



Public Administration and Constitutional Affairs Committee

Oral evidence: [EU Referendum Bill: Part One: Purdah and Impartiality](#)

Tuesday 14 July 2015

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Members present: Mr Bernard Jenkin (Chair); Ronnie Cowan; Oliver Dowden; Paul Flynn; Kelvin Hopkins; Mr David Jones; Tom Tugendhat; and Mr Andrew Turner

Questions 1–90

Witnesses: **Rt Hon Lord David Owen**, gave evidence.

Q1 Chair: I welcome Lord Owen to this first evidence session of the Public Administration and Constitutional Affairs Select Committee, as it is now called, and we are very pleased to have you. Thank you very much for joining us. This inquiry is about the EU Referendum Bill but we are splitting our inquiry into two parts and we are concentrating on the issue of purdah in order that we can contribute to a discussion in Government about how they should respond to a concern about the removal of Section 125 Political Parties Elections and Referendums Act that provides for statutory purdah in referendums.

Thank you for your memorandum. I wonder if I could just go straight to a question. Looking back at 1975 referendum in which you were particularly involved, Lord Owen, how did the Government ensure that voters received objective information ahead of the referendum in 1975?

Lord Owen: Well, I think the basic view is set out by the Lord Chancellor in the Cabinet meeting minutes that you have of 17 January 1975 when he said openly, “There is some apprehension about the conduct to the referendum campaign where both pro and anti-marketers have a fair crack of the whip. Public opinion will expect us to take any practicable measures that are needed to prevent manifest unfairness.” That was the overall attitude and they tried to maintain it but, as I said in my memorandum, I think there were abuses and in particular there is very little doubt that the diplomatic service got too close to the Yes campaign.

Q2 Chair: Can you give an example of that?

Lord Owen: I think there were just too many meetings. In an election period it is really impossible to preserve your objectivity and have diplomats attending meetings of Yes campaign. Now, there was some argument as to whether or not it is dealt with by Sir Stephen Wall in his official record of history but I think they were governed by overall—there were no rules in those days but what we all understood about purdah, this was not a normal period of relationships between diplomats and Ministers, we were in the midst of a referendum. Why do you call referendums? Politicians broadly call referendums because their parties are divided and in this particular case that was the situation and, as I say, that is going to be the situation next time. So diplomats and civil servants, there are distinctions between them. Diplomats do not spend as much constant involvement with the political process and perhaps that was reflected in this. But the onus was felt throughout the government machine and there was guidance to Ministers that in Parliament the Government would present its case but particularly when Parliament was in recess, over the Whitsun recess, that period in particular they would have to be very careful for no undue intervention of the government machine behind the Yes vote.

Q3 Chair: I note that you cite the same sentence in the minutes that I, myself, have highlighted about the need to prevent manifest unfairness but it is notable how much of these minutes and, indeed, the memorandum attached are about the provision of information, not about restricting what the Government should do. How much discussion was there about preventing unfairness?

Lord Owen: We are all adults, we have gone through general elections, we have been on both sides of the situation, either in Opposition or in Government. We know that during a general election and during referendums normal rules do not apply and that we are trying to get a response from the general public and that is therefore going to tie the hands of MPs. We are effectively suspending the normal parliamentary processes in referendums, usually for good sound reasons that Parliament is not able to reflect as well the opinion and the country. But that puts an onus on you to have a fair result. This is not a device for the Government to get its own way. That is often how it is seen.

Q4 Chair: How much do you think that compromised the impartiality of civil servants themselves and indeed the civil service?

Lord Owen: They are very well used to using this, Ministers know it too and politicians know it. It is an informal procedure. I personally think it was probably very unadvised to step down in such detail what are the criteria of purdah. There is an adult relationship between politicians and civil servants in which they know there are judgment calls should you during this period make a decision. For example, when I was dealing with the general election of 1979 there was an issue as to whether or not we should change the Government's position over a price freeze in agricultural policy and the issue came to me that we should, in the negotiations going on every day in Brussels, abandon our price freeze. I said, "No". The civil servants thought there was a case for it. We sorted it out between us. If there had been a difference of opinion the Permanent Secretary could have appealed to the Prime Minister, it could have gone higher up above my thing but we resolved it amicably between us. I made the case that this was Government policy, it had

been Government policy for over two years, it was also supported the commission. Therefore the onus on us was to keep the policy not to change it.

Q5 Chair: That example is about the continuation of day to day business during the purdah period, how did the interaction of diplomats with the Yes campaign in 1975 affect the impartiality in respect of their own personal code of conduct?

Lord Owen: I was not Foreign Secretary at the time, I was Minister for Health, so I do not know. I saw it from the vantage point of the Department of Health and Social Security in which the Secretary of State was on the No side and I was on the Yes side. So we had to resolve the questions between ourselves, and then also between the civil service, of not getting into arguments about the National Health Service, which Barbara felt—probably correctly in the light of experience—that it did have implications to the NHS. I took the view it did not have implications to the NHS. So we did not disagree on the floor of the house or in Parliament or on any issue that came out of the Department of Health and Social Security but we were free on platforms to argue a case differently.

Q6 Mr Turner: What impact did the Government's control of public information have on the referendum campaign itself, the referendum result and the perception of fairness and legitimacy of the campaign?

Lord Owen: I don't think there was a lot of criticism but by then the result was obvious, you know, in the start of 1974 it was perfectly possible to think the referendum might well have come up with a No vote. By the time of February onwards, opinion polls were increasingly pointing to a very clear cut Yes vote and so I think that people were not so concerned. Various criticisms were made, for example, in the Government's statement they did not refer to the fact that in December 1974 in Paris Harold Wilson had accepted the European monetary union as a concept. That was soft pedalled, as indeed on the Yes campaign, so there was absolutely no question on any of these issues of the EMU or anything like that. They took the lead and since that was Ted Heath and Roy Jenkins, it was believed that there were no implications for what we eventually got, a single currency and all that. So there was criticism of that. Then there was criticism that in the 1972 statement to Ted Heath as Prime Minister about sovereignty, that there was a very considerable loss of parliamentary sovereignty. That was, again, not particularly—it was never referred to in the Government statement.

We cannot expect masochism in a Government statement. They are not going to be putting out things that are particularly disobliging but I think it was unwise, for example, to have the Government draft popular version given to a prominent journalist in *The Daily Mirror*, who did a good job. But his job was to put the most persuasive case, not necessarily the most objective case.

Q7 Chair: But that was using the machinery of government to disseminate the Government's message?

Lord Owen: Yes, that was the Government message. I personally have no objection to Yes, No campaigns each having their say and the Government putting their case. But if the

Government use that then they must be clear that that is not a propaganda statement, that must be factually correct, and it must stay correct both in the long official version, so to speak, which the input of the diplomats was considerable, and even in the shortened version that that should be checked by the civil service for probity and for objectivity.

Q8 Chair: So you are saying it is legitimate right up to polling day for the government machinery to be used for the dissemination of objective information?

Lord Owen: No, the statement which came out at the start of the campaign—Yes, No and the Government's statement—that was perfectly legitimate to do. After that it should be an even playing field as far as possible. You could not shut the Prime Minister up, as you do not shut them up in a general election. You could not shut up the Foreign Secretary, you do not shut him up in the general election. The broad principles under which general elections have been fought in this country since before the Second World War should be complied with.

Q9 Mr Turner: So an individual who is not the Prime Minister, not a politician but a civil servant, they must be silent?

Lord Owen: This is where the Cabinet Secretary becomes a crucial figure. I have concerns about the Cabinet Secretary, not about his integrity or his ability, which is absolutely clear cut, he is a very able person, but I think his capacity to make a judgment between the interests of a Prime Minister and the wider Cabinet, for example, or between the interests of Ministers collectively and civil servants is open to question. Not because of any fault of his but the fact that his whole career has been spent in the hothouse atmosphere of politicians private offices and three successive Prime Ministers. He was private secretary to Tony Blair in the period 1999 to 2003, which is the period in which we had the greatest accumulation of power under a Prime Minister. We had a presidential system without any form of discussion or debate and during that period you got into habits. His habits were criticised by the Hutton Inquiry, which said that there had not been the normal practice of minuting minutes when they came to examine the decision making structure, which ultimately had a very tragic result in the death of David Kelly, the defence scientist.

