

## **EUROPEAN UNION REFERENDUM BILL**

### **Memorandum concerning the Delegated Powers in the Bill**

#### **A. INTRODUCTION**

- 1 This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the European Union Referendum Bill (“the Bill”).
- 2 The Memorandum identifies the provisions in the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **B. PURPOSE AND EFFECT OF THE BILL**

- 3 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. It 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 Ministers 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 Minister 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 and others wholly or mainly publicly funded.
- 11 Clauses 7 to 12 deal with regulations made under the Bill, financial provisions, definitions, extent, commencement and the short title of the Bill.

### **C. DELEGATED POWERS**

#### ***Clause 1(2) (the date of the referendum)***

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

- 12 Clause 1 requires the Secretary of State to set the date of the referendum by regulations. The date must be no later than 31 December 2017 and must not be:
- a. 5 May 2016 (the date of elections to the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales, Police and Crime Commissioner elections in England and Wales and some local elections in England); or
  - b. 4 May 2017 (the date of local elections in England, Wales and Scotland).
- 13 It is not possible to set the date of the referendum now. There is a complicated negotiation in Brussels and with other European leaders, which is just beginning. The Government cannot know now how this negotiation will develop or precisely when it will lead towards the changes and reforms needed in the European Union. In order, therefore, to protect the national interest and ensure that the referendum is held at the most appropriate time, it is necessary to make regulations to set the date in due course.
- 14 There are, however, important limits on the Secretary of State's discretion: the clause provides that the appointed day must be no later than 31 December 2017, in line with the Prime Minister's commitment, and must not be 5 May 2016 or 4 May 2017.
- 15 Given the importance of the date of the referendum to voters, campaigners and administrators, regulations setting the date of the referendum are subject to the affirmative procedure.

**Clause 4(1) (the conduct of the referendum)**

*Power conferred on:* Secretary of State or Chancellor of the Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

- 16 Clause 4(1) provides that the Minister may by regulations:

- a. make provision about voting in the referendum and otherwise about the conduct of the referendum, which may include provision corresponding to any provision of Schedules 2 and 3 to the Parliamentary Voting System and Constituencies Act 2011 (“the 2011 Act”) (with or without modifications);
  - b. apply for the purposes of the referendum, with or without modifications:
    - i. any provision of the Representation of the People Act 1983 (“the 1983 Act”),
    - ii. any other enactment relating to elections or referendums, including provisions creating offences;
  - c. further modify the 2000 Act for the purpose of the referendum;
  - d. modify or exclude any other enactment that applies to the referendum.
17. The powers in clause 4 can be used to make regulations extending to Gibraltar, and clause 5 makes further provision in this regard.
18. Paragraph 12(2) of Schedule 1 makes clear that the power in clause 4(1)(a) can be used to confer functions on referendum agents appointed under that paragraph.
19. Paragraph 7(2) of Schedule 3 makes clear that the power in clause 4(1)(a) can be used to confer additional responsibilities on counting officers (as to which see paragraph 3 of that Schedule).
20. Paragraph 9(2) of Schedule 3 makes clear that the power in clause 4(1)(a) can be used to specify the circumstances in which a recount of votes may be conducted.
21. The purpose of clause 4(1)(a) is to allow the detailed provision about the administration of the referendum to be set out in regulations. This will necessarily include provision about the referendum timetable; the form of the ballot paper, poll cards and other forms and notices; the manner and method of voting including provision for postal and proxy voting; the procedure for the counting of votes; and the retention and disposal of documents relating to the referendum.

