No Campaign Limited
Under the name “NO to AV” No Campaign Limited was formed for the purposes of fighting the AV Referendum of 2011. It was the designated lead campaign group on the No side. Although the company is now formally dormant, the individuals involved in its operations continue to take an interest in referendum-related matters.

Matthew Elliott is a board director of No Campaign Limited and was the Campaign Director of NOtoAV, which turned public opinion from being 2:1 in favour of introducing the Alternative Vote to voting 2:1 against a year later in the referendum. Matthew also founded the TaxPayers’ Alliance in 2004, to campaign on behalf of taxpayers and to tackle government waste. He launched Big Brother Watch in 2009 to fight the surveillance state, and has been described as “probably the most effective political campaigner that Britain has produced in a generation”.

William Norton is a board director of No Campaign Limited and was the Responsible Person for the AV Referendum, handling the legal and compliance aspects of the campaign. He was also the registered referendum agent for No Campaign Limited in all 440 electoral districts. In the past William acted as referendum agent for North East Says No Limited, which was the designated lead campaign group on the No side for the 2004 North East Referendum. He is the author of White Elephant: How the North East said NO (Social Affairs Unit, 2008), an account of the regional assemblies issue and how the North East Referendum answered it.
Executive Summary

We recommend that the Scottish Independence Referendum Bill be amended.

High Level concerns for the fairness of the Referendum

- The Electoral Commission should not be given the duty of promoting understanding of the Referendum Question (Section 21) because as the question is drafted it will be impossible for the Commission to explain it without compromising their neutrality.

- It is clearly wrong in principle for one side in a referendum to have access to a free mailing to all voters (possibly also TV broadcasts) which is denied to the other side (Schedule 4, paragraph 5). That defeats the object of designating lead groups in the first place, which is to ensure that the public receives a fair hearing from both sides.

- The method for calculating the expenditure limits for political parties (Schedule 4, paragraph 18) is a significant departure from existing principles and severely handicaps some parties compared to the position under UK law. This could be interpreted as an attempt to favour one side over the other.

- The only legal restriction on public authorities (Schedule 4, paragraph 25) contains loopholes and lacks an enforcement procedure. This creates an opportunity for undue influence of the outcome. It should be replaced by a measure with genuine teeth which also applies to bodies in receipt of EU funding.

- Grants should be available to both designated organisations. The grant would only reimburse expenditure on printing the freepost mail-shot and preparation of TV broadcasts. Only 50% of expenditure would be reimbursed and the maximum grant payable would be capped at 10% of the campaign’s spending limit, i.e. £150,000.

Medium Level concerns about the technical conduct of the Referendum

- The deadline for appointing referendum agents (Section 16) is too early and should be put back to the normal PPERA date that applies under UK law.

- The provision for aggregating spending among groups working to a common plan (Schedule 4, paragraph 19) is unworkable and misconceived. A better way to prevent abuse is to tighten the rules for registering as a participant (Schedule 4, paragraph 2).

- The investigation powers of the Electoral Commission (Schedule 5) should include an express provision to enforce the controls on Ministers. This would provide clarity that the referendum will be fought fairly, and be seen to have been fought fairly.

- The matters caught by the Electoral Commission’s civil penalty regime (Schedule 6) should be specified now, not left to later statutory instrument. Ministers and public bodies should be inside the scope of these penalties.

Low Level concerns about other aspects of the Bill

- It seems odd that non-English languages are not represented in the
referendum materials (the Question in Section 1 and the ballot paper in Schedule 1). This may raise concerns from the point of view of voter engagement. Has this issue been considered?

- The power for Ministers to re-write the provisions of the Bill (Section 30) should be qualified or subject to a final deadline. Ministers should explain why they require such a power and the circumstances in which they expect to use it.
Introduction

1.1 The Scottish Independence Referendum Bill (“the Bill”) introduced on 21 March 2013 contains significant revisions from the original Draft Bill published in January 2012. We were highly critical of the Draft Bill, chiefly in regard to its omissions, and we welcome the fact that many of its deficiencies have been addressed. In particular, we welcome the fact that the provision of campaign loans is now regulated, as we called for through the various consultation processes.

1.2 There is already an existing framework for fighting a referendum, laid down by the Political Parties, Elections and Referendums Act 2000 (“PPERA”). That UK statute was drafted following a full review of the area by the Committee on Standards in Public Life, under the chairmanship of Lord Neill, in their Fifth Report of October 1998. That report reviewed the 1997 referendums, as well as looking back to the 1975 European Referendum, in formulating their recommendations.

1.3 The Bill largely copies the provisions of PPERA. On the whole, that is to be welcomed since there is now reasonable familiarity with its provisions, and hence certainty as to the legal position of campaigners. Unfortunately, it also means that the Bill carries over some aspects of PPERA which, in the light of experience, ought to have been amended before any other referendums were held.