I think it goes on, I do not make any secret of the fact I am very concerned about the way the Chilford Inquiry has been handled. An unbelievable situation, for which the Cabinet Secretary must take a measure of responsibility, quite a large measure of responsibility. Then there was Plebgate, then we had this extraordinary situation about a judgment over the Home Secretary's special adviser. Then I have my own indifferences, as I have shown you in the letters, I think, for the first occasion ever for the Prime Minister to send out 2 million letters about a budget proposal in April before a European election was highly questionable. The correspondence is there for you to see. I have carried on because I do not think he understands the rules of purdah. Not the rules maybe set out in the general rules for referendum, but I do not think he seems to understand the spirit that underlies it. A Cabinet Secretary is there to maintain the overall structure of government under which we have peacefully and broadly happily lived now for many decades. I think it is under threat and it started to be under threat, not initially in the last five years with the Coalition, that was a return to Cabinet Government, but in the present situation, unless we are

vigilant, we will go back into the situation that happened during the Prime Ministership of Tony Blair.

Q10 Oliver Dowden: Can I just interject? On the employment allowance, you had concerns about the letter. The purpose of the letter was to explain to potential recipients of the employment allowance that this benefit was available to them. Would it be possible to explain why you think that crossed the boundary from Government information into what you seem to be implying was propaganda?

Lord Owen: It was the first time it was ever done, that is the first thing. So we need to look at it because otherwise we could start having Prime Ministers rising very frequently about Government positions and using the government printing machine and letters and all that. My worry about it was it was pretty close to the European parliamentary election and my concern, and the tone of the correspondence was perfectly courteous from the Cabinet Secretary, is that I felt with the European Parliament elections fixed and now we coming into this new phase in 2015 of the first time we are experiencing a fixed term parliament—we all know when it is going to take place—therefore the purdah period ought to be examined. I was rather upset that there was not a reflection of this in the guidance in 2015. I think the purdah period should be extended because you know when the election is going to be taking place therefore Government can order its information, public statements and letters. I am not saying no letters should ever be written by a Prime Minister or Chancellor of the Exchequer explaining policy, that is a perfectly legitimate area. But in that sensitive area, coming close to an election, I think that is very doubtful.

Q11 Oliver Dowden: So it was more the timing of the letter relative to the European elections—

Lord Owen: Absolutely, the timing.

Oliver Dowden: —not the content. Okay, thank you.

Q12 Paul Flynn: Are you concerned about the matter that this Committee were very critical of, and that was the intervention by the senior civil servants, Nicholas Macpherson of the Treasury, on to the Scottish referendum debate in which he published under his own name his advice to the Minister—not an unprecedented move but a very rare move—that was supported then subsequently by Sir Jeremy Heywood and Bob Kerslake but seemed to us as a Committee to be a dangerous step in politicising the civil service?

Lord Owen: Is this the Scottish referendum?

Paul Flynn: The Scottish referendum and the—

Lord Owen: I think the Scottish referendum is a different circumstance because here you are again deciding that a decision will be taken by a section of opinion in the United Kingdom and that relationship then moves between the Scottish Assembly and Ministers in the Scottish Government and the Scottish people, but the UK Government does have a view. This is tricky. I personally think the use of Macpherson and the Governor was questionable, but on the other hand it needed to be heard, that view, and would the

objectivity of say the Chancellor of the Exchequer or the Prime Minister have been questioned as an intervention? To some extent here is a political judgment made, perhaps on the right side, that it was more likely to be seen by the Scots as being objective if it was done by a civil servant. I have some respect for that.

In these regional or national referenda, Northern Ireland, Wales, Scotland, perhaps different circumstances apply. But, broadly speaking, I think we have to be careful about that. I personally think that if there had been a vote to come out any British Government and the Governor of the Bank of England would have had to negotiate over—

Q13 Paul Flynn: We do not have a problem with a civil servant giving advice to the Chancellor, the point was that this advice would seem to carry greater weight if it was given under the name of the civil servant who appeared to give an objective judgment rather than the Chancellor giving a political judgment. Isn't that a step towards politicising the civil service, if this continues and they are allowed to give their opinions under their own names?

Lord Owen: I am having difficulty hearing but if I get your point correct, I don't think in that particular situation there was probably any difference between Macpherson's view and George Osborne's view. I am not sure whether there is any difference between the Governor and Osborne but they would be perfectly entitled to be different. The Governor is not a civil servant and the Governor is capable and is charged with having independent views on bank rates and a lot of things. I just think the politicians would have overridden the Governor. I am sure the Governor's advice was what he thought but in the real world, after a vote to secede, we would have had to come to grips with the realities and the politicians would have faced up to that reality.

Paul Flynn: Thank you.

Q14 Mr Jones: Lord Owen, a moment ago you said that it was clear for several months prior to the 1975 referendum that public opinion was moving firmly in favour of a vote to remain in what was then the EEC. That may be the case but was that influenced in your view to an extent by the fact that the Government information machinery was pushing out pro Yes vote messages to the public?

Lord Owen: I have no doubt about that. We are politicians so we can talk pretty frankly between ourselves. We know perfectly well that Harold Wilson by then had become convinced that it was a good thing. When did Harold Wilson really become convinced? It is much later than you might have imagined. I do not think he came completely off the fence until he was pretty clear he could win it. I do believe that from 1972 onwards he was determined to, in any referendum—when he accepted the referendum in 1972 I think he was determined to become Prime Minister and to win that referendum. There is a straight line of Harold Wilson's views on Europe from 1965 right the way through. That may be surprising for me to say so because I was, of course, very critical of him and had resigned in 1972. He always made it clear, as did Callaghan, that they would accept the result of the referendum, that they were there to do so. There is a very revealing correspondence in Sir Stephen Wall's book in which Callaghan is saying right in May, 14 May, that he disagrees with the advice coming from Pat Nairne, who is then in the Cabinet Office, a very able civil servant. He said that if there is a No vote—and we are talking only a few weeks

later—we will have to reform the European Communities Act so we reclaim sovereignty for the British Parliament.

This was not a complete *fait accompli* in the atmosphere of that Government, even though opinion polls were showing a very clear Yes vote. The job of Callaghan and Wilson was far more important than the Yes campaign or the No campaign. They basically, in a low key way, set out to shift the opinion inside the Labour Party and no doubt that is what Cameron will try to do if and when we have this referendum that we are promised.

Q15 Mr Jones: So what lessons would you say could be learned from the 1975 referendum as to how the forthcoming EU referendum should be managed and administered?

Lord Owen: That the impartiality of the Government was not absolute, that there were deficiencies. There were deficiencies in the relationship particularly of diplomats who were very committed to Europe, as they have always been perfectly entitled to do so. But the diplomats in the Yes campaign were much too close, that the official Government view in its shortened version should have been more objective and if given to a journalist should have come back to the civil service. I think there is some evidence it did not come back for proper assessment. That is it. The framing of the question governs the department. Whips are applied and that is done.

But, of course, at every level given their head a politician will gear it to their views. There is nothing disreputable about that. You were arbitrating about a very unusual procedure. You are not free in the real world to vote differently to the result. They call it an advisory or consultative referendum, but we are grown ups we know that if we put to a referendum and you pass the referendum legislation your hands are tied. You are then responsible for carrying that legislation out. If you want to be pejorative you would say it is an abdication of Members of Parliament. I would prefer to say it is a recognition in a parliamentary democracy that there are other ways of democracy operating and referenda have their place. It is very important that this Committee and this debate takes place in advance to tie the hands of the politician who will try and win this referendum by hook or by crook, and to tie the hand of the Cabinet Secretary and demand from him a far greater degree of impartiality and objectivity on these matters than we have yet seen in his performance of the duties of a Cabinet Secretary.

I am speaking quite bluntly. As I say, I am not critical of him in any personal way but his conduct for the office so far is below the standards that we require of him, we require of him as people and you as parliamentarians.

Q16 Mr Jones: Of course the big difference between 1975 and now is that in 2000 the Political Parties Elections and Referendums Act was passed. Section 125 does set out grounds upon which the conduct of referendums are regulated. The Government now proposes to disapply that. What view do you take of that?

Lord Owen: Yes. I am not a great expert in it to be blunt but it does seem to me you set up an Electoral Commission and they tell you you should not make these changes. You consult people and they tell you you should not make these changes. I do not know what conclusions you have come to but I hope you will come to a critical position and I imagine

the Government will back off. I hope so, but if not on a cross party vote in the House of Commons you should vote it down. This is not an issue of party politics, this is because party politics is not capable of dealing with it. This is not new.