22. Clause 4(1)(b) enables the regulations to apply, for the purposes of the referendum, provisions in the 1983 Act and provisions in other enactments about elections or referendums. The clause specifies that this may include the application of criminal offences. This is necessary so that the established suite of offences that exist for parliamentary elections (including voting more than once, bribery, and impersonation of another voter) can be applied, with modifications, for the purposes of the referendum.
23. The Government anticipate that clauses 4(1)(a) and (b) will be used to make regulations that contain similar provisions to Schedules 2 to 4 to the 2011 Act. These Schedules deal with practical and procedural details (including the application of well-established criminal offences) which are set out in secondary legislation in respect of many elections, including:
  - a. The European Parliamentary Elections Regulations (SI 2004/293);
  - b. The National Assembly for Wales (Representation of the People) Order 2007 (SI 2007/236);
  - c. The Scottish Parliament (Elections etc) Order 2010 (SI 2010/2999);
  - d. The Northern Ireland Assembly (Elections) Order 2001 (SI 2001/2599);  
and
  - e. The Police and Crime Commissioner Elections Order 2012 (SI 2012/1917).
24. Clauses 4(1)(c) and (d) allow the Minister to make regulations to further modify the 2000 Act for the purposes of the referendum, in addition to the modifications made in the Bill, and to modify or exclude other enactments that apply to the referendum. Schedule 4 to the 2011 Act made a small number of modifications to the 2000 Act for the purposes of the referendum on the voting system, and this aspect of the power would allow regulations to make similar modifications for the purposes of this referendum and/or to make other modifications as are considered by the Minister to be necessary or expedient closer to the time of the referendum. This power could not be used to make textual amendments to the 2000 Act or to other legislation, only to modify or exclude provisions for the purposes of this referendum.
25. Before exercising this power, the Minister must consult the Electoral Commission. On 21 July 2015, by way of Ministerial Written Statement to the House of Commons (HCWS168; HLWS157), the Minister for Europe

published draft rules for the conduct of the referendum (which will eventually be made under clause 4(1) of the Bill). The Electoral Commission has provided comments on the draft rules which will be taken into account before draft regulations under clause 4(1) are laid in Parliament.

26. Consistent with the secondary legislation about elections listed above; given that clause 4(1)(b) can be used to create criminal offences; and given that clause 4(1)(c) and (d) may be considered to be Henry VIII powers (albeit limited to the modification of primary legislation that already applies to the referendum), the power in clause 4(1) subject to the affirmative procedure.

**Clause 4(2) (combination of polls)**

*Power conferred on:* Secretary of State or Chancellor of the Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

27. Clause 4(2) contains a power for the Minister to make provision for and in connection with the combination of the poll for the referendum with polls at other elections and referendums (to be specified in the regulations). Such provision can include the amending or modifying of this Bill (when enacted) or any other enactment (defined to include primary legislation - see clause 8), but may not be used to change the date of another poll.
28. This power is necessary because, although the Bill prevents the referendum from being held on 5 May 2016 or 4 May 2017 (the date of elections referred to in paragraph 12 above), it is still possible that the referendum may take place on the same day and in the same area(s) as an election (such as a Parliamentary by-election), or a local referendum. The power enables the Minister to make provision to enable the referendum to take place in combined form with the other poll or polls taking place on the same day. This is likely to include, for example, provision for the use of combined polling stations, postal voting packs and poll cards, and to allocate functions between counting officers and returning officers. The power to make combination regulations is likely to be exercised only if the date of the referendum coincides with the date of an election or a local referendum.

29. The combination provision required will depend on the date of the referendum, which has yet to be set. The making of combination provision for elections in secondary legislation is common practice. See, for example, the secondary legislation listed at paragraph 23 above, and the Representation of the People (Combination of Polls) (England and Wales) Regulations 2004, which make combination provision in respect of Parliamentary elections.
30. Clause 4(2) is a Henry VIII power that enables regulations to be made to amend the Bill after it is enacted. The Government takes the view that this is an exceptional case in which such a power is justified. For example, it would enable polls taking place on the same day to be combined in the most efficient manner possible, and depending on the boundaries of those polls, it may be desirable for regulations to make provision to change the counting officers at the referendum (see paragraph 3 of Schedule 3 to the Bill), or their duties (paragraph 7 of Schedule 3).
31. Consistent with the secondary legislation about elections listed above, and given that this is a Henry VIII power that allows regulations to amend the Bill following enactment, the power is subject to the affirmative procedure.
32. Before exercising this power, the Minister must consult the Electoral Commission.

***Clause 4(3) – amendments or modifications because referendum is to be held in Gibraltar***

<i>Power conferred on:</i>	<i>Secretary of State or Chancellor of the Duchy of Lancaster</i>
<i>Power exercised by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative</i>

33. This power enables the Minister to make amendments or modifications to the Bill (when enacted) or any other enactment (defined to include primary legislation - see clause 8) as appear necessary to the Minister because the referendum is to be held in Gibraltar as well as the UK.

