

The Electoral Commission – Written Evidence to the Constitution Committee’s Inquiry into Referendums in the UK’s Constitutional Experience

1. The legislative background

1.1 The Political Parties, Elections and Referendums Act 2000 (PPERA) established the Electoral Commission and gave us statutory responsibilities in relation to elections and referendums. In particular, Part 7 of PERA sets out the legal framework for UK-wide, national and regional referendums and the Commission’s role in those. Additional legislation must be made to enable any specific referendum to take place.¹

1.2 Our role in elections is twofold: we are the independent regulator of party and election finance, and we set standards for electoral administrators, provide advice and assistance and report on their performance.² In referendums our role is significantly wider, as we have the additional responsibility for the conduct of the referendum. A referendum under PERA is the only electoral event that has a framework for national coordination and accountability.

1.3 Our powers and responsibilities relating to referendums include:

- commenting on the intelligibility of the referendum question
- registering those who want to spend significant amounts on campaigning in the referendum as ‘permitted participants’
- where appropriate, appointing lead campaign groups (‘designated organisations’) for each outcome
- ensuring that designated organisations have access to certain assistance, including grants that we determine within statutory limits
- making recommendations to Government on campaign spending limits for sub-UK referendums
- monitoring and reporting on campaign spending
- reporting on the administration of the referendum

1.4 The Chair of the Commission (or someone they appoint) will be the Chief Counting Officer (CCO), responsible for the conduct of the referendum and ensuring the accuracy of the overall result. The CCO appoints a Counting Officer for each local authority within the referendum area.

¹ Such as an enabling Act; a Conduct Order; a Fees and Charges Order.

² The Electoral Administration Act 2006 gave the Commission powers to set and monitor performance standards for the administration of elections.

2. Our referendum experience

2.1 Our direct experience of running a referendum was the November 2004 North East regional assembly referendum ('the North East referendum'). This was the first practical test of the PPERA referendum legislation.

2.2 The Chair of the Commission appointed the Chief Executive of Sunderland City Council as CCO, to give a regional focus to the leadership of the administration of the referendum. The CCO appointed 22 Counting Officers from the network of local Returning Officers, and designated regional coordinators in each county in the region to enable a consistent and coordinated approach to the administration of the referendum.

2.3 Our report on the North East referendum concluded it was successfully run, producing a clear outcome in which people had confidence.³ It was an experience from which we learned important lessons, including identifying where changes to the legislative framework would be beneficial for future referendums (see section 4). We have recently revisited the experience of the North East referendum during our work to prepare for possible forthcoming referendums.

2.4 We have also commented on the intelligibility of referendum questions for other proposed referendums (none of which were ultimately held).⁴

3. Key principles that should inform the way referendums are run

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

- they should be well-run and produce results that are accepted
- there should be integrity and transparency of campaign funding and expenditure

3.2 In that context, we set out here the principles we believe should inform the way referendums are run.

3.3 There should be **no barriers to voters taking part**. This means:

- those eligible can register to vote
- voters can easily understand the question (and its implications)
- voters are informed about the possible outcomes, and can easily understand the campaign arguments
- voters can have confidence that:

³ The full report is enclosed as Appendix 1

⁴ We commented in 2004 and 2005 on proposed questions for a European Constitution referendum, and in 2007 and 2008 on proposed questions for local referendums on local governance arrangements.

- campaign funding is transparent
- distribution of any public support and access to media is fair
- any rule-breaking will be dealt with
- the voting process should be easy to take part in and well-run
- the result and its implications should be clear and understood

3.4 There should be **no barriers to campaigners putting forward arguments for any of the possible outcomes**. This means that:

- it is easy to register as a permitted participant and to take part in campaigning
- the rules that govern campaign spending and fund-raising activity are clear and fair
- the process for designating lead campaign organisations for each outcome (and consequent distribution of public funds and access to media) is easy to understand, and accepted as fair

3.5 The referendum should be **administered efficiently and produce results that are accepted**. This needs:

- a clear legal framework with clear roles and responsibilities communicated to those who are bound by them
- clear guidance and efficient procedures for voters, campaigners and administrators
- Performance standards against which the performance of Electoral Registration Officers and Counting Officers at referendums is evaluated
- an efficient process for distributing funds to campaigners and administrators
- rapid and clear reporting on campaign funding and spending
- a timely and persuasive report on how the referendum worked

4. The legislation

4.1 PPERA provides the generic legal framework for referendums. The detailed rules for the North East referendum were provided by secondary legislation (three separate Orders). Following that referendum and our analysis of our experience, we wrote to the Government⁵ setting out the areas where we believed changes should be made to the legislative framework for referendums, which are:

- Creation of a statutory Regional Counting Officer role (similar to that of a Regional Returning Officer at a European Parliamentary Election) on a level between the CCO and Counting Officer. This would support the effective management of the poll, ensure consistent standards of administration, and enable regional co-ordination and communication between the CCO and local Counting Officers, particularly in the case of any national referendum.

⁵ We wrote to what was then the Department for Constitutional Affairs in 2007; subsequently to the Ministry of Justice; and most recently to the Minister of State for Justice in June 09.

