



**BRIEFING PAPER**

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# Pre-election period of sensitivity

By Neil Johnston

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## Summary

In the period immediately before an election or referendum there are restrictions on the use of public resources and activities of civil servants. This pre-election period is also known as the 'period of sensitivity' and has often been referred to as 'purdah'.

During a general election Ministers remain in office and in charge of their departments but it is customary for them to observe discretion in announcing initiatives that are new or of a long-term character in their capacity as a minister. It does not prevent ministers from campaigning on their party manifesto in their role as politicians seeking election.

The general principle for ministers, as outlined in the *Ministerial Code of Conduct*, is that departmental resources and facilities are provided at Government expense to enable them to carry out their official duties. These facilities should not generally be used for party or constituency activities.

### General elections

The pre-election period before general elections is not regulated by statute, but governed by conventions based largely on the Civil Service Code. The Cabinet Office issues guidance for civil servants in UK government departments, and the staff and members of non-departmental public bodies (NDPBs) and other arm's length bodies (ALBs) on their role and conduct during election and referendum campaigns. This is available on the Cabinet Office website.<sup>1</sup>

Guidance for civil servants for the 2017 General Election was issued by the Cabinet Office on [20 April 2017](#). The pre-election period for the 8 June General Election started on midnight on Friday 21 April 2017.

### Civil service guidance for local elections

In May 2019, local elections took place in most parts of England outside of London. All seats for local councils in Northern Ireland were also up for election. Polling day was 2 May 2019. Civil service [guidance was published](#) on 9 April 2019.

The period of sensitivity for UK Government civil servants preceding the local and mayoral elections is not fixed to any particular date, but the general convention is that particular care should be taken in the three weeks preceding the elections.

### Civil service guidance for European Parliamentary elections

The pre-election period for European Parliamentary elections is not fixed to any particular date, but the general convention is that particular care should be taken in the three weeks preceding the elections. For the elections on 23 May 2019, the pre-election period started on 2 May.

Civil service [guidance was published](#) on 1 May 2019.

### Civil service guidance for devolved administration elections

The [guidance](#) for civil servants on their role and conduct during the election campaign period before the elections on 5 May 2016 (which included the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly elections) was published on 24 March 2016. A ministerial statement gave details of the different pre-election periods for the different elections on 5 May 2016:

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<sup>1</sup> [Election and referendum guidance for civil servants](#), GOV.UK

## 4 Pre-election period of sensitivity

The period of sensitivity preceding the local, mayoral and Police and Crime Commissioner elections starts on 14 April, and in relation to the devolved administrations from 24 March for the elections to the Scottish Parliament; 30 March for the Northern Ireland Assembly; and 6 April for the National Assembly for Wales.<sup>2</sup>

### Guidance for local government

There is statutory guidance for local authorities about publicity during the period just before local elections. The pre-election period is defined as beginning with the publication of notice of the election.

For the 2019 local elections in England and Northern Ireland the latest date for the publication of the notice of election is 26 March.<sup>3</sup>

In 2017, the latest date for the publication of the notice of election in England and Wales was 27 March 2017. In Scotland, returning officers were directed to publish notice of elections on the earliest day possible, which was 13 March 2017.

The [Code of Recommended Practice on Local Authority Publicity](#) is issued under section 4 of the *Local Government Act 1986*.

The Local Government Association has published [Purdah: a short guide to publicity during the pre-election period](#) which gives further information.

### Scotland, Wales and Northern Ireland

Civil servants working for devolved administrations also, by convention, observe pre-election periods.

In 2016, elections were held to the Scottish Parliament and National Assembly for Wales. [Guidance](#) was issued by the Scottish Government for civil servants in Scotland and by Welsh Government published [guidance](#) for its staff before the National Assembly elections.

The Northern Ireland Executive [published guidance](#) on conduct for civil servants and special advisers during the Northern Ireland Assembly election campaign in 2017.

During UK General elections the devolved administrations and their civil servants carry out their functions in the usual way and civil servants will continue to support devolved Ministers in their work. However, civil servants should be aware of the need to avoid any action which is, or could be construed as being, party political or otherwise controversial in the context of the UK general election.

### Referendums

The pre-referendum period for the EU referendum began on 27 May 2016, which was 4 weeks before the poll on 23 June 2016. The period before referendums is regulated by the *Political Parties, Elections and Referendums Act 2000*. During the pre-referendum period before the EU referendum, central and local government were prohibited from publishing material relating to the referendum although some exemptions applied.

In April 2017, the Public Administration and Constitutional Affairs (PACAC) Select Committee published a [report](#) on the lessons to be learned from the EU referendum. As part of that inquiry it considered the operation of the period of sensitivity restrictions on referendums included in the *Political Parties, Elections and Referendums Act*.

