



RESEARCH PAPER 00/3  
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# ***The Political Parties, Elections and Referendums Bill – Referendums and Broadcasting***

**Bill 34 1999-2000**

This paper deals with part VII of the Bill (which deals with the regulation of referendums), and those parts of the Bill stemming from the Neill Committee's recommendations on party political broadcasts (PPBs), etc.

Companion papers deal with the establishment of an Electoral Commission and the control of campaign expenditure (Research Paper 00/1 - *The political Parties, Elections and Referendums Bill - Electoral Aspects*), and with the funding of political parties and related issues (Research Paper 00/2 - *The Political Parties, Elections and Referendums Bill -Donations*).

The provisions covered in this paper are intended to extend to the whole of the United Kingdom although there are certain exemptions for referendums on devolved matters, etc.

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## Summary of main points

Part I of this paper deals with part VII of the current Bill, which provides for the regulation of referendums, up to now the conduct of which has been subject to ad hoc legislation. See Research Papers 00/1 and 00/2 for details of the Bill's provisions on the regulation of election expenditure and donations to parties.

The Neill Committee report of October 1998 contained a number of recommendations about the regulation of referendums, including:

- The Electoral Commission should oversee the conduct of referendums
- Each side in a referendum should be given equal access to an amount of core funding sufficient to enable it to mount at least a minimal campaign and to make its views widely known
- The government of the day in future referendums should, as a government, remain neutral and should not distribute at public expense literature, even purportedly 'factual' literature, setting out or otherwise promoting its case
- Similar disclosure requirements should apply to organisations campaigning in referendums as would apply to political parties<sup>1</sup>

The Government response to Neill was issued in a white paper together with a draft bill in July 1999. Most of the committee's recommendations were accepted but the Government decided, contrary to Neill's recommendation, to introduce spending limits for referendums. These would operate in a similar way to the limits at elections, "to discourage excessive spending by the political parties and others and to ensure that individual organisations do not obtain disproportionate attention for their views because of the wealth behind them". In addition, the Government proposed a 28 day limit before which the Government would be able to distribute literature on the subject of the referendum.

The Bill's main provisions concerning referendums are described in part I(A) of this paper. Differences between the Bill and the white paper are discussed at part I(G).

Part II of this paper covers those parts of the Bill stemming from Neill's recommendations on party political broadcasts (PPBs), etc. A brief description of the current system is given, including the changes introduced following the 1998 BBC/ITC consultation paper on PPBs. The Bill would give the Electoral Commission oversight of the arrangements for party political broadcasts. It would also require that broadcasters only transmit referendum campaign broadcasts made by an umbrella organisation designated by the Electoral Commission. This is intended to ensure that, in any referendum, each side of the campaign will have equal access to free airtime for referendum broadcasts.

Part II also covers briefly some other issues relating to politics, elections and the media, including the "candidates' veto" on broadcasts at election times under section 93 of the *Representation of the People Act 1983*.

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<sup>1</sup> For the rules on disclosure of donations generally, see RP 00/2

## CONTENTS

<b>I</b>	<b>Regulation of Referendums</b>	<b>7</b>
	<b>A. Overview of Referendum Provisions in the Bill</b>	<b>7</b>
	<b>B. An electoral commission and the regulation of referendums</b>	<b>8</b>
	<b>C. The Draft Bill</b>	<b>11</b>
	<b>D. Expenditure Limits for Referendum Campaigns</b>	<b>13</b>
	<b>E. The Role of the Government in Referendum Campaigns</b>	<b>15</b>
	<b>F. Responses to the Draft Bill Proposals</b>	<b>16</b>
	<b>G. Referendum Provisions in the Current Bill</b>	<b>17</b>
<b>II</b>	<b>Party Political Broadcasts</b>	<b>21</b>
	<b>A. Background</b>	<b>21</b>
	<b>B. Allocation of Time</b>	<b>22</b>
	<b>1. Prior to 1998</b>	<b>22</b>
	<b>2. The 1998 Consultation Paper</b>	<b>23</b>
	<b>3. Arrangements for minor parties during elections</b>	<b>24</b>
	<b>4. Current arrangements for Party Political Broadcasts</b>	<b>25</b>
	<b>C. The Neill Report</b>	<b>26</b>
	<b>1. Party Political Broadcasts and Political Advertising</b>	<b>26</b>
	<b>2. Referendum Broadcasts</b>	<b>27</b>
	<b>D. The Bill</b>	<b>28</b>
	<b>E. Other Media Issues</b>	<b>30</b>
	<b>1. The Neill Report</b>	<b>30</b>
	<b>2. Section 93 of the Representation of the People Act 1983</b>	<b>30</b>

# I Regulation of Referendums

## A. Overview of Referendum Provisions in the Bill

**Clause 95** applies the Bill to any regional or national referendum but not local referendums, or referendums held under devolved powers. **Clause 96** sets out the process by which a 'referendum period' is determined; normally this is six months and begins on the day in which the Bill providing for a referendum is introduced into Parliament. **Clause 97** provides for a period of 28 days preceding a poll for campaigning.

**Clause 98** defines permitted participants as registered parties or third parties (including individuals) who have notified the Commission. **Clauses 99-100** deal with notification and the register of notifications. **Clause 101** provides for the designation of umbrella organisations for each side of the outcome. Normally there will be two but where there are two questions in a referendum there may be organisations for each of the possible outcomes. **Clause 102** sets out the procedure and timetable for applications for designation and **Clause 103 and Schedule 11** provide for grants by the Commission of up to £600,000 per umbrella organisation. Other benefits receivable are a free referendum address to every household, free use of public rooms, and referendum campaign broadcasts.

**Clause 104 and Schedule 12** define 'referendum expenses' by reference to qualifying lists of expenses, as in Schedule 7 for campaign expenses and in s76 of the RPA in respect of election expenses. **Clause 105** deals with 'notional referendum expenses' and **clauses 106-7** create a system of channelling expenses through a responsible person. **Clauses 108-9** deal with claims for payment and disputed claims. **Clause 110** makes it an offence to incur referendum expenses in a referendum period of over £10,000, unless the person is a 'permitted participant'.

**Clause 111 and Schedule 13** impose limits on referendum expenditure by permitted participants, set at £5m for a designated umbrella organisation, and for registered political parties an amount based on the percentage of vote secured at the last parliamentary general election. More than 30 per cent of the vote would allow £5m expenditure, less than 5 per cent £0.5m. Other permitted participants are allowed £0.5m each.

**Clause 112 and Schedule 114** provide for controls on donations to permitted participants in referendum campaigns, in terms similar to those for political parties in Part IV. Political parties are not covered by this Schedule as they will be subject to ongoing controls on donations in Part IV of the Bill (see RP 00/2). **Clauses 113-7** deal with returns to be made by permitted participants, similar to those by third parties with reference to election expenses.

**Clause 118** places restrictions on promotional material made available to the public during the period of 28 days before the referendum by the Government, local authority or other publicly funded body (apart from the Electoral Commission). **Clause 119** prohibits publications in a referendum period unless the name and address of the printer appears on the

document. **Clause 120** prohibits referendum campaign broadcasts other than those made by 'umbrella' groups designated as such (see part II of this paper).

## **B. An electoral commission and the regulation of referendums**

The Committee on Standards in Public Life report of October 1998 contained more extensive recommendations about the regulation of referendums than had been expected by many commentators.<sup>2</sup> It followed many of the recommendations of the 1996 report of the Commission on the Conduct of Referendums, chaired by Sir Patrick Nairne, the permanent secretary responsible for devising the rules for the conduct of the first UK referendum on membership of the EEC in 1975.<sup>3</sup> A principal recommendation had been the creation of an independent body to oversee the conduct of referendums.

Neill saw a strong case for core funding for Yes and No campaigns in each referendum, and recommended that an electoral commission administer such funding, with the power to decide which organisations, if any, should be in receipt and to require audited accounts within three months of the result. Campaigning individuals or organisations intending to spend more than £25,000 would also be required to register with the Commission and to be subject to the disclosure requirements concerning donations applicable to political parties. However, there would be no overall limit on spending to monitor, unlike for elections.

