



Public Administration and Constitutional Affairs Committee

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

Thursday 16 July 2015

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

Questions 91 – 220

Examination of Witness

Witness: **Lord Bew**, Chair, Committee on Standards in Public Life, gave evidence.

Chair: May I welcome our first witness today on this session on the EU Referendum Bill? I wonder if you could identify yourself for the record, please.

Lord Bew: I am Lord Bew and I am the chair of the Committee on Standards in Public Life.

Q91 Chair: First of all, can I ask for your overall reaction to the EU Referendum Bill as tabled, which removes section 125 on purdah from the Political Parties, Elections and Referendums Act from applying in this referendum?

Lord Bew: Well, with your permission, Mr Chairman, I would like to make an opening brief statement stating the classic position of the committee as a whole. I know later on we will move on to discussion of recent amendments. I am very grateful for the invitation to speak to you today to discuss this particular issue of the proposal in the EU Referendum Bill to disapply section 125 of the Political Parties, Elections and Referendums Act 2000.

The Act gave effect to the recommendation of our committee in the report of our committee under Lord Neill in October 1998 on the funding of political parties. That report made a number of recommendations concerning the conduct of referendums, and the committee under the chairmanship of Lord Neill drew on the experience of the 1975

European Communities referendum and more recent referendums, including that of the Good Friday Agreement. Both written and oral evidence to the committee stressed the importance of fairness and consistency, and the committee did recommend a new regulatory framework with the aim of ensuring that both sides in a campaign period had an adequate and fair opportunity to put their views to the public. The committee specifically considered the role of Government in a referendum and acknowledged that the Government of the day would have a particular view of the outcome but considered neither taxpayers' money nor Government machinery should be used to promote the interests of the Government's side of the argument. The committee concluded, and I want to quote from the conclusion, "We believe that it is extraordinarily difficult, if not impossible, for the Government of the day to offer purely objective and factual information in the course of a referendum campaign, especially when, as will usually be the case, it is itself a party to the campaign". The committee's recommendation 89 stated, "The Government of the day in future referendums should, as a Government, remain neutral and should not distribute at public expense literature, even purportedly 'factual' literature, setting out or otherwise promoting its case". Section 125 was the Government response to that recommendation that prohibits the Government of the day, in the form it now exists at any rate, or local authority or other public-funded body from publishing promotional material in relation to a referendum in the 28 days prior to the poll.

Q92 Chair: Can I pick you up on one point? You say publishing promotional material but you also referred to the machinery of Government. The Government have already said that they are not going to publish material during the purdah period. The concern is about the use of the Government's machinery and so much of this discussion seems to be directed at the publication of leaflets or emails or buying advertising.

Lord Bew: Yes, I know.

Q93 Oliver Dowden: May I just ask did your report address that wider question or is it more narrow than promotional material?

Lord Bew: The point is this, isn't it? Section 125 is distinct but complementary to other conventions and guidance that govern the role of Ministers and civil servants and conduct during election campaigns. It is complementary to other guidance. That is the crucial point and we do have a concern about impartiality and objectivity, for example, of civil servants, which will no doubt come up in discussion. Our view is that it has worked, largely speaking. Our view, if I can put this very briefly, is that it is fundamentally important that the dice is not perceived to be loaded in favour of any one side and outcomes have general legitimacy, and I would like to come back to that point.

Could I make just one other point about purdah before concluding? That is that the issue has come up also with respect to elections that will be held probably before—well, definitely before—any European referendum. That is the police and crime commissioners. When we published our recent report on police and crime commissioners and accountability on policing, which we published in the last fortnight, again it became clear

that the issue of purdah is a sensitive issue with respect to those elections as well. But I know you want to talk about Europe today.

Q94 Paul Flynn: Good morning. The Committee on Standards in Public Life, your role, you have explained some of it here. If you saw the evidence of last week by David Owen, he referred to a unique form of propaganda, in his view, something that has not occurred before, where nearly 2 million letters were sent out to businessmen allegedly talking about a tax exemption but actually including a Conservative Party mantra, slogan, that all Conservative MPs have to repeat about once every third sentence. That was actually in the letter and what was claimed to be a piece of Government information was a piece of crude party propaganda. Is that something you would like to—they might well do the same again.

Chair: Just to make it clear, David Owen's point was more about the timing of the letter rather than the content.

Paul Flynn: Indeed, yes, but the fact that there is a Tory party slogan in the letter is very odd for a Government letter to be in, but that was the point, and because it was a very short time before the European elections.

Lord Bew: Sorry, for which election?

Paul Flynn: The European elections, yes.

Lord Bew: Yes. The point of my committee when it came in on Lord Nolan's committee, as it then was, in 1998 was to take a view that there was chaos in this field and there was a need for regulation and a clear line to emerge. We take the view that, broadly speaking, we have articulated a clear line. It is embodied in section 125. We also take the view that there are concerns that the committee has generally about the impartiality and objectivity of the civil service and we are anxious to protect that inasmuch as we can. We do take the view that section 125 in principle was the answer to a series of messy problems, that by and large since then we have had a reasonable degree of perceived fairness in referendums. That is our broad view. I know there are controversial points and I have heard other evidence given to you about certain things that happened in the case of Scotland and so on, but by and large these are our concerns and by and large it—

Q95 Chair: On the principle of Mr Flynn's question, is it right that a Prime Minister should personally top and tail a letter to 2 million businessmen and women that goes out during the purdah period explaining a tax change that is advantageous to business, ie is popular? Is that the kind of communication that should go out during a purdah period?

Lord Bew: It is clearly not within the ethos of 125, which the committee endorses. If I could say one thing about this, the reason why I was anxious to make that opening statement is I was able—because I knew that this issue was coming up—to discuss it at our last committee meeting and it represents a view of the committee as a whole about 125. I was anxious to put that on record. In fact, there are other points and new clauses and so on that the committee has not had an opportunity to discuss. It is only fair to my members to say that.

Q96 Oliver Dowden: Just a small point of factual clarification: have you actually seen the letter that we are discussing?

Lord Bew: I know about Lord Owen's evidence.

Oliver Dowden: I wonder whether it might be helpful for you to see the letter.

Lord Bew: Yes, I agree. On the face of it, it does not fit with the logic of what our committee has been arguing for.

Q97 Paul Flynn: If you see the letter you will also see the response from Jeremy Heywood that says, "To the best of my knowledge, this is"—and this word is underlined—"the first time a Prime Minister has decided to communicate directly with taxpayers in this way". Now, what we find frustrating on this Committee, we would reach conclusions about actions by Government, by civil servants or by politicians that are defended by Sir Jeremy Heywood and there does seem to be a need for somebody neutral to come in, a body like your own, the Committee on Standards in Public Life, to adjudicate when Sir Jeremy Heywood habitually supports the Government in all they do. All Governments, not just this one.

Lord Bew: Could I add something to that, though? While that is true and I understand the point that you are making, it is the case that you cannot talk realistically about what you might call a general theory of purdah. We do not have it. The nearest we have is section 125 but, as your committee has discussed, we have a changing situation, postal votes happening earlier, social media and so on. The best thing of all is that we reach an agreement between the two sides—and the Institute for Government has indicated this in blogs—because the idea that the accumulation of precedents, this or that statement by a Cabinet Secretary, even section 125, that somehow we know where we are is I think inferior to the possibility of an agreement, a genuine agreement, before the referendum to both sides because new things are happening all the time, if I can put it like that.

Q98 Paul Flynn: Has your committee reached any general conclusions about the conduct of referendums since the Political Parties, Elections and Referendums Act was passed some 15 years ago?

Lord Bew: We have a view that since then there has been an improvement. The committee met in the wake of the Good Friday Agreement referendum. Now, one of the things that the committee was very sensitive to was the Government—it was something I was involved in myself, so was one of the members of your Committee—made no attempt at neutrality. It was umpire and referee at the same time. There was no pretence of neutrality in that referendum for a variety of reasons. The committee was very sensitive to that and there is the question of legitimacy of outcome. It heard evidence from people who felt that the referendum had been unfair, that the "no" side had been stigmatised in various ways.

Now, one thing I would say about the Good Friday Agreement is the institutions that supposedly should be set up as a function of it in 1998 did not then operate properly until

eight years later, in effect. That shows the prize. The prize is to get legitimacy, not just a win. The prize is that everybody accepts that the outcome was fair and that the pitch was not manipulated and the game was not manipulated in some sort of way. One of the costs that has to be said about the Government's campaign or the campaign in 1998 is that resentments about the illegitimacy of the outcome definitely slowed up political progress and, as I say, institutions that were supposed to be set up initially were not stably operative for another eight years, in effect. That is the key point. I think the committee was very sensitive to the fact it did not look at either the Welsh referendum or the recent referendum in Northern Ireland and say, "That is fine, lots of people are happy with the result". It took the view that it was uncomfortable with the way that the Government had operated in both cases and the desirable thing was to have legitimacy and a sense on all sides that it had been fair. It is a big prize and that is one of the things that I really want to emphasise today. When I look back at the committee's evidence and the way it approached that problem in 1998, that is what I think was really serious and valuable about what our committee did at that time.