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<sup>2</sup> [HC Deb 24 March 2016 c72WS](#)

<sup>3</sup> Electoral Commission, [2019 timetable for local government election in England](#) and Electoral Office for Northern Ireland, [Guide for Candidates and Agents, Local Council Elections 2019](#)

### Pre-election period or 'purdah'?

The term 'purdah' is still used by many to describe the pre-election period. The word 'purdah', meaning 'curtain' is also used to describe a system of secluding women from sections of society. According to the *Oxford English Dictionary*, the word derives from Urdu and Persian.

The purdah system is common in parts of south Asia in both Hindu and Muslim communities. The system places limitations on the interaction between women and men outside certain defined categories. These differ among Muslims and Hindus.<sup>4</sup>

The OED notes that the word 'purdah' has been in extended use to refer to secrecy or seclusion in general. However, many find the use of a word that refers to the segregation of women from men to describe a civil service practice as offensive.

The Cabinet Office's guidance for civil servants issued for the general elections in 2010 and 2017 did not use the word 'purdah' and only one mention of the word was included in the 2015 guidance. In a [civil service blog piece](#) before the 2015 General Election, Sir Jeremy Heywood, Cabinet Secretary and Head of the Civil Service, wrote:

The term 'purdah' is often used, unofficially, to describe the period immediately before an election or referendum when there are restrictions on the activity of civil servants. More literally, it is also called the 'pre-election period'.<sup>5</sup>

In 2010, the guidance referred to the campaign period before the general election and the latest guidance uses the phrase 'election period'.

A PQ answered on 21 January 2015 about the impending 2015 general election described this period as 'pre-election purdah' and the term 'purdah' has been used a number of times in Parliamentary questions and committee publications over the years.

The rest of this briefing uses the term 'pre-election period' unless quoting from another source.

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<sup>4</sup> Hannah Papanek, *Purdah: Separate Worlds and Symbolic Shelter*, *Comparative Studies in Society and History*, Vol. 15, No. 3, 1973.

<sup>5</sup> Civil service blog, [What 'purdah' means for civil servants](#), 30 March 2015

# 1. UK Government civil servants

## 1.1 General elections

The pre-election period before general elections is not regulated by statute, but governed by conventions based largely on the Civil Service Code.

The Cabinet Office issues guidance for civil servants in UK departments on their role and conduct during election campaigns. This is available on the Cabinet office website.<sup>6</sup>

Under the *Fixed-term Parliaments Act 2011*, elections should now take place every five years, unless an early election is triggered. The next scheduled general election is due in May 2022. This follows the Prime Minister's announcement of Tuesday 18 April 2017, and the vote in Parliament the following day, that triggered an early general election on 8 June 2017.<sup>7</sup>

On 20 April 2017, the Cabinet Office issued guidance on the pre-election period for the 8 June 2017 General Election. It announced the 'election period' would start at midnight on Friday 21 April 2017.<sup>8</sup>

The general principle is that:

During the election period, the Government retains its responsibility to govern, and Ministers remain in charge of their departments. Essential business must be carried on. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long term character. Decisions on matters of policy on which a new government might be expected to want the opportunity to take a different view from the present government should be postponed until after the election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.<sup>9</sup>

The principles underlying the conduct of civil servants in a general election are an extension of those that apply at all times, as set out in the [Civil Service Code](#).

It is also a requirement of the Ministerial Code that Ministers must not use government resources for party political purposes and must uphold the political impartiality of the Civil Service.

In the past, the pre-election period for a general election commenced with the announcement of the election by the Prime Minister. For example, for the 2010 General Election, Parliament dissolved on 12 April 2010 but the Cabinet Office guidance on the pre-election period took effect on 6 April 2010, the day the election was announced.<sup>10</sup>

The situation was slightly different in 2015. Under the provisions of the *Fixed-term Parliaments Act*, the 2015 general election had to be held on

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<sup>6</sup> [Election guidance for civil servants](#), GOV.UK, accessed on 10 July 2015

<sup>7</sup> For more information on the Act see the Library [briefing Fixed-term Parliaments Act 2011](#)

<sup>8</sup> Cabinet Office, [General election guidance 2017](#), 20 April 2017

<sup>9</sup> *Ibid*, p3

<sup>10</sup> Cabinet Office, [General election guidance 2010](#), 6 April 2010.

7 May 2015 and Parliament had to be dissolved on 30 March 2015. There was no need for a pre-dissolution announcement that a general election was about to be held. The Government announced that the pre-election period would commence on 30 March 2015, the same day as the dissolution of Parliament.<sup>11</sup>

## MPs' correspondence

The 2017 General Election guidance included a section on handling constituency correspondence from MP. The general principle is that outstanding responses should be cleared quickly. Letters may be sent after dissolution to those who were MPs before the dissolution of Parliament, to be picked up or forwarded.

