Extending the role of the Electoral Commission

Section 21 - ‘Information for voters’ - paragraph (b)

This section proposes an important new role for the Commission ‘promoting understanding … of the referendum question’. I take this to mean ‘unbiased’, ‘impartial’ or ‘bipartisan’ information on the issue. While the intent is excellent, the practice is so difficult that I recommend the committee does not support paragraph (b).

The provision of ‘unbiased’ information in referendums is the Rubicon in world referendum practice that Sir Patrick Nairne (charged with drafting arrangements for the EEC referendum) in 1975 and Lord Neill (then-chair of the Committee on Standards in Public Life) in 1999 both declined to cross. Extending this role to the Commission would be a major change in the conduct of referendums in the UK.

The Commission is primarily an electoral commission and over the ten or so years of its existence has through many elections earned its spurs. It is well connected and led in Scotland and has the confidence of politicians here. It is clearly the right body to be given responsibility for the conduct of the referendum.

But as a referendum commission, it is still in its apprenticeship. It has conducted only three major referendums earning mixed reviews. Lord Neill whose report is the basis for PPERA, made a significant distinction between elections and referendums as political events and it is reflected here in the commission’s differing reputations.

For example, it has weakened the generic intent of PPERA with shifting interpretations including restrictive interpretation of the use of grants; and has proved hesitant in the face of authority infractions. Having itself been inadequately funded for referendums, it has not had the time nor research capacity to develop an understanding of their qualitative aspects or a wider knowledge of their practice.

No matter how experienced the Commission is, I would oppose this extension in principle. But for those who see no objection in principle, giving an inexperienced referendum commission the most difficult issue to cut its teeth on is inviting controversy in the independence referendum. The risk is increased because the issue has not yet been negotiated, meaning much of the detail must be ‘undecided’ detail with two, perhaps more, possible outcomes.

---

1 Sir Patrick’s 1975 report (Cmd 5925) does not appear to be available online. His later Report of the Commission on the Conduct of Referendums, 21 November 1996, is accessible at: [http://www.ucl.ac.uk/spp/publications/unit-publications/7.pdf](http://www.ucl.ac.uk/spp/publications/unit-publications/7.pdf)

Attempting to provide this kind of unbiased information has largely defeated referendum commissions around the world. The attempts fall broadly into three categories. They are: thorough, dull and unread; or readable but milk and water in content and valueless; or clear cut, unwittingly partisan and therefore controversial. Few served their referendum debates and most used a great deal of public money ineffectively.

In lesser referendums, the limitations are tolerated and accommodated. In important referendums, they create the sort of difficulties encountered by the Irish referendum commission in the EU referendums, leading to costly judicial actions and complex legal redress.

Because of the veto used in the designation process in the Wales ‘primary powers’ referendum of 2011 the Commission was forced to provide unbiased information on the issue at stake. The Committee has already heard evidence on this. But scaling up the Welsh experience to the independence referendum is a step too far. There is impeccable precedent for declining the obligation to provide unbiased information entirely.

In 1998, Lord Neill specifically rejected an unbiased information role for the Commission. He reached his conclusion after hearing from all sides in the four referendums of 1997 and 1998, reviewing the 1975 EU referendum and the two devolution referendums in 1979 and commissioning research in other countries. Instead, he laid the duty solely on each side to make their case and gave them a public grant to do so ‘far and wide’. The Labour government when enacting PPERA amended some of his other recommendations while accepting his recommendation on this point in its entirety.

Before the 1975 EEC referendum, Sir Patrick Nairne conducted a review of practice abroad and came to the same conclusion that ‘unbiased’ advice however desirable was not achievable. So in 1975 public money funded a brochure with a ‘statement and rebuttal’ from each side and a statement from the government. In addition, a grant was made to each side. One difference from 1999 was the government was allowed to make its own statement.

Variations of 1975 are the most common format for dealing with the problem. In Switzerland and the US, the world’s two most experienced referendum democracies, neither attempts to provide ‘unbiased’ information. Switzerland funds a booklet including statements from all participants including the government; the US, a statement from both sides and a rebuttal of each statement.

What is to be avoided here is the promotion of ‘unbiased’ information on the issue by the Commission. PPERA does this as it stands but it means reinstating the public grant.

The drafters of the Scottish Independence Referendum Bill seem to have seen the public grant as a random and superfluous use of public money rather than an integral
part of the solution proposed by Lord Neill to the need for information. Abolishing grants means even more public money is spent by commissions on information leaflets that would be spent far more effectively by the campaigns. No public money is saved and a less than satisfactory outcome for all is the result.

This is not to deny the importance of information in referendum debates. In my view, it is what distinguishes a good referendum and delivers a stable result. I urge the committee to find a different solution than that proposed in section 21, paragraph (b).

For the record, I chaired the cross-party Yes campaign in the 1997 Scottish devolution referendum, gave evidence to Lord Neill in 1998, and made first use of PPERA in 2001 preparing for the euro referendum which was subsequently abandoned. I have been an observer of the three referendums actually held under PPERA. In addition, I have visited referendums in other parts of the world.

Nigel Smith
May 2013