



House of Commons  
Public Administration  
and Constitutional Affairs  
Committee

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**Lessons learned from  
the EU Referendum**

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**Twelfth Report of Session 2016–17**

*Report, together with formal minutes relating  
to the report*

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## Public Administration and Constitutional Affairs

The Public Administration and Constitutional Affairs Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration and the Health Service Commissioner for England, which are laid before this House, and matters in connection therewith; to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service; and to consider constitutional affairs.

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## Summary

On 23 June 2016 voters went to the polls on the question: “Should the United Kingdom remain a member of the European Union or leave the European Union”? This report identifies the lessons that can be learned from the handling of that referendum, and makes recommendations which would improve the legislation and regulatory framework for referendums, as well as for the government, civil service and Electoral Commission in the effective conduct and delivery of any future referendums.

The UK is a representative democracy, but like in many other democracies, referendums have become part of the UK constitution, used over a dozen times since the 1970s. Since being introduced in the UK as a democratic device, referendums have become accepted as the most convenient means of deciding issues of key constitutional importance. Referendums are by their nature divisive. A referendum is less satisfactory in the case of what might be called a “bluff call” referendum in order to close down unwelcome debate, like the referendum on EU membership. The Government was against the suggested proposal, the consequences were less clear, and the Prime Minister of the day would not implement the outcome. There was no proper planning for a Leave vote so the EU referendum opened up much new controversy and left the Prime Minister’s credibility destroyed. Referendums are the creations of Parliament and the Government. Parliament and the Government are therefore accountable and must take responsibility for the conduct of referendums, and the fairness of the question, and there should be proper information about, and planning for, either outcome.

Before the referendum, the Government argued that section 125 of the Political Parties and Referendums Act (2000) (PPERA), which contains the provisions for pre-referendum ‘purdah’, would impair the functioning of government, and proposed in the EU Referendum Bill that its provisions should be set aside. PACAC and the Electoral Commission opposed this, and in September 2015, the House of Commons amended the Bill accordingly. Fears that the application of section 125 would have potentially problematic consequences for the conduct of Government proved groundless. The section 125 restrictions on government were of critical importance to the fair conduct of the referendum. The provisions of section 125, while imperfect, have been successfully applied in numerous referendums since 2000. The purdah provisions of section 125 of PERA play a key role in the fair conduct of referendums and must continue to do so in future referendums. PACAC supports the Law Commission’s proposals to consolidate the law regulating referendums, and the establishment of a generic conduct order that can be applied to future referendums. The section 125 restrictions should be clarified and modernised to reflect the digital age, and extended to cover the full ten weeks of the referendum period. There should be sanctions for breach of section 125, and the Electoral Commission should have powers to police its application.

The Register to Vote website crashed on the evening of 7 June 2016. The Government has stated that this was due to an exceptional surge in demand, partly due to confusion as to whether individuals needed to register to vote. The Government should develop an online service to enable people to check whether they are already correctly registered. However, the Government clearly failed to undertake the necessary level of testing and

precautions required to mitigate against any such surge in applications. The Association of Electoral Administrators criticised the government and the Electoral Commission for a clear lack of contingency planning.

We do not rule out the possibility that there was foreign interference in the EU referendum caused by a DDOS (distributed denial of service attack) using botnets, though we do not believe that any such interference had any material effect on the outcome of the EU referendum. Lessons in respect of the protection and resilience against possible foreign interference in IT systems that are critical for the functioning of the democratic process must extend beyond the technical. The US and UK understanding of 'cyber' is predominantly technical and computer-network based, while Russia and China use a cognitive approach based on understanding of mass psychology and of how to exploit individuals. We commend the Government for promoting cyber security as a major issue for the UK. We recommend permanent machinery for monitoring cyber activity in respect of elections and referendums be established, for promoting cyber security and resilience from potential attacks, and to put plans and machinery in place to respond to and to contain such attacks if they occur.

On the whole, the referendum was well run and competently administered by the Electoral Commission. We recommend that the Electoral Commission undertake a review of the designation process of the two official campaigns, to examine where greater transparency could be achieved. This review should include consultation with campaigners from each of the campaigns that sought designation during the EU referendum. It should address whether earlier designation would have been fairer, and whether there should be a more explicit fit and proper person test for those applying for designation.

During the run-up to the EU referendum, there were many occasions when it appeared to many that civil servants were being drawn into referendum controversy. This damaged the reputations of the Civil and Diplomatic Services for impartiality. We regret the Government did not accept the recommendation of our predecessor Committee, PASC, in relation to the provision of a new paragraph in the Civil Service Code, which would have served to clarify the role and conduct of civil servants during a referendum campaign. This proportionate and sensible step, would have served to promote clarity and a clear understanding of the role for civil servants at the very outset of the EU Referendum campaign, thereby avoiding some of the controversies which arose during that campaign. The manner of the presentation of government reports, particularly those from the Treasury, and the decision to spend £9.3m on sending a leaflet, advocating a Remain vote, to all UK households, were inappropriate and counterproductive for the Government.

While the Government did not support a Leave vote, they nonetheless had a constitutional and public obligation to prepare for both outcomes from the referendum. In 1975, Whitehall undertook contingency planning for a possible vote in favour of withdrawal from the European Communities and there was no adequate reason for a refusal to prepare for either eventuality in 2016. Though we were relieved to learn that work was undertaken within the Civil Service on the potential implications of a Leave vote, Civil Servants should never have been asked to operate in a climate where contingency planning was formally proscribed by the Government. We recommend that in the

event of future referendums civil servants should be tasked with preparing for both possible outcomes. The presumption should be that the sitting Prime Minister and his/her administration will continue in office and take responsibility for the referendum result in either eventuality. We recommend that the Government heed the lessons from this referendum of the implications of the use of the machinery of government during referendums on public trust and confidence in the institutions of government.



# 1 Introduction

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1. On 23 June 2016 voters went to the polls on the question: “should the United Kingdom remain a member of the European Union or leave the European Union”? This was only the third nationwide referendum in the UK’s history. The result was momentous: the victory for Leave- by a margin of 51.89% to 48.11%, representing 17.4 million votes to 16.14 million- was the first State-wide referendum in which the electorate rejected the advice of the Government.

2. Many months after that vote, and without any new referendum in prospect, it may seem otiose to pore over the details of the events leading up to the referendum. Nevertheless on 14 July 2016 the Public Administration and Constitutional Affairs Committee (PACAC) launched an inquiry into the lessons that can be learned from this referendum for the conduct of future referendums. This builds on the work of the Public Administration Select Committee (PASC) on the conduct of the Scottish independence referendum in the last Parliament.<sup>1</sup> Both reports should be required reading for anyone contemplating a referendum at some future date. It is also necessary for the Government to take heed of the recommendations for reform to the legislation governing referendums now, in order to be ready for any future referendum.

3. During the course of this inquiry, PACAC has focused on four broad areas:

- the role and purpose of referendums and the relationship between direct and parliamentary democracy (Chapter 1). The relationship between representative and direct democracy has been the subject of longstanding debate in the United Kingdom, with the use of referendums for substantial political or constitutional issues being a relatively recent phenomenon;
- the effectiveness of the existing legislation regulating the conduct of referendums (Chapter 2). The existing regulatory framework for referendums is underpinned by the Political Parties Elections and Referendums Act 2000. We consider the main criticisms made about this regulatory framework and provide proposals for reform;
- the Electoral Commission and the administration of the referendum Chapter 3). The Electoral Commission is both the regulator and one of the key actors in delivering the referendum; and
- the role of the machinery of government during the referendum (Chapter 4). This also addresses the question of how much contingency planning for a Leave vote took place in Whitehall prior to 23 June 2016.

4. PACAC took evidence from the Cabinet Secretary, Sir Jeremy Heywood, the two designated lead campaigns, Britain Stronger in Europe and Vote Leave, academic experts and from the Electoral Commission. A full list of those who gave evidence can be found at the back of this report. We thank all of those who gave evidence to this inquiry.

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1 House of Commons Public Administration Select Committee, [Lessons for Civil Service impartiality from the Scottish independence referendum](#), Fifth Report of Session 2014–15, HC 111, 23 March 2015; Public Administration and Constitutional Affairs Committee, [Lessons Learned from the EU Referendum](#), 14 July 2016.

## 2 Referendums and representative democracy in the UK

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### *“A device so alien to all our traditions”?*

#### *The history of the referendum in UK politics*

5. In 1945, when presented with the proposal that the continuance of the wartime coalition should be put to the public in a referendum, the then Deputy Prime Minister, the Rt Hon Clement Attlee, famously responded that he could not “consent to the introduction into our national life of a device so alien to all our traditions as the referendum”.<sup>2</sup> Despite this claim, and the fact that it took until 1973 for the first major referendum in the United Kingdom to take place (the Northern Ireland Sovereignty Referendum - commonly referred to as the ‘Border Poll’), referendums have long featured in discussions on constitutional and political reform in the United Kingdom. Professor Stephen Tierney has maintained that the argument that the devolution of powers from Westminster would require a referendum can be seen as stretching back to 1890. A.V. Dicey, the pre-eminent constitutional theorist in British constitutional history, is more often associated with the doctrine of parliamentary sovereignty, but even he proposed a referendum on the question of Irish Home Rule.<sup>3</sup> In the early decades of the Twentieth Century, the Conservative Party floated the idea of a referendum in the context of House of Lords reform (1910) and tariff reform debates (in 1910 and 1930).<sup>4</sup>

6. Since the first major referendum in the United Kingdom, the 1973 border poll, there have been twelve notable referendums in this country. Three of those twelve have been state-wide in nature: the 1975 vote on Britain’s continued membership of the European Community, the 2011 AV referendum and the 2016 EU referendum. The other seven have taken place solely within one of the constituent nations of the UK, and two within regions of England: London in 1998 and the North East of England in 2004; a second one in Northern Ireland, on the Good Friday Agreement in 1998; three in Scotland, of which two were on devolution, 1979 and 1997, and one on independence in 2014; and three in Wales on devolution, 1979, 1997 and 2011. There have also been a number of local referendums on local government issues, such as on reorganisations, and on the question of elected mayors.<sup>5</sup>

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2 Clement Attlee quoted in, Bogdanor, V., *The People and the Party System: The Referendum and Electoral Reform in British Politics*, (Cambridge, 1981), p.35.

3 Tierney, S., *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, (Oxford, 2012), p.108; Dicey, A.V., ‘Ought the referendum to be introduced into England?’ *Contemporary Review* 57 (April, 1890).

4 Horwill, H. The Referendum in Great Britain, *Political Science Quarterly* (September, 1911) Vol. 26, No. 3, pp. 415–431; Bogdanor, V., *The People and the Party System: The Referendum and Electoral Reform in British Politics*, (Cambridge, 1981), p.34.

5 Mayoral referendums were held in 2012 in 11 of England’s largest cities to determine whether or not to introduce directly-elected mayors to provide political leadership, replacing their current council leaders, who are elected by the local council. Advisory referendums were also held in Edinburgh in 2005 and in Greater Manchester in 2008 which both rejected local transport strategies, which included congestion charges.

## A competitive or complementary relationship? Referendums and Parliament

7. The United Kingdom is a representative, parliamentary democracy where the doctrine of parliamentary sovereignty has been a cornerstone of its uncodified constitution. Indeed, it has been claimed that the traditional British Constitution could be summarised in eight words: “what the Queen-in-Parliament enacts is law”.<sup>6</sup>

8. It is unsurprising, then, that the compatibility of the UK’s model of representative democracy, imbued with the principle of parliamentary sovereignty, and referendums has long been contested. There are those who oppose the use of referendums in the belief that they undermine either, or both, parliamentary sovereignty and representative democracy. There are others, meanwhile, who believe that referendums can complement the sovereignty of Parliament and are in keeping with our system of parliamentary government.<sup>7</sup>

9. Critics of the referendum warn that referendums by their very nature undermine the UK’s representative, and parliamentary, democracy, not least when there is a clear difference between the views of a majority of the public and the majority of parliamentarians.<sup>8</sup> The trustee model of representation was formulated by Edmund Burke MP, Irish MP and philosopher, who told the electors of Bristol that “your representative owes you, not his industry only; and he betrays, instead of serving you, if he sacrifices it to your opinion”. As Peter Browning noted in his evidence to the House of Lords Constitution Committee, “if the people vote one way, their representatives another, who should prevail, who is sovereign”?<sup>9</sup>

10. For proponents, on the other hand, referendums can enhance the quality of representative democracy and have been used across the world, in countries such as Switzerland, Australia and New Zealand, and in some US states, such as California, without endangering representative democracy.<sup>10</sup> As, Dr Alan Renwick from the Constitution Unit at UCL noted, “most democracies hold referendums and there is no evidence to suggest that the existence of referendums undermines the broader representative democratic process”.<sup>11</sup> Professor Stephen Tierney, University of Edinburgh, suggested that “the referendum can be a useful way to engage citizens in processes of constitutional change if [ ... ] well designed and well regulated”.<sup>12</sup>

### *Reconciling referendums and representative democracy*

11. An emphasis on design, rather than the principle, of referendums was a prominent feature of the evidence submitted to PACAC’s inquiry. As Professor Tierney acknowledged, referendums can generate heat, with the risk of “ill-tempered and potentially bitter

6 Bogdanor, V., *The New British Constitution*, (Oxford, 2009), p.13.

7 This divergence of view was captured by the House of Lords Constitution Committee in its 12th Report of Session 2009–10, [Referendums in the United Kingdom](#), HL Paper 99, (see: paras. 13–59)

8 Dr Stephen Barber ([EUR0012](#)); The Sir Bernard Crick Centre, University of Sheffield ([EUR0062](#)); the nature of the UK’s representative parliamentary democracy is discussed later on in this report.

9 House of Lords Select Committee on the Constitution, [Referendums in the United Kingdom](#), 12th Report of Session 2009–10, HL Paper 99, para. 58

10 Professor Richard Ekins ([EUR0104](#)).

11 [Q68](#).

12 Professor Stephen Tierney ([EUR0072](#)).

referendum campaigns”. As a result, “it is of the highest importance [ ... ] that the process of the referendum itself be fair and be seen to be so by both sides: that the result is agreed to, even if it is not agreed with, by losers as well as winners”.<sup>13</sup>

12. Of particular importance then, is the choice of issue put forward to the electorate at a referendum. Since the 1970s, there has been a growing trend towards the use of the referendum to settle major constitutional questions in the United Kingdom, with Professor Vernon Bogdanor claiming in 2009 that “there can be little doubt [ ... ] that the referendum has now become part of the British constitution”.<sup>14</sup> While Bogdanor acknowledged that the absence of a codified constitution meant there was little certainty as to the precise role of the referendums, he has nonetheless suggested that “a series of persuasive precedents” have developed as to the circumstances in which referendums should be called.<sup>15</sup> These precedents have included issues of sovereignty and the scope of Westminster’s power. For example, the devolution referendums of 1979 and 1997; the constitutional position of Northern Ireland in 1973 and, in the form of power sharing, in 1998; and the UK’s membership of the European Communities in 1975.<sup>16</sup>

13. The House of Lords Constitution Committee in its 2010 report, *Referendums in the United Kingdom*, drew a similar conclusion about the bluntness of referendums and noted the “significant drawbacks” to these devices.<sup>17</sup> However, their Lordships argued that “if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues”. While they did not believe it is possible to provide a precise definition of what constitutes a “fundamental constitutional issue” (not least because of the absence of a codified constitution), they suggested that any proposals to do the following would fall within this definition:

- To abolish the Monarchy;
- To leave the European Union;
- For any of the nations of the UK to secede from the Union;
- To abolish either House of Parliament;
- To change the electoral system for the House of Commons;
- To adopt a written constitution; and
- To change the UK’s system of currency.<sup>18</sup>

**14. The UK is, in principle, a representative democracy. The referendum in the United Kingdom has been viewed by some as a device which is both alien to our constitutional principles and a potential threat to parliamentary sovereignty. However, referendums have become part of the UK’s largely uncodified constitution, with over a dozen referendums, since the early 1970s, on issues ranging from the future of Northern**

13 Professor Stephen Tierney ([EUR0072](#)).

14 Bogdanor, V., *The New British Constitution*, (Oxford, 2009), p.173.

15 Bogdanor, V., *The New British Constitution*, (Oxford, 2009), pp.186–188.

16 Bogdanor, V., *The New British Constitution*, (Oxford, 2009), pp.186–189.

17 House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, 12th Report of Session 2009–10, HL Paper 99, para.62.

18 House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, 12th Report of Session 2009–10, HL Paper 99, para.94.

Ireland to the voting system used for Westminster elections. On the basis of these precedents, we agree with the House of Lords Constitution Committee’s judgement in 2010 that, if referendums are to be used, they are most appropriate as a device for resolving questions of key constitutional importance, and we consider them appropriate when issues cannot be resolved through the usual medium of party politics.

### *The importance of a clear question for a clear outcome*

15. An additional design consideration, closely interwoven with the choice of subject put to the electorate at a referendum, is the clarity of the question itself and its potential outcomes. For example, in their written evidence, the Sir Bernard Crick Centre (Crick Centre) warned that referendums, in their view a “blunt democratic instrument”, were “clearly problematic where the matter to be decided is a complex issue”.<sup>19</sup> Indeed, John Sturrock QC (a specialist adviser to PACAC) has noted that the binary nature of referenda serve to polarize debate, and are therefore not the most appropriate way to make decisions and move forward on major constitutional issues.

16. In the context of the 2016 EU referendum, the lack of clarity as to the potential consequences of a Leave vote was criticised by some witnesses. The UK in a Changing Europe project suggested that while at one level, the EU referendum posed “the simple question do the British people want to stay or go?”, the reality was much more complex.<sup>20</sup> According to their submission, “while staying was known, going was unknown” with “no route map as to what Leave actually looked like”, with the consequences of the referendum being “very hard to grasp”.<sup>21</sup> As a result of the “crude form in which the question was put”, the UK in a Changing Europe project concluded that a “referendum was not a suitable vehicle for an issue of this magnitude”.<sup>22</sup>

17. In his submission, Dr Justin Gerlach similarly emphasised the lack of clarity regarding the potential outcome of a Leave vote. According to Dr Gerlach, “a referendum should only be undertaken when a black-and-white binary choice is presented”. He explained that while the referendum appeared to be a binary decision between the status quo and leaving, “the Leave option covered several widely different approaches, from a clean break ‘hard Leave’ to a EU-access at all costs ‘EU-lite’”.<sup>23</sup> This was in marked contrast to the AV referendum, “an illustration of a truly binary referendum”, when voters were asked to make a choice “not between the status quo and electoral reform ... but between the status quo and the AV version of reform”.<sup>24</sup> It was of course the intention of the Remain side that the detail of the Leave proposal should be unclear and it also suited the Leave campaign that they should not be tied to a particular plan for Leave, but the principle of the question was clear.

18. In contrast, however, Professor Richard Ekins argued that it was “entirely proper for Parliament to put the question of membership of the EU to the electorate for decision”.<sup>25</sup> He added:

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19 The Sir Bernard Crick Centre, University of Sheffield ([EUR0062](#)).

20 The UK in a Changing Europe ([EUR0064](#)).

21 The UK in a Changing Europe ([EUR0064](#)); [Q69](#).

22 The UK in a Changing Europe ([EUR0064](#)).

23 Dr Justin Gerlach ([EUR0013](#)).

24 Dr Justin Gerlach ([EUR0013](#)).

25 Professor Richard Ekins ([EUR0104](#)).

This was a question that called out for decision other than by Parliament itself, not only because it concerned a central question about constitutional identity and about the self-constituting choice of whether to embrace or reject membership of a larger political community (the emerging partial state that is the EU), but also because of the continuing divergence between elite opinion (largely in favour of membership) and mass opinion (in the event, in favour of exit).

Furthermore, while Professor Tierney criticised the lack of clarity in the European Union Referendum Act 2015 as to the legal effect of the referendum, he nonetheless emphasised that the referendum, although not perfect, was a “free, fair and deliberative process” and “although many were unhappy with the result”, its legitimacy had not been the subject of serious legal challenge.<sup>26</sup>

**19. If the results of referendums are to command the maximum of public support, acceptance and legitimacy, then they must be held on questions and issues which are as clear as possible. Voters should be presented with a choice, where the consequences of either outcome are clear. There is bound to be uncertainty arising from what might be termed a “bluff-call” referendum, like the 2016 EU referendum, but this should not limit how the participants campaign on either side. The UK Government initiated the process which led to the referendum, despite being against the suggested proposal, and with the aim of using a negative result to shut down the debate about the question at issue. Moreover, the referendum was confined to a tight question, on the basis of a clear binary choice. There could, however, have been more positive efforts to explain, and therefore to plan for, the consequences for voters in the event of either outcome. This would have required providing impartial consideration of the outcome which the Government clearly did not want.**

### *The legal status of referendums*

20. The doctrine of parliamentary sovereignty, allied to the absence of a codified constitution, has resulted in referendums in the UK generally being treated as advisory, rather than legally binding.<sup>27</sup> The sole exceptions to this general rule were the AV referendum in 2011, and, in a more complicated fashion, the 1979 devolution referendums in Scotland and Wales, where the legislation enacted the legal consequences of the result.<sup>28</sup>

21. However, as Dr Renwick, of the Constitution Unit, University College London, notes, referendums “are in practice treated as binding”.<sup>29</sup> Professor Ekins, of St John’s

26 In contrast to the 2011 AV referendum, where section 8 of the Parliamentary Voting Systems and Constituencies Act 2011 included provision requiring the Government to either make an order commencing, or repealing, the Alternative Vote provisions of the Act (Parliamentary Voting System and Constituencies Act 2011, [s.8](#)); Professor Stephen Tierney ([EUR0072](#)).

27 See, for example: House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, 12th Report of Session 2009–10, HL Paper 99, paras. 190–197; and Rogers, R. and R. Walters, *How Parliament Works* (7th Edn.), (London, 2015), pp.370–371; Professor Stephen Tierney ([EUR0072](#)).

28 As Dr. Craig Prescott explains in his written evidence, in 1979 the ‘Cunningham Amendment’ made to the Wales Act 1978 and Scotland Act 1978 meant that if less than 40% of the total eligible electorate voted in favour of devolved assemblies for Scotland and Wales, then the legislation had to be repealed. However, if the 40% figure was met, and the result been in favour of creating either assembly, then there was no obligation for the Government to commence the legislation (Dr Craig Prescott ([EUR0098](#)), see also: Bogdanor, V., *Devolution in the United Kingdom*, (Oxford, 1999), pp.186–191; 199).

29 Dr Alan Renwick ([EUR0080](#)).

College, Oxford, while stressing Parliament's autonomy and sovereignty, contended that the referendum placed "an obligation in political morality on Parliament and the Government to take action to make it the case that [the] UK ceases to be a member of the EU".<sup>30</sup> Similarly, the Electoral Reform Society emphasised that regardless of whether a referendum is legally binding or not, "it is clear that referendums are viewed as morally binding on the political system" and that "citizens' expectations are that referendum results will be acknowledged and fulfilled".<sup>31</sup> However, few, if any, anticipated the legal challenge that ended with the Supreme Court Ruling of 24 January 2017. While this did not challenge the result of the EU Referendum, it did underline how little certainty there was about what might follow a Leave vote.