Neill did not specifically recommend that the Election Commission should involve itself in the political dimension of the referendum, such as setting the question to be asked, but the overall tenor of its recommendations about the role of government in a referendum campaign would suggest that this eventuality could not be discounted. The proposal was that an Electoral Commission 'should, in an advisory capacity, keep under review the law and practice relating to referendums, and should be empowered to issue reports and make recommendations to Parliament and Government concerning them.'<sup>4</sup>

The Independent Commission on the Voting System (the Jenkins Commission) report recommended that if it were not possible to establish an electoral commission in time for the administration of a referendum on a different voting system, then a separate referendum commission should supervise its conduct and could also 'advise on the wording of the question.'<sup>5</sup> The success of the referendum could depend on the question being clear, simple and not open to legal challenge.'<sup>6</sup> Clearly, the nature of the question to be asked in a referendum remains deeply political and no government seems likely at present to cede control of the phrasing to an outside body.

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<sup>2</sup> *The Funding of Political Parties in the United Kingdom*, Cm 4057-I

<sup>3</sup> *Report of the Commission on the Conduct of Elections*, Constitution Unit, November 1996

<sup>4</sup> Recommendation 93

<sup>5</sup> Cm 4090, October 1998

<sup>6</sup> para 168

The Neill proposals for the regulation of referendums are set out in detail in Research Paper 99/30 *Referendums: Recent Proposals*. A summary of the recommendations is reproduced below:

83. In any referendum campaign there must be a fair opportunity for each side of the argument to be properly put to the voters. (p 164)

84. Depending on the circumstances, each side should be given equal access to an amount of core funding sufficient to enable it to mount at least a minimal campaign and to make its views widely known. (p 164)

85. The Election Commission should decide which organisations, if any, should be in receipt of core funding. (p 164)

86. A campaign organisation in receipt of core funding should be required to submit its audited accounts to the Election Commission within three months of the referendum. (p 165)

87. The core funding provided to the two sides in a UK-wide referendum should, in real terms, be not less than that provided in connection with the 1975 referendum. It should be enough, in connection with all referendums, to cover the establishment of a campaign headquarters for each side, with basic equipment and staff. (p 165)

88. Each side should also be provided with the same facilities as parliamentary candidates in general elections, namely, a free mailing of a statement of its views to every household and the free use of public premises for the holding of meetings. (p 165)

89. The government of the day in future referendums should, as a government, remain neutral and should not distribute at public expense literature, even purportedly 'factual' literature, setting out or otherwise promoting its case. (p 169)

90. Donations to campaigning individuals and organisations in referendums from one source which total £5,000 or more should be publicly disclosed in audited accounts which should be delivered to the Election Commission within three months of the holding of the referendum. (p 171)

91. Campaigning individuals and organisations other than political parties that wish to incur 'referendum expenses' of £25,000 or more, should register, like a political party, with the Election Commission. No individual or organisation not so registered may incur expenses in connection with a referendum in excess of £25,000. (p 171)

92. Campaigning individuals and organisations taking part in referendum campaigns should be restricted to the receipt of donations only from a 'permissible source'. (p 171)

93. The Election Commission should have as part of its remit keeping referendums and referendum campaigns under review and making reports and recommendations to Parliament and the Government concerning them. (p 172)

The Government accepted the recommendations but expressed some concern about the possibility that the recommendations might inhibit Government actions prior to a referendum.

In a debate on the Neill Committee recommendations on 9 November 1998 the Home Secretary, Jack Straw, commented on the potential difficulties, and John MacGregor, a member of the Neill Committee, attempted to clarify the recommendations:<sup>7</sup>

**Mr. Jack Straw:** Those are important comments and recommendations, and they need careful attention in the context of future referendums. It is fair to say, with respect, that this is not the clearest section of the Neill committee's report, not least because of the opening chapter. I have taken some personal interest in this matter, not least because I was on the wrong side in the 1975 referendum--although some might say it was the right side in terms of the argument, but the wrong side in terms of the result. On one hand, the committee says, as does the Conservative party, that we should follow the rubric of the 1975 referendum campaign. On the other, however, it seems to imply that it is possible to recreate during a referendum campaign--which, by definition, will occur during the active life of a Government--the conditions that must apply at the end of a Government's term when there is a general election.

**Mr. John MacGregor (South Norfolk):** I hope to comment further on this point later if I am called. I agree with the Home Secretary that there was some public misunderstanding of the recommendations on referendums because of the way in which the summary recommendation was put. However, the key issue is that the committee said that core funding should be equal for both sides. Ministers will of course want to campaign, and in some cases--obviously so in the case of proportional representation--they will campaign on different sides of the argument. The committee said that there should not be core funding from the state for one side of the campaign, and Government funding for that side too.

**Mr. Straw:** I accept the right hon. Gentleman's point. Campaigning should be for political parties and other bodies. The permanent civil service should not be embroiled in the campaign as that would be quite wrong. However, in some circumstances, it may be appropriate--probably in advance of a referendum rather than at it--for the Government of the day to publish a White Paper stating their views. For some referendums--one on the single currency, for example--Ministers would have to continue to have access to official advice during the campaign. If there were turbulence in the markets, or some other serious question arose during the campaign which related to the conduct of monetary or economic policy, it would be wholly unrealistic to cut Ministers off from that advice.

Responding on behalf of the Opposition, Sir Norman Fowler made observations on the propriety of government funding for information on the euro: 'If the Government can use money for propaganda on the euro, there is an unquestionable right for public money to go the other way.'<sup>8</sup> Winding up the debate, the junior Home Office minister defended the Government information campaign on the euro and refused to accept that expenditure on referendums held since 1997 was unfair.<sup>9</sup>

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<sup>7</sup> HC Deb vol 319 c 57-58

<sup>8</sup> Ibid, c61

<sup>9</sup> Ibid, cc 115-6

Robert Maclennan, for the Liberal Democrats, commented:

It is not easy to draw a line between facts and opinion, and if a referendum is to be conducted on a central issue of Government policy--the only occasion on which referendums are likely to be held, and on precedent many of them will focus on matters of constitutional change--it is ridiculous to suggest, or imply, that the Government should be hampered in making their case as the Government. Is the implication that a Government who go to the country to ask whether the country supports a Government policy must contract out the case to another body before it is possible to have a properly financed campaign? Such a set-up would be artificial in the extreme.<sup>10</sup>

A cross party campaign to secure impartial rules for the conduct of referendums was launched in November 1998 with the support of the independent MP Martin Bell, Charter 88, the Constitution Unit, and the Electoral Reform Society.<sup>11</sup> It called on the government to 'establish an Independent Commission to draw up proposals for a Referendums Act - a framework for the conduct of such polls'.<sup>12</sup>

### C. The Draft Bill

The Government response to Neill was issued in a white paper together with a draft bill in July 1999.<sup>13</sup> A summary of the response on referendums is given below:

1.13 The Neill Committee's report extends beyond the funding of political parties and spending in election campaigns and makes a number of recommendations concerning referendums. These recommendations are directed principally at ensuring that the two sides in a referendum campaign each have a fair opportunity to put their views to the public and that referendum campaigns are not skewed by the intervention of the government of the day. The Government accepts these recommendations. The main points are given effect in Part VI of the draft Bill. The Government's proposals are explained in Chapter 8 of this White Paper.

1.14 The Neill Committee recommended against the introduction of limits on what parties and other organisations taking part in referendums should be able to spend on their campaigns. The Government, however, believes that limits are desirable and practicable. It accepts that it is not possible, by the imposition of spending limits on parties and organisations, to ensure a level playing field in terms of spending between those urging one outcome of the

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<sup>10</sup> Ibid, c 70

<sup>11</sup> *Daily Telegraph*, 3 November 1998 'MPs seek rules to provide 'real referendums''

<sup>12</sup> Letter from Oliver Letwin and Martin Bell September 1998 *Reasoned Plea for Real Referendums*

<sup>13</sup> *The Funding of Political Parties in the United Kingdom: The Government's Proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life* Cm 4413 July 1999

referendum and those urging the other. Nevertheless, in the Government's view, there is no reason in principle why spending limits should not operate, in a similar way as at elections, to discourage excessive spending by the political parties and others and to ensure that individual organisations do not obtain disproportionate attention for their views because of the wealth behind them.

