

## Political Parties and Election Bill Report Stage Day 1 – Monday 9 February 2009

Please note that this briefing note comments on certain amendments which the Commission believes raise significant issues of workability or policy. The note does not comment on every amendment tabled. The absence of comment on an amendment does not imply that we support it.

### Summary

- Healthy political parties are vital to the democratic process, and their regulatory structure has to be fit for purpose. The amendments the Government has tabled for Report stage propose some helpful changes to the structure.
- The Electoral Commission supports the Government's proposed amendments to our future investigatory powers, which address concerns raised in previous Parliamentary stages.
- We think it would be sensible to extend the new court order procedure for enforcing our statutory requests for documents, so that it could also cover requests for information and explanations.
- The proposed civil sanctions introduced in the Bill will enable the Commission to act proportionately to secure compliance. It is important that the regulatory regime governing political parties is flexible and proportionate and reflects the fact that many of those with statutory responsibilities under the law are volunteers whilst enabling the Commission to enforce the rules effectively.
- We welcome the Government's proposals to replace the Bill's current provisions on candidate spending at general elections with a new, clearer regime

### Functions of Electoral Commission

#### Clause 1

#### Compliance with controls imposed by the 2000 Act etc

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The Commission welcomes the clearer definition of its regulatory function contained in clause 1.

#### Recommendation on amendments

The Commission does not support **amendment 1** which would require it to produce guidance on every regulatory requirement and restriction imposed by the 2000 Act. We currently publish written guidance on all the key regulatory requirements in the Act, and provide ad hoc guidance in writing, by telephone or in person whenever requested to do so. This includes a formal Advisory Opinions service through which we offer written guidance on complex and significant matters requiring legal consideration. If the amendment was agreed and the Commission published detailed guidance on every provision in the Act, no matter how technical or minor,

the resulting material would be very lengthy and inaccessible; while if we did not publish such guidance we could be subject to legal challenge.

**Amendment 44** proposes to make monitoring and securing compliance the Commission's "primary" function. The Commission is satisfied that the legislation as currently drafted reflects the importance of all of our functions. Monitoring and securing compliance is central to the Commission's regulatory functions.

The Commission does not support **amendment 45** as its effect would be to remove our duty to promote public awareness of electoral systems/systems of government. Our view is that electors are entitled to information about how to register to vote, and how to take part in elections, and that this information is best provided by an independent body.

The Commission currently fulfils its duty to promote public awareness, under S13 of the 2000 Act, by undertaking public information campaigns providing information about the deadline to register to vote, how to register, and how to take part in elections (for example polling station opening hours, and how to apply for postal or proxy votes). Commission campaigns also provide information where there are changes to voting systems (and would do so in the event of any change in the registration system).

The Committee on Standards in Public Life, in its eleventh report, recommended that Commission should no longer retain a wider statutory duty to encourage participation in the democratic process. However, it also recommended that the Commission should "retain a clearly defined statutory duty for the provision of public information on the mechanics of the electoral process including electoral registration procedures, how to vote and explaining any changes to the electoral system." In line with this recommendation, the Commission has narrowed its approach to the provision of public information and no longer encourages participation in the broader sense. We therefore agree with the government's response to the recommendation of the Committee on Standards in Public Life on this point: that legislative change is not necessary.

## Clause 2 and Schedule 1 Investigatory Powers of Commission

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Debate at Second Reading and the Public Bill Committee highlighted a number of concerns about the mechanics of the proposed wider powers for the Commission to enter premises. To help inform further debate on our powers and sanctions we have produced a document<sup>1</sup> setting out how we propose to use the new powers, and the civil sanctions proposed in clause 3 of the Bill, in line with the principles of good regulation. We are pleased that the Government has brought forward amendments to address Parliament's concerns about the scope of the proposed new powers.

It is important for the Commission to have access to the right supervisory and investigatory powers, so that we can carry out our regulatory role effectively and proportionately. The Bill contains important proposals which fill gaps in the powers

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<sup>1</sup> Available on our website at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0020/71606/Working-Draft-Enforcement-Policy-and-Guidance---post-PPP.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/71606/Working-Draft-Enforcement-Policy-and-Guidance---post-PPP.pdf)

provided by the 2000 Act. For instance, clause 2 would for the first time enable us to obtain information from donors to political parties, in a situation where we have reasonable grounds to believe the law has been broken.