1.4 In a number of key areas, the Bill deviates from the PPERA template, either in its provisions or in what it omits. Viewed from the perspective of campaigners, we consider that these differences will have a significant impact on the way in which the referendum will be conducted.

1.5 This note highlights areas where we believe the Bill could be improved. Since this is necessarily a technical and specialised subject, for ease of reference we have divided our recommendations into three categories:

- Matters of High Level Concern, which could affect the fairness of the referendum;
- Matters of Middle Level Concern, which are principally issues of a technical and compliance nature with drawbacks for campaigners on either side;
- Matters of Low Level Concern, where other improvements could be made.

Section 1 and Schedule 1

2.1 We note that the Referendum Question (Section 1) and the draft ballot paper (Schedule 1) are written in solely in English. The Bill does not appear to permit non-English documentation for the Scottish Referendum. On the other hand, the AV Referendum did permit the use of Welsh language material in
Wales.¹

2.2 We are aware that there are sufficient Gaelic speakers in Scotland to justify the existence of a bespoke TV channel (BBC Alba) and a Gaelic version of the website for the Scottish Parliament.

2.3 This omission will not represent any difficulties for campaigners, and actually simplifies their work. But it seems odd that non-English languages are not represented in the referendum materials and we would mention it as a Low Level concern from the point of view of voter engagement. For example, there is the question of Gaelic language referendum broadcasts. Has this issue been considered?

Section 16: appointment of referendum agents

3.1 Referendum Agents will be the principal representatives of a campaign in each local authority area, e.g. dealing with the counting officer. Section 16(3) states that the deadline for appointing these Agents is 25 working days before polling day, i.e. Wednesday 13 August 2014.

3.2 This is earlier than has been the case in previous referendums. A deadline of 16 working days before polling day applied for the North East Referendum of 2004,² and in the Welsh Referendum³ and AV Referendum⁴ of 2011. That deadline would fall on 27 August if the Referendum Date is retained as 18 September 2014.

3.3 In 2011 Scotland’s electoral administrators were able to deal with a 16-day deadline for AV referendum agents, as well as handling the parallel elections (in fact, on the whole they handled it far better than their counterparts in England). So it is not obvious why they would require an earlier deadline in handling Referendum Agents alone.

3.4 On the other hand, an early deadline increases the inconvenience for campaigners, especially if that deadline falls in August.

3.5 We would consider this to be a procedural annoyance, rather than inherently unfair, and categorise it as a Medium Level concern.

Section 21: role of the Electoral Commission

4.1 Under the Bill, the Electoral Commission is given the specific task of promoting public awareness and understanding of the Referendum, the Question and the voting process. This is a different remit than has applied in previous PPERA referendums.

4.2 In the 2004 North East Referendum the Commission had the primary remit of

¹ Parliamentary Voting System and Constituencies Act 2011, section 1(8)
² The Regional Assembly and Local Government Referendums Order 2004, article 11
³ The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010, article 18
⁴ Parliamentary Voting System and Constituencies Act 2011, Schedule 1, para 12
encouraging voting. The duty to promote awareness about the arguments for and against the proposal only arose if the Commission were unable to appoint designated organisations for both sides. The Commission discharged this remit by a public advertising campaign and website, and issuing each voter with a booklet which said very little about the substance of the regional assembly proposal, and concentrated more upon the associated reorganisation of local government.

4.3 In the 2011 Welsh Referendum, the Commission was given the remit of promoting public awareness of the referendum, its subject matter and how to vote.

4.4 In the 2011 AV Referendum, the Commission was given the remit of promoting public awareness of the referendum and how to vote, and a separate obligation of providing information about the rival voting systems. They discharged the first through a public advertising campaign and website, and the second by issuing each voter with a booklet which described the mechanics of the two systems. Both sides had complaints about the booklet content.

4.5 It is undesirable for the Commission to be responsible for promoting understanding of any Question, because it would be very difficult to do so without engaging with the issues on the Yes and No sides and thereby compromising their neutrality.

4.6 For example, some people would say that in many ways Scotland already is a separate “country”, e.g. in having a distinct legal system, a devolved law-making parliament and its own representation in international sporting events. Others would argue that Scotland would not be “independent” in any meaningful sense if it remained within the EU and/or did not have its own currency, citing the recent example of Cyprus. It will be impossible for the Commission to explain this particular Question, and what it means for Scotland to become an “independent country”, without being either subjective or partisan.

4.7 Because this problem creates the risk of compromise to the neutrality of the Electoral Commission, we would categorise it as a High Level Concern. Sub-section (b), and the duty to promote “understanding”, should be deleted from Section 21. Explaining the Question raises more serious problems than the actual wording of the Question.

Section 30: amendment by statutory instrument

5.1 Section 30 contains a very wide-ranging power for Ministers to alter any provision of the Bill or the rules it contains. In theory, everything in the Bill could be re-written before polling day.

