



## Regulation of referendums

Standard Note: SN/PC/05142

Last updated: 14 February 2012

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This Note sets out the mechanics for holding referendums. It summarises the applicable provisions of the *Political Parties, Elections and Referendums Act 2000* (PPERA) which regulate publicity and campaigning. The Electoral Commission has to be consulted over the intelligibility of the question or questions to be asked in the referendum, where that poll has been established under legislation passed at Westminster. The Commission also has the power to designate organisations as lead campaign groups and to regulate spending limits on campaigns.

The question of a referendum on the future constitutional arrangements for Scotland has arisen since the Scottish National Party won a majority of seats in the Scottish Parliament elections in May 2011. The UK Government issued a consultation paper on 10 January 2012, and the Scottish Government produced proposals on 25 January, in its own consultation document. This proposed the passage of legislation in Scotland which would allow for a referendum on independence, which would be regulated by the Electoral Commission. The UK Government has proposed using powers under section 30 of the *Scotland Act 1998* to pass to Holyrood power of competence to hold the referendum. Further discussions between the UK Government and the Scottish Government are continuing.

[Standard Note 6185 \*Scotland Bill –latest developments\*](#) sets out the progress of the *Scotland Bill 2010-12*. This was introduced in January 2011 following the Calman Commission recommendations on devolving further functions to Scotland.

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## 1 Introduction

Referendums have become a relatively common constitutional device in the UK since 1997. However, only two referendums have been held throughout the UK. The first was the referendum on the continuing membership of the Common Market in 1975 and the second was on proposals to introduce the Alternative Vote (AV) in May 2011. The *Political Parties, Elections and Referendums Act* (PPERA) 2000 sets out a scheme to regulate expenditure by political parties and campaigning groups in both elections and referendums, following recommendations from the (Neill) Committee on Standards in Public Life.<sup>1</sup> Each referendum held subsequently still requires primary legislation to set the terms of the question and the franchise to be used, amongst other provisions. The *Parliamentary Voting System and Constituencies Act 2011* set these out for the AV referendum.

Just before the 2010 general election, the House of Lords Constitution Committee published a report [Referendums in the United Kingdom](#). This made some general observations on the appropriate use of referendums for constitutional questions.

The Electoral Commission published a review of the conduct of the 2011 AV referendum on 19 October 2011 which makes recommendations for change, including the suggestion that if significant changes are made to the referendum question during the passage of the relevant bill, the Commission should be required to re-run its intelligibility of question test.<sup>2</sup>

## 2 A referendum in Scotland?

Since the SNP formed a minority government in Scotland in 2007, the question of holding a referendum on independence for Scotland has arisen. Section 101(2)(a) of PERA refers to the regulation of referendums held under an Act of the UK Parliament.

The Scottish Government published a [Draft Referendum \(Scotland\) Bill](#) in February 2010, in the last Scottish Parliament, which proposed the establishment of a Scottish Referendum Commission and a Chief Counting Officer.. These effectively would have taken on the role of the Electoral Commission for the purposes of an independence referendum. A consultation paper [Scotland's Future: Draft Referendum \(Scotland\) Bill consultation](#) was published at the same time. The *Draft Referendum (Scotland) Bill* was not formally introduced into the Scottish Parliament. The SNP formed a majority Government after the May 2011 elections for the Scottish Parliament and announced its intention of holding a referendum in 2014.

On 10 January 2012 the Secretary of State for Scotland, Michael Moore, made a statement in the House of Commons and released a consultation document.<sup>3</sup> The Government proposes to use section 30 of the [Scotland Act 1998](#) to make an order explicitly giving the Scottish Parliament power to hold a referendum on independence. The consultation paper favoured using the Scottish Parliament electoral franchise and a regulatory role for the Electoral Commission. The consultation paper accepted that it would be possible for a joint referral to the Supreme Court to decide on the competence of the Scottish Parliament to legislate for a referendum, but considered that it would be better to end the uncertainty, preferably through an order under section 30 or through primary legislation at Westminster, including the use of the *Scotland Bill 2010-12*. The draft order set out in the consultation

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<sup>1</sup> [The Funding of Political Parties in the United Kingdom](#), Cm 4057

<sup>2</sup> [Referendum on the voting system for UK parliamentary elections; report on May 2011 referendum Electoral Commission](#)

<sup>3</sup> Scotland Office, [Scotland's Constitutional Future](#), Cm 8203, January 2012. The consultation closes on 9 March 2012.

paper provided for a date by which the referendum should be held, but the draft did not give a specific date. The consultation paper expressed the UK Government's firm view that "the question of Scotland's constitutional status should be resolved sooner rather than later".<sup>4</sup>

The UK consultation paper considered that it was unnecessary to establish a separate Referendum Commission in Scotland and argued that the Electoral Commission should be given the powers to oversee any referendum on Scottish independence.