- The CCO to have a power of direction in primary legislation over both Regional Counting Officers and Counting Officers to enable efficient organisation and coordination of the referendum.
- The restriction on the publication of promotional material by central or local government to apply from the start of the referendum period (i.e. the date from which campaigners can be registered as permitted participants). The existing restriction applies to the period of 28 days immediately before polling day. We believe it would be fairer if the restriction covered – ideally – the entire referendum period, or at the very least, the 28 day period before postal ballot packs are issued.⁶
- The Commission to have powers to promote public awareness of the registration and voting process at a referendum, akin to those we have in relation to elections, to ensure that voters are informed about how to participate.⁷
- The Commission to have a discretionary power to provide information to voters on the referendum options, if it is unable to appoint designated organisations (we already have this power in Wales).⁸ This avoids a scenario whereby no organisation has responsibility for informing voters about the options being put to them at the referendum, and allows us to undertake such activity if we decide that it is necessary in the interests of voters.
- Aggregation of spending limits for permitted participants who operate to a common plan in campaigning, to bring them into line with the rules on spending by third parties in election campaigns. This would prevent participants circumventing spending limits by registering separately but acting together.

4.2 We support the idea of a generic Conduct Order that would set out the detailed regulations governing the administration of referendums held under PPERA. This would ensure clarity and consistency for those involved in planning and running referendums, and allow them to develop a shared understanding of the rules that would apply to any referendum well in advance.

5. Our role in future referendums

5.1 There is potential for a referendum in Wales on law-making powers of the National Assembly and, at UK-wide level, there has been considerable recent speculation about the possibility of referendums on topics including electoral reform.

5.2 There is also the possibility of a referendum in Scotland on independence, though based on current information that would be a non-PPERA referendum, for which we would have no statutory responsibility under existing legislation.

5.3 We have therefore recently reviewed our referendum planning and our approach to key elements of our role. In doing so, we have in particular sought to

⁶ Postal ballot packs can be issued from 5pm on the 11th working day before polling day.

⁷ Under Section 13 of PPERA.

⁸ Contained in Schedule 6 of the Government of Wales Act 2006.

take account of our role as a UK-wide organisation operating in the context of devolution.

Commenting on question intelligibility

5.4 Referendum questions should present the options to voters clearly, simply and neutrally. Our preferred approach to assessing question intelligibility is published on our website, as are our *Referendum question assessment guidelines*.⁹ We would assess the question using our guidelines, taking account of evidence from research with voters, and discussions with key stakeholders and plain language and accessibility experts.

Making recommendations on spending limits in sub-UK elections

5.5 Spending limits for UK-wide referendums are set out in PPERA. The Government will set the limits for sub-UK referendums but must have regard to the views of the Electoral Commission.

5.6 Our advice will be based on the principle that limits should be set at a level which allows effective campaigning for all outcomes of a referendum, deters excessive spending, and is not so low as to distort reasonable campaigning behaviour and affect transparency (e.g. by giving campaigners an artificial incentive to split their spending between multiple campaigning bodies).

Setting grants for designated organisations

5.7 We are responsible for setting the value of the grant available to all designated organisations at a referendum, up to a statutory maximum of £600,000. Our principle is that grants should be set at a level that will ensure voters are well informed about the arguments for all possible outcomes, while ensuring proper use of public money.

6. Other issues

6.1 This section addresses some of the issues mentioned in question 8 of the Committee's call for evidence.

Ballot paper design

6.2 We believe voters should be confident that their vote will be counted as they intended. We have recently issued good practice guidance on ballot paper design that aims to improve the usability and accessibility of voter materials.¹⁰

Public information

6.3 PPERA does not contain any provisions for the Commission to undertake public awareness activity in relation to referendums. The enabling Act¹¹ for the North East referendum gave the Commission powers to promote public

⁹ We first published our question assessment guidelines in 2002 and have recently updated them (November 2009). These documents are available on our website at www.electoralcommission.org.uk/elections/referendums/legislation.

¹⁰ *Making your mark – Good practice design guidance for designing voter materials: guidance for government policy-makers* (2009). Available at www.dopolitics.org.uk/making-your-mark

¹¹ The Regional Assemblies (Preparations) Act 2003

awareness, and the Commission encouraged people to register to vote and provided information on how to take part.

6.4 The enabling Act also gave us powers to provide information explaining the ‘yes’ and ‘no’ arguments in the event that we were unable to designate organisations as lead campaigners for each outcome of a referendum. We have similar powers for referendums in Wales.¹²

6.4 If permitted in subordinate legislation, at any future referendum we would carry out activity to inform voters about the referendum and explain how to take part.

Combination of referendums with other elections

6.5 In the event of a government proposal to combine a referendum with an election, we would advise on a case-by-case basis. We would consider the facts relating to that specific election/referendum combination, looking at what the benefits or drawbacks to the voter would be, in order to advise on the particular risks of combination, and how they could be managed.

6.6 Relevant factors would include whether any additional legislation applied for the first time, the complexity of running a particular referendum and election at the same time, the likely increase in turnout resulting from combination and issues of accountability for the administration of the elections and referendum.

¹² Contained in Schedule 6 of the Government of Wales Act 2006.