---

5 Regional Assemblies (Preparation) Act 2003, section 8
6 Regional Assemblies (Preparation) Act 2003, section 9
7 The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010, article 16
8 Parliamentary Voting System and Constituencies Act 2011, Schedule 1, para 9
5.2 We appreciate that widely-drafted amendment powers of this nature have become almost boilerplate provisions in modern legislation. The statute governing the AV Referendum included a number of order-making provisions, including modification powers, but each of these was limited to a narrow scope. In particular, there was no power to re-write the conduct rules or the campaign rules, because the referendum period started with Royal Assent to the Act, so those rules came into effect immediately. With this Bill the referendum period starts on a specific date (Friday 30 May 2014, following the definition in Schedule 8) and there is likely to be an interval between the Bill being enacted and the start of the controlled period.

5.3 It would be helpful for campaigners and election staff if they could be certain that there was a deadline beyond which the conduct rules would not be altered. For example, in the AV Referendum, the Electoral Commission set 16 February 2011 as a deadline for Royal Assent to the legislation, because election staff needed assurance on the final governing framework for planning local elections and the referendum. The Act was passed on that day (albeit just before midnight).

5.4 It would also be useful if Ministers could explain why they require such a wide-ranging power, and the circumstances in which they expect to use it. In the wider scheme of things we would categorise this as a Low Level Concern.

Schedule 4 paragraph 5: designation

6.1 The Bill expressly permits the Electoral Commission to designate a lead campaigner for one side but not the other. This is a significant deviation from PPERA section 108, where the Commission is bound by the “both-or-neither” rule that it has to designate lead groups for both sides.

6.2 Under the Bill, a designated organisation is only entitled to the use of public rooms for holding meetings (Schedule 4, paragraph 7). It was necessary for the Section 30 Order to incorporate PPERA section 127 (right to make referendum TV broadcasts) and PPERA Schedule 12, paragraph 1 (right to send a referendum mailshot to voters free of charge) for the benefit of any designated organisation.

6.3 Broadcasters have a duty of impartiality. Campaigners have limited scope to influence them. In the AV Referendum, although both Yes and No Campaigns had a “right” to TV broadcasts under PPERA, they could only accept the number of slots, and the timing of them, which the broadcasters were prepared to make available – e.g. a scheduled No Campaign broadcast was delayed at short notice to allow the BBC News to give extended coverage of the death of Osama bin Laden.

6.4 The Section 30 Order is silent about the duty of impartiality, but it does include a provision to exclude the duty of Welsh TV to broadcast Scottish referendum broadcasts. That reinforces the conclusion that the broadcasters’ duty of impartiality is not overridden, because otherwise it would have been expressly

---

9 Broadcasting Act 1990 section 6; The BBC Agreement, clause 44
10 Section 30 Order, Article 4(3) disapplying Communications Act 2003 Schedule 12, paragraph 18
mentioned in the Order.

6.5 For their own professional reasons broadcasters are unlikely to want to provide airtime for only one side in the Referendum. Even if they were prepared to do so, they would expose themselves to legal challenge. Case law indicates that they would be on strong grounds in resisting the Parliament.

6.6 Royal Mail would probably be prepared to deliver a one-sided designated mailshot, if they could be certain of being paid. The Section 30 Order authorises payment by the Scottish Ministers\(^1\) “where paragraph 1(3) of Schedule 12 to [PPERA], as applied by this article, applies section 200A of the Representation of the People Act 1983”. That PPERA provision is framed on the assumption that there will only ever be a designated organisation for both sides, and never a one-sided designation. There is the risk of legal challenge (chiefly, to payment out of Scottish funds), but it would be less likely to succeed than an action against one-sided TV broadcasts.

6.7 It is clearly wrong in principle for one side in a referendum to have access to a free mailing to all voters (possibly also TV broadcasts) which is denied to the other side. That defeats the object of designating lead groups in the first place, which is to ensure that the public receives a fair hearing from both sides. We categorise this as a High Level Concern because paragraph 5 clearly creates the risk of an unfair referendum. It should be replaced by the equivalent wording from PPERA.

6.8 We suspect that the reason one-sided designation is permitted in the Bill is to avoid the perceived problem of a “tactical non-designation” by one side. In the Welsh Referendum of 2011, the No Campaign declined to apply for designated status. As this was a PPERA referendum with the both-or-neither rule, the Electoral Commission was unable to make designations. The result was that campaigners had lower spending limits, and there were no TV broadcasts or mailshots from either side. It has been alleged that the Welsh No Campaign opted for this approach in order to deliberately stifle the debate.

6.9 We are in no position to speak for the Welsh No Campaign, but their decision may have been motivated as much by finance. In the AV Referendum we experienced a genuine dilemma over whether to apply for designation. Sending a leaflet to every voter, and preparing TV broadcasts, would cost us at least £1 million. At that stage (February 2011) the level of donations received made it doubtful whether we would ever raise that much money. In theory a designated organisation was eligible for an Electoral Commission grant of up to £380,000, but the terms were extremely restrictive and grant money could not have been used to finance either the mailshot or any TV broadcast. Only comparatively late in the process did we decide to take the risk of applying for designation, committing to the expense of preparing the mailshot and raising funds to pay for it later.

