

**EUROPEAN UNION REFERENDUM BILL
ECHR MEMORANDUM FOR THE BILL AS INTRODUCED IN THE HOUSE OF
LORDS**

1. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).
2. Baroness Anelay, Minister of State at the Foreign and Commonwealth Office has made the following statement:

"In my view the provisions of the European Union Referendum Bill are compatible with the Convention rights."

The Bill

3. The European Union Referendum Bill ("the Bill") makes provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union. The Bill sets out the referendum question and the franchise, and provides a mechanism for setting the date of the referendum.
4. Part 7 of the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act") provides a framework regulating national and regional referendums that take place pursuant to a UK Act of Parliament. That framework is applied for the purposes of this referendum, subject to several additions and modifications made by the Bill.
5. Clause 1 of the Bill provides for the Secretary of State, by regulations, to appoint the day on which the referendum will take place. The date must be no later than 31 December 2017 and must not be 5 May 2016 or 4 May 2017. Clause 1 also provides both the English and Welsh text of the referendum question. The original referendum question set out in the Bill was amended in the House of Commons in line with the recommendations of the Electoral Commission under section 104(2) of the 2000 Act.
6. Clause 2 sets out who is entitled to vote at the referendum. The franchise is based on the franchise for UK Parliamentary elections, with the addition of certain peers and of Commonwealth and Irish citizens who can vote at European Parliamentary elections in Gibraltar.
7. Clause 3 confirms the application of Part 7 of the 2000 Act to the referendum and introduces Schedules 1 to 3, which modify provisions of that Act (for the purposes of this referendum) as well as making further provision about campaigning rules, financial controls and the conduct of the referendum.

8. Clause 4 provides the Secretary of State with regulation making powers to make further provision, principally as to the conduct of the referendum, the manner of voting (i.e. in person, or by post or by proxy), the application of other enactments for the purposes of the referendum, and the combination of the poll at the referendum with other polls taking place on the same day. It also contains a power to amend the Act or other legislation as appears to the Secretary of State to be necessary because the referendum is to be held in Gibraltar.
9. Clause 5 makes specific provision in relation to the power to make regulations that extend to Gibraltar.
10. Clause 6 provides Ministers with a power to modify section 125 of the 2000 Act for the purposes of the referendum. Section 125 contains restrictions on the publication of materials relating to the referendum during the 28 day period leading up to the poll, by Ministers, government departments, local authorities and other persons and bodies whose expenses are met wholly or mainly from public funds.
11. Clauses 7 to 12 deal with regulations made under the Bill, financial provisions, definitions, extent, commencement and the short title of the Bill.

The Human Rights issues

12. A number of provisions of the Bill engage, or might be considered to engage, Convention rights.

The franchise

13. Clause 2 sets out that the following people are entitled to vote at the referendum:
 - a. persons who, on the date of the referendum, would be entitled to vote as electors at a UK parliamentary election, in any constituency;
 - b. persons who, on the date of the referendum, are disqualified from voting in a UK parliamentary election by reason of being peers, but who would be entitled to vote as electors at a local government election in any electoral area in Great Britain, at a local election in any district area in Northern Ireland, or at a European Parliamentary election in any electoral region;
 - c. Commonwealth and Irish citizens who on the date of the referendum would be entitled to vote in Gibraltar as electors at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised.
14. For those who derive the right to vote from residence or previous residence in the UK, the franchise is identical to that for the referendum held under the Parliamentary Voting System and Constituencies Act 2011. For those who derive the right to vote from residence or previous residence in Gibraltar, the

franchise is identical to that for referendums held under the European Union Act 2011, save for the addition of those Irish citizens who are entitled to vote at European Parliamentary elections in Gibraltar. Irish citizens resident in Gibraltar have been added for consistency with the position for Irish citizens resident in the UK.