Q99 Paul Flynn: Just a final brief question; you have been very generous with your answers. How does your committee, the Committee on Standards in Public Life, work with other bodies such as the Electoral Commission when looking towards a referendum?

Lord Bew: We are not a regulator. We do have regular discussions—because we have an interest in the electoral process, obviously—with the Electoral Commission. They will be talking to you just after I finish. The committee does have three party political members and why I wanted to put matters as I have put it is that what I said at the beginning represents the consensus of the committee as it was a month ago when we last met. We are meeting later on today. There are now new clauses and so on before the House. The committee has not had a chance to discuss that. I do want to stress that point. We have not had a chance to discuss the most recent clauses, which you are all aware of, of what the Government is proposing and so on.

Q100 Chair: Just briefly—and I will come to Mr Tugendhat in a moment—Oliver has very kindly brought up the said letter that went out to businessmen. It starts, "I am writing to you today about the new tax cut for business and charities that starts on 6th April". That is what went out during the purdah period. We might send you a copy of this letter and ask you perhaps to send us a supplementary note about it.

Lord Bew: I would be happy to respond in that way. I have not seen that letter but I am aware of the discussion that happened.

Q101 Kate Hoey: I want to follow up something you said, very quickly. Lord Bew, nice to see you. You said that it would be better if the two sides had agreements about some of these things.

Lord Bew: Yes.

Q102 Kate Hoey: Isn't it very different in this referendum that we are going to be looking at where there is a kind of almost third party around, which is the European Commission and the whole European establishment?

Lord Bew: Yes.

Q103 Kate Hoey: Have you given any thought to how we might be able to ensure that the purdah, whether we hopefully get it back into what we want to see, is going to be affected by that and how that is going to—can we really have a fair referendum when we have these outside bodies, really outside of this country, involved?

Lord Bew: I understand your point and it does create a difficulty. Of course, I also understand from the Government's point of view it is also maybe the same point, to defend the changes it might want to envisage in the way that the section operates. It is not something that the committee has formally discussed. What we are most anxious to insist upon is that we had, to use Peter Riddell's evidence to us in 1998, a chaotic situation in referenda before, an indefensible situation. We have put forward an advance to try to ensure more fairness and a greater sense of fairness, and we need to be convinced that there was any need to depart from the advice that we offered in 1998 in view of the fact that referendums since, by and large—and I know there are a number of other controversies about Scotland, for example—are perceived to have been more fair than those beforehand, less questionable.

Q104 Chair: You have brought up the amendment. Can I deal with that question, which is not in our list? The official Opposition has tabled some changes for the remaining stages of the Bill, which is going to be now on the very first day we are back in September, which essentially restores section 125 but then provides a mechanism for the Government to exempt by regulation whatever they require to be exempted. Given that there is no specification about those regulations or the timing of those regulations, it looks as though the Government could make a regulation and an hour later do what they have just exempted, even if Parliament is not sitting and cannot scrutinise the regulation. This would appear to be a blank cheque for exempting whatever they want whenever they want. Would this be a satisfactory arrangement?

Lord Bew: Well, I have to repeat what I said again. I have not had a chance to discuss with the committee and my entire committee is entitled to give me a view on it. I can see potential under the proposed new clause amendments for general and wide exemptions that potentially undermine the purpose of 125. For example, draft regulations might be very important here and one would need to be clear about those before giving a final judgment. I think there are issues and I will go back to something we have talked about earlier. Connected to this are the issues for civil service objectivity and the perception of civil service objectivity. There are in principle points to be discussed, if I can put it like that.

Q105 Chair: There is another potential amendment, which I have drawn to the Committee's attention at the beginning of this meeting. It would extend section 125 to the entire referendum period—which is I think 16 weeks, am I correct about that?—but allow the Government to issue statements and stuff and use the machinery of Government for such purposes subject to having regard to the advice of the Electoral Commission, ie the Electoral Commission would have a more active role in policing what the Government does and the Government would have to go to the Electoral Commission to do anything that might conflict with purdah. Do you think that could be a practical suggestion?

Lord Bew: You will have the opportunity to discuss this very shortly with the Electoral Commission and their opinion on this is worth considerably more than mine. I am anxious today to be able to say to you, "This is the view of the Committee on Standards in Public Life". As I have spoken thus far, I have actually conveyed the committee's view as a whole. This is a point of detail that we have not discussed. I do not think I would be misleading the Committee to say that we have tended to be relaxed about 28 days as a timeframe. I think I am honestly reflecting the general tenor of the committee's view just on timeframe.

Chair: Right, okay. We might send you these amendments and ask you to comment on it, too.

Lord Bew: We would be happy to follow up with any comments. I simply want to be able to discuss it with my committee.

Q106 Oliver Dowden: Just a small factual question: on this 16 weeks versus 28 days, your instinct is 28 days is a more sensible period than 16 weeks?

Lord Bew: I am anxious to accurately reflect the committee's view. In our discussions thus far, what your Chairman is referring to is a potential reframing of the debate and we will now have to think about that. But up until this point a relaxed view of that timeframe would be characteristic of the committee.

Q107 Tom Tugendhat: Following straight on from that is your indication then that purdah specifically helps the Government to achieve the independence that is required of being an umpire as well as being an active player? Do you think that purdah helps?

Lord Bew: To go back to the Good Friday Agreement, in the days beforehand the Government's feeling was that the whole thing was not so good four or five days before that referendum. Things appear written by civil servants in the last day or two, which are essentially pledges or promises about what will happen from the Prime Minister to the people in Northern Ireland. Now, some of these things did not happen; hence the long delays in getting these institutions up and running in a stable way. It is inconceivable to me that it is good either for the reputation of the Prime Minister or the Government of the day or the civil service that that should happen. It is as simple as that. It really is as simple as that and, as I keep saying, the great prize is an outcome that is considered to be fair on all sides.

Q108 Tom Tugendhat: Going back to the 1975 referendum then, you would argue that there were similar—no, I am leading you there. Could you talk about the 1975 referendum in the same terms and discuss the Government’s control of information?

Lord Bew: Well, there was quite a lot of evidence, actually somewhat competing evidence, given to the committee in 1998 about 1975, but the view, broadly speaking, of the committee was that there was a need. Their reading of the history of previous referendums, including 1975, justified their advocacy of what became section 125, to put it as simply as that.

Chair: Okay. Oliver Dowden.

Oliver Dowden: Sorry, I am not going to ask the next question.

Chair: Oh, right. Okay.

Oliver Dowden: I do actually have a question while I have the floor.

Chair: Six and seven because people have other questions at the moment.

Q109 Oliver Dowden: Some of the evidence we received previously suggested that there may be some concern, due to enhanced judicial activism over the past 10 years, that parts of section 125 may be subject to the courts making judgments on it and, therefore, there may be a need to redraft 125 slightly more narrowly because of the current wide scope. Do you have a view on that?

Lord Bew: I understand that, in effect, this issue in the form of nervousness of Government lawyers about how 125 might be interpreted has played a role and it has been discussed before your Committee and I have followed that in the last few days myself. The committee as such has not discussed this question of the nervousness of some lawyers about how 125 should be interpreted and I do not think I am misrepresenting that the committee’s view would be or was when we last discussed it that 125 as it stands is okay and there perhaps is not too much reason for fear, but I do understand that there are differing views about this and you have heard differing testimony on this.

Q110 Oliver Dowden: What should we learn from the CSPL’s work about how the forthcoming EU referendum should be managed and administered?

Lord Bew: Well, administering, you will be talking to the Electoral Commission shortly and, again, as a regulator their opinion is much more significant than mine. We have one dog in this race and, as I have said now a number of times, the great prize is having an outcome unlike the outcome in 1998 where one side feels it has been cheated and the negative effects were really quite considerable in that in terms of delay in making these institutions that the referendum of 1998 was supposed to set up. In other words, you can fetishise the outcome and result of a referendum and unless you think seriously about

subsequent political effects, then that can lead to a misevaluation of what is really important about the process of the campaign.

Q111 Oliver Dowden: I know you have said that we need to wait for the Electoral Commission's view on their potential role, but just as a point of general principle do you think it would be useful or do you think it could become too burdensome to have a third party adjudicating in real time on the applicability of purdah rules to individual pieces of Government information?

Lord Bew: Absent an agreement, which I think is by far the best outcome, you are going to have this kind of contestation, I am confident of that. In some sense or other, you are going to have appeals. You could well have appeals to the courts and so on. That is why a great prize is an agreement because, as I have also said, I do not think you can reasonably say—and the Institute for Government's blog has also said the same point—that we have something that you can call a general theory of purdah, referenda and so on. We have section 125, certain types of building blocks, certain types of precedents, but we are in a situation where there are new elements in the process all the time, tweeting being one, and we do not have a general theory. The best thing would be an agreement.

Q112 Oliver Dowden: You would need greater clarity around the theory of purdah before you could proceed down that route?