As Mr Moore was delivering his statement to the House of Commons, Mr Salmond announced his intention to hold the referendum in autumn 2014, via a YouTube broadcast.<sup>5</sup> Previously, the First Minister had outlined some of the SNP's thinking behind the planned referendum on independence in his October 2011 [conference speech](#). There was no detail at that stage on the wording of the question and the timing of the referendum. A consultation paper from the Scottish Government was published on 25 January. The main points were as follows:

*Your Scotland, Your Referendum* is an important first step in the process which will lead to the referendum. It sets out proposals for the question to be asked and the rules governing the campaign and the vote. The referendum will meet the highest standards of fairness, transparency and propriety. The consultation paper:

□ sets out a proposed ballot paper with the question:

Do you agree that Scotland should be an independent country?

□ seeks views on the inclusion of a second question. The Scottish Government is willing to include a question about further, substantial devolution on the lines of "devolution max" if there is sufficient support for such a move.

□ proposes that the referendum should be run in exactly the same way as an election. Local returning officers will have operational responsibility for the poll and the count, under the direction of a Chief Counting Officer. The Electoral Commission will be responsible for regulation of the campaign and for oversight and reporting the referendum process and in this role will be accountable to the Scottish Parliament. Restrictions on Government publicity will apply in the run-up to polling day as they would for elections.

□ asks whether 16 and 17 year-olds who are on the electoral register should be eligible to vote in the referendum. With this exception, eligibility will be the same as for Scottish Parliament and local government elections and for the 1979 referendum on devolution. This reflects the internationally accepted principle that the franchise for constitutional referendums should be determined by residency and the Scottish Government's view that sovereignty lies with the people of Scotland.

□ seeks views on proposed spending limits of £750,000 for the lead campaign organisations designated by the Electoral Commission, £250,000 for each political party represented in the Scottish Parliament and £50,000 for others who want to spend more than £5,000 on campaigning. This approach is based on the legislation which applies to UK-wide referendums with the limits tailored to reflect that the referendum will be held in Scotland only.

The total cost of the referendum is likely to be around £10 million, the bulk of which will be spent on running the poll and the count. This cost is broadly in line with the cost

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<sup>4</sup> Ibid p18

<sup>5</sup> See <http://www.scotland.gov.uk/News/Releases/2012/01/10210754>

(per voter) of the Welsh Assembly and AV Referendums in 2011. There will be no public funding for campaign organisations

The Scottish Government is ready to work with the UK Government to agree a clarification of the Scotland Act 1998 that would put the referendum effectively beyond legal challenge. This would be achieved through an order under section 30 of the 1998 Act and subject to the agreement of both parliaments. The Scottish Government does not accept that conditions should be placed upon the order. The Scottish Government's mandate to hold a referendum is clear. As a matter of democratic principle it is for the Scottish Parliament to decide on the timing and terms of the referendum and the rules under which it is to be conducted.<sup>6</sup>

There has been debate over the extent to which any referendum called by the Scottish Government would be within its powers under the devolution settlement. The constitution and the Union are reserved matters under the *Scotland Act 1998*. Section 29 provides that an Act of the Scottish Parliament is not law if it is outside the competence of the Parliament.<sup>7</sup> The SNP has argued that an advisory reference is within the competence of the Parliament and a positive response would authorise the Scottish Government to open negotiations.<sup>8</sup> Mr Salmond has also indicated his party's continuing support for the inclusion of 16 and 17 year olds as voters in any referendum. At present, matters concerning the franchise are reserved to the Westminster Parliament.<sup>9</sup>

The debate has been complicated by the possibility of the inclusion of a third option in a referendum, commonly referred to as 'devolution plus', 'full fiscal autonomy' or 'devo-max'. This concept has not been authoritatively defined, or endorsed in any way by the Scottish Government, but it is generally understood to include further devolution of all policy-making and fiscal power to the Scottish Parliament, with the exception of 'high state' matters such as defence and foreign affairs.

The Scottish Affairs Committee of the UK Parliament launched an enquiry in 2011 titled the *Referendum on Separation for Scotland*. The Committee has published some written evidence but has not yet held oral evidence on this topic.<sup>10</sup>

Malcolm Moore met Alex Salmond on 13 February 2012 and according to media sources, some progress towards agreement was made. BBC News reported the comments of the Secretary of State for Scotland:

He said there remained two main areas of disagreement between the two governments - over the number of questions to be asked and whether 16 and 17 year-olds would be allowed to vote in the ballot.