However, once Parliament is dissolved, a Member of Parliament's constitutional right to represent his or her constituents' grievances to government disappears, and all candidates for the election are on an equal footing. Civil servants are advised take account of the possibility of candidates making responses public and "that if they become public knowledge they will do so in the more politically-charged atmosphere of an election and are more likely to become the subject of political comment."

The guidance states that the main consideration is that the citizen's interests are not prejudiced. It advises that:

it is possible that a personal case may become politically controversial during the election period. Departments should therefore make particular efforts to ensure, so far as possible, that letters are factual, straightforward and give no room for misrepresentation.

Departments and agencies whose staff routinely deal directly with MPs' enquiries should ensure that their regional and local offices get early guidance on dealing with questions from parliamentary candidates.<sup>12</sup> The pre-election period should not affect nor prevent agencies dealing with non-policy issues such as casework.

## 2017 court case

As noted above, the pre-election period before general elections is not regulated by statute. This was confirmed in a court ruling in April 2017.

During the 2017 General Election campaign, the Government was taken to court over its decision not to publish its clean air strategy by a date ordered in an earlier court judgement. The date of publication fell within the pre-election period for the 2017 General Election and the Government had cited this as the reason not to publish. This followed a legal battle between the government and ClientEarth, a UK charity which uses advocacy and litigation to protect the environment.

In 2015 the Government was ordered by the Supreme Court to submit new air quality plans to the European Commission no later than 31 December 2015. The Government had published an air quality plan in

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<sup>11</sup> [PQ 219064, 21 January 2015](#)

<sup>12</sup> Cabinet Office, *General election guidance 2017*, 20 April 2017

## 8 Pre-election period of sensitivity

September 2011 that recognised that it would fail to meet EU air quality limits for nitrogen dioxide (NO<sub>2</sub>) limits.

Defra launched a consultation on [draft plans to improve air quality in the UK](#) in September 2015. Defra published its final [plans](#) on 17 December 2015. These updated and replaced the previous 2011 NO<sub>2</sub> air quality plans.<sup>13</sup>

ClientEarth again challenged the Government and was granted a judicial review on 28 April 2016. The Review took place in October 2016. [A ruling was made in against the Government](#) on 2 November 2016 that quashed the 2015 Air Quality Plan. Following the judgement, ClientEarth and Defra returned to court to decide when a new Air Quality Plan should be published. The [decision](#) was that draft modified Air Quality Plan should be produced by 16.00 on 24 April 2017 and a copy provided to ClientEarth. The new plan should then be published and sent to the European Commission by 31 July 2017.

The Government did not publish the draft plan on 24 April as required by the courts. In response to an urgent question the then Secretary of State for Environment Food and Rural Affairs, Andrea Leadsom, set out that the Government had [applied to the High Court for a delay](#) until 30<sup>th</sup> June to publish the draft, because of the up-coming local and general elections, with a final publication date of 15 September :

Following long-standing precedent, we have entered the period of sensitivity that precedes elections. In accordance with the guidance covering both local and general elections, the propriety and ethics team in the Cabinet Office has told us that it would not be appropriate to launch the consultation and publish the air quality plan during this time. The Government have therefore applied to the High Court for a short extension of the deadline for publishing the national air quality plan for nitrogen dioxide, in order to comply with pre-election propriety rules. The Government seek to publish a draft plan by 30 June and a final plan by 15 September. The application will be considered by the Court.<sup>14</sup>

The application to delay was heard by the High Court on 27 April 2017. The court ruled that the publication could be delayed until after the local elections but that it should be published by 9 May 2017 and not be delayed until after the general election. The court judgement commented on the nature of 'purdah' as a convention:

"Purdah" is not a principle of law. The guidance from the Cabinet Office, to which I have referred, is directed towards government ministers, other elected officers and officials in central or local government. It is not directed towards the court, nor, consistent with the rule of law, could it be. Purdah does not amend duties imposed on ministers by statute. It does not provide ministers with a defence to proceedings in private or public law. What is set out by the Cabinet Office in the guidance is not law, it is convention. Ordinarily such convention must give way to a duty under statute or an order of the court.<sup>15</sup>

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<sup>13</sup> See: <https://uk-air.defra.gov.uk/library/no2ten/>

<sup>14</sup> HC Deb 24 April 2017 [624 c901](#)

<sup>15</sup> [\[2017\] EWHC B12 \(Admin\)](#)



In his ruling the judge concluded that *purdah* was not a principle of law and the exceptional circumstances of the threat to public health that meant that pre-election guidance could be overridden. The conclusion of the judgement stated:

- (i) That *Purdah* is not a rule of law which overrides the duty on the Government to comply with its statutory duty and the orders of the court.
- (ii) That, properly understood, the general principles set out in the Cabinet Office Guidance apply here but do not in themselves establish that the publication of the draft [Air Quality Plan] before the general election would be unacceptable.
- (iii) That in any event, this case falls within the exceptions provided for by the Guidance.<sup>16</sup>

## 1.2 Devolved government elections

The Cabinet Office issued [guidance](#) on 24 March 2016 for UK civil servants on their role and conduct during the election campaign period before the elections on 5 May 2016. These included the elections to the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly. The guidance noted that:

Special care will need to be exercised in relation to the Devolved Administrations from 24 March for the elections to the Scottish Parliament; 30 March for the Northern Ireland Assembly; and 6 April for the National Assembly for Wales.