1.15 Proposals for spending limits in referendum campaigns are included in clause 83 of the draft Bill.

1.16 The provisions of the draft Bill so far as referendums are concerned are confined to the points mentioned earlier in this Chapter. When the Bill is introduced into Parliament, however, the Government has it in mind to include proposals extending a little way beyond the recommendations of the Neill Committee. Provision for major referendums has customarily been made in separate Bills, but those Bills have contained a number of procedural provisions which have by now become the standard. It is not the intention that the Political Parties, Elections and Referendums Bill should replace specific Bills providing for referendums to be held, but the Government believes that it would be helpful to enact a number of general (and uncontentious) procedural provisions which would otherwise take up time and space when individual Bills were introduced to provide for a referendum.

The Government proposals could be summarised as follows:

- Individuals and groups wishing to spend more than £10,000 in a referendum period before the poll would be required to notify an independent Electoral Commission
- Campaigning organisations which had made notifications would be required to disclose donations over £5,000 and refuse donations from non-permissible sources. Donations would not be permissible from persons who did not appear on the current electoral register or from non-EU registered companies. The Neill Committee recommended allowing donations from individuals who had the *right* to appear on the electoral register<sup>14</sup>
- Political parties would be subject to similar requirements on donations and expenditure under the general scheme to regulate party funding
- A referendum campaign period would be set by order and would normally begin shortly after the introduction into Parliament of a bill providing for a poll
- An independent Electoral Commission would designate one organisation on each side of the issue as an umbrella organisation. Each umbrella organisation would receive a maximum £600,000 core funding, free use of public rooms and free mailing and free referendum broadcasts (subject to the consent of the broadcasters)
- Spending limits would apply for both umbrella groups, campaigning organisations and political parties (see below for details)

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<sup>14</sup> This is an important distinction since there are over two million British citizens who have lived abroad for less than twenty years, but only 13,700 of these have chosen to appear on the electoral register for 1999 [Source: *Electoral Statistics*, ONS, 1999]

- The Government would be able to publish material on the case for a particular result until a period of 28 days leading up to the poll (see below).

The main changes from the Neill recommendation were :

- the creation of expenditure limits for pressure groups campaigning in referendums
- a new 28 day limit before which the Government would be able to distribute literature on the subject of the referendum.

## **D. Expenditure Limits for Referendum Campaigns**

Expenditure limits on national election campaigns by political parties was a key proposal of the Neill Committee and these limits are the subject of a separate Research Paper, 00/1. The Committee also proposed limits on election expenditure by ‘third party’ groups such as trades unions or pressure groups. It considered the possibility of imposing expenditure limits on referendums, concluding that the arguments against were too strong:

**12.46** We believe, however, that it would be futile and possibly also wrong to attempt to impose such limits in connection with referendums. Ordinary election campaigns bear some resemblance to sporting contests, in the sense that they are fought by competing ‘teams’ in the form of the political parties. It is known long in advance that such contests will take place (though, in the case of general elections, the precise date may be uncertain). The political parties themselves are, in the great majority of cases, permanent institutions with leaders, members, headquarters and professional staffs. By contrast, a referendum campaign is more like a free-for-all. Anyone can participate. Many do. The political parties may, or may not, be the principal contestants. It is often not known long in advance whether a referendum will take place, let alone when it will take place. Those on the Yes and No sides of the argument may never have worked together before - and may, quite possibly, be unwilling to work together now. It appears to us that under these circumstances it would be impracticable to try to control campaign spending. The number of individuals and organisations involved would often be too large. The time-scale would often be too short. Adequate accounting procedures would often be impossible to put in place. The administrative apparatus required would resemble one of Heath Robinson’s most outlandish contraptions - and would almost certainly not work.

**12.47** In addition, there is an argument of principle that arises in connection with referendum campaigns that does not arise - or at least does not arise in the same form - in connection with ordinary election campaigns. In ordinary election campaigns, the political parties are competing for power. The party that wins the election takes power. The parties therefore have an interest in putting forward every argument that may possibly persuade voters to vote for them rather than for someone else. In an ordinary election campaign, it is extremely rare for relevant arguments to go unheard. By contrast, in a referendum campaign the reasons for voting Yes or No may be exceedingly large in number, extremely disparate and possibly even contradictory. The Yes campaign in Northern Ireland, with the Ulster Unionists, the SDLP and Sinn Fein all on one side, and Republican splinter groups and the DUP on the other, provides a vivid illustration. Future referendum campaigns on electoral reform or on

joining the European Economic and Monetary Union could easily take the same form (as, to some extent, the European Community referendum campaign did in 1975). Given this possibility, we believe that seeking to impose spending limits in referendums would not only be administratively impracticable but would, or at least might, impose an unwarranted restriction on freedom of speech.

There were early signals that the government would want to institute a spending ceiling on parties and other third party groups in referendum campaigns.<sup>15</sup> In the debate on the Neill report on 9 November 1998, Sir Norman Fowler appeared to indicate support for a ceiling on spending by third parties in referendum campaigns.<sup>16</sup> The case against a ceiling made in the Neill report has been criticised as 'unclear'.<sup>17</sup> Following the 1993 New Zealand referendum, where the No campaign outspent the Yes campaign by a factor of 10 to 1, the independent Electoral Referendum Panel argued in favour of spending limits for government-initiated referendums.<sup>18</sup>

By the time of the July 1999 white paper, the Government was 'not persuaded that limits on spending (provided that they do not attempt to do too much) need be ineffective or would raise fresh issues of principle'.<sup>19</sup>

It proposed limits of:

- £5m for each of the two umbrella groups and any party with two or more Westminster seats
- £500,000 for any other political party, or other pressure group or individual

The limits would apply for the referendum campaign period which would begin after the introduction of a bill providing for a referendum. Thus pressure groups which campaign before the referendum period might still face regulation for considerable periods. In other provisions of the draft bill the Government proposed that any individual or organisation intending to incur election expenditure of more than £10,000 should be required to notify the Electoral Commission.<sup>20</sup> The notification would need to be made *before* the limit is exceeded.<sup>21</sup> If notification is made, then after the election the group needs to submit its income and expenditure and will be subject to requirements to identify the source of donations over £5,000, and to refuse donations from prohibited sources in the same way as

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<sup>15</sup> *Financial Times*, 14 December 1998 'Referendum spending curbs may anger Euro-sceptics' The article suggested that a ceiling of £5m might be proposed by the government. See also *Times* 29.12.98 'Straw plans a ceiling on referendum spending'

<sup>16</sup> HC Deb vol 319, c62

<sup>17</sup> *Public Law* Spring 1999 'The Funding of Political Parties in the United Kingdom: The Case for Cherry Picking'

<sup>18</sup> Cited in *Electoral Reform in New Zealand: Lessons for the UK*, Constitution Unit, August 1998

<sup>19</sup> Cm 4413 para 8.7

<sup>20</sup> This subject is dealt with in detail in Research Paper 00/1, *The Political Parties, Elections and Funding Bill: Electoral Aspects*

<sup>21</sup> Cm 4413 para 7.27

political parties. Pressure groups campaigning over the issue of the euro may well be considered to be campaigning for or against a particular political party, and so might be considered to be incurring election expenditure.

The period for applying expenditure limits in the case of a parliamentary general election is set at 365 days before the poll. But because Westminster is not subject to a fixed term the Government is free to call an election at any time. The election period of 365 days would come into force retrospectively, and political parties and pressure groups intending to campaign would have to ensure that the limits had not been breached in the year before the date of the general election.

In the case of pressure groups the limit of £10,000 is relatively low, and many would not wish to take the risk of possible prosecution for incurring expenditure which will be subsequently judged as election expenditure. Expenditure which has the effect of influencing electors for or against voting for particular parties is likely to fall within the definition. Because general elections can be called at any time, legal advice would presumably be that pressure groups should make the notification as a precautionary measure each year. These provisions remain in the bill currently before Parliament.