## Recommendations on amendments

The Commission supports **Government amendments 11 - 22** which have two main effects. First, they impose reasonable limitations on our routine supervisory powers to enter premises, at a reasonable time and without use of force, for audit and inspection purposes. These supervisory powers were provided in the 2000 Act in respect of registered parties, third parties and permitted participants in a referendum. The Government amendments would extend the existing powers to cover regulated members' associations, whose affairs are by definition more complex than those of individuals, but not to individual regulated donees (such as holders of elective office and members of registered parties) or to candidates or agents, as the Bill originally proposed.

We believe these changes should address the concerns recently raised by the Joint Committee on Human Rights in their report on the Bill<sup>2</sup>. We do not support the alternative approach proposed in **amendments 34 and 35**, which would remove our statutory right to visit the premises of regulated entities altogether. It is an important part of our role to check that the organisations we regulate are complying with the rules. We could not do that properly if we were unable to visit their premises. We always seek to arrange such visits on a voluntary basis, but the statutory ability to access the premises of regulated organisations - at a reasonable time, and without the use of force - is an important backstop if a regulated body refuses to co-operate, or withdraws its co-operation.

Second, the Government amendments remove altogether the proposed power for the Commission to apply for a warrant enabling entry to premises by force, in cases where we have reasonable grounds to believe the law has been broken and where documents that we have formally asked for are not provided to us. This power would be replaced by a new court order procedure, detailed in **amendment 13**. Failure to comply with a court order requiring the production of documents the Commission has already sought through a statutory notice would be a contempt of court. We welcome this change, which provides an effective and proportionate means of enforcing statutory requests for documents without the need for a warrant power to enter premises by force. It therefore removes the need for **amendments 2, 3 and 9** which qualify the warrant power.

The Commission believes that it would be very helpful to extend the approach taken in **amendment 13** further, so that it would cover statutory requests for information and explanations made under paragraph 2(2)(b) of Schedule 19A, as well as requests for documents under paragraph 2(2)(a). Obtaining such information can be critical to an investigation, to get a full understanding of documents or to corroborate evidence. It would be more effective and proportionate to follow up refusal to comply with a statutory request for that information through a civil court procedure than by pursuing a criminal prosecution for failing to comply with a notice requiring information.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/23/2302.htm>

The Commission believes that **amendment 4** is unnecessary since the Bill as amended at Public Bill Committee now requires the Commission to report annually on its use of its investigatory powers (Schedule 19A para 15).

**Amendments 46 – 58** propose procedural changes to the supervisory and investigatory powers in the Bill. As we have said in previous briefing on the Bill, we see no difficulty with the introduction of procedural safeguards on these powers except where they undermine our ability to regulate effectively. We do not support **amendment 48**, which would require the service of disclosure notices by hand, since regulated entities could easily use this requirement to evade or delay acceptance of a disclosure notice. We also see difficulties with **amendments 50 and 51**, imposing a fixed 28 day period for compliance with a disclosure notice. In some cases, such as those requiring a regulated entity to collate or check information, this period may be unreasonably short, while in others it may be much longer than is reasonably required. We see no need for **amendment 52** which allows members of police forces to be authorised by the Commission for the purposes of the Schedule.

We do not support **amendments 53, 54, 55, 56 and 58** which would cut the time during which the Commission can retain documents obtained under the process in paragraph 3 of Schedule 19A. The current warrant process in paragraph 3 is to be replaced by a court order process, under the Government amendments discussed above. The owner of any documents obtained through a court order will be able to take copies of them before providing them to the Commission, so these amendments appear unnecessary.

## Clause 3 and Schedule 2 Civil Sanctions

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Healthy political parties are vital to the democratic process. It is important that the regulatory regime governing them is flexible and proportionate, reflecting the fact that many of those with statutory responsibilities under the law are volunteers. At the same time, the Commission must be able to enforce the rules effectively when the rules are not followed.

The proposed civil sanctions introduced by clause 3 and Schedule 2 will enable the Commission to act proportionately to secure compliance. As noted above, the Commission has recently produced a document (see footnote 1) setting out how it proposes to use the civil sanctions. In appropriate cases the new sanctions will enable us to move away from referring a case for criminal investigation or the rigid imposition of a statutory fine, and instead use constructive new approaches to secure compliance with the law. For instance, we could issue a notice requiring a non-compliant body to take specified steps to become compliant, such as training party officers or amending systems.