I came into politics in 1962 as a candidate. In 1962 the political parties were split on the then common market as much as they are today and it has gone through the whole of my life. I have spent the whole time broadly on the Yes side but I hate the euro, totally opposed to the euro and I was thankful that we got the safeguard of a referendum and that referendum safeguard reluctantly came out of the Government, all credit to John Major, he pushed it through against senior colleagues—the Chancellor of the Exchequer against it and others—and that has saved us from the eurozone. We were very afraid in the Yes to Europe, No to the eurozone campaign that we would have had on the back of a so-called Baghdad Bounce in 2003 a referendum. There were not many advantages to the fact that we didn't have a Baghdad Bounce because it was all a failure. But one advantage was there was no question that Tony Blair was not going to call a referendum on the euro in 2003, 2004 or ever since.

We have fought for those things. They did not come to us naturally. The people have fought for it. The referendum did not come from the politicians it did come from the grass roots campaign and it did come, if we are blunt about it, by Goldsmith. This referendum has been fought for. It did not come naturally, it was not going to be offered up, it was wrung out of them.

Now, to come back to the role of the Cabinet Secretary, it is a very difficult role and that is why it is very frequently given to a person who has had a very balanced career. Spent quite a lot of time in the civil service doing a succession of jobs, not always associated with politicians. They may well have been in private office for a little of their time but a substantial period of their time infiltrated with the ethos of the civil service. It is very hard to define.

Chair: I am enjoying this enormously but we must press on.

Q17 Oliver Dowden: May I ask one small supplementary to the previous question? I was very interested in what you said about the Government and the government machine effectively making the case some period before the actual referendum campaign started. Do you think it is meaningful to talk about a purdah period, of having a moment when you start talking about a purdah, as it were?

Lord Owen: For a general election it usually works out about 21 days. I personally, as I say, believe it should be more like 35 days now that we have fixed term elections. Governments will try and fix that period when Parliament is not present to the minimum and the recession was pretty short in 1975. My own view is that period where Parliament is not sitting should be a little bit longer. The reason this European issue is so important is it is not a Welsh, Scottish or Northern Ireland issue, so it is not fragmented, it is the UK as a whole and also Europe goes into every avenue of British life, like a general election. It is not a narrow issue like an AV referendum, it is not a narrow issue, it is a very broad issue and I think needs, therefore full exposure. So my own view is it should certainly be a general election period and I would have said a little bit longer.

Q18 Oliver Dowden: Thank you. You were talking a lot about the role of Cabinet Secretary and being quite critical of the current Cabinet Secretary in this regard, could you just explain by what mechanisms the impartiality of the civil service was protected during the 1975 campaign and how effective was this?

Lord Owen: You have to remember that referenda were very new, we had only had one before and that was in Northern Ireland as a result of this. To any extent that announcement of the referendum by Ted Heath in 1972 precipitated the whole crisis because suddenly referendum became acceptable and the national executive of the Labour Party met, first rejected it, secondly accepted it. The Shadow Cabinet had previously rejected it and suddenly accepted it. So it had very considerable implication on the commitment to a referendum in 1975, that first referendum. But we were feeling our way as to how to conduct one. It is the first one that was held throughout the whole nation and I think we should learn from it. It is perfectly reasonable to think we made a few mistakes. I do not think it was a disreputable referendum in any way but we should sharpen up, learn from some mistakes and recognise that this one maybe even more important.

Q19 Oliver Dowden: Did you feel during the course of that campaign there was a need for some sort of legislative control over the purdah period, because clearly it was in the hands of the Cabinet Secretary and civil service to self-govern? Did you feel that there was a need for a legislative requirement?

Lord Owen: I do think if you look the procedures that Lord President of the Council's paper to Cabinet in January 1975 was the correct procedure. You had a general discussion about how to deal with this issue. Then much later in the campaign Harold Wilson, as a tactical decision, decided it would help his case to have the anti spokesman given high publicity. Therefore he wanted, and he went to Jim Callaghan and they agreed, that the Cabinet collective responsibility would be given up for this period and members could stay as members of the Cabinet giving their views. He did not want to make them martyrs by sacking them. He believed their views were not representative of the British public and he wanted them to have more publicity. It was a very astute but somewhat cynical judgment. He will not be the first or the last politician to make those judgments.

Q20 Chair: Lord Owen, you have been very helpful. Just one last point: the Scottish independence referendum was marked by the intervention of the vow that occurred during the purdah period. Of course, it was delivered not by the Prime Minister but by the former Prime Minister. One can imagine that the Prime Minister wanted to subscribe to this vow, as he did, and sitting in Downing Street, wanted to respond through the mechanism of government in support of that vow but obviously he was not allowed to do so because of statutory purdah. Supposing that was the case, do you think it is reasonable that the Cabinet Secretary should have turned to him and said, "No, you will have to do that through the Better Together campaign and you cannot use the machinery of government for this purpose"?

Lord Owen: I think the vow reeks in every aspect of it. It was not necessary. It was a lack of nerve. It was probably against any form of objective advice as to how the government machine should operate.

Q21 Chair: But that aside, how reasonable would it have been to have the Prime Minister involved?

Lord Owen: I think to have another vow in those circumstances in this coming referendum would be outrageous during that period.

Q22 Chair: So it would be reasonable for the Cabinet Secretary to say, “No, you cannot use the Government Information Service to disseminate this message; it is a matter for the Yes campaign”.

Lord Owen: Yes. The distinction with Scotland I made earlier is that it is an unusual one in that it is a Scottish decision but with huge UK implications and it can be argued that throughout that process there is a case. In this particular case, because you have all three parties in the UK signing up to it, it had a certain validity, but personally I think it was an abuse of the referendum procedure.

Q23 Chair: We must leave it there, I am afraid, but thank you very much indeed, Lord Owen. That has been very interesting.

Lord Owen: Thank you.

Q24 Chair: Welcome to our former colleague, Jack Straw. I wonder if I could ask you initially when you were Leader of the House at this stage.

Mr Straw: It depends which stage you are talking about.

Examination of Witness

Witness: **Rt Hon Mr Jack Straw**, Former Cabinet Minister, gave evidence.

Q25 Chair: Welcome to our former colleague, Jack Straw.

Mr Straw: Good morning.

Chair: I wonder if I could ask you initially, you were Leader of the House at this stage?

Mr Straw: It depends what stage you are talking about.

Q26 Chair: We are talking about 1999-2000, the rationale for the PPERA.

Mr Straw: Home Secretary.

Chair: You were Home Secretary. I beg your pardon. You have had so many jobs it is difficult to keep track. How widespread were concerns about consistency and fairness in referendums before PPERA?

Mr Straw: There had been concerns about fairness arising in the 1975 referendum campaign, as you have just heard from Lord Owen. Then I had concerns about the conduct of the Welsh referendum in 1998, not the Scottish one. I was very much in favour of Welsh devolution but there was considerable evidence that the government machine, the Welsh Office machine, had been used in a way that some people might say was inappropriate. What happened was we had asked the Committee on Standards in Public Life to look at the whole issue of party funding in a context in which, aside from regulations on local funding, there were no regulations at all of party funding to speak of. The Committee, under the chairmanship of Lord Neill, took evidence and, as you will know from chapter 12 of that report, all three parties were in favour of there being a purdah period in the course of referendum campaigns. At paragraph 12.23 they recite the reaction of the parties including the Conservative Party who said that, “The same rules that govern the conduct of Ministers and civil service during the general election campaign should apply during referendum campaigns”. That is 12.23 and similar views were echoed in 12.24 and 12.25.

The Political Parties Elections and Referendums Act 2000 was based almost entirely on the recommendations of Neill and I was extremely anxious to ensure we had an all-party consensus on this and we did not use what was then an overwhelming Labour majority just to push through things that were in our partisan favour. My recollection is, and I have checked the Hansard record as well, that what became Section 125 went through on a consensus. No one seriously argued against it.

Q27 Chair: On the contrary, I think some of us argued in favour of a longer purdah period in line with the recommendation of the Committee on Standards in Public Life.

Mr Straw: Indeed.

Q28 Chair: Why did you not accept that?

Mr Straw: You were one, Mr Jenkin, and Dominic Grieve was another. The reason we did not was because there are obvious differences between a general election campaign and a referendum campaign and this was recited in the Labour Party’s evidence to Neill that I had written. The obvious one is that in a general election campaign the Government of the day has finished with that Parliament and you are in a new situation. A referendum campaign is going to happen in the course of a Parliament and the Government is bound to have a very strong view on one side or the other. My judgment was it was unrealistic to have too long a period of purdah and that is how we came down in favour of 28 days. But my recollection is, and this is entirely my recollection, that went through in the end without much division.

