

Political Parties and Election Bill - Committee Stage 20 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.

Clause 8 & Schedule 3 Declaration as to source of donation

Overview

The Commission has said in its written and oral evidence to the Committee that it supports the aim of clause 8 – to increase transparency in respect of donations and to act as a procedural reminder of the rules on agency – but is concerned that the clause as drafted may provide limited benefits while imposing new administrative burdens on parties and donors.

Recommendation on amendments

The Commission supports **Government amendments 153-157, 160-162, 164-166 and 168-170** which build on amendments 3-5, 134, 135 and 140-148 and increase the threshold for the new declarations from £200 to the relevant reporting threshold for a declaration, namely either £5,000 or £1,000. These changes should reduce the administrative burdens of the new declaration requirement, while introducing a new procedural reminder of the rules on agency in respect of reportable donations. The Commission welcomes the decision to set the declaration threshold at the same level as the existing donation reporting limits rather than introducing a general £1,000 threshold, which would have created a new regulatory threshold for those parties without accounting units.

The Commission also supports **Government amendments 158, 163, 167 and 171** which remove the requirement for recipients of those donations that attract the new declaration requirement to take “all reasonable steps” to “verify” the declaration. It has not been clear to us what verification would involve in this context, and the removal of this requirement simplifies the proposed declarations regime.

The Commission does not support **amendments 120 and 121** which would delete clause 8 and Schedule 3 altogether. In view of the Government’s

proposed changes to the thresholds applied by clause 8, the Commission believes that an appropriate balance is being struck.

The Commission does not support **amendment 151**. The Bill already distinguishes between offences that are committed ‘knowingly’ and ‘recklessly’ and in doing so requires the Commission to have regard to the intent or state of mind of the party or individual at the time the false declaration was made. This would also be a necessary consideration for the Commission in deciding what offences to pursue and what sanctions to apply, so inadvertent offences against clause 8(5) may not attract the same penalty as offences involving deliberate false declarations. However, there may be circumstances where continued false declarations, even if inadvertent, would justify the imposition of a sanction – for instance, if a party failed to put adequate systems in place to comply with the law - and this amendment would restrict the Commission’s ability to impose such a sanction.

The Commission does not support **amendment 6** which substantially reduces the maximum penalty for making a false declaration under clause 8. We believe that if a new criminal offence of making a false declaration in respect of donations is to be created, then the maximum penalty should be set at a level which reflects the gravity of a ‘dishonesty’ offence of this nature and the need for deterrence. A fine of up to £1,000 is insufficient as a maximum penalty for this offence.

In Schedule 3, the Commission does not support **amendments 7 and 149** which seek to introduce new reporting requirements for donations from unincorporated associations. The Commission sees merit in increased transparency in this area, but any change to the regulatory regime should balance that against the additional administrative burdens on regulated entities and on donors. We do not think these amendments strike the right balance, since they impose sweeping new reporting requirements, going beyond those applying to e.g. registered companies or trade unions where the identities of those controlling the organisation are already in the public domain so do not need to be listed in the donation report.

The amendments also require details about donors to an association for any purpose (although in the case of amendment 149, only those donating more than £1,000), not just those whose donations are political in nature. Much of this information may be irrelevant and potentially misleading, since it is unlikely that all the members of and donors to the organisation will have participated in the decision to make any given donation. It may be helpful to introduce greater transparency about those who provide substantial donations to unincorporated associations which fund political parties, but the workability of any new requirements in this area, and the administrative burden associated with them, would need careful thought.

If Parliament wishes to impose additional transparency requirements for unincorporated associations, the Commission considers that particular regard should be given to those not already regulated under the 2000 Act as members’ associations. In order to minimise administrative burdens, it would

be preferable to introduce reporting requirements that will disclose clearly relevant information (e.g. the identities of those responsible for the decision to make the donation) rather than imposing a very wide-ranging reporting requirement. Further information on this issue can be found in the memorandum the Commission sent to the Committee Clerk on 17 November in follow up to its oral evidence session.

The Commission does not support **amendment 8** as drafted. We are not opposed in principle to giving compliance officers appointed by holders of elective office a formal role under the PPERA framework, but we consider that holders of elective office should not be able simply to delegate their personal responsibility for compliance with the law to a compliance officer. In the event of a breach of the law, the facts and circumstances of each case should determine whether the compliance officer or the holder of elective office is liable. We therefore recommend that if Parliament wishes to pursue this change, it should do so by adding appointed compliance officers to the relevant category of regulated donees, but should not provide for such officers to act “on behalf of” the holder of elective office.

The Commission does not support **amendment 9**, which would mainly affect crossbench peers since members of political parties are already regulated donees. We are not aware of any evidence suggesting that donations to peers who are not members of political parties are a concern in terms of the transparency and integrity of party and election finance.