15. On the basis of the current franchises for the elections referred to in clause 2, the following groups would not be entitled to vote at the referendum:
 - a. Sentenced prisoners who are barred from voting at UK Parliamentary elections by section 3 of the Representation of the People Act 1983 or, in Gibraltar, by paragraph 3 of Schedule 4 to the European Parliamentary Elections Regulations 2004.
 - b. UK citizens resident outside the UK who do not qualify as service voters¹ or as overseas electors under the “15 year rule” set out at section 1 of the Representation of the People Act 1985; and Commonwealth citizens in an equivalent position as regards Gibraltar.
 - c. EU citizens resident in the UK who are neither Irish nor Commonwealth nationals and therefore do not qualify to vote at UK Parliamentary elections under section 1 of the 1983 Act; and EU citizens resident in Gibraltar who are not Commonwealth or Irish citizens.
 - d. Residents of crown dependencies and British overseas territories other than Gibraltar (unless they qualify as overseas electors or service voters).
 - e. Those aged under 18 on the day of the poll.
16. The Government has considered whether the exclusion of these groups is consistent with Article 3 of Protocol 1 to the ECHR (the right to free and fair elections).
17. Case law establishes that referendums do not fall within the scope of Article 3 of Protocol 1 because they are not “elections concerning the choice of the legislature” and, accordingly, that no right to vote in a referendum is derived from that Article.
18. In *X v UK*², the European Commission on Human Rights found inadmissible a claim that the referendum on EEC membership in 1975 engaged Article 3 of Protocol 1. That case has been followed by the Commission and the European Court of Human Rights on at least 12 subsequent occasions³.

¹ See sections 14-17 of the 1983 Act. These sections allow certain members of the armed forces, Crown servants, British Council employees, and spouses and civil partners of these groups to be treated as resident in the UK for voting purposes.

² Application 7096/75.

³ See for example, *Bader v Germany* (application 26633/95), *Nurminen v Finland* (application 27881/95), *Castelli v Italy* (applications 35790/97 and 38438/97), *Z v Latvia* (application 14755/03), *Niedzwiedz v Poland* (application 1345/06).

19. In *McLean and Cole v UK*⁴ one of the applicants (a sentenced prisoner) complained that he had been denied the vote at the referendum on the voting system held in May 2011. The European Court of Human Rights cited its previous case law on referendums and said there was nothing in the nature of the referendum at issue in that case which would lead the Court to reach a different conclusion. The complaint was therefore declared inadmissible.
20. In *Moohan*⁵ the majority of the Supreme Court held that Article 3 of Protocol 1 did not protect an individual's right to vote at the Scottish independence referendum. Lord Hodge (with whom Lords Neuberger, Clarke and Reed and Lady Hale agreed) said (at paragraphs 15 and 16):
- “There is ... no real support for the appellants' position in the Strasbourg jurisprudence. There is no clear direction of travel in that jurisprudence to extend A3P1 to referendums. On the contrary, between 1975 and 2013 there have been at least 12 applications in which claims under A3P1 concerning a right to vote in referendums have been rejected as inadmissible... At best for the appellants there is the first sentence from the quotation in para 11 above from McLean and Cole, which could suggest that there could be a referendum which would be the equivalent of an election to a legislature. But that must be construed against the backdrop that the Strasbourg Court has held that referendums which could have a direct and material effect on the powers and operation of a legislature are not within the ambit of A3P1. Thus accession to the European Union, by which the European Parliament is introduced as a new legislature in relation to a Contracting State and the powers of the national legislature are constrained, is outside A3P1: Z v Latvia and Niedzwiedz v Poland. So also is a referendum on the way in which the legislature is elected: McLean and Cole. In my view there is no material difference between accession and secession in this context. In each case the powers of one legislature are reduced in favour of another legislature.”*
21. On this basis, the Government considers that the provision made in respect of the franchise for the referendum in clause 2 does not engage Article 3 of Protocol 1 and that no issue of incompatibility of this Bill with the ECHR arises in respect of either section 3 of the 1983 Act or any other ground of disqualification or exclusion from the referendum franchise.
22. It follows that it is unnecessary to deal with the justification for excluding the groups listed at paragraph 15 from the referendum franchise. However, the Government would add the following:
- a. As regards UK citizens who are resident abroad and do not qualify as overseas voters or service voters, the European Court of Human Rights has held in the case of *Shindler*⁶ that excluding individuals from the UK Parliamentary franchise after a 15 year break

⁴ [2013] ECHR 1368

⁵ [2014] UKSC 67, [2015] 2 All ER 361, [2015] 2 WLR 141.