The general principles contained in the guidance were as follows:

The following general principles should be observed by all civil servants, including Special Advisers:

- Particular care should be taken over official support, and the use of public resources, including publicity, for government announcements that could have a bearing on matters relevant to the elections. In some cases it may be better to defer an announcement until after the elections, but this would need to be balanced carefully against any implication that deferral could itself influence the political outcome and the need to continue essential business. Each case should be considered on its merits.
- Care should also be taken in relation to proposed visits.
- Special care should be taken in respect of paid publicity campaigns and to ensure that publicity is not open to the criticism that it is being undertaken for party political purposes.
- there should be even-handedness in meeting information requests from the different political parties and campaigning groups; and
- Officials should not be asked to provide new arguments for use in election campaign debates.<sup>17</sup>

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<sup>16</sup> [Ibid](#)

<sup>17</sup> Cabinet Office, [May 2016 Elections: Guidance on conduct](#), 24 March 2016

## 1.3 Local elections

[Guidance for civil servants](#) for the 2019 local elections in England was published by the UK Government on 9 April 2019.<sup>18</sup>

The period of sensitivity for UK Government civil servants preceding the local and mayoral elections is not fixed to any particular date, but the general convention is that particular care should be taken in the three weeks preceding the elections. Polling day for the 2019 local elections was 2 May, which meant the pre-election period started on 11 April.

Ministers continued to carry out their functions in the usual way and civil servants continued to support their ministers in their work, but the following general principles were to be observed by all civil servants, including special advisers:

The general principles follow the same wording as contained in the 2016 Guidance (see Section 1.2).<sup>19</sup>

Earlier guidance for civil servants published before local elections and devolved assembly elections, is on the [GOV.UK website](#).

## 1.4 European Parliamentary elections

The pre-election period for European Parliamentary elections is not fixed to any particular date, but the general convention is that particular care should be taken in the three weeks preceding the elections.

European Parliamentary elections are being held on 23 May 2019. This means the pre-election period would start on 2 May. The Government

Guidance was published by the Cabinet Office on 1 May 2019.<sup>20</sup>

The guidance set out the general principles that should be observed by all civil servants, including special advisers, during this period:

The following general principles should be observed by all civil servants, including Special Advisers:

- Particular care should be taken over official support, and the use of public resources, including publicity, for government announcements that could have a bearing on matters relevant to the elections. In some cases it may be better to defer an announcement until after the elections, but this would need to be balanced carefully against any implication that deferral could itself influence the political outcome and the need to continue essential business. Each case should be considered on its merits.
- Care should also be taken in relation to proposed visits.
- Special care should be taken in respect of paid publicity campaigns and to ensure that publicity is not open to the criticism that it is being undertaken for party political purposes.

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<sup>18</sup> See gov.uk web page [Election guidance for civil servants](#)

<sup>19</sup> Cabinet Office, *May 2019 elections: guidance on conduct*, 10 April 2017

<sup>20</sup> Published on the [Election guidance for civil servants](#) pages on gov.uk

- There should be even-handedness in meeting information requests from the different political parties and campaigning groups.
- Officials should not be asked to provide new arguments for use in election campaign debates.<sup>21</sup>

The Scottish Government [published guidance](#) for Scottish Government civil servants on 2 May 2019.

The Welsh Government [published guidance](#) for its civil servants on 29 April 2019.

The Northern Ireland Executive Office [published guidance](#) for its civil servants on 2 May 2019.

## 1.5 Special advisers

Special Advisers who wish to take part in a general election campaign or help in a party headquarters or research unit during such a campaign must first resign their appointments.

They no longer receive preferential access to papers and officials and neither should they have access to departmental resources such as phones and IT equipment.<sup>22</sup>

The European Parliamentary elections were classed as national elections and Special Advisers who wanted to take part in the campaign or help in a Party capacity had to first resign their appointment.

For local and mayoral elections, Special Advisers may undertake local political activity with the approval of their minister and in accordance with the terms of the [Code of Conduct for Special Advisers](#).

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<sup>21</sup> Cabinet Office, *May 2019 Elections for the European Parliament: Guidance on Conduct*, 1 May 2019

<sup>22</sup> Cabinet Office, *General election guidance 2017*, 20 April 2017

## 2. Local authorities

The pre-election period just before local elections, when there are restrictions on local authority publicity and rules concerning media reporting of the election campaign, is defined as beginning with the publication of the notice of the election.