Q29 Chair: How chaotic and unfair was the system before PPERA and to what extent do you think, had PPERA been in force, the outcome of the Welsh referendum might have turned out differently?

Mr Straw: It might have been different because it was won only by a margin of 7,000. By the by, if these rules, Section 125, had applied to the referendum campaign in 1975 on the

EU it would not have made any difference at all. Because I worked for one of the dissenting Ministers I was part of the merry band of special advisers who worked on the staff to the dissenting Ministers. It may have made one percentage point difference but we were beaten by two to one. But one percentage point difference in the Welsh referendum would have been the difference.

Q30 Chair: So you agree that the system was chaotic and unfair in that sense?

Mr Straw: I do not think it was chaotic. I think it was perfectly clear but in my judgment the absence of any regulations meant that it was stacked in favour of the view the Government of the day was pursuing.

Q31 Mr Jones: I obviously have an interest in the Welsh referendum and I am interested in the remarks you made about the role of the Welsh Office in that particular campaign, which I infer you think went beyond the bounds of what was regarded, for example, at the time of the 1975 referendum, as proper. Do you think what the Welsh Office did then swung the vote in favour of yes as opposed to no?

Mr Straw: Mr Jones, I do not know whether it swung the vote. It is difficult to say. I was uneasy and expressed this at the time, about what I thought was pursuit by Ron Davies, and he was obviously the boss of the Welsh Office, of his very profound belief in Welsh devolution and the way government resources were being used. If you asked me if I can give you granular evidence about this, I cannot without doing a great deal of research. But I can certainly tell you I was uneasy about this and I recorded that when I wrote the relevant chapter in my memoirs a couple of years ago.

Q32 Mr Jones: Sufficiently uneasy to press for the introduction of PPERA?

Mr Straw: It was not the trigger for Section 125. The trigger for that was what Neill recommended, as I have said. But it certainly was an additional argument in favour of the kind of restrictions both on spending and on the use of the government machine that found their way into the referendum chapter of PPERA.

Q33 Mr Jones: We have seen that there were extensive discussions prior to the 1975 referendum within Cabinet with a view to ensuring that as far as possible, as Edward Short put it, both sides should have a fair crack of the whip. One might have thought that might have become the convention in the holding of referendums in this country and there might well have been similar discussions prior to the 1997 Scottish and Welsh referendums. Again, are we to infer that the 1975 experience was not regarded as a precedent for what happened in 1997?

Mr Straw: I do not think it was seen as a precedent. May I just say this about the 1975 campaign? There were efforts made by the Government of the day, the civil service administration, to be fair to both sides. There was an information unit established and in the days before e-mail I remember spending a lot of time on the telephone with one of the

officials in this information unit getting information from them for No campaign leaflets and things like that, and they were very ready to provide that.

It was not that the No campaign was completely excluded from Government information, and bear in mind—and I do not make this as a trite point, it is a really important point—that in these pre-internet days the Government was the prime source of information and there were very few alternative sources of information. If you wanted to know about, say, relative prices in France or Germany you could only get them from the Government.

So having that access was important, but the other side of this in the 1975 referendum campaign was that the Government believed that it was so existential for the Government to get its view accepted by the British people that it both funded the Yes campaign, which was on an equal basis to the No campaign, but also in a sense ran its own campaign as well. So you have a Yes leaflet through each door and a No leaflet through each door and then the Government leaflet as well saying Yes.

Q34 Mr Jones: Why was provision made in PPERA for a statutory period for referendums in contrast to general elections?

Mr Straw: I sought to explain that to the House when the Bill was going through. It comes back to the Chairman's question. We simply made a judgment that in the special and different circumstances of a referendum campaign, different from a general election, 28 days was about the maximum where you could realistically have a period of purdah. It could have been less and it could have been more, but that was our judgment. My recollection—and, Mr Chairman, you may want to ask your staff to check this—is that was broadly accepted by the House.

Q35 Oliver Dowden: Mr Lidington has stated that Section 125 provides a very wide-ranging ban on everyday government activities during a referendum campaign. It would be helpful if you could explain what legitimate government activities you think are restricted by Section 125 as it stands.

Mr Straw: I am sorry to retreat into saying that it is not for me to offer legal advice to the Government of the day. The words mean what they say on the page. But I may say, Mr Dowden, that Section 125 as I understand it did apply during the course of the Scottish referendum campaign last year and it did not overly restrict either side from putting their point of view. So, it is about the involvement of the government machine rather than the involvement of Ministers, although it talks about Ministers. It is Ministers qua Ministers. If the Leader of the Labour Party and the Leader of the Conservative Party and other parties wish, and I know they will, to say, "Vote Yes" in a referendum there is no restriction on that. It is just how much of the government machine behind them is involved as well.

Q36 Oliver Dowden: Perhaps I can ask it in a slightly different way. As the Minister ultimately responsible for the legislation what intent did you have behind it and what—

Mr Straw: The intent was that there should be fairness in the campaign so, to be very specific, for example, in the campaign in 1975 there would have been two leaflets going through the door and not three, to give a specific example.

Q37 Oliver Dowden: How reasonable do you think it is for the Government to claim that 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”?

Mr Straw: That is a matter for Government legal advice. If that is the heart of the anxiety then that seems to me to be a case for amending Section 125 to make it clear that what Ministers say in a Council of Ministers or in respect of normal EU business, which will have to go on in the 28 days of purdah, is unaffected by Section 125.

Q38 Chair: But presumably that is not what was intended?

Mr Straw: No, not for a second.

Q39 Chair: Presumably you took legal advice when you drafted the Bill and it was not intended to stop the normal course of politics. This Bill was constructed with the single currency referendum in mind, which presumably was of equally impressive import.

Mr Straw: That was certainly in my mind since I was not keen on the single currency then or now. Subsection (2) of Section 125 is quite widely drawn, it has to be accepted, and it says, “No material to which this section applies shall be published during the relevant period by any Minister of the Crown, Government department or local authority”. What is material is set out in Subsection (1). I can see that if Government lawyers are now worried about whether they would be constrained from being involved in the normal course of business and their officials, then that would be a case for amendment.

I would just make this point, Mr Chairman. The big difference between 1998/99, when these passages were being drafted, and today is that we are now in a much more litigious era and the courts are willing to entertain judicial review in the way they were not 15 or 16 years ago. Mr Dowden, I do not in any sense—I was about to use the word “blame” but that is wrong but I think Government legal advisers are doing their job if they are raising these concerns because you could easily end up in a situation where one side or another or groups on their behalf during the course of a referendum campaign could seek injunctions against a Government.

Q40 Oliver Dowden: Do you think the wider legal framework in which this sits has changed over the course of the past decade or so, so there may be a case for amendments to reflect the greater concern around potential litigation?

Mr Straw: Yes. There is an issue of principle whether the government machine is utilised in favour of one side or another in a referendum. That issue of principle I do not think has changed. It is a matter for the House of Commons. Views on that principle may have changed but we all know what purdah looks like and feels like if we have been in

Government. That has not changed. What has changed without any question is that we are a more litigious society and we have a senior judiciary much more willing to entertain applications for judicial review and to accede to them than they were 15 or 16 years ago. Government lawyers right up to the Attorney need to take that into account. This was not an issue, as I recall, on my desk 16 years ago when this was drafted. If it is now, then maybe one way through is to see sensible amendments by way of a saving to make it clear that nothing in the subsections above in any way constrains Ministers and officials from going about their normal business relating to the European Union.

Q41 Tom Tugenhat: Mr Straw, can you tell me what advice you had from the Cabinet Secretary of the day when you were drafting this?

Mr Straw: I cannot but as far as I recall I do not think I had any advice. I would have to check the record. I do not recall any advice coming to me from the Cabinet Secretary. This is a long time ago, bear in mind, and we had a lot of legislation going on. But my recollection is that I was basically left to my own devices on this. You had the concerns expressed in Opposition about the overall problem of party funding and referendum conduct. Then it went off to the Committee on Standards in Public Life, an independent body chaired by a very distinguished member of the House of Lords. It reported, chapter 12 said all these things about referenda, and that was then transported into what became the Act with some minor amendments.

Q42 Tom Tugenhat: You do not remember any specific civil service advice at a very senior level. Did your PUS consult with the Cabinet Secretary about it, by any chance?

Mr Straw: He may have done but I do not remember. There would have been an official level working group on this but there was not much argument about this in Government and nor was there much argument about it across the Chamber either, as the record shows.

Q43 Paul Flynn: Why do you think the Government wished to set aside Section 125? What would you think they intended to do in the run up to the referendum that they could not do if Section 125 is in place?