⁶ [2013] ECHR 19840/09, [2013] All ER (D) 239 (May).

in residency is compatible with Article 3 of Protocol 1. Confining the Parliamentary franchise to those citizens with a close connection with the UK and who would therefore be most directly affected by its laws, was accepted to be a legitimate aim and to be proportionate.

b. As regards the exclusion of those who hold neither Commonwealth nor Irish nationality, the case of *Barclay*⁷ is supportive of the proposition that the exclusion of “aliens” from electoral rights can be justified as pursuing a legitimate aim and as being proportionate under Article 3 of Protocol 1, including when read with Article 14 ECHR.

c. As regards individuals who are under 18 years of age, the European Court of Human Rights has recognised⁸ that the imposition of an age condition can be acceptable in that it seeks to pursue the legitimate aim of ensuring the maturity of those participating in the electoral process.

d. The exclusion of the residents of the Crown Dependencies⁹ from the franchise is justified. The exclusion pursues the legitimate aim of confining the franchise to those citizens with a close connection to the UK: although residents of the Crown Dependencies are part of the UK for the purposes of nationality law¹⁰, the Crown Dependencies are not part of the UK, and they have their own directly elected legislative assemblies, administrative, fiscal and legal systems and their own court of law. They are not represented in the UK Parliament. Further, unlike Gibraltar, the Crown Dependencies are generally not bound by EU law. The exceptions are customs rules, quantitative restrictions and levies, and other import measures in respect of agricultural products.

e. Insofar as the British Overseas Territories¹¹ outside Europe are concerned, residents of those territories can be distinguished due to the very limited application of EU law to those territories.

f. The question of whether the UK should remain a member of the EU is a constitutional matter for the UK. The appropriate starting point is the franchise for the UK’s Parliamentary

⁷ [2009] UKSC 9, though this case concerned the right to stand for election, rather than the right to vote.

⁸ See para 62 of *Hirst v United Kingdom (No 2)* - (2005) 19 BHRC 546.

⁹ The ECHR provides that a contracting state can declare that the Convention should extend to all or any of the territories for whose international relations it is responsible. The Crown Dependencies are recognised as territories for which the UK is responsible, and the UK’s ratification of the ECHR extends to them. See the UK’s declarations under Article 56 of the Convention.

¹⁰ See s.50(1) of the British Nationality Act 1981.

¹¹ The ECHR has been extended to all British Overseas Territories with the exception of Pitcairn, the British Antarctic Territory and the British Indian Ocean Territory. The right of individual petition to the European Court of Human Rights has been accepted in respect of all territories to which the Convention has been extended. Protocol 1 has been extended to most of the substantially populated territories.

elections and a wide margin of appreciation should be applied to a franchise that is to be debated and subject to the agreement of Parliament.

Restrictions on campaigning

Campaigners and spending limits

23. Clause 3(1) provides that Part 7 of the 2000 Act applies to the referendum. Accordingly, section 117 and section 118 of and Schedule 14 to the 2000 Act will limit and regulate the expenses of both “permitted participants” and others in relation to the referendum. Only an individual or body listed at section 105(1)(b) of the 2000 Act, as modified by paragraph 2 of Schedule 1 to the Bill, is eligible to be a “permitted participant”. Most permitted participants are able incur up to £700,000 in referendum expenses during the referendum period, though there are higher limits for some political parties, and for the official “yes” and “no” campaigns¹². Individuals and bodies other than permitted participants are prohibited from incurring referendum expenses of more than £10,000 within the referendum period. Sections 120 to 124 of the 2000 Act, and various provisions in Schedule 1 to the Bill, set out reporting requirements for permitted participants. Section 125 of the 2000 Act subjects Government and other publicly funded persons and bodies to a different form of restriction, preventing them from publishing certain material relating to the referendum in the 28 days ending with polling day.
24. The restrictions on the freedom to spend money in connection with promoting or procuring the outcome of a referendum engage Article 10 rights. The European Court of Human Rights found in *Bowman v United Kingdom*¹³ that the restriction imposed by section 75 of the 1983 Act on the freedom of unauthorised persons to incur expenditure with a view to promoting or procuring the election of a particular candidate in a Parliamentary election amounted to a restriction of the right to freedom of expression.
25. However, the Government considers that the restrictions on spending at referendums meet the legitimate aim of protecting the rights of others in that they aim to ensure a fair and level “playing field” for competing campaigners, and to ensure that only those with a direct and legitimate interest in the UK democratic process are able to incur substantial expenses to influence the outcome of the referendum. In *Bowman*, the court accepted that it may be considered necessary, in the period preceding or during an election, to impose certain restrictions on freedom of expression, of a type which would not usually be acceptable, to secure the “free expression of the opinion of the people in the choice of the legislature” (a reference to Article 3 of Protocol 1). The court found that securing equality between competing campaigners was

¹² See Schedule 14 to the 2000 Act as modified by paragraph 21 of Schedule 1 to the Bill

¹³ (1998) 26 EHRR 1

a legitimate aim. See also *Animal Defenders International v the UK*¹⁴ in which the European Court of Human Rights found that the regulation of broadcasted public interest debate can be necessary within the meaning of Article 10(2) and the UK's regulations were proportionate.