He said issues over the timing of the referendum and the role of the Electoral Commission in organising the vote had been "more or less settled."

Alex Salmond says "modest progress" was made during the talks.

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<sup>6</sup> [Your Scotland, Your Referendum summary](http://www.scotland.gov.uk/Resource/0038/00386122.pdf) Scottish Government 25 January 2012 Full document is available at <http://www.scotland.gov.uk/Resource/0038/00386122.pdf> The consultation closes on 12 May 2012.

<sup>7</sup> See [evidence from Professor Adam Tomkins to Scottish Affairs Committee](#) inquiry The Referendum on Separation for Scotland 9 November 2011

<sup>8</sup> For a view from the nationalist perspective see "is there a constitutional path to Scottish independence?" *Parliamentary Affairs* 2000 Professor Sir Neil McCormick

<sup>9</sup> Schedule 5 Scotland Act 1998 lists reserved matters including the local government franchise

<sup>10</sup> <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmsscota/writev/referendum/contents.htm>

The SNP wants the vote to take place in autumn 2014, while the UK government had previously said it wanted it to take place earlier".<sup>11</sup>

### 3 Regulation of referendums in the UK

#### 3.1 The question(s) to be asked in a referendum

The wording of the question or questions to be asked is generally contained in the act passed for each referendum held. The initial drafting is therefore undertaken by the executive. Clearly, the nature of the question is itself a political decision. Many issues do not easily lend themselves to a yes or no answer. Similarly, a referendum may be held for a number of different reasons; these may include entrenching an existing policy or eliciting support for a major change.

PPERA requires the Electoral Commission to consider the wording of the referendum question and publish a statement of any views it has about the question's intelligibility.<sup>12</sup> This must be done as soon as practicable after the bill is introduced. The Electoral Commission is not required to consider the wording until the bill is introduced into Parliament. In practice there are likely to be contacts at official level before the publication of any legislation. The Electoral Commission's views are not binding on the Government, but are clearly influential.

The Electoral Commission produced its [Referendum Question Assessment Guidelines](#) in November 2009, as an indication of the principles to be used in assessing intelligibility. The Lords Constitution Committee recommended in 2010 that the decision on the wording of the question should be passed completely to the Electoral Commission, which would then seek parliamentary approval.<sup>13</sup>

The question to be asked in the Scottish independence referendum is set out as follows in the consultation issued by the Scottish Government:

Do you agree that Scotland should be an independent country?

Mr Salmond responded to concerns that the Scottish Government consultation document had not explicitly stated that the Electoral Commission would assess intelligibility by stating that the Commission would have a role in assessing the questions.<sup>14</sup>

The current debate on the type of question to be put in any referendum on Scottish constitutional arrangements has raised the question of multi-option polls. The referendum on Scottish devolution held in 1997 had two questions: one on the establishment of a Scottish Parliament and one on the need or otherwise for tax raising powers for that Parliament. There were two separate ballot papers, one for each question.<sup>15</sup>

There are precedents for multi-option referendums internationally.<sup>16</sup> In New Zealand there were two referendums on electoral reform. The first poll in 1992 asked voters firstly, whether they were content with First Past the Post or wanted a change, and secondly, if they favoured change, which of a variety of electoral systems they would prefer. A second poll in 1993 offered voters a straight choice between First Past the Post and the favoured

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<sup>11</sup> "Scottish independence: 'Modest progress' at Moore Salmond talks" 14 February 2012 *BBC News*

<sup>12</sup> Section 104

<sup>13</sup> [Referendums in the United Kingdom](#) HL Paper 99 2009-10, para 154

<sup>14</sup> "Independent Scottish parliament by May 2016 targeted by Salmond" *Guardian* 26 January 2012

<sup>15</sup> "1997 Scottish referendum: an analysis of the results" Pattie et al Scottish Affairs 1997

<sup>16</sup> "The next Scottish referendum" Peter Emerson in *Scottish Affairs* Autumn 2010

alternative, Mixed Member Proportional (MMP)<sup>17</sup>, and was held at the same time as a general election. A similar referendum was held there on 26 November 2011, again with two questions; whether voters wanted to retain MMP or if not, which electoral system they would prefer. There was a majority in favour of MMP. Options where three questions are presented on one paper are rarer. One example is Puerto Rico where voters were asked in 1967 and 1993 whether they wanted the island to be independent, to become part of the USA or remain as a Commonwealth linked to the USA.<sup>18</sup>

The Scottish Government has previously preferred two questions, with separate ballot papers: on support for devo-max and on support for independence.<sup>19</sup> A number of academic commentators have argued that either the Alternative Vote or the Condorcet method would more reliably express the will of the people. Under the Condorcet method, there would be three votes, for each option, status quo, devo-max or independence.<sup>20</sup> Its consultation paper issued on 25 January 2012 has called for responses to indicate whether there is support for a question on devo-max, as well as independence.<sup>21</sup>