Lord Bew: Yes. It does not exist now. I think it would be a great delusion to think that combined with precedents, combining the 125, we can, therefore, envisage all the things. Your own Committee's deliberations have raised issues. Postal votes are now more important than they were before. That does raise questions about the timing, even though I have said we are quite relaxed as a committee about the timing. Tweeting and so on, there are all these new elements. A European Commission that you point to has been raised to me already today and I think that the great thing, if it proved to be possible, would be an agreement between the two sides as to how we proceed rather than thinking we know the rules of this particular football match, we know exactly what the offside rule is.

Q113 Chair: The question that this touches on is whether, in fact, we should move towards having a referendum commission, which is what they have in many other countries, like Ireland, for example. At the moment, the Electoral Commission is a fairly passive institution during the actual process. In other countries, they have a much more active institution. But CSPL does not have a view about that?

Lord Bew: The committee has not discussed this but, again, in line with some of the other points that you have made, Mr Chairman, I am more than happy that we do undertake to discuss it and come back and write to you on such a matter.

Chair: Thank you.

Q114 Mr Jones: Lord Bew, you mentioned Peter Riddell's remarks that the purdah system was chaotic and unfair and you mentioned also that there was a feeling that people were uncomfortable with the way the Government operated in the Northern Irish and the Welsh referendums.

Lord Bew: And the Welsh referendum, yes.

Mr Jones: You have mentioned the Northern Irish referendum at some length. What were the concerns over the Welsh referendum?

Lord Bew: Well, the committee's language is that when you look at the distribution of material, when you consider it was very narrow—1%, isn't that right, or something? It was very, very narrow anyway. The committee actually says looking at the weight of distribution of Government material it is possible that you could regard that as in some ways—determinant may be too strong a word but affecting the outcome. The committee basically does argue that the weight of the Government's intervention, even in that referendum when it was nothing like as dramatic as Northern Ireland where it was all hands to the pump really, the committee in its discussion in our chapter on this does argue that it is possible that the actual outcome was affected. Affected might be the right word.

Q115 Mr Jones: What was the nature of the Government activity that you identified?

Lord Bew: They just discussed promotional material. Can I give you the reference to the committee's discussion? It is chapter 12 in the document. The committee quite explicitly does not just discuss Northern Ireland but discusses Wales and says, "The weight of material received by electors" is the sense that the committee conveys.

Q116 Mr Jones: Can you say why PPERA makes a statutory provision for a purdah period in referendums as opposed to general elections?

Lord Bew: Our problem as a committee was to look at the problem as it existed in referendums. I can tell you why the committee made the recommendation that led to section 125: because they were asked about referendums and the whole discussion in chapter 12 is about referendums. There is, of course, a separate argument about purdah and parties in general elections, but that was not what the committee was doing at the time, if I can put it like that.

Q117 Gerald Jones: You may have touched on some of this, but to what extent do you feel that the purdah is based on the committee's 1998 report and specifically how well does section 125's introduction impact or reflect the committee's recommendation in that report from 1998?

Lord Bew: I think I am right in saying you have already had evidence from Jack Straw to the effect that it was the committee's recommendation and section 125 is intended to implement that recommendation. I think the committee's view is that that is indeed so and insofar as the Committee on Standards in Public Life is ever happy with anything, we

were happy with that, as simple as that. I well understand that there are parts of section 1 that some people consider to be unduly restrictive and I do think the committee would accept that there may be some clauses that refine the operation of 125. I do not think the committee is in a necessarily fetishistic position with respect to it and it may be conceivable that there could be clarification of a benign sort. At the moment, we think it is clear and we think it has worked.

Q118 Gerald Jones: Could I ask as a follow-up to that what concerns you would have about the disapplication of section 125 specifically?

Lord Bew: Our concern is simply that we think the Government has to make a case and we as a committee are broadly supportive of 125, it is as simple as that. While we acknowledge the possibility of clauses that refine or deal with perceived difficulties in 125, and section 1 particularly, which some people have seen as being too restrictive, we would need to be convinced that such clauses are indeed benign.

Q119 Gerald Jones: Are you clear as to what the Government want to be able to do that they cannot currently do under section 125? Has that been made clear to you?

Lord Bew: No, it is not clear to me at all what the agendas are. To be absolutely honest, nor is it my problem what the agendas are on one side or the other in this broader debate. The only function of the committee is to defend a certain model of fairness. 125 has certainly helped in that respect.

Q120 Gerald Jones: In the Government's statements so far they have made it clear that they want to be able to use the machinery of Government to explain the outcome of the negotiations. Would that be acceptable?

Lord Bew: First of all, there are timing questions here that—

Gerald Jones: But in the purdah period?

Lord Bew: In the purdah period. I think, and it has been raised already by other witnesses to you, it is arguable that section 1 of 125—how can I put this because I do not know quite what they mean? The word “explain” is puzzling me. The word “explain” is puzzling me, so I am just going to leave that hanging in the air.

Q121 Mr Turner: That has almost answered or not answered because it is not known, but are you able to say if anything could be done to amend this rather than full disapplication?

Lord Bew: This is a job for Parliament. There are new clauses in the last 24 hours, I think maybe in the last hour or two hours. That is Parliament's job, not our job. Our job is to defend certain broad principles of public life and related to this are issues about

accountability and objectivity and impartiality at the civil service, which the committee has always played a role in trying to preserve. Parliament now has new wording before it and Parliament will decide.

Q122 Mr Turner: What do you think of the proposed amendment to new clause 2 that seeks to remove the Government's position to repeal?

Lord Bew: I have already said that the difficulty for me is the committee has not had a chance to talk about the new amendment. You must remember with all parties represented on the committee I am trying to be fair to every member in my committee and I have been trying to keep my remarks to things that I know the committee is comfortable with. My opening statement I know the committee is comfortable with. I do think at first glance, as I have said, there is—how can I put this?—an issue about clause 2 and certainly the new amendment, to be able to translate it properly you would need to see draft regulations. The potential under the new clause 2 is, as it stands, for general and wide exemptions that would fundamentally undermine 125. As it stands, just baldly like that. I think I can say that without, as it were, misrepresenting the views of the members of my committee, or I hope I can.

Q123 Ronnie Cowan: With hindsight, as always, lessons to learn from the Scottish referendum and the supposed intervention from the civil service, maybe at the behest of Government?

Lord Bew: I understand what you are getting at from watching previous meetings of this Committee. Sir Nicholas Macpherson's letter is probably in your mind. From our point of view and the way that we think about this and our role in section 125, that was outside the purdah period. Sir Bob Kerslake also has given evidence about precedents for that sort of intervention and so on. The way I want to answer your question is to say that from the point of view of the doctrine of CSPL that case, as it were, is outside our remit but, as I have already said, CSPL generally has a profound concern with the protection of the impartiality of the civil service. We think that the Government should bear this very much in mind with respect to this referendum and that CSPL generally has, if you like, pointed to the other way on the other side of the moon of not being a good example in this case, which is what happened in the 1998 referendum in Northern Ireland, if I can put it like that.

Q124 Ronnie Cowan: What can you actually do to ensure that there is no repeat of the civil service intervention?

Lord Bew: You ask me what the committee can do. The committee can only defend the positions it has always taken about the role and the necessity of impartiality of our civil servants in particular at these critical moments. For the Government there is a crucial area of reflection in this respect. I come back to my original point: the desirability above all of some kind of understanding between the two sides rather than a belief that we do know the

rules of this game, because so much is changing that we do not quite know the rules of this game.

Q125 Kate Hoey: Lord Bew, you are the chairman of a really important committee in terms of public perception of public life and standards. In your personal view, do you have a worry about this hugely important referendum, most important probably to anything that has happened in the past and since the last referendum? Are you worried that this, if not handled properly by our Prime Minister and our Government, could end up with even further feeling among the public that public life is not fair?

Lord Bew: I have been influenced by rereading the work of the committee in 1998 and I do think it is really to the credit of the previous committee and Lord Neill the way that they approached this, which led to section 125. It would have been so easy, don't you think, to say we all are—I know I certainly am—happy with the outcome of the referendum in 1998 in Northern Ireland and in Wales where in so many ways so many problems have been solved that could have been very bad for our polity? We are moving forward. Wouldn't it have been easy for them to say, "We do not need to worry too much about the way some of the rules were infringed"? Don't you think it is to their credit that they said, "No, it is really quite serious the way that the Government chose to operate", Northern Ireland more dramatically than Wales but they were concerned about Wales? Don't you think it is to their credit that they said that it is really quite serious? Don't you think they were justified by the fact that it took so many years to implement the outcome of the referendum in Northern Ireland because so many people felt it had not been fair? Don't you think it is to the credit of the committee at the time the commitment that they had to fairness and taking a long-term view and not just saying—let us be absolutely honest, a great majority of members of the political Whitehall class believe thank heavens those referendums are over and the outcome is going in the right direction for society. I think it is to their credit that they have shown so much nervousness about what has happened. They took seriously the views of unfashionable people who said, "I felt I was dealing with an unfair situation in this referendum in Northern Ireland". I think it is enormously to their credit.