26. In *Bowman*, the court concluded that the £5 limit on spending by non-candidates operated as a barrier to freedom of expression and therefore violated Article 10. The 1983 Act was then amended to raise the limit to £500. In the Government's view, the spending limits and requirements in and applied by the Bill are a proportionate means of preventing those with the finances to do so from dominating the campaign at the expense of others with more limited funds. All potential campaigners are able to spend a modest amount without being unduly burdened with the requirement to become permitted participants, and there are tiered spending limits and regulatory requirements for those who wish to spend more.
27. Section 125 of the 2000 Act bites on Ministers, government departments, local authorities and other persons or bodies whose expenses are met wholly or mainly from public funds. Largely, those affected fall outside the categories of person who can apply to the European Court of Human Rights under Article 34 of the Convention. In any event, the section has the legitimate aim of restricting the ways in which public funds can be used to influence the outcome of the referendum¹⁵ and, given its time-limited nature and exceptions, is a proportionate means of achieving that aim. Clause 6 permits Ministers to provide for further exceptions by regulations.

Donations, loans and other transactions

28. Schedule 15 to the 2000 Act and various provisions in Schedules 1 and 2 to the Bill make provision restricting permitted participants (who are not registered political parties covered by the existing regimes in the 2000 Act) from entering into loans and other transactions for referendum purposes, and from accepting donations intended to meet referendum expenses. A permitted participant may only accept a donation of more than £500, or enter into a loan or other transaction with a value of more than £500, if the donation is from a "permissible donor"¹⁶ or the other party to the transaction is an "authorised person"¹⁷. Again, there are certain reporting requirements.
29. The purpose of these restrictions is to prevent permitted participants from accepting donations from, or entering into transactions with, individuals who are not on a UK electoral register, and bodies that do not have a sufficient connection with the UK. This is arguably an interference with the Article 10

¹⁴ Application 48876/08

¹⁵ For the background, see Chapter 12 of the 5th Report of the Committee on Standards In Public Life.

¹⁶ See paragraph 6 of Schedule 15 to the 2000 Act, as modified by paragraph 25 of Schedule 1 to the Bill.

¹⁷ See paragraph 4(2) of Schedule 15A to the 2000 Act, as inserted by Schedule 2 to the Bill.

rights of the donee (who is prevented from spending the donated money to further his or her campaign) or the Article 11 rights of both the donee and the donor. In *Parti Nationaliste Basque v France*¹⁸ the applicant, a French political party, was prevented from receiving funding from the Spanish Basque Nationalist Party, on the ground that the latter was a foreign political party. Having regard to the impact of the funding restriction on the applicant party's ability to carry out its political activities, the European Court of Human Rights found that there had been an interference with Article 11.

30. Article 1 of Protocol 1 may also be engaged in respect of those prohibited from making donations and entering into loans and other transactions, and in respect of permitted participants who are obliged to refuse, return or forfeit donations and other benefits. The European Court of Human Rights has held that "the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property" (*Marckx v Belgium*¹⁹).
31. The Government considers that any interference with Articles 10 or 11, or with Article 1 of Protocol 1 (in each case, including when read with Article 14), is compatible with the Convention. The legitimate aim is the protection of others, namely other campaigners and voters. The broad purpose of the restrictions on donations, loans and other transactions is to ensure that only those with a direct and legitimate interest in the UK democratic process are able to spend substantial amounts to influence the outcome of the referendum.
32. The Government also considers that the restrictions go no further than is necessary to meet the legitimate aim. The court in *Parti Nationaliste Basque* accepted that the interference in that case pursued the legitimate aim of preventing disorder (accepting that this encompassed the protection of the institutional order). Further, the court considered that the prohibition fell within the margin of appreciation afforded to the Contracting States, who (it said) remained free to determine which sources of foreign funding were permissible. The court observed that the prohibition did not call into question the applicant party's legality or constitute a legal impediment to its participation in political life or censorship of the political views it intended to promote. Other sources of funding were, at least hypothetically, available. Accordingly the measure was not disproportionate.
33. The court has stated that Contracting States remain free to determine which, if any, sources of foreign funding may be received by political parties, and the same rationale must apply to campaigners at the referendum. The Government considers that in order to pursue the legitimate aim of protecting the rights of other campaigners and voters, it is necessary to impose the prohibition on permitted participants accepting donations of more than £500, and entering into transactions of a value of more than £500, from certain