Pressure groups would be able to spend above the £10,000 notification limit in an election, but would be subject to overall limits of 5 per cent of the maximum limit for a political party - £793,000 for England, £108,000 for Scotland, £60,000 in Wales and £27,000 in Northern Ireland in the case of a Westminster election.<sup>22</sup>

## **E. The Role of the Government in Referendum Campaigns**

The white paper proposed a campaign period of 28 days. Before that period Government literature could be distributed:

8.15 The Neill Committee was of the opinion that it was perfectly appropriate for the government of the day to state its views and for members of the government to campaign vigorously in referendum campaigns, just as in general election campaigns, but that neither taxpayers' money nor the permanent government machine should be used to promote the interests of the Government side of the argument. In particular, they recommended (R89) that the government of the day should not distribute literature, even purportedly 'factual' literature, setting out or otherwise promoting its cause.

8.16 These recommendations raise some difficult issues. The government of the day may well have a position on a referendum issue which, whilst yielding the same answer as one favoured by one or more political parties and other organisations, is nevertheless distinctive. In most of the cases in which referendums have been held so far, the purpose of the referendum has been to obtain the endorsement of the electorate for a policy which the government of the day has developed and adopted,

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<sup>22</sup> Cm 4413 para 7.29

and the view has traditionally been that a government has not only a right but a duty to explain and promote its policies. It will clearly be appropriate for it to do so, and to have the assistance of the Civil Service, during the period when a Bill to provide for a referendum is being taken through Parliament. This period, at any rate, cannot reasonably be equated with a general election campaign period. Nevertheless, the Government accepts that there ought to be a period leading up to the referendum poll in which the government of the day, as a government, stands aside and the campaigning is left to the political parties and other organisations, with Ministers taking part in their political capacity if they wish. The draft Bill thus provides, in clause 79, that the government of the day is not to publish material relating to the referendum issue within the period of 28 days leading up to the poll. This will ensure that, in the crucial period when the electors are weighing up the referendum issue, the campaign is not skewed by the expenditure of large sums of taxpayers' money.

8.17 This legislative provision will be backed by the long-standing, non-statutory guidance on conduct customarily issued to civil servants during general elections and referendum campaigns. This guidance sets out the framework for civil service support to Ministers during such campaigns.

## F. Responses to the Draft Bill Proposals

Organisations preparing to campaign against the UK's entry into European and Monetary Union made some objections to these proposals. A *Telegraph* editorial<sup>23</sup> protested that the pro-euro parties would each be able to spend £5m, with political parties opposing the euro having limited ability to spend. Ann Widdecombe, Shadow Home Secretary, was quoted as saying that the proposals 'will obviously give the campaign to scrap the pound an unfair advantage'.<sup>24</sup>

Business in Sterling reportedly commented that it would spend most of its funds before the referendum campaign begins, and as a result the proposed legislation would 'backfire'. The chief executive, Nick Herbert, also argued that the real funding gap was between Business in Sterling and the publicity campaigns of the European Commission.<sup>25</sup>

The Neill Committee expressed some concerns about the government proposals in a letter on 15 October. Its response on referendums is reproduced in full below:

We recognise that some of your recommendations in relation to the conduct of referendums differ from our proposals quite materially, the most significant being your decision to put a cap on referendum expenditure by political parties and other organisations. As a matter of principle we do not oppose the imposition of a cap on such expenditure. Our conclusion to the contrary was largely founded on practical considerations. However, we are concerned that the detail of your proposals could

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<sup>23</sup> *Daily Telegraph* 29 July 1999 'Straw's Polls'

<sup>24</sup> *Guardian* 29 July 1999 'Tories cry foul over £5m referendum spending cap'

<sup>25</sup> *Financial Times* 14 December 1999 'Anti Euro Group aims to avoid rules on spending'

give rise to some difficulties. I will set these out briefly, for further consideration by your Government and by Parliament.

You have proposed that, for a United Kingdom-wide referendum, there should be a limit of £5 million for each political party with two or more Members of the House of Commons, with a similar restriction on umbrella groups. If in a particular referendum most political parties were on the same side of the argument, there would be a risk that such an arrangement could work unfairly. We are also concerned that the proposed arrangement provides a disincentive to the formation of umbrella groups, and we question whether it is right that political parties, irrespective of the number of Members of the House of Commons they have, should be subject to the same £5 million cap.

We welcome your proposals on the part which should be played by the government in referendum campaigns, and your recognition of the importance of ensuring that there is a period immediately prior to a referendum in which, as you say, "the government of the day ... stands aside and the campaigning is left to the political parties and other organisations".<sup>26</sup>

There were 36 responses to the white paper, which have been deposited in the Commons Library.<sup>27</sup> The Conservative response to the white paper suggested that the ceilings on expenditure on referendums might be 'on the low side' but considered that the most important thing was that both sides were treated equally.<sup>28</sup> The Liberal Democrat response considered that the Electoral Commission should have an advisory role in the wording of a question to be used in a referendum. The Referendum Party response deplored the idea of funding for umbrella organisations, fearing that there would be disputes between the various members of the organisation as to the application of the funds.

The Newspaper Society and the Society of Editors' responses raised concerns about the drafting of clause 79 (now clause 118) on the restriction of promotional material, claiming that it might be interpreted to prevent regional BBC news broadcasts or other publicly funded broadcasters' publication of factual reports dealing with the referendum issues. They also thought that clause 80 (requiring the name and address of printer - now clause 119) would cause problems since newspapers might inadvertently be caught by the drafting. This was because the inclusion of a referendum advertisement might transform the newspaper as a whole into a document relating to the referendum. These concerns have been addressed by some redrafting in the current bill.

## **G. Referendum Provisions in the Current Bill**

An overview of the Bill's referendum provisions is given in section I of this paper.

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<sup>26</sup> *The Funding of Political Parties: The Government's Proposals for Legislation* available from website [www.public-standards.gov.uk](http://www.public-standards.gov.uk)

<sup>27</sup> Dep 99/1866

<sup>28</sup> Dep 99/1866 Conservative party response

Part VII of the Bill introduces some changes from the draft bill proposals. In particular, the expenditure limits per party have been adjusted. The *Explanatory Notes* set out the limits as follows:

**Clause 111 and Schedule 13 : Special restrictions on referendum expenditure**

195. *Subsection (1)* introduces Schedule 13 which imposes limits on referendum expenses incurred by permitted participants. The limits for participants in a UK-wide referendum are set out in *paragraph 2 of Schedule 13*.

196. The limits are as follows:

a) for a designated umbrella organisation - £5 million

b) for a registered political party a sum based on the percentage of the vote secured by the party at the previous parliamentary general election, namely:

<u>Percentage of UK vote</u>	<u>Permitted limit</u>
	£m
More than 30%	5
20 - 30%	4
10 - 20%	3
5 - 10%	2
Less than 5%	0.5

c) other permitted participants - £0.5 million.

197. If a referendum were held under the provisions of Part VII during the course of the Parliament elected in 1997, the permitted limit for the main political parties would be as follows: Labour (43.2% of the vote) £5 million; Conservative (30.7%) £5 million; Liberal Democrat (16.8%) £3 million. All other political parties secured less than 5% of the UK-wide vote and would consequently have a limit of £500,000.

Compared with the draft bill, the maximum limit for the Liberal Democrats has been reduced from £5m to £3m, and the SNP, Plaid Cymru, and the Northern Ireland parties would be restricted to £0.5m. Of course, these parties may not have had the capacity to spend up to the £5m limit proposed in the draft bill for each party with two Members in the Commons. There may well be concerns that the expenditure limits are tied to share of the vote, given that the subject of a future referendum may not have been at issue in a general election.