34. This power is necessary because the legislation providing for the referendum, including this Bill (when enacted) and the 2000 Act will need to operate effectively in Gibraltar and be consistent with the law of Gibraltar. The Bill already makes some provision for Gibraltar, but adjustments may well be necessary or desirable as the Government continues to consult with the Government of Gibraltar, and because of the possibility of changes to Gibraltar law.
35. Clause 4(3) is a Henry VIII power that enables regulations to be made to amend the Bill when enacted. The Government takes the view that this too is an exceptional case in which such a power is justified, for the reasons given above, and because this is a rare case in which a Bill makes provision that will extend to and apply in an overseas territory that has its own parliament and system of law.
36. As a Henry VIII power, this power is subject to the affirmative procedure.
37. Before exercising this power, the Minister must consult the Electoral Commission.

**Clause 6 – power to modify section 125 of the 2000 Act**

*Power conferred on:* Secretary of State or Chancellor of Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

38. This power enables the Minister to make regulations creating specified exemptions from section 125 of the 2000 Act for the purposes of the referendum.
39. With certain existing exceptions, section 125 bans, during the 28 day period leading up to the referendum poll, the publication of certain materials, including material that deals with any of the issues raised by the referendum question, by Ministers, government departments and others whose expenses are defrayed wholly or mainly out of public funds. The power in clause 6



provides for regulations to exclude from the restrictions in section 125 materials published in a prescribed way or by a communication of a prescribed kind. The regulations may also prescribe conditions that must be met by excluded materials.

40. Ministers are required to consult the Electoral Commission before making any regulations under this power. Any regulations under this power must be made not less than four months before the date of the referendum.
41. This power is necessary for two reasons. First, the restrictions imposed on communications by section 125 are very broad. In particular, they prevent the publication of any material that deals with any of the issues raised by the question of whether the United Kingdom should remain a member of the EU or leave the EU. For these purposes “publication” is defined very broadly – it captures material that is made available to the public at large, or any section of the public, in any form or by whatever means. The restrictions could, for example, prevent publication of articles or letters by a person to whom section 125 applies in newspapers or communications with the media (other than press notices, which are exempted on the face of section 125) about the referendum.
42. The Government’s view is that, such is the breadth of section 125, it may be necessary to exempt forms of publication from the section to enable material legitimately to be published in the lead up to the referendum.
43. Secondly, the Government is not yet in position to propose all of the forms of publication that should be exempt from section 125. The Government will wish to continue discussions with Members of Parliament and others before proposing those exemptions.
44. Because it provides for the modification of primary legislation for the purposes of the referendum, this power is subject to the affirmative procedure.

**Schedule 1, paragraph 1 - the referendum period**

*Power conferred on:* Secretary of State or Chancellor of Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

45. Paragraph 1 of Schedule 1 enables the Minister to prescribe the referendum period in regulations. The referendum period is the period, prior to the referendum taking place, in which certain financial restrictions and other regulatory requirements apply to campaigners.
46. The 2000 Act provides for certain timescales within the referendum period, which when taken together mean that the referendum period must be at least 10 weeks. This power, therefore (unless exercised in conjunction with other powers in the 2000 Act itself) could only be used to prescribe a referendum period of 10 weeks or more.
47. The referendum period selected by the Minister may depend on the date chosen for the referendum and the time needed by campaigners to plan a campaign that complies with the financial restrictions. It is therefore appropriate for the period to be set in secondary legislation.
48. As a power to set a key aspect of the regime for regulating the referendum campaigns, this power is subject to the affirmative procedure.

**Schedule 1, paragraph 9 – period for applications to be made a designated organisation**

*Power conferred on:* Secretary of State or Chancellor of Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative

49. Section 108 of the 2000 Act allows the Electoral Commission to designate two organisations to whom grants of money and other referendum campaign

assistance is available under section 110 of the Act (the “lead campaigners”). Section 109 sets out the process for designation.

50. Section 109 provides that applications for designation must be made within 28 days beginning with the first day of the referendum period. The Electoral Commission must then make a decision on designation within 14 days beginning the day after the application period.
51. Paragraph 9 of Schedule 1 to the Bill modifies section 109 to decouple the start of the application process from the referendum period. It provides instead for the Minister to prescribe the start of the application period by regulations. This enables flexibility as to the start of the designation process and, for example, could allow the lead campaigners to be designated before the start of the referendum period (this is sometimes referred to as “pre-designation”). This flexibility can only be achieved by providing for the start of the designation process to be prescribed by regulations because, at this stage, the date of the referendum and other matters (such as the length of the referendum period) are not known.
52. “Pre-designation” applied at the Scottish Independence referendum. It is supported by the Electoral Commission as it means the lead campaigners are in place for the start of the referendum period and have sufficient time to plan their campaign and use the benefits they receive as lead campaigners (free mailshots, access to referendum broadcasts, free use of public rooms).
53. The remainder of section 109 of the 2000 Act remains unmodified. The period for applications to be made remains 28 days and applications are still to be determined by the Electoral Commission within the 14 day period beginning after that period.
54. Regulations prescribing the start of the designation process will be subject to the negative procedure. We consider that this is the appropriate level of Parliamentary scrutiny because the regulations will merely fix the date on which the designation process will start. All other elements of the designation process, in particular, the timeframes for applications and decisions and the tests that the Electoral Commission is to apply in deciding