The notice for election for local elections being held in England and Northern Ireland in May 2019 was 26 March 2019. There were no ordinary local elections in Scotland or Wales on 2 May 2019 (although by-elections may have taken place on the same day).

There is statutory guidance for local authorities regarding publicity. The [Code of Recommended Practice on Local Authority Publicity](#) is issued under section 4 of the *Local Government Act 1986* and local authorities must have regard to it. The Code was revised in 2011.

The following section is relevant:

### **Care during periods of heightened sensitivity**

33. Local authorities should pay particular regard to the legislation governing publicity during the period of heightened sensitivity before elections and referendums – see paragraphs 7 to 9 of this code. It may be necessary to suspend the hosting of material produced by third parties, or to close public forums during this period to avoid breaching any legal restrictions.

34. During the period between the notice of an election and the election itself, local authorities should not publish any publicity on controversial issues or report views or proposals in such a way that identifies them with any individual members or groups of members. Publicity relating to individuals involved directly in the election should not be published by local authorities during this period unless expressly authorised by or under statute. It is permissible for local authorities to publish factual information which identifies the names, wards and parties of candidates at elections.

35. In general, local authorities should not issue any publicity which seeks to influence voters. However, this general principle is subject to any statutory provision which authorises expenditure being incurred on the publication of material designed to influence the public as to whether to support or oppose a question put at a referendum. It is acceptable to publish material relating to the subject matter of a referendum, for example to correct any factual inaccuracies which have appeared in publicity produced by third parties, so long as this is even-handed and objective and does not support or oppose any of the options which are the subject of the vote.<sup>23</sup>

The Local Government Association has published [Purdah: a short guide to publicity during the pre-election period](#) which gives further information.

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<sup>23</sup> [Code of Recommended Practice on Local Authority Publicity](#), DCLG

## 3. Devolved government civil servants

### 3.1 UK general elections

Civil servants working in devolved governments observe pre-election periods during UK general elections.

Guidance from the devolved administrations notes the different issues raised during a UK general election. The devolved administrations will remain in office whatever the outcome of a UK general election. In general, it is 'business as usual' and ministers will continue to carry out their functions in the usual way and civil servants will continue to support Ministers in their work.

The UK Government civil service guidance notes that "civil servants in the devolved administrations owe their loyalty to those administrations, not to the UK Government."<sup>24</sup>

Similar general principles apply, civil servants should continue to conduct themselves in accordance with the Civil Service Code. However, civil servants need to be aware of the need to avoid any action which is, or could be construed as being, party political or otherwise controversial in the context of the UK general election. The general principles also apply to NHS bodies, government sponsored and other public bodies in each nation.

The pre-election period was 22 April 2017 to polling day, 8 June.

During the 2017 UK General Election the following guidance was issued:

- Scottish Government - *UK General Election 2017: guidance for civil servants*, published 20 April 2017.
- Northern Ireland Executive Office - *Elections to the United Kingdom Parliament 2017: Guidance on conduct for Civil Servants*, published 21 April 2017
- Welsh Government - *UK General Election 2017 Guidance for Welsh Government Officials* (currently unavailable online)

### 3.2 National elections

Elections to the Scottish Parliament and National Assembly for Wales/Senedd last took place on 5 May 2016.

The Scottish Government issued [guidance](#) about the role and conduct of people working in the Scottish Government, its agencies and national devolved public bodies during the election period beginning 24 March 2016.

The general principles were as follows:

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<sup>24</sup> Cabinet Office, *General election guidance 2017*, 20 April 2017, p37

## 14 Pre-election period of sensitivity

10. During the election period, the Scottish Government retains its responsibility to govern and Ministers remain Ministers and in charge of their portfolios. Essential business must be carried on (see Note 1 below for a definition of 'essential business'). However, you can expect Ministers to observe discretion in initiating any new action of a continuing or long-term character.

11. Decisions on matters of policy on which the next administration might wish to take a different view from the current administration are expected to be postponed until after the election, provided that such postponement would not be detrimental to Scotland's interest or wasteful of public resources. You can also expect Ministers to be largely engaged in the election campaign and therefore not want to be asked to make decisions on issues during the election period unless it is essential that they should do so.

12. There are three basic principles to remember and apply during the election period. You should:

1. Remain politically impartial;
2. Ensure that public resources are not used for party political purposes; and
3. Avoid anything that could distract attention from or compete with the campaign.<sup>25</sup>

The Welsh Assembly Government published [guidance](#) for civil servants for the pre-election period in advance of the dissolution of the Assembly on 6 April 2016. The pre-election period started on 6 April.

The guidance followed the same general principles as of pre-election guidance:

The Civil Service Code continues to apply during the campaign. Under that, we must adhere to two basic principles at all times:

- (i) to be, and to be seen to be, politically impartial; and
- (ii) to ensure that public resources are not used for party-political purposes.<sup>26</sup>

The last elections to the Northern Ireland Assembly were held on 2 March 2017.

