

European Union Referendum Bill 2015 House of Commons Second Reading briefing

9 June 2015

Introduction

This briefing sets out the Electoral Commission's view on key issues arising from the European Union Referendum Bill, ahead of its Second Reading on Tuesday 9 June. It covers the following:

- Principles for the conduct of referendums
- Our role in referendums held under the Political Parties, Elections and Referendums Act 2000 (PPERA)
- Timing of legislation and the referendum poll
- Referendum question assessment
- The regulatory framework
- Promotional activities by central and local government
- Referendum conduct rules

The Electoral Commission is an independent body which reports directly to the UK Parliament. We regulate political party and election finance and set standards for well-run elections and referendums. We put voters first by working to support a healthy democracy, where elections and referendums are based on our principles of trust, participation, and no undue influence.

Parliamentarians may wish to note in particular the key points highlighted in this briefing:

- The Bill, and any amendments that are passed by Parliament, should adhere to the referendum principles outlined in this briefing.
- The Bill should be amended to make clear that an EU referendum cannot be combined with the significant elections already scheduled to take place in May 2016, and should be held on a suitable separate day to any other poll.
- While we have already commenced our statutory assessment of the question contained in the Bill in line with approach we have taken for previous assessments, it is unlikely that our assessment will be published until mid-August 2015, after Parliament rises for summer recess in July.
- The timetable for designating the lead campaigners should be made clear during the passage of the Bill.
- Early clarification is needed from the Government about its proposed approach to the regulation of spending on promotional activities related to a referendum outcome by central and local government and other publicly-funded bodies.
- The referendum conduct rules should reflect recent changes to the rules for elections, for example to ensure that voters queuing at polling stations at the close of poll can still be issued with ballot papers.

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 Commission intends to provide briefings to keep Parliamentarians informed of key priorities throughout the passage of the Bill.

Principles for the conduct of referendums

Since the first referendum held under PERA in 2004, the Commission has published a number of reports recommending legislative changes intended to improve the administration of referendums and the regulation of referendum campaigners, drawing on our practical experience.¹ Our most recent report was published in December 2014 following our oversight of the Scottish Independence Referendum.² The lessons from this referendum and others have informed our key principles for referendums in the UK³.

We will be publishing a further report by the end of June on the lessons that can be learnt for future referendums from the information submitted by campaigners at the independence referendum in their spending and donation returns.

¹ We have reported on the 2004 North East regional assembly referendum, the March 2011 referendum on the law-making powers of the National Assembly for Wales, the May 2011 referendum on the voting system for UK Parliamentary elections, and the 2014 Scottish Independence Referendum.

² http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf

³ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/183742/Referendums-Principles-Letter-Parties-Panels-26-03-2015.pdf

Based on our experience of administering and regulating referendums in the UK since 2004, we have identified two key principles that we believe should inform the way referendums are run:

- Our focus is on voters and on putting their interests first, and that underpins everything we do.
- Referendums should be administered in a way that engenders confidence, is credible, transparent, and open to scrutiny.

We are pleased that the Government has incorporated into this Bill many of our previous recommendations for changes to the legislative framework for referendums.

Timing of legislation and the referendum poll

The Bill provides that a referendum on the UK's membership of the EU must be held no later than 31 December 2017, on a date which will be specified in secondary legislation. This means that the date of the referendum may not be known until after the Bill receives Royal Assent, and will not be confirmed until any regulations have been approved by Parliament.

In our report on the 2014 Scottish Independence Referendum, we set out our assessment that holding a poll on such an important constitutional issue on a separate day from other elections gave voters space to engage fully with the referendum issues, and helped both campaigners and electoral administrators plan their activities more effectively. We recommended that for other high-profile issues likely to attract cross-party campaigning, such as the UK's membership of the EU, any referendum should be held on a separate day to other polls.