6.10 Paragraph 5 appears to be intended as a “stick” to force both sides to apply for designation by holding out the threat of a one-sided designation. But designated status is of little value to a campaign group which cannot finance

\(^1\) Section 30 Order, article 4(4)
the costs of printing a mailshot and preparing TV broadcasts. The better approach is to use a “carrot”, which we discuss in paras 12.1-12.10 below.

Schedule 4 paragraph 18: expenditure limits

7.1 The Bill contains radically different expenditure limits than were included in the Draft Bill of 2012. Those controls were widely criticised as unfair and unworkable.

7.2 PPERA Schedule 14 sets the expenditure limits for UK-wide referendums. A designated organisation is limited to £5 million, political parties are limited to amounts ranging in banded intervals between £500,000 and £5 million depending upon their share of the vote, and all other campaigners are limited to £500,000. Those were the limits which applied in the AV Referendum of 2011. This leaves open the question of how the limits would be set for smaller voting areas.

7.3 For the North East Referendum in 2004, the limits for all participants were scaled back proportionately by the size of the electorate, but no lower than £100,000, and parties’ vote shares were taken from the most recent elections to the European Parliament (which are conducted regionally). The principle was maintained that no political party had a spending limit which was higher than a designated organisation, which was set at £665,000.

7.4 For the Welsh Referendum in 2011, the same scaling back approach was followed, with no participant capped at spending less than £100,000. Political party vote share was derived as a blended percentage of their votes for both constituencies and the list results in the most recent Welsh Assembly elections. The principle was again upheld that no political party could have a higher spending limit than a designated organisation, which was set at £600,000 (although in the event, no such organisations were designated).

7.5 The Bill follows a somewhat more complicated approach. Designated organisations are limited to £1.5 million, and other non-party campaigners to £150,000, which is the proportionate relationship which would be expected following the principles of PPERA. However, the effect of Schedule 4 is to place a maximum ceiling on campaign spending by all political parties of £3 million, and to use the blended percentage approach to determine how much of this aggregate pot is allocated to each party. The result produces a different spending limit than under PPERA:

---

12 The Regional Assembly and Local Government Referendums (Expenses Limits for Permitted Participants) Order 2004, article 4
13 The National Assembly for Wales Referendum (Assembly Act Provisions) (Limit on Referendum Expenses Etc.) Order 2010, article 4
<table>
<thead>
<tr>
<th>Party</th>
<th>SNP</th>
<th>Lab</th>
<th>Con</th>
<th>Lib Dem</th>
<th>Green</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constituency vote</td>
<td>45.4%</td>
<td>31.7%</td>
<td>13.9%</td>
<td>7.9%</td>
<td>-</td>
</tr>
<tr>
<td>List vote</td>
<td>44.0%</td>
<td>26.3%</td>
<td>12.4%</td>
<td>5.2%</td>
<td>4.4%</td>
</tr>
<tr>
<td>Blended percentage</td>
<td>44.8%</td>
<td>29.3%</td>
<td>13.3%</td>
<td>6.8%</td>
<td>1.9%</td>
</tr>
<tr>
<td>Spending limit</td>
<td>£1,344,000</td>
<td>£834,000*</td>
<td>£396,000**</td>
<td>£201,000***</td>
<td>£150,000</td>
</tr>
<tr>
<td>PPERA equivalent</td>
<td>£1,500,000</td>
<td>£1,200,000</td>
<td>£900,000</td>
<td>£600,000</td>
<td>£150,000</td>
</tr>
<tr>
<td>Worse off by</td>
<td>£156,000</td>
<td>£321,000</td>
<td>£501,000</td>
<td>£396,000</td>
<td>-</td>
</tr>
</tbody>
</table>

* Originally presented as £879,000 – corrected following 9 May oral evidence
** Originally presented as £399,000 – corrected following 9 May oral evidence
***Originally presented as £204,000 – corrected following 9 May oral evidence

7.6 We are aware that this approach has been vetted by the Electoral Commission. They appear to have accepted as a valid policy objective the claim that it would damage voters’ trust in the Referendum if there was not a rule which limited spending by political parties to a rough equivalence between pro-Yes and pro-No sides – although we note that the concocted paragraph 18 formula actually produces a pro-Yes advantage.

7.7 We believe that the Commission has overlooked the fact that Schedule 4 paragraph 25 does not follow the PPERA template (see paras 9.1-9.10 below). In the Bill the controls on publically-funded organisations are much weaker than under PPERA. Hence there is an area of politically-influenced activity which falls outside the narrow party spending covered by paragraph 18.