The Northern Ireland Executive [published guidance](#) on conduct for civil servants and special advisers during the Northern Ireland Assembly election campaign on 30 January 2017. The pre-election period started on 26 January. The guidance followed a similar format:

The two principles which should govern the conduct of civil servants during the pre-election period are that:

- civil servants, with the exception of special advisers, should not undertake any activity which could call into question their political impartiality; and

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<sup>25</sup> Scottish Government, *Scottish Parliament election: 5 May 2016, Guidance for the Scottish Government, its agencies and national devolved public bodies*

<sup>26</sup> Welsh Government, *Elections to the National Assembly for Wales – May 2016 Guidance for Welsh Government Staff*, undated

- civil servants should ensure that public resources are not used for party political purposes.<sup>27</sup>

### 3.3 Local elections

Scottish and Welsh local government elections are devolved matters. Scottish and Welsh Government and Ministers are responsible for setting the rules for the conduct of local government elections.

Guidance for civil servants working for the Scottish Government for the local election in Scotland in May 2017 was issued by the Scottish Government Cabinet Secretariat.<sup>28</sup>

Welsh Government guidance for staff was published in March 2017.<sup>29</sup>

In Northern Ireland, where local elections took place in 2019, the Northern Ireland Executive Office published [guidance for civil servants](#) in the Northern Ireland Civil Service on 17 April 2019. Local elections in Northern Ireland are an excepted matter, which means the conduct of the elections is not devolved.

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<sup>27</sup> Northern Ireland Executive Office, *Elections to the Northern Ireland Assembly 2017: Guidance on Conduct for Civil Servants and Special Advisers*, 30 January 2017

<sup>28</sup> *Scottish Local Government Election Guidance 2017*

<sup>29</sup> *Local Government Elections – guidance for Welsh Government staff*

## 4. Referendums

### 4.1 Section 125 of PPERA

The period before referendums is regulated by [Section 125](#) of the *Political Parties, Elections and Referendums Act 2000* (PPERA). Section 125 refers to “restriction on publication etc. of promotional material by central and local government etc.” PPERA was passed following a review into political party funding in the UK by the Committee on Standards in Public Life, published in 1998.

Section 125 provides:

**Restriction on publication etc. of promotional material by central and local government etc.**

(1) This section applies to any material which—

- provides general information about a referendum to which this Part applies;
- deals with any of the issues raised by any question on which such a referendum is being held;
- puts any arguments for or against any particular answer to any such question; or
- is designed to encourage voting at such a referendum.

(2) Subject to subsection (3), no material to which this section applies shall be published during the relevant period by or on behalf of—

- any Minister of the Crown, government department or local authority; or
- any other person or body whose expenses are defrayed wholly or mainly out of public funds or by any local authority.

(3) Subsection (2) does not apply to—

- material made available to persons in response to specific requests for information or to persons specifically seeking access to it;
- anything done by or on behalf of the Commission or a person or body designated under section 108 (designation of organisations to whom assistance is available);
- the publication of information relating to the holding of the poll; or
- the issue of press notices;

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

(4) In this section—

- “publish” means make available to the public at large, or any section of the public, in whatever form and by whatever means (and “publication” shall be construed accordingly);



- “the relevant period”, in relation to a referendum, means the period of 28 days ending with the date of the poll.

A [question in the House of Lords](#) in 2004 had clarified that, under Section 125, Ministers are free to campaign as long as they do so in a personal or political (i.e. not official) capacity.

The Electoral Commission has reviewed the conduct of the referendums that have been held since PPERA was passed, and on each occasion commented on Section 125. In summary, the Commission has held that public awareness activities by Counting Officers should be exempt from the period of sensitivity provision; that other government activity should be restricted for the entire duration of the referendum period (during which campaign activities are regulated); and that sanctions for breaches of Section 125 should be clarified.<sup>30</sup>

## 4.2 The EU Referendum 2016

The pre-referendum period before the EU referendum began on 27 May 2016 which was 4 weeks before the poll on 23 June 2016.

During the pre-referendum period there are restrictions on the publication of information by public bodies under the provisions of Section 125 of the *Political Parties, Elections and Referendums Act 2000* (PPERA) which sets out the generic rules for the conduct of referendums.

When it was introduced, the *European Union Referendum Bill 2015-16* (Schedule 1, paragraph 25) provided that the restrictions of section 125 of PPERA would not apply to the referendum on EU membership.

This provision met with opposition from MPs during the Second Reading debate and the Committee stage of the Bill. It was removed at Report stage (see Briefing paper 07249 [European Union Referendum Bill 2015-16: Progress of the Bill](#)).