¹⁸ Application 71251/01

¹⁹ (1979) 2 EHRR 330

sources. The Government considers that the fact that (a) no restriction on the receipt of donations or other transactions is placed on a campaigner who intends to incur less than £10,000 in referendum expenses, and (b) impermissible donors may make donations or enter into transactions worth £500 or less, helps achieve the appropriate balance and to ensure that the restrictions are proportionate.

34. It is important to note that similar restrictions on the acceptance of donations²⁰ and the entering into of loans and other regulated transactions²¹ already exist in relation to registered political parties (other than minor parties). Were it not for the restrictions on other permitted participants provided by Schedule 15 of the 2000 Act and Schedules 1 and 2 to the Bill, political parties would be at a disadvantage when compared to other referendum campaigners.

Restriction on challenges to the result of the referendum

35. Paragraph 16 of Schedule 3 to the Bill says that no court may entertain proceedings questioning the number of ballot papers counted or votes cast, as certified by the Chief Counting Officer, a Regional Counting Officer or a counting officer, unless the proceedings are brought by judicial review within six weeks of the certificate being given.
36. The Government has considered whether this engages Article 6(1) ECHR.
37. By specifying that no court may entertain proceedings questioning the ballot papers or the number of certified votes cast, unless the claim form for those proceedings is filed within a period of six weeks, the Bill prevents access to a court to any persons who do not comply with this time limit requirement.
38. Certain proceedings concerning elections have been held to involve the determination of political rather than civil rights and therefore to fall outside the scope of Article 6. See *Priorello v Italy*²² which involved a challenge to an applicant's eligibility for office; *IZ v Greece*²³ which involved a challenge to an election following a lack of ballot papers; *Pierre-Bloch v France*²⁴ which concerned a dispute over the election campaign expenses of a member of the French National Assembly; and *Krasnov and Skuratov v Russia*²⁵ which concerned the right to stand for election to the Russian State Duma. In *X v United Kingdom*²⁶ the Commission decided that the right to take part in the work of the House of Lords "falls into the sphere of 'public law' rights outside the scope of Article 6". In *Bompard v France*²⁷ the Court said that

²⁰ See Part 4 of the 2000 Act.

²¹ See Part 4A of the 2000 Act.

²² Application 11068/84.

²³ Application 18997/91.

²⁴ Application 24194/94.

²⁵ Applications 17864/04 and 21396/04.

²⁶ Application 8208/78.

²⁷ Application 44081/02.

“proceedings concerning electoral disputes do not generally fall under Article 6”.

39. The Government therefore considers that paragraph 16 of Schedule 3 does not engage Article 6 at all. It has nevertheless considered whether, if Article 6 is engaged, the provision is compatible with it. The Government considers that the limitation period imposed in paragraph 16 pursues a legitimate aim, namely to ensure that challenges to the referendum result can be brought but to avoid prolonged uncertainty about the outcome. In the Government’s view the six-week time limit is proportionate to this aim and achieves the correct balance between the need for certainty about the referendum outcome and the need to ensure that there is an adequate opportunity to challenge the result in the event of any procedural difficulties.
40. This approach also follows the most recent precedent for a referendum (i.e. the referendum on the voting system in 2011, see paragraph 23 of Schedule 1 to the Parliamentary Voting System and Constituencies Act 2011).
41. While this is a shorter time limit than would otherwise apply in respect of judicial review applications, it is considered that the circumstances likely to give rise to a challenge are likely to be known (or capable of being known) shortly after the certification of the result and the six-week period therefore allows a reasonable time for any person to bring a challenge. In this regard, the Government notes that a shorter period of three weeks is generally applicable in respect of challenges to election results (brought by way of an election petition and heard by a specially constituted election court rather than by judicial review).
42. It follows that if Article 6 applies at all, the Government considers that the provision made in respect of restricting certain types of legal challenges in paragraph 16 of Schedule 3 is justified and proportionate by reference to a legitimate aim and that no issue of incompatibility with the ECHR arises.

Foreign and Commonwealth Office
[8 September] 2015