Q126 Chair: Just on two wrap-up points, your difficulty with the word "explain", what does the Government mean by "explain" the outcome—

Lord Bew: You can help me, can you?

Chair: —I am advised that in no other country could the Government use the machinery of Government to explain the outcome of the negotiations in that fashion during the purdah period. What conclusion should we draw from that?

Lord Bew: Well, again, thank you for that clarification. I was—

Tom Tugendhat: Sorry, I remember the French constitutional referendum when the entire mechanism of the French state was used to publish, print and distribute leaflets that explained very specifically what the constitution said. I remember receiving them because my

mother is French and we got them in our home. It was very clear that these came from République Française and not from the “oui” or “non” camp.

Chair: There might be some clarification we can draw from that. In Ireland, it would be illegal and it would be illegal, for example, in California where they regularly have referendums.

Lord Bew: Yes, I will come back to you on that because the word “explain” is open to a number of different meanings. I am grateful to Mr Tugendhat for his explanation of the French case. Could I just put this very simply? I do not think you can take, for example, any external model, even if the French case was different and the Irish case, as a model for what we are trying to do. In the Irish case, for example, there was a huge controversy subsequent to the recent referendum about American money, which operated in that campaign in a way that it could not, I think, possibly operate in a campaign in the United Kingdom. I think it is for us to work out what we think is appropriate for the United Kingdom and not be too worried by other models. The committee will look at this and we will come back to you.

Tom Tugendhat: I agree with your point entirely on that because the key point that I think you have made is the one on fairness and looking fair. The key thing that we have to do, I would argue, in taking advice from witnesses is to find that moment of fairness and find that point of leverage. If we get that right, then we will have achieved much more than simply a legalistic drawing around the law.

Q127 Chair: I think that is a good summary point. Finally, in our report just before the election on the civil service impartiality and referendums, we made a recommendation that the civil service code, which at the moment makes no reference to referendums whatsoever, should, in fact, include a paragraph that basically says what applies to political parties in elections should apply to referendums and yes and no campaigns in terms of civil service impartiality. What is your reaction to that recommendation?

Lord Bew: We have noticed and our committee was alerted to the position that your Committee took on this matter and, if I could put it like this, we take it seriously. It is something that the committee will have to discuss in more detail, but we are aware of the fact that you put forward this and we took it seriously. We quite regularly make submissions to your committee and I think you might well find that we come back to it, but we did take note of it and we could see the seriousness of the point that you were trying to make.

Chair: We look forward to your response to that. Lord Bew, thank you very, very much indeed. You have been very fulsome and open. Thank you very much indeed.

Lord Bew: Thank you.

Examination of Witnesses

Witnesses: **Bob Posner**, Director of Party and Election Finance, Electoral Commission, and **Tom Hawthorn**, Head of Policy, Electoral Commission, gave evidence.

Chair: Welcome to our two new witnesses. Please could you identify yourselves for the record?

Bob Posner: Yes. Good morning. I am Bob Posner. I am the commission's director of party and election finance and the commission's legal counsel.

Tom Hawthorn: I am Tom Hawthorn. I am the commission's head of policy.

Q128 Chair: Thank you very much for joining us. What exactly are the Electoral Commission's responsibilities in respect of referendums?

Bob Posner: The commission itself has a number of roles in relation to advising on the intelligibility of the question, question assessment, which we are doing currently, through to registering campaigners and regulating campaigners. We have public awareness responsibilities as well. The commission's chair under the Political Parties, Elections and Referendums Act 2000—which I might just call PPERA as I go forward to keep it easier—will be the chief counting officer at this forthcoming referendum.

Q129 Tom Tugendhat: Other countries have various commissions. How does the Electoral Commission fulfil the role that the commissions, for example, in Ireland, Canada and New Zealand have in reference to referenda?

Bob Posner: The commission's role is set out in PPERA and, as Lord Bew said, that is a UK context. That is the system we have chosen in the UK. If we step back and look at that role, be it in elections or referendums, it is regulating campaigners. It is not regulating how campaigners carry out those campaigns; it is regulating whether they comply with the rules on spending, reporting, transparency and donations, and that applies for referendums or elections.

Q130 Tom Tugendhat: On that you bring us straight into purdah because, of course, if you are counting the money for various donations how do you count the influence of Government? The rules set out from the Cabinet Office versus local versus national referendums, how confident are you that non-statutory purdah is applied as effectively as the statutory purdah?

Bob Posner: Section 125 sits in PPERA and so the commission has a certain role in that sense, although it is a section that, as the Committee is aware, does not have any direct sanctions and we do not actually directly regulate as such. In a sense, that is because the commission does not regulate. That is the structure. It does not regulate the affairs of Government in the UK. The conventions of the civil service, the conventions around Ministers, constitutionally, as you know, in the UK that is a matter for the civil service, for

Government. What we have done in recent referendums—I can speak about that—is we have observed how section 125 has operated. We have made a number of recommendations about that and we are comfortable with the provision. We support the provision being reinstated in the Referendum Bill but we also recognise that PPERA was written effectively in 1999, quite a while ago, and we have seen and experienced abuse of section 125, which has broadly worked. But in the north-east referendum we did recommend back then that perhaps it needed looking at in the sense of the 28-day period. We thought that might be worth looking at.

Tom Tugendhat: Extending or shrinking?

Bob Posner: We observed in that that the Government voluntarily effectively extended the period by applying it at the stage where postal ballot papers were issued for that.

Chair: It was an all-postal ballot, let us be clear about that.

Bob Posner: It was. It was. I think that triggered people at the time probably to say it needs thinking about in a wider context.

Q131 Chair: In the context of where we now have perhaps 30% of voters voting by post, shouldn't the statutory purdah period of 28 days start 28 days before people receive their ballot papers in the post?

Bob Posner: Our current position is that following the Scottish referendum where a variation of section 125 was applied what we have said is that—and where we observed considerable spend by both the Scottish and UK Governments before the 28-day period, effectively, on paid advertising booked as to households, but they both observe the 28-day period, what we said on the Scottish referendum was that our current recommendation is that parts of section 125 should apply for the full referendum period, the full campaign period, and those parts are about spend on promotional material in the sense of paid advertising, be that booked as to households or maybe billboard campaigns and so forth. So our recommendation currently is we see that there are aspects of it that should apply for the full referendum period. To clarify the early remarks, currently the Bill does not set the referendum period it is to be set by regulations. The 2000 Act, PPERA, the structure of that is for a 10-week referendum period, although we have had a longer one since in Scotland—

Q132 Chair: This is very important; you are saying the referendum period could be made much shorter by regulation?

Bob Posner: It could. Our position is that even the 2000 Act, 10 weeks in the experience of referendum since is too short. In Scotland it was possible to designate the two lead campaigners before the referendum period and they had 16 weeks, effectively, to campaign. The 2000 Act works on the basis of from when the referendum period starts there are 28 days, four weeks, for campaigners to apply to be a designated body. There are then 14 days, two weeks, for the Commission to designate the two lead bodies, so we are

six weeks into the 10 weeks, and then there are four weeks for the campaigning. That is the link to section 125 and 28 days. That is where the 28 days comes. Once you have the two designated lead bodies, the way the 2000 Act works, at that point the 125 restriction on Government bites and they should be stepping back.

Chair: I am going to short-circuit this rather complicated discussion. It would be terribly useful if you could send us a note—

Bob Posner: Of course.

Chair: —saying what you think the minimum timelines are that would be acceptable to the Electoral Commission because, if the Government is basically taking powers to alter these by regulation that is something I think we will want to think about.

Q133 Tom Tugendhat: Could I ask you to include in your note what I am hearing from you is a slight vagueness as to what is a useful statutory period, and what is not, on the grounds that your statutory period is so short that everything seems to be covered by the non-statutory period beforehand and given that, in this referendum in particular, there is a very strong third party acting or likely to act in the European Commission, how relevant is this anyway once you have designated your two parties?

Bob Posner: We are quite clear that the 28 days should apply; section 125 should apply. We are also clear that there are aspects of it—and we will set that out in the note—where that statutory purdah period should apply for longer, for the whole referendum period. It does cover Governments in the plural, so I think we need to think about it in the context of four Governments in the UK, not just the UK Government, clearly, although I am aware of what has happened in the Scottish Parliament, so whatever prism we end up with applies to all.

Q134 Tom Tugendhat: Well, fine, through the European Commission. The big element outside the box here is the European Commission, which has vast pockets and can spend.

Bob Posner: The PPERA, the 2000 Act, the way that works is that, as we see it, they could not donate money into the UK. That would prohibit it under the Act. They could not be a donor and also, as we read the Act, they would not be able to register as a campaigner. They would not be an eligible body to register, which means the limit they could spend would be £10,000 under the Act. What I could not say with clarity is quite how enforceability would work with a body outside the UK; quite how that would work, but the way the Act is set out—

Q135 Chair: They have their own offices. They have their own press operations just across the road from here. The European Parliament has its own office.