The Minister for Europe, David Lidington, had stated on the first day of Committee stage ([16 June 2015](#)) that Section 125 went further than the conventions that cover the pre-election periods prior to general elections. It could affect the Government’s ability to conduct “ordinary day-to-day EU business”; and it could:

... make it impossible to explain to the public what the outcome of the renegotiation was and what the Governments’ view of that result was.<sup>31</sup>

At Report stage, the Government moved a new clause that would enable the Minister to make regulations to modify Section 125. This new clause was amended by a manuscript amendment moved by Bernard Jenkin (Conservative) and was added to the Bill. The Jenkin

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<sup>30</sup> Electoral Commission, *The 2004 North East regional assembly local government referendums*, November 2005; Electoral Commission, *Report on the referendum on the law-making powers of the National Assembly for Wales*, March 2011; Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, October 2011; Electoral Commission, *Scottish independence referendum*, December 2014

<sup>31</sup> HC Deb 16 June 2015, cc233-4

amendment made provision for the regulations to modify the pre-referendum period of sensitivity arrangements to be made at least four months before the date of the referendum. David Lidington said that he had concluded that the Government should accept the amendment “largely in the interests of trying to secure as great a consensus as possible”.<sup>32</sup>

However, a Government amendment which replaced this paragraph of Schedule 1 was defeated on a division.<sup>33</sup>

After the defeat of the Government amendment, an Opposition amendment which made provision to omit the paragraph which would have disapplied Section 125 of PPERA from Schedule 1, was agreed without division.

Amendments made at Committee stage in the House of Lords applied the restrictions on the publication of information specified in Section 125 of PPERA to Gibraltar public bodies, and exempted the Gibraltar Broadcasting Corporation.

Section 125 of PPERA therefore applied to the EU referendum with some modifications.

Guidance for the Civil Service and special advisers for the pre-referendum period was contained in Sir Jeremy Heywood’s [letter](#) of 23 February 2016. This guidance applied until the start of the statutory 28-day pre-referendum period. [Further guidance](#) for the 28-day period beginning on 27 May 2016 was published in May 2016.<sup>34</sup>

The Electoral Commission published a factsheet, *Publicly funded bodies and the referendum on the UK’s membership of the EU*, on its website which gives further information about the restrictions on the publication of material relating to the referendum by publicly funded bodies.

The Public Administration and Constitutional Affairs (PACAC) Select Committee considered the initial proposal of the Government to disapply Section 125 of PPERA during the EU referendum campaign and the operation of Section 125 more generally.

In April 2017, PACAC published its report *Lessons learned from the EU Referendum*.<sup>35</sup>

One of its conclusions was:

The provisions of section 125, while imperfect, have been successfully applied in numerous referendums since 2000. There is no evidence that section 125 created any of the threats to good governance that the Cabinet Secretary feared during his appearance before PACAC in July 2015. *The purdah provisions of section 125 of PPERA play a key role in the fair conduct of referendums and must continue to do so in future referendums.*<sup>36</sup>

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<sup>32</sup> HC Deb 7 September 2015 c92

<sup>33</sup> HC Deb 7 September 2015 c123

<sup>34</sup> EU Referendum: guidance for UK Government Departments on activities during the period 27 May 2016 to 23 June 2016, Cabinet Office, May 2016

<sup>35</sup> PACAC, *Lesson learned from the EU referendum*, HC Paper 496, 12 April 2017.

<sup>36</sup> Ibid, paragraph 60

In its recommendations the Committee questioned whether the four-week pre-election period is sufficient. It supports the Electoral Commission's position that the 28-day period should be extended. It also questions whether the drafting of the Section remains appropriate and has recommended that the Government should consult on redrafting Section 125. In particular, in relation to what constitutes 'publishing' material in a digital age:

Section 125 was originally drafted some 16 years ago. Since that time campaigning and publishing have both become increasingly digital in nature. As a result, terminology and provisions that may have been appropriate in 2000, may be less effective at regulating campaign activity in 2017. PACAC, the Electoral Commission and the Government all had different legal advice and interpretations as to: a) whether the [eureferendum.gov.uk](http://eureferendum.gov.uk) website represented publishing for the purposes of section 125; and b) whether the steps taken to remove links to the website satisfied the exception provided in section 125(3)(a). This underlines the need for section 125 to be reviewed and amended so as to better reflect the increasingly digital nature of our democracy.<sup>37</sup>

Other recommendations identified by the Committee were that a redrafted Section 125 should clarify what sort of activities are restricted, and cooperation between organisations and campaign should be accounted for in campaign spending. The Committee also recommends the Government should consider what investigatory and sanctioning power the Electoral Commission should have.