The Constitution Unit in University College London has argued for a two separate referendums on independence. The first referendum would authorize the Scottish government to open negotiations on the terms of independence. The second would allow a final decision to be made on the basis of the terms agreed.<sup>22</sup>

The January 2012 UK consultation paper argued that SNP plans for two questions were flawed:

The UK Government believes that the Scottish Government's proposition for two questions is not right for a number of reasons. These questions deal with two entirely separate constitutional issues: first whether more powers should be devolved to the Scottish Parliament within the United Kingdom; and second whether Scotland should become an independent country. The Scottish Government has compared its proposal with the 1997 referendum, which asked first if there should be a Scottish Parliament, and second whether it should have tax raising powers. This comparison is not valid. In 1997, both questions related to devolution. While the Scottish Government's two proposals both call for the Scottish Parliament to be given new powers, the first would keep Scotland in the UK, and the second would lead to independence. These are two different issues, and should be considered separately. If these two questions were asked together, there would be four possible outcomes, and potentially four different campaigns, each arguing for a different result. On an issue as important as whether Scotland remains part of the UK, the arguments must be presented clearly, to allow people in Scotland to make an informed decision. Having four different campaigns would not help to generate clarity.<sup>23</sup>

The Scottish Government consultation paper argued that there was considerable support for another question:

While the Scottish Government's preferred policy is independence, it recognises that there is considerable support across Scotland for increased responsibilities for the

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<sup>17</sup> This is similar to the Additional Member System used for elections to the National Assembly for Wales and the Scottish Parliament

<sup>18</sup> From M. Qvortrup (Forthcoming), *From Bullets to Ballots: Referendums on Ethnic and National Issues*

<sup>19</sup> *Scotland's Future: Draft Referendum (Scotland) Bill consultation* February 2010, chapter 1

<sup>20</sup> See Emerson in fn 9 and "Scotland and the Kenner conundrum" You Gov 16 January 2012

<sup>21</sup> *Your Scotland, Your Referendum* 25 January 2012 Scottish Government, paras 1.25-6

<sup>22</sup> *Scottish Independence – A Practical Guide* Jo E Murkens 2002

<sup>23</sup> Scotland's constitutional future: January 2012 p19

Scottish Parliament short of independence. One option, full devolution (or “devolution max”) was set out in some detail in the Scottish Government white paper *Your Scotland, Your Voice* published in 2009<sup>1</sup>. The Scottish Government has consistently made it clear in that paper and its 2010 consultation paper on a draft referendum Bill<sup>2</sup> that it is willing to include a question on further devolution in the referendum. That remains the Scottish Government’s position. It will listen carefully to the views and arguments put forward on this issue in response to this consultation.<sup>24</sup>

### 3.2 The franchise

The electorate to be used is usually a simple choice between the local and parliamentary franchise and is decided in the bill establishing a particular referendum. The local electorate includes other EU nationals resident in the UK and peers who sit in the House of Lords, but not British citizens who have registered as overseas voters. The parliamentary franchise includes these overseas voters but not EU citizens or members of the House of Lords. In the case of the 1975 EC referendum, the electorate was the parliamentary franchise, with the addition of peers and special arrangements for the armed forces electorate.<sup>25</sup>

Since 1997, the local electorate has been used for referendums in Scotland, Wales and London, and the parliamentary for the Northern Ireland referendum. The electorate for the AV referendum was set out in the *Parliamentary Voting System and Constituencies Act 2011* as the parliamentary electorate, but including members of the House of Lords.

In his statement to the House of Commons on Scotland’s constitutional future on 10 January 2012, the Secretary of State for Scotland, Michael Moore, said:

On the franchise, we are suggesting that the same franchise that was the right basis on which the First Minister and all his colleagues in the Scottish Parliament were elected should be used to determine this historic decision. As far as 16 and 17-year-olds participating is concerned, there is an entirely fair debate about their role in the electoral system generally, but it should not be focused around a single electoral event to suit one party or another.<sup>26</sup>

The Scottish Government proposed the use of the Scottish Parliament and local government franchise, arguing that the most appropriate franchise would be that based on residency. This franchise would exclude overseas voters, but include service personnel serving overseas, registered in Scotland.<sup>27</sup>

### 3.3 Expenditure limits and permitted participants

- PPERA established procedures for maximum expenditure limits for:<sup>28</sup>
- UK wide referendums and
- referendums held throughout either Scotland, Wales, England or Northern Ireland and
- referendums in any region in England.<sup>29</sup>