Bob Posner: Yes.

Chair: Could they use those offices as part of the machinery for a campaign?

Bob Posner: It is not obvious to us they would be able to register as a campaign, no, and have the higher spend it would take.

Chair: But it would not stop them doing stuff.

Q136 Oliver Dowden: May I just press on this point? A lot of what we are discussing is a scenario, for example, whereby the Government produces a report on the consequences of a vote in the run up to the election, which then influences it. It is naturally covered by purdah. The European Commission could instead produce a huge dossier about the impact of withdrawal and prepare a regulation with powers to stop that potentially very major intervention into the campaign at a very late stage.

Bob Posner: Section 125 is about the last 28 days.

Chair: Yes, well, we are talking about the last few days.

Bob Posner: So clearly before then anyone can.

Oliver Dowden: Yes. It is just whether there is this loophole that enables the Commission—

Chair: They could drop a bombshell in the last 10 days.

Oliver Dowden: Yes, exactly.

Bob Posner: It is also about publishing promotional material. It does not seek to stop things being said—I appreciate you said a dossier—be it Government or Ministers or anyone announcing things. The exceptions with it allow Government to make press statements, to respond to questions to it, so there is no attempt to stop things being said by Government or—

Q137 Tom Tugendhat: When you say “publish”, publish on a website in English on a Brussels server?

Bob Posner: You come back to online, social media, what is published and one has to take a judgment on that, so something that appears on an official Government website we regard as published. It is more difficult when you get to other areas.

Q138 Tom Tugendhat: If it is published on a European Commission website, then it is published?

Bob Posner: Yes.

Q139 Kate Hoey: Should the European Commission be aware of this concern that there is about the huge institution of the European Union being used in a biased way in this

country? Are you not going to make some comments on this? Are you not going to be able to say something?

Bob Posner: What the Commission can do is set out where the legislation stands—I hope I am making clear how the legislation works—and it is then a question for Parliament to decide how it structures legislation. We will want to make it clear, if we have not made it clear we will make it clearer, how the current legislation works.

Q140 Kate Hoey: Yes, but will you make it clearer that there are these concerns about this particular referendum that would not have applied to other referenda in the past?

Bob Posner: It certainly could be applicable to this referendum. It could be applicable to the Scottish referendum as well. What I can say about section 125 is it has broadly worked in recent referendums. But it is not sacrosanct. There could be variations or clarification, and there have been variations on it. The Scottish referendum provision is a good example where we recommended in the lead up to it that it needed to be amended to make it clear about how it applied to other bodies that had public funds, and it was very useful in the Scottish referendum to be absolutely crystal clear. So it is not sacrosanct. It can be amended and it can be clarified.

Q141 Ronnie Cowan: It did not stop it in the Scottish referendum and it is the same thing, the European Commission could stump up 10 days before there is an election or a referendum and say, “Here is a vote to all the people in the United Kingdom if you stay in the EU”. It is meaningless and it is completely uncontrolled.

Bob Posner: Section 125 is not about that.

Q142 Ronnie Cowan: I am talking about the European Commission’s role in this now. You have no control of the European Commission and they could mirror exactly what happened in the Scottish referendum. An organisation, a person or body in the Scottish referendum, Gordon Brown and cohorts, stepped up and made a vow, which was completely not applicable, and the European Commission could do the same thing here.

Bob Posner: Section 125 was respected by the Scottish and UK Governments during the last 28 days. There are the Civil Service codes and conventions and codes for Ministers about conduct, and no doubt the European Commission and its institutions as well. The Commission does not regulate the institutions of the Government and that is not how it has been set up in the UK.

Q143 Chair: One clarification and I will come back to Mr Tugendhat in a moment. In your evidence that we published that we published this morning you say that it was a Scottish referendum under Scottish legislation and the purdah provisions in Scotland did not apply to the UK Government, but can you clarify was the Government of the United Kingdom still subject to section 125 of PPERA in respect of that referendum?

Bob Posner: No, it wasn't because it wasn't a referendum under that Act. What happened was that both Governments signed what has been termed "the Edinburgh agreement" in the lead up, as you might recall—

Q144 Chair: During the Scottish referendum there was no statutory purdah?

Bob Posner: The UK Government agreed to comply with the purdah provision. So the Scottish Government were able to put it in their legislation but the Scottish Parliament could not bind the UK Parliament in Scottish Parliament legislation. The Scottish Government bound itself effectively in their legislation and the UK Government agreed to comply with that.

Q145 Chair: In fact it would be to the advantage of a fair referendum in Scotland for another Scottish referendum to be conducted under a UK Act of Parliament rather than a Scottish Act of Parliament?

Bob Posner: It worked in the referendum in Scotland. They did both—

Q146 Chair: But there was no statutory purdah applying to the United Kingdom Government during the Scottish referendum. That is a bit of a bombshell I have to say.

Bob Posner: Both Governments signed the Edinburgh agreement and agreed to abide by its principles and both did.

Q147 Chair: But why are you arguing that section 125 is so important in this referendum when section 125 did not apply to the United Kingdom Government in the Scottish referendum?

Bob Posner: It did in the sense that once the Edinburgh agreement was signed both Governments then proceeded on the basis—

Q148 Chair: That was a non-statutory agreement.

Bob Posner: That was the structure.

Q149 Chair: There would have been no threat of litigation against the Government under section 125 under the Scottish referendum.

Bob Posner: I do not think I am able to comment on what the effect of the Edinburgh agreement would have been and how that would have worked through.

Q150 Chair: You think the Edinburgh agreement was justiciable?

Bob Posner: I am not sure about that but I think there is something about it, and it has been said earlier, about getting a touch too legalistic about section 125. The history as you have heard, the background, the context was about setting a norm and a behaviour for Government and about them being accountable and transparent for that.

Q151 Chair: Sorry, I just do not understand this because PPERA remained in force. We passed no law at the United Kingdom level that would have suspended section 125 of PPERA, so surely section 125 remained in force in respect of a referendum—it does not specify which referendum—that was taking place in the jurisdiction of the United Kingdom.

Bob Posner: That is not the way the structure works. There are provisions that sit in the PPERA Act, any referendum requires enabling legislation. With the Scottish referendum, the UK Government specifically devolved the power to hold a referendum in Scotland to the Scottish Parliament and to make the legislation. They made that legislation. They effectively took provisions from PPERA and put it in their legislation. That is how the legislation came in place.

Q152 Chair: When civil servants told Ministers they could not do this or could not do that, they were merely looking at convention and the Edinburgh agreement?

Bob Posner: I think that must be right.

Q153 Chair: Were you ever asked for advice on this matter during the Scottish referendum?

Bob Posner: Not on the internal workings of Government, not by the Civil Service, no.

Chair: No, fascinating. Mr Tugendhat, are you finished?

Tom Tugendhat: I think you have covered the issues I was looking at.

Q154 Oliver Dowden: May I ask, first of all, which machinery of Government activities should be restricted and which should be allowed during the purdah for a referendum?

Bob Posner: I think it has been said by other witnesses but for me there are the words in section 125 as to what is permitted and what is not permitted. For me, you have to read them as they are. I do not think there is anything difficult in seeing them. I think there can be scope for interpretation and I can see that and, therefore, potentially scope for clarity. I spoke about how we recommended some clarity on provision 2b about other persons or bodies with expenses out of public funds, which came in the Scottish referendum. Then

there are some exceptions as to what can be done, including the Government issuing press notices in the 28 days and responding to specific requests for information to people seeking that. It is not an absolute prohibition in the last 28 days, and it has been said by other witnesses, the Commission does not think it was ever intended or is intended to get in the way of the necessary business of Government during that period. It is about influencing the referendum outcome.

Q155 Oliver Dowden: I was interested both in your comments and in the evidence that you have given, you referred to it being restrictions on the publication of promotional material by central and local government. Is that the extent of it or does the Commission view that it has a wider applicability to statements and other pronouncements made by Government during that period?

Bob Posner: No, we do draw a distinction. We think it is what it says, which is about spend by Government on operational material, central and local governments in the plural. We do not think that it stops a Government Minister saying things and we have seen that in previous referendums. We do not think it is intended to stop that. It does all interweave. There is the separate system of the internal government, the Civil Service code, and to what extent they can use the resources and the code for Ministers, which is not our remit.

Q156 Oliver Dowden: Can I ask about the responsibilities of the Electoral Commission? What monitoring and enforcement responsibilities does the Electoral Commission have in relation to the observance of purdah in elections and referendums?

Bob Posner: In relation to the Civil Service code and for Ministers, none at all. PPERA was very specific and clearly set up. We would not be seeking to regulate the internal affairs of Government. In relation to section 125 that sits in the Act and we do monitor. Section 145 of the Act talks about our responsibilities to monitor, including this part of the Act, and we do monitor and we make recommendations. You can see that in the recent referendum, as I sought to explain. We kept an eye on how section 125 has worked and we have sought to advise on how it could be made clearer as referendums move forward. I think the Scottish referendum model, which is the most recent model, is a good model if 125 is to come back in this referendum Bill to start from, because that is just a development of 125 and the 2000 Act, and then to see how that could work here.