Mr Straw: Mr Flynn, I am not trying to be facetious but you need to ask the Government.

Q44 Paul Flynn: I am aware that Governments tend to behave the same way. It is just changing the script. If you were in Government, if you could put yourself into the invidious position?

Mr Straw: I say this without any provenance for what I say. My instinct is that this has come through cautious Government lawyers and senior officials, worried for the reasons Mr Dowden has raised about how this could impact on the day-to-day business of Government. I doubt, but I may be quite wrong about this, that it has initiated from senior Ministers saying, "How can we utilise the government machine in favour of a Yes campaign or a No campaign"?

Q45 Paul Flynn: There is a suspicion that the Government might want to intervene in the campaign in a way that has not been done in past years, and the evidence for that is the vow, the 2 million letters that Lord Owen just referred to that contained a party political mantra in there about the Government's economic plan, and other indications like the civil servants allowed to spray their opinions around in public in a way that was unprecedented. Do you think this is a question of them trying to set aside purdah and behave in an obviously party political way and that purdah no longer really exists?

Mr Straw: That is one way of looking at it. About that letter, that was obviously nothing to do with the referendum campaign, without any question it breached purdah rules and it probably breached normal rules of public spending as well. It was a party political flyer sent to 2 million households and it was wrong for the Government to do it.

Putting that aside, there is always a temptation on Ministers of any party to want to utilise the government machine to the best possible way, and if you have a majority I do not see any objection in principle to that. On the other hand, the civil service machine is there to serve the public as well as the Government of the day and has to abide by very clear principles of balance and impartiality. That is the difficulty if part of the machine is permitted to take part in referendum campaigns. That problem emerged in the 1975 campaign.

Q46 Paul Flynn: We are thinking with great interest in Wales in your suggestion that the government machinery in the shape of Ron Davies and his civil service presumably had an improper influence on the result or behaved improperly. Is that what you are suggesting here? We know it is a controversial result and it was a tiny result. As you said, the majority was 7,000. But are you seriously suggesting that there was something improper that took place in the run-up to the referendum?

Mr Straw: There was nothing improper—I do not think that was the word I have used—about what happened at the time because it was obviously self-evidently lawful within the regulations at the time, or certainly they went unchallenged. I simply, Mr Flynn, felt uneasy about the way the government machine was being used in Wales in what was, as you know, a highly contested referendum, and I remain uneasy. If you wanted me to give you chapter and verse about why I would have to come back to this Committee but I think it was quite well known. It is also reflected in some of the evidence recited by the Neill Committee on paragraph 12.41.

Q47 Kelvin Hopkins: I was in the No campaign in 1975 and I remember the vast resources the Yes campaign had compared with the puny No campaign and the Government clearly was not worried in the end about losing. Are we just not in a different situation because the Government is a bit more nervous about the No vote possibly winning? The world had changed. The events of the last week have hardly encouraged Yes voters, I would think, and the Government is much more nervous and they are going to try to stitch things up as far as possible, getting rid of the purdah period among them.

Mr Straw: You will have to ask Ministers and officials precisely for the provenance of this clause in the latest Bill to deactivate 125. Going back a year from the 1975 referendum there was a lot of nervousness around then and the opinion polls back then suggested the likelihood of a more even result. In the event, as you know, it was two to one, basically because the Yes campaign had the better arguments. The No campaign was irredeemably

split between dissenting Ministers like Tony Benn, Peter Shore, Barbara Castle, for whom I was working, on the one side, Enoch Powell there, and then further to the right the Monday Club. Going to the meetings of the No campaign was an extraordinary experience. Whereas the Yes campaign had all the senior leaders of all three political parties and they were agreed about this, the No campaign was only agreed about what they were against, not what they favoured. Then they had business support, quite a lot of trade unionists were supporters, you remember, were supporting the Yes campaign, and all the newspapers including papers like *The Daily Mail*, *The Sun*, *The Daily Telegraph*.

Q48 Kelvin Hopkins: Except *The Morning Star*.

Mr Straw: Except *The Morning Star*. Only *The Morning Star*.

Q49 Ronnie Cowan: You have previously mentioned amending Section 125. What would an alternative clear mechanism to 125 look like and how could it be enforced?

Mr Straw: How could you amend it?

Q50 Ronnie Cowan: How could you amend it to be clearer and how could that be enforced?

Mr Straw: You enforce any section of an Act ultimately by going to the courts. If the concern of Government was specifically and discretely on this question of being able to pursue normal EU business in the Council of Ministers in terms of advice to that and what was said, you could simply have a saving to that effect. You simply add a further subsection and would say, "Nothing in this section or in this Act, however, prevents Ministers and officials from taking part in normal EU business". It is a matter for parliamentary counsel to say that, to draft it, but that is how you do it. It is easily enough done.

The other thing about sections like this is that it would be rare for them to be a subject of court action and hopefully it would be rather inappropriate in a way. But they are there to set a norm of behaviour. That is the important thing, and it is for this Parliament to decide whether it wants the Government to be fully and actively involved in a referendum as it was in 1975 or whether it wants it to step back a bit. That is the issue and that is the choice.

Q51 Mr Turner: Can you give me an example of what things cannot be postponed for 28 days in the eyes of the euro organisers?

Mr Straw: What cannot be postponed in the European Council? Plenty, actually. I have to try and think but if there is an item on the agenda of, say, the Justice and Home Affairs Committee or the General and External Affairs Committee, the two I was most familiar with, that was coming up and you wanted to block it or pursue it. To take one example, sanctions against Zimbabwe where we were in the lead, if that was coming up it was confirmed and the sections were time-limited and the time limit had been set a year or so before. Then if it was on the agenda and you wanted those sanctions to continue, as for example we did—

Q52 Mr Turner: But you know well in advance.

Mr Straw: You may well know well in advance but if the meeting is plumb in the middle of a referendum campaign you have to deal with it. There are plenty of other examples.

Q53 Chair: You say we live in a more litigious society but how serious a threat is it a Government carrying out some perfectly reasonable bit of Government business and talking about it in dispassionate and objective terms, not in a way designed to persuade people one way or the other in the referendum? How seriously would a judge entertain an injunction or a judicial review, an emergency judicial review, under such circumstances? What effect would it have after it had been said anyway?

Mr Straw: I have to say, without naming names, much depends who is on the bench but I could certainly envisage circumstances in which an application for a judicial review was entertained. It is a discretionary order so you have to apply for permission.

Q54 Chair: But if it has been said anyway what can be done about it?

Mr Straw: Not much is the answer, but in the course of a referendum campaign if somebody was successful in obtaining permission to pursue an application for a judicial review that could be quite an issue in the campaign. I think most members of the senior judiciary would say, "Hang on a second, this is for the politicians, not for us". But you never know.

Q55 Chair: We have taken an opinion from Speaker's counsel and we will be publishing this, where he suggests the reasons advanced for the complete disapplication of Section 125, "Suggest the section is being read more restrictively of the ability to report EU business than is really justified in the true construction of the terms." Would you have any reason to doubt that?

Mr Straw: Only to say that if there was any single opinion on the interpretation of statutes lawyers would be out of business.

Q56 Chair: There is the alternative problem that making it more difficult to apply restrictions on what the Government does, particularly in view of the previous record of Governments during referendums, could render the whole purdah restrictions toothless. How much of a risk is that?

Mr Straw: Sorry, I do not quite follow that.

Q57 Chair: If it becomes very difficult to enforce purdah provisions against unreasonable Government action during a referendum then whatever purdah provisions you have will be toothless and not worth the paper they are written on.

Mr Straw: I think you have to work on the basis that if there is a particular provision agreed by Parliament, either very recently or back in 2000 not amended, the Government will abide by that. We do live in a—

Q58 Chair: During the North East referendum, halfway through the purdah period the Deputy Prime Minister went up to the North East and announced the proposed assemblies would have more powers than was originally proposed in the White Paper on which the referendum was being conducted. When North East Says No wrote to the Cabinet Secretary and asked, “What are you going to do about this breach of purdah?” the answer came back, “That is a matter for Ministers”. So, in some respects this is already toothless.

Mr Straw: I am trying to remember the date of that.

Q59 Chair: 2004. Perhaps it needs more teeth, not less teeth.

Mr Straw: That is a matter for you and your colleagues. I am simply offering you views about the background of 125.

Q60 Chair: But is not the lesson of that experience is that if you are relying on the intervention of the Cabinet Secretary to protect purdah you are in a very dangerous situation?