22. The then Prime Minister, Rt Hon David Cameron, insisted during the campaign that he would not resign in the event of a Leave vote.<sup>32</sup> This assurance proved false. However, the recent experience of other EU countries where the government in power has lost a referendum shows that Prime Ministers often remain in office in such circumstances, albeit often following a re-negotiation and the winning of a further referendum.<sup>33</sup>

23. **Parliamentary sovereignty, and the associated principle that no Parliament can bind a successor, makes the concept of a legally binding referendum impossible in theory. However, it is clear that, in reality, referendums are seen by the public as conferring an obligation on parliamentarians to deliver the result. Parliament has delivered this, and the EU (Notification of Withdrawal) Bill completed its passage through both Houses, and received Royal Assent on 16 March 2017.**

24. **In other countries, referendums are not conducted on the basis that a Prime Minister must resign in the event of losing a referendum. A more responsible conduct of the Government's case in the run up to the referendum, and proper planning for a Leave vote, would not have opened up so much new controversy nor left the Prime Minister's authority and credibility undermined. Using a referendum as a "bluff call" in order to close down unwelcome debate on an issue is a questionable use of referendums. Indeed, it is incumbent on future Parliaments and governments to consider the potential consequences of promising referendums, particularly when, as a result, they may be expected to implement an outcome that they opposed.**

## Conclusion

25. **The relationship between the direct democracy of a referendum and the established expectations of representative democracy requires careful management. We agree that it is of the highest importance that the referendum process is seen to be fair, by both sides, and that the result is agreed to, even if not with, by both sides. This is particularly important given the public's expectation, post-referendum, that the result will be accepted and implemented.**

26. **To achieve this level of acceptance and legitimacy, referendums, therefore, need to be designed in such a way as to provide the utmost clarity for parliamentarians,**

30 Professor Richard Ekins ([EUR0104](#)).

31 Electoral Reform Society ([EUR0093](#)).

32 See, for example, *The Independent*, [David Cameron says he will not stand down - even if he loses the EU referendum](#).

33 As for example after the Danish Maastricht Treaty Referendum, 2 June 1992, the Irish Nice Treaty Referendum, 7 June 2001, or the Irish Lisbon Treaty Referendum, 1 June 2008.

**campaigners and, above all, the electorate. Referendums should be limited to matters which lend themselves to a binary question. Confusion as to the possible consequences of a referendum result serves only to heighten the potential tensions between referendums and representative democracy and risks increasing the public's disenchantment with politics. Referendums are the creations of Parliament and the Government. Parliament and the Government are therefore accountable and must take responsibility for the conduct of referendums, and the fairness of the question, and there should be proper information about, and planning for, either outcome.**



## 3 The regulatory framework for referendums

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### The Political Parties, Elections and Referendums Act 2000

27. The Political Parties, Elections and Referendums Act 2000 (PPERA) applies to referendums held throughout the United Kingdom, including in one or more of the constituent parts of the UK and any specified region in England, “in pursuance of any provision made by or under an Act of Parliament”.<sup>34</sup> PERA provides for the following:

- The means by which a referendum period is determined;
- The means by which referendum question(s) are determined;
- Requirements on individuals and groups who campaign in referendums—known as permitted participants—including controls on the amount that they spend and on the donations that they are permitted to accept; and
- The means by which lead campaign groups—known as designated organisations—are determined and the assistance which they are entitled to receive.<sup>35</sup>

28. Of particular importance is section 125 of PERA, which provides for a 28 day controlled period prior to a referendum polling day, during which Government Ministers, Departments, Local Authorities and other public bodies are prohibited from publishing material relating to the referendum question.<sup>36</sup>

29. Prior to the EU Referendum there had only been two referendums of note held under the PERA regime, the 2004 referendum on an elected assembly for the North-East of England, and the UK-wide referendum on the electoral system in 2011. Because the 2014 Scottish independence referendum was the product of an Act passed by the Scottish Parliament the referendum did not formally fall under the provisions of PERA. However, the Edinburgh Agreement 2012, signed by the UK and Scottish Governments, stated that the principles governing the referendum would be based on PERA.<sup>37</sup> As a result, the Scottish Independence Referendum Act 2013 (SIRA) complied with the broad framework laid out by PERA.<sup>38</sup>

30. While PERA creates a regulatory framework for referendums, bespoke legislation, providing detailed rules, are required for each referendum. William Norton, the Legal Director of Vote Leave, explained to the Committee that PERA provides “a certain basic

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34 Political Parties, Elections and Referendums Act 2000, [s.section 101\(1\) and \(2\)](#).

35 House of Lords Select Committee on the Constitution, [Referendums in the United Kingdom](#), 12th Report of Session 2009–10, HL Paper 99, para.142.

36 *Political Parties, Elections and Referendums Act 2000* (PPERA), [section 125](#); PERA also provides for the creation of an [Electoral Commission](#), a body independent of government and established in 2001 (*Political Parties, Elections and Referendums Act 2000, Part 1*). The Electoral Commission and its role during referendums will be discussed in more detail in Chapter Four of this report. For the purposes of this chapter it is sufficient to note that PERA provides for the Commission to comment on the intelligibility of the referendum question, appoint designated campaign organisations, monitor and report on campaign spending; and report on the administration of the referendum.

37 [The Edinburgh Agreement 2012](#).

38 [Scottish Independence Referendum Act 2013](#); for example, [section.4 of SIRA](#) incorporated, for Scottish public bodies at least, the provisions laid out in section 125 of PERA, [s.4](#).

minimum regulatory framework that governs any referendum that is held under the Act, but it leaves space for particular bespoke regulations governing, for example, the question itself, the date and various other ancillary matters”.<sup>39</sup> In the case of the EU Referendum, this additional regulatory structure not only included the European Union Referendum Act 2015 (the Referendum Act), but also the European Union Referendum (Conduct) Regulations 2016, the European Union Referendum (Date of Referendum) Regulations 2016 and the European Union Referendum (Voter Registration) Regulations 2016.<sup>40</sup>

31. The Referendum Act provided for a referendum on the UK’s membership of the EU to be held by 31 December 2017 (but not on either 5 May 2016, or 4 May 2017), while the regulations provided for the dates of the application period for campaigns seeking official designation (applications opened on 4 March 2016 and the designation announcement was made on 13 April), the referendum period (15 April-23 June) and of the referendum itself (23 June), as well as the deadline for electoral registration (following the crash of the Government’s voter registration website, a set of emergency regulations, the European Union Referendum (Voter Registration) Regulations 2016, were tabled to extend the original registration deadline).

### **Section 125 of PPERA**

32. Section 125 of PPERA provides for the following prohibition on the publication of referendum-related promotional material by central and local government and other public bodies, during the final 28 days of the referendum campaign:

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39 [Q199](#).

40 [European Union Referendum Act 2015](#); [European Union Referendum \(Conduct\) Regulations 2016](#); [European Union Referendum \(Date of Referendum\) Regulations 2016](#); [European Union Referendum \(Voter Registration\) Regulations 2016](#).

**Box 1: Political Parties, Elections and Referendums Act 2000, section 125****125 Restriction on publication etc. of promotional material by central and local government.**

- 1) This section applies to any material which—
  - a) provides general information about a referendum to which this Part applies;
  - b) deals with any of the issues raised by any question on which such a referendum is being held;
  - c) puts any arguments for or against any particular answer to any such question; or
  - d) is designed to encourage voting at such a referendum.
- 2) Subject to subsection (3), no material to which this section applies shall be published during the relevant period by or on behalf of—
  - a) any Minister of the Crown, government department or local authority; or
  - b) any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority.
- 3) Subsection (2) does not apply to—
  - a) material made available to persons in response to specific requests for information or to persons specifically seeking access to it;
  - b) anything done by or on behalf of the Commission or a person or body designated under section 108 (designation of organisations to whom assistance is available);
  - c) the publication of information relating to the holding of the poll; or
  - d) the issue of press notices;

and subsection (2)(b) shall not be taken as applying to the British Broadcasting Corporation or Sianel Pedwar Cymru (S4C).

- 4) In this section—
  - a) “publish” means make available to the public at large, or any section of the public, in whatever form and by whatever means (and “publication” shall be construed accordingly);
  - b) “the relevant period”, in relation to a referendum, means the period of 28 days ending with the date of the poll.

Source: Political Parties, Elections and Referendums Act 2000, section 125

33. As originally presented to the House of Commons in June 2015, Schedule 1 of the Referendum Act 2015 would have disapplied the section 125 provisions for the purposes

of the EU referendum.<sup>41</sup> The Government’s explanation for this proposed dis-application, offered by the then Europe Minister, the Rt Hon David Lidington MP, was that section 125 resulted in a “very wide-ranging ban on what the Government can do”.<sup>42</sup>

34. As such, the Minister continued, section 125 would “prevent the Government or any public body from making any comment not necessarily on the referendum question but on an issue that might be discussed in the Council of Ministers meeting or in response to a European Court of Justice judgment” and “could make it impossible to explain to the public what the outcome of the renegotiation was and what the Government’s view of that result was”.<sup>43</sup>

35. Similar warnings about the potentially detrimental effect of section 125 on the Government’s ability to conduct business as usual were made by Sir Jeremy Heywood when he appeared before PACAC in July 2015, as part of our inquiry, EU Referendum Bill part 1: Purdah and impartiality.<sup>44</sup> This inquiry was launched on 8 July 2015, in response to a commitment made by the Minister to “consult parliamentary colleagues in all parts of the House to understand their concerns and views [on section 125] more closely”.<sup>45</sup>

36. According to Sir Jeremy Heywood, the Civil Service’s main concern was in relation to normal government business in Brussels, where Ministers would be “sitting in those [Ministerial] Councils trying to secure the best outcome for Britain”.<sup>46</sup> Sir Jeremy Heywood warned that the Government’s legal advice was “very worrying [ ... ] that unless Ministers tread very carefully, they may well end up using arguments in those internal EU discussions that could be construed by anyone litigious as bearing on the question of the referendum”.<sup>47</sup> Elaborating on this point, Sir Jeremy Heywood explained that “often during Council discussions”, the UK would register its position “by way of a minute statement, or you publish a document that is not technically a press notice, but is a statement of the UK’s position in writing”. He expressed concerns that such a document might be considered to constitute an infringement of section 125.<sup>48</sup>

37. On 22 July 2015, PACAC wrote to the then Minister for Europe, Rt Hon David Lidington MP, detailing the Committee’s objections to the disapplication of section 125.<sup>49</sup> PACAC called for section 125 to be reinstated for the EU referendum, though

41 European Union Referendum Act 2015, [Sch.1](#).

42 This explanation was offered by Mr Lidington during the first day of the Committee of the Whole House for the EU Referendum Bill on 16 June 2015 (HC Deb, 16 June 2015, [c.232](#)).

43 HC Deb 16 June, [c.233](#).

44 As the House of Commons Library explains, “the term ‘purdah’ is in use across central and local government to describe the period of time immediately before elections or referendums when specific restrictions on the activity of civil servants are in place. The terms ‘pre-election period’ and ‘period of sensitivity’ are also used” (White, I. ‘Purdah’ before elections and referendums, House of Commons Library Briefing Paper, [Number 05262](#), 26 May 2016, p.3). Use of the term ‘purdah’ has attracted some controversy as it is derived from the Urdu and Persian word *parda* meaning “veil or curtain”, often referring to the practice in certain Muslim and Hindu societies of screening women from men or strangers, particularly by means of a curtain. However, in elections and referendums it is common parlance to use the term to refer to the pre-election period and we use the term as shorthand, in this report, for the 28 day pre-referendum period.

45 HC Deb 16 June 2015, [c.235](#); House of Commons Public Administration and Constitutional Affairs Committee, [EU Referendum Bill part one: Purdah and Impartiality](#), 8 July 2015.

46 Oral evidence taken before the Public Administration and Constitutional Affairs Committee: EU Referendum Bill: Part One: Purdah and Impartiality, Tuesday 21 July 2015, HC 319 [Q230](#).

47 Oral evidence taken before the Public Administration and Constitutional Affairs Committee: EU Referendum Bill: Part One: Purdah and Impartiality, Tuesday 21 July 2015, HC 319 [Q230](#).

48 Oral evidence taken before the Public Administration and Constitutional Affairs Committee: EU Referendum Bill: Part One: Purdah and Impartiality, Tuesday 21 July 2015, HC 319 [Q232](#).

49 [Letter from Bernard Jenkin MP to the Rt Hon David Lidington MP](#), 21 July 2015.

it acknowledged that there could be scope for section 125 to be amended to provide clarification to reduce the perceived risk of legal challenge. In addition, it argued that regardless of any additional exemptions the machinery of government should not be used for campaigning purposes during a referendum.<sup>50</sup> Following this letter and after a series of amendments to the Referendum Act at Report stage, including defeats for the Government, the provisions of section 125 in full were effectively applied to the EU referendum.<sup>51</sup> This was a significant instance of how a Select Committee can directly influence the progress of government legislation.

38. When Sir Jeremy Heywood returned to give evidence to PACAC, as part of this inquiry, he defended his previous comments on *purdah*, saying that it was “absolutely right that the Cabinet Secretary takes seriously legal advice that I am given and the Government is given”.<sup>52</sup> According to Sir Jeremy Heywood, the concerns the Government had about *purdah* were twofold:

First, the Prime Minister had a very clear concern that the Government should be able to set out their perspective all the way through the referendum campaign. That was the political concern that he expressed repeatedly, and I mentioned it in the Committee as well. Secondly, we had this legal advice that we would have to be very careful to avoid business-as-usual business in Brussels falling foul of the wording of section 125.<sup>53</sup>

39. Nonetheless, he conceded that the problems that the Government’s lawyers warned about did not arise during the *purdah* period. Not only did Sir Jeremy Heywood acknowledge that he was “not aware of any” litigation threats made against the Government during the 28 day *purdah* period, but he also stated that the application did not cause “huge difficulties for business as usual”.<sup>54</sup>

40. The Electoral Commission had also stressed the importance of reinstating the *purdah* provisions into the Referendum Act, in line with PACAC’s recommendations. According to Jenny Watson, Chair of the Electoral Commission, the Commission felt that the application of section 125 was “extremely important” in providing fairness in the referendum. In Ms Watson’s opinion, section 125 is “there for a reason”, to give people confidence and it was “entirely right that it should have been reintroduced into the Bill”.<sup>55</sup> Matthew Elliott from Vote Leave noted that “it was not until *purdah* kicked in that we felt that both sides were given a fair hearing” during the actual campaign.<sup>56</sup>

**41. The reinstatement of the restrictions on government set out in section 125 of the Political Parties and Referendums Act (PPERA) was of critical importance to the fair conduct of the referendum and the legitimacy of its outcome. Parliament was right to resist the then Prime Minister’s desire that the government qua government should be able to promote its views on the referendum issue right the way through the referendum campaign. This would have constituted the use of public resources for political campaigning and would have made a nonsense of one of the purposes of PERA, which**

50 [Letter from Bernard Jenkin MP to the Rt Hon David Lidington MP](#), 21 July 2015.

51 [s.8 of the European Union Referendum Act](#) provided for a power to modify section 125 through regulations, though such regulations had to be agreed at least four months before the date of the referendum.

52 [Q1](#).

53 [Q5](#).

54 [Qq1–6; 8–10](#).

55 [Q307](#).

56 [Q207](#).

is to create parity between the two campaigns. Fears that the application of section 125 could have potentially problematic consequences for the conduct of government proved groundless. Sir Jeremy Heywood conceded that the application of section 125 did not cause huge difficulties for business as usual. Regardless of the legal advice, or the concerns of ministers, the attempt to disapply section 125 of PPERA left the Government open to the impression that it was seeking to manipulate the referendum process.

42. The provisions of section 125, while imperfect, have been successfully applied in numerous referendums since 2000. There is no evidence that section 125 created any of the threats to good governance that the Cabinet Secretary feared during his appearance before PACAC in July 2015. *The purdah provisions of section 125 of PPERA play a key role in the fair conduct of referendums and must continue to do so in future referendums.*

## Reforming the regulatory framework for referendums

43. PPERA has been in operation for over 16 years and while our evidence suggested that, in certain respects, the legislation has stood the test of time well, there was general agreement that there was scope for improvement.<sup>57</sup> In particular, witnesses pointed to two main areas where reform is needed: first, in terms of consolidating the regulatory framework for referendums; and second, in modernising and clarifying the provisions of section 125. According to the Electoral Commission, the time has “probably come [ ... ] to update the rules in the legislation”, with “some real opportunities to improve section 125”.<sup>58</sup>

### Consolidating referendum law

44. As discussed in paras. 34–35, while PPERA provides the basic regulatory framework for referendums, each referendum requires bespoke, primary and secondary legislation, that not only provides for the referendum to be held, date of poll and franchise, but also the conduct rules.

45. The requirement for new primary legislation for every referendum was described by the three UK Law Commissions in December 2014, when launching a joint consultation on consolidating electoral and referendum law, as “complex, voluminous and fragmented”.<sup>59</sup> The twin aims of the Law Commissions’ project were to ensure “that electoral laws are presented within a rational, modern legislative framework, governing all elections and referendums within scope” and “that electoral laws are modern, simple, and fit for purpose”.<sup>60</sup>

46. In their joint interim report, published in February 2016, the Law Commissions recommended that “the current laws governing elections should be rationalised into a

57 Dr Alan Renwick ([EUR0080](#)); Professor Stephen Tierney ([EUR0072](#)); The UK in a Changing Europe ([EUR0064](#)).

58 [Qq262](#); 264.

59 Law Commission, Scottish Law Commission and Northern Ireland Law Commission, [Electoral Law](#), Joint Consultation Paper LCCP 218 / SLCDP 158 / NILC 20 (2014), p.4.

60 Law Commission, Scottish Law Commission and Northern Ireland Law Commission, [Electoral Law](#), Joint Consultation Paper LCCP 218 / SLCDP 158 / NILC 20 (2014), p.4.

single, consistent legislative framework governing all elections (enacted in accordance with the UK legislatures’ legislative competences).<sup>61</sup> It is intended that this single legislative framework would be extended to referendums. According to the Commission:

At present, referendum law is on the whole contained in the instigating Act, even if it concerns the most basic elements of administering the poll. Whenever a referendum is to be called, the legislation instigating it must “reinvent the wheel”—making provision that, in essence, duplicates established electoral law, with some modification to accommodate the referendum taking place. This presents administrators with a large volume of new rules, and government and Parliament with unnecessarily extensive bills to prepare and scrutinise.<sup>62</sup>

47. In the Law Commissions’ opinion, it therefore seemed “desirable to produce a set of generic referendum conduct rules that could simply be applied with minimal adaptation in the instigating Act to the referendum it calls”. Such a development would, they suggested, “reduce the current complexity of the law, speed up the legislative process and make the conduct rules accessible in advance by electoral administrators”.<sup>63</sup>

48. As a result, the Law Commissions’ made the following recommendations for the reform of referendum law in the UK:

Recommendation 12-1: Primary legislation governing electoral registers, entitlement to absent voting, core polling rules and electoral offences should be expressed to extend to national referendums where appropriate.

Recommendation 14-2: Secondary legislation should set out the detailed conduct rules governing national referendums, mirroring that governing elections, save for necessary modifications.<sup>64</sup>

The Law Commissions’ recommendations have been supported by the Electoral Commission, both during the Law Commissions’ consultation process and, most recently, the form of the Electoral Commission’s official report into the EU referendum.<sup>65</sup>

49. The report makes a number of recommendations for future referendum legislation and conduct, not least on the merits of standardising and simplifying the regulatory framework for referendums. Indeed, the first of the Electoral Commission’s recommendations was that “the UK Government should establish a clear standard framework for the conduct and regulation of future referendums”.<sup>66</sup>

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61 Law Commission, Scottish Law Commission, Northern Ireland Law Commission, [Electoral Law: a joint interim report](#) (2016), p.8.

62 Law Commission, Scottish Law Commission, Northern Ireland Law Commission, [Electoral Law: a joint interim report](#) (2016), p.195.

63 Law Commission, Scottish Law Commission, Northern Ireland Law Commission, [Electoral Law: a joint interim report](#) (2016), p.195.

64 Law Commission, Scottish Law Commission, Northern Ireland Law Commission, [Electoral Law: a joint interim report](#) (2016), p.196.

65 Law Commission, Scottish Law Commission, Northern Ireland Law Commission, [Electoral Law: a joint interim report](#) (2016); The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016.

66 The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016, p.10.

50. In response to the Law Commissions' proposals, the Electoral Commission recommended that, rather than wait for another referendum to act, the Government use the powers provided to the Secretary of State in section 129 of PPERA "to make an Order providing the detailed conduct rules for the administration of any future referendum poll".<sup>67</sup> Jenny Watson emphasized to us that the Electoral Commission "very strongly" supports the work of the Law Commissions.<sup>68</sup>

**51. PACAC supports the Law Commissions' proposals to consolidate the law relating to referendums. The basic regulatory framework provided by PPERA would be strengthened by the establishment of a generic conduct order that can be applied for future referendums. Such an order would end the current practice whereby each referendum results in a process of 'reinventing the wheel' with referendum-specific provisions required which, in the case of conduct, essentially duplicate the provisions that were made for previous referendums. Consolidation in the form of a new generic conduct order would streamline the process of calling a referendum. It would provide greater stability in the constitutional and legal framework for referendums, and would also provide greater clarity for parliamentarians, campaigners and the electorate.**

### **Modernising section 125**

52. The other principal aspect of regulatory reform, identified by witnesses to our inquiry, was the modernisation and clarification of section 125. Suggestions as to how section 125 could be reformed have generally focused around the length of the purdah period and whether the terms of the provision should be reviewed and clarified (including whether the provisions of section 125 adequately capture the increasingly online nature of campaigning and publishing).<sup>69</sup>

### **The last 28 days: a long enough period?**

53. There has been a long-running debate as to whether the last 28 days of a referendum is a sufficiently long controlled period. In particular, the Electoral Commission has repeatedly argued that the existing 28-day period should be extended. For example, in its report on the 2004 North East referendum, the first to be held under the PPERA regime, the Commission concluded:

Although the legislation currently prevents the use of public money for publishing certain types of information in the 28 days before the close of poll, the Commission believes that the Government should not use public money after the referendum period begins. However, if it does, it should adhere to a self-imposed restriction period of at least 28 days prior to the distribution of postal ballots.<sup>70</sup>

Following the referendum on the voting system for UK parliamentary elections in May 2011, the Electoral Commission again recommended that "the prohibition on publication

67 The Electoral Commission, *The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK's membership of the European Union*, September 2016, p.10.

68 [Q299](#).

