammond, would enable the start of the application period for the appointment of lead campaigners to be prescribed in regulations, rather than starting only once the referendum period begins. **Amendment 27**, also tabled in the name of Secretary Philip Hammond, would ensure that these regulations are subject to the negative resolution procedure.

The Electoral Commission supports Amendment 34.

The Bill 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 if the legislative timetable allowed: we recommended that the appointment should take place shortly *before*, rather than during, the referendum period. This would provide earlier clarity for voters and campaigners, and would ensure that the lead campaigners are appointed shortly before the majority of the regulatory controls come into force.

Amendment 34 would give the Government the power, subject to approval by Parliament, to de-couple the start of the process to appoint lead campaigners from the start of the referendum period. The regulations prescribing the start of the application period could, however, be annulled by a resolution in either House of Parliament. This could result in the Commission having considered and appointed lead campaigners on the basis of legislation which is subsequently annulled. **We will consider further the practical and legal implications of the Parliamentary process proposed under Amendment 27, and will highlight any specific concerns in our briefings in advance of further Parliamentary consideration of the Bill.**

Amendment 32, tabled in the name of Secretary Philip Hammond, would ensure that campaign officers for registered political parties cannot be the responsible person for two or more registered campaigners.

The Electoral Commission supports this amendment.

The Bill provides that the same person cannot be the responsible person for two or more registered campaigners³. This is an important addition to the PPERA regulatory controls which helps to ensure that the same campaigner cannot set up multiple campaign groups in order to circumvent spending controls. This amendment would extend that restriction to campaign officers of political parties.

³ Schedule 1, paragraph 6

Amendment 33, tabled in the name of Secretary Philip Hammond, would enable the Commission to reject an application from an unincorporated association to register a campaign name which in the Commission's opinion is obscene or offensive or which includes words which, if published, would be likely to amount to the commission of an offence.

The Electoral Commission supports this amendment, which gives effect to a recommendation made following the Scottish independence referendum.

Following the Scottish independence referendum in 2014, the Commission recommended that the legislation for future referendums should include express provision giving the Commission discretion over whether or not to register certain campaigner names. We recommended that the legislation should not allow campaigners with, for example, obscene or offensive names to campaign using the official status of a registered name which is obscene or offensive. In our view, the official registration of such names would undermine voters' trust in the system.

The Commission can reject an application from an unincorporated association which, in the Commission's view, is obscene or offensive or which, if published, would be likely to amount to the commission of an offence.

Amendments 40 to 43, tabled in the name of Secretary Philip Hammond, would amend the rules on campaigners working together.

The Electoral Commission supports these amendments, which give effect to recommendations made following the Scottish independence referendum.

The Bill as introduced contains rules regulating campaigners who work together on a coordinated campaign. This is a significant addition to the PPERA controls to prevent campaigners setting up multiple campaign groups in order to circumvent spending controls, while giving campaigners the freedom to work together to get a unified message to voters.

Following the Scottish independence referendum in 2014, the Commission recommended that the working together rules at future referendums should be based on those that applied at the Scottish referendum. We also recommended that campaigners should be required to set out information in their post-referendum return about other campaigners they worked with and the total amounts they each spent.

The amendments will improve the incentives for campaigners to work with lead campaigners by clarifying that coordinated spending only counts against the lead campaigner's limit, removing the regulatory burdens on small campaigners that work with a lead campaigner, and reducing the reporting burdens on campaigners that work together.

The amendments will also require campaigners that work together to include in their post-referendum spending report the names of those they worked with and how much they each spent. This is an important addition to the rules which will improve transparency and the overall effectiveness of the controls.

Amendment 44, tabled in the name of Secretary Philip Hammond, would provide that political parties are able to accept donations from Gibraltar electors and bodies, Royal Charter bodies, charitable incorporated organisations and Scottish partnerships.

The Electoral Commission supports this amendment.

The Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 extended the categories of organisations that can donate to non-party campaigners at elections. The changes did not apply to political parties at all elections or to campaigners at referendums. The Commission has previously recommended that all those campaigning at elections and referendums should be able to accept funding from the same sources.

The Bill as currently drafted implements the Commission's recommendation by extending the categories of individuals and organisations who are permissible donors to referendum campaigners – both to cover the extension of the franchise to Gibraltar and to align them with those that can donate to non-party campaigners at elections⁴. It is important that all those campaigning at the referendum are able to accept donations from the same sources. This amendment provides that political parties that register to campaign at the referendum will be able to accept donations from those additional categories of donors during the referendum period.

One of the implications of these changes is that a wider group of donors would be able to donate money to political parties that register to campaign at the referendum than are able to donate to parties campaigning at elections. Under the PPERA election rules these donors are impermissible sources of election funding. There are offences and penalties should parties accept money from these sources for election campaigning.

Allowing political parties to accept donations from these extended sources for campaigning at the referendum means it is possible that funding from these sources could be used for future elections. However, until such time as PPERA can be amended to align the sources of funding for those that participate across all electoral events, limiting the ability of political parties to accept donations from these sources to the referendum period will go some way to help ensure the integrity of the wider financial controls. As the rules currently stand, political parties will report the sources of their funding in their quarterly donation returns which may be after the poll has taken place.

⁴ Schedule 1, paragraph 17

Amendments 2 and 22, tabled in the names of Sir William Cash and Steve Baker respectively, would provide that no funds or support provided directly or indirectly by European Union bodies have a bearing on the outcome of the referendum.

The Commission does not support these amendments, because PPERA already places controls on direct and indirect sources of campaign funding.

A central principle of the PPERA regulatory regime for elections and referendums in the UK is to ensure that foreign sources of funding do not have an undue influence on our democratic process. PPERA already provides that referendum 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 referendum campaigners from certain UK-based sources. There are also rules and offences related to using permissible donors as agents to circumvent the rules.

It is important that the legislation is clear about those organisations that can and cannot participate in the referendum. The European Commission does not fall within the list of bodies that can register as a campaigner⁵ or donate to other referendum campaigners⁶. In our view, this amendment is therefore unnecessary.

In addition, Amendment 2 goes significantly further than the current controls in PPERA by looking at the ultimate source of a campaigner's funds, rather than primarily at the eligibility of a donor. In our view, the broadness of this amendment would make it unworkable in practice.

For further information, please contact **Mazida Khatun**, Public Affairs Officer on 020 7271 0583 or mkhatun@electoralcommission.org.uk.

⁵ s.105(1) PPERA as modified by para 2, Schedule 1 EUR Bill

⁶ paragraph 6, Schedule 15 PPERA as modified by para 17, Schedule 1 EUR Bill