A significant number of important polls are already scheduled to take place on Thursday 5 May 2016, including: elections for the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly, Police and Crime Commissioners in England and Wales, the London Assembly and Mayor of London, and local authorities and mayors in many parts of England. 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 EU takes place at a time that allows the full participation of voters and campaigners, uncomplicated by competing messages and activity from elections which might be held on the same day.

We therefore recommend that a referendum on the UK's membership of the EU should not be held on the same day as the other polls which will take place on 5 May 2016. We would welcome an amendment to the Bill which would ensure the referendum will not take place on 5 May 2016 or on the same day as any other scheduled polls. We will advise the Government and Parliament about the implications for public awareness, campaigner regulation and electoral administration of any referendum date specified in regulations in future, including the implications of holding the referendum close to any other scheduled polls.

Our report on the Scottish Independence Referendum also highlighted the benefits for voters, campaigners and electoral administrators of early confirmation of the legislative framework for the referendum, which was clear almost 10 months before the referendum date. **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.

Referendum question assessment

Under PPERA the Electoral Commission is required to assess and comment on the intelligibility of any question included in a Bill for a UK-wide referendum.

Following the introduction of the European Union Referendum Bill in the House of Commons we have begun to assess the proposed wording of the referendum question (including the Welsh language version of the question wording) included in the Bill:

“Should the United Kingdom remain a member of the European Union?”

“A ddylai'r Deyrnas Unedig ddal i fod yn aelod o'r Undeb Ewropeaidd?”

As well as looking at the wording of the question ourselves, we are gathering evidence by:

- Carrying out research with voters from different backgrounds and across different areas, through focus groups and one to one interviews.
- Asking for advice from experts on accessibility and plain language.
- Talking to potential campaign groups, other interested groups and individuals, including political parties.

The Commission has previously assessed the wording of a question for a referendum on the United Kingdom's membership of the European Union, which was included in a Private Members' Bill introduced in 2013. We recommended in October 2013 that the proposed question wording should be amended to reduce the risk of misunderstanding or ambiguity about the current membership status of the UK within the EU. We provided two alternative question wordings for Parliament to consider, the first of which is now included in the Bill:

- **“Should the United Kingdom remain a member of the European Union?”**
The response options would be **“Yes”** and **“No”**
- **“Should the United Kingdom remain a member of the European Union or leave the European Union?”**
The response options would be **“Remain a member of the European Union”** and **“Leave the European Union”**.

However, we also highlighted in October 2013 that we had not been able to fully test the second of these two alternative question wordings in the time available to us before we reported. We therefore made clear that, if Parliament amended the question in the Bill to include this wording, the Commission would undertake further work to check whether this wording raised any new issues of intelligibility.

After the question wording included in the Private Members' Bill had been amended in Parliament to “Should the United Kingdom remain a member of the European Union or leave the European Union?”, we carried out further research in early 2014. Taking into account the results of that research, we were satisfied that the amended question wording (using “Remain a member of the European Union” and “Leave the European Union” as

response options) was not only clear and straightforward for voters but was, at that time, also the most neutral wording from the range of wording options we had considered and tested.

More information about our previous referendum question assessments and recommendations can be found on our website.⁴

We are now undertaking further research with members of the public and consulting with interested individuals and organisations. This is due to the time which has passed since our previous research and assessment, and to ensure we have a clear understanding from campaigners about the impact of the question wording on their ability to campaign in support of, or against, either outcome. We also think it is important to reconsider any updated evidence about levels of understanding among some people about the United Kingdom's current membership of the European Union, which was a significant factor in our previous research and assessment.

We will report our views on the question to the UK Parliament and will make our findings public at the same time. Based on the timetable for completing our assessment, which is the same timetable used for assessing the questions for the referendums in 2011 and 2014, it is unlikely that we would be able to publish our assessment until mid-August 2015, after the UK Parliament has risen for summer recess.