69 Dr Alan Renwick ([EUR0080](#)); [Qq317–318](#).

70 The Electoral Commission, *The 2004 North East regional assembly and local government referendums*, November 2005, p.7.



of promotional material about the referendum by publicly-funded bodies or individuals should commence at the same time as the beginning of the referendum period for future referendums”.<sup>71</sup>

54. Following the 2014 Scottish independence referendum, the Electoral Commission appeared to adopt a somewhat different view of whether section 125 should effectively last for the duration of the referendum period.<sup>72</sup> In its report of the referendum, the Commission recommended that in future:

Relevant governments, not only in Scotland but also those in other parts of the UK, should publicly commit to and refrain from, in practise, any paid advertising, including the delivery of booklets to households, which promotes a particular referendum outcome for the full duration of the referendum period.<sup>73</sup>

55. Despite this, the Commission has argued “in principle that a period of 28-days is an adequate duration for the restrictions on the publication of other promotional material by central and local government”. To prevent any risks that might arise from this “relatively short period”, the Commission said it was “important that relevant governments give careful consideration to the impact on the campaign and voters’ trust in the rules of any referendum related information they publish before the restrictions come into force”. It added that it was “also important that there is a clear explanation of the rules and how to comply with them for relevant public bodies to follow during that period”.<sup>74</sup>

56. In evidence to PACAC, Dr Alan Renwick (University College London) and Dr Simon Usherwood (the University of Surrey) both spoke about the short nature of the purdah period during the referendum campaign. As Dr Renwick noted, while purdah applied for four weeks, “the intensive campaign clearly lasted for more than four weeks and, therefore, the Government was able to be involved in April and May”.<sup>75</sup> This state of affairs was, according to Dr Renwick, “not satisfactory”.<sup>76</sup> Drawing attention to the fact that the official campaign period was 10 weeks, he suggested that “something like that might be appropriate”.<sup>77</sup> Dr Usherwood also noted that “the purdah period felt rather short in the context of the long campaign that effectively started at the general election last May”.<sup>78</sup>

57. William Norton, from Vote Leave, suggested that the period of 28 days was a rather arbitrary figure, with little explanation for this figure provided when PPERA was taken through Parliament.<sup>79</sup> He also contrasted the section 125 arrangements of a 28 day controlled period with the 39 day purdah period that applied during the run-up to the 2015 General Election:

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71 With the exception of the activities carried out by Counting Officers, under any statutory duty to promote participation and in accordance with the CCOs directions (The Electoral Commission, [Referendum on the voting system for UK parliamentary elections: Report on the May 2011 referendum](#), October 2011, p.11).

72 The Electoral Commission, [Scottish Independence Referendum: Report on the referendum held on 18 September 2014](#), December 2014.

73 The Electoral Commission, [Scottish Independence Referendum: Report on the referendum held on 18 September 2014](#), December 2014, p.118.

74 The Electoral Commission, [Scottish Independence Referendum: Report on the referendum held on 18 September 2014](#), December 2014, p.118.

75 [Q120](#).

76 [Q121](#).

77 [Q122](#).

78 [Q121](#).

79 [Q207](#).

... if the Government can carry on quite amicably with a purdah period of 39 days for a general election, why is 28 a sort of horrific period of time for a much smaller matter like a referendum? I think I would have the position of a referendum exactly the same as for a general election. It seems to work every five years. I do not see why we cannot have that situation.<sup>80</sup>

58. Though Will Straw, the Executive Director of Britain Stronger in Europe, felt that the 28 day period was sufficient, he noted that he would not object to a longer purdah period as his campaign had worked “on the rules that were set”.<sup>81</sup>

59. The Electoral Commission, during their oral evidence to PACAC, reiterated their suggestion, made while the Referendum Act was going through Parliament, that the Government “should be restricted for the whole referendum period”, including an extended restriction on the ability of governments to produce advertising material during referendums (a restriction that would, in Jenny Watson’s opinion, have caught the Government’s booklet).<sup>82</sup> With regards to restrictions for future referendums, the Commission indicated that its preference was for section 125 to be extended to 10 weeks (the length of the campaign period).<sup>83</sup>

**60. Section 125 of PPERA provides important protection for the fairness of referendum campaigns, but the 28 days specified is too short a period in the context of the much longer official campaign period. The absence of a longer purdah period enables the Government and other relevant public bodies to produce promotional material during most of the referendum campaign period, a situation that is far from satisfactory.**

**61. The Electoral Commission has long argued that the restrictions on the publication of promotional, referendum-related, material by the Government should be extended, beyond the current 28 day period, provided by section 125, to cover the full referendum period. Nothing but the Government’s political intentions are served by maintaining the 28 day purdah period. PACAC recommends that the Government should bring forward proposals to extend the section 125 restrictions so that they are in force for the full duration of a referendum period of ten weeks, as recommended by the Electoral Commission and so many other respected authorities.**

### *Analogue in a digital age? Section 125 and the definition of publishing*

62. Section 125 of PPERA was drafted before the digital age. The issue arose during the referendum of what constitutes to ‘publish’ in an increasingly digital democracy. Should materials published online by the Government before the purdah period remain online during the final 28 days of the campaign when section 125 is in force?

63. During the campaign, the Government established a website [www.eureferendum.gov.uk](http://www.eureferendum.gov.uk), which hosted a range of material related to the referendum, including a range of government produced reports and material making the case for a remain vote. The intention was that this website would continue to be publicly accessible during the 28 day purdah period, albeit with no new material uploaded to the website.

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80 [Q207](#).

81 [Q170](#).

82 [Qq308](#); [311](#).

83 [Qq310–311](#).

64. This prompted a significant difference of opinion, and legal advice, among PACAC, the Government and the Electoral Commission as to what constitutes publishing for the purposes of an online publication. To summarise, PACAC's position, based on advice provided by the then Speaker's Counsel, Michael Carpenter, supported by reference to relevant case law, was essentially that publishing in an online context was an iterative process, occurring each time material was accessed online. He explained to 'publish' is defined (in section 125(4)(a)) as to 'make available to the public at large, or any section of the public, in whatever form and by whatever means'. He continued:

I understand that the Cabinet Office is taking the view that section 125 permits material to remain accessible on the website, provided that no new material is added during the purdah period. The Written Answer suggests that it will be in order to continue to make 'factual information' available.

In my view, this is based on an incorrect reading of the term 'publish' in section 125 and of the restriction in section 125(2). To keep material on the website so that it remains accessible during the purdah period amounts to a breach of the duty under section 125(2) and is unlawful. 'Factual information' is not an exempted category under section 125(3).<sup>84</sup>

As a result, the Government's website would represent a breach of section 125.<sup>85</sup> The full texts of Mr Carpenter's advice are attached as Annexes 1 to 3 to this report.

65. The Cabinet Secretary and the Government disputed this interpretation. Sir Jeremy Heywood rejected the notion that section 125 imposed a legal requirement "to cleanse the web of already published material".<sup>86</sup> Instead, he asserted that the purpose of the legislation was instead aimed at "preventing new material from being put into the public domain by the Government during the 28-day period".<sup>87</sup> However, Sir Jeremy Heywood indicated that the Government would, during the controlled period, "remove all links to the website from government channels such as GOV.UK" and that while individuals will be able to search for already published information "they will actively have to do this".<sup>88</sup>

66. The Electoral Commission announced that they took the view that "allowing continued access to a website that was published before the 28 day period, whether or not any new content is subsequently added, is likely to be amounting to "publish" under section 125 of PPERA, given the wide definition of "publish" in section 125(4)(a)".<sup>89</sup> However, they also argued that the exception under section 125(3)(a), concerning "material made available to persons in response to specific requests for information or to persons specifically seeking access to it "[ ... ] would cover content that was originally published prior to the 28 day period, which remained available to anyone specifically seeking access to that content within the 28 days".<sup>90</sup>

84 [Note from Michael Carpenter: Section 125 of PPERA](#), 3 May 2016.

85 See: [Correspondence between Bernard Jenkin MP and Sir Jeremy Heywood](#), 2 May 2016; [Note from the Speaker's Counsel to PACAC, Publication of material on website and section 125 Political Parties, Elections and Referendums Act](#), 3 May 2016.

86 [Letter from Sir Jeremy Heywood to Bernard Jenkin MP](#), 6 May 2016.

87 [Letter from Sir Jeremy Heywood to Bernard Jenkin MP](#), 6 May 2016.

88 [Letter from Sir Jeremy Heywood to Bernard Jenkin MP](#), 6 May 2016.

89 [Letter from Jenny Watson to Bernard Jenkin MP](#), 11 May 2016.

90 [Letter from Jenny Watson to Bernard Jenkin MP](#), 11 May 2016.

67. The Commission judged that as long as “the website is designed in such a way that members of the public need to take active steps to seek access to the content, in our view the exception under section 125(3)(a) would apply”. In the event, the Government took measures to comply with the Electoral Commission’s interpretation of section 125, which was that the material remained online, but not promoted by advertising links on other government websites. We doubt that the Government would have acted in this way without PACAC’s intervention. Sir Jeremy Heywood outlined these measures in his letter to the Chair of this Committee on 6 May 2016.<sup>91</sup> The Commission concluded that it appeared unlikely that there would be a breach of section 125(2).<sup>92</sup> Nevertheless, as the Electoral Commission acknowledged, these discussions on section 125 had raised “some complex legal issues and matters of principle, concerning whether the legislation is drafted in the best way to achieve the underlying purpose behind the provision”.<sup>93</sup>

**68. Section 125 was originally drafted some 16 years ago. Since that time campaigning and publishing have both become increasingly digital in nature. As a result, terminology and provisions that may have been appropriate in 2000, may be less effective at regulating campaign activity in 2017. PACAC, the Electoral Commission and the Government all had different legal advice and interpretations as to: a) whether the e referendum.gov.uk website represented publishing for the purposes of section 125; and b) whether the steps taken to remove links to the website satisfied the exception provided in section 125(3)(a). This underlines the need for section 125 to be reviewed and amended so as to better reflect the increasingly digital nature of our democracy.**

69. *PACAC recommends that the Government bring forward consultative proposals for the redrafting of section 125. These proposals should provide greater clarity as to the status of online publications, for the purpose of the section 125 restrictions, and what constitutes “specifically seeking access” to materials, under the terms of the exception laid out in section 125(3)(a), in respect of online material available from government websites.*

### *Time for a wider review of section 125?*

70. In their official report into the EU referendum, The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union, the Electoral Commission recommended that the UK Government should consult “on options for redrafting section 125 PPERA to clarify the nature, scope and enforcement of the restrictions”. According to the Commission, section 125 should be “significantly redrafted” so as to clarify the nature and scope of the restrictions, with greater clarity provided on the activities that are restricted, whether specific exemptions are required, when the restrictions should apply and over the enforcement of the restrictions.<sup>94</sup>

71. Bob Posner, the Electoral Commission’s Legal Counsel and Director of Party and Election Finance, said that the key points the Commission wanted any review to cover,

91 [Letter from Sir Jeremy Heywood to Bernard Jenkin MP, 6 May 2016.](#)

92 [Letter from Jenny Watson to Bernard Jenkin MP, 11 May 2016;](#) This prompted further discussion as to what constitutes ‘specifically seeking access’, with Speaker’s Counsel contending that the steps outlined by the Cabinet Secretary did not satisfy the ‘active steps’ needed to trigger the exceptions in section 125(3)(a) (Note from the Speaker’s Counsel to PACAC, [Publication of material on website and section 125 Political Parties, Elections and Referendums Act 2000: third note](#), 17 May 2016).

93 [Letter from Jenny Watson to Bernard Jenkin MP, 27 May 2016.](#)

94 The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016, p.15.

in addition to clarity and scope, were sanctions for the enforcement of section 125 and investigatory powers for the Commission.<sup>95</sup> As Mr Posner explained, at present there are no sanctions available for the enforcement of section 125. As a result, the investigatory powers that the Electoral Commission enjoys in relation to their other functions do not apply in relation to policing section 125.<sup>96</sup>

72. In addition, the Commission would, according to Jenny Watson, want, as part of this review, to “more closely define the type of activity that a public body should not be undertaking during the referendum period”.<sup>97</sup> Such activity would include, for example, advertising, billboards, leaflets, essentially the “kind of activity that is clearly intended to be campaign activity”.<sup>98</sup>

73. Indeed, during the course of the campaign, the specific question of legitimate activities for public bodies arose in relation to the Bank of England, and in particular, public comment made by the Governor of the Bank of England, Mark Carney. Bernard Jenkin MP, Chair of PACAC raised concerns directly with the Governor that the Bank was, and should be subject to the restrictions of section 125 during the purdah period. The Governor replied:

The Bank is not “a person or body whose expenses are defrayed wholly or mainly out of public funds” and, as such, is not subject to the restrictions in section 125. Nonetheless, the Bank has voluntarily determined to observe pre-Referendum purdah in the spirit of the guidelines issued by the Cabinet Office on 26 May 2016. Of course, the Bank must continue to pursue its statutory objectives throughout the purdah period and will therefore continue to publish ‘business as usual’ communications pursuant to its statutory remit.<sup>99</sup>

Mr Carney’s assertion that the Bank of England is not a public body falling under the section 125 definition is contradicted by the advice given to us by the then Speakers’ Counsel.<sup>100</sup> We do, however, note that the Bank felt obliged to submit to the substance of the section 125 restrictions. At a subsequent meeting with the Chair of PACAC, following the referendum, Mr Carney was invited to submit written evidence to clarify his position further. At the time of writing, this had not been received.

**74. Section 125 has been in force for over 16 years and has operated, either directly or through similar provisions (e.g. via the Scottish Independence Referendum Act 2014), for a number of high-profile referendums. In light of this experience and the issues, detailed earlier in this report, that arose regarding section 125 during the EU referendum, there is now an opportune moment to explore the effectiveness of section 125.**

*75. PACAC recommends that the Government undertake a wider review into section 125. Such a review should take into account PACAC’s recommendations that the length of the controlled period be extended, and for the provision to be redrafted so as to provide greater*

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95 [Q316](#).

96 [Q316](#).

97 [Q318](#).

98 [Q319](#).

99 Letter from Mark Carney, Annex 6.

100 Annex 6.

clarity on the question of what constitutes publishing. PACAC agrees with the Electoral Commission that this review should also aim to provide a tighter definition of the kinds of activities that should be restricted during the controlled, and referendum, periods. It should also explore the sanctions that should apply for the purposes of upholding section 125 and the investigatory powers that the Electoral Commission should enjoy to police the application of section 125.

### **Other proposals for legislative and regulatory reform**

76. Witnesses also proposed reform to the ‘working together rules’ which apply to campaign spending during a referendum. As Britain Stronger in Europe (BSE) explained, working together rules apply to ensure that that neither side coordinate expenditure between different organisations in a way that circumvents expenditure limits”.<sup>101</sup>

77. While BSE stated that the intention of these regulations “is perfectly sensible”, they argued that the definition of ‘working together’ has not been tested in law and that the level of guidance given to campaigners was “too opaque to allow participants to be sure of their ground when they are on the same side of the argument, but parts of different campaigns”.<sup>102</sup> According to BSE the regulations created an “unnecessary ‘freezing’ of activity by some smaller participants” who decided, in order to avoid any risk of breaching the rules, “not to undertake any activity at all that could be perceived to have involved any other participants”.<sup>103</sup>

78. Bob Posner conceded that the working together rules, while aimed at enabling campaigners to cooperate, did pose problems. For example, he identified a common issue, namely the question of “if there is campaign spending, whose campaign spending is it, and therefore whose limit does it count against”?<sup>104</sup>

79. Mr Posner continued that there was “not a lot of assistance in the legislation itself” as to what constitutes working together. While he claimed that “at one extreme” such working together can “be very obvious if two campaigners have a common strategy and approach”, in practice, he suggested that it tends to be “campaigners on the same side of the argument probably just talking fairly informally about things”.<sup>105</sup> According to Mr Posner, somewhere in that spectrum “you cross a threshold where two campaigners are working together”.<sup>106</sup>

80. In light of these complexities, Mr Posner conceded that there was no hard and fast answer as to what constitutes working together and suggested that this would be an area for future exploration by the Commission, after it has settled the campaign spending returns.<sup>107</sup>

**81. PACAC is concerned that campaigns are struggling to operate within the existing system of working together rules. These rules should provide clarity for campaigners, so that they can cooperate with one another in a way that is clearly consistent with**

101 Britain Stronger in Europe ([EUR0091](#)).

102 Britain Stronger in Europe ([EUR0091](#)).

103 Britain Stronger in Europe ([EUR0091](#)).

104 [Q268](#).

105 [Q268](#).

106 [Q268](#).

107 [Qq268-269](#); the deadline for spending returns over £250,000 was 23 December 2016.

**the letter and spirit of the campaign spending rules. Instead, we heard evidence that the current lack of certainty regarding the working together rules has resulted in an “unnecessary freezing” of activity among campaign participants who wish to avoid any risk of breaching the rules. PACAC, therefore, welcomes the suggestion, from the Electoral Commission, that it will return to this issue after it has settled the full spending returns from the referendum campaigns.**

## 4 The Electoral Commission and the administration of the referendum

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### The role of the Electoral Commission during referendums

82. The Electoral Commission was established by Parliament as a body independent of government in 2001, as a result of the Political Parties, Elections and Referendums Act 2000 (PPERA).<sup>108</sup> PPERA, as amended in 2009, provides for an Electoral Commission with nine or ten Commissioners (originally, the range was between five and nine Commissioners).<sup>109</sup> The legislation provides that one of the Commissioners will be appointed as the Chair of the Electoral Commission. From 2009 until 31 December 2016, the Chair of the Commission was Jenny Watson. Her replacement, who took office in January 2017, is Sir John Holmes. The Commission's Chief Executive, Claire Bassett was appointed in October 2015.

83. The Electoral Commission's remit stretches from the management of elections and referendums to regulating fundraising and campaign spending by parties. During referendums, the Commission is charged with examining the way in which proposed referendum questions are worded to make sure that they are intelligible to voters.<sup>110</sup> In addition, at UK-wide referendums, the Chair of the Electoral Commission acts as the Chief Counting Officer, responsible for certifying and announcing the result of the referendum. In this guise, they appoint local Counting Officers and instruct them on how to run specific aspects of the referendum poll.

84. For the EU Referendum, the European Union Referendum Act obliged the Government to consult the Electoral Commission before tabling regulations amending section 125 of PPERA 2000.<sup>111</sup> More generally in the field of referendums and elections, the Commission runs public awareness campaigns to ensure voters know:

- when the polls are taking place;
- how to register to vote and by when they need to register in order to be able to vote; and
- how to vote in the polls.<sup>112</sup>

After each election and referendum, the Commission publishes reports which examine how well these elections were run and make recommendations for improvements for future elections or referendums.<sup>113</sup>

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108 [Political Parties, Elections and Referendums Act 2000](#).

109 [Political Parties and Elections Act 2009](#).

110 [Electoral Commission, Referendum question assessment guidelines, November 2009](#).

111 European Union Referendum Act.

112 Electoral Commission, [Our role in elections and referendums](#).

113 Electoral Commission, [Election and referendum reports](#).



## Administrative issues that arose during the referendum

85. During the campaign, a number of administrative issues arose and were recorded by the Electoral Commission in an incident log. These issues can be distilled into two main categories: software problems and regulatory/administrative problems.

### Software problems

#### *The crash of the online registration site*

86. With regards to software problems, the most significant example of software failure was the collapse of the voter registration website, <https://www.gov.uk/register-to-vote>, only hours before the registration deadline on 7 June 2016.

87. The website was launched on 10 June 2014 by the then Coalition Government as part of the move to Individual Electoral Registration (IER) which replaced the previous model of household registration.<sup>114</sup>

88. On 7 June 2016, hours before the deadline for individuals to register to vote at the EU referendum, the voter registration website crashed. The collapse of the website, managed by the Cabinet Office and the Government Digital Service, was blamed on “unprecedented demand” for the service, with 515,256 online applications to register to vote recorded on 7 June (the previous record for the largest number of online applications received in a day was 469,047 on 20 April 2015).<sup>115</sup>

89. In light of this demand and the subsequent failure of the registration website, the Government explained that it felt that all individuals who are eligible to register to vote for the referendum should continue to do so and said it was “urgently looking at all options and talking to the Electoral Commission about how we can extend the deadline for applying to register to vote in the EU referendum”.<sup>116</sup> On 10 June, the Government tabled a set of regulations, the European Union Referendum (Voter Registration) Regulations 2016, which would extend the registration period until midnight that day.<sup>117</sup> The regulations were approved by Parliament.

90. The Electoral Commission suggested in its official report on the referendum, that the problems that led to the website’s crash were aggravated by a large number of duplicate applications to register to vote. According to the Commission’s report, 38% of applications made during the campaign were duplicates.<sup>118</sup> Furthermore, they estimate that of the 436,347 applications to register to vote between midnight on 7 June (the original deadline) and the extended deadline of midnight on 9 June, “approximately 46% of these were duplicate registration applications submitted by people who were already correctly registered to vote”.<sup>119</sup> The Electoral Commission noted that in 26 local authority

114 The move to IER was brought about by the [Electoral Registration and Administration Act 2013](#).

115 GOV.UK, Voter registration: [Applications breakdown](#); the website crashed on the same night as the ITV referendum programme ‘Cameron and Farage live’ which featured the then Prime Minister, followed separately by Nigel Farage, taking questions from a studio audience.

116 [HC Deb 8 June 2016, col.1193](#).

117 [European Union Referendum \(Voter Registration\) Regulations 2016](#).

118 The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016, p.40.

119 The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016, p.78.

areas more than half of the applications received in that period were duplicates.<sup>120</sup> Jenny Watson indicated that the situation was not helped by the existence, at one point in the referendum, of a Facebook rumour that incorrectly said that voters had to re-register to make sure they could vote in the referendum.<sup>121</sup>

91. In order to reduce the number of duplicate applications, the Electoral Commission recommended that in future the Government “should develop an online service to allow people to check whether they are already correctly registered to vote before they complete a new application to register”.<sup>122</sup> Jenny Watson suggested that such a platform would be difficult to implement, not least because, as Claire Bassett, the Commission’s Chief Executive, explained, there is a separate register for each part of the country where they are held independently and across five different IT systems.<sup>123</sup> Nonetheless, despite these difficulties, Ms Watson said that the Commission believes “the Cabinet Office need to pursue this [the ability to check your registration status online]”.<sup>124</sup>

92. **The Register to Vote website crashed on the evening of Tuesday 7 June. The Government has stated that this was due to an exceptional surge in demand. It is clear that the level of public interest in the referendum, allied to the sheer numbers of duplicate applications and confusion as to whether individuals needed to re-register to vote for the referendum, created a much higher demand for the Register to Vote website. Duplicate applications pose an unnecessary administrative burden on electoral registration officers and are an equally unnecessary drain on the time of electors themselves. PACAC therefore endorses the Electoral Commission’s recommendation that the Government should develop an online service to enable people to check whether they are already correctly registered to vote. While PACAC is aware of the technical issues that would need to be overcome to deliver such a service, it would be of invaluable assistance in preventing the Register to Vote website from collapsing due to high levels of demand again ahead of future elections and referendums.**

93. After the crash of the website, the Government promised to undertake a “lessons learned exercise”.<sup>125</sup> The results of this exercise, undertaken by Equal Experts UK for the Cabinet Office, were published on 14 November 2016.<sup>126</sup> The review noted that the register to vote service has “been very successful in terms of uptake by citizens” and “successfully supported the general election in 2015 and the May elections in 2016 without incident”.<sup>127</sup> Though the report’s general view is “that the Cabinet Office supports the Register to Vote service very well”, it nonetheless suggested that while the issue that led to the website’s crash was “technical in nature, gaps in technical ownership and risk management contributed to the problem, and prevented it from being mitigated in advance”.<sup>128</sup>

94. In addition, the report found that performance testing of the website was “limited, and the conclusions drawn from the results were not sufficiently detailed or tested”, with

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120 [Q332](#).

121 [Q332](#).

122 The Electoral Commission, [The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK’s membership of the European Union](#), September 2016, p.88.

123 [Qq343–344](#).

124 [Q343](#).

125 [HC Deb 8 June 2016, col.1199](#).