Mr Straw: I do not think so. Provisions like this and, indeed, the whole purdah rules, set broad parameters for how the Government and Ministers should operate and on the whole they work better than in many other countries.

Q61 Chair: Just one last question before I come to Mr Jones, would it be sensible for perhaps the Electoral Commission to have some adjudicatory role in deciding whether the Government should be allowed to do something on an ongoing basis or would that be asking too much of the Electoral Commission?

Mr Straw: I think it would asking too much of the Electoral Commission if they had a prospective role.

Q62 Mr Jones: Isn't the lack of a sanction an inherent problem with Section 125? Were you never tempted, for example, in formulating that section to include a sanction such as, for example, in the event of a serious breach of purdah a court would declare that the referendum that follows it was a nullity and would have to be re-run, which would be significantly embarrassing to the Government?

Mr Straw: That certainly would be embarrassing. There is not no sanction. If there is a provision in an Act of Parliament then ultimately you can go to the courts to enforce it and by the sound of it what Mr Lidington is saying arises because of the anxiety of presumably Foreign Office lawyers about how this section could impact on the normal course of Government business. So, it is obviously, from the point of view of Government lawyers and a Minister like Mr Lidington, it does have force and effect, as it should.

Chair: Thank you very much indeed. It was very informative to hear all that background. Thank you very much indeed.

Mr Straw: Thank you.

Examination of Witnesses

Witnesses: **Rt Hon Peter Riddell**, Director, Institute for Government, and **Professor Robert Hazell**, Director of the Constitution Unit, University College London, gave evidence.

Q63 Chair: I should go through the usual procedure of asking you to identify yourselves for the record, please.

Peter Riddell: I am Peter Riddell. I am Director of the Institute of Government.

Professor Hazell: Robert Hazell and I am Director of the Constitution Unit, University College.

Q64 Chair: It is very nice to have two of our regulars. How effective has PPERA been in providing for fairer referendums than before and, in particular, how important has the purdah provision been in that legislation?

Peter Riddell: I think there are several elements to it. One is Section 125 and I heard, as you did, the background explained and I discovered when I looked at the original report I had given evidence to the Neill Committee at the time and that we can take as there. But that is only one element of it that controls the campaigns. Quite separately there is the Prime Minister's guidance to Ministers and then the Cabinet Secretary or Head of Civil Service guidance to civil servants. There was a slight confusion before. They are separate. The Cabinet Secretary cannot police Ministers it can only police civil servants so all these are interlocked. There has been purdah in relation to the behaviour of civil servants way before the 2000 Act covering elections and so on and so forth, so I think there are various elements to that.

On the whole since the 2000 Act in the limited experience we have had with referendums it has been pretty good. Even in the testing circumstances of Scotland it worked pretty well and from my observations certainly of the civil service element, certainly during the campaign—I know there was a report you did on what happened before the campaign—but during the campaign it was observed pretty well.

Professor Hazell: I would only add this in terms of the background. Forgive me, I did not hear all of Lord Owen's evidence so I do not know all of what he said about the 1975 referendum, but I hope the Committee does not have the impression that the conduct of that referendum was chaotic or seriously unfair. The real worry, I think, looking back at that referendum, is that it was in effect won by the Cabinet Office by a Referendum Unit led by Sir Patrick Nairne. Patrick Nairne in effect made up the rules for the 1975 referendum and that did lead subsequently to concern if there were future referendums, whether it was right that they should be run in effect by a Government department.

Twenty years later in 1995 we established an independent commission on the conduct of referendums chaired by Sir Patrick Nairne that produced a report. It was an all-party report. The Conservative member was John Whittingdale and that helped to lay some of the ground for the Neill Committee report that then laid the ground for PPERA 2000.

Q65 Chair: How much did the decision to extend the purdah period in two of the recent referendums under the PPERA, the North East referendum and the Welsh 2011 referendum, benefit the fairness of those referendums?

Peter Riddell: It is an interesting point because looking up 1975 the legislation was passed just before the referendum was held because it was done after the negotiations. The more recent experience, and clearly it will not apply this time, is there is a long period between the passing of legislation and the referendum being held. There are virtues in a relatively long period. The question is what do we count as the period for restriction on civil service action? I think it is a very difficult question, whether you have a full six weeks or you limit it to 28 or 35 days. That is a hard judgment call to say when the restrictions apply either on Government publicity in the broader sense of the term, the Section 125, and on the rules affecting the behaviour of Ministers and so on. Then again presumably in periods when the House will not be sitting, there are some very difficult issues involved in that. On the whole I am inclined to think around a month or five weeks is a reasonable period.

Q66 Chair: So many people vote by post now and the 2004 North East referendum was a postal referendum so it was decided to extend the purdah period to reflect when the ballot papers went out rather than when they were counted, which seems reasonable and would be a reasonable test in any country.

Peter Riddell: Indeed in some countries their referendums are purely by post. Some of the ones in New Zealand are, for example.

Q67 Chair: But if 25% or 30% of people are voting by post shouldn't the purdah period start 28 days before the postal ballots go out?

Professor Hazell: I cannot get quite so worked up about the need for strict rules of purdah in relation to referendums by comparison with general elections. I think it is really important for elections that there are well understood rules about purdah because it is very important that the government machine is not drawn in at election time to what is essentially a party political conflict. But, as you heard from your previous witnesses, in a referendum the Government is not itself necessarily neutral and the Government should be allowed clearly to state its view, if it has a view, and should be allowed to publish the evidence on which it bases that view. We saw both Governments doing that during the Scottish independence referendum. For me it is slightly artificial then to have a kind of lock-down in the last 28 days and Section 125 is drafted too restrictively and I understand the concerns of the Foreign Office lawyers, if they are now the source, suggesting it should not be applied.

Peter Riddell: I do not agree with Robert on that. I think there has to be a period when the government machine qua Government is not involved, which is behind 125, with whatever

qualification one gets into on normal EU and other business. Obviously there are drafting issues there, and I think up to the period when the referendum period begins, however defined, the Government is—I agree with Robert to that—perfectly entitled, because it is not neutral, to use civil service sources. That is absolutely right. But I do think, as occurred during the Scottish referendum as the most recent example, during the defined period government resources should not be used. That does not stop Ministers themselves being extremely vigorous participants in their role as politicians. They are perfectly entitled to do that. The Neill Committee used a quite interesting phrase, “We believe it is perfectly appropriate for the Government of the day to state its views, for members of the Government to campaign vigorously during referendum campaigns, just as they do during general election campaigns. We also believe that just as in general election campaigns neither taxpayers’ money nor the permanent government machine—civil servants, official cars, the Government Information Service, and so forth—should be used to promote the interests of the Government side of the argument.” That is a slightly different role during that period but as politicians they are going to participate so I would defend 125, with no doubt some amendments that David Lidington has been talking about, and that have to be clarified in the future.

Q68 Chair: Can I just press Professor Hazell? Is it because referendums are somehow less important than referendums that you think it does not matter if the government machinery is used to promote one side of the case during the purdah period?

Professor Hazell: Let me clarify what I said because perhaps I said it too concisely. I think the real dilemma is the source of information for the public and the report of the independent commission that we set up, and to some extent the PPERA and Section 125, is predicated on the Electoral Commission being the primary source of information for the voting public. If you look at Section 125(3)(b) it excludes from the ban anything done by or on behalf of the Electoral Commission. Similarly, our report envisaged that the Electoral Commission would be the primary source of information.

Since the Electoral Commission clearly does not play that role there is a real question where the public should get information from. In 1975 it worked perfectly well that the Foreign Office set up an information unit—at its peak it was staffed by 15 people—who responded to requests for information. The crux perhaps comes on whether anyone in Government should be proactively putting out information, and there I do agree with Peter Riddell, it is up to Ministers then to campaign and to make the arguments. I do not think the government machine in the last weeks of the purdah period should be proactively publishing anything. But I think Section 125 is too tight and, just on that point, the tightest bit is Subsection (1)(b) which says the Government cannot publish any material that, “deals with any of the issues raised by any question on which such a referendum is being held”. If you take that literally the Foreign Secretary could not answer PQs about anything to do with the European Union because he would be dealing with issues raised by some of the questions on which the referendum is being held.

Q69 Chair: Except that anything in Parliament is immune due to Article 9. But I take the point you are making. There is a case for clarification, in your view, that the Foreign Secretary must be allowed to carry on the normal course of government and that means

issuing press notices about things that are happening and the Government's view on them, so long as they are not designed to persuade or influence the outcome of the referendum. Would that be a reasonable interpretation of what you are saying?