The number of third parties is not restricted, and so there may well be concerns about the proliferation of such groups, which can each spend £0.5m. However it was presumably not

possible to regulate the number of third parties, as this might be considered a potential infringement of freedom of expression, culminating in a legal challenge.<sup>29</sup>

There are provisions in **Clause 104 and Schedule 12** to define ‘referendum expenses’, which mirror definitions and lists in Schedule 7 on campaign expenses.<sup>30</sup> The referendum period is defined as beginning with the introduction into Parliament of the relevant bill or six months as a maximum in **clause 96**. Permitted participants intending to spend over £10,000 must register with the Electoral Commission, which will be responsible for designating umbrella organisations. Assistance available to such organisations is summarised in the *Explanatory Notes*:

**Clause 103 and Schedule 11 : Assistance available to designated organisations**

190. Clause 103 and Schedule 11 confer certain benefits on designated umbrella organisations. Subsection (2) of clause 103 provides that the Commission may award each designated organisation a grant of up to £600,000. This figure is broadly the equivalent at today's prices of the £125,000 grant paid to the umbrella organisations in the 1975 referendum under the provisions of section 3 of the Referendum Act 1975. All umbrella organisations designated in connection with a particular referendum must receive the same level of grant. Such grants are intended to provide a designated campaign organisation with sufficient resources to mount an effective campaign. Subsection (3) enables the Commission to attach such conditions to a grant as they may determine. The conditions attached to the grants made to the umbrella groups in the 1975 referendum included a requirement that the grant be used only for purposes connected with the referendum; a requirement that the accounts were available for audit within two months of the date of the referendum; and that the accounts would be subject to audit by the Comptroller and Auditor General (Accounts of Campaigning Organisations, October 1975, Cmnd 6251). Subsection (4) and Schedule 11 confer benefits on designated referendum campaign organisations similar to those conferred on candidates and political parties at elections, namely:

- a) the sending of a referendum address free to every household or elector;
- b) the use of public rooms free of charge for holding public meetings; and
- c) referendum campaign broadcasts. Under the terms of paragraph 4 of Schedule 11 it is a matter for the broadcasting authorities to determine the length and frequency of referendum broadcasts, but in doing so they must have regard to any views expressed by the Electoral Commission.

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<sup>29</sup> See *Libman v Quebec (Attorney General)*(1997) 151 DLR(4<sup>th</sup>) 385 (SCC) which allowed some expenditure limits on third parties as constitutionally justified, but expressed concern on limiting the number of third party groups

<sup>30</sup> see *Research Paper 00/xx The Political Parties, Elections and Referendums Bill: Electoral Aspects* for details

The restrictions on referendum expenditure, on donations to permitted participants, and on returns to the Electoral Commission are modelled on similar provisions relating to campaign expenditure (**Clauses 105-117 and Schedule 14**). These are covered in the accompanying Research Paper 00/1 *The Political Parties, Elections and Referendums Bill- Electoral Aspects*. In particular assistance given at a discount or free of charge is counted within the definition of referendum expenditure, expenditure has to be channelled through authorised persons, and donations to permitted participants are subject to the same controls as those for registered parties.

There are controls on publications addressed or made available to the public on the referendum by the Government, local authority or publicly funded body (apart from the Electoral Commission) during the 28 days before the poll. There are some significant exceptions however, set out in **Clause 118(3)**:

(3) Subsection (2) does not apply to-

(a) material made available to persons in response to specific requests for information or to persons specifically seeking access to it;

(b) anything done by or on behalf of the Commission or a person or body designated under section 101 (designation of organisations to whom assistance is available);

(c) the publication, display or distribution of information relating to the holding of the poll; or

(d) the issue of press notices;

and subsection (2)(b) shall not be taken as applying to the British Broadcasting Corporation or Sianel Pedwar Cymru [S4C].

The civil service is subject to non statutory codes during election and referendum periods,<sup>31</sup> and press releases issued in those periods typically cover non controversial issues.

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<sup>31</sup> see for example *Elections to the Scottish Parliament, the National Assembly for Wales, Local Government and the European Parliament: Guidance for Civil Servants on Conduct* Cabinet Office February 1999, Dep 99/356

## II Party Political Broadcasts

### A. Background

ITV, Channels 4 and 5 and the independent national radio stations are required under sections 36 and 107 of the *Broadcasting Act 1990* to transmit party political broadcasts in line with arrangements made by the relevant licensing body (for example, the Independent Television Commission or ITC). There is no parallel duty on the BBC but the Corporation has a long standing commitment to making airtime available on a similar basis. According to the Neill report on party funding, Sky TV and the Welsh language channel S4C transmit party broadcasts voluntarily.<sup>32</sup> The general arrangements are currently devised jointly by the ITC, the BBC, S4C and the Radio Authority. Party broadcasts are less frequent on the radio than on television, and the account below concentrates on the latter medium.

Party broadcasts were first broadcast by the BBC prior to the general election in 1924. In 1929, the BBC made comprehensive arrangements for the allocation of time to the parties.<sup>33</sup> Party broadcasts were first shown on television in 1951. For most of the subsequent period the broadcasts were transmitted simultaneously on BBC and ITV, but in recent years the broadcasts have been staggered. On its launch in 1982, Channel 4 adopted alternative arrangements for broadcasts outside elections, showing a short, regular party political comment programme. This series ended in 1999.

#### Party broadcasts: a note on terminology

Party broadcasts fall into two main categories:

- **party election broadcasts (PEBs)**, which are shown at election times on each of the five terrestrial television stations; and
- **party political broadcasts (PPBs)**, which are shown at other times of the year. This terminology can be confusing as PPBs is also used as a generic term to describe all party broadcasts.

In addition the main political parties have, for some time now, each made a broadcast at the time of the Budget. The current arrangements for party broadcasts integrate PPBs and PEBs in a single series (see below).

<sup>32</sup> *The Funding of Political Parties in the United Kingdom*, Fifth Report of the Committee on Standards in Public Life, Cm 4057-I, p177

<sup>33</sup> *The Consultation Paper on the Reform of Party Political Broadcasting*, issued jointly by the BBC, ITC, S4C and the Radio Authority, January 1998, has a useful history of party political broadcasting at Appendix 1

## B. Allocation of Time

### 1. Prior to 1998

The allocation of party broadcasts was determined mainly on the basis of the parties' performance in votes at the previous general election and was agreed by the Committee on Party Political Broadcasting, which consisted of representatives of the main political parties and the broadcasters.

PEBs were shown by all terrestrial channels. Channels 4 and 5 were not obliged to show PPBs. The allocation of party election broadcasts was related both to the level of support in previous elections and to the number of candidates nominated. During general elections, a maximum of five PEBs was allowed for any single party, and the party in government and the official opposition were given the same number of broadcasts. The rules were flexible enough to take account of strong support for new parties (such as the SDP in the 1980s) where this had been demonstrated in by-election results and opinion polls. Any party contesting at least 50 seats in a General Election was entitled to at least one election broadcast (in May 1996 the additional hurdle that such parties also had to demonstrate "proven electoral support" was dropped). PEBs were also broadcast in advance of local and European elections. The allocation of PPBs was based on a formula of 10 minutes' time for each 2 million votes cast for a party at the last general election, with the proviso that the governing party and the official opposition should always receive the same number of broadcasts. Special arrangements were made for PPBs and PEBs for the nationalist parties.

There had always been a certain amount of criticism of the system for allocating party broadcasts, particularly from the third and minor parties which have tended to feel squeezed by the traditional government/official opposition dominance of the arrangements. In general, the Committee on Party Political Broadcasting only met when there was failure to reach agreement over the broadcasters' proposals for allocating PPBs or PEBs.<sup>34</sup> This occurred before the 1983 General Election when the Liberal/SDP Alliance would not agree any allocation that did not give them parity in broadcasts with the Labour Party. The response of the broadcasters was to impose the allocation they believed fair, with the result that the Alliance received four broadcasts, and five each were offered to the Conservative and Labour parties.

There were a number of court challenges to the allocation, etc., of PEBs around the time of the May 1997 general election.<sup>35</sup> The Referendum Party sought judicial review of the broadcasters' decision to offer only one five minute television and radio PEB. The application was dismissed; Lord Justice Auld stated that the broadcasters had acted in a 'reasonable manner'. The Pro-Life Alliance was unsuccessful in its attempt to reinstate a sequence from its PEB cut by the broadcasters on the grounds that it would offend against 'good taste or decency' and be 'offensive to public feeling'. Sinn Fein was also unsuccessful in its attempt to reinstate shots cut from its broadcast on the grounds that they were potentially defamatory. The broadcasters did not reach a unanimous view of the BNP broadcast and two versions were transmitted; in

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<sup>34</sup> A fuller account of the workings of the Committee on Political Broadcasting is given in Robert Blackburn, *The Electoral System in Britain*, 1995, pp238-40

<sup>35</sup> See *Communications Law*, Vol 2, No 5, 1997, "The 1997 general election and media law"

addition, the BNP was unable to make all the changes required by Channel 4 in the time available and so they did not transmit it at all.