126 Equal Experts, [Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#).

127 Equal Experts, [Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), p.2.

128 Equal Experts, [Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), p.2.

mistaken assumptions about the likely traffic on the website.<sup>129</sup> Indeed, while load testing did result in system performance problems, “it was assumed that such a load would not occur”. Furthermore, the report found that performance tests “did not continue to the point of destruction - which would have flagged up the system’s breaking point in advance”.<sup>130</sup>

95. The report also identified a gap in the technical ownership of the website, “with roles and responsibilities unclear”. As the report noted, while the Cabinet Office was the owner of the service, “its technical responsibilities were delegated to multiple suppliers” with the consequence being that it was “harder for technical issues to be identified and solved (or mitigated)”.<sup>131</sup> The report made the following recommendations:

- Improve system monitoring capability—so that it is possible to easily gain a detailed view of all metrics relating to the system’s architecture and performance, at any given moment in time.
- Application changes and move to a cloud based infrastructure—to allow for automated testing in a production-like environment. This will require application changes as the application at the time of the incident would not have benefitted from a cloud based infrastructure. We understand this is part of the re-platforming project currently in progress.
- Run performance tests frequently—Make sure the service is routinely ‘tested to destruction’, is tested against real world user scenarios and is also tested continuously, as part of the continuous integration and deploy build. This will assist you in spotting and fixing issues before they ever become a problem in production.
- Appoint a technical owner for the service—clear, well-understood technical ownership (in the hands of a suitably experienced, senior person or team), will ensure that the planning, coordination between technical suppliers, running, testing and ongoing development of the service is closely managed—especially in advance of and during key events.
- Refine technical risk management activities—be more specific regarding technical risk, for example, correlate expected spikes in usage to specific impacts on the system e.g. predicting likely bottlenecks within each of the different components of the architecture. Test any assumptions made by referring to historical monitoring data and performance data.<sup>132</sup>

**96. The Government has consistently argued that the Register to Vote website’s collapse was the product of a significant, last minute spike in applications to register to vote, magnified by the large number of duplicate applications. However, the Government clearly failed to undertake the necessary level of testing and precautions**

129 [Equal Experts, Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), pp.3; 6.

130 [Equal Experts, Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), p.6.

131 [Equal Experts, Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), pp.3; 5.

132 [Equal Experts, Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), p.3.

**required to mitigate against any such surge in applications. It is worrying that when testing identified issues in system performance, mistaken assumptions meant that these issues were not investigated further and corrected.**

97. **The Register to Vote website is a key component of the transition to Individual Electoral Registration. The nature of the electoral cycle is that public interest and engagement grows in close proximity to election and referendum polling days. It is, therefore, of the utmost importance that the website can withstand spikes in the number of applications, not least as such spikes are likely to emerge near, if not on, the registration deadline.** *PACAC supports the recommendations of the Equal Experts report, in particular in ensuring more frequent performance tests of the website are conducted, including those that test it destruction.*

98. Both the Government and the Electoral Commission’s response to the website collapse was heavily criticised by the Association of Electoral Administrators (AEA).<sup>133</sup> According to the AEA, there was “a clear lack of contingency planning and communications from the Cabinet Office and the EC [Electoral Commission] to EAs [Electoral Administrators], who had to deal with the phone calls etc. the next morning with no indication of what was going to happen”. The AEA had been informally consulted on a number of options that the Government and Commission were considering as responses to the collapse, resulting in the AEA management board “unanimously” agreeing:

... that any potential change to the registration deadline would introduce considerable risk to the administration of the EU referendum, not least because of the additional pressures it would place on EAs but also the precedent it could have on future elections and the potential for a challenge to the result of the referendum if it were close. This viewpoint was forcibly expressed to both the Cabinet Office and the EC.<sup>134</sup>

99. However, when the decision was taken to introduce emergency legislation, it happened “without any further consultation with the AEA or its members, i.e. those who would need to make fundamental changes to the administration of the referendum process”. The AEA claim that “EAs effectively had to read the BBC website for updates”. The consequence of the extension and emergency legislation was, according to the AEA, “to impact heavily on already exhausted staff, thereby placing the conduct of the entire EU referendum under significant risk”.<sup>135</sup>

100. Jenny Watson acknowledged that the website crash caused confusion not only for the Commission, “but also for EROs (Electoral Registration Officers), who were really up against a deadline”.<sup>136</sup> Her colleague, Ailsa Irvine, the Electoral Commission’s Head of Electoral Guidance, conceded that EROs “could have done with having a more effective strategy between us and government to give them more information earlier” and suggested that one of the lessons the Commission wants “to learn and work with government on is to make sure that we can communicate fully and effectively with electoral registration offers [ ... ] in future”.<sup>137</sup>

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133 Association of Electoral Administrators ([EUR0016](#)).

134 Association of Electoral Administrators ([EUR0016](#)).

135 Association of Electoral Administrators ([EUR0016](#)).

136 [Q348](#).

137 [Q348](#).

101. It is disappointing that the local electoral administrators who play a key role in delivering the referendum on the ground, including the implementation of the extended registration deadline, had to rely on news sources for updates on the Government's decision to introduce emergency legislation. PACAC therefore welcomes the Electoral Commission's recognition of the need for a more effective communication strategy between themselves, the Government and electoral administrators. PACAC recommends that the Government and Electoral Commission develop new guidelines, in consultation with bodies such as the Association of Electoral Administrators, on the level and quality of information provided to electoral registration officers and other administrators both prior to, and during, referendum campaigns.

### *Cyber security of elections*

102. Although the Committee has no direct evidence, it considers that it is important to be aware of the potential for foreign interference in elections or referendums. The report on lessons learned from the website crash described it as "technical in nature, gaps in technical ownership and risk management contributed to the problem, and prevented it from being mitigated in advance".<sup>138</sup> However the crash had indications of being a DDOS (distributed denial of service) 'attack'.<sup>139</sup> We understand that this is very common and easy to do with botnets.<sup>140</sup> There can be many reasons why people initiate a DDOS: commercial (e.g. one company bringing down a competitor's website to disrupt sales); legal (e.g. a law enforcement agency wanting to disturb criminal activity on Darknet); political; etc. The key indicants are timing and relative volume rate.

103. PACAC does not rule out the possibility that the crash may have been caused by a DDOS (distributed denial of service attack) using botnets. Lessons in respect of the protection and resilience against possible foreign interference in IT systems that are critical for the functioning of the democratic process must extend beyond the technical. The US and UK understanding of 'cyber' is predominantly technical and computer-network based. For example, Russia and China use a cognitive approach based on understanding of mass psychology and of how to exploit individuals. The implications of this different understanding of cyber-attack, as purely technical or as reaching beyond the digital to influence public opinion, for the interference in elections and referendums are clear. PACAC is deeply concerned about these allegations about foreign interference.

104. We commend the Government for promoting cyber security as a major issue for the UK. We recommend that Cabinet Office, the Electoral Commission, local government, GCHQ and the new government Cyber Security Centre establish permanent machinery for monitoring cyber activity in respect of elections and referendums, for promoting cyber security and resilience from potential attacks, and to put plans and machinery in place to respond to and to contain such attacks if they occur. We recommend that the Government presents regular annual reports to Parliament on these matters.

138 [Equal Experts, Register to Vote Website: Lessons Learned Review for the Cabinet Office, 14 November 2016](#), p.2

139 Distributed denial of service (DDoS) attacks consist of floods of internet traffic from distributed sources often caused by botnets, which result in network facilities becoming overloaded and inoperable.

140 Cyber attacks can be launched by hackers themselves or from computers that have been compromised to serve the hacker's need without the users knowledge (bots). Networks of bots (botnets) can act together to achieve a collective aim.

### *Registration of ineligible voters*

105. During the referendum campaign, [it](#) emerged that a number of EU-nationals had mistakenly received poll cards and, in some instances, postal votes. The Electoral Commission's incident log notes that 3,502 non-eligible EU citizens had mistakenly received either poll cards and/or postal votes.<sup>141</sup> In response the Electoral Commission claimed that this was a result of a fault in the Xpress elections software used by 238 local authorities in England and Wales.

106. On 2 June 2016 the Electoral Commission issued a statement outlining the steps taken to remedy this problem. According to the Commission, the software provider had “resolved the issue which means that, if any postal votes have been issued to these electors, they will be cancelled and none of these electors will be shown as eligible on the electoral registers to be used at polling stations on 23 June”. Furthermore, the Commission stated that all of the affected electors would also be written to by their local Electoral Registration Officer “with an explanation of what happened and will be told that they will not be able to vote at the referendum”.<sup>142</sup>

### *Administrative and regulatory issues*

#### *Verification of an individual's entitlement to register to vote*

107. Issues with the system of checks in place to verify an individual's entitlement to be a registered elector under the system of individual electoral registration (IER), were identified during the referendum, in connection to the incorrect registration of EU citizens.

108. Schedule 2 of The Electoral Registration and Administration Act 2013 provides for the sharing of data as a means of assisting registration officers in verifying an attempted registration.<sup>143</sup> This Schedule is further developed by The Electoral Registration and Administration Act 2013 (Transitional Provisions) Order 2013.<sup>144</sup> The Electoral Commission's guidance for Electoral Administrators explains that this data sharing, in the first instance, takes the form of cross-checking the details provided by an individual when registering with Department for Work and Pensions (DWP) records:

Any person making a new application for registration must provide personal identifiers for the purpose of establishing whether they are the person named in the application, and the results of this process must be taken into account in determining the application. The information provided is used to verify their identity against DWP records, and may also be matched against local data sources if the applicant's identity cannot be verified using DWP records.<sup>145</sup>

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141 The Electoral Commission, [EU Referendum Incident Log](#).

142 The Electoral Commission, [Electoral Commission statement on non-eligible EU citizen voters](#), 2 June 2016.

143 Electoral Registration and Administration Act 2013, [schedule 2](#).

144 [The Electoral Registration and Administration Act 2013 \(Transitional Provisions\) Order 2013](#).

145 The Electoral Commission and Cabinet Office, [Guidance for Electoral Registration Officers: Part 4-Maintaining the register throughout the year](#), originally published September 2013 (last updated July 2016), p.37.

109. Furthermore, even when an individual's records match those held by DWP the Commission's guidance makes clear that an Electoral Registration Officer (ERO) will also need to establish that the applicant fulfils their other eligibility criteria (age, nationality, residence) and may have already done so before receiving the match results from DWP.<sup>146</sup>

110. However, while EROs have the power to request checks of a person's immigration status against Home Office records, the Electoral Commission has noted that Parliament did not specify, in the 2013 Act, "that checks on nationality must be carried out on all registration applications, nor has it provided EROs with access to the data they would require to be able to do so".<sup>147</sup> This is despite the fact that the Commission had previously recommended, in their response to the 2011 White Paper on IER "that the Government should explore the feasibility of enabling EROs to seek confirmation from relevant agencies (such as the United Kingdom Border Agency) of an applicant's nationality and immigration status".<sup>148</sup>

### *Other errors with postal votes/polling cards*

111. According to the Electoral Commission's incident log, there were a small number of local authorities which reported other incidents relating to postal votes and polling cards. For example, in Harborough a number of poll cards were not delivered within the delivery window of 18–24 May, due to an issue with the local counting officer's contracted print suppliers and delivery service. More substantially, in Basingstoke and Deane all 128,000 poll cards sent to electors contained an error regarding the deadline for postal vote applications or applications to amend their postal vote status, and in Bristol and Swale, two Counting Officers issued pictorial postal voting instructions with their first wave of postal votes that could have been interpreted as favouring one particular referendum outcome, this affected 61,000 voters.<sup>149</sup>

### **Assessments of the administration of the referendum**

112. Evidence to our inquiry suggests that, while not without some faults and problems, the EU referendum was, on the whole, well run and that the Electoral Commission competently discharged its duties as an administrator and regulator. Indeed, Dr Alan Renwick stated that he wished "to specifically praise the Electoral Commission for doing a good job" in administering the referendum.<sup>150</sup>

113. Professor Stephen Tierney suggested that both the Scottish independence referendum in 2014 and the EU referendum in 2016 had been "free, fair and deliberative processes, comparable in terms of democratic legitimacy to recent elections".<sup>151</sup> He said that the "combination of PPERA, the work of the Electoral Commission and Parliament's approach to purdah all helped to ensure that the referendum rules worked fairly".<sup>152</sup>

146 The Electoral Commission and Cabinet Office, *Guidance for Electoral Registration Officers: Part 4-Maintaining the register throughout the year*, originally published September 2013 (last updated July 2016), p.40.

147 [Letter from Jenny Watson to Bernard Jenkin MP, 9 June 2016.](#)

148 [Letter from Jenny Watson to Bernard Jenkin MP, 9 June 2016.](#)

149 The Electoral Commission, [EU Referendum Incident Log.](#)

150 [Q128.](#)

151 Professor Stephen Tierney ([EUR0072](#)).

152 Professor Stephen Tierney ([EUR0072](#)).

114. In a similar vein, *The UK in a Changing Europe* drew attention to the experience of both the Scottish and the EU referendums, arguing that they had demonstrated that there is “a very high level of compliance with PPERA 2000 and with the decisions of the Electoral Commission”, continuing that the Commission had “effectively established itself as an arbitrator in such matters”.<sup>153</sup> Indeed, their evidence noted that in “the only notable instance of possible gaming of the rules [ ... ] when Grassroots Out created a number of sub-groups (that weren’t registered with the Electoral Commission) [thus potentially circumventing spending limits]”, the Electoral Commission acted swiftly to remedy the situation.<sup>154</sup>

115. The Association of Electoral Administrators (AEA) suggested that “the Electoral Commission (EC) and the Chief Counting Officer (CCO) generally discharged their statutory duties satisfactorily” and commended the coordination and communication at the early stages of referendum planning.<sup>155</sup>

116. Following the referendum, the Electoral Commission commissioned an independent assessment of the administration of the referendum.<sup>156</sup> The “overall picture” from this report was that “given the high profile nature of the referendum, the Chief Counting Officer, the Electoral Commission and electoral officials across the UK managed the referendum very well”.<sup>157</sup>

117. However, the report did flag some problems that emerged during the referendum as a result of the underlying electoral machinery (and thus beyond the direct remit of the CCO and the Commission). For example, the crash of the Register to Vote website placed a major burden on many electoral officials, while many members of the public reported confusion about the electoral registration process and a large number of duplicate applications which absorbed resources. In addition, the report identified some “challenging business processes involved in postal voting and overseas voting which also place a strain on local authorities”. As a result, “some overseas citizens may not have not been able to cast their votes or have them counted because of the tight timescales involved with registration and posting ballot papers through the international mail system. There were also concerns that the proxy voting process was open to vulnerabilities”.<sup>158</sup>

118. To inform their findings, the authors of the independent assessment, Dr Alistair Clark and Dr Toby James, commissioned a survey sent to 380 local authorities administering the referendum in Great Britain and to the electoral authorities in Northern Ireland and Gibraltar. The survey had a response rate of 66%. The survey revealed that while there were “high levels of overall satisfaction among COs [Counting Officers] with the management

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153 *The UK in a Changing Europe* ([EUR0064](#)).

154 *The UK in a Changing Europe* ([EUR0064](#)).

155 However, as discussed in paras.98–101, the AEA was particularly critical of the handling of the registration website’s collapse Association of Electoral Administrators ([EUR0016](#)).

156 The assessment was conducted by Dr Alistair Clark from Newcastle University and Dr Toby James from the University of East Anglia (Clark, A. and T. James, *An Evaluation of Electoral Administration at the EU Referendum: Report prepared for the Electoral Commission*, 22 August 2016).

157 Clark, A. and T. James, *An Evaluation of Electoral Administration at the EU Referendum: Report prepared for the Electoral Commission*, 22 August 2016, p.2.

158 Clark, A. and T. James, *An Evaluation of Electoral Administration at the EU Referendum: Report prepared for the Electoral Commission*, 22 August 2016, p.2.



structure [during the referendum][ ... ] there were some reservations that a conflict of interest may exist because the Commission was both the regulator and manager of the referendum process”.<sup>159</sup>

### **Regulator and provider: the Electoral Commission’s dual role**

119. On this point of the Commission’s role as administrator and regulator, the AEA suggested that “on balance, we believe that there should be separate bodies” running and regulating the referendum, rather than the current arrangement which “provides the Chief Counting Officer with the support of the EC’s [Electoral Commission’s] staff and infrastructure”.<sup>160</sup>

120. While Will Straw and Paul Comer from Britain Stronger in Europe stated that “the administration of the regulation in the main worked well” and that they had a good relationship with the Commission, they also raised questions about the dual role of the Electoral Commission during the campaign and the consequences this has for the Chair of the Commission (who recuses themselves from Chairing duties to act as CCO).<sup>161</sup> As a result, Mr Comer noted, when BSE posed “regulatory questions of a possibly thorny nature to the Electoral Commission, clearly their chair was recusing them from any involvement in the determination of those because of their role as the Chief Counting Officer”. Therefore, “there is just a question as to whether in future referenda their role as chair of the regulator should take precedence and someone else acts as chief counting officer, so that they can apply their judgement to those sorts of questions”.<sup>162</sup>

121. Though Mr Comer did not provide an example of a situation when BSE asked for the Commission’s guidance, or action, and were refused because of this dual role, he nonetheless commented that during the course of the campaign a number of important questions were raised and the “feeling that the chair was not there to help guide the senior staff at the Electoral Commission just raised the question as to whether it is more appropriate that they recuse themselves from those sorts of decisions to be the Chief Counting Officer, or whether they should actually be applying their judgment to those issues instead and have someone else as Chief Counting Officer”.<sup>163</sup>

122. However, the Commission’s role as both a regulator and a provider was strongly supported by Dr Simon Usherwood, who argued that it neither made the Commission’s job more difficult nor caused a conflict for the Commission.<sup>164</sup> The idea of separating the Commission’s regulatory and administrative functions was also rejected by Vote Leave’s William Norton, who said he could not see “any other practical way of doing it [the regulation, and delivery, of referendums]”.<sup>165</sup>

123. Mr Norton did, however, suggest that the Electoral Commission could have been more proactive a regulator, arguing that it has a tendency to operate more as “an auditor than a referee”:

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159 Clark, A. and T. James, *An Evaluation of Electoral Administration at the EU Referendum: Report prepared for the Electoral Commission*, 22 August 2016, pp.5, 10.

160 Association of Electoral Administrators ([EUR0016](#)).

161 [Qq174–175](#).

162 [Qq174–175](#).

163 [Q176](#).

164 [Q130](#).

165 [Q216](#).

It is more the case that it does not blow a whistle and say, “That is offside”. It is much happier coming back about five months later and saying, “Three of the goals were offside”, and so on and so forth.<sup>166</sup>

While Mr Norton indicated that the Commission “are getting better at intervening where there is a clear and present danger of a breach”, he said that he would rather the Commission “kept closer to campaigners and were more forthcoming”.<sup>167</sup>

### **The Designation Process**

124. One area, identified by both designated campaigns, where the administration of the referendum could have been improved was the designation process. Witnesses from Britain Stronger in Europe and Vote Leave contended that greater clarity could be provided by the Electoral Commission on the criteria used for designating campaigns. Vote Leave’s William Norton suggested that, despite his experience of three referendum campaigns, he was still no nearer to “guessing what the criteria are as to how you get designated”.<sup>168</sup> Britain Stronger in Europe’s Will Straw suggested that greater clarity as to those guidelines “may have helped those different campaigns [Vote Leave and Grassroots Out] be clearer in their applications”.<sup>169</sup>

125. Vote Leave highlighted a further issue with designation: a delay in designation of the leave campaign due to an “acrimonious split in the leave side”.<sup>170</sup> Matthew Elliott, its Chief Executive, explained that Vote Leave were designated as the official campaign on 13 April and then the control period started on 15 April.<sup>171</sup> As a result “until 13 April, we did not know whether we would be a campaign spending £7 million or one spending £700,000. That brought in several budgeting and cash flow issues”.<sup>172</sup> Matthew Elliott suggested that “it was quite useful to the Government that it was so late in the day, because it did mean that during a long period, that run-up to the referendum, you had both the leave campaigns preparing for designation rather than working out how to debate the other side—the remain campaign”.<sup>173</sup>

126. Responding to the evidence listed above, the Electoral Commission’s Chief Executive, Claire Bassett, argued that the Commission had “actively sought to achieve” transparency of the designation process, with the criteria published well in advance.<sup>174</sup> Indeed, Ms Bassett went as far as to suggest that the steps taken by the Commission, which included publishing the criteria in advance and talking to people about those criteria, was “probably the maximum transparency that we could achieve, short of changing the process in its entirety”.<sup>175</sup>

127. Jenny Watson did, however, suggest that the Electoral Commission could look at whether an explicit fit and proper person test should form part of the designation process

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166 [Q216](#).

167 [Q216](#).

168 [Q202](#).

169 [Q158](#).

170 [Q204](#).

171 [Q202](#).

172 [Q202](#).

173 [Q204](#).

174 [Q278](#).

175 [Q280](#).

for future campaigns.<sup>176</sup> According to Ms Watson, the Commission already comes close to conducting such a test during the designation process and already possesses the ability to “call campaigners in for interview” should it have any issues or concerns.<sup>177</sup>

### **The Electoral Commission**

128. With regards to the Electoral Commission’s dual role as a regulatory and administrator for referendums, Jenny Watson rejected any suggestion that any serious tensions arose during the campaign. For example, Ms Watson explained that the Commission had delegated the regulation of campaigners away from the Chair, which also acts as Chief Counting Officer during the referendum, and the board “through to the Chief Executive to staff members”, during the campaign.<sup>178</sup>

129. Ms Watson also said she was unconvinced by the suggestion, made by Britain Stronger in Europe in their written evidence, that “on some key compliance issues where we felt more junior staff weren’t giving due attention to the issues, we had no point of recourse” due to the Chair of the Commission recusing herself as a result of her CCO role.<sup>179</sup> According to Ms Watson, her experience of her staff team was that “if something was raised with them that they thought needed action they would take that action” and stated that she was unaware of any issues that had not been “effectively and properly handled at the right level”.<sup>180</sup>

130. Overall, in terms of the efficacy of the Chair of the Electoral Commission being Chief Counting Officer, Ms Watson acknowledged that there could be other individuals within the Commission that could be appointed to the role in future. However, Ms Watson’s evidence emphasised the importance of the role being housed within the Commission. She explained that there “simply was nobody else with the time or capacity [to be CCO]”. Ailsa Irvine, the Electoral Commission’s Head of Electoral Guidance, explained that “trying to co-ordinate the delivery of the poll across 362 local areas” was a “significant co-ordinating role” that requires “significant resource and expertise to be able to manage that”.<sup>181</sup>

131. In Ms Watson’s opinion, when Parliament voted to establish the Electoral Commission, it considered “who else could take this on [the CCO function]” and decided that the Commission “was the right place to put it”. Though she suggested that had there been somebody else with that capacity to undertake the duties of CCO “we would have seriously considered that”, Ms Watson also re-emphasized that the capacity needed for the task currently only resides within the Commission.<sup>182</sup>

### **Conclusion**

**132. On the whole, the referendum was well run and competently administered by the Electoral Commission. We pay tribute to the work of the Electoral Commission’s staff**

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176 [Qq286–287](#).

177 [Q287](#).

178 [Q326](#).

179 Britain Stronger in Europe ([EUR0091](#)); [Q327](#).

180 [Q327](#).

181 [Q329](#).