Amendments 188, 194 and 198 would require the Commission to publish guidance notes on the declaration requirements, which should be attached to any declaration made by a donor to regulated donees, recognised third parties and permitted participants. If the provisions in clause 8 are agreed by Parliament the Commission would expect to publish guidance on the new requirements, including the issues described as minimum requirements in these amendments. However, we do not support the requirement for our guidance to be attached to each declaration, since the mechanics of declarations will be for donees and their donors to arrange. In addition, the amendment creates legal uncertainty about the validity of declarations which do not have Commission guidance attached to them.

Clause 9 Defence to charge of failing to return donation from impermissible donor

Overview

Clause 9 clarifies the 2000 Act, by providing that if a party or treasurer takes all reasonable steps to verify that a donation is permissible, that is a defence against being charged with accepting an impermissible donation. The Commission believes this provision is reasonable.

Recommendations on amendments

Amendment 152 seeks to exclude donations from this defence where the donor is impermissible because of New Clause 22. We have commented on that clause in our briefing note on new clauses relating to political donations and expenditure. If a provision along the lines of the new clause were to be adopted by Parliament, the Commission sees no grounds for disapplying the defence set out in clause 9 in the case of offences involving donations which would be impermissible because of the new clause.

The Commission notes that **amendment 183** is not necessary or workable since the statutory obligation for a party's compliance with the rules on permissibility rests with the registered treasurer.

Clause 10

Election expenses incurred for person not yet a candidate

Overview

As the Commission said in its memorandum to the Committee it has argued for a longer regulated period for candidate expenditure for some time. Given the complexity of the subject it is important that the legislation is as clear as possible to minimise the scope for uncertainty and avoidance. The Commission notes that debate at Second Reading and oral evidence to the Committee have raised a number of questions about the interpretation of clause 10 and the possible benefits of alternative approaches to a longer regulated period.

Recommendation on amendments

Amendment 18 appears intended to deal with concerns about the potential retrospective effect of clause 10. The Commission would welcome clarification as to whether a person's self-description or acting as a candidate in the period before the commencement of clause 10 would be sufficient to trigger the regulated period in respect of that period on commencement, even if the person had by that point ceased to describe themselves or act as a candidate. We also note that it may be helpful for the avoidance of doubt to clarify the meaning of 'expenses incurred' in clause 10(5), given that expenditure incurred before the start of the regulated period, on materials that are used during the regulated period presently counts towards a candidate's expenses.

Amendments 201 and 202 appear intended to introduce a new 'trigger' point for the regulated period for candidates' expenses, commencing 50 months following the month of the previous general election. Such an approach could provide greater certainty for parties and candidates about the start of the regulated period than either the current triggering proposals in clause 10, or a fixed regulated period measured from the date of the election to which the period relates. However, it would also raise a number of workability issues, including the potential truncation or elimination of the regulated period where a general election is called relatively soon after the previous election. The proposed timetable in these amendments would heighten the likelihood of this. If this mechanism were to be considered further, some kind of additional provision to ensure suitable controls on candidate expenditure in the event of an early election may be appropriate.

Amendment 104 provides for commencement of clause 10 to be determined by affirmative resolution after a consultation on Commission guidance. The appropriate mechanism for commencement is not a matter for the Commission. However, it may be helpful to note that subject to further Parliamentary consideration of the regulated period for candidate expenses, the Commission intends to provide an initial draft of guidance on the triggering

provisions to Parliament in January 2009. The Commission will then consult on and finalise the guidance as soon as possible after Parliament has finished its consideration of the Bill. The speed at which we can do this will of course depend on whether there are late changes to the provisions in the Bill, and on the nature of the responses to the consultation.

Clause 11

Election expenses: guidance by Commission

Overview

Clause 11 of the Bill makes provision, through schedule 4A of the Representation of the People Act, for the Commission to prepare a code of practice giving guidance on matters that do and do not fall within categories of election expenses and guidance on the cases or circumstances in which expenses are, or are not to be regarded as incurred for the purposes of a candidate's election.

As noted in our briefing on clause 10, we intend to consult on and issue guidance on the triggering provisions as soon as possible after Parliament completes its consideration of the Bill. However, the Commission is not presently persuaded that it would be appropriate to frame this guidance in the form of a code of practice under Schedule 4A. This is for reasons of practicality, effect and principle.

In terms of practicality, at present the Commission issues updated guidance on the matters falling within Schedule 4A to candidates and agents for each major set of elections. If this guidance were to be issued in future as a code of practice under Schedule 4A, that would increase the lead time required to prepare the guidance for issue, and could reduce our ability to update the guidance quickly when necessary, for instance to reflect new developments in candidate campaigning and spending. Given that the Bill does not give guidance produced in the form of a code of practice more weight or effect than other Commission guidance, we think it is much preferable to produce guidance in a non-code form which can be modified as and when needed, so as to meet the needs of its users as fully as possible.

The issue of principle is that it is vital that the Commission is independent, and seen to be so. The procedure for producing codes of practice requires the Commission to provide a draft code to the Secretary of State, who decides whether to approve the draft and may amend it before it is laid before Parliament. It would not be desirable to make the Commission's independent guidance subject to such a process.

Recommendations on amendments

No amendments to this clause have been tabled.