In June 1997 the BBC and ITV decided, following legal advice, that it would in future receive representations from the political parties directly rather than relying on the Committee on Party Political Broadcasting to convey the views of the parties.

## 2. The 1998 Consultation Paper

The ITC and BBC, together with S4C and the Radio Authority, produced a consultation paper in January 1998 proposing reforms of the whole party political broadcasting system.<sup>36</sup> The consultation paper suggested that PPBs rely more on the techniques of the advertising world than those of public service broadcasting. The broadcasts were introduced “for a different era” before the televising of Parliament and the current multitude of news and current affairs programmes.<sup>37</sup> Viewers and listeners, it was argued, now have ample opportunity to see, hear and judge politicians on a wide range of subjects; and party political broadcasts simply give the parties free political advertising. The consultation paper did not mention viewing figures during PPBs but briefings given to the press indicated that this was an important consideration for the broadcasters: research by the BBC quoted in the *Guardian* found that recent PPBs by Labour and the Conservatives had led to switch-off rates of 36% and 27% respectively.<sup>38</sup>

Nevertheless, in order to avoid the need for paid political advertising on television and radio, the broadcasters proposed that party broadcasts should continue, with a revised format. It was proposed that regular PPBs and the post-Budget broadcasts should be abandoned altogether and replaced with more broadcasts at election times. This system would more closely resemble arrangements in other countries. In addition to general elections there would be PEBs for elections to the European and Scottish Parliaments, the Welsh and Northern Ireland Assemblies and for local elections. The broadcasters did not propose to offer broadcasts during referendum campaigns due to the difficulty of achieving balance when parties are split on the issue in question, the possible future referendum on European Monetary Union being a case in point (see part C(2) below for the Neill Committee’s view on this issue). Ministerial broadcasts (accompanied by a right to reply for the opposition parties) would be made only in exceptional circumstances.

Arrangements for Northern Ireland would be made more consistent with the situation on the mainland. Previously the Northern Ireland parties received 'Campaign Broadcasts' incorporated in programmes rather than separate PEBs. Under the new system the national political parties would not receive PEBs in Northern Ireland unless they contested one sixth of the seats there.

These proposals received a mixed response from the political parties. The Liberal Democrats' spokesman, Nick Harvey, said that his party valued PPBs because they did not have strong support in the press or access to the “massive advertising budgets” available to Labour and the Conservatives. Peter Mandelson wrote in the *Times* that, while the government could always

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<sup>36</sup> *Consultation Paper on the Reform of Party Political Broadcasting*, op cit

<sup>37</sup> General election campaigns were not covered at all by television news programmes until 1959

<sup>38</sup> 21.1.98 “Broadcast threat angers Labour”

rely on extensive media coverage, this was not the case for the opposition and minority parties. The broadcasts were “the only opportunity for political parties to communicate with the public without editorialising by journalists”.<sup>39</sup> The Conservatives' initial reaction to the proposals was more favourable, and Lord Parkinson, then Chairman of the party, said in evidence to the Neill Committee:<sup>40</sup>

There is a case for the party political broadcast... But it is traditionally the time when people go and put the kettle on and wait for the thing to end. I think politicians have to recognise that. So I do not think our attitude to the proposals is quite as entrenched and hostile as Labour's. We think there is a case for giving more exposure and more time at a time when people are really interested in politics, rather than just filling five minute slots at odd times of the year.

Neill also had reservations about the proposal to end party broadcasts outside elections. The Committee suggested that PPBs<sup>41</sup>

afford the parties an opportunity, between elections, to set their views before the public on their own terms, and the fact that such broadcasting opportunities exist may make it somewhat easier for the broadcasters to resist some of the other political pressures to which they are subject. The existence of PPBs also weakens, to some extent, any case that might be made for legitimising paid advertising on the broadcast media. A few PPBs, scattered through the year, seem a small price to pay for keeping open direct lines of communication between political parties and those they claim, or seek, to represent. After all, no political party is obliged to participate. A political party that considered that a PPB at a particular juncture was too expensive to produce or likely to be ineffective could simply abstain. This should not, we consider, operate as a barrier to PPBs on behalf of those parties which wish to participate.

Following negotiations between the parties and the broadcasters, a compromise was reached. The majority of party broadcasts will be at election time, but there will be a small number of additional broadcasts to coincide with other key events in the political calendar, such as the Budget, the Queen's Speech and party conferences.<sup>42</sup> This will ensure that the parties continue to have access to the airwaves throughout the year, given that elections tend to be concentrated in the first half of the year. The proposals are also intended to ensure that the number of broadcasts shown in each year is reasonably consistent, regardless of the number of elections in a given year (see part B(4) below for further details).

### **3. Arrangements for minor parties during elections**

In the 1997 election, eight parties not currently represented in the Commons qualified for a PEB under the 'fifty seat' rule. These included the Green Party, the Referendum Party (Sir

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<sup>39</sup> 24.1.98 “The media misses our message”

<sup>40</sup> *The Funding of Political Parties in the United Kingdom*, op cit, Cm 4057-II, p118, para 1410, reproduced at Cm 4057-I, p179

<sup>41</sup> Ibid, Cm 4057-I, pp179-80

<sup>42</sup> ITC/BBC joint news release, “Revisions to rules on political broadcasting”, 28 June 1999

James Goldsmith's anti-EU party), the Natural Law Party (practitioners of Transcendental Meditation), the British National Party, and the Pro-Life Alliance (an anti-abortion party). Of these, the Referendum Party got 2.6% of the total vote while the other seven polled less than 0.3% each. The January 1998 consultation paper raised the possibility of single-issue campaigners or extremist parties fielding candidates purely in order to gain access to national television. The broadcasters pointed out that the real value of the election deposit has fallen greatly since it was first introduced in 1918; in the 1997 election fifty deposits cost £25,000 and secured a five minute broadcast on five television channels. At current advertising rates on the three commercial channels alone that would cost several million pounds. The consultation paper admitted that previous attempts to distinguish "serious political parties" from those trying to exploit the rules on PEBs had failed, and the broadcasters concluded that the best course would be to raise the threshold for broadcasts to one sixth of all seats contested. This would mean a threshold of 110 seats for a national broadcast; parties contesting one sixth of the seats in Scotland and Wales would qualify for a PEB in those countries only.

This proposal was subsequently adopted by the broadcasters. If a party not currently represented in Parliament stood in substantially more than 110 seats, the allocation of additional broadcasts would be based on a range of factors including the percentage of votes obtained in previous elections and/or any other reliable evidence of the level of the party's electoral support.

#### **4. Current arrangements for Party Political Broadcasts**

The major parties will be offered 1 Budget broadcast in March, 1 party conference broadcast in September/October and 1 Queen's Speech broadcast in November. In England parties will also be offered three local election broadcasts and one PEB for the London mayoral election.

There are no elections due in Scotland or Wales in 2000. The Budget, party conference and Queen's Speech broadcasts will be carried throughout the UK. In addition in Wales, broadcasts will be offered for the Welsh Budget in February, the spring Welsh party conferences and the National Assembly's end of term report in July. There will be additional broadcasts in Scotland for the spring Scottish party conferences, the anniversary of the establishment of the Scottish Parliament in May and the start of the parliament's new year in September. There are no plans in 2000 for extra broadcasts in Northern Ireland.

These arrangements apply to the Labour, Conservative and Liberal Democrat parties, plus the SNP in Scotland and Plaid Cymru in Wales. Other parties will qualify for local government PEBs if they contest one sixth or more of the seats fought in an election.

The BBC/ITC consultation paper gave details of new editorial guidelines for party political broadcasts.<sup>43</sup> These demand compliance with the law on matters such as libel, obscenity, incitement to racial hatred etc, and with broadcasting codes on taste and decency, privacy and fairness etc. In addition the guidelines state:

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<sup>43</sup> *Consultation Paper on the Reform of Party Political Broadcasting*, op cit

- The use of actors in a broadcast must be made clear to the audience if there is any possibility that the audience could be confused or misled by their appearance
- No revenue-generating telephone numbers are to be used in a broadcast
- PEBs which closely mimic the format of established programmes on any channel, particularly news programmes, run the risk of misleading the audience and therefore they must be clearly labelled throughout.