182 [Q329](#).

and local electoral administrators across the United Kingdom in ensuring that the referendum could be delivered effectively, within a compounded time frame, even with the added pressures that arose as a result of the crash of the Register to Vote website.

133. The Electoral Commission's dual role as a regulator and key delivery agent for referendums could pose potential difficulties. However, while we note suggestions that these roles should be divided between separate bodies, it is clear that the Electoral Commission is the only body, at present, which is capable of discharging both roles.

134. The Electoral Commission's dual role has resulted in the Chair of the Commission acting as Chief Counting Officer during referendums. Our inquiry explored whether it would be more appropriate for these roles to be separated out. However, we are again persuaded that the Chair of the Commission was the only person with the capacity, resource and expertise to co-ordinate the delivery of the referendum.

135. The process of designating the two official campaigns could be improved to provide greater clarity and transparency by the Electoral Commission. In particular, it was unfair that designation was so late, so that the Leave side could not plan ahead and commit to spending while competing for designation, but the uncontested Remain side was not disadvantaged in this way. *We recommend that the Electoral Commission undertake a review of the designation process to examine where greater transparency could be achieved. This review should include consultation with campaigners from each of the campaigns that sought designation during the EU referendum. It should address whether earlier designation would have been fairer, and whether there should be a more explicit fit and proper person test for those applying for designation.*

## 5 The machinery of government during the referendum

136. While collective responsibility was suspended on the question of the UK's continued EU membership the Government's official position during the referendum campaign was in favour of the UK remaining within a reformed European Union, under the terms of renegotiation agreed at a meeting of the European Council on the 18 and 19 February 2016.<sup>183</sup>

137. Both prior to, and during the referendum campaign, the role of the machinery of government would be the subject of controversy. Indeed, the Government suffered its first defeat in the House of Commons, following the 2015 General Election, over proposals to modify purdah rules for the purposes of the EU referendum. As this chapter details, concerns were also raised about the advice given to Civil Servants on the support they could provide Ministers dissenting from the Government's position on EU membership, the publications issued by the Government during the referendum campaign, as well as the Government's prohibition on contingency planning.

### Guidance and the Civil Service Code

138. On 23 March 2015, our predecessor Committee, PASC, published its report entitled *Lessons for Civil Service impartiality from the Scottish independence referendum*.<sup>184</sup> Based on the experience of that referendum, PASC identified that the experience of the Scottish independence provided an "opportunity to strengthen and clarify the Civil Service Code ... so that future referendums do not give rise to the same uncertainty and controversy".<sup>185</sup> In particular, the Committee recommended that explicit guidance should be provided for officials, to govern the conduct of the Civil Service during referendum campaigns. PASC recommended that such guidance should draw upon "existing guidance on conduct during elections and the guidance drawn up for officials in advance of the Scottish independence referendum". The Committee concluded that the resulting guidance should be sufficiently generic to serve all foreseeable future referendums.<sup>186</sup>

139. Furthermore, PASC recommended that the Civil Service Code be revised to include a new paragraph, so that the provisions which apply in respect of parties in elections in the Code also apply in respect of the "yes" and "no" campaigns in referendums, and to ensure that that any future referendum does not give rise to the same uncertainty and controversy.<sup>187</sup> The new paragraph would read as follows:

The obligations in this Code apply to your conduct towards a referendum, and towards any possible answer to a referendum question, in general,

183 European Council, *European Council meeting (18 and 19 February) - Conclusions: The United Kingdom and the European Union*, EUCO 1/16, 19 February 2016.

184 House of Commons Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish independence referendum*, Fifth Report of Session 2014–15, HC 111, 23 March 2015.

185 House of Commons Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish independence referendum*, Fifth Report of Session 2014–15, HC 111, 23 March 2015, para.76.

186 House of Commons Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish independence referendum*, Fifth Report of Session 2014–15, HC 111, 23 March 2015, para.77.

187 House of Commons Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish independence referendum*, Fifth Report of Session 2014–15, HC 111, 23 March 2015, para.78.

and in respect of any political party, belief or persuasion. In particular, you are to have regard to any special restrictions upon Ministers, or your organisation, which may apply during all or part of a referendum period (as defined in the Political Parties, Elections and referendums Act 2000), concerning the release of information or material, or otherwise.

140. However, in its response to the report, the Government disagreed with the Committee's recommendation for a change to the Civil Service Code.<sup>188</sup> It noted that the Code is "a short, high level statement setting out the core values and standards of behaviour expected of all civil servants. The nature of the Code enables it to adapt flexibly to a wide range of circumstances including referendums". It concluded that it was satisfied that the "existing arrangements to raise awareness and support civil servants in understanding and abiding by the core principles and standards of conduct during a referendum campaign are sufficient". The Government stated clearly, that while it was "committed to issuing guidance to civil servants nearer the time on their conduct during referendum campaigns", it did not "believe there is a need to insert a specific new paragraph on referendums into the Civil Service Code".<sup>189</sup>

**141. During the run-up to the EU referendum, there were many occasions when it appeared to many that civil servants were being drawn into referendum controversy. This damaged the reputations of the Civil and Diplomatic Services for impartiality. It is a matter of some regret to this Committee that the Government did not accept the recommendation of our predecessor Committee, PASC, in relation to the provision of a new paragraph in the Civil Service Code, which would have served to clarify the role and conduct of civil servants during a referendum campaign. This proportionate and sensible step, would have served to promote clarity and a clear understanding of the role for civil servants at the very outset of the EU Referendum campaign, thereby avoiding some of the controversies which arose during that campaign.**

### The suspension of collective responsibility and the guidance given to Civil Servants

142. Though the Government's official position was in favour of the UK remaining within the European Union, the then Prime Minister, as in 1975, agreed to suspend collective responsibility in relation to the referendum question. On 11 January 2016, the Rt Hon David Cameron MP announced, in a letter to ministerial colleagues, that there would be a "special arrangement to permit individual Ministers to take a different personal position from the official position of the Government".<sup>190</sup> This agreement to differ only applied to the question of the UK's continued EU membership, with "all other EU or EU-related business, including negotiations in or with all EU institutions and other Member States, and debates and votes in Parliament here on EU business will continue to be subject to the normal rules of collective responsibility and party discipline". Again as with 1975, this

188 Public Administration and Constitutional Affairs Committee, Second Special Report of Session 2015–16, [Lessons for Civil Service impartiality from the Scottish independence referendum: Government Response to the Public Administration Select Committee's Fifth Report of Session 2014–15](#), HC 725, 12 January 2016.

189 Public Administration and Constitutional Affairs Committee, Second Special Report of Session 2015–16, [Lessons for Civil Service impartiality from the Scottish independence referendum: Government Response to the Public Administration Select Committee's Fifth Report of Session 2014–15](#), HC 725, 12 January 2016.

190 HM Government, [EU referendum: Prime Minister's minute to ministers](#), 11 January 2016.

also meant that when speaking from the Front Bench, Ministers (including those differing from the Government's position on EU membership) would be expected to support official government policy.

143. Importantly, the Prime Minister's letter made clear that as the Civil Service is duty bound to serve the government of the day, it would "not be appropriate or permissible for the Civil Service or individual civil servants to support Ministers who oppose the Government's official position by providing briefings or speech material on this matter".<sup>191</sup>

144. On 23 February, the Cabinet Secretary, Sir Jeremy Heywood, issued guidance to Civil Servants and Special Advisers on their conduct during the referendum and the support they could provide to Ministers during the campaign.<sup>192</sup> This guidance reiterated the key principle that the Civil Service supports the Government of the day in developing and implementing its policies, which included "supporting the Government to make the case for the UK to remain in a reformed EU".<sup>193</sup>

145. According to Sir Jeremy Heywood, Departments should continue to provide support "in the normal way" to Ministers operating in their ministerial capacity. However, the guidance stated that it would not "be appropriate or permissible for the Civil Service to support Ministers who oppose the Government's official position by providing briefing or speech material on this matter".<sup>194</sup> This included access to official departmental papers, with the exception of papers that Ministers have previously seen on issues relating to the referendum question prior to the suspension of collective agreement.

146. This guidance was supplemented by a 'Q&A' note, which provided further detail on the Ministerial support and access to papers:

Q: Can dissenting Ministers see departmental papers/information relating to the EU referendum? What kind of factual advice can they have?

A: Ministers can see papers that they have already seen prior to the suspension of collective responsibility. The same rules apply to their special advisers. They can ask officials to verify the factual accuracy of speeches etc., but not ask them to provide new arguments or suggest new facts.

Q: Can dissenting Ministers see departmental papers on matters that aren't directly about the Referendum, but may have a bearing?

A: They can see or commission any papers produced by their departments in the normal way except those that have a bearing on the referendum question or are intended to be used in support of their position on the referendum.

The 'Q&A' also made clear that should No.10 ask for material from a Department headed by a dissenting Secretary of State, then said material should be provided to the Prime Minister.<sup>195</sup>

191 HM Government, [EU referendum: Prime Minister's minute to ministers](#), 11 January 2016.

192 HM Government, [EU Referendum: guidance for the Civil Service and special advisers](#), 23 February 2016.

193 HM Government, [EU Referendum: guidance for the Civil Service and special advisers](#), 23 February 2016.

194 HM Government, [EU Referendum: guidance for the Civil Service and special advisers](#), 23 February 2016.

195 [Q & A: EU Referendum guidance to Civil Servants](#).

147. This guidance raised concerns that Cabinet Ministers campaigning for a Leave vote would either be by-passed, or even banned from using, the Civil Service. One particular line of concern was that Sir Jeremy Heywood’s guidance would conflict with the responsibilities laid out for ministers in the ministerial code and with the *Carltona* principle which outlines that officials in a department work “under the authority of ministers”.<sup>196</sup>

148. During an evidence session with PACAC on 1 March 2016, Sir Jeremy Heywood defended the guidance issued to civil servants. According to Sir Jeremy Heywood, the guidance had been based “very closely” on the 1975 precedent and on the guidance issued to Civil Servants during the Scottish independence referendum, suggesting that the guidance had been misunderstood.<sup>197</sup> Sir Jeremy Heywood claimed that the area where the Civil Service would not be providing support to pro-Leave Ministers was “very specific [ ... ] that area is the provision of briefing material and speech material”.<sup>198</sup> That, Sir Jeremy Heywood argued, would be the material denied to Ministers dissenting from the Government’s official position, “for all the material that they need to answer parliamentary questions and to handle European business that is not related to the question-normal European business-we will of course continue to provide the usual limousine service”.<sup>199</sup>

149. There nonetheless remained some uncertainty as to whether the reference in the guidance to preventing access “to official departmental papers, excepting papers that Ministers have previously seen on issues relating to the referendum question prior to the suspension of collective agreement”, constituted a more restrictive level of support to pro-Leave ministers than Sir Jeremy Heywood’s evidence implied.

150. On 8 March, Bernard Jenkin MP, Chair of PACAC wrote to Sir Jeremy Heywood, calling for the guidance and the Q&A to be withdrawn and fresh guidance provided, as a means of removing any lingering ambiguity and uncertainty.<sup>200</sup> The letter was based on legal advice from the then Speakers Counsel, which stated that the guidance was “at the very least ... ambiguous” as to which papers Ministers who intended to campaign for Leave would be able to see. The full text of this advice is attached in Annex 4 to this report.

151. On 1 April 2016, the Chair of the Liaison Committee, the Rt Hon Andrew Tyrie MP, wrote to the Prime Minister raising concerns that the guidance could result in the “unacceptable situation whereby Secretaries of State were unable to fulfil their duties under the Ministerial Code, their statutory responsibilities set down in legislation, and their constitutional responsibilities to Parliament to account for the work of their Departments”.<sup>201</sup> Noting that the ministerial code recognises that ministers can delegate authority to their officials, Mr Tyrie claimed that the guidance appeared to delegate the Minister’s authority, “without their consent, to unaccountable and unelected civil servants. Civil servants will decide what a minister may or may not see”.<sup>202</sup>

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196 This is the principle that permits civil servants to act as the Secretary of State. The principle was recognised by the courts in *Carltona v Commissioner of Works* [1943] 2 All ER 560.

197 Public Administration and Constitutional Affairs Committee, [Oral evidence: EU Referendum: Civil Service Guidance](#), HC 792, Tuesday 1 March 2016, Qq3–4.

198 Public Administration and Constitutional Affairs Committee, [Oral evidence: EU Referendum: Civil Service Guidance](#), HC 792, Tuesday 1 March 2016, Q4.

199 Public Administration and Constitutional Affairs Committee, [Oral evidence: EU Referendum: Civil Service Guidance](#), HC 792, Tuesday 1 March 2016, Q4.

200 [Letter from Bernard Jenkin MP to Sir Jeremy Heywood](#), 8 March 2016.

201 [Letter from Andrew Tyrie MP to the Prime Minister](#), 1 April 2016.

202 [Letter from Andrew Tyrie MP to the Prime Minister](#), 1 April 2016.



152. In their responses to Mr Jenkin and Mr Tyrie, the Cabinet Secretary and the then Prime Minister both defended the existing guidance. Sir Jeremy Heywood, for example, refused to accept that the guidance “could be read to imply that briefing or documentation relating to issues outside of ‘the question of whether the UK should remain in a reformed EU-or-leave’ should be withheld” and was confident that the guidance did not raise any confusion as to its intent.<sup>203</sup> The Prime Minister, in his letter to Mr Tyrie, stressed that ministers would continue to “have access to all information necessary in order to fulfil their official duties as a Minister” and claimed that the Government was “not aware of any difficulties caused by the current guidance and would not expect it to interfere with any Minister’s statutory or constitutional responsibilities”.<sup>204</sup>

153. Following this exchange of correspondence, Mr Tyrie reiterated his concern that the guidance undermines the authority of Secretaries of State and their responsibility for all of the business of their departments, “until such time as another minister is allocated the specific responsibility at issue”.<sup>205</sup> According to Mr Tyrie, the guidance instead “attempts to delegate this authority, without the minister’s consent, to unaccountable and unelected civil servants”.<sup>206</sup>

154. Overall, Mr Tyrie considered the regime established by the guidance to be “an unsatisfactory arrangement and could turn out to be unsustainable”. Nonetheless, he did suggest that it “could command somewhat more confidence with a simple change”, namely a commitment “to publish a list of the official departmental papers which will not be made available to pro-Brexit ministers” (or, in the event that confidential material is involved, to provide such a list privately to Mr Tyrie in his capacity as Liaison Committee Chair).<sup>207</sup>

**155. Relaxing Cabinet collective responsibility on the question of the UK’s EU membership was a sensible decision. However, the Cabinet Secretary’s guidance to Civil Servants on their conduct during the referendum, was ambiguous and caused unnecessary uncertainty as to the support civil servants could provide to Ministers supporting a Leave vote. We recommend that, in the event of a future referendum where Cabinet collective responsibility is relaxed, any guidance should be more precise as to the support that civil servants should not provide to dissenting Ministers, including a list of official departmental papers that would not be made available to those Ministers. All Ministers should continue to receive factual information in relation to the work and remit of their departments.**

## The publication of referendum-related government documents

156. In the months leading up to the referendum, the Government published a range of different documents relating to aspects of the UK’s membership of the European Union, including alternative models of relationships with the EU and Treasury analysis of the immediate impact of withdrawal from the UK and the long term impact of the UK’s

203 [Letter from Sir Jeremy Heywood to Bernard Jenkin MP](#), 14 March 2016.

204 [Letter from the Prime Minister to Andrew Tyrie MP](#), 12 April 2016.

205 House of Commons Liaison Committee, [EU referendum: Prime Minister’s response on civil service guidance](#), 4 May 2016.

206 House of Commons Liaison Committee, [EU referendum: Prime Minister’s response on civil service guidance](#), 4 May 2016.

207 House of Commons Liaison Committee, [EU referendum: Prime Minister’s response on civil service guidance](#), 4 May 2016.

membership of the EU and the alternatives.<sup>208</sup> These reports, particularly those from the Treasury, and the Government’s decision to spend £9.3m on a leaflet advocating a Remain vote, sent to households across the United Kingdom in the run-up to the referendum, were the subject of some controversy during the referendum.<sup>209</sup>

157. In their written evidence, the UK in a Changing Europe project suggested that while these documents were clearly not “neutral”, the quality of the analysis in these documents was similar to most government documents produced to support policy. In particular, the Treasury documents “used standard, accepted methodologies and produced results that were qualitatively similar to those produced by respected independent economists”.<sup>210</sup>

158. However, they suggested that while the analysis in these documents was “couched in relatively sober terms, the public presentation by the Remain campaign, including by serving Ministers, was not”.<sup>211</sup> For example, while the Treasury analysis contained a number of scenarios for the potential economic impact of a Leave vote (forecasts which incorporated the large amount of uncertainty as to which scenario (if any) will materialise), “the Chancellor and others made a number of statements that “Britain would be poorer by £4,300 per household”, a level of certainty that was not justified by the underlying analysis”.<sup>212</sup> Furthermore, the UK in a Changing Europe’s evidence suggests that there was one case where “the Treasury clearly overstepped the bounds of normal practice”:

When the report on the short-term impacts of Brexit was published, just a month before the referendum, the front page of the Treasury website had a banner headline reading “UK economy would fall into RECESSION if Britain leaves the EU” This both misrepresented the analysis and was very obviously partisan in the context of the campaign.<sup>213</sup>

This was, they argue, “entirely improper on any possible reading of the Civil Service Code”, with the UK in a Changing Europe project expressing disappointment that “senior Treasury civil servants, including the Permanent Secretary, allowed it to happen”.<sup>214</sup> Such an incident, they suggest, was “deeply corrosive of impartiality—both actual and perceived—and should not be allowed to recur”.<sup>215</sup>

159. During his appearance before the Committee, Dr Alan Renwick also criticised the Government, suggesting that the documents that were published by the Government “particularly by the Treasury, should not have been published”.<sup>216</sup> According to Dr Renwick, these documents “contained claims that were clearly not justifiable” and even

208 HM Government, *The process for withdrawing from the European Union*, Cm 9216, February 2016; HM Government, *The best of both worlds: the United Kingdom’s special status in a reformed European Union*, February 2016; HM Government, *Alternatives to membership: possible models for the United Kingdom outside the European Union*, March 2016; HM Government, *Rights and obligations and European Union membership*, April 2016; HM Government, *HM Treasury analysis: the long-term economic impact of EU membership and the alternatives*, Cm 9250, April 2016; HM Government, *HM Treasury analysis: the immediate economic impact of leaving the EU*, Cm 9292, May 2016.

209 HM Government, *Why the Government believes that voting to remain in the European Union is the best decision for the UK*, 6 April 2016; White, I. and N. Johnston, *The Government leaflet on the EU Referendum*, House of Commons Library Briefing Paper, No.7579, 4 May 2016, pp.5–8.

210 The UK in a Changing Europe ([EUR0064](#)).

211 The UK in a Changing Europe ([EUR0064](#)).

212 The UK in a Changing Europe ([EUR0064](#)).

213 The UK in a Changing Europe ([EUR0064](#)).

214 The UK in a Changing Europe ([EUR0064](#)).

215 The UK in a Changing Europe ([EUR0064](#)).

216 [Q150](#).

if they had only contained justifiable claims, “the fact that they were being made by the Government and, particularly, where money was being spent on sending that pamphlet out to all households, I think was inappropriate”.<sup>217</sup>

160. The importance of the distinction between public information and campaign material is highlighted by the Government’s Command Paper, ‘The Process of Withdrawing from the European Union’.<sup>218</sup> Paragraph 2.5 of that document states:

The complexity of the negotiations, and the need for the UK to negotiate adequate access to the Single Market after it leaves the EU, would make it difficult to complete a successful negotiation before the two year deadline expired. Any extension to the two year period set out in the Treaty would require the agreement of all 27 remaining EU Member States.

However, the Government’s White Paper, “The United Kingdom’s exit from and new partnership with the European Union”, published in February 2017, sets out a different position.<sup>219</sup> This raises the question of whether the 2016 White Paper could be classified as campaigning material rather than an objective publication, and whether civil services resources should be used to produce such material.

**161. The Government was legally obliged to publish reports on aspects of the UK’s membership of the EU. However, the presentation of these reports, particularly those from the Treasury, and the decision to spend £9.3m on sending a leaflet, advocating a Remain vote, to all UK households, were inappropriate and counterproductive for the Government. These incidents strengthen the case for the purdah provisions of section 125 to be extended to the full length of a referendum campaign.**

## The Government’s policy on Civil Service contingency planning

162. In 1975, Whitehall prepared for a possible UK exit from the ‘Common Market’ with a “fairly intensive” programme of Cabinet Office led contingency planning.<sup>220</sup> The contingency planning focused on the length of time required for withdrawal to be negotiated, the financial consequences of leaving and issues such as subsidy payments to farmers, tariffs and future trading arrangements with Europe.<sup>221</sup>

163. However, unlike in 1975, the Government’s official position during the 2016 EU referendum was that there would be no contingency planning, the only exception being planning within the Treasury to anticipate the likely impact of a Leave vote on the UK’s financial stability.<sup>222</sup>

164. The Government’s refusal to undertake contingency planning has been the subject of criticism, both before and after the referendum. In April 2016, the Foreign Affairs Committee’s report *Implications of the referendum on EU membership for the UK’s role in*

217 [Q150](#).

218 FCO, *The process for withdrawing from the European Union*, Cm 9216, February 2016, para 2.5.

219 HMG, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, February 2017.

220 For records of the contingency planning undertaken in 1975, see the following collections at The National Archives: T 355/273; T 355/274; T 355/275; BT 241/2752; BT 241/2753.

221 Mance, H. *Lessons from 1975 haunt Cameron’s EU referendum plans*, *The Financial Times*, 8 April 2016.

222 House of Commons Treasury Committee, *The economic and financial costs and benefits of the UK’s EU membership*, First Report of Session 2016–17, HC 122, 27 May 2016, para.89.

the world bemoaned the “regrettable” lack of contingency planning by the Government.<sup>223</sup> Their post-referendum report, *Equipping the Government for Brexit* was particularly critical of the Government’s approach to contingency planning.<sup>224</sup>

165. According to the Committee, “the previous Government’s confidence that basic planning for the practicalities of implementing Brexit could be undertaken at a leisurely pace after the vote now appears at best naïve and at worst negligent”.<sup>225</sup> Noting the scale of the challenge posed by a withdrawal from the EU, the Committee went on to contend that “the absence of any planning both for the key challenges and opportunities that the UK will now face and for the structures that will need to be put in place to manage them constitutes a major setback for the new government”.<sup>226</sup>

166. However, in his evidence to our inquiry, the Cabinet Secretary, Sir Jeremy Heywood, claimed that the discussion regarding contingency planning had “become a very odd debate”.<sup>227</sup> In addition to the work that had been undertaken between the Treasury and the Bank of England, Sir Jeremy Heywood pointed to “the extensive work” that had been undertaken, at Parliament’s behest (as a result of the European Union Referendum Act 2015), on documents covering “alternatives to the European Union’s membership, an outline of the deal, something on the rights and obligations, and so on”.<sup>228</sup>

167. According to Sir Jeremy Heywood, the work undertaken on these documents was, and remains, “extremely valuable” to the Civil Service:

Obviously there is no particular model that the Prime Minister is looking to adopt. We want a British model, not a pre-existing model that does not work for us. Obviously getting our heads around EA membership, WTO membership, all the different sorts of trading agreements that other countries have managed to negotiate, was really valuable work. It required a lot of work by the Civil Service. Some of that was captured in the documents that we produced, but all of that background work and the economic analysis the Treasury did around it is valuable work for us now.<sup>229</sup>

168. Furthermore, Sir Jeremy Heywood claimed that during the final 28 days of the referendum, the Civil Service looked “at what was being said by people advocating Leave and try to understand what were the issues-the policy issues-that were likely to immediately arise on 24 June in that case”.<sup>230</sup> Indeed, he revealed that the Civil Service held an away day “to discuss the sorts of issues we would have to confront on 24 June”, including what

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223 House of Commons Foreign Affairs Committee, *Implications of the referendum on EU membership for the UK’s role in the world*, Fifth Report of Session 2015–16, HC 545, 26 April 2016, para. 33.