New Clauses relating to political donations and expenditure

Overview

Several new clauses, a new schedule and amendments have been tabled which relate to political donations and expenditure. Many of these deal with issues considered during the cross party talks convened by Sir Hayden Phillips, including donation caps and local spending limits.

Recommendations on new clauses

New clauses 3, 4, 9, 11, 12 and 13 and the **new schedule 1** and **amendments 19-24** relate to party spending and donations. These provisions seek to introduce fundamental changes in the scope of statutory limits on party, candidate and third party spending and donations to political parties.

The Commission has previously published reports on broader issues of policy in relation to party funding (e.g. *The funding of political parties* [December 2004]; *Public perspectives: the future of party funding in the UK* [October 2006]). The Commission has published its views on emerging policy proposals on party and election funding, including the provisions in the Political Parties and Elections Bill and amendments to it, where its experience regulating the current system can assist in the consideration of the policy intentions of proposals or into their workability in practice. However, the Commission does not comment in detail on the proposals for systemic change to the party funding system, since these are primarily for Parliament rather than the Commission to consider. If Parliament were to decide to take any such proposals forward, the practical implications of the legislation would need careful consideration and the Commission would wish to comment.

The Commission notes that two proposed new clauses seek to alter substantially the permissibility requirements for donations. **New clause 10** proposes that donations by otherwise permissible companies that are controlled by impermissible donors should be impermissible, while **new clause 22** proposes that individuals not qualified to vote at Parliamentary elections, and companies controlled by such persons, should also be impermissible donors. Clause 22 would narrow the current definition of permissible donors (i.e. those registered in an electoral register) by removing persons who are on a register but not eligible to vote in parliamentary elections. This would restrict donations from members of the House of Lords and citizens of member states of the European Union who are eligible to register to vote in elections to local councils, devolved legislatures and the European Parliament.

As with the other new clauses referred to above, these proposals involve substantial change to the current regulatory regime and are for Parliament

rather than the Commission to consider. We note however two considerations. First, the compatibility of such an amendment with the European Convention on Human Rights would have to be considered. Secondly, it may be difficult for regulated entities to determine whether a given individual is actually qualified to vote, taking into account nationality and capacity as well as registration.

Remaining New Clauses

New Clause 23

Person may not be “responsible person” for more than one third party

Government **new clause 23** proposes that a person may not be ‘responsible person’ for more than one third party. The Commission supports this as a means to ensure that individuals are deterred from evading the limits by creating more than one recognised third party.

New Clause 16

Removal of criminal sanctions from specified offences

The Commission does not support **new clause 16** which proposes replacing a number of the criminal offences in the 2000 Act with a fixed monetary penalty capped at £1,000. This would relate to failure to submit proper Statements of Account, quarterly and weekly donation returns from registered political parties, and donation reports from regulated donees within the statutory timeframe.

These failures are examples of the type of regulatory breach where the Commission is likely to seek to impose a civil sanction such as a fixed monetary penalty in future. However, new clause 16 would remove our ability to use the most appropriate civil sanction available 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. One of the key reasons for the civil sanction framework proposed by Professor Macrory and reflected by the enactment of Regulatory Enforcement and Sanctions Act 2008 is to allow regulators to respond appropriately to non-compliance and provide an adequate deterrent. The Commission will consult during 2009 on our future enforcement policy, which will set out the circumstances in which we would expect to apply the various civil sanctions to different offences.

New Clause 20

Disclosure of election candidate's addresses

The Commission supports the intent behind this clause. In particular, the Commission acknowledges the concerns that have been expressed about the confidentiality of candidates' home addresses and believes that there is a case for considering whether this information should continue to appear in full on nomination papers, the statement of persons nominated and ballot papers. In the case of UK Parliamentary general elections, providing only the first three or four digits of a postcode may for some electors constitute an adequate level of information about a candidate's proximity or otherwise to a particular constituency. On the other hand, there is a risk with this proposal that Returning Officers would spend an inordinate amount of time checking candidates' home addresses, which could prove distracting during the busy election period, particularly if large number of candidates were standing. The situation at present (as established by case law) is that Returning Officers should not concern themselves with the question of whether the address given is actually the candidate's true home address or not.

Paragraph (2A) places the onus on candidates to provide proof of their home address to the returning officer. It does not specify which documents would constitute acceptable proof – the phrase 'as the returning officer may require' means that it would be up to the returning officer to decide what would and would not be acceptable.

It is possible that returning officers may feel obliged to lay down fairly stringent criteria, particularly given that the proposed system would allow no external scrutiny of the full addresses by third parties, including other candidates (the current system does provide transparency in this sense), which could leave their decision open to challenge at a later date. Identifying a suitable list of documents and checking their validity in the case of each candidate would place an additional responsibility on returning officers and could be time consuming.

The Commission believes that further consideration will need to be given to the impact that this new requirement for checking addresses will have on Returning Officers. The impact of New Clause 20 on the workload of returning officers has not been assessed and we believe that further consideration should be given to this ideally through a consultation with returning officers.

Further information

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