

**Publication of material on website and s.125 Political Parties, Elections and Referendums Act 2000**

1. I have been asked for advice on whether it is lawful (in the sense of complying with section 125(4) Political Parties, Elections and Referendums Act 2000) for material to be kept on the Government website during the purdah period.
2. The material in question falls within s.125(1) of the 2000 Act, that is to say, it is material which provides general information about a referendum, deals with any issue in the referendum, puts any arguments for or against any particular answer to the referendum question or is designed to encourage voting at such a referendum.
3. Section 125(2) provides that no such material shall be published during the ‘purdah’ period (as defined in s.125(4)(b)) by any Minister of the Crown, government department etc. To ‘publish’ is defined (in s.125(4)(a)) as to ‘make available to the public at large, or any section of the public, in whatever form and by whatever means’.
4. I understand that the Cabinet Office is taking the view that s.125 permits material to remain accessible on the website, provided that no new material is added during the purdah period. The Written Answer suggests that it will be in order to continue to make ‘factual information’ available.
5. In my view, this is based on an incorrect reading of the term ‘publish’ in s.125 and of the restriction in s.125(2). To keep material on the website so that it remains accessible during the purdah period amounts to a breach of the duty under s.125(2) and is unlawful. ‘Factual information’ is not an exempted category under s.125(3).
6. The matter turns on the definition of ‘publish’. The formula used in s.125(4) refers to making the material available to the public. This may be compared with s.175(1) Copyright, Designs and Patents Act 1988 where ‘publication’ is defined as ‘the issue of copies to the public’. It has long been established, for the purposes of copyright, that a work is published whenever

and wherever it is offered to the public (*McFarlane v. Hulton* [1899] I Ch. 884). The printed work therefore continues to be ‘published’ for as long as it remains available.

7. The same rule applies in the law of defamation. In *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805 each new ‘hit’ on a web page was held to constitute a fresh publication and accordingly a new cause of action arose. This ‘single publication rule’ has been criticised and s.8(3) of the Defamation Act 2013 now provides that for the purposes of the time limit for actions for defamation any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication. The change only affects the law of limitation, and in all other respects (such as aggravation of damages) publication is continuous until such time as the material is withdrawn or destroyed.
8. The reference to making the material available to the public in s.125 of the 2000 Act is plainly designed to include electronic communication of the work, not involving the supply of hard copies. When material is made available through a website, it is made available by means of an executable code embedded in the designer’s computer which is then interpreted on the viewer’s computer. Publication occurs when a viewer’s computer is provided with a copy of the code from the server computer and the viewer’s browser programme converts this into a visual representation. Where material is made available on a server for the public to access over the internet it is published by means of an electronic retrieval system and this is taken to be publication for the purposes of s.175(1) of the 1988 Act (see Gringras-*The Laws of the Internet* 4<sup>th</sup> ed. para.4.92).
9. It is therefore abundantly clear that an electronic communication of the contents of the website amounts to publication for the purposes of s.125. Unless the material is removed from the website (or, more precisely, the code is changed so that it is no longer accessible by a viewer’s computer) it continues to be ‘published’ for the purposes of s.125.

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