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<sup>24</sup> *Your Scotland, Your Referendum* Scottish Government Consultation January 2012, summary

<sup>25</sup> *Referendums Act 1975*, s1(3),(5)

<sup>26</sup> HC Deb 10 January 2012 c56

<sup>27</sup> *Your Scotland, Your Referendum* Scottish Government consultation January 2012 paras 2.11-12

<sup>28</sup> See section 101. This was contrary to the recommendations of the Neill Committee. Its report argued that controls would be impractical and might be considered an unwarranted restriction on freedom of speech. Neill Committee 1998 Cm 4057 [http://www.public-standards.gov.uk/Library/OurWork/5thInquiry\\_FullReport.pdf](http://www.public-standards.gov.uk/Library/OurWork/5thInquiry_FullReport.pdf)

Apart from UK wide referendums, the limits are set by the Secretary of State by order, having regard to the views of the Electoral Commission.<sup>30</sup> The UK wide limits are specified in PPERA, in Schedule 14.

Briefly, expenditure limits apply during the 'referendum period' – a time period set out in the legislation authorising a particular referendum. The referendum on the Alternative Vote was the first nationwide referendum to be held under the PPERA provisions and the referendum period began with royal assent on 16 February 2011 and lasted 11 weeks.

Groups (including political parties, campaign groups and other bodies) must register with the Electoral Commission if they plan to spend more than £10,000 during the referendum period. These are called permitted participants. For UK wide referendums, the maximum expenditure is £0.5m for permitted participants; for political parties the limit is related to share of the vote at the last general election, ranging up to £5m.

Permitted participants must submit returns of expenditure to the Electoral Commission, within 6 months of the poll. More detail is required where participants have spent over £250,000. This means that full details of expenditure is not known until the referendum has taken place. The Electoral Commission has expressed concern in the past about the difficulty of regulating expenditure during the short campaign period, when accounts will not be submitted until after the poll.<sup>31</sup>

The Commission also expressed concern that the legislation did not guarantee an equality of spending, and that permitted participants could proliferate, causing difficulties in assessing whether expenditure limits had been breached.<sup>32</sup> A number of witnesses to the Lords Constitution Committee inquiry on referendums in April 2010 also repeated these concerns. The Committee recommended the aggregation of spending limits for permitted participants who operate to a common plan and there is provision in the 2011 Act to link expenses where persons are acting in concert.<sup>33</sup>

The Scottish Government has proposed the following campaign limits in the consultation paper issued in January 2012:

The Scottish Government seeks views on proposed spending limits of £750,000 for the designated lead campaign organisations, £250,000 for each political party represented in the Scottish Parliament and £50,000 for other permitted participants.<sup>34</sup>

### **Political parties**

If a registered party campaigns as a permitted participant under sections 105 and 106 of PPERA, it needs to indicate the outcome for which it intends to campaign. S106(7) defines 'outcome' as 'a particular outcome in relation to any question asked in the referendum. The declaration must be signed by the 'responsible officers of the party', defined in s64(7) as the

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<sup>29</sup> specified in Schedule 1 to the *Regional Development Agencies Act 1998* (see s101 of PPERA) Expenditure limits were set for the only regional referendum so far, that for the North East region. See Electoral Commission report 2004 *North East regional assembly and local government referendums* 2005 which specifies the limits

<sup>30</sup> PPERA, Schedule 14, para 2

<sup>31</sup> [Evidence from Sam Younger](#), former Chairman of the Electoral Commission, to the Treasury Select Committee, 18 March 2003, HC 187-II, Session 2002-03, Q1327

<sup>32</sup> [Evidence to Select Committee on Transport, Local Government and the Regions](#), 10 July 2002, HC 1077-1, Session 2001-2, Q85

<sup>33</sup> *Referendums in the United Kingdom* HL Paper 99 2009-10, para 200. See para 17 of Schedule 1 to the *Parliamentary Voting System and Constituencies Act 2011*

<sup>34</sup> *Your Scotland, Your Referendum* Scottish Government consultation January 2012, chapter 3

'registered leader', the 'registered nominating officer' and any other registered officer. Under s106, it is necessary to make the declaration in order to become a permitted participant.