Regulatory framework

At referendums held under PPERA, the Commission has a regulatory role in providing advice and guidance to those that wish to campaign, registering campaigners, and appointing lead campaigners. We also monitor and secure compliance with the regulatory controls. To enable us to fulfil that role we have access to investigatory and sanctioning powers. The Commission will have these roles at the referendum.

It is important that the lessons learned from the experience of previous referendums in the UK can be applied to the campaigning rules for a referendum on the UK's membership of the EU. This will not only provide a robust and proportionate regulatory regime, but also improve trust and confidence in the poll.

We are therefore pleased that the majority of the Commission's recommendations intended to improve the regulatory controls, reduce burdens on campaigners and improve the information available to voters have been incorporated in the European Union Referendum Bill. In particular we welcome changes to:

- **Rules on campaigners working together** – The Bill contains rules regulating campaigners that work together on a coordinated campaign. This is a significant addition to the PPERA controls to prevent campaigners setting up multiple campaign groups to circumvent spending controls whilst giving campaigners the freedom to work together to get a unified message to voters. These rules are based on those that applied at the Scottish Independence Referendum which, based on our practical experience of regulating those rules, broadly worked well.

⁴ <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/eu-referendum-question-assessment>

- **Loan controls** – The Bill provides for regulatory controls on loans to referendum campaigners. These rules will strengthen the controls on the funding of referendum campaigners to ensure that funding comes from appropriate sources and to provide transparency for voters about those that fund the campaigns
- **Pre-poll reporting** – The Bill contains rules requiring campaigners to report donations and loans they have received during the referendum period over £7,500. These rules are based on those that applied at the Scottish Independence Referendum. This is an important addition to the PPERA controls that will ensure that voters have access to information about the sources of significant amounts of funding given to the campaigners before they cast their vote. The Bill provides for the reporting periods and submission dates to be set in Regulations. It will be important that these provide the right balance between the burdens placed on campaigners during the most intensive campaigning period and transparency for voters; including providing sufficient time for the Commission to publish the final report before polling day.

The Bill does not however address our recommendations on designation of lead campaigners⁵ and the length of the referendum period.

PPERA provides for a ten week referendum period. It provides for up to the first six weeks of the referendum period to be used to appoint the lead campaigners and for potentially only four weeks thereafter for any lead campaigners to use the benefits of designation to get their messages to voters before the poll. The EU Referendum Bill uses this timetable.

Following the referendums in 2011 and 2014, we proposed two alternative timetables to ensure that any designated lead campaigners are able to make the most effective use of the benefits available to them:

- a. The referendum rules should be amended to allow designation of lead campaigners to take place shortly before, rather than during, the first six weeks of, the referendum period – this would provide for a ten week campaign period starting after the designation decision has been made
- b. Alternatively, if the legislative timetable is such that designation before the start of the referendum period is not possible, then the referendum period should be extended to at least 16 weeks, including the designation process.

Currently the Bill does not provide for either of these options; rather, the Bill provides for the date of the referendum and for the referendum period to be set by Regulations.

It will be important for campaigners and for the Commission that the Government makes clear during the passage of the Bill the proposed approach and timetable for designating the lead campaigners; that is, by amending the Bill to provide sufficient time following the designation of the two lead campaign bodies for campaigning on the referendum outcome.

⁵ PPERA provides that the Commission may designate lead campaigner for each of the referendum outcomes that represent those campaigning for the outcome they support. If designated, lead campaigners are entitled to the maximum spending limit of £5m, campaign broadcasts, free mailing (to each voter or household), access to public meeting rooms and a publicly funded grant of up to £600,000 each (set by the Commission).

The Bill will apply the approach set out in PPERA to the designation of lead campaigners, which provides for the Commission to designate a lead campaigner for both outcomes or not all. In practice this means that, if it is not possible to designate a lead campaigner for both outcomes, then neither side of the debate will have access to the benefits of a maximum spending limit, free delivery of mailings to voters or television broadcasts. **It will therefore be important to consider the implications for the availability of information for voters if there are not suitable applicants for lead campaigner status in relation to both referendum outcomes.**

Promotional activity by central and local government

The Bill provides that section 125 of PPERA (which places restrictions on the publication of promotional material about referendums by Ministers, government departments, local authorities and certain other public bodies during the period of 28 days immediately before polling day) would not apply at the referendum on the United Kingdom's membership of the European Union.