224 House of Commons Foreign Affairs Committee, *Equipping the Government for Brexit*, Second Report of Session 2016–17, HC 431, 20 July 2016.

225 House of Commons Foreign Affairs Committee, *Equipping the Government for Brexit*, Second Report of Session 2016–17, HC 431, 20 July 2016, p.3.

226 House of Commons Foreign Affairs Committee, *Equipping the Government for Brexit*, Second Report of Session 2016–17, HC 431, 20 July 2016, para.17.

227 [Q48.](#)

228 [Q48.](#)

229 [Q48.](#)

230 [Q48.](#)

organisational changes would be required.<sup>231</sup> This away day was held without the Prime Minister’s knowledge, while Sir Jeremy Heywood denied that the preparatory work, listed above, was contingency planning on the grounds that “there was no plan”.<sup>232</sup>

169. One question that arose during the course of our inquiry was whether there should have been contact, during the last few months of the referendum campaign, between the two designated campaigns and the Civil Service, along the lines of the pre-General Election contact between civil servants and opposition parties.<sup>233</sup> Vote Leave’s Matthew Elliott said that this would have been a practical proposal, suggesting that had the Civil Service contacted Vote Leave to discuss their proposals for leaving the EU, they would have “been very happy to give any briefing to any government department they wanted”.<sup>234</sup>

170. While Dr Simon Usherwood saw some merit in the suggestion of pre-referendum contact between campaigners and the civil service, he suggested that one problem with that proposal is that a referendum is not an election “and so there will not necessarily be a change of personnel in the event that that non-government campaign wins”. This raises the question of whether a winning, non-government campaign will “be in a position to then require or oblige the Government [ ... ] to follow that advice [provided by the winning campaign to the civil service]”.<sup>235</sup> Dr Renwick agreed, arguing that as Vote Leave was not going to form a government, the status of any briefing or advice to civil servants would be different from that provided by opposition parties before a General Election.<sup>236</sup> Nonetheless, he felt that the campaigns “should have done as much as possible to clarify what they wanted to happen” in the event of their preferred outcome being successfully.<sup>237</sup>

171. Sir Jeremy Heywood also expressed caution at this suggestion, on the grounds that the comparison between General Elections and referendums was “not a precise analogy”.<sup>238</sup> While Sir Jeremy Heywood said that the civil service looked at the outputs of the Leave campaign, for example, the Leave ‘roadmap’ produced by Vote Leave on 15 June, he stressed the differences between a referendum campaign and a General Election:

You need to know you are talking to. A political party has a leader, has a manifesto, and has a clear set of promises. Then you have a campaign that has many different strands. We could have put our eggs in that particular basket and ended up doing a whole pile of work on something that turned out to be completely irrelevant.<sup>239</sup>

Indeed, Sir Jeremy Heywood commented that in the case of the points outlined in the roadmap issued by Vote Leave, “very little of that has come to pass”.<sup>240</sup>

**172. While the Government did not support a Leave vote, they nonetheless had a constitutional and public obligation to prepare for both outcomes from the referendum.**

231 [Qq48–50.](#)

232 [Qq48; 54.](#)

233 Gay, O. [Pre-election contacts between civil servants and opposition parties](#), House of Commons Library Standard Note, SN/PC/03318, 22 May 2014.

234 [Qq258–259.](#)

235 [Q153.](#)

236 [Q154.](#)

237 [Q154.](#)

238 [Q63.](#)

239 Vote Leave, [A framework for taking back control and establishing a new UK-EU deal after 23 June](#), 15 June 2016; [Q63.](#)

240 [Q63.](#)

**In 1975, Whitehall undertook contingency planning for a possible vote in favour of withdrawal from the European Communities and there was no adequate reason for a refusal to prepare for either eventuality in 2016. Though we were relieved to learn that work was undertaken within the Civil Service on the potential implications of a Leave vote, Civil Servants should never have been asked to operate in a climate where contingency planning was formally proscribed by the Government. Such preparation would negate the need for the Prime Minister to resign. The UK Government failed to learn the lessons from the Scottish referendum in this respect.**

*173. We recommend that in the event of future referendums civil servants should be tasked with preparing for both possible outcomes. While we recognise the important distinctions between General Elections and referendums, these preparations should include pre-referendum contact between the two designated campaigns and the Civil Service, along the lines of pre-General Election contact between opposition parties and the Civil Service. It should be reasonable to presume that the sitting Prime Minister and his/her administration will continue in office and take responsibility for the referendum result in either eventuality.*

## Conclusion: the machinery of government and the EU referendum

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174. Giving evidence to this inquiry, Vote Leave’s Matthew Elliott claimed that the “extent to which the Government used the whole machinery of government to push the Remain campaign was, I think, unprecedented”.<sup>241</sup> While this assertion by the Chief Executive of the designated Leave campaign may be rather unsurprising, it is instructive that the role of the Government has been the subject of significant criticism from impartial observers.

175. For example, as paragraphs 156 to 161 of this report demonstrate, the Government’s presentation of policy papers and its £9.3m leaflet have been the subject of fierce criticism by academic observers such as the UK in a Changing Europe project and Dr Alan Renwick. In his evidence to PACAC Dr Renwick also argued that while the principle of *purdah* “is to maintain equality and to ensure that the Government does not skew the debate”, the Government “did clearly try to skew the debate” during the referendum.<sup>242</sup>

176. Indeed, witnesses to our inquiry have suggested that the Government’s behaviour was noticed by the public, with polling evidence reportedly indicating “that people were unhappy with the role that the Government played”.<sup>243</sup> According to Dr Renwick, is “certainly plausible to think that the Government’s interventions might well have been counterproductive from their point of view and people resented the fact that the Government was getting involved in that way”.<sup>244</sup> Polling undertaken by the Electoral Reform Society (ERS) indicated that the level of importance voters attached to the Government as a source of information fell from 10% to 8%, following the leaflet’s publication.<sup>245</sup> According to the ERS, the fact that the Government’s influence essentially remained the same “despite a significant increase in government output on the referendum in the run-up” suggested a certain level of public distrust in the Government.<sup>246</sup>

177. While Sir Jeremy Heywood, in his evidence to PACAC, defended the role of the Civil Service during the referendum and denied that the Civil Service has been put under “unnecessary pressure” by the Government, he nonetheless conceded that a perception existed, described by Sir Jeremy Heywood as “unfortunate ... inaccurate and unfair”, that the Civil Service had operated in a biased way during the referendum:

I do not think we behaved improperly, I do not think we behaved in a biased way, or an unfair way, or a constitutionally improper way. Yet the perception was out there that we were exceeded our brief in some way or were biased, and that was very unfortunate. I think that partly was because there was not sufficient understanding, even in Parliament, frankly, as to what our role is when the Government has a position and there is nothing in the Bill that stops the Government from using the Civil Service.<sup>247</sup>

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241 [Q207](#).

242 [Q121](#).

243 [Q148](#).

244 [Q148](#).

245 Brett, W., *It’s good to talk: Doing referendums differently after the EU vote*, Electoral Reform Society, September 2016, pp.16–17.

246 Brett, W., *It’s good to talk: Doing referendums differently after the EU vote*, Electoral Reform Society, September 2016, pp.16–17.

247 [Q27](#).

178. While it is perfectly legitimate for the Prime Minister and government to take an official position during a referendum campaign, the fairness, and legitimacy, of a referendum rests on a careful and restrained use of the machinery of government. Unfortunately, many of the Government's actions in the run-up to the referendum appear to have increased public distrust. As Sir Jeremy Heywood has acknowledged, the use of the machinery of government during the referendum contributed to a perception that the civil service were, in some way, biased. That any such perception exists is deeply regrettable and was entirely avoidable. *We recommend that the Government heed the lessons from this referendum of the implications of the use of the machinery of government during referendums on public trust and confidence in the institutions of government.*



# Conclusions and recommendations

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## Chapter 2: Referendums and representative democracy in the UK

### A competitive or complementary relationship? Referendums and Parliament

1. The UK is, in principle, a representative democracy. The referendum in the United Kingdom has been viewed by some as a device which is both alien to our constitution principles and a potential threat to parliamentary sovereignty. However, referendums have become part of the UK's largely uncodified constitution, with over a dozen referendums, since the early 1970s, on issues ranging from the future of Northern Ireland to the voting system used for Westminster elections. On the basis of these precedents, we agree with the House of Lords Constitution Committee's judgement in 2010 that, if referendums are to be used, they are most appropriate as a device for resolving questions of key constitutional importance, and we consider them appropriate, when issues cannot be resolved through the usual medium of party politics. (Paragraph 14)
2. If the results of referendums are to command the maximum of public support, acceptance and legitimacy, then they must be held on questions and issues which are as clear as possible. Voters should be presented with a choice, where the consequences of either outcome are clear. There is bound to be uncertainty arising from what might be termed a "bluff-call" referendum, like the 2016 EU referendum, but this should not limit how the participants campaign on either side. The UK Government initiated the process which led to the referendum, despite being against the suggested proposal, and with the aim of using a negative result to shut down the debate about the question at issue. Moreover, the referendum was confined to a tight question, on the basis of a clear binary choice. There could, however, have been more positive efforts to explain, and therefore to plan for, the consequences for voters in the event of either outcome. This would have required providing impartial consideration of the outcome which the Government clearly did not want. (Paragraph 19)
3. Parliamentary sovereignty, and the associated principle that no Parliament can bind a successor, makes the concept of a legally binding referendum impossible in theory. However, it is clear that, in reality, referendums are seen by the public as conferring an obligation on parliamentarians to deliver the result. Parliament has delivered this, and the EU (Notification of Withdrawal) Bill completed its passage through both Houses, and received Royal Assent on 16 March 2017. (Paragraph 23)
4. In other countries, referendums are not conducted on the basis that a Prime Minister must resign in the event of losing a referendum. A more responsible conduct of the Government's case in the run up to the referendum, and proper planning for a Leave vote, would not have opened up so much new controversy nor left the Prime Minister's authority and credibility undermined. *Using a referendum as a "bluff call" in order to close down unwelcome debate on an issue is a questionable use of referendums. Indeed, it is incumbent on future Parliaments and governments to*

*consider the potential consequences of promising referendums, particularly when, as a result, they may be expected to implement an outcome that they opposed.* (Paragraph 24)

## Conclusion

5. The relationship between the direct democracy of a referendum and the established expectations of representative democracy requires careful management. We agree that it is of the highest importance that the referendum process is seen to be fair, by both sides, and that the result is agreed to, even if not with, by both sides. This is particularly important given the public's expectation, post-referendum, that the result will be accepted and implemented. (Paragraph 25)
6. To achieve this level of acceptance and legitimacy, referendums, therefore, need to be designed in such a way as to provide the utmost clarity for parliamentarians, campaigners and, above all, the electorate. Referendums should be limited to matters which lend themselves to a binary question. Confusion as to the possible consequences of a referendum result serves only to heighten the potential tensions between referendums and representative democracy and risks increasing the public's disenchantment with politics. *Referendums are the creations of Parliament and the Government. Parliament and the Government are therefore accountable and must take responsibility for the conduct of referendums, and the fairness of the question, and there should be proper information about, and planning for, either outcome.* (Paragraph 26)

## Chapter 3: The regulatory framework for referendums

### The Political Parties, Elections and Referendums Act 2000

7. The reinstatement of the restrictions on government set out in section 125 of the Political Parties and Referendums Act (PPERA) was of critical importance to the fair conduct of the referendum and the legitimacy of its outcome. Parliament was right to resist the then Prime Minister's desire that the government qua government should be able to promote its views on the referendum issue right the way through the referendum campaign. This would have constituted the use of public resources for political campaigning and would have made a nonsense of one of the purposes of PERA, which is to create parity between the two campaigns. Fears that the application of section 125 could have potentially problematic consequences for the conduct of government proved groundless. Sir Jeremy Heywood conceded that the application of section 125 did not cause huge difficulties for business as usual. Regardless of the legal advice, or the concerns of ministers, the attempt to disapply section 125 of PERA left the Government open to the impression that it was seeking to manipulate the referendum process. (Paragraph 41)
8. The provisions of section 125, while imperfect, have been successfully applied in numerous referendums since 2000. There is no evidence that section 125 created any of the threats to good governance that the Cabinet Secretary feared during

his appearance before PACAC in July 2015. *The purdah provisions of section 125 of PPERA play a key role in the fair conduct of referendums and must continue to do so in future referendums.* (Paragraph 42)

### Reforming the regulatory framework for referendums

9. PACAC supports the Law Commissions' proposals to consolidate the law relating to referendums. The basic regulatory framework provided by PPERA would be strengthened by the establishment of a generic conduct order that can be applied for future referendums. Such an order would end the current practice whereby each referendum results in a process of 'reinventing the wheel' with referendum-specific provisions required which, in the case of conduct, essentially duplicate the provisions that were made for previous referendums. Consolidation in the form of a new generic conduct order would streamline the process of calling a referendum. It would provide greater stability in the constitutional and legal framework for referendums, and would also provide greater clarity for parliamentarians, campaigners and the electorate. (Paragraph 51)
10. Section 125 of PPERA provides important protection for the fairness of referendum campaigns, but the 28 days specified is too short a period in the context of the much longer official campaign period. The absence of a longer purdah period enables the Government and other relevant public bodies to produce promotional material during most of the referendum campaign period, a situation that is far from satisfactory. (Paragraph 60)
11. The Electoral Commission has long argued that the restrictions on the publication of promotional, referendum-related, material by the Government should be extended, beyond the current 28 day period, provided by section 125, to cover the full referendum period. Nothing but the Government's political intentions are served by maintaining the 28 day purdah period. *PACAC recommends that the Government should bring forward proposals to extend the section 125 restrictions so that they are in force for the full duration of a referendum period of ten weeks, as recommended by the Electoral Commission and so many other respected authorities.* (Paragraph 61)
12. Section 125 was originally drafted some 16 years ago. Since that time campaigning and publishing have both become increasingly digital in nature. As a result, terminology and provisions that may have been appropriate in 2000, may be less effective at regulating campaign activity in 2017. PACAC, the Electoral Commission and the Government all had different legal advice and interpretations as to: a) whether the [eureferendum.gov.uk](http://eureferendum.gov.uk) website represented publishing for the purposes of section 125; and b) whether the steps taken to remove links to the website satisfied the exception provided in section 125(3)(a). This underlines the need for section 125 to be reviewed and amended so as to better reflect the increasingly digital nature of our democracy. (Paragraph 68)
13. *PACAC recommends that the Government bring forward consultative proposals for the redrafting of section 125. These proposals should provide greater clarity as to the status of online publications, for the purpose of the section 125 restrictions, and what*

*constitutes “specifically seeking access” to materials, under the terms of the exception laid out in section 125(3)(a), in respect of online material available from government websites. (Paragraph 69)*

14. Section 125 has been in force for over 16 years and has operated, either directly or through similar provisions (e.g. via the Scottish Independence Referendum Act 2014), for a number of high-profile referendums. In light of this experience and the issues, detailed earlier in this report, that arose regarding section 125 during the EU referendum, there is now an opportune moment to explore the effectiveness of section 125. (Paragraph 74)
15. *PACAC recommends that the Government undertake a wider review into section 125. Such a review should take into account PACAC’s recommendations that the length of the controlled period be extended, and for the provision to be redrafted so as to provide greater clarity on the question of what constitutes publishing. PACAC agrees with the Electoral Commission that this review should also aim to provide a tighter definition of the kinds of activities that should be restricted during the controlled, and referendum, periods. It should also explore the sanctions that should apply for the purposes of upholding section 125 and the investigatory powers that the Electoral Commission should enjoy to police the application of section 125. (Paragraph 75)*
16. PACAC is concerned that campaigns are struggling to operate within the existing system of working together rules. These rules should provide clarity for campaigners, so that they can cooperate with one another in a way that is clearly consistent with the letter and spirit of the campaign spending rules. Instead, we heard evidence that the current lack of certainty regarding the working together rules has resulted in an “unnecessary freezing” of activity among campaign participants who wish to avoid any risk of breaching the rules. PACAC, therefore, welcomes the suggestion, from the Electoral Commission, that it will return to this issue after it has settled the full spending returns from the referendum campaigns. (Paragraph 81)

## Chapter 4: The Electoral Commission and administration of the referendum

### Administrative issues that arose during the referendum

17. The Register to Vote website crashed on the evening of Tuesday 7 June. The Government has stated that this was due to an exceptional surge in demand. It is clear that the level of public interest in the referendum, allied to the sheer numbers of duplicate applications and confusion as to whether individuals needed to re-register to vote for the referendum, created a much higher demand for the Register to Vote website. Duplicate applications pose an unnecessary administrative burden on electoral registration officers and are an equally unnecessary drain on the time of electors themselves. *PACAC therefore endorses the Electoral Commission’s recommendation that the Government should develop an online service to enable people to check whether they are already correctly registered to vote. While PACAC is aware of the technical issues that would need to be overcome to deliver such a*

*service, it would be of invaluable assistance in preventing the Register to Vote website from collapsing due to high levels of demand again ahead of future elections and referendums. (Paragraph 92)*

18. The Government has consistently argued that the Register to Vote website's collapse was the product of a significant, last minute spike in applications to register to vote, magnified by the large number of duplicate applications. However, the Government clearly failed to undertake the necessary level of testing and precautions required to mitigate against any such surge in applications. It is worrying that when testing identified issues in system performance, mistaken assumptions meant that these issues were not investigated further and corrected. (Paragraph 96)
19. The Register to Vote website is a key component of the transition to Individual Electoral Registration. The nature of the electoral cycle is that public interest and engagement grows in close proximity to election and referendum polling days. It is, therefore, of the utmost importance that the website can withstand spikes in the number of applications, not least as such spikes are likely to emerge near, if not on, the registration deadline. *PACAC supports the recommendations of the Equal Experts report, in particular in ensuring more frequent performance tests of the website are conducted, including those that test it destruction. (Paragraph 97)*
20. It is disappointing that the local electoral administrators who play a key role in delivering the referendum on the ground, including the implementation of the extended registration deadline, had to rely on news sources for updates on the Government's decision to introduce emergency legislation. PACAC therefore welcomes the Electoral Commission's recognition of the need for a more effective communication strategy between themselves, the Government and electoral administrators. PACAC recommends that the Government and Electoral Commission develop new guidelines, in consultation with bodies such as the Association of Electoral Administrators, on the level and quality of information provided to electoral registration officers and other administrators both prior to, and during, referendum campaigns. (Paragraph 101)
21. PACAC does not rule out the possibility that the crash may have been caused by a DDOS (distributed denial of service attack) using botnets. Lessons in respect of the protection and resilience against possible foreign interference in IT systems that are critical for the functioning of the democratic process must extend beyond the technical. The US and UK understanding of 'cyber' is predominantly technical and computer-network based. For example, Russia and China use a cognitive approach based on understanding of mass psychology and of how to exploit individuals. The implications of this different understanding of cyber-attack, as purely technical or as reaching beyond the digital to influence public opinion, for the interference in elections and referendums are clear. PACAC is deeply concerned about these allegations about foreign interference. (Paragraph 103)
22. We commend the Government for promoting cyber security as a major issue for the UK. *We recommend that Cabinet Office, the Electoral Commission, local government, GCHQ and the new government Cyber Security Centre establish permanent machinery for monitoring cyber activity in respect of elections and referendums, for promoting cyber security and resilience from potential attacks, and to put plans and machinery*

*in place to respond to and to contain such attacks if they occur. We recommend that the Government presents regular annual reports to Parliament on these matters.* (Paragraph 104)

## Conclusion

23. On the whole, the referendum was well run and competently administered by the Electoral Commission. We pay tribute to the work of the Electoral Commission's staff and local electoral administrators across the United Kingdom in ensuring that the referendum could be delivered effectively, within a compounded time frame, even with the added pressures that arose as a result of the crash of the Register to Vote website. (Paragraph 132)
24. The Electoral Commission's dual role as a regulator and key delivery agent for referendums could pose potential difficulties. However, while we note suggestions that these roles should be divided between separate bodies, it is clear that the Electoral Commission is the only body, at present, which is capable of discharging both roles. (Paragraph 133)
25. The Electoral Commission's dual role has resulted in the Chair of the Commission acting as Chief Counting Officer during referendums. Our inquiry explored whether it would be more appropriate for these roles to be separated out. However, we are again persuaded that the Chair of the Commission was the only person with the capacity, resource and expertise to co-ordinate the delivery of the referendum. (Paragraph 134)
26. The process of designating the two official campaigns could be improved to provide greater clarity and transparency by the Electoral Commission. In particular, it was unfair that designation was so late, so that the Leave side could not plan ahead and commit to spending while competing for designation, but the uncontested Remain side was not disadvantaged in this way. *We recommend that the Electoral Commission undertake a review of the designation process to examine where greater transparency could be achieved. This review should include consultation with campaigners from each of the campaigns that sought designation during the EU referendum. It should address whether earlier designation would have been fairer, and whether there should be a more explicit fit and proper person test for those applying for designation.* (Paragraph 135)

## Chapter 5: The machinery of Government during the referendum

### Guidance and the Civil Service Code

27. During the run-up to the EU referendum, there were many occasions when it appeared to many that civil servants were being drawn into referendum controversy. This damaged the reputations of the Civil and Diplomatic Services for impartiality. It is a matter of some regret to this Committee that the Government did not accept the recommendation of our predecessor Committee, PASC, in relation to the provision of a new paragraph in the Civil Service Code, which would have served to clarify the role and conduct of civil servants during a referendum campaign. This

proportionate and sensible step, would have served to promote clarity and a clear understanding of the role for civil servants at the very outset of the EU Referendum campaign, thereby avoiding some of the controversies which arose during that campaign. (Paragraph 141)

### The suspension of collective responsibility and the guidance given to Civil Servants

28. Relaxing Cabinet collective responsibility on the question of the UK's EU membership was a sensible decision. However, the Cabinet Secretary's guidance to Civil Servants on their conduct during the referendum, was ambiguous and caused unnecessary uncertainty as to the support civil servants could provide to Ministers supporting a Leave vote. *We recommend that, in the event of a future referendum where Cabinet collective responsibility is relaxed, any guidance should be more precise as to the support that civil servants should not provide to dissenting Ministers, including a list of official departmental papers that would not be made available to those Ministers. All Ministers should continue to receive factual information in relation to the work and remit of their departments.* (Paragraph 155)

### The publication of referendum-related government documents

29. The Government was legally obliged to publish reports on aspects of the UK's membership of the EU. However, the presentation of these reports, particularly those from the Treasury, and the decision to spend £9.3m on sending a leaflet, advocating a Remain vote, to all UK households, were inappropriate and counterproductive for the Government. These incidents strengthen the case for the purdah provisions of section 125 to be extended to the full length of a referendum campaign. (Paragraph 161)

### The Government's policy on Civil Service contingency planning

30. While the Government did not support a Leave vote, they nonetheless had a constitutional and public obligation to prepare for both outcomes from the referendum. In 1975, Whitehall undertook contingency planning for a possible vote in favour of withdrawal from the European Communities and there was no adequate reason for a refusal to prepare for either eventuality in 2016. Though we were relieved to learn that work was undertaken within the Civil Service on the potential implications of a Leave vote, Civil Servants should never have been asked to operate in a climate where contingency planning was formally proscribed by the Government. Such preparation would negate the need for the Prime Minister to resign. The UK Government failed to learn the lessons from the Scottish referendum in this respect. (Paragraph 172)
31. *We recommend that in the event of future referendums civil servants should be tasked with preparing for both possible outcomes. While we recognise the important distinctions between General Elections and referendums, these preparations should include pre-referendum contact between the two designated campaigns and the Civil Service, along the lines of pre-General Election contact between opposition parties*

*and the Civil Service. It should be reasonable to presume that the sitting Prime Minister and his/her administration will continue in office and take responsibility for the referendum result in either eventuality. (Paragraph 173)*

### Conclusion: the machinery of government and the EU referendum

32. While it is perfectly legitimate for the Prime Minister and government to take an official position during a referendum campaign, the fairness, and legitimacy, of a referendum rests on a careful and restrained use of the machinery of government. Unfortunately, many of the Government's actions in the run-up to the referendum appear to have increased public distrust. As Sir Jeremy Heywood has acknowledged, the use of the machinery of government during the referendum contributed to a perception that the civil service were, in some way, biased. That any such perception exists is deeply regrettable and was entirely avoidable. *We recommend that the Government heed the lessons from this referendum of the implications of the use of the machinery of government during referendums on public trust and confidence in the institutions of government. (Paragraph 178)*



## Annex 1: Publication of material on website and section 125 Political Parties, Elections and Referendums Act 2000: third note

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The Clerk of the Public Administration and Constitutional Affairs Committee 17 May 2016

This note further supplements the note I sent on 3 May, and supplements my note of 9 May 2016. It takes account of views expressed by the Electoral Commission in its letter of 11 May commenting on the letter of 6 May from Sir Jeremy Heywood.