The parties can choose whether to show broadcasts of three, four or five minutes. Broadcasts must normally be broadcast between 5.30 and 11.30 pm.<sup>44</sup>

## **C. The Neill Report**

### **1. Party Political Broadcasts and Political Advertising**

The Neill Committee, in its report on party funding, considered that the current ban on political advertising on television and radio, and the availability of party political broadcasts, were two sides of the same coin, and that both should be retained:<sup>45</sup>

Preventing the political parties and other politically motivated organisations from buying time on television and radio has the effect of restricting the total amount of money they can spend and also, thereby, of limiting the amounts of money they have to raise. These effects are almost universally agreed to be beneficial. Election campaigns in the United Kingdom are cheaper than in many other countries. During election campaigns, television viewers and radio listeners are not subjected to a continuous barrage of party political propaganda (much of which, if it were permitted here, would undoubtedly be negative). The parties' dependence on wealthy donors is reduced. Political leaders are not forced to spend enormous amounts of time and energy raising money to fund television and radio campaigns. Not least of the benefits is the fact that the broadcasters provide the parties with free air-time. This means that all the major political parties, and not just the richest ones, are given an opportunity to state their views. Almost all those who have observed election campaigns in the United States regard these aspects of the UK system as superior. We believe that the present arrangements have served this country well and should remain in place.

Neill acknowledged that the ban on political advertising on television and radio constitutes a restriction on the right of free expression guaranteed by Article 10 of the European Convention on Human Rights, but took the view that "it is perfectly proper for the Government to continue to proceed on the basis that the ban on political advertising on television and radio is legally defensible".<sup>46</sup>

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<sup>44</sup> ITC Note No. 19: Party Political Broadcasting, December 1998

<sup>45</sup> Fifth Report of the Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, Cm 4057-I, p174

<sup>46</sup> *Ibid*, p176

Neill supported the continuing availability of PPBs between elections, suggesting that they gave the parties an opportunity to set their views before the public on their own terms, thus making it somewhat easier for the broadcasters to resist some of the other political pressures to which they are subject. The existence of PPBs also weakened, to some extent, any case that might be made for legitimising paid advertising on the broadcast media.<sup>47</sup>

Neill suggested that the Election Commission proposed by the Committee might play an ‘honest broker’ role in the allocation of party broadcasts:<sup>48</sup>

In connection with both the future of party election broadcasts and party political broadcasts (if they continue to exist), and also their allocation among the parties, we believe there may be a role for our proposed Election Commission. The Commission could express non-binding views on such matters as those raised by the broadcasting authorities’ consultative document; and the political parties and the broadcasters might find it mutually advantageous if the Election Commission played an ‘honest broker’ role in connection with the allocation of the available free air-time. Such a role is played in Canada, with considerable success, by a body under the direction of the Chief Electoral Officer.

## 2. Referendum Broadcasts

As noted above, the BBC/ITC *Consultation Paper on the Reform of Party Political Broadcasting* indicated that the broadcasters were reluctant to allocate political broadcasts to opposing sides in referendum campaigns due to the potential conflict with their overriding duty to achieve balance.<sup>49</sup> Particular problems cited were the court’s decision in *Wilson v. IBA* at the time of the 1979 referendum, the difficulty of achieving fairness when parties are unequally balanced between two sides of the question (as in the recent Scottish and Welsh Referendums on devolution), the difficulty of achieving fairness when parties are internally divided on the issue and the uncertain status of umbrella organisations.<sup>50</sup> Neill sets out the following summary of the 1979 case:<sup>51</sup>

The case of *Wilson v. IBA* [1979] SC 351; (1979) SLT 279 rested on the requirement placed upon the IBA to ‘ensure that the programmes broadcast maintain ... a proper balance in their subject matter.’ – Independent Broadcasting Authority Act, 1973, Section 2(2)(b). Brian Wilson and others of the “Labour Vote No Campaign Committee” argued that the four planned referendum broadcasts – one for each of the four main Scottish parties – were a breach of this requirement. Three of the broadcasts would have been by parties supporting a ‘Yes’ vote, with only one broadcast (Conservative) against. The Lord Ordinary (Lord Ross) ruled that this was indeed a breach of the provisions of the legislation, and granted an interdict (the equivalent of an injunction) restraining the broadcasting of the planned series of four

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<sup>47</sup> Ibid, pp179-80

<sup>48</sup> Ibid, p180

<sup>49</sup> Op cit, p9

<sup>50</sup> See part I of this paper for provisions relating to umbrella organisations in the current Bill

<sup>51</sup> Op cit, Cm 4057-I, p166, fn 16

referendum broadcasts. The Judge said (at p 285 (1979) SLT) that it was up to the IBA to decide what referendum broadcast should take the place of the planned series – ‘It will be necessary however to ensure that the same time is given to the proponents of “Yes” as is given to the proponents of “No”.’

However, evidence submitted to the Committee by Russell Deacon of the University of Wales Institute, Cardiff Business School, seems to suggest that the desire to achieve balance at all costs might itself present a problem:<sup>52</sup>

[...] the media would not broadcast ‘Yes’ campaign material until they could find somebody who was a ‘No’ campaigner. I think that problem got easier as the ‘No’ campaign grew stronger. The media wanted a balance, so although lots of ‘Yes’ campaign activity was occurring, the media were not recording it because there was no counterbalance of ‘No’ campaigning. That caused some concern among broadcasters.

The Neill Committee suggested that the broadcasters should reconsider their position on referendum broadcasts.<sup>53</sup>

We agree with the broadcasters that “fairness over single issue referendums cannot easily be achieved by a simple application of the rules governing fairness between parties”, but we draw a different conclusion: namely, that the broadcasters should consider allocating free air-time to the two umbrella organisations on each side of a referendum, if two such umbrella organisations exist. There seems no reason on the face of it why the broadcasters should not follow the lead of the Election Commission in this matter... If the Commission designates two such organisations for the purpose of receiving core funding, those could be the organisations given free air-time. If the Commission cannot in any instance identify two organisations as being appropriate recipients of core funding, then the broadcasters would not be under any obligation to provide free air-time to anyone.

This proposal is addressed in **Clause 120** of the current Bill (see below).

## **D. The Bill**

As explained above, when the ITC grants a licence to broadcast on ITV or Channels 4 and 5, it must under section 36 of the *Broadcasting Act 1990* require the licence holder to broadcast party political broadcasts in accordance with such rules as the Commission may determine. Section 107 of the 1990 Act places a similar duty on the Radio Authority in respect of national radio stations. The BBC has a long-standing commitment to making party broadcasts and the Welsh language station S4C operates a similar policy.

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<sup>52</sup> Ibid, Cm 4057-II, p343, para 4130; reproduced at Cm 4057-I, p166

<sup>53</sup> Ibid, Cm 4057-I, p166

**Clause 9** of the current Bill stems from the Neill Committee’s view that the Electoral Commission should be able to express non-binding views on the arrangements for party political broadcasts (see part C above). It amends sections 36 and 107 of the 1990 Act, inserting a new duty for the ITC and the Radio Authority to have regard to any views expressed by the Electoral Commission (established by **Clause 1**) before making rules for party political broadcasts. This will enable the Commission to comment on issues such as the allocation of time to the various political parties. Clause 9 will also require the BBC and S4C to have regard to any views expressed by the Commission in formulating their policy on party broadcasts. The *Explanatory Notes* to the Bill state:

It is not the purpose of these provisions to give the Commission a prescriptive role in relation to editorial and broadcasting decisions, which are properly a matter for the broadcasters themselves, nor is it intended that broadcasters should be required to seek the views of the Commission before deciding whether to transmit each and every party political broadcast.<sup>54</sup>

The precise nature of the relationship which will develop between the broadcasters and the Electoral Commission remains to be seen.