Although we are still working through the detailed implications of these provisions, it could mean that governments and others will be free to spend unlimited amounts of public funds promoting an outcome at the referendum right up until polling day.

Following the referendums held in 2011 and again most recently following the 2014 Scottish Independence Referendum, the Commission made a number of recommendations intended to improve the effectiveness of controls on the activities of governments in the lead up to a referendum poll. **We are therefore disappointed and concerned that the Bill includes provision to remove the restrictions on the use of public funds by governments and others to promote an outcome right up until voters cast their vote.**

As we highlighted in our report following the Scottish Independence Referendum, published at the end of last year, the underlying legislative basis for referendums held under PPERA is that campaigners will come forward to put the arguments for each side of the debate to voters. These campaigners are subject to a regulatory regime including limits on the amount that they can spend during the regulated referendum period.

In the Commission's view, there is a risk that the use of significant amounts of public money for promotional activity could give an unfair advantage to one side of the argument. It would also undermine the principle of having spending limits for registered campaigners if governments were able to spend unlimited funds on paid advertising during the period when campaigners were restricted in the amount they could spend. This has the potential to be particularly significant in the case of a referendum on the UK's membership of the EU where there would be four governments⁶ with views on the issue being debated, as well as local authorities who may have strong interests in promoting a particular outcome.

The Commission has previously recommended that relevant governments should publicly commit to and refrain in practice from any paid advertising, including the delivery of booklets to households, that promotes a particular referendum outcome for the full duration of the regulated referendum period. We have also suggested that it is important that relevant governments give careful consideration to the impact on the campaign, and voters'

⁶ UK, Scotland, Wales and Northern Ireland

trust in the rules, of any referendum-related information they publish before the 28 day restriction comes into force.

We would therefore welcome early clarification from the Government about its proposed approach to the regulation of promotional activities by central and local governments and other publicly-funded bodies. We will continue to assess the potential impact of changes to the regulatory framework for these bodies, and will highlight to Parliament any specific concerns at the earliest opportunity.

We will consider, in light of any further information from the Government about its proposed approach, whether Parliament should amend the Bill to re-apply the controls in section 125 of PPERA.

Referendum conduct rules

The Bill provides that the detailed rules for the conduct of the referendum poll may be specified by Ministers in regulations. The Government has indicated, in a Delegated Powers Memorandum,⁷ that it anticipates the regulations will contain similar provisions to those used for the May 2011 referendum on the voting system for UK Parliamentary elections. The Bill provides that Ministers must consult the Electoral Commission before making any regulations for the conduct of the poll.

Following the May 2011 referendum we concluded that overall the rules for the administration of the referendum poll worked well, and we recommended that they should provide a template for the rules for future referendums. Following the September 2014 Scottish referendum we concluded that the rules set out in the Scottish Independence Referendum Act 2013 (which reflected many of the changes we had recommended based on our experience of delivering two referendums in 2011) had also worked well overall.

Once the referendum conduct rules have been developed and introduced for approval by Parliament, the Commission will be able to finalise and issue detailed guidance to Counting Officers to support the delivery of the referendum poll.

We welcome the Government's intention to include similar provisions to those used for recent referendums in the rules for the conduct of the referendum on the UK's membership of the EU. We expect that the Government will also incorporate important recent changes which have been made to the equivalent rules for the conduct of elections, including changes to allow voters to be issued with a ballot paper if they are in a queue to vote at a polling station at the close of poll for example.

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⁷ http://data.parliament.uk/DepositedPapers/Files/DEP2015-0466/EU_Referendum_Bill_DP_Memorandum.pdf