### 3.4 Controls on donations

Donations made to permitted participants are also controlled by PPERA. Permitted participants have to register donations received over £7500 with the Commission, and refuse donations over £500 if they are from donors not on the UK electoral register, from non UK companies, from blind trusts, or from unknown sources.<sup>35</sup> Information on donations will not be made available until after the result of the poll is known, since section 120 of PPERA does not require the return to be made on referendum expenses and donations until after the end of the referendum period. The Electoral Commission issued [guidance for permitted participants](#) on the acceptance of donations for the AV referendum.<sup>36</sup>

During the passage of the *Parliamentary Voting System and Constituencies Act 2011* (PVSC) an opportunity was taken to clarify the position on media comment. Section 5 of the PVSC Act set out that press or media comment is not to be treated as referendum expenditure. Newspaper advertisements would count as campaign expenditure. There are no specific guidelines on accuracy, beyond the usual Advertising Standards Authority guidance which notes that it has no remit over non-broadcast ads where the purpose of the ad is to persuade voters in a local, national or international election or referendum. Complaints of political bias in radio or TV advertisement are made to Ofcom.

Section 6 of the PVSC Act 2011 applies the new controls on non commercial loans to referendums. These new rules were applied to political parties in respect of election funding in the *Electoral Administration Act 2006*.

### 3.5 Designated organizations- public funding

The Electoral Commission may appoint designated or umbrella organisations for each side of the outcome of the referendum. These benefit from maximum grants of £600,000 to each organisation combined with a free referendum address to every household and referendum campaign broadcasts.<sup>37</sup> The Commission decided to award £380,000 to each side for the AV referendum. Technically it is possible to designate organisations for a multi-option referendum. Designated organisations have a maximum spending limit of £5 million.<sup>38</sup> They also benefit from a free post mailing to electors and referendum campaign broadcasts.

The Commission may decide not to designate, where it does not consider that an organisation exists which represents the body of opinion on one side. It cannot designate one side only. The Commission was unable to designate for the referendum on further devolution in Wales, held on 3 March 2011, since the only applicant for the 'No' campaign did not meet a statutory test of adequately representing those campaigning for a 'No' vote<sup>39</sup>. The main No campaign had decided against applying for designation.<sup>40</sup>

The Commission published the criteria for designation for the AV campaign as follows:

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<sup>35</sup> These limits were set out in Section 20 of the *Political Parties and Elections Act 2009*, brought into force by [SI 2009/3084](#); the Act also introduced new restrictions on donations for non domiciled UK nationals, but these have not yet been brought into force

<sup>36</sup> [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0003/105618/sp-referendum-pvs-rc.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0003/105618/sp-referendum-pvs-rc.pdf)

<sup>37</sup> [Referendum on the parliamentary voting system in the UK](#) 17 February 2011 *Electoral Commission*

<sup>38</sup> See s108(3) PPERA

<sup>39</sup> [No lead campaigners for National Assembly referendum](#) 25 January 2011 *Electoral Commission*

<sup>40</sup> [Lack of official campaigns for referendum 'sad day'](#) 20 January 2011 *BBC News*

- The extent to which the applicant is an ‘umbrella organisation’ coordinating the activities of a number of member organisations
- The level of support for each applicant
- The level of grassroots campaigning associated with the applicant
- The applicant’s capacity to deliver their campaign, and
- The range of interests represented by the applicant
- We will also look at, but give less weight to, factors such as:
  - How long the applicant’s organisation has been in existence
  - Its fundraising capacity, and its organisational structure
  - Its capacity to ensure the proper use of public grant money <sup>41</sup>

### 3.6 The regulation of campaigns

PPERA provided that any material to do with the referendum, which is published in a referendum period, must carry the name and address of the printer together with the name of any person or body on whose behalf it is published.<sup>42</sup> This was intended to help the Electoral Commission and the public identify who is behind publications, and therefore who has incurred referendum expenses. Campaign material is subject to statutory regulation in terms of defamation, incitement to hatred etc, but there is no equivalent to the electoral law provision on false statements about candidates which led to the election petition in Oldham East and Saddleworth in November in 2010.<sup>43</sup>

PPERA places restrictions on promotional material published during the 28 days (known as the “relevant period”) before a referendum by the Government, local authority or other publicly funded body, apart from the Electoral Commission.<sup>44</sup> This has caused some difficulties, according to the Commission, in alerting voters to the issues. The powers in the PVSC to enable the Commission to encourage participation have been added as a result.<sup>45</sup>

### 3.7 Public awareness

The Commission issued a booklet to each household in the UK for the AV referendum in May 2011. Content included different ways to vote (at a polling station, postal, proxy etc.) and a brief guide to AV and First Past the Post. Drafts of the leaflets are available on the [Commission website](#).<sup>46</sup>

The Scottish Government consultation proposed the following:

- 1.15 As part of the process the Scottish Government will set out full details of the offer

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<sup>41</sup> [Delivering the 5 May elections and referendum statement](#) by Jenny Watson 16 February 2011

<sup>42</sup> Section 126

<sup>43</sup> See [Standard Note 5751 Election Petition: Oldham East and Saddleworth](#)