The Electoral Commission takes the view (which I respectfully share) that allowing continued access to a website that was published before the 28 day period, whether or not any new content is subsequently added, is likely to amount to ‘publishing’ within the meaning of section 125(4) of the Political Parties, Elections and Referendums Act 2000. The Commission takes the view that making relevant material available in this way would be likely to be prohibited under section 125(2) unless an exception under section 125(3) applies.

I agree, if I may say so, that the exception under section 125(3)(a) is the most likely to be generally relevant. There are, of course, exceptions under section 125(3)(c) and (d) which would allow the Government to publish information relating to the holding of the poll, and to issue press notices. Section 125(3)(a) provides, in effect, that the prohibition in section 125(2) does not apply to “material made available to persons in response to specific requests for information or to persons specifically seeking access to it”.

The Electoral Commission takes the view that, in respect of material searchable on the internet, the exception in section 125(3)(a) “would cover content that was originally published prior to the 28 day period, which remained available to anyone specifically seeking access to that content within the 28 days”. The Commission goes on to say that “provided the website is designed in such a way that members of the public need to take active steps to seek access to the content” the exception under section 125(3)(a) would apply, and accordingly there would be no breach of the prohibition in section 125(2).

The Commission is, of course, right to say that the exception would cover the case of material made available to persons ‘specifically seeking access to it’. The issue is, therefore, what is meant by ‘specifically seeking access’. The Commission suggests that if the website is so designed that members of the public ‘need to take active steps to seek access to the content’ then the exception will apply.

With the greatest respect, I do not think that takes one much further, since the question remains as to what is meant by taking ‘active steps to seek access’. Simply clicking on a website does not strike me as ‘specifically seeking access’, whereas gaining access to information hidden behind a password by a person who knows what to look for and clicks on a particular icon might well be. It seems to me that ‘specifically’ has to be given some weight, and that to provide the information to a person who has responded to a generic signpost on the website (as would occur with general browsing) is not covered by the

exception. Even less would this be true of being directed to the material by a search engine. If the exception were to cover such visits to a website, then the exception would deprive section 125(2) of any effect, since the material would remain published on the website and readily available to all. There would, in substance, be no difference between the period before the statutory ‘purdah’ and thereafter.

It seems to me that the exception under section 125(3) was designed for the provision of specific information in response to the reasonably determined researcher looking for information which he knows is there. The exception was not designed to cover the provision of general information the way to which is flagged up on a website and the existence of which is not necessarily known by the person seeking access. Given the existence of the exceptions in section 125(3)(c) and (d) (relating to information about the poll and press releases), there is no need to give any wider interpretation to section 125(3)(a) than is justified by the natural and ordinary meaning of ‘specifically’. Moreover, the exceptions ought to be read in a restrictive way, to avoid undermining the basic prohibition in section 125(2). I feel bound to say that the risk that such undermining may occur is the inference to be drawn from Sir Jeremy Heywood’s letter.

I do not disagree with the Electoral Commission’s analysis, but I do not think the Government’s proposals satisfy the ‘active steps’ proviso the Electoral Commission has itself suggested. Neither do they fall, in my view, within the ‘specifically seeking access’ exception in section 125(3)(a) of the 2000 Act.

Michael Carpenter, Speaker’s Counsel

## Annex 2: Publication of material on website and section 125 Political Parties, Elections and Referendums Act 2000: second note

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The Clerk of the Public Administration and Constitutional Affairs Committee, 9 May 2016

This note supplements the note I sent on 3 May and takes account, in particular, of the letter of 6 May from Sir Jeremy Heywood. In that letter Sir Jeremy Heywood explains that the Government will not be placing any new material of a kind falling within section 125 PPERA on the [eureferendum.gov.uk](http://eureferendum.gov.uk) website and states that he does not consider that section 125 ‘imposes a legal obligation to remove previously published material from the web’. Sir Jeremy Heywood adds that the Government’s ‘clear view’ is that, for the purposes of PPERA, material is to be regarded as ‘published’ on a website ‘when it is made available for the first time’.

With the greatest respect to Sir Jeremy Heywood, I do not find this explanation at all convincing. First, ‘publish’ is defined in section 125(4)(a) as ‘to make available to the public at large, or any section of the public, in whatever form and by whatever means.’ There is no limitation in the statute confining the ‘making available’ to the first time the material is made available, or confining it to ‘new’ material. The view attributed to the Government amounts to a gloss on the statute which is not supported by its plain and ordinary meaning.

Secondly, the definition of ‘publish’ in section 125(4) is consistent with the meaning of ‘publish’ in other contexts, such as copyright, data protection and defamation. In section 175(1) of the Copyright, Designs and Patents Act 1988 ‘publication’ is defined as ‘the issue of copies to the public’. In section 32(6) Data Protection Act 1998 ‘publish’ is defined as ‘to make available to the public or any section of the public.’ For the purposes of abolishing the ‘single publication rule’, section 8(3) of the Defamation Act 2013 now provides that for the purposes of the time limit for actions for defamation (but for no other purpose) any cause of action against a person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication. The references to ‘first’ and ‘subsequent’ publication are necessary precisely because publication of a defamatory statement continues and does not cease at the moment of first publication. Whenever it is intended to fix publication at a particular time, some extra words such as ‘first publication’ are necessary, as is the case with copyright where the time or place of first publication may be relevant to questions of copyright duration or international protection respectively. In the European Union (Referendum) Act 2015 ‘publish’ is not specifically defined, but no issue arises as to whether publication is continuous, provided there is (first) publication before the beginning of the final 10 week period.

Thirdly, Sir Jeremy Heywood’s letter does not seem to take account of what happens when material is published electronically. When material is made available through a website, it is made available by means of an executable code embedded in the designer’s computer which is then interpreted on the viewer’s computer. Publication occurs whenever a viewer’s

computer is provided with a copy of the code from the server computer and the viewer's browser programme converts this into a visual representation. Where material is made available on a server for the public to access over the internet it is published by means of an electronic retrieval system and this is taken to be publication for the purposes of section 175(1) of the 1988 Act (cf. Gringras-The Laws of the Internet 4th ed. para.4.92). It continues to be made available, and therefore 'published' for so long as the code allows the material to be retrieved.

Sir Jeremy Heywood's letter dismisses the case of *Byrne v. Dean* [1937] 1 KB 818 (described as 'long predating the internet') as not helpful in interpreting PPERA. However, that case is still referred to as good law (one recent reference being *Payam Tamiz v Google Inc* [2013] EWCA Civ 68) in relation to defamatory comments being published on a website blog where there was no doubt but that comments which remained on the blog continued to be published. A case which does not predate the internet is *Godfrey v Demon Internet* [2000] 3 WLR 1020 in which Morland J said: "In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their I.S.P. who accesses the newsgroup containing that posting. Thus every time one of the defendants' customers accesses soc.culture.thai and sees that posting defamatory of the plaintiff there is a publication to that customer." (Emphasis added).

Fourthly, if it were right that material is to be regarded as 'published' on a website 'when it is made available for the first time', then all the Government need do is to put up a huge amount of material on billboards the day before the 28 day period and claim that, the material having already been published, it is no longer caught by the section 125 prohibition. By parity of reasoning the Government would be entitled to circulate or deliver that same material—say a leaflet—after 27 May simply because that leaflet had first been "published" a week before. The examples are sufficient to demonstrate that the interpretation advanced in Sir Jeremy Heywood's letter would completely subvert the purpose of section 125 and it seems most unlikely that it would be accepted by a court.

It therefore remains clear in my view that an electronic communication of the contents of the website amounts to publication for the purposes of section 125, and that unless the material is removed from the website (or, more precisely, the code is changed so that it is no longer accessible by a viewer's computer) it continues to be 'published' for the purposes of section 125.

Michael Carpenter, Speaker's Counsel

## Annex 3: Publication of material on website and section 125 Political Parties, Elections and Referendums Act 2000

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The Clerk of the Public Administration and Constitutional Affairs Committee, 3 May 2016

I have been asked for advice on whether it is lawful (in the sense of complying with section 125(4) Political Parties, Elections and Referendums Act 2000) for material to be kept on the Government website during the purdah period.

The material in question falls within section 125(1) of the 2000 Act, that is to say, it is material which provides general information about a referendum, deals with any issue in the referendum, puts any arguments for or against any particular answer to the referendum question or is designed to encourage voting at such a referendum.

Section 125(2) provides that no such material shall be published during the ‘purdah’ period (as defined in section 125(4)(b)) by any Minister of the Crown, government department etc. To ‘publish’ is defined (in section 125(4)(a)) as to ‘make available to the public at large, or any section of the public, in whatever form and by whatever means’.

I understand that the Cabinet Office is taking the view that section 125 permits material to remain accessible on the website, provided that no new material is added during the purdah period. The Written Answer suggests that it will be in order to continue to make ‘factual information’ available.

In my view, this is based on an incorrect reading of the term ‘publish’ in section 125 and of the restriction in section 125(2). To keep material on the website so that it remains accessible during the purdah period amounts to a breach of the duty under section 125(2) and is unlawful. ‘Factual information’ is not an exempted category under section 125(3).

The matter turns on the definition of ‘publish’. The formula used in section 125(4) refers to making the material available to the public. This may be compared with section 175(1) Copyright, Designs and Patents Act 1988 where ‘publication’ is defined as ‘the issue of copies to the public’. It has long been established, for the purposes of copyright, that a work is published whenever and wherever it is offered to the public (*McFarlane v. Hulton* [1899] 1 Ch. 884). The printed work therefore continues to be ‘published’ for as long as it remains available.

The same rule applies in the law of defamation. In *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805 each new ‘hit’ on a web page was held to constitute a fresh publication and accordingly a new cause of action arose. This ‘single publication rule’ has been criticised and s.8(3) of the Defamation Act 2013 now provides that for the purposes of the time limit for actions for defamation any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication. The change only affects the law of limitation, and in all other respects (such as aggravation of damages) publication is continuous until such time as the material is withdrawn or destroyed.

The reference to making the material available to the public in section 125 of the 2000 Act is plainly designed to include electronic communication of the work, not involving the supply of hard copies. When material is made available through a website, it is made available by means of an executable code embedded in the designer's computer which is then interpreted on the viewer's computer. Publication occurs when a viewer's computer is provided with a copy of the code from the server computer and the viewer's browser programme converts this into a visual representation. Where material is made available on a server for the public to access over the internet it is published by means of an electronic retrieval system and this is taken to be publication for the purposes of section 175(1) of the 1988 Act (see Gringras-The Laws of the Internet 4th ed. para.4.92).

It is therefore abundantly clear that an electronic communication of the contents of the website amounts to publication for the purposes of section 125. Unless the material is removed from the website (or, more precisely, the code is changed so that it is no longer accessible by a viewer's computer) it continues to be 'published' for the purposes of section 125.

Michael Carpenter, Speaker's Counsel

## Annex 4: Issues raised by the Cabinet Secretary's guidance of 23 February

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The Clerk to the Public Administration and Constitutional Affairs Committee, 29 February 2016

1. In his letter of 23 February 2016 the Secretary to the Cabinet and Head of the Civil Service has issued guidance to civil servants and special advisers about their conduct during the EU referendum. This follows a letter of 11 January from the Prime Minister to his Ministerial colleagues on the matter.

2. In issuing the guidance, the Cabinet Secretary acts on behalf of the Prime Minister. The Prime Minister, as Minister for the Civil Service, is entitled to give instructions as to the conduct and running of the civil service. In so doing, the Prime Minister is not exercising any prerogative power exclusive to the Crown, but is in effect exercising a common law power of an employer to give directions as to how work should be done by employees (in this case Crown servants). Although it is the duty of the civil servant to give impartial advice to Ministers, the civil servant is not neutral on a question which the Government has decided. In such a case, it is the duty of the civil servant to assist, and not obstruct, the Government's policy (so far, of course, as this remains lawful).

3. In this context, the guidance letter of 23 February largely sets out the orthodox position: as the Government has reached a view on whether the UK should remain a member of the European Union, the Prime Minister (as the Minister for the Civil Service) is entitled to remind civil servants of their duty under the Civil Service Code (provided for under s.5 Constitutional Reform and Governance Act 2010) to support the duly-elected government of the day.

4. As the letter explains, a 'wholly exceptional arrangement' has been made by which individual Ministers are permitted to take a different personal position on the issue of the EU Referendum (whilst remaining Members of the Government). The arrangement is to apply only to the question of whether the UK should remain within the EU or leave, and the letter (at least) makes clear that all other EU or EU-related business, including negotiations in or with EU institutions or the Member States, and debates and votes in Parliament on EU business 'will continue to be subject to the normal rules of collective responsibility,'<sup>248</sup> and that this is also to apply 'to policy discussions within Government'. Indeed, the letter emphasises that 'the existing machinery of government for making policy on EU business will continue to function in the normal way'.

### Access to papers and information

5. From this it might reasonably be assumed that a Minister who takes a different position from that of the Government on the question to be submitted to a referendum will continue to receive papers and briefing from the Civil Service on all questions relating to the normal run of EU or EU related business. This would be an aspect of the normal functioning of the machinery of government for making policy on EU business.

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<sup>248</sup> The letter also refers to 'party discipline', which (I would have thought) was not the concern of the Head of the Civil Service in writing to his colleagues.

6. That something different is intended is apparent from the succeeding two paragraphs of the letter. The first of these deals with access to official papers:

“As set out in the Prime Minister’s letter it will not be appropriate or permissible for the Civil Service to support Ministers who oppose the Government’s position by providing briefing or speech material on this matter. This includes access to official departmental papers, excepting papers that Ministers have previously seen on issues relating to the referendum question prior to suspension of collective agreement. These rules will also apply to their special advisers.”

7. The second paragraph deals with handling requests from dissenting Ministers for facts to be checked, as follows:

“In line with usual practice, Departments may check facts for such Ministers on request. And civil servants should continue to support such Ministers in undertaking all official government business in the usual way.”

8. Quite how differently dissenting Ministers are to be treated is not clear, since the drafting is at best ambiguous. In particular, it is not clear what is meant by the reference to ‘this matter’. Since the ‘wholly exceptional arrangement’ applies only to the referendum question (all other EU business being dealt with normally) one might again reasonably assume that ‘this matter’ is confined to the referendum question. On the other hand, there appears to be a general prohibition on access to official departmental papers, ‘excepting papers that Ministers have previously seen on issues relating to the referendum question prior to the suspension of collective agreement’. The necessary implication of this is that subsequent papers which ‘relate’ to the referendum question are to be withheld. The letter does not give any assistance on how to deal with papers which ‘relate’ to the referendum question, but which nevertheless concern normal EU or EU related business and where, it is said, the existing machinery of government for making policy on EU business is to continue to function in the normal way.

9. The Q & A briefing attached to the Cabinet Secretary’s letter does not define what is meant by papers which ‘relate’ to the referendum but appears to suggest an even more restrictive approach to the supply of information and papers to dissenting Ministers. In reply to the questions “can dissenting Ministers see departmental papers/information relating to the EU referendum?” and “what kind of factual advice can they have?” it is said in reply that such Ministers (and their special advisers) may see papers they have already seen prior to the suspension of collective responsibility, and may ask officials “to verify the factual accuracy of speeches etc.” but may not ask them “to provide new arguments or suggest new facts”. As with the Cabinet Secretary’s letter, the necessary implication is that dissenting Ministers may not be shown papers ‘relating’ to the EU referendum. It is not clear from the Q&A briefing how a civil servant is to verify the factual accuracy of a speech if some ‘new facts’ have rendered the speech inaccurate.

10. In reply to the question “can dissenting Ministers see departmental papers on matters that aren’t directly about the Referendum, but may have a bearing?” it is said that such Ministers “can see or commission any papers produced by their departments in the normal way except those that have a bearing on the referendum question or are intended to be used in support of their position on the referendum.” From this, it appears



that dissenting Ministers may not see papers which ‘have a bearing’ on the referendum question. In the context it appears that ‘have a bearing’ may cover a wider class than papers ‘relating to’. At the very least the matter is ambiguous: no doubt the guidance is not to be interpreted as if it were statute, but the question arises of why the words ‘have a bearing on’ have been introduced in place of ‘relating to’ if no difference were intended. Secondly, it is not clear how the civil servant is to establish whether papers are ‘intended’ to be used in support of the dissenting Minister’s position. As a matter of drafting (although it is possible this was not intended) a paper which is intended to be so used need not be one which has a ‘bearing’ on the referendum question, so the restriction could conceivably apply to any paper dealing with an EU matter.<sup>249</sup>

11. It may fairly be concluded that the letter, taken with the Q&A briefing, has the effect that a dissenting Minister will not continue to receive papers and briefing from the Civil Service on all questions relating to the normal run of EU or EU related business. The normal functioning of the machinery of government for making policy on EU business is to be qualified by denying access by dissenting Ministers to Departmental papers except;

- those which do not relate to the referendum question,
- those which such Ministers have already seen prior to the suspension of collective agreement,
- those which have no ‘bearing’ on the referendum question,
- those which the Minister does not intend to use in support of his dissenting position.

12. As far as concerns the Civil Service, it may verify the factual accuracy of speeches etc. However, the civil service may not provide new arguments or suggest new facts (seemingly, even where the ‘new facts’ point up factual inaccuracies in such speeches).

### **The obligation of civil servants to follow the instructions of the Cabinet Secretary**

13. The instructions must be assumed by the Civil Service to have been given by and with the authority of the Prime Minister as Minister for the Civil Service. For so long as those instructions are lawful and reasonable, a civil servant is bound to comply with them as would any employee be bound to follow the lawful and reasonable instructions of his employer. It is quite possible, nonetheless, that the observance of the instructions could bring the civil servant into conflict with the Minister responsible for his Department. No doubt, arrangements will be made within Departments to address such conflicts, but in an extreme case the civil servant would be entitled to raise his or her concerns with the Civil Service Commission if it is thought that compliance with the instructions would breach the principles of the Civil Service Code and the civil servant does not consider he has received a reasonable response to his concerns when they have been raised within the Department.

14. Whilst the duty of the civil servant is to serve the duly elected government of the day (rather than a particular Minister) it is possible to conceive of situations where the duties of honesty and objectivity under the Code could conflict with the instructions.

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<sup>249</sup> It is also not clear whether the intention here is to exclude access to papers the Minister has already seen prior to the suspension of collective responsibility.

The duty of honesty requires the civil servant to “set out the facts and relevant issues truthfully, and correct any errors as soon as possible”. In addition, the civil servant “must not ignore inconvenient facts or relevant considerations when providing advice or making decisions”. The duty of objectivity requires the civil servant to “provide information and advice, including advice to ministers, on the basis of the evidence, and accurately present the options and facts”. It is obvious that if certain facts are deliberately withheld, then the duties of honesty and objectivity would be put in issue.

15. It might be said against this that the duties under the Code must prevail in any case where the Minister is called on to take a decision as part of the normal Departmental business. One would wish for more confidence in such a case that the relevant papers and facts would neither ‘relate’ to the referendum question, nor have a ‘bearing’ on it, but would only relate to the decision in hand and therefore be outside the scope of the prohibition. In the absence of any examples in the Cabinet Secretary’s letter or the Q&A briefing, it is difficult to see how this will be worked out in practice.

### **Accountability and legal responsibility of Ministers**

16. It is commonplace that a Minister will be both accountable to Parliament, and amenable to judicial review and other forms of legal challenge, in respect of decisions he may not have taken personally, but which have been taken by civil servants within his Department. The well-known ‘Carltona’ doctrine (from the leading case of *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560) recognises that decisions may be taken by civil servants as the alter ego of the Minister, but this is because the Minister remains accountable to Parliament for such a decision.

17. In the event of proceedings in Parliament, the responsible Minister will need to be informed by his civil servants of all the facts on which a decision has been taken in his behalf. In my view, a civil servant cannot properly be instructed to deny such information to the responsible Minister where it is needed for the purposes of assisting that Minister to discharge his responsibilities to the House.

18. As far as legal responsibility is concerned, it is normally not necessary for the Minister to bring his own mind to bear upon a matter entrusted to him, but may act through a duly authorised officer. If the person taking the decision on behalf of the Minister is in possession of the relevant facts, that would be a sufficient answer to a challenge based on grounds of *Wednesbury* unreasonableness (in this case, that the Minister failed to take into account a relevant fact).

19. There is an exception to this general principle where the Minister is required by statute to act personally. In such a case, the relevant Minister’s decision is vulnerable to judicial review if it has been taken in the Minister’s personal ignorance of a relevant fact. One would hope that the instructions recently issued would not be interpreted as preventing full disclosure to the Minister of all the relevant facts in such a case, not least because they would not ‘relate’ to the referendum question, but to the matter in hand. Moreover, the civil servant has a duty under the Code to comply with the law and uphold the administration of justice. An instruction not to do so would be unlawful.

Michael Carpenter, Speaker’s Counsel

## Annex 5: Letter from Chair of PACAC to the Governor of the Bank of England Mark Carney OC, dated 13 June 2016

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Application of Section 125 of the Political Parties and Referendum Act 2000 (PPERA)

Dear Governor,

I should declare, as well as being Chair of the Public Administration and Constitutional Affairs Select Committee, I am a Director of Vote Leave, the organisation officially designated by the Electoral Commission to campaign for a 'leave' vote.

