**The Clerk of the Public Administration and Constitutional Affairs Committee** 9 May 2016

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

1. This note supplements the note I sent on 3 May and takes account, in particular, of the letter of 6 May from Sir Jeremy Heywood. In that letter Sir Jeremy explains that the Government will not be placing any new material of a kind falling within s.125 PPERA on the eureferendum.gov.uk website and states that he does not consider that s.125 'imposes a legal obligation to remove previously published material form the web'. Sir Jeremy adds that the Government's 'clear view' is that, for the purposes of PPERA, material is to be regarded as 'published' on a website 'when it is made available for the first time'.

2. With the greatest respect to Sir Jeremy, I do not find this explanation at all convincing. First, '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.' There is no limitation in the statute confining the 'making available' to the first time the material is made available, or confining it to 'new' material. The view attributed to the Government amounts to a gloss on the statute which is not supported by its plain and ordinary meaning.

3. Secondly, the definition of 'publish' in section 125(4) is consistent with the meaning of 'publish' in other contexts, such as copyright, data protection and defamation. In s.175(1) of the Copyright, Designs and Patents Act 1988 'publication' is defined as 'the issue of copies to the public'. In section 32(6) Data Protection Act 1998 'publish' is defined as 'to make available to the public or any section of the public.' For the purposes of abolishing the 'single publication rule', section 8(3) of the Defamation Act 2013 now provides that for the purposes of the time limit for actions for defamation (but for no other purpose) any cause of action against a person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication. The references to 'first' and 'subsequent' publication are necessary precisely because publication of a defamatory statement continues and does not cease at the moment of first publication. Whenever it is intended to fix publication at a particular time, some extra words such as 'first

publication' are necessary, as is the case with copyright where the time or place of first publication may be relevant to questions of copyright duration or international protection respectively. In the European Union (Referendum) Act 2015 'publish' is not specifically defined, but no issue arises as to whether publication is continuous, provided there is (first) publication before the beginning of the final 10 week period.

4. Thirdly, Sir Jeremy's letter does not seem to take account of what happens when material is published electronically. 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 whenever 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 (cf. Gringras-The Laws of the Internet 4th ed. para.4.92). It continues to be made available, and therefore 'published' for so long as the code allows the material to be retrieved.

5. Sir Jeremy's letter dismisses the case of *Byrne v. Dean* [1937] 1 KB 818 (described as 'long predating the internet') as not helpful in interpreting PPERA. However, that case is still referred to as good law (one recent reference being *Payam Tamiz v Google Inc* [2013] EWCA Civ 68) in relation to defamatory comments being published on a website blog where there was no doubt but that comments which remained on the blog continued to be published. A case which does not predate the internet is *Godfrey v Demon Internet* [2000] 3 WLR 1020 in which Morland J said: "In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their I.S.P. who accesses the newsgroup containing that posting. Thus every time one of the defendants' customers accesses *soc.culture.thai* and sees that posting defamatory of the plaintiff there is a publication to that customer." (Emphasis added).

6. Fourthly, if it were right that material is to be regarded as 'published' on a website 'when it is made available for the first time', then all the Government need do is to put up a huge amount of material on billboards the day before the 28 day period and claim that, the material having already been published, it is no longer caught by the s.125 prohibition. By parity of reasoning the Government would be entitled to circulate or deliver that same material – say a leaflet - *after* 27 May simply because that leaflet had first been "published" a week before. The examples are sufficient to demonstrate

that the interpretation advanced in Sir Jeremy's letter would completely subvert the purpose of s.125 and it seems most unlikely that it would be accepted by a court.

7. It therefore remains clear in my view that an electronic communication of the contents of the website amounts to publication for the purposes of s.125, and that 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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