Q157 Oliver Dowden: Just for clarity, the conduct of Government during the purdah period, essentially you are saying that is not the responsibility of the Electoral Commission. That is a matter for the Civil Service code and Cabinet Secretary and others?

Bob Posner: Yes, if I could expand on that. It would be quite a constitutional change—and I will comment on that—if the Electoral Commission was to have a role to regulate in some way the affairs of Government. For a long time, well before the Commission, as you know there has been a convention and this is going back many, many years. So it would be quite a change for that to happen.

What I would say is—I was asked up front about the responsibilities of the Commission at referendums—how important it is that the body that is effectively responsible for running referendums is seen as impartial towards the ultimate acceptance of the result. We would have concern if we were having to be drawn into what are areas of controversy and judgment, if on the one hand we were running a referendum it is essential we were seen as impartial and running it fairly. On the other hand if we were making judgments, which potentially could be litigated against, we would see that as perhaps undermining our role and not to be in the best interests.

Q158 Oliver Dowden: This is quite apposite because there is a proposed amendment that would give the Electoral Commission this adjudicatory role. You are saying at the moment that would amount to quite a profound constitutional change and it is something at the moment that is quite without the scope of the conduct of the Electoral Commission?

Bob Posner: That is right. We will certainly consider and comment on the amendment but our position will not be to support us having a role, for the reasons I have said.

Oliver Dowden: Okay. Thank you.

Q159 Chair: Can I come in on that? The question is: what constitutes promotional activity? Who defines what “promotional activity” is?

Bob Posner: In my job, which is regulating the political parties on their campaign spend donations, I always take the view that you know it when you see it with some things. People sometimes say, “Is this caught or it isn’t?” and there are always so many possibilities. You cannot define in legislation exactly what something is but, generally speaking, you know it when you see it and, “As a regulator I think that breaches the rules. I think it is caught by it. We will take action. We hope the courts support us”. Other times we might get allegations and you say, “No, we do not think it is”. I think the same principle applies here. I would suggest that is what is behind this provision. It is about setting a level of behaviour for Government for their accountability to scrutiny and it is about meeting that behaviour, so I suspect it is the same answer for me.

Q160 Chair: The official Opposition has tabled amendments that would restore section 125 but allow the Government by regulation to self-exempt wherever it thought it appropriate to do so. How happy would you be with that proposal?

Bob Posner: The Government has said they are going to come back to clarify their position for the report stage of the Bill. We are waiting for that like others are. We are waiting to see. They have said they see some difficulties about the practical workings of Government and particularly mentioned the European institutions. We are waiting to understand that. If there are difficulties, which we can see with how 125 is currently drafted, then we do not think the section tends to stand in the way of that and if it can be usefully clarified that will be fine. But we have not seen that case yet; 125 has not worked in recent referendums.

Q161 Chair: You are happy with 125 as it stands unamended?

Bob Posner: Yes, and may be slightly varied as a result of—

Q162 Chair: What would happen if, in order to address the Government's concerns, some mechanism to allow exemption was created? There is one amendment possibly going down that would require the Government to have regard to the advice of the Electoral Commission. It would not be putting you in an adjudicatory role; it would just require them to have regard to your advice, which I guess would have to be made public.

Bob Posner: I do not think we are in a position to give advice that would necessarily be universally accepted.

Q163 Chair: But if Parliament required you to do that you could do it?

Bob Posner: Our position is it is probably simply to say it would not be a good idea because we are in no better position than anyone else to do that.

Q164 Chair: You do not have an opinion on it?

Bob Posner: We do have an opinion. We have an opinion it would not be a good idea because—

Chair: Your opinion is that it would not be a good idea?

Bob Posner: It would not be a good idea to put us in that position.

Chair: Right, okay.

Bob Posner: Because for the reasons I said earlier it would draw us into areas, when I would suggest it is more important as a body that is running the referendum to stand back in an impartial way and there is confidence and trust in that.

Q165 Tom Tugendhat: You do not think it would be, therefore, at all useful for you during the period to say anything at all about the two bodies that are likely to have the largest influence on a referendum, the British Government and the European Commission?

Bob Posner: What we are doing at this stage, and we will continue to do it, is we will brief on the provisions of the Bill as they emerge, including amendments, on how we think it is best to structure the legislation behind it and sitting as well, of course, is the Civil Service code and the ministerial conduct code, and so forth. I know you as a committee have a view on that. That could be clarified for referendums. So there is a structure there.

Whatever structure is put in place, the Commission has its role, which is about running the referendum, about regulating the rules with the campaigners, and we will report on the referendum afterwards. That is our role.

Q166 Chair: What you are saying here is there is no substitute for section 125 as it is?

Bob Posner: We think it should be there, absolutely.

Q167 Chair: Putting the Electoral Commission in some kind of advisory role to try to police a looser arrangement is not satisfactory, that is what you are saying?

Bob Posner: We do not think that would work well.

Q168 Chair: So the amendment, the new clause 2 that the Labour Party have tabled to provide this avenue, is not satisfactory?

Bob Posner: Part of it suggests regulations are made, which I think are both Houses of Parliament, as I read it, so 125 can come back into the Bill, or a variation of it, or it could be brought in, in a combination of that and regulations, all that conventional practice and so forth. There is a combination of ways to make the principles of 125 apply, which is simply to put the section back in, but the part of the amendment that gives the Commission a role effectively to regulate we would not support that.

Q169 Chair: Yes, but an open door for the Government to pass any regulation to exempt anything it wants, that is a negation of section 125, isn't it?

Bob Posner: I think as we read the amendment it is still both Houses of Parliament.

Tom Hawthorn: Yes. As we understand the amendment it would still be subject to parliamentary approval, so any regulation to—

Chair: It doesn't specify what approval process.

Tom Hawthorn: As we understand the structure of the Bill, it is within a section where regulation-making powers are subject to approval by both Houses of Parliament.

Q170 Chair: It would have to be done in advance; it could not be done at the last minute?

Tom Hawthorn: Correct, yes, and I think if Parliament gave its scrutiny to those regulations and was satisfied then we would think that that would be a reasonable process to go through. Better than, for example, requiring the Commission to adjudicate.

Q171 Chair: So any regulation could be promulgated and it goes through the affirmative resolution procedure?

Tom Hawthorn: As we understand it, the amendments as they are drafted and as they would fit within the Bill as it stands at the moment.

Q172 Kelvin Hopkins: I missed your earlier answers, I am afraid, but just a general question. I was active in the 1975 referendum. I was in the No campaign, and I remember it was so biased it was unbelievable the vast amounts of money spent, particularly by the European institutions, business and whatever. Have you looked back to what happened in 1975 to learn some lessons, to revise how the coming referendum might be better regulated?

Bob Posner: Yes, we are certainly aware of the referendum and the issues that could arise there. We saw the process with the Committee on Standards in Public Life recommending legislation, what became section 125. So we support 125. We support that control mechanism and we have seen that work in recent referendums. Post the Scottish referendum we do think aspects of it should apply for the whole referendum period, be that 10 weeks or 16 weeks; whatever period. In the Scottish referendum we saw both Governments spending money on paid advertising and booklets to households in the period before the last 28 days. We do not think that was a good idea. We think for the whole campaign referendum period, the 16 weeks to the referendum, none of that should have happened. We would like to see the remit of 125 broader in those aspects, which partly goes to some of the things that—

Q173 Chair: Ultimately, if Parliament required you to play that role you would have to play that role.

Bob Posner: The role?

Chair: If Parliament required you to give advice to the Government on exemptions from purdah you would have to take on that responsibility and you would have to be resourced to do so.

Oliver Dowden: Presumably that would be a completely different remit you would be taking on, so that would be changing the nature of the Electoral Commission from what you have said so far.

Bob Posner: It would be a fundamental change and in the UK structure long before the Electoral Commission you had the Civil Service codes of practice and so forth. The Commission came along in 2000. Section 125 does not require us to regulate the affairs of Government. Nothing in the 2000 Act does. Our role has been totally around the rules on party funding, so it would be a major, major change. Can I just clarify—

Q174 Chair: It is very odd to have a public body come in front of a committee and say, “We prefer to be toothless”.

Bob Posner: Well, no, we are not toothless in what we do, but can I clarify—

Chair: Okay. Let’s move on to the next question.

Bob Posner: Could I just clarify one point, if that is possible.

Chair: Okay.

Bob Posner: Because the electoral commissions in other countries have been alluded to and my bit of confusion about the remit of some of their powers. Tom, do you want to comment on that?

Tom Hawthorn: Yes. It is not universally the case that electoral commissions in other countries have powers to intervene and regulate spending by other Government ministries or Crown bodies. Certainly we have seen and we have provided in our written evidence some examples where restrictions do apply, and we understand that electoral commissions are not normally set up to administer those particular rules where they are also the bodies who are charged with administering the conduct of the referendum poll.