The law currently enables the Commission to apply to a court to order forfeiture of donations which should not have been accepted. To bring our existing powers into line with the new set of flexible sanctions introduced by the Bill, we would like to see the stand-alone forfeiture provision in the 2000 Act repealed and replaced by an amended forfeiture sanction integrated with the civil sanction regime.

## Recommendations on amendments

The Commission supports **Government amendments 23 - 28** to the statutory reporting requirements imposed by Schedule 2. The changes will require the Commission to report annually on its use of the new civil sanctions, as would **amendment 7**. We had intended to report at least annually on our use of the new sanctions, recognising that transparency is an important part of being a good regulator.

The Commission does not support **amendment 83** which would preclude our reports from naming persons subject to civil sanctions below the value of £5,000. This would significantly reduce the transparency of our enforcement and sanctioning work, contrary to good regulatory practice. Fixed monetary penalties and many variable monetary penalties for offences that are only triable summarily are capped at £5,000 so persons subject to such penalties, and to non-monetary sanctions such as compliance notices, would be excluded from our reports by this amendment.

The Commission does not support **amendment 6**, which would enable a person who has broken the law, and is therefore subject to a fixed monetary penalty, to require the Commission to pursue the contravention as a criminal offence instead. This would offer no additional protection to the person involved, since the Commission can only impose a fixed monetary penalty where it is satisfied to the criminal standard of proof (beyond reasonable doubt) that a contravention has occurred, and there is a right of appeal against such penalties to the civil courts. The pursuit of a criminal offence, for the sort of low-impact regulatory failure which is likely to attract a fixed monetary penalty, would be disproportionate and contrary to the principles of good regulation.

The Commission does not support **new clause 3** which proposes replacing some criminal offences in the 2000 Act with a fixed monetary penalty capped at £1,000. The offences relate to failures to submit statutory information, including reports of donations received, to the Commission on time. This is the kind of non-compliance where the Commission is likely to seek to impose a civil sanction, such as a fixed monetary penalty, if the Bill is enacted. However, new clause 3 would remove our ability to use the most appropriate civil sanction to secure compliance and deter future non-compliance in any given case. This might be a variable penalty, restoration notice, compliance notice or enforcement undertaking rather than a fixed penalty, depending on the circumstances of each case and how serious the late or non-reporting was. Our recent document on our future enforcement policy (see footnote 1) explains how we expect to use the new sanctions. We will consult publicly on our approach during 2009, before seeking access to the new sanctions.

The Commission does not support **amendments 59 to 62**. These would disapply fixed monetary penalties in cases where a regulated entity had contravened a requirement of the 2000 Act, but had not committed a criminal offence. There are several requirements in the Act which are important to ensure transparency, but where contravention is not a criminal offence. An example is a failure by a registered party to provide full and accurate quarterly reports of donations and loans received. While it is a criminal offence to provide a late report, it is a contravention, but not a criminal offence, to provide an inaccurate report, e.g. by omitting a reportable donation. The amendments would prevent the Commission imposing a

fixed monetary penalty for such a contravention. It will be for Parliament to agree the contraventions for which fixed monetary penalties and other civil sanctions will be available.

The Commission does not support **amendments 63 to 67** which would remove variable monetary penalties from the set of discretionary requirements that the Commission may impose. As our enforcement policy document (see footnote 1 above) explains, discretionary requirements are intended to provide a flexible range of sanctions for differing degrees of non-compliance. Variable monetary penalties, unlike fixed monetary penalties, can be adjusted to take account of aggravating and mitigating circumstances, and may be used in conjunction with other requirements, such as compliance or restoration notices. Removing them from the Bill would significantly reduce our ability to apply the appropriate sanction in a proportionate way.

The Commission does not support **amendments 73 and 77** which delete the specified grounds for appeal against fixed monetary penalties and discretionary requirements, and provide a fixed 28 day period for appeals. Removing the grounds for appeal from the Bill would reduce certainty for both appellants and the courts, while departing from the Regulatory Enforcement and Sanctions Act precedent.

The Commission does not support **new clause 4** which proposes the creation of an independent panel to offer guidance and a code of practice to the Commission and to advise on the proportionate use of civil penalties. The 2000 Act already provides for the Parliamentary Parties Panel to submit representations to the Commission on such matters, and we will consult with the Panel and publicly on our future enforcement approach before we seek access to the new sanctions. It will be for Parliament to agree which sanctions are to be made available in respect of the various requirements of the 2000 Act.