Professor Hazell: Yes.

Peter Riddell: In practice during general elections it works pretty well but external events happen. I heard what Mr Turner asked earlier that external events are going on and the British Government has to respond, for example, during the recent general election what was happening with the migrants from Libya to Italy. The Foreign Secretary was involved in that issue. That might well occur during a referendum and the Government has to have a view. There are questions of how it is presented naturally because external events do not stop for the convenience of a British referendum.

Chair: Moving on, thank you.

Q70 Tom Tugendhat: Is there a way in which the Section 125 could therefore be underpinned better by a more general code of conduct for referendums? There seems to be some division between your positions there.

Professor Hazell: There is a code of conduct that applies to the civil service generally, the civil service code of conduct, which requires them to be impartial, and so on. I think that is probably sufficient.

Peter Riddell: It would probably be desirable to have—and the proposal is to waive 125 just for the purposes of the referendum—we will see what comes up in the report stage, but it is probably desirable to have something quite specific if it is just for this Bill. As I said earlier in my remarks, quite separately, there is guidance for the Ministers and for the civil servants during the conduct of elections and referendums; that is guidance that is non-statutory and that clearly would have to be clarified by the Prime Minister for Ministers, of the Cabinet Secretary for civil servants, whatever is on the face of the Bill. You have to separate out the groups. On the problems of the purdah discussion it is blended several strands together.

Q71 Ronnie Cowan: On the point there on the impartiality of the civil service, you seemed to say there is already a code of conduct there that says, “This civil service will be impartial” but we heard earlier on Lord Owen quite clearly say that they were not and they were questionable during the Scottish referendum.

Professor Hazell: For myself I was not greatly troubled during the Scottish independence referendum, either by the Scottish Government's White Paper, of which I know this Committee in a previous report was highly critical, nor by the publication of Sir Nicholas Macpherson's advice.

Q72 Ronnie Cowan: So you disagree with Lord Owen on that point then?

Professor Hazell: I do.

Peter Riddell: The key distinction there is in the run-up period the civil servants both in Edinburgh serving the Scottish Government and in London serving the UK Government were doing their duty. The key thing is what happened during the designated period and there was clear guidance, I have it here, to civil servants working for the Scottish Government as well as civil servants working for the UK Government about what they should and should not do. Certainly from my observation, and I saw it quite clearly at this end in London, they observed that very clearly during the referendum period.

Q73 Mr Jones: David Lidington has expressed concern that Section 125 creates, as he puts it, a very wide-ranging ban on everyday government activity during a referendum campaign and you, Professor Hazell, have acknowledged that you understand the concerns of Foreign Office lawyers in this regard. Could you give me examples of what legitimate or everyday activities by Government could be restricted during the referendum period by Section 125 as it stands?

Professor Hazell: We have heard examples—Peter Riddell has just given one—about the boat people in the Mediterranean and any statements about that. Forgive me for repeating it, but I do encourage you to read Section 125 and, in particular, to read Section 125(1)(b), which prohibits the publication of any information dealing with any of the issues raised by any question on which such a referendum is being held.

Peter Riddell: Could I add to what Professor Hazell has said? Reference back to what Jack Straw was giving evidence to you on. We do live in more litigious times and the problem is that this is a referendum where there is going to be hypersensitivity on both sides on the issue of fairness. The key thing is people regard the referendum and its conduct as fair and legitimate and there is not a bias in the system. So everyone is going to be watching out for everything, so a degree of clarity about what is permissible. I do not think it is hard to define. It is that necessary business that has to be conducted in that period, which is exactly what happens in a general election period. In a sense Government does stop in a much greater extent during a general election but there still has to be business, given the example I gave.

There are a number of other examples during a general election that does not cause controversy where a British Government has to take a view and has to respond. Also, because it is a UK-wide referendum, that makes it slightly easier. In the Scottish referendum there was an additional complication, and I went and talked to the civil service about it, that there might be actions not narrowly in relation to the Scottish referendum that had implications to Scotland. They were being cautioned, the Ministers were cautioned, “If you are making an announcement that has a particularly Scottish relevance” say something to do with defence, which might affect a base closure or something like that, “hold it off until after the referendum”, because even though it was not narrowly within the scope it was more broadly. I think you can produce definitions of what necessary Government business that has to be conducted in the period.

Q74 Mr Jones: Is it not the case though that the mischief that Section 125 was aimed at is the use by Government of its resources improperly to influence the outcome of a referendum? That is essentially why it was created in the first place.

Peter Riddell: That is the mischief, yes.

Professor Hazell: We can get possibly overly concerned about trying to draft a very tight set of guidelines when—and I hope I am not being naive or over-optimistic about this—to some extent this has to be policed not by legal means, drawing in the courts, but by political means in which every Government action and statement will be keenly watched by critics and perhaps it is a bit easier in a referendum where the governing party may not be of one view about the referendum outcome and so there will be people looking very closely over the Government's shoulder.

Q75 Mr Jones: The remedy for an infringement of Section 125, if indeed it is a remedy, would appear to be an action for judicial review.

Professor Hazell: Can I mention one possible alternative remedy? I am not recommending this but during the earlier discussion it did occur to me, because if it is the conduct of officials that is being called into question a Permanent Secretary, if he is being asked by his Secretary of State to do something that he regards as improper, is entitled to seek a Ministerial Direction that, you will all know, is a kind of red flag that is normally immediately published. That could be an alternative to people going to the courts.

Q76 Mr Jones: But in the case of an action by a Minister, for example, it would surely only be a judicial review that would be an appropriate way forward. Is it the case that a judge would regard, for example, taking action over the boat people in the Mediterranean, as being something that is potentially an infringement of Section 125? Surely what the courts would be more concerned about would be the Government deploying its information resources in what would appear to be an attempt to influence the outcome of a referendum.

Professor Hazell: I think the courts would be very leery of getting drawn into litigation of that kind so to that extent, although I agree with Jack Straw's general proposition that there has been more judicial review and more willingness on the part of the courts to entertain judicial actions against other actions of Government, I would be very surprised if the courts were tempted to hear such a case.

Peter Riddell: It is quite clear the senior judiciary are very wary of crossing over the boundaries into what is political for that reason. You would have to be clearly in the section defined, Mr Jones, a narrow abuse in terms of spending money or something like that. There is, as Professor Hazell said rightly, the incentive to a Ministerial Direction.

The other thing I would say is a broader point, which is that if people regard the referendum as somehow illegitimate that would be such a severe political blow if people just cried foul and with substance, and it was widely believed, that is a discipline itself.

Q77 Mr Jones: How reasonable is it for the Government to claim that Section 125, and I am quoting, "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"? Is that reasonable concern?

Professor Hazell: I am sorry I have nothing to add to my earlier answer. I would encourage yourself to read Section 125(1)(b) and draw your own conclusion.

Peter Riddell: Lawyers will disagree on that point. I am happy to say I am not a lawyer, unlike Professor Hazell, but at the root of this is clearly an interpretation by the lawyers behind drafting the Bill; that wording stands in a way it does. There is a lot of comment for it being clarified.

Q78 Chair: On Section 125(1)(b) the Speaker's Counsel says, "It is again far from obvious why reporting by Ministers' day-to-day business with the EU amounts to supplying information which 'deals with' the referendum question." He points out that it is in fact qualified by Section 125(3)(d), which makes provision for the exempt press notices. He makes it clear that unless Ministers are seeking to comment in such a way as to show a cause for a yes or a no vote he does not think this would fall foul of the provision. I appreciate the Government is making one case but there is another side of the argument. Anything to add?

Peter Riddell: No.

Q79 Kelvin Hopkins: Surely the Government could simply make sure that they did not indulge in any mischief at all during the 28 days and there would be no suggestion of litigation then. Is not the suspicion really that the Government wants to use that 28 days to campaign and therefore they want purdah out of the way?

Peter Riddell: No, I do not think so. I am inclined to take the view this is an overly cautious interpretation by the lawyers. I do not think mischief lies behind it at all, Mr Hopkins. On that, clearly the lawyers, as we have just been discussing, will disagree. I do not see anything sinister behind it at all.

Q80 Mr Turner: What is your view of David Lidington's contention that Section 125 would be unworkable?

Peter Riddell: We are going round in circles a bit. It is dependent on the advice he is getting and you need to ask him and his advisers on that. Views differ. As we have been indicating in our evidence, there may well be a case for clarification of it.

Q81 Mr Turner: The problem is why is it that from the point of the people like me, who are for the anti-part party to this, feel it is always the same, the euro with the views of the Foreign Office defend while we normal people think it is barmy?