<sup>44</sup> Section 125

<sup>45</sup> Schedule 1, paras 8 and 9

<sup>46</sup> <http://www.electoralcommission.org.uk/news-and-media/public-awareness-campaigns/public-information-on-5-May-2011-elections-and-proposed-referendum>

to the people of Scotland in a comprehensive white paper on independence. This will be published following Royal Assent to the Referendum Bill, expected in November 2013 (see timetable following paragraph 1.24). To ensure that voters are fully informed about the proposals, a factual information leaflet about the process of the referendum will be sent to every household. This was exactly the approach taken by the UK Government in the lead-up to the 1997 referendum about the Scottish Parliament. Comprehensive factual information will also be made available on the Internet. This information will be distinct from material produced by those campaigning for a particular outcome in the referendum.<sup>47</sup>

### 3.8 Referendum campaign broadcasts

Only designated umbrella organisations can have referendum campaign broadcasts.<sup>48</sup> This is to ensure that, in any referendum, each side of the campaign will have equal access to free airtime for campaigning.<sup>49</sup> Section 127 of PPERA prevents the main purpose of any broadcast, other than a referendum campaign broadcast, from being to procure or promote a referendum's outcome. It is the role of the broadcasters to interpret this. The Broadcaster's Liaison Group has a role in the allocation and regulation of party political broadcasts and issued [production guidelines](#) for referendum broadcasts. The BBC Trust has consulted on these and referendum guidelines were adopted by the BBC in December 2010.<sup>50</sup>

### 3.9 The administration of the referendum

PPERA provides that the Chief Counting Officer for the referendum is the chair of the Commission, Jenny Watson, or their appointee, who may delegate responsibility to counting officers for each local government relevant area.<sup>51</sup> 12 Regional Counting Officers were appointed to assist with coordination and local returning officers acted as counting officers for the AV referendum. The Electoral Commission therefore has a major role in directing the conduct of the referendums. The Chief Counting Officer has powers of direction which make the poll more centrally managed than elections, which are subject to the discretion of local returning officers.

Following the AV referendum, the Electoral Commission published a report in October 2011 on the conduct of the poll, which called for more consistency and a longer period between royal assent and the actual referendum:

**The Commission's report also makes recommendations on how future referendums can be improved.** The report calls for a generic set of rules for referendums to be agreed by Parliament. Establishing a broad set of rules under which referendums would operate, separate from the important Parliamentary scrutiny of the particular question and franchise for a specific referendum, would ensure electoral administrators and campaigners could start to plan properly even if the legislation establishing the referendum is delayed. The report also recommends that there should be a minimum period of 28 weeks between Royal Assent and polling day at future referendums. Parliament only gave final agreement for the referendum on the Parliamentary voting system on 16 February 2011 leaving just 11 weeks before polling day. This was well after resources needed to be committed to planning a UK wide

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<sup>47</sup> [Your Scotland, Your Referendum](#) Scottish Government consultation January 2012, para 1.15

<sup>48</sup> Section 127

<sup>49</sup> [Explanatory Notes](#), paragraph 223

<sup>50</sup> [Referendum campaign broadcasts- give us your views](#) December 2010 BBC Trust

<sup>51</sup> Section 128

referendum and posed a risk to the successful delivery of the polls as well as limiting campaigners' ability to organise and plan their activities.<sup>52</sup>

Schedule 2 of the PVSC Act sets out the referendum rules. These included the timetable, postal votes and procedures at the count. Schedule 3 set out the rules for absent voting and Schedule 4 adapted existing provisions in electoral law to the referendum.<sup>53</sup>

One point of concern during the AV referendum was the question of providing guidance to electors in the polling station as to the nature of the referendum. Clearly, polling staff cannot describe the arguments for Yes or No, but it was suggested that a number of voters may be confused about the question being asked. The PVSC Act prescribed a guidance notice to be displayed in each polling station, but this simply explains how to mark the ballot paper. The Electoral Commission provided templates for use by counting officers.<sup>54</sup>

### **The count**

The PVSC Act set out the rules for the count of the referendum vote in Schedule 2, para 40. The rules were adapted from those in use for normal elections. Once the count was complete, the results were sent to the relevant regional counting officer. The Electoral Commission direction to counting officers was that the count for the referendum should take place **after** the count for the other elections to be held on 5 May, where administrations need to be formed. There was a limited exception for Northern Ireland Jenny Watson announced in December 2010 that the count would begin at 4pm on 6 May, verification having been concluded by 1pm that day.<sup>55</sup> The time for counting the election poll is at the discretion of the local returning officer.<sup>56</sup> In Northern Ireland this is the responsibility of the Chief Electoral Officer. The count for the Northern Ireland Assembly elections concluded on the afternoon of Saturday 7 May and counting for the local elections in Northern Ireland did not begin until Monday 9 May.<sup>57</sup>