**Clause 32** recreates section 14 of the *Representation of Political Parties Act 1998*, which prevents broadcasters from transmitting a party political broadcast on behalf of a party which is not registered under that Act.<sup>55</sup>

Clause 101 enables the Electoral Commission to designate an umbrella organisation for each of the possible outcomes in a referendum campaign.<sup>56</sup> Designated organisations will be able to apply for public funding. **Clause 120** requires that broadcasters may only transmit referendum campaign broadcasts made by an organisation designated by the Electoral Commission under Clause 101. The inclusion of this Clause indicates that the Government agrees with the Neill Committee’s view that the broadcasters should “reconsider their position with regard to referendums” (see part C above). The *Explanatory Notes* to the Bill state:<sup>57</sup>

This requirement on broadcasters ensures that, in any referendum, each side of the campaign will have equal access to free airtime for referendum broadcasts. The two umbrella bodies in the 1975 referendum were each awarded free airtime for four ten-minute television broadcasts and three ten-minute and two five-minute radio broadcasts. Attempts to provide referendum broadcasts in the 1979 devolution referendums foundered following the decision of the Scottish courts in the case of *Wilson v Independent Broadcasting Authority* which held that the IBA, in deciding to allocate a broadcast to each of the four Scottish parliamentary political parties (which divided three to one in favour of devolution) had acted in breach of its statutory duty

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<sup>54</sup> Bill 34-EN, para 51

<sup>55</sup> Part II of the current Bill re-enacts the 1998 Act but with significant modifications: see RP 00/1

<sup>56</sup> See part I of this paper

<sup>57</sup> Bill 34-EN, para 203

to ensure that programmes broadcast on the subject of the referendum maintained a proper balance.

## **E. Other Media Issues**

### **1. The Neill Report**

In addition to the areas already covered, Neill made the following recommendations on the media and political advertising:

R94 The ban on political advertising on television and radio should be maintained. Existing legislation should be reviewed to ensure that its reach is sufficiently wide to block attempts at evasion by new modes of communication.

R95 The broadcasters should do all in their power to maintain their established tradition of strict political neutrality.

R96 The political parties should seek to agree, in association with the advertising industry, a code of best practice for political advertising in the non-broadcast media.

In its white paper produced in response to the Neill report, the Government strongly endorsed the Committee's recommendations on political neutrality and political advertising in the broadcast media, and described the action being taken in respect of new communications media.<sup>58</sup> On recommendation 96, the Government raised difficulties which might arise if the Committee of Advertising Practice or the new Electoral Commission were asked to oversee a code of practice on political advertising. It stated that it would explore with the main political parties whether there is any existing or ad hoc body which could possibly fulfil such a role:

If a suitable organisation can be found which commands consensus, the Government will help the political parties to reach agreement on the adoption of such a code.<sup>59</sup>

### **2. Section 93 of the Representation of the People Act 1983**

Section 93 affects the broadcasting of elections. It prohibits broadcasting about a parliamentary or local election where one or more of the candidates does not give his or her consent. It applies at constituency level only for parliamentary elections, and so does not affect coverage of elections nationally or regionally. If the candidate participates and consents, there are further restrictions. The programme cannot be aired until nominations have closed, and even then all the candidates must consent to the programme. Originally, the provision was conceived as an attempt to protect the rights of minority candidates, but

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<sup>58</sup> *The Funding of the Political Parties in the United Kingdom*, Cm 4413, July 1999, chapter 9

<sup>59</sup> *Ibid*, para 9.10

effectively, this means that every candidate for a particular constituency can insist on taking part and so has a veto on the broadcast. The provision is long standing and dates from the *Representation of the People Act 1969*. For parliamentary elections the restrictions come into force when the intention to dissolve Parliament is announced.<sup>60</sup>

The provision has been seen as unnecessarily inhibiting coverage of local issues, and has been opposed by a number of broadcasters. The interpretation of the provision has also been subject to legal challenge as this extract from *Media Law* illustrates:<sup>61</sup>

Bernadette McAliskey (Bernadette Devlin) complained that the BBC had divided a candidate's programme into two parts, and she had been placed with 'minor' candidates, who were given less air-time. The judge thought the division was fair but acknowledged that the BBC had to obtain Ms McAliskey's consent or scrap the programme. This 'candidate's veto' means, in practice, that sitting MPs who decide they have nothing to gain by appearing will often refuse to appear or to consent to the programme going ahead without them. It means, in addition, that a single candidate can veto a programme in order to stop the public from hearing the views of a specific opponent (many Labour candidates for this reason veto programmes that would include a candidate from the National Front). These consequences are wholly unacceptable. The voting public in a democracy should be entitled to see the candidates for local and national elections ranged against each other, and local radio and television stations perform a public service by setting up such debates. The law at present permits individual candidates to ban them, from motives of self-interest or censorship. A provision that was drafted with the reasonable purpose of giving candidates some assurance against unfair editing has, by loose drafting, become a serious infringement of freedom of communication. It should be replaced by a provision entitling election items to be broadcast so long as all candidates are invited and they consent to any editing of their contributions.

The case of *Marshall v BBC*<sup>62</sup> is also relevant. Here the court held that a candidate, James Marshall, had not 'taken part' since there had only been pictures of his canvassing. The programme did not, therefore, require consent before being broadcast.

Equivalent provisions to s93 were not made in the secondary legislation governing elections to the Northern Ireland Assembly, Scottish Parliament and the National Assembly for Wales.<sup>63</sup> Nor did such provisions feature in the elections to the European Parliament in June 1999,<sup>64</sup> conducted under the new proportional representation system,<sup>65</sup> leading to hopes that the provision might be repealed altogether. However, all these elections featured lists of candidates, where it would be difficult to apply the s93 principle, since list candidates did not

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<sup>60</sup> s93(2)(a)i

<sup>61</sup> (2nd ed.) by Geoffrey Robertson and Andrew Nicol: *McAliskey v BBC* [1980] NI 44

<sup>62</sup> [1979] 3 All ER 80

<sup>63</sup> *New Northern Ireland (Elections) Assembly Order 1998, Scottish Parliament (Elections) Order The National Assembly for Wales (Representation of the People) Order*

<sup>64</sup> *The European Parliamentary Elections Regulations 1999*

have individual constituencies. The exception was Northern Ireland where Single Transferable Vote also made the use of s93 inappropriate. The official Government position was set out by Alun Michael, the then Secretary of State for Wales in response to a PQ in February 1999.<sup>66</sup>

**Mr Michael:** We have consulted the political parties and broadcasters about including in the [Assembly Elections Procedure] Order provisions equivalent to those in section 93 of the 1983 Act and have concluded that it is impracticable in the context of party list elections to apply that section. Broadcasters will therefore simply be bound to fulfil the normal requirements of fair and balanced coverage in reporting particular constituency or regional contests. The broadcasters have been working on new guidelines to cover the circumstances of the coming elections and all have agreed to respect those guidelines. The Government intend to review the situation after the elections in the light of experience during the campaign.

Section 93 of the Representation of the People Act 1983 lays down restrictions on broadcasting items about constituency campaigns during parliamentary elections; a broadcast focusing on a constituency may be vetoed by any candidate contesting that constituency. The original purpose of section 93 was to try to ensure equal treatment to candidates in the same electoral area. The broadcasters believe that section 93 is outdated (from a time when there were usually no more than 2 or 3 candidates per constituency) and inhibits their ability to provide meaningful coverage at election times. In an Assembly election, the section 93 provisions would enable any one of the list candidates in an electoral region to veto a broadcast about the campaign in that region.

Section 93 was not applied for the elections to the Northern Ireland Assembly. When we consulted on the draft Elections Procedure Order in October, we drew specific attention to the fact that we were proposing not to apply section 93 and invited comments. Only one political party responded, expressing mild concern but not outright opposition. The only other respondents were the broadcasters who were wholeheartedly in favour of non-application.

There are no proposals in this Bill or in the *Representation of the People Bill*, currently before Parliament, to amend or repeal s93. However it has again been disapplied for the purposes of the Greater London Authority elections.<sup>67</sup> These elections will feature lists of candidates.

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<sup>65</sup> *The European Parliamentary Elections Act 1999*

<sup>66</sup> HC Deb 11 February 1999 vol 325

<sup>67</sup> *Greater London Authority Act 1999, Schedule 3, para 28*