The Government rejected the Committee's recommendations. In its response to the report, the Government said it considered the 28-day pre-referendum period was appropriate:

There needs to be a balance between the restriction on any government activity that might influence voters and the need for day-to-day government business to take place.<sup>38</sup>

The Government also rejected a wider review of the application of Section 125. It noted that any changes would require primary legislation saying that there was little chance of Parliamentary time soon:

There is a risk that any changes identified by the review would need to be updated due to changes in technology before legislation could be introduced.<sup>39</sup>

### 4.3 Scottish independence referendum 2014

The Scottish independence referendum was not regulated by PPERA, but by the *Scottish Independence Referendum Act 2013*. This Act made provision for a statutory pre-referendum period in Scotland for the 28 days before the referendum. The explanatory notes to the Act gave further details:

Part 4: Publications

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<sup>37</sup> Ibid, paragraph 68

<sup>38</sup> Cabinet Office, *Government Response to the Public Administration and Constitutional Affairs Committee Report on Lessons Learned from the EU Referendum*, Cm 9553, December 2017, p2

<sup>39</sup> Ibid, p2-3

183. Paragraph 25 provides that, for the 28-day period before the date of the referendum, the Scottish Ministers and certain public authorities in Scotland cannot publish any material providing general information about the referendum, dealing with issues raised by the question to be voted on in the referendum, putting any arguments for or against a particular answer to the question to be voted on, or which is designed to encourage voting in the referendum. However, this rule does not apply to information made available following a specific request; specified material published by or under the auspices of the Scottish Parliament Corporate Body; any information from the Electoral Commission, a designated organisation or the Chief Counting Officer or any other counting officer; or to any published information about how the poll is to be held.

The UK Government gave an undertaking to respect the 28-day period in the Edinburgh Agreement:

2. Both governments agree that the principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum. Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), provides a framework for referendums delivered through Acts of Parliament, including rules about campaign finance, referendum regulation, oversight and conduct.

3. Both governments agree that the referendum rules should be based on PERA, with particular Scottish circumstances, such as the establishment of the Electoral Management Board and subsequent role of the Electoral Commission, reflected in the Referendum Bill.

### *Government activity during the 28 days before the referendum*

29. It is customary for there to be a period before elections in the UK, during which Ministers and other public bodies refrain from publishing material that would have a bearing on the election. Section 125 of PERA sets out the restrictions that apply to Ministers and public bodies in the 28 days preceding referendums held under that Act. Both governments recognise the importance of respecting the 28-day period prior to a referendum, in the same way that both governments already respect each other's pre-election period for Parliamentary elections. The Scottish Government will set out details of restricted behaviour for Scottish Ministers and devolved public bodies in the Referendum Bill to be introduced into the Scottish Parliament. These details will be based on the restrictions set out in PERA. The UK Government has committed to act according to the same PERA-based rules during the 28-day period.<sup>40</sup>

The Scottish Government published [guidance](#) on the publication restrictions in the 28 days prior to the independence referendum. It recognised that [their emphasis]:

A wide range of Scottish Government activity has the potential to be caught by these statutory restrictions. Each case will need to be considered on its merits. [...]

Restrictions are, however, much less likely to apply to activity such as marketing campaigns on child flu vaccination, Homecoming or the Ryder Cup. Even in such cases, however, **care must be taken**

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<sup>40</sup> [Edinburgh Agreement](#), 15 October 2012

**to avoid issues being cast in the frame of the independence debate.**

Nevertheless, there was some controversy over certain government activities in the run-up to the referendum. These are discussed in last Parliament's Public Administration Select Committee report *Lessons for Civil Service impartiality from the Scottish independence referendum*. The report recommended including provisions about referendum campaigns in the Civil Service Code.<sup>41</sup>

## 4.4 The Alternative Vote referendum 2011

In 2011, the Cabinet Office published one set of [guidance](#) for civil servants in UK departments on their role and conduct during the campaigns for the elections to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and to local authorities in England and Northern Ireland, and the referendum on the voting system for the UK parliament (which all took place on 5 May 2011). Civil servants were instructed to act impartially and to avoid announcements, ministerial visits and other activities that could potentially affect the election and referendum campaigns.

With reference to the referendum, the guidance stated:

14. In relation to the referendum, during the period between the announcement of the referendum and the start of the 28-day campaign period, the Political Parties, Elections and Referendums Act imposes restrictions on expenditure of the political parties or others campaigning on the referendum. It is important therefore that during this period, civil servants take particular care relating to ministerial announcements and paid publicity to avoid any criticism that official resources are being used for party political purposes. [...]

17. In relation to the referendum, there are very tight restrictions on Government publicity during this period – see Annex A (also see paragraph 14 above). Essentially, Government Departments, local authorities and NDPBs are prohibited from publishing material about a referendum in the 28-day period ending with the date of the poll. During this period the Electoral Commission will be running a campaign to encourage people to vote. Political parties will have to observe financial limits imposed on their total referendum campaigning expenditure, and of course the usual rules about not using official resources for party political purposes apply.<sup>42</sup>

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<sup>41</sup> Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish independence referendum*, 17 March 2015, HC111 2014-15

<sup>42</sup> *Guidance on Conduct*, Cabinet Office, March 2011



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