Q175 Mr Jones: Which bodies in this country would you say could conveniently carry out that sort of role?

Bob Posner: As it is currently set out there is a form of self-regulation through the Civil Service codes and the Ministers and so forth. That is the system that has been in the UK since—I do not know how long going back—the early part of the 20th century no doubt.

Mr Jones: If you are looking—

Bob Posner: It is not obvious under the current UK model, and not surprisingly there is not a body out there.

Q176 Chair: What reference to referendums does the Civil Service code make?

Bob Posner: Currently it is clear it applies to elections but, as your Committee commented, it does not pick up directly that it applies to referendums. Certainly in recent referendums, though, the Civil Service have operated as if it does apply, as I understand it. I think we would support any clarification of that definitely.

Q177 Ronnie Cowan: You have said in previous referendums you have monitored and you have made recommendations. What action, if any, would the Commission take if it suspected a breach of purdah?

Bob Posner: I am not quite sure you would call this action but what we have done is we have proactively—and the Scottish referendum was a good example—issued information

to make it clear to people if they are concerned that section 125 has been breached about who to contact in Government, how to make contact and how to complain. We have overtly sought to make it easier for people to know where to go if they have concerns under the current system, the Civil Service code and so forth. The only other thing we can do currently, when we report after referendums or elections, we make recommendations and we obviously publish that.

Q178 Ronnie Cowan: But your complaint would be to the Government. What if is the Government you believe has breached purdah?

Bob Posner: Sorry?

Ronnie Cowan: You said you had had to complain to the Government.

Bob Posner: Yes.

Ronnie Cowan: I am saying, what if the Government breached purdah? You were complaining to them that they have—

Bob Posner: That is why they have the system where there is the Cabinet sector investigates. They can be required to administer a direction. I am not an expert on that. You will have witnesses before you who are, but that is the system of regulation that applies.

Q179 Chair: If I can just chip in here, because during the North East referendum there was a very clear breach of purdah, because the Deputy Prime Minister went up to the North East, and during the purdah period he announced that the proposed regional assembly would have more powers. When North East said no, with which I was involved, and contacted the Government to complain, the civil servants said, “It is a matter for Ministers”. Where is the protection for purdah? What did you do as a result of that breach of purdah?

Bob Posner: It predates my time. Tom may have a comment. We certainly made comment after referendum, which I alluded to earlier, about whether consideration should be given to the 28 days, whether that was the right period. We certainly made that comment.

Chair: It is not about the 28 days. It is about a Minister using his departmental machinery to breach purdah. What are the consequences?

Tom Hawthorn: I think, as Bob says, we were not directly involved in dealing with that complaint, but, as a result—

Chair: Could you send us a note about it?

Tom Hawthorn: Yes, I think it is covered in our post-referendum report from that referendum when we made recommendations that the consequences and sanctions should be clearer.

Q180 Chair: It does beg the question, what is the point of the Electoral Commission if you have no teeth and you do not recommend that there should be any teeth?

Bob Posner: This was not part of the role set up for the Electoral Commission; it never has been, and it is not, as things stand. It is not an area where you would expect us to have teeth, as things currently are set up. The teeth, such as they are, such as the system is, is around—you are going to see certain Government Ministers; you will have to ask them how their system operates.

Chair: We will. Mr Cowan?

Ronnie Cowan: Nothing further.

Q181 Mr Turner: Your report afterwards said it should be looked at. What happened?

Bob Posner: We will send you a note, because I do not have the exact words. I know there was and we did say something in our report after it. I do not know what happened in relation to the workings of Government, their own code and so forth. I do not know what happened with that. They will be able to answer that for you. Section 125 sat there, was applied in subsequent referenda. There was one in Wales about Welsh Assembly powers, a 20-vote system referendum and then the Scottish referendum with variation. Broadly, section 125, in those contexts, broadly worked. Our position is that it should be in the legislation and we are waiting to see what the need is to vary it, but if there is a need to vary it so that all the workings of government can happen, we would support that, if that case is demonstrated.

Chair: I think we will go back to Ronnie; 28?

Q182 Ronnie Cowan: 28, yes. What is your view of the suggestion by the Minister of State for Europe that section 125 would be unworkable for a referendum on EU membership?

Bob Posner: The Government now are going to come back and clarify their position on what their concerns are, and we are waiting for that.

Chair: But they have explained it in Parliament and they have explained it in letters.

Bob Posner: Yes, so we have seen some of what they have to say, but they are going to come back at a—

Q183 Chair: You do not think they have given a satisfactory explanation?

Bob Posner: As things stand, our position is that a need has not been demonstrated, as things stand at the moment.

Q184 Chair: You seem to be very wary of upsetting the Government. Have they given a satisfactory explanation?

Bob Posner: At the moment, our position is that section 125, or a variation of it, should be in the Act.

Chair: Have the Government given a satisfactory explanation? Yes or no?

Bob Posner: It is not “yes or no”. The position currently is that they have published the Bill without it, the Commission said very clearly, I think our words are, “disappointed and concerned,” in our public briefing—

Chair: I think that is a no, right? Mr Cowan?

Ronnie Cowan: No, thank you.

Q185 Mr Jones: How would you say that section 125 could be amended to allay the concerns of Government, or such of those concerns as are legitimate?

Bob Posner: It is not unamendable. It has been amended for the Scottish referendum, and amended sensibly in relation to other public bodies. It certainly can be amended; it is a doable thing to amend it, to have the vision and amend it. If there are parts of it that Government demonstrates need amending for the affairs of business to carry on, then that can be done. I think Parliamentary Council can do that. I do not think it is beyond the wit of lawyers to amend it. It could just be, at the one end of the spectrum, a very general provision about it not getting away from the general affairs of business. Just some wording that is very broad. It could be more specific and very precise about what can and cannot happen. I think we wait to see precisely what the Government say at the report stage; we will brief our view on that.

Q186 Mr Jones: Which would you say would be preferable? General or a more specific set of exceptions?

Bob Posner: What is important for us is that the provision works. It has worked in recent referenda; we want it to work.

Q187 Mr Jones: It could work well or work badly. Clearly, we want it to work well. If it were to work well, how would you suggest it could be amended?

Bob Posner: I would just say, generally with any amendments to the provision, the more clarity is in it, the better.

Q188 Mr Jones: You would go for the specific exceptions rather than for the general?

Bob Posner: If it was needed. As matters stand today, we are waiting to see.

Q189 Mr Jones: Do I infer from that that you do not think it is needed?

Bob Posner: No, you infer that the present position is that, as matters stand, we are waiting to see what the Government have to say further about it. They have said they are going to come back and say more; we are waiting to see that.

Q190 Mr Jones: When they do say more, can we expect further comments from the Electoral Commission?

Bob Posner: Definitely. The Commission will definitely comment to Parliament before the report stage.

Q191 Mr Jones: Are there any potentially alternative mechanisms available, alternatives to section 125?

Bob Posner: I am not quite sure of the thought behind that.

Q192 Mr Jones: If the Government does not like section 125, might it be possible to put forward some other mechanism that might, in your view, offer sufficient safeguards?

Bob Posner: We think that the reasons that the Committee on Standards in Public Life recommended what effectively became section 125 are equally applicable today, so we think section 125, or a variation or a form of it, is the answer.

Q193 Mr Jones: That would be your preferred option, to stick to section 125?

Bob Posner: Yes, or if it needed varying, to make sure it was not getting in the way of what is the normal business of Government. But the principles of it, as it stands, about what is precluded, about promotional material, absolutely we support that. We think that should be in legislation.

Q194 Chair: The Minister of State for Europe says that PPERA imposes, “A very wide ranging ban” on everyday Government activities during a referendum campaign. How much do you agree with that statement?

Bob Posner: It is an interpretation, no doubt on legal advice, of section 125. I have not seen that legal advice.

Chair: You are a lawyer.

Bob Posner: Yes.

Chair: What is your advice?

Bob Posner: My position is that we see the words on paper in the section; we have seen section 125 has worked in recent referenda.

Chair: That is a formula of words you keep giving us. What is your advice? How much are they over-interpreting that section?

Bob Posner: As matters stand, we have said that we think the section should be in, so we are not currently persuaded of that position.

Chair: Yes, I know, you keep coming out with these formulaic phrases. You are not being very forthcoming as a witness, if I may say so. I would like to know what advice you have taken about that statement. Surely you have a view about how the Government is interpreting section 125.

Bob Posner: Yes, our view is very clear, because we briefed Parliament on it. Our view is very clear indeed, which is that—

Q195 Chair: Does it constitute a wide ranging ban?

Bob Posner: We have said that what has been said so far has not persuaded us that section 125 should not be in the Bill—

Chair: As it is?

Bob Posner: If Government—

Chair: Weasel words, Mr Posner.