A referendum agent or a designated counting agent, appointed by a campaign group, who is present at the completion of the counting locally, may request a recount and this may not be refused unless the request is unreasonable. There is no provision for a recount at a regional level with respect to the referendum poll after the local results have been transferred to the Regional or Chief Counting Officer. Any re-count must take place after the initial count at local level, or be the result of a direction from the Regional or Chief Counting Officer. This direction may only be where the Officer thinks there is a reason to doubt the accuracy of the counting of the votes in that area.<sup>58</sup> This avoids a challenge from a campaign group should the overall result be very close. Under s128 of PPERA, the Chief Counting Officer is required to certify only the total number of ballot papers and the number of votes cast for Yes or No and each local counting officer certifies the same for the local area. The local certification

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<sup>52</sup> "Well run referendum shows elections can be better for voters" 19 October 2011 Electoral Commission. The report is available at <http://www.electoralcommission.org.uk/elections/referendums/referendum>

<sup>53</sup> Referendum on the UK Parliamentary Voting System January 2011 campaigner update Appendix

<sup>54</sup> <http://www.electoralcommission.org.uk/guidance/resources-for-electoral-administrators/forms-and-notice-for-poll-on-5-may-2011>

<sup>55</sup> [Decision of the Chief Counting Officer on timing of the count](#) December 2010 Electoral Commission

<sup>56</sup> [Jenny Watson royal assent statement](#) 16 February 2011 Electoral Commission

<sup>57</sup> [Decision of the Chief Counting Officer on timing of the count](#) December 2010 Electoral Commission

<sup>58</sup> Schedule 2, paras 43 and 44 of PVSCA. See also [Referendum on the voting system for UK Parliamentary Elections Verification and count](#) Electoral Commission undated p30

gave the total votes cast and the numbers for Yes and No and took place once the Regional Counting Officer was satisfied with the data passed to him/her.<sup>59</sup>

### **Earlier precedents**

For the 1975 EEC referendum, the Government decided to release the results centrally. The Liberals sought to allow for a constituency count, but their amendment was defeated.<sup>60</sup> However a back-bench Labour amendment, drafted with government encouragement according to Butler & Kitzinger<sup>61</sup>, was moved by Roderick MacFarquhar to provide for a county/regional count (other than in Northern Ireland, which would be treated as a single unit).<sup>62</sup> This amendment was carried by 270-153, despite the opposition of Ted Short, the government minister in charge of the bill.<sup>63</sup> Attempts to introduce a count by constituency in the Lords were, however, unsuccessful.<sup>64</sup> For the 1979 and 1997 devolution referendums, results were available by local government areas.

### **3.10 Combination of polls**

The Government chose to combine the AV poll with planned elections in Scotland Wales and Northern Ireland and local elections in Northern Ireland and England for 26 and 280 councils respectively. Parish polls could also be held on the same day. Section 4 and Schedules 5-8 of PVSC Act 2011 contained the detailed provisions for combination, together with statutory instruments passed under the relevant devolution legislation.<sup>65</sup> The decision on whether to use a separate ballot box for referendum votes rested with the returning officers. The colour of the ballot paper for the Scottish Parliament elections was peach. The colour for the referendum was grey.<sup>66</sup>

In Scotland and Wales the administration of the referendum was conducted according to the same boundaries as used for the Scottish Parliamentary and Welsh Assembly constituency seats. In England it was organised by local authority areas. In Northern Ireland, the Chief Electoral Officer took responsibility.

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<sup>59</sup> [Referendum on the voting system for UK Parliamentary Elections Verification and count](#) Electoral Commission undated p30

<sup>60</sup> HC Deb 23 April 1975 cc1491, 1492

<sup>61</sup> David Butler and Uwe Kitzinger, *The 1975 Referendum*, 1996, p63

<sup>62</sup> s2(3)-(7) of the *Referendum Act 1975*

<sup>63</sup> HC Deb 23 April 1975

<sup>64</sup> HL Deb 5 May 1975 cc144-154

<sup>65</sup> [Scottish Parliament \(Elections\) etc Order 2010](#) SI no 2999; the [Northern Ireland Assembly \(Elections\) \(Amendment\) Order 2010](#); SI no 2892 and the [Local Elections \(Northern Ireland\) Order 2010](#). SI 2977. No amendments have been necessary in relation to the combination provisions for Wales, according to the Minister, Mark Harper (HC Deb 2 November 2010 c795)

<sup>66</sup> <http://www.electoralcommission.org.uk/guidance/resources-for-electoral-administrators/forms-and-notice-for-poll-on-5-may-2011>