

Political Parties and Election Bill - Committee Stage 11 November 2008

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.

Clauses 4-7 - Electoral Commissioners etc

Overview

The Commission understands and endorses the underlying aim of these proposals, that its work should be informed by a clear and current understanding of how political parties function. We seek to work at all times in a way consistent with that aim. However, we expressed some concerns in our memorandum to the Committee (PPE 01).

Clause 4

Selection of prospective Electoral Commissioners and Commission Chairman

Recommendation on amendments

The Commission supports the principle of **amendment 16**, which would require the process for appointing all Electoral Commissioners to be in accordance with the Public Appointments Code of Practice. The principles of the Code have been observed in all appointments of Electoral Commissioners to date, but there is currently no requirement in legislation for this to be so.

Clause 5

Four Electoral Commissioners to be persons put forward by parties

Recommendations on amendments

The Commission has noted in evidence to the Committee the question of what would happen if a leader of a qualifying party failed to nominate two or more persons to be considered for appointment as a nominated Commissioner. We therefore support the intention of **amendment 105**, which seeks to address this concern.

The Commission has made known its concerns about the proposal to introduce Commissioners with recent party political experience to the Commission, and notes that **amendments 109 and 110** would remove this proposal from the Bill; while **amendment 15** would exclude donors to political

parties from being nominated for consideration for appointment as a nominated Commissioner (if the Committee wished to pursue this approach, it would be sensible also to exclude from nomination people who have appeared as lenders on the register of loans to parties).

The Commission has noted in written evidence to the Committee that it would need to consider carefully how to demonstrate that its decisions are not at risk of challenge on the grounds that they may have been influenced by any Commissioners or staff who might be seen as biased because of nomination by and/or background association with a political party that could be said to have an interest in the outcome. We therefore support the intention of **amendment 111**, although we think that rather than specifying certain decisions in which nominated Commissioners should not be involved, it would be preferable to introduce a provision which makes clear the Commission's responsibility to demonstrate that none of its decisions are at risk of challenge as set out above.

Clause 6 Number of Electoral Commissioners

No amendments tabled on which the Commission seeks to comment.

Clause 7 Political restrictions on Electoral Commissioners and staff

Recommendations

The Commission is disappointed that no amendment has yet been put forward to delete Clause 7, paragraph (1), which would reduce the ban on party political involvement in relation to those Commissioners not nominated by party leaders, from 10 to 5 years. Whether or not the appointments process for these Commissioners is in accordance with the Public Appointments Code of Practice, this change will mean that in principle, the Electoral Commission could consist of 4 Commissioners with immediate past involvement in political parties, and 6 Commissioners whose involvement ended just 5 years previously. We have yet to see an explanation of the need for this change.

In relation to Clause 7, paragraph (2) the Commission has argued that the Bill should be amended to allow some flexibility to apply a ban of more than one year on party political activity to certain posts other than that of the Chief Executive. Such posts might include, for example, senior roles in the Commission's investigations team, or staff dealing with local authority boundary decisions. The Electoral Commission could be required to publish a list of posts subject to a longer ban, or even to submit it for approval by the Speaker's Committee.

Clause 1, Clause 2 & Schedule 1, Clause 3 & Schedule 2 - Functions of Electoral Commission

Clause 1

Compliance with controls imposed by the 2000 Act etc

Overview

The Commission welcomes the clearer definition of its regulatory function which clause 1 provides, and the explicit power for the Commission to prepare guidance on regulatory matters.

Recommendations on amendments

The Commission does not support **amendment 2** requiring it to produce guidance on every requirement of the 2000 Act, since the Act includes many complex technical provisions which may only apply to a small section of the regulated community, or in rare circumstances. If the Commission produced guidance on all such provisions in the level of detail contemplated by the amendment, the resulting material would be too lengthy and detailed to meet the criteria for accessibility, clarity and appropriateness set out in the Code of Practice on Guidance on Regulation developed by the Department for Business Enterprise and Regulatory Reform BERR. The Commission already makes guidance on specific issues available, both informally and via our formal Advisory Opinions service, which provides written guidance on complex, significant matters requiring legal consideration.

The Commission does not support **amendment 81** since it reduces the scope for the Commission to present information on the minimum legal requirements in a clear and helpful manner, giving examples not only of what things need to be done to comply with the law, but also of where taking a certain action may be sufficient to comply.

The Commission does not support **amendment 38** which would remove our duty to promote public awareness of electoral systems and related matters. There is a strong case for ensuring that people get clear and reliable information about how to register to vote, and how to take part in elections, and for this information to be provided by the independent Electoral Commission.

Although the Committee on Standards in Public Life (CSPL), in its eleventh report, recommended that the Commission should no longer retain a wider statutory duty to encourage participation in the democratic process, 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."

