

SCOTTISH INDEPENDENCE REFERENDUM BILL

WRITTEN SUBMISSION FROM NIGEL SMITH

Government role in the referendum including the 28 day purdah

Schedule 4 Part 4 paragraph 25: Publications and Control of Ministers

All campaigners in the referendum except the Scottish Government will be regulated throughout the proposed four month campaign by the Electoral Commission.

The Scottish Government need only comply with the Scottish Independence Referendum Bill for the last 28 days of the campaign. For the other three months, the government is free to do as it wishes with public money in support of the referendum limited only by the usual Ministerial conduct codes.

These standing codes do not normally provide redress within the timescale of a referendum and sometimes involve the government being judge and jury in its own case. Any alleged infringement is often followed by a media firestorm that distracts from the issues at stake in the referendum.

Because the UK Government has agreed, in the *Edinburgh Agreement*, to abide voluntarily by the 28 day purdah, both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry. And for the last month, by a referendum Commission with few tools in the Bill and its own uncertain will. This is no regulation of government at all.

PPERA, in section 125, has from enactment in 2000, been seen to give significant advantage to the government of the day. Despite Ministerial codes of conduct, the government can easily plan its business, lean on public bodies and tax payer funded clients, and use the profile of office with its routine attendance of media to its own advantage in the first three months of any referendum it calls.

The deficiency in PPERA has been copied into the Scottish Independence Referendum Bill and then simply amended to delete restrictions on its tax funded clients.

The advantage may be increased in the smaller polity of Scotland where the reach of government is greater. The focus on the high profile events like the festival of Bannockburn and the Commonwealth Games has tended to obscure the other areas where this clause could benefit the government.

Yet this is not a specific criticism of the Scottish Government. Other governments are tempted to abuse their power. One example was the use of public money to conduct opinion polling for the YES side in the 1998 referendum on the Good Friday Agreement. The current UK Government could also be tempted to misuse its power in the Scottish Independence referendum leading to a war of allegations.

The Neill Committee whose report in 1998 formed the basis for PPERA, recommended that government – as a government - should play no part in referendum campaigns except as individuals through their political parties. This would have solved the problem at a stroke. He cited other countries where this ‘neutrality’ is a longstanding practice without problems

His recommendation that government should take no part in a referendum that it calls may, at first, seem counter intuitive. But the fact that in both the UK's national referendums (1975 EEC and 2011 AV) and two of the three referendums fought under PPERA (AV and Powers) the government played no effective part - as a government - without the roof falling in, suggests Lord Neill was right. (The qualification should be made that in 1975, the Government issued a White paper and statement of its views; then played no further part in the referendum.)

Lord Neill's recommendation was not adopted by the new Labour Government. Jack Straw as Home secretary said that '*the government has got to be very careful about using its power and its money to unfairly influence the results of a referendum*' indicating that it was unwilling to stay out of the referendum altogether or play by the rules of everyone else. The most it was prepared to concede was 28 days.

In 2003, the No euro campaign took legal opinion that the privileged treatment of government in section 125 of PPERA, breached their rights under Articles 10 and 14 of the European Convention on Human Rights. Although the Lord Chancellor disputed the opinion, the campaign only desisted from pursuing the case when the Labour Government abandoned the euro referendum in June of that year. The legal opinion is therefore untested.

The Labour Government remained cautious on the point. Before the North East referendum in 2004, it voluntarily agreed to the Electoral Commission's request to date the 28 day purdah from the distribution of postal ballots rather than referendum day (in effect, a 56 day period). This self-imposed extension had no legal force but the government stuck to its promise.

Then in 2010, the same Labour Government decided that it would play no part – as a government - in the Powers referendum in Wales. The referendum was held in 2011 under the new Coalition government who also decided against participating as a government. In effect, three major UK political parties have made some active acknowledgment of PPERA's weakness on the government role and the 28 days.

In its own consultation in January 2012, the Scotland Office promoted PPERA as '*well established, tried and tested rules*' but it should be ashamed of such an inaccurate claim. The rules have been tried and found wanting in several important respects - not once but three times – in referendums in 2004 and 2011. After each referendum, the Electoral Commission recommended reforming the government role by dropping the 28 days in favour of the whole referendum period, in this case - 125 days.

In January 2012 in its own consultation *Your Scotland: Your Referendum*, the Scottish Government said that it would consider these reforms with the Commission before introducing the Bill. But the Commission has been unable to persuade its sponsoring government to adopt 125 days.

Instead of accepting the reform on its merits, the Scottish government seems to have drawn the definition of public body even more to its advantage. Grant funded clients of the government of which there are many in Scotland, appear to be excluded. Para 9.13 from the No to AV campaign evidence seems to propose sensible amendments that cover the point.

The law of course has to be enforced within the 28 day purdah. The Bill seems to have given no new powers to do so. In addition, there must be some doubt of the will of the Commission to enforce any provisions against governments.

The Commission seems to have sorted out the preliminaries of a referendum to the satisfaction of participants but when the race starts and the tempo steps up, it has on occasions been seen to be slow to deliver timely decisions or guidance. The criticisms can be quite trenchant.

There is little experience of the 28 days but what there is in the North East referendum and AV referendum suggests the Commission is even slower to regulate Government or rule against tax funded bodies.

The more general point could be made that it is unrealistic to ask any public body to regulate the two governments *in the heat of a referendum* yet that is what it must do if the ruling is to affect the conduct of the referendum. Faced with sponsoring governments, the temptation is to split the difference rather making a clear cut ruling when one is justified and to do so only after much indecision.

So extending the 28 days to 56 days or 125 as the Commission recommends will certainly bring governments more fully into the Bill but it also compounds the problem of weak enforcement of government infractions.

Whereas removing the Government from the referendum solves the problem entirely. Both governments should issue White papers and statements then cease to take part in the referendum - as governments - exactly as was done in 1975 EEC referendum.

Leaving the Bill as it stands means both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry. And for the last month, by a referendum Commission with few tools in the Bill and its own uncertain will.

I conclude that the Bill on this point provides no regulation of government and is more likely to distract voters than enlighten them.

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.

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