Peter Riddell: That is a political judgment. It is for you to say and it is on the record now, Mr Turner.

Q82 Ronnie Cowan: We are going round in circles here because we are looking at Section 125 and the question still remains: can Section 125 be written in such a manner as it will not constrain Government Ministers in doing their job?

Professor Hazell: Yes, clearly it could be redrafted and, in particular, Subsection (1)(b) could be modified or it could be glossed by guidance.

Peter Riddell: Now you have the Bill in front of you, doing it on the face of the Bill given where we are with the drafting of the Bill, and clearly it is up to the Government to produce its amendment by the autumn. It is probably desirable to do that, but as I said before, as important in practice is the quite separate guidance to be given by the Prime Minister to Ministers and the Cabinet Secretary to civil servants, which is as important as any amendment when you get to report stage.

Could I introduce one element that was not conceived of when the Neill Committee was reporting, which is social media? There is an issue here where I think guidance will have to be clarified. It is all this tweeting issue and the ambiguity about whether it is a Government tweet or the individual Minister's tweet. We are in danger of getting a little obsessive about these points but that is something that otherwise you have a kind of phony or real row during the referendum campaign, and that is something that clearly needs to be addressed by the Prime Minister on the status of tweeting by Ministers. I noticed during the election a lot of Ministers were quite actively tweeting and I was never quite sure whether it was the account they normally use in peace time or whether it is a political account.

Chair: Given the purpose of a free good it might not be covered by it anyway. Are you finished, Ronnie?

Ronnie Cowan: Yes.

Q83 Chair: Just finally on the civil service code and impartiality, does the present code of conduct guarantee civil service impartiality during the purdah period of a referendum?

Peter Riddell: Nothing guarantees anything in life because civil servants do not operate alone. But it is pretty good. The evidence is that civil servants do want to observe the necessary impartiality during periods, and I use the phrase "heightened sensitivity", which applies both to elections and referendums, that they absolutely work strongly for the Government of the day during and up until the beginning of the referendum period. The current guidance is pretty good on such things. If you look at the guidance on Scotland during the referendum period it was very clear, and it seems to work during the referendum period pretty well.

Q84 Chair: There is very specific mention of political parties and elections in the civil service code, there is no reference to referendums. We made a recommendation in our report at the end of last term suggesting, just for the sake of clarity, that what applies to political parties in elections should also apply to Yes and No campaigns and referendums.

Peter Riddell: There was specific guidance, and I have it in front of me, "Scottish referendum guidance for UK civil servants and their role and conduct" which was put out last year and applied from 22 August last year, which goes through, "not to undertake any activity which could call into question their political impartiality and ensure that public resources are not used for party political purposes" and then explaining how that applies

within a referendum. So there was specific guidance given then that was very clear on what can happen both before and after the formal referendum starts, in line with the code.

Professor Hazell: I would only add that I do not think your proposed new paragraph that was appended to your report about the Scottish independence referendum is necessary as an addition to the civil service code.

Chair: That is my last question. Any other questions?

Q85 Paul Flynn: The alternative vote referendum seemed to spin, as far as the information that I had as a voter is concerned, to an advert on Vauxhall Bridge that said if alternative votes came in more babies would die in hospitals and more of our soldiers would die in Afghanistan because alternative votes would cost money and therefore the Government would take money from those two sensitive sources. On the other hand, those in favour of the alternative vote were arguing that it would be beneficial to take power from crooked MPs. When we had a debate that was on such a base level, and we heard about the untruths and the things that were hidden in the 1975 referendum. Is there a case to say that we take it out of the hands of both sides, the propaganda that is issued, because it cannot be trusted to make a case for an improvement in the democratic process of what the referendum should be about and we had somebody who would give objective evidence on what the issues are and presented, rather than allow it to go to those on both sides that cannot be presented with a fair case? I think the AV referendum was a complete farce because the majority of people who voted had no idea what was on offer.

Peter Riddell: That, if I may say, is a rather anti-democratic view, Mr Flynn.

Paul Flynn: I am very flattered.

Peter Riddell: Indeed. I think you should allow certain flowers to bloom even if they are under the umbrella of two organisations. You have to allow a wide spectrum and it is up to the campaigns how they argue it.

The other thing I would say is plenty of other people can comment and one of the features of the current elections, if you notice for example in the general election, animal bodies, students of political studies, were commenting on the strengths or otherwise of comments made by politicians. You would find the people who are making outrageous statements and are not supported by the evidence, there are plenty of organisations that will correct them. I think that is the only way that can happen. Parties, groups will say what they want to say but we live in a pluralistic society where people can comment.

Q86 Paul Flynn: We just like the hell of being informed by, say, *The Daily Mirror* and *The Daily Mail* only and not having a BBC, how would we know what to think?

Professor Hazell: Can I just add, Mr Flynn, that in effect you may be advocating the model of a stronger Electoral Commission and if you want to look at an existing model look at New Zealand where the Electoral Commission is charged with being the body primarily responsible for producing public information leaflets for the yes and for the no side and it also has the power to make public statements that campaigners have themselves made statements that are false or misleading? So it is a kind of lie detector as well. I am

not advocating that our Electoral Commission should operate in such a strong way but if you want to look for a model of what I think you are suggesting look to New Zealand.

Q87 Kelvin Hopkins: Just following the chairman's final point about civil service impartiality. Clearly Professor Hazell takes a very different view from ourselves about the letter from Sir Nicholas Macpherson. We were very exercised about that and thought it was a breach of impartiality and would set a dangerous precedent for the future. You were very relaxed about that. I just wonder if that was because you would prefer a more politicised civil service, a more overtly political civil service, or just that particular instance you were relaxed about it?

Professor Hazell: I do not know the background circumstances to the publication of that letter. I can only assume that it was published with the full authorisation of the Chancellor of the Exchequer and possibly at the wishes of the Chancellor. It is wrong to say that all civil service advice is exempt from publication. It is analogous to legal professional privilege, and remember that the privilege belongs to the client, not to the lawyer, and it is open to any client to publish legal advice that he has received.

Let us take a slightly different example but from the same campaign, when Alex Salmond was claiming, if I remember right, that he had had legal advice reassuring him that an independent Scotland could remain within the European Union and he was challenged about that, and I think it emerged that perhaps there was no such advice. But suppose that he had had legal advice to that effect, I would say it would be perfectly open to Mr Salmond to have published that legal advice. It is open to any Minister to publish the advice they receive from their officials if they want to do so. It will be a very rare circumstance because generally such advice is regarded as confidential, but if Ministers want to publish advice they sometimes do and we know that they have published legal advice in the run-up to military action.

Q88 Kelvin Hopkins: Legal advice is one thing. Lawyers and legal advice can be public but that civil service advice, even if the Chancellor had used exactly the same words as Sir Nicholas in the Commons and said "on advice", even if he had used that word, that would have been legitimate, but for the Permanent Secretary to say those words on his own behalf is that not very different from the Chancellor saying, "On advice this is what we are saying"?

Professor Hazell: I again do not know the detail of the circumstances that led to the publication of that advice but I was not as shocked by it as some others were.

Q89 Oliver Dowden: Finally, we may have dealt with this, but if Section 125 of PPERA is disapplied during the EU referendum would the civil service code of conduct need to be amended and how do you think it would need to be amended?

Peter Riddell: No, it is separate. There have been ministerial and civil service guidance on conduct during elections, because we did not have referendums until 1975, way before PPERA. My colleague, Dr Catherine Haddon, who has done a blog on this and is preparing some written evidence for the Institute for Government and I was discussing it yesterday, and went back to some of the advice of the civil service guidance in the 1979 election, a long time before PPERA, and that was very clear. So if the current Bill carried

on, the disapplication was there, you might well have to strengthen the advice because there would not be atmosphere but it is entirely separate from statutory advice.

Q90 Oliver Dowden: What do you think PPERA then adds vis-à-vis the conduct of civil servants to what is already in place then with the existing code of conduct?

Peter Riddell: What it does is, in a sense, because of what had happened, and as we have heard from Lord Owen and Jack Straw, because of the controversies in 1975, and particularly the Welsh referendum in 1997, that it acted as a further reinforcement and a reassurance of proper conduct. If you look at the whole chapter, chapter 12 of the Neill Committee report, it was a sense of the worries of unfairness. It ensures in a demonstration of that, that it is much better to have clear guidance than not.

Chair: Thank you very much indeed to you both. We are very grateful to you. It has been very informative and we have a broader picture of the issues. Thank you very much.