## Electoral Commissioners etc

### Clauses 4 - 7

#### Electoral Commissioners etc

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The Commission seeks to work in a way that is informed by a clear and current understanding of political parties. We believe that we could benefit from being able to employ staff with more recent direct party political experience than the current ten-year bar allows. However, we consider it important for there to be some flexibility for the Commission to extend the proposed five year bar to a small number of posts other than the Chief Executive with the agreement of the Speaker's Committee. This may apply for instance to staff involved in or advising on regulatory decisions or acting on behalf of the Chief Executive. We have noted previously comments about the clauses relating to nominated Commissioners.

**Amendments 31 to 33** to clause 5, tabled by Sir Peter Viggers MP will replace the proposal for political parties to put forward two or more people to be considered for appointment as a nominated Commissioner with the proposal to put forward one nominee. The Commission believes that this amendment puts forward a workable proposal for the appointment of nominated Commissioners from political parties.

# Political donations and expenditure

## Clause 11

### Election expenses incurred for person not yet a candidate

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The Commission has argued for a longer regulated period for candidate expenditure for some time. We said in our evidence to the Public Bill Committee that the 'triggering' proposals in the Bill as it left Committee were widely defined, and that it would be helpful for the legislation to be clearer about the effect of the new rules in order to minimise the scope for uncertainty and avoidance.

#### Recommendations on amendments

The Commission supports **Government new clause 17 and amendments 38 - 43** which remove the triggering proposals from the Bill and replace them with new controls on candidate spending at Westminster general elections. In our view the new controls are preferable to the triggering arrangements because:

- they will only apply during a clearly defined period of time, beginning 55 months after a Parliament first met, rather than being triggered by the behaviour and intentions of each individual prospective candidate;
- they will therefore only apply during a period a few months away from the last possible date for a general election, when it will generally be simpler to determine whether expenditure is incurred 'for the purposes of a candidate's election' than under the triggering proposals; and
- the new controls will be linked to a new, additional spending limit, separate from the existing limit that comes into play when Parliament is dissolved and people formally become candidates. This would provide increased regulation of candidate spending in the run-up to the election (in circumstances where Parliament has sat for more than 55 months), while reducing the risk that candidates will find themselves unable to campaign effectively after the dissolution of Parliament because they have already used up most of their spending limit.

As noted above, the new controls would only apply where a Parliament has sat for more than 55 months. In other cases, the existing controls on candidate spending would remain in place, with no additional regulation. The Commission continues to believe that in principle it would be preferable to introduce a longer regulated period for candidate spending at the end of all Parliaments, not just those that sit for longer than 55 months. However, we support the amendments on the basis that they improve on both the current position and the previous proposals in the Bill.

The new controls will only apply to the next Westminster general election if it is held after the end of 2009. If Parliament agrees to the amendments, the Commission will prepare, consult on and issue practical guidance on the new controls during 2009.

The Commission does not support **amendments (a) – (d) to new clause 17** which would extend the new regulated period so that it begins 50 rather than 55 months after a Parliament first met. While these amendments would introduce a longer regulated period for a greater number of general elections than the Government amendments, we are concerned that they would also create considerable uncertainty for candidates and agents, in a similar way to the 'triggering' provisions

currently in the Bill. They would create a regulated period potentially lasting for many months, during which it would often be unclear whether particular items of spending have been incurred for the purposes of a candidate's election, or for some other purpose. The Commission believes that any further extension of the regulated period, beyond that provided by the Government amendments, should be framed in a way that provides greater certainty for potential candidates about when their expenditure will count against the spending limit.

The Commission notes that in view of the Government amendments replacing the triggering provisions of the Bill, **amendment 10** is no longer relevant.

## New Clause 13 Compliance Officers

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We said in our briefing at Public Bill Committee stage, we are not opposed in principle to creating a formal role in the PPERA framework for compliance offices appointed by holders of elective office.

### **Recommendations on amendments**

The Commission is content with the Government's proposed **new clause 13**, which develops **amendment 5** by introducing a provision for holders of elective office to appoint compliance officers. The mechanism proposed in clause 13 would enable this class of regulated donees to nominate a named person to assist them in meeting their legal obligations, while - importantly - not allowing them to delegate or waive their own responsibility for complying with the law.

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We are sending this briefing to Frontbench teams and Members who have spoken in past debates on the Bill. If you would like any further information, please contact Aileen Keyes, Public Affairs Manager on 020 7271 0628 or [akeyes@electoralcommission.org.uk](mailto:akeyes@electoralcommission.org.uk)