7.8 The logic of the argument behind paragraph 18 is to set an absolute “top-down” limit on spending by all Yes campaigners and all No campaigners. The limit would have to be increased significantly, probably to at least £4 million. A “top-down” approach could only be enforced by another special rule which prohibited referendum spending except by the officially designated lead campaign groups, and so prevented other organisations from registering as participants in their own right and conducting their own campaigns. That would be a major violation of the way in which democratic politics has been carried on in Scotland (and the rest of the UK) – and that is why a “top-down” approach to spending limits has never been adopted in the UK.

7.9 The theory behind paragraph 18 assumes that the parties concerned in fact register for the Referendum on the sides they are expected to. What happens if a party changes sides (e.g. because of the brilliance of the arguments) or decides not to register (e.g. because of internal division)? If either of those happens then the theory breaks down and the formula would produce a deliberately un-level playing field.

7.10 We do not believe that voters’ trust in the Referendum rules would be strengthened by a “special rule” which is designed to produce a pro-Yes advantage, particularly when the Bill contains other “special rules” which also
appear to favour Ministers over their opponents. In fact, we do not believe that the rules will have any effect on the level of public trust in Scotland’s politicians – other than, of course, to weaken it even further.

7.11 Taking into account the defects with the provisions on expenditure control (see below, paras 8.1-8.15 and 9.1-9.13), the Bill is open to the criticism that it appears to be designed to throttle spending by one side in the Referendum. We regard this as a matter for High Level Concern.

7.12 We would prefer a simple restoration of the PPERA approach to spending limits.

Schedule 4, paragraph 19: campaign expenses

8.1 This provision is not found in PPERA. It governs “expenses incurred as part of a common plan”. Where expenses are incurred as part of a “plan or other arrangement” among groups on the same side, and there is a designated organisation for both sides, each group subject to the plan has to declare all of the spending as counting towards its total, i.e. the same spending is multiple-counted towards the overall expenditure limits of all the groups.

8.2 This appears to be based upon a specific provision about “concert parties” which applied in the AV Referendum,14 (and which, so far as is known, had no effect – although most of the campaign groups on the Yes side opted to file a joint expenditure return). In the event, no participant spent anywhere near its limit, so the provision did not matter.

8.3 The concert party rule did not apply to the Welsh Referendum. There were no designated organisations on either side in that contest. Instead, a large number of local groups registered as permitted participants on one side. There has always been a suspicion that this was an attempt to engineer a higher amount of spending above the limit applicable to a non-designated campaigner.

8.4 The justification for this measure in the Explanatory Notes (para 172) is that it is intended to prevent the establishment of dummy campaign groups, in order to manufacture higher spending limits. We are aware that the Electoral Commission favours the introduction of rules to catch “concert parties” trying to subvert the spending limits.15 However, as it has been drafted it will not achieve this objective. Paragraph 19 is misconceived.

8.5 Campaigns are more likely to establish dummy groups in situations where there is no designated organisation – to accumulate several entitlements to spend £150,000 because no group is entitled to spend up to £1.5 million. But paragraph 19 is expressly limited to situations where there is a designated organisation on both sides (para 19(1)(d)), so it will not catch the circumstances where abuse is most likely.

14 Parliamentary Voting System and Constituencies Act 2011, Schedule 1, para 17
15 Electoral Commission Referendum on the voting system for UK parliamentary elections (October 2011), Recommendation 15
8.6 In any well-run referendum there will always be some form of plan or co-ordination between sympathetic groups on the same side. The need for contact and co-operation will be even more acute if, say, there are a number of different political parties on one side who are more used to opposing each other. But the risk is that as soon as they try to reach a sensible plan for fighting the Referendum, paragraph 19 will handicap their activities.

8.7 Either: all activities will be co-ordinated through the umbrella designated organisation, in which case expenses will count against the designated organisation’s limit (so that supporting groups’ limits never come into play); or: the cost of activities co-ordinated outside the umbrella will count double (using up the limits more quickly).

8.8 Example (1): The SNP holds a pro-Yes rally, which costs £20,000. It notifies the Yes Campaign in advance, and the Yes Campaign refrains from holding any events on that day to avoid dividing media attention. Under paragraph 19, that amounts to an arrangement for incurring referendum expenses. Both groups are treated as having spent £20,000 (making £40,000 in total) - unless the Yes Campaign decides to accept all of the cost as having been incurred on its behalf (in which case it is treated as having spent £20,000 and the SNP £0). Neither filing outcome represents the reality of what actually happened.

8.9 Example (2): Group A is double-booked to give pro-No speeches in both Edinburgh and Glasgow on the same day. They agree with Group B that it will make the Glasgow speech instead. Both speeches cost £500. Under paragraph 19, there is an arrangement between the two groups, and they are both treated as having spent £1,000.

8.10 Ironically, paragraph 19 would probably not be very effective at preventing one obvious form of evading the spending limits. As campaign Group X reached its spending limit during the referendum, it could shut down, dismiss its staff and then re-register as a new organisation, Group Y. There would be no plan or arrangement between Groups X and Y, which had never been in operational existence at the same time, and they would probably have different board directors. The Electoral Commission would have to prove a pre-ordained conspiracy, which might be difficult.