The Commission no longer encourages participation in the broader sense discussed by the CSPL. We agree with the Government's response to the CSPL on this point:

informing the public on the mechanics of the electoral system, including the registration process, is key to maintaining a strong democracy and we agree that the Electoral Commission should continue to fulfil this role.

....there is now general consensus, including from the Commission itself, that the Commission should withdraw from a wider role of encouraging democratic engagement. Given this agreement we do not feel that legislative change to Section 13 of PPERA....is necessary.

The Commission does not support **amendment 106**. In our view the amendment will not provide the necessary clarity on reporting requirements or regulatory certainty. We are working with the Government and the Committee on Standards and Privileges to bring to an end as quickly as possible the current requirement for dual reporting of donations to the Commission and the Register of Members' Interests, while maintaining the necessary regulatory oversight, and we hope that any further legislative changes to give effect to a solution will be enacted in this current Bill.

Clause 2

Investigatory powers of Commission

Schedule 1

Investigatory powers of Commission: Schedule to be inserted into the 2000 Act

Overview

The Commission believes that the new **investigatory** powers in Schedule 1 (paragraphs 2-5 of new Schedule 19A to the 2000 Act) are necessary, in order to allow us to obtain information from donors and other people and organisations not regulated under PPERA, in cases where we have reasonable grounds to believe that an offence or contravention of the law has taken place. The Commission has noted the concerns raised about these powers at Second Reading, and agrees that appropriate safeguards should apply both to these new investigatory powers and to its existing PPERA **supervisory** powers, which are restated (with the power to enter premises and inspect documents relating to income and expenditure expanded to include regulated donees for the first time) in paragraph 1 of Schedule 19A.

Provided that the new **investigatory** powers encompass regulated donees, the Commission does not regard as essential the extension of our existing **supervisory** power to enter premises and inspect documents relating to income and expenditure (Schedule 19A para 1), to cover individuals who are regulated donees. Our routine monitoring role, in circumstances where there is no specific concern about a possible breach of the rules, is of less significance in the case of regulated donees than of political parties, since the former have no reporting obligations to us except where they receive a donation or loan. However, we think that the supervisory power to enter premises is helpful in the case of members' associations that are regulated donees, since their affairs are by definition more complex than those of individual regulated donees.

As we explained in our oral evidence to the Committee, our key concern in respect of the **investigatory** powers (Schedule 19A paras 2-5) is that we should have an effective way of enforcing reasonable requests for information, from any relevant individual or organisation, in cases where we have reasonable grounds to suspect a breach of the law. We are open as to the mechanics of achieving this, and there may be mechanisms which would raise fewer concerns than the current proposals for a warrant-based power to enter premises.

Recommendations on amendments

The Commission supports the policy intention underlying **Government amendments 122–126**. Amendments **122 and 123** would prevent the Commission from using its supervisory power to enter premises and inspect documents relating to income and expenditure, under Schedule 19A paragraph 1(5), for the purpose of investigating suspected offences or

contraventions. This is reasonable since the Commission would expect to use its power of entry with a warrant under paragraph 3 for that purpose.

Government amendment 124, requiring the Commission's Chief Executive or a suitable designated alternative to authorise applications for warrants under Schedule 19A paragraph 3, is a sensible safeguard. The Commission also supports **Government amendment 125** which introduces a requirement for us to consult on, publish and have regard to guidance on the use of our supervisory and investigation powers. This parallels the requirement in Schedule 2 paragraph 25 to prepare such guidance on the use of the new civil sanctions.

In principle the Commission supports **Government amendment 126**, requiring us to publish information on the use of our supervisory and investigative powers in our annual report. Sub-paragraph 3 of the amendment enables the Commission to omit from such reports information that it could be unlawful to include, and information that might adversely affect any current investigations or proceedings. We believe it is also important that we should not be required to include information that would enable the identification of subjects of specific supervisory or investigation activity, since this may be prejudicial to individuals and organisations who are asked for information on a routine basis, or where an allegation is investigated by the Commission and found to be groundless.

In clause 2, the Commission does not support **amendment 10** which would remove the penalties for obstructing the use of investigatory powers, thus undermining the Commission's ability to regulate effectively.

Many other amendments to Schedule 1 have been proposed. Some would have clearly material effects, such as:

- removing all regulated donees from the scope of the Commission's supervisory powers, including its existing power to require information, which currently applies to regulated donees, as well as its power to enter premises and inspect documents relating to income and expenditure (**amendment 102**);
- removing the existing supervisory power to enter premises after giving notice, in circumstances where the Commission is carrying out its monitoring functions rather than investigating a suspected offence (e.g. **amendments 91, 94, 96**), and setting a £10,000 threshold for offences to which the residual power to enter would relate (**amendment 95**);
- removing the proposed new power for the Commission to require information from people and organisations not regulated by PPERA, in cases where we have reasonable grounds to suspect that an offence has been committed (**amendments 99, 100**);

Other amendments to Schedule 1 are primarily procedural or drafting, such as: specifying the time permitted to respond to or appeal against a disclosure notice (**amendments 92, 93**); specifying what persons may be authorised to enter premises (**amendments 97, 98**); requiring that a High Court judge rather than a justice of the peace may issue a warrant to enter premises

where an offence is suspected (**amendment 103**); and reducing the time for which seized documents may be held (**amendments 25-27**).