Bob Posner: No, if Government have a reasonable concern that sways Parliament that actually there are things in here that present doubt to the ordinary work as a Government, then certainly the section can be clarified sensibly. We have no difficulty with that. That is not what the section intends to get in the way of. What the Minister says, which is a concern that this will get in the way of the ordinary work of Government, in this referendum, we are waiting to hear more from the Government about that. We are waiting to hear what they are saying about clarifying the section, about amending it, assuming they want it back in. That would be fine, if that is the position.

If their position was that section 125 cannot be in at all, our current position on that is, we do not see why not.

Q196 Mr Jones: If I may, Chair. What are your views on the difficulties that have been given by Mr Lidington as, for an illustration, the problems that Government might have if section 125 were not to be misapplied?

Bob Posner: I think he referred to council here at business, did he not, and whether they could say something about attending meetings, and so forth. I do not think there is anything in section 125 that stops Ministers saying things. I do not think there is anything

in section 125 that stops minutes of meetings being published in the ordinary course of business.

Mr Jones: You disagree with him?

Bob Posner: Well—

Q197 Chair: What are you frightened of, Mr Posner? Why will you not give us your view? Are you an independent body?

Bob Posner: No, it is—I think what has to be said is that these are legal provisions in an Act, they are interpretable; like any legal provisions, they are interpretable. That is what lawyers do, is it not? There can be different interpretations and they are valid interpretations about legislation. I respect that. I respect the fact that the Government has looked at it and said that some of it is vague wording. It is vague wording, some of it. I respect that. That is understandable. However, we have not seen this section not work. It has not been legally challenged in the courts in previous referenda; it has worked. As things stand, we are not persuaded that it does not work. I am not persuaded that it does not work.

Q198 Mr Jones: That sounds to me that you disagree with him.

Bob Posner: I am—the Government—what has been said is that they are going to come back and clarify their position, so we are waiting to see it.

Q199 Chair: Yes, but as it stands—

Bob Posner: As it stands, our position is clear. We have just one concern; we think the provision should be in the Act, yes.

Q200 Kate Hoey: So, you disagree?

Bob Posner: We disagree with the Government position that it is—

Q201 Chair: Why is this like pulling teeth? Why can you not just tell us what you think? You have obviously been given a line to take.

Bob Posner: No, no. I am saying it as it is, which is that, for the Commission, this is legislation going through Parliament, we have briefings it goes through, we are now waiting for the next stage and we will brief further at that stage. We have been quite clear we have just one concern that it is not in the Act—

Q202 Mr Jones: Mr Posner, you are a lawyer. In your professional opinion, as it stands, on the basis of the evidence that you have seen, do you disagree with the Minister?

Bob Posner: As it—well, you want me to say I disagree with the Minister. What—

Mr Jones: No, I do not. I just want you to say yes or no.

Bob Posner: It is not my personal position. I am here to represent the Commission's—

Chair: I invited you in front of a Select Committee and you are obliged to tell us the truth.

Bob Posner: Yes, I am here for the Commission's position. The Commission's position is very straightforward, which is that, as it stands, we see no reason why this provision cannot be in the Bill. We are waiting to hear further from the Government.

Q203 Kate Hoey: The Commission disagrees at the moment?

Bob Posner: Yes.

Tom Hawthorn: I think it also worth us reiterating that when we have looked at the operation of section 125 in previous referenda, we have not seen any concrete examples that Governments have highlighted where they have faced difficulties in continuing normal business as a result of section 125.

Chair: Which is very diplomatic speak for saying that they are talking rubbish. Yes?

Bob Posner: Yes, that is your comment.

Chair: Thank you.

Bob Posner: Your words.

Q204 Kate Hoey: So, he has said that the Electoral Commission disagree with the Minister on this particular Bill.

Bob Posner: The Minister's position is that section 125 cannot be in the Bill, for reasons of practical workability. Our position is that, as things stand, we think the provision can be in the Bill.

Q205 Oliver Dowden: What about this argument that, because of enhanced traditional activism over the past 10 years or so there is more of a danger that certain activity that may not have been caught 10 years ago now may be caught and there is a need for some greater clarity around that? Do you have a view on that proposition?

Bob Posner: I think it is a fair proposition to say, but people are more likely to be in judicial review changes than perhaps in 1999, 2000. Perhaps that is a fair comment; I am

not sure. What I will say is that, in recent referenda, Wales' alternative vote system, and Scotland, section 125 did apply and worked and there was a legal challenge.

Q206 Chair: What form would judicial action take?

Bob Posner: Presumably it would have to be some form of—it would be a judicial review, it might seek an injunction to stop some activity. I am not aware of anyone trying that on this section, I am not aware of that having happened, so there is no precedent for that.

Q207 Chair: There is no precedent for it?

Bob Posner: No, I do not think so.

Q208 Oliver Dowden: Do you think there is a possibility of it?

Bob Posner: I think it would be possible to bring an action before the courts.

Q209 Mr Jones: Who would sue for such an action?

Bob Posner: When one gets into the last 28 days, the field is left clear for campaigning, for campaigners. So it is conjecture, but it could be a campaigner, could it not?

Mr Jones: A registered campaigner?

Bob Posner: Yes. It could be anyone, I suppose, who had sufficient standing as a concern—but yes, a registered campaigner would be a possibility, I suppose.

Q210 Chair: Any further questions? Can I just clarify one thing? What discussions has the Electoral Commission had directly with the Government about these matters?

Tom Hawthorn: We have had discussions with officials about the provisions within the Bill, and we have made clear our view that section 125 should remain in the Bill and we have made clear our position, as we briefed Parliament, that we would support the restrictions being reintroduced. I think that any discussions that we have with Ministers would also reinforce that point, and that would be the extent of our discussions.

Q211 Chair: When have you had these discussions?

Tom Hawthorn: I cannot speak for discussions with Ministers, but we can give you a note of when those discussions have taken place. We meet officials regularly and we make clear to them our position on the provisions in the Bill.

Q212 Chair: When did you last meet officials?

Tom Hawthorn: We last met officials earlier this week.

Q213 Kate Hoey: Officials from Downing Street?

Tom Hawthorn: Cabinet Office officials and Foreign Office officials.

Q214 Chair: What discussions did you have about this forthcoming evidence session?

Tom Hawthorn: We told them that we had been invited, and that was the extent of the discussion.

Q215 Chair: What advice did they give you about what you should say?

Tom Hawthorn: None whatsoever.

Q216 Chair: What discussions did you have about this session?

Tom Hawthorn: We explained that we were being asked to give evidence and we explained that we had set out our views on section 125 in briefings to Parliament.

Q217 Chair: In terms of your relationship with officials in the Cabinet Office, would you describe it as a day to day relationship? What kind of relationship?

Tom Hawthorn: Probably not a day to day relationship, but a week to week relationship. We have worked very closely with Cabinet Office officials on all aspects of election legislation. We will have issues with that we want to discuss with them where we think that the Bill ought to be—could be improved, and we will have those discussions with them. But anything that we think Parliament needs to be aware of, we will brief Parliament—

Q218 Chair: How independent is your opinion on these matters, from the Government?

Tom Hawthorn: Entirely.

Chair: Entirely? Then why is it so difficult to get you to express your opinions?

Bob Posner: We have been very clear in our brief to Parliament at the Committee stage in what we said about this. We have just one concern that the provision should be in the Bill. I do not think it could have been clearer.

Chair: Any other questions? Kate Hoey?

Q219 Kate Hoey: No, there are more questions but it covered another stage in terms of the wording of the referendum and so on. You have been obviously very involved in that. Are you happy with the change that the Government has brought to what your suggestion was?

Bob Posner: The question? We are assessing that currently, the question, and in early September I think we will be—before the Bill comes out, we will be—

Kate Hoey: It is quite possible that you might come back and say, “Actually, yes, no it is not; it should be stay and leave”.

Bob Posner: There will be an outcome with it. Anything is possible. We will say what we think.

Q220 Kelvin Hopkins: Previous Governments, notably that of Mr Blair, were very concerned that regulators did not get out of line and take a strong view, and one or two of them were seriously attacked by the Government because they took a strong view. Is there a nervousness that if you took a strong line and came out strongly and publicly against the Government that they might take a dim view of that and life would be uncomfortable for the Commission?

Bob Posner: No, not at all. I hope the Commission has written a briefing to Parliament and to you, and I hope what I have said has been clear. We have not agreed with the Government’s position on this Bill on section 125; it is as simple as that. We are waiting to see what they have got next to say about it. We will advise Parliament further on our view on that, very clearly. Absolutely crystal clear about our independence, and we guard that and protect that carefully, with no fear or favour.

Chair: I am sorry if one or two of us may have a misapprehension—

Bob Posner: It is probably my fault.

Chair: —about your position, and I am glad you have put that on the record at the end. We are grateful for the work that the Electoral Commission does. We think it plays a very valuable role in our constitutional arrangements, and we treasure your independence. I believe this Committee will want to guarantee your independence, and should you ever require protection of your independence, come to this Committee and we will protect you. Thank you very much for your evidence today.

Bob Posner: Thank you.

Chair: We look forward to robust analysis of whatever the Government proposes, from the Electoral Commission. Thank you very much.