8.11 The obvious nonsenses created by paragraph 19 could be avoided through the use of Electoral Commission guidance, stating in advance which non-contentious situations would not be regarded as comprising a “plan” or “arrangement”. But it is not ideal to cure a bad law by issuing extra-statutory guidance that has to pretend the law does not say what it actually does. The better course is to avoid enacting bad laws in the first place.

8.12 The mischief which the legislation seeks to prevent is evasion of the spending limits. The abuse which should be blocked is the creation of dummy organisations to qualify for additional spending capacity. The test should be whether different bodies are in substance the same organisation. That would actually address the objective in the Explanatory Notes, of blocking the same group from registering itself under multiple names.

8.13 This could be achieved by strengthening registration as a permitted
participant (Schedule 4, paragraph 2): requiring a declaration from the responsible person that the group is genuinely independent, supported by details of their separate bank account, payroll arrangements, campaign logo, corporate governance and administration. In particular, it would be a criminal offence to file a false declaration and the persons involved in the conduct and management of a registered participant could not also be involved in the conduct and management of another. Sufficient of these details would be disclosed on the Electoral Commission’s register of participants (Schedule 4, paragraph 4) to enable the opposing sides to police each other’s compliance.

8.14 The administrative burden for the Electoral Commission in policing the registration requirements we recommend would be much lower than would be created by paragraph 19. Furthermore, paragraph 19 potentially requires the Commission to second-guess whether participants are acting to a “common plan” in following a particular campaign structure. It would be unattractive if the Commission became involved in dictating campaign structure to participants.

8.15 On the face of it, this is an arcane technical point but it will add to the compliance burden of running any campaign. For that reason it should be best categorised as a Middle-Level concern. It would not have hindered any previous PPERA referendum, because in no referendum fought so far has either side approached its maximum expenditure. However, it would be far more significant in a close-fought, high-spending contest and might in practice adversely affect one side more than the other.

Schedule 4, paragraph 25: control of Ministers

9.1 Paragraph 25 is the equivalent of PPERA section 125, which is commonly known as “the purdah”. The material covered by both is identical and the two provisions share the same heading (“restriction on publication etc. of promotional material by central and local government etc”). Both measures prohibit the publication of material relevant to a referendum and both come into operation 28 days before polling day, which would be Thursday 21 August 2014 on the current timetable. The provisions do not create an offence; they merely impose a public duty.

9.2 The PPERA purdah applies to Ministers of the Crown, government departments, local authorities and “any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority”. There are exemptions for the Electoral Commission, the BBC, S4C and designated organisations.

9.3 The objective behind PPERA section 125 is clear: to prevent undue influence of a referendum by the use of public resources. This was almost certainly intended to address lingering allegations that the 1975 European referendum was in some way rigged.

9.4 Section 125 has been an issue in two of the referendums fought under PPERA (and it is understood that it was also a concern in the Welsh Referendum, even if no cases were ever pursued). It is not fit for purpose.
There is no mechanism for adjudicating or enforcing section 125 against a Minister of the Crown, and the limited machinery is too obscure and slow-working to provide any remedy even in a case that constitutes a clear breach.

9.5 In the North East Referendum of 2004 a Minister gave a newspaper interview two days before polling day to announce a change in government policy that would favour a North East Regional Assembly, were one to be approved. He considered this news to be a reason for voting Yes. The then Chief Executive of the Electoral Commission claimed he had no authority over section 125 complaints, and that it did not apply to the conduct in question. The Propriety & Ethics Unit of the Cabinet Office informed the No Campaign that it had no powers to force a Minister to obey section 125.

9.6 In the AV Referendum, a campaign group on the Yes side received a majority of its income from various public sector sources. They submitted a letter to the Commission in support of the Yes Campaign’s application for designated status. The group’s logo appeared on the Yes Campaign’s website as a supporter, and its own website publicised its support for a Yes vote. The Enforcement Team of the Electoral Commission took until the 27th day of the purdah period to decide that there was insufficient evidence of breach. When pushed further, they claimed that although they had by then found such evidence, nothing could be done after polling day.

9.7 In addition to carrying over these defects, paragraph 25 has a narrower scope. It covers only Ministers and parts of the Scottish Administration, the Scottish Parliamentary Corporate Body and certain public authorities. There is no equivalent for grant-funded organisations that are not public bodies.

9.8 That creates an obvious loophole for the mis-use of public resources. A campaign group or body wholly or mainly dependent upon taxpayers’ money could be financed to support one side in the Referendum (and this would arguably not rank as a reportable donation, due to the exemption in Schedule 4, paragraph 31(1)(a)).

9.9 The Bill has managed to take the PPERA section 125 purdah and produce something even less fit for purpose, and arguably creates an opportunity for the undue influence of the outcome.