I hope you will forgive my writing in response to concerns raised with me. You have already made your views known about the question in the forthcoming referendum. The concern is that you, as Governor of the Bank of England, or others who serve the Bank, may have occasion to make further public comment on matters arising from the question on the ballot paper for the referendum to be held on 23rd June.

I have no doubt that you will have been made familiar with the provisions of PPERA, which place restrictions on what any "person or body whose expenses are defrayed wholly or mainly out of public funds" may publish during the 28 days prior to a referendum (known as 'purdah'). I attach a full text of section 125 of the Act. As such, I am sure you are aware that you are prohibited from making any public comment, or doing anything, which could be construed as taking part in the referendum debate, in the same way as civil servants, government departments and other public bodies are restricted.

I have taken legal advice from Speakers' Counsel on behalf of my committee on this matter. While there is specific exemption for the BBC, for example, there appears to be no exemption in law for the Bank of England or anyone publishing material on behalf of the Bank of England in respect of section 125.

I wanted to take the opportunity to stress the importance of this matter. Parliament was invited by the government last year to consider weakening the application of 'purdah', during consideration of the EU Referendum Bill. The House of Commons voted down the government's proposed amendment, thereby establishing the importance which Parliament attaches to the observance of 'purdah'.

I very much hope that you will avoid doing anything which could suggest you or the Bank have disregarded Parliament's wishes. By defeating the government in a vote in the Commons, the importance of this matter could not have been made any clearer.

Bernard Jenkin MP, Chair, PACAC

## Annex 6: Letter from the Governor of the Bank of England Mark Carney OC to Chair of PACAC, dated 14 June 2016

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I am responding to your letter to dispel immediately the numerous and substantial misconceptions it contained.

First, I have not “already made [my] views known about the question in the forthcoming referendum”. Nor do I intend to share my private opinion other than via the anonymity of ballot box when I join millions of others to cast my vote. All of the public comments that I and other Bank officials, have made regarding issues related to the Referendum have been limited to factors that affect the Bank’s statutory responsibilities and have been entirely consistent with our remits.

I have made this point explicitly on a number of occasions. For example, at the outset of a speech I gave last October, alongside a report we published on EU membership and the Bank of England, said “Our report is solely concerned with how EU membership affects the Bank’s ability to achieve our core objectives of maintaining monetary and financial stability. It is not a comprehensive assessment of the pros and cons of the United Kingdom ‘being in Europe’<sup>250</sup>.

In my evidence to the House of Commons Treasury Committee session on the economic and financial costs and benefits of UK membership of the EU, I was clear that “economic questions are important questions in terms of the broader decision the people of the United Kingdom have to make, but they are not the totality of the considerations upon which people will reflect and make their decision on how to vote. We will not be making and nothing we say should be interpreted as making any recommendation with respect to that decision.”<sup>251</sup>

Second, your letter demonstrates a fundamental misunderstanding of central bank independence as enshrined in statute. The Bank has been given, by Parliament, operational independence to pursue monetary and financial stability, within clearly defined frameworks. The Bank must assess the implications of the UK’s EU membership for our ability to achieve our core objectives. The Bank has a duty to report our evidence-based judgments to Parliament and the public. Indeed that responsibility to provide a high level of transparency is enshrined in our remits.

For example, the Remit for the Monetary Policy Committee sets out that “the Committee should promote understanding of the trade-offs inherent in setting monetary policy”. Moreover, it requires when inflation deviates from the 2 % inflation target by more than 1 percentage point as was the case in May, that the Governor must write an open letter to the Chancellor that sets out, amongst other

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250 See Carney, M (2015), Cairncross Lecture, October 2015, available here <http://vwww.bankofengland.co.uk/publications/Documents/speeches/2015/speech852.pdf> and Bank of England (2015), EU Membership and the Bank of England, October 2015, available here <http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf>.

251 Oral evidence: The economic and financial costs and benefits of UK membership of the EU, Tuesday 8 March 2016, available here: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasurv-committee/the-economic-and-financial-costs-and-benefits-of-uks-eu-membership/oral/30246.html>

things, a description of “the trade-off that has been made with regard to inflation and output variability in determining the scale and duration of any expected deviation of inflation from the target rate” and “how this approach meets the Government’s monetary policy objectives”. Given that in the view of all nine independent members of the MPC the “most significant risks to the MPC’s forecast concern the referendum” and the implications of a vote to leave the EU “could lead to a materially lower path for growth and a notably higher path for inflation” and therefore the Committee “would face a trade-off between stabilising inflation on the one hand and output and employment on the other” it would have been clearly contrary to our remit not to comment on this in our publications.<sup>252</sup>

Similarly, the FPC was quite clearly meeting its statutory remit when it reported that in agreeing its view on the outlook for financial stability and, on the basis of that, its intended policy actions, it “assessed the risks around the referendum to be the most significant near-term domestic risks to financial stability”.<sup>253</sup>

As testified to the House of Lords Economic Affairs Committee in April 2016 “This is the fundamental standard of an open and transparent central bank. Assessing and reporting major risks does not mean becoming involved in politics; rather, it would be political to suppress important judgments that relate directly to the Bank’s remits and which influence our policy actions.”<sup>254</sup>

As also explained in my testimony to the House of Commons’ Treasury Committee in May if “we are changing policy, as the Bank of England have changed our liquidity policy, we have changed our supervisory policy, and we might have to change our monetary policy in pursuit of our have an obligation to disclose that”.<sup>255</sup>

The Chair of the Treasury Committee, through which the Bank of England is accountable to Parliament, has acknowledged the appropriateness of the MPC setting out the impact of this issue on our statutory responsibilities when he said, again recently and publicly, “a vow of from the Bank of England on this subject would have resulted in a bumpy hearing or two for you and your colleagues in front of this Committee in the face of a decision or an event of this type.”<sup>256</sup>

Third, your letter refers to section 125 of the Political Parties, Elections and Referendums Act 2000 (PPERA). The Bank is familiar with PPERA and has confirmed its understanding of those provisions with the Electoral Commission. The Bank is not “a person or body whose expenses are defrayed wholly or mainly out of public funds” and, as such, is not subject to the restrictions in section 125.<sup>257</sup>

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252 Monetary Policy Summary and minutes of the Monetary Policy Committee meeting ending on 11 May 2016 available here: <http://www.bankofengland.co.uk/publications/minutes/Documents/mpc/pdf/2016/mav.pdf>

253 Record of the FPC’s March 2016 meeting is available here: <http://www.bankofengland.co.uk/publications/Documents/records/fpc/pdf/2016/record1604.pdf>.

254 Available here: <http://www.bankofengland.co.uk/publications/Documents/other/treasuryccommittee/other/eac190416.pdf>

255 Oral evidence on the Bank of England inflation report, Tuesday 24 May 2016, available here: <http://www.parliament.uk/business/committees/committee-england-inflation-report-hearings-2015-16/>

256 See footnote 6 for reference.

257 Further details of our funding arrangements can be found in our Annual Report, available [here: http://www.bankofengland.co.uk/publications/Documents/annualreport/2015/boereport.pdf](http://www.bankofengland.co.uk/publications/Documents/annualreport/2015/boereport.pdf).

Nonetheless, the Bank has voluntarily determined to observe purdah in the spirit of the guidelines issued by the Cabinet Office on 26 May 2016. Of course, the Bank must continue to pursue its statutory objectives throughout the purdah period and will therefore continue to publish ‘business as communications pursuant to its statutory remit.

The Bank’s full arrangements for purdah were shared with the Chairman of the Treasury Select Committee on 25 May as noted to Andrew Tyrie MP, these arrangements were discussed by the Bank’s Court of Directors and circulated to all Bank staff, including MPC, FPC and PRA members. They are in addition to our normal codes of conduct for our policy committees that are available on the Bank’s website.<sup>258</sup>

As highlighted in my most recent evidence to the Treasury Committee, the most obvious “business as usual” publication that the Bank will make this month is the minutes of the latest MPC meeting which will be published on 16 June. These minutes will provide a full record of the MPC’s deliberations and the factors the Committee considered relevant to its monetary policy decisions<sup>259</sup>. As noted in my evidence, these may therefore make reference to Referendum effects if the independent committee members judge them to be relevant to the pursuit of the MPC’s remit. Again this is entirely appropriate, especially if, in the view of the independent MPC, the data on which our monetary policy decision is based are being affected by the referendum.

Mr Jenkin, in conclusion, transparency is a hallmark of parliamentary accountability. My comments as Governor, and those of my independent colleagues, have been in the discharge of the Bank’s responsibilities. Those responsibilities stem from the sovereign will of Parliament which we must respect. The vast majority of these public statements have been made in the context of official publications relating to the Bank’s policies or minutes of its Committee meetings, or during parliamentary testimony. The Bank’s policies and the minutes of the proceedings of its committees are published to hold the independent members of those committees to account and to enhance the effectiveness of their policies - there is an extensive literature on how to structure central bank independence and accountability most effectively, which is summarised and drawn on in the recent Warsh Review<sup>260</sup> would note that have testified more than anyone else in front of Parliamentary Committees having given evidence on 22 occasions since became Governor in July 2013.

Given his consideration of this issue, and our accountability to Parliament via his Committee, I am copying our exchange to the Chair of the Treasury Committee. You should feel free to place these letters in the public domain.

In the future, I would be grateful if you would do me and my fellow independent committee members the courtesy of consulting the public record before writing letters such as that which I received on Monday.

Mark Carney

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258 MPC Code of Conduct is available here: <http://www.bankofengland.co.uk/monetarypolicy/Documents/mpccoc.pdf> FPC Code of Conduct is available here: <http://www.bankofengland.co.uk/financialstability/Documents/fpcoc.pdf>

259 Transcripts of these meetings, alongside all relevant documents and analysis, will be published in eight years.

260 See Warsh, K (2014), Transparency and the Bank of England’s Monetary Policy Committee, available here: <http://www.bankofengland.co.uk/publications/Documents/news/2014/warsh.pdf>

### **Comment from Michael Carpenter on s.125 and the Bank of England, 15 June 2016**

The Bank is a Government-owned corporation, but funds its operations from the sale of gilts and the receipt of regulatory fees.

To the man in the street, this seems to be very like the BBC (which is specifically excluded in s.125). The TV licence fee was reclassified in 2006 by the Office of National Statistics as a tax, and so for statistical purposes the BBC is classified as a central government body. The income of the BBC is largely derived from the TV licence fee which is paid by viewers (whether they intend to watch the BBC or not) and these monies seem to have been regarded as ‘public funds’ for the purposes of s.125 (otherwise there would have been no need for the exclusion).

The reference in s.125 is to ‘public funds’, rather than funds voted by Parliament, so it is a nice question whether the funds held by a Government owned body are also ‘public funds’. Technically, they are not funds paid by the taxpayer (or at least not exclusively) but they are, in a broader sense, funds which are publicly owned. It is very hard to predict, but if the matter were ever litigated a court might well take a more purposive approach in deciding that s.125 is concerned with the use of publicly-owned resources in a referendum campaign, and might not be too attracted by technical arguments as to the origin of those resources.

The meaning of s.125 is a question of law for the courts, not for the Electoral Commission (to be clear, no power is conferred by PPERA on the EC to make such a determination). I think one may infer from the Governor’s letter that the Bank was sufficiently uncertain of its position as to feel the need to obtain some comfort from the EC. They no doubt did so, because the EC would be the most likely person to seek to enforce s.125.

Michael Carpenter, Speaker’s Counsel Formal Minutes

# Formal Minutes

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**Tuesday 7 March 2016**

Members present:

Bernard Jenkin, in the Chair

Ronnie Cowan	Kelvin Hopkins
Mr Paul Flynn	John Stevenson
Marcus Fysh	Mr Andrew Turner
Mrs Cheryl Gillan	

Mr Bernard Jenkin declared an interest as a former Director, Vote Leave.

Draft Report (*Lessons to be learned from the EU Referendum*), proposed by the Chair, brought up and read.

Question put, That the draft Report be read a second time, paragraph by paragraph.

Committee divided.

**Ayes**

Ronnie Cowan  
Marcus Fysh  
Mrs Cheryl Gillan  
Kelvin Hopkins  
John Stevenson  
Mr Andrew Turner

**Noes**

Mr Paul Flynn

Question accordingly agreed to.

Paragraphs 1 to 178 read and agreed to.

Appendices agreed to.

Summary agreed to.

*Resolved*, That the Report be the Twelfth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134.

[Adjourned till Tuesday 14 March at 9.45am.]



## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 14 September 2016

*Question number*

**Sir Jeremy Heywood**, Cabinet Secretary and Head of the Civil Service

[Q1–66](#)

### Tuesday 1 November 2016

**Dr Alan Renwick**, Deputy Director, UCL Constitution Unit, and **Dr Simon Usherwood**, Senior Lecturer in Politics, University of Surrey, and Fellow, UK in a Changing Europe

[Q67–154](#)

**Will Straw**, Executive Director, Britain Stronger in Europe, and **Paul Comer**, Head of Compliance, Britain Stronger in Europe

[Q155–197](#)

**Matthew Elliott**, Chief Executive, Vote Leave, **William Norton**, Legal Director, Vote Leave, and **Antonia Flockton**, Finance Director, Vote Leave

[Q198–269](#)

### Wednesday 14 December 2016

**Jenny Watson**, Chair, Electoral Commission, **Claire Bassett**, Chief Executive, Electoral Commission, **Bob Posner**, Director of Party and Election Finance, Electoral Commission, and **Ailsa Irvine**, Head of Electoral Guidance, Electoral Commission

[Q260–374](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EUR numbers are generated by the evidence processing system and so may not be complete.

- 1 A 1 ([EUR0018](#))
- 2 A 2 ([EUR0024](#))
- 3 Alexander Minter ([EUR0115](#))
- 4 Alliance EPP: European People's Party UK ([EUR0056](#))
- 5 Alpha Mason ([EUR0078](#))
- 6 Andrew Robertson ([EUR0043](#))
- 7 Anthony Austen ([EUR0030](#))
- 8 Anton Neumann ([EUR0031](#))
- 9 Association of Electoral Administrators ([EUR0016](#))
- 10 Brenda Hall ([EUR0020](#))
- 11 Brian Edwards ([EUR0108](#))
- 12 Britain Stronger in Europe ([EUR0091](#))
- 13 Dr Alan Renwick ([EUR0080](#))
- 14 Dr Ana Tiganeşcu ([EUR0102](#))
- 15 Dr Craig Prescott ([EUR0098](#))
- 16 Dr James Sloam ([EUR0107](#))
- 17 Dr Justin Gerlach ([EUR0013](#))
- 18 Dr Michael Brownutt ([EUR0077](#))
- 19 Dr Rachel Farebrother ([EUR0071](#))
- 20 Dr S. Rebecca Bamford ([EUR0090](#))
- 21 Dr Stephen Barber ([EUR0012](#))
- 22 Dr Suzanne Conboy-Hill ([EUR0089](#))
- 23 Electoral Reform Society ([EUR0093](#))
- 24 Facebook Campaign for the Real Referendum on the Terms of Brexit ([EUR0019](#))
- 25 Full Fact ([EUR0111](#))
- 26 Guy Sherry ([EUR0114](#))
- 27 Hotel and Manchester ([EUR0086](#))
- 28 Information Commissioner's Office ([EUR0099](#))
- 29 James Beadle ([EUR0021](#))
- 30 James Chater ([EUR0034](#))
- 31 James Hardaker ([EUR0113](#))
- 32 Janet O'Brien ([EUR0045](#))
- 33 John Muir ([EUR0051](#))

- 34 Kate Hammer PhD FRSA ([EUR0082](#))
- 35 Mark Ryan ([EUR0116](#))
- 36 Mark Stewart ([EUR0049](#))
- 37 Martin Cahn ([EUR0058](#))
- 38 Miss Joanna Tilley ([EUR0079](#))
- 39 Miss Keziah Mee ([EUR0009](#))
- 40 Mr Adam Parkinson ([EUR0026](#))
- 41 Mr Alan Kerr ([EUR0040](#))
- 42 Mr Alastair Macphail ([EUR0007](#))
- 43 Mr Brian Hinchcliffe ([EUR0037](#))
- 44 Mr Carl Thompson ([EUR0041](#))
- 45 Mr Christopher Dennison ([EUR0022](#))
- 46 Mr Clifford Williams ([EUR0035](#))
- 47 Mr David Brown ([EUR0096](#))
- 48 Mr David Isaacs ([EUR0028](#))
- 49 Mr David Shilton ([EUR0097](#))
- 50 Mr James Forrest ([EUR0042](#))
- 51 Mr James MacColl ([EUR0110](#))
- 52 Mr James Wilkinson ([EUR0029](#))
- 53 Mr John Willis ([EUR0083](#))
- 54 Mr Jonathan Hoffman ([EUR0003](#))
- 55 Mr Martin Robinson ([EUR0015](#))
- 56 Mr Michael Boden ([EUR0032](#))
- 57 Mr Michael Carberry ([EUR0100](#))
- 58 Mr Paul Goldsmith ([EUR0075](#))
- 59 Mr Paul Milton ([EUR0002](#))
- 60 Mr Peter Hutchison ([EUR0047](#))
- 61 Mr Peter Moors ([EUR0067](#))
- 62 Mr Peter Smart ([EUR0055](#))
- 63 Mr Peter Vass ([EUR0059](#))
- 64 Mr Philip Hogge ([EUR0033](#))
- 65 Mr Richard Veryard ([EUR0092](#))
- 66 Mr Robert Wetherill ([EUR0088](#))
- 67 Mr Roger Cracknell ([EUR0014](#))
- 68 Mr Stephen Hutton ([EUR0039](#))
- 69 Mr Stewart Small ([EUR0061](#))
- 70 Mr Stuart Smith ([EUR0023](#))
- 71 Mrs Barbara Robinson ([EUR0050](#))

- 72 Mrs Elizabeth Gill ([EUR0048](#))
- 73 Mrs Patricia Geary ([EUR0054](#))
- 74 Mrs Sally Bean ([EUR0094](#))
- 75 Mrs Tamsin Bouju ([EUR0004](#))
- 76 Mrs Zeba Clarke ([EUR0006](#))
- 77 Ms Alison Ball ([EUR0069](#))
- 78 Ms Charlotte Roberts ([EUR0063](#))
- 79 Ms Polly Sykes ([EUR0017](#))
- 80 Ms Sheelagh Abbots ([EUR0053](#))
- 81 Ms Susan Hedley ([EUR0065](#))
- 82 National Council for Voluntary Organisations ([EUR0076](#))
- 83 Norman Willcox ([EUR0038](#))
- 84 Oliver Rowland ([EUR0060](#))
- 85 Pamela Howarth ([EUR0046](#))
- 86 Paul Davies ([EUR0036](#))
- 87 Paul Matuszczyk ([EUR0005](#))
- 88 Peter Hirst ([EUR0011](#))
- 89 Philip Hodson ([EUR0008](#))
- 90 Professor Ailsa Henderson ([EUR0103](#))
- 91 Professor Derek Taylor ([EUR0101](#))
- 92 Professor Graham Smith ([EUR0109](#))
- 93 Professor John Ryan ([EUR0105](#))
- 94 Professor Richard Ekins ([EUR0104](#))
- 95 Professor Stephen Tierney ([EUR0072](#))
- 96 Professor Steven Brown ([EUR0074](#))
- 97 Talk Shop ([EUR0085](#))
- 98 The Centre for European Reform ([EUR0084](#))
- 99 The Royal Statistical Society ([EUR0106](#))
- 100 The Sir Bernard Crick Centre, University of Sheffield ([EUR0062](#))
- 101 The Sixty-Three Group ([EUR0052](#))
- 102 The UK in a Changing Europe ([EUR0064](#))
- 103 UK Social Scientists ([EUR0087](#))
- 104 William Chapman ([EUR0070](#))

## List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2015–16

First Report	Follow-up to PHSO Report: Dying without dignity	HC 432 (HC 770)
Second Report	Appointment of the UK's delegation to the Parliamentary Assembly of the Council of Europe	HC 658
Third Report	The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators	HC 431 (HC 980)
Fourth Report	The collapse of Kids Company: lessons for charity trustees, professional firms, the Charity Commission, and Whitehall	HC 433 (HC 963)
Fifth Report	The Future of the Union, part one: English Votes for English laws	HC 523 (HC 961)
Sixth Report	Follow up to PHSO Report of an investigation into a complaint about HS2 Ltd	HC 793 (HC 258)
Seventh Report	Appointment of the Commissioner for Public Appointments	HC 869
Eight Report	The Strathclyde Review: Statutory Instruments and the power of the House of Lords	HC 752
Ninth Report	Democracy Denied: Appointment of the UK's delegation to the Parliamentary Assembly of the Council of Europe: Government Response to the Committee's Second Report of Session 2015–16	HC 962
First Special Report	Developing Civil Service Skills: a unified approach: Government Response to the Public Administration Select Committee's Fourth Report of Session 2014–15	HC 526
Second Special Report	Lessons for Civil Service impartiality for the Scottish independence referendum: Government Response to the Public Administration Select Committee's Fifth Report of Session 2014–15	HC 725
Third Special Report	Follow-up to PHSO Report: Dying without dignity: Government response to the Committee's First Report of Session 2015–16	HC 770

Fourth Special Report	The Future of the Union, part one: English Votes for English laws: Government response to the Committee's Fifth Report of Session 2015–16	HC 961
Fifth Special Report	The collapse of Kids Company: lessons for charity trustees, professional firms, the Charity Commission, and Whitehall: Government Response to the Committee's Fourth Report of Session 2015–16	HC 963
Sixth Special Report	The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators: Government response to the Committee's Third Report of Session 2015–16	HC 980

### Session 2016–17

First Report	PHSO review: Quality of NHS complaints investigations	HC 94 (HC 742)
Second Report	Appointment of the Chief Investigator of the Healthcare Safety Investigation Branch	HC 96
Third Report	Better Public Appointments?: The Grimstone Review on Public Appointments	HC 495
Fourth Report	Appointment of the First Civil Service Commissioner	HC 655
Fifth Report	Follow-up to PHSO report on unsafe discharge from hospital	HC 97
Sixth Report	The Future of the Union, part two: Inter-institutional relations in the UK	HC 839
Seventh Report	Will the NHS never learn? Follow-up to PHSO report 'Learning from Mistakes' on the NHS in England	HC743
Eighth Report	Appointment of the Parliamentary and Health Service Ombudsman	HC 810
Ninth Report	Appointment of the Chair of the UK Statistics Authority	
Tenth Report	Lessons still to be learned from the Chilcot Inquiry	HC 656
Eleventh Report	Better Public Appointments? Follow-up and the Government Response to the Committee's Third Report, Better Public Appointments?: The Grimstone Review on Public Appointments	HC 1062
First Special Report	Follow up to PHSO Report of an investigation into a complaint about HS2 Ltd: Government and HS2 Ltd responses to the Committee's Sixth Report of Session 2015–16: First Special Report of Session 2016–17	HC 258
Second Special Report	PHSO review: Quality of NHS complaints investigations: Government response to the Committee's First Report of Session 2016–17	HC 742

Third Special Report Follow-up to the PHSO report on unsafe discharge from hospital: Government response to the Committee's First Report of Session 2016–17

HC 1016