who to designate as lead campaigners, are set out on the face of the 2000 Act.

***Schedule 1, paragraph 32; Schedule 2, paragraph 5 - reporting of donations, loans and regulated transactions during the referendum period***

*Power conferred on:* Secretary of State or Chancellor of the Duchy of Lancaster

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative

55. These paragraphs require “permitted participants” at the referendum (i.e. registered campaigners) to submit periodic reports to the Electoral Commission, including details of certain donations, loans and other transactions of a value of more than £7,500. The times at which those reports must be submitted, and the periods to which they must relate, are matters to be set by the Minister in regulations. The regulations may also deal with cases in which a person or body becomes a permitted participant during one of the prescribed periods.

56. Since the appropriate times and periods in respect of these reports will be affected by the length of the referendum period, they cannot sensibly be set until the referendum period has been set.

57. The Government anticipates that the regulations made to set the referendum period will also deal with the times and periods for pre-poll reporting. Accordingly, these powers are also subject to the affirmative procedure.

***Schedule 3, paragraphs 13(1)(b) and (4) - payments to counting officers and Regional Counting Officers***

*Power conferred on:* Secretary of State or Chancellor of the Duchy of Lancaster, with the consent of the Treasury

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary procedure:* None

58. In carrying out their functions to conduct the referendum, counting officers and Regional Counting Officers will render their own services and incur expenses (e.g. on the printing of ballot papers, hiring rooms and paying staff). Under paragraph 13 of Schedule 3 to the Bill, those officers are entitled to recover charges from the Electoral Commission if the services were necessarily rendered, or the expenses were necessarily incurred, for or in connection with the referendum. The sums required by the Commission for making these payments are to be charged on and paid out of the consolidated fund.
59. Under paragraph 13(1)(b) of Schedule 3, such charges may only be recovered if the total of the charges does not exceed the “overall maximum recoverable amount” specified in or determined in accordance with regulations made by the Minister with the consent of the Treasury. The regulations may also specify, or make provision for determining, a maximum recoverable amount for services or expenses of a specified description (see paragraph 13(4)).
60. This power is a limited administrative one to set maximum spending limits, which will be calculated in the months leading up to the referendum. This is an appropriate matter for secondary legislation, following the equivalent provisions that exist for Parliamentary and other elections. See, for example, section 29 of the Representation of the People Act 1983 and the Parliamentary Elections (Returning Officers Charges) Order 2015 (SI 2015/476).
61. Following the equivalent provisions that exist for Parliamentary elections, and given that the use of this power is an executive rather than a legislative matter, the power is not subject to a Parliamentary procedure. However, the regulations may only be made with the consent of the Treasury.

***Schedule 3, paragraph 13(10) - manner and form of accounts***

*Powers conferred on:*                      *Electoral Commission*

*Power exercised by:*                      *Regulations*

*Parliamentary procedure:*              *None*

62. Paragraph 13(10) of Schedule 3 provides that the Electoral Commission may by regulations make provision as to the time when and the manner and form in which accounts are to be rendered to the Commission for the purposes of the payment of charges of a counting officer, Regional Counting Officer or the Chief Counting Officer.
63. This is a specific power, of an administrative nature. As the body that will be responsible for receiving the accounts from the counting officers and Regional Counting Officers, the Electoral Commission is best placed to determine the most appropriate manner and form for the submission of those accounts. It is therefore both appropriate and necessary that these matters are dealt with in secondary legislation.
64. Following equivalent provisions that exist for Parliamentary elections (albeit that for those elections it is the Secretary of State who makes the equivalent regulations and receives the accounts), this power is not subject to a Parliamentary procedure.

**Foreign and Commonwealth Office**

**9<sup>th</sup> September 2015**