9.10 The enforcement of paragraph 25 is opaque. Section 11 gives the Electoral Commission a general duty to monitor and secure compliance with the Campaign Rules in Schedule 4, but does not state how this is to be achieved.

9.11 It is laughable that there is a series of detailed rules which campaigners must follow (Schedule 4, 59 paragraphs), and very extensive provisions for them to be investigated by the Electoral Commission and punished for breach (Schedule 5, 15 paragraphs; Schedule 6, 29 paragraphs; Schedule 7, 21 paragraphs) but there is only one measure which applies to Ministers – who have actually decided that there should be a referendum in the first place.

9.12 We would categorise this as a High Level Concern. The purdah is the only legal restriction which applies to public authorities during a referendum. So far its deficiencies have not been significant in PPERA referendums because,
broadly, the only breaches have involved participants on the losing side.

9.13 Paragraph 25 should be replaced by a new measure with the following provisions:

- It should apply to Ministers, government departments, local authorities, public bodies and organisations who receive a majority of their resources from public funds (retaining exemptions for the Electoral Commission, the Chief Counting Officer, the BBC and either designated organisation).
- “Public funds” should include EU funding, which is currently ignored altogether.
- A 28 day purdah period is too short. The Electoral Commission’s longstanding view is that the purdah should run from the start of the referendum period. A sensible and principled compromise would be for it to start on the day after designation of the official Yes and No Campaigns – or when the Commission decides that it cannot designate (for whatever reason). Designation creates official groups entitled to public support. That is an obvious point for restricting any other form of publically-funded interventions.
- Breach should create an offence (which it does not at present). The Electoral Commission and anyone eligible to vote in the referendum should be able to refer a case to the courts.
- It should prohibit expressing or providing support for one side in a referendum as well as the activities currently forbidden. (In the case of Ministers, this restriction would apply to them only in their official capacity, not party political activity, but that merely reflects the current position on, e.g. electioneering.)
- It should clarify that the purdah extends to placing information in the public domain in any form and does not allow designated organisations to publish material or information on behalf of an individual or body which would be prohibited if that individual or body published it directly.

Schedule 5: investigatory powers

10.1 Schedule 5 copies over the investigatory powers of the Electoral Commission from PPERA Schedule 19B (which is not yet in force). It contains measures under which the Commission may require the disclosure of documents, and is chiefly aimed at ensuring that permitted participants have complied with the spending limits and donations rules.

10.2 However Schedule 5 paragraph 3 is drafted widely to cover any suspected breach of the Schedule 4 campaign rules and to require the provision of any document, information or explanation. This would appear to be the only mechanism for enforcing the Schedule 4 paragraph 25 purdah which applies to Ministers and public bodies (see para 9.1-9.13 above).

10.3 There should be an express provision within Schedule 5 stating that the Commission may compel compliance with the purdah provisions of Schedule 4, paragraph 25 (whether amended as we recommend or not). This would provide clarity that the referendum will be fought fairly, and be seen to have been fought fairly.

10.4 This suggested amendment carries a Medium Level Concern because it is primarily a matter of referendum compliance and practice.

**Schedule 6: civil penalties**

11.1 Schedule 6 contains robust measures for the Electoral Commission to levy fixed monetary penalties (Schedule 6, paragraph 1), impose a discretionary requirement (Schedule 6, paragraph 5) or serve a notice to stop activity (Schedule 6, paragraph 10) where they are satisfied beyond reasonable doubt that a person has committed a campaign offence or otherwise breached the Campaign Rules in Schedule 4. These penalties override any later criminal proceedings. Campaigners may also offer to give an undertaking to the Commission in lieu of such measures (Schedule 6, paragraph 15).

11.2 These carry over amendments to PPERA (Schedule 19C) which have not yet been brought into force. In PPERA the intention is that a future statutory instrument will specify which offences and rules are covered by the Commission’s civil penalty powers. Because the Bill mainly copies PPERA, that feature has also been copied over. Hence, at the present time there is uncertainty because the offences and campaign rules which are covered will not be known until Ministers have issued a supplemental order.

11.3 There is no need to replicate such uncertainty with this Bill. Since they have copied these provisions, Ministers are presumably content with the idea that the civil penalty regime should come into force immediately. They should therefore be able to write into the Bill which offences and which of the Schedule 4 campaign rules they want to be covered, without recourse to a supplemental order.

11.4 It is not obvious why Ministers need a power for transitional provisions in their supplemental order (Schedule 6, paragraph 16(1)(a)). UK Ministers would require such a power in bringing PPERA Schedule 19C into effect, because PPERA-regulated elections have been taking place for many years, and it would change a pre-existing legal environment for handling election offences. In Scotland, however, it is not currently possible to commit a referendum offence, because there are no rules governing Scottish referendums. There is nothing from which to transition.

11.5 Specifying which offences and rule-breaches are covered from the outset would greatly assist prospective campaigners, election officials and the Commission itself.