As noted in the Commission's written evidence to the Committee and in the overview above, we would welcome reasonable procedural safeguards over our existing supervisory powers, as restated in Schedule 19A paragraph 1, and over our new investigatory powers, provided that they do not undermine our ability to perform our regulatory role effectively. However, the Commission's view is that a number of the amendments to Schedule 1, including those highlighted as material above, would undermine our regulatory role.

The Commission does not support **amendments 118 and 119** which would provide that an offence is not committed in respect of Schedule 19A if there is no intent to fail to provide information. We believe that the provision in paragraph 12(1) that failure to comply with a requirement of the Schedule is only an offence if "without reasonable excuse" provides sufficient protection in these circumstances.

Clause 3

Civil sanctions

Schedule 2

Civil sanctions: Schedule to be inserted into the 2000 Act

Overview

The proposed civil sanctions, which are based on those to be made available to other regulators through the Regulatory Enforcement and Sanctions (RES) Act 2008, will enable the Commission to secure compliance with the PPERA regulatory regime in a proportionate way.

As a general point, the Commission believes that it is likely to be helpful for the proposed civil sanctions to follow the RES Act precedent. The RES Act provisions are based on the principles of good regulation, and it is desirable that the Commission's civil sanctions regime is designed on similar lines as far as is practicable.

Recommendations

In clause 3, the Commission does not think **amendment 85** is necessary since the Bill (Schedule 2 para 16) already requires both Houses of Parliament to approve the order prescribing the PPERA offences in respect of which the new civil sanctions will be available.

The Commission does not support **amendments 82 and 83** which would reduce the maximum fine in respect of failure to comply with a stop notice from £20,000 (the value in the RES Act) to £5,000. Stop notices can only be used where there is a significant risk of serious damage to public confidence. It follows that a decision not to comply with a stop notice should be able to attract a significant penalty.

In Schedule 2, the Commission does not support **amendments 31-34** which would remove the availability of fixed monetary penalties in cases where a prescribed restriction or requirement of PPERA has been contravened but a criminal offence has not been committed. This would rule out the use of such penalties to incentivise regulated entities to comply with those PPERA requirements for which non-compliance is not a criminal offence. An example where these penalties might be used is the failure by a registered party to provide full **and accurate** quarterly reports of donations and loans received – it is an offence to provide a late report, but not to provide an inaccurate report. The specific contraventions in respect of which fixed monetary penalties will be available must be prescribed by an order approved by both Houses of Parliament.

The Commission does not support **amendment 1** since we are concerned that it cuts across the principles of good regulation on which the civil sanctions in the PPE Bill are based. We note that a similar proposal was tabled during debate on the Regulatory Enforcement and Sanctions (RES) Bill, on which the

PPE Bill sanctions are modelled, in the House of Lords. The Government opposed that proposal on the grounds that, among other things,

“[it] would also go against another of the fundamental tenets of Macrory: that criminal prosecution should be reserved for the most serious and egregious offences. That can only be assessed by the regulator in view of all of the cases before it.” [Lord Bach, House of Lords, 30 January 2008, col GC378]

In the case of this Bill, fixed monetary penalties are most likely to be used in relation to administrative or other lower-impact regulatory failures. Criminal offence proceedings in respect of such offences would be disproportionately onerous on regulated entities. The Commission would be able to impose a fixed monetary penalty only where it is satisfied that the case meets the criminal standard of proof. The Bill also provides a clear appeal process for those who are subject to fixed penalties - first a review by the Commission, and then an appeal to the courts.

The Commission does not support **amendments 71, 72 or 46** which appear to create the possibility of persons whose offence has been dealt with via a fixed monetary penalty or discretionary requirement being prosecuted for the same offence.

The Commission does not support **amendment 51** which would have the effect of removing stop notices from the range of civil sanctions. As we set out in our written evidence to the Committee, stop notices would enable the Commission to prevent an imminent breach of the rules and thus avert illegal action aimed at influencing the conduct of an election, rather than imposing a sanction after the action has occurred. The Bill sets a high threshold for the use of stop notices; there must be a significant risk of seriously damaging public confidence in the effectiveness of the PPERA regime. The analogous threshold for the use of stop notices in the RES Act is the significant risk of serious harm to health, the environment or consumers' finances.

Further information

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