11.6 We would strongly recommend that in any event Schedule 6 paragraph 16 is amended to require that any supplemental order specify that breach of the Schedule 4 paragraph 25 purdah (whether amended as we recommend or not) must be covered by the civil penalty regime. The purdah period only
extends for the final 28 days of the referendum period (see para 9.1 above), and the civil penalties generally contain a 28 day warning period, so it would not of itself stamp out inappropriate conduct by Ministers and public bodies before polling day. Nevertheless, it would be an excellent early indication that the referendum will be fought fairly, and be seen to have been fought fairly.

11.7 This suggested amendment carries a Medium Level Concern because it is primarily a matter of referendum compliance and practice.

Grants to campaigners

12.1 The Bill is silent on the question of grants to campaigners. That follows earlier consultation documents which stated that none would be paid. This is a significant change from PPERA, under which designated organisations are eligible for grants from the Electoral Commission.

12.2 This was a key recommendation of the Neill Committee, which advocated the provision of grants to referendum groups to cover “core funding” and ensure a level playing field between the two sides. The Neill Committee were particularly influenced by evidence that “the referendum campaign in Wales in 1997 was very one-sided, with the last-minute No organisation seriously under-funded and having to rely for financial support essentially on a single wealthy donor. The outcome of the Welsh referendum was extremely close, and a fairer campaign might well have resulted in a different outcome.”

12.3 The payment of grants to both sides in a referendum predates the introduction of PPERA. In the 1975 European Referendum, £125,000 each was made available to the two lead groups. PPERA section 110 sets a maximum amount of grant that may be paid (£600,000) but otherwise allows the Commission to determine quantum and criteria on a case-by-case basis.

- In the North East Referendum of 2004, grants of £100,000 were paid to both sides.
- In the AV Referendum of 2011, the Commission decided on a maximum grant of £380,000 to reimburse “eligible spending”. This covered campaign infrastructure and specifically excluded campaign materials and activity. £114,000 was paid on designation, with the balance claimable on provision of evidence of expenditure. Due to the restrictive eligibility criteria, both sides only claimed in the region of £140,000-£150,000 each.
- Similar rules would have applied in the Welsh Referendum of 2011, with proportionately lower amounts. No grants were paid to either side for the Welsh Referendum, but only because in the end no designation took place.

12.4 Thus, grants in the two 2011 referendums could not be used to finance the preparation of mail-shots to voters or official TV broadcasts. The result was less than satisfactory:

---

17 Fifth Report of the Committee on Standards in Public Life, paragraph 12.36
18 Fifth Report of the Committee on Standards in Public Life, paragraph 12.32.
• In the Welsh Referendum the No Campaign decided not to apply for designated status, meaning no designation could be made. Voters in Wales were denied the opportunity to hear fully from both sides.

• In the AV Referendum the Yes Campaign decided not to send a mail-shot to all voters.

12.5 What is the purpose of designation? It is to ensure that there is a reasonable presentation of the arguments on both sides. That is why the two lead groups are entitled to freepost mailing of their referendum addresses and TV broadcasts. Therefore, a grant should be paid to ensure that these two facilities are taken up, so that the public receives a minimum level of information.

12.6 Discharging these public education rights comprises the largest activity during a referendum. During the AV Referendum the two sides spent the following amounts on “designated functions”:

• The Yes Campaign spent about £427,000 on their (limited) mail-shot and perhaps a further £54,000 on TV broadcasts, making a total of £481,000. That represented about 24% of their total declared spending and a little less than 10% of their limit.

• The No Campaign spent £929,000 on their mail-shot to the whole UK and a further £139,000 on TV broadcasts, making a total of £1,068,000. That represented about 43% of their total declared spending and a little over 20% of their limit.

12.7 We recommend that a grant should be available to a designated organisation on the following terms:

• The grant would only be available to reimburse expenditure on either the printing of the freepost mail-shot or the preparation of a TV broadcast.

• Only 50% of expenditure would be reimbursed – a campaign would have to spend £2 of its own money in order to receive £1 of public grant.

• The maximum amount of grant payable would be capped at 10% of the campaign’s spending limit, i.e. £150,000.

12.8 This assumes that the cost of printing 4 million leaflets and preparing two TV broadcasts would be £300,000. If a designated campaign spent less than this, it would receive a proportionately smaller grant, but if it spent more the grant would still be capped at £150,000. In this way designation would ensure that the public receive a reasonable minimum contact from both sides.

12.9 If the grant were to be restructured in this way then it would solve the “problem” of one side making a “tactical non-designation”. Applicants would know that if successful they could cover half of the cost of designated status. But the grant would be pegged at only 10% of their spending limit and it could not be used to subsidise wider campaigning activity, for which they would have to raise their own donations.
12.10 We consider this recommendation to be a High Level Concern because it is the most effective way of ensuring Scotland’s voters are fully and fairly informed.

2 May 2013