

## The Transparency of Lobbying, Non Party Campaigning and Trade Union Administration Bill

### House of Commons Second Reading

Tuesday 3 September 2013

On 17 July 2013, the Transparency of Lobbying, Non Party Campaigning and Trade Union Administration Bill ('the Bill') had its First Reading. This briefing sets out thematically for parliamentarians our views on Part 2 of the Bill, which amends the rules covering 'non-party campaigners' – people and organisations other than political parties and candidates – in the run-up to a UK Parliamentary General Election (UKPGE). Many of the changes will also affect future elections to the other UK legislatures and the European Parliament.

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#### **Key points for Second Reading**

It is important that, where non-party campaigning takes place on a scale that could have a significant impact on elections, it is transparent and controlled. Inadequate controls could ultimately result in voters losing trust in the fairness and effectiveness of the UK's overall framework for regulating political campaigning. We regulate the general rules relating to this type of campaigning.

The Bill both widens the scope of the current rules on non-party campaigning that affects parties and groups of candidates, and imposes some additional controls on such campaigning. **In our view, as drafted, the Bill raises some significant issues of workability that you may wish to explore at Second Reading.**

Areas that you may wish to focus on in particular include that:

- the Bill **creates significant regulatory uncertainty for large and small organisations that campaign on, or even discuss, public policy issues** in the year before the next general election, **and imposes significant new burdens** on such organisations
- the Bill effectively **gives the Electoral Commission a wide discretion to interpret what activity will be regulated as political campaigning**. It is likely that some of our readings of the law will be contentious and

challenged, creating more uncertainty for those affected. While we as the independent regulator should be free to decide when the rules have been broken, and how to deal with breaches of the rules, **we do not think it is appropriate for us to have a wide discretion over what activity is covered by the rules**

- **some of the new controls in the Bill may in practice be impossible to enforce**, and it is important that Parliament considers what the changes will achieve in reality, and balances this against the new burdens imposed by the Bill on campaigners

## Background

1. Campaigning by organisations that are not political parties in the run-up to elections is an important and established part of the UK democratic process. But it is also important that it is regulated effectively, under clear and enforceable rules, to give voters confidence that political campaigning is appropriately controlled and transparent.
2. We regulate the controls on political party and election finance under the Political Parties, Elections and Referendums Act 2000 (PPERA) and are responsible for monitoring and enforcing compliance with the current rules on non-party campaigning that promotes or prejudices the electoral success of political parties and groups of candidates. The police are responsible for dealing with breaches of the rules on non-party campaigning for or against individual candidates
3. Earlier this year we published a briefing<sup>1</sup> setting out the scope of the current rules, how we regulate them and how much regulated activity has taken place at recent elections. In June we published a regulatory review of the current party and election finance rules which recommended some changes to the rules on non-party campaigning, including widening the scope of the activities covered by the rules<sup>2</sup>. Our review also emphasised the need for any such changes to be carefully defined, and for the PERA spending limits to be reassessed alongside any change to the scope of the rules. This is because changes to the rules on non-party campaigning need particularly careful consideration, and it is important that spending limits are sufficient to enable freedom of expression.

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<sup>1</sup> [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0004/155380/Briefing-on-third-party-campaigning-in-the-UK.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/155380/Briefing-on-third-party-campaigning-in-the-UK.pdf)

<sup>2</sup> [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0003/155874/PEF-Regulatory-Review-2013.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0003/155874/PEF-Regulatory-Review-2013.pdf) See paragraphs 4.34 - 4.50

## **Our assessment of the impact of the Bill**

4. We share the concerns that the Political and Constitutional Reform Committee expressed in July about the timing of the Bill and the absence of pre-legislative scrutiny. We have submitted written evidence to the Committee on the Bill, which makes similar points to those contained in this briefing, and are scheduled to provide oral evidence to it on the same day that Second Reading of the Bill is due be held.
5. The timing of the Bill is a particular issue in the context of regulating non-party campaigning at the 2015 UKPGE, because if it is enacted the changes will take effect by May next year, which will allow only a matter of weeks for organisations to prepare prior to the introduction of the new regime<sup>3</sup>.
6. In our view the Government has not yet set out clearly the rationale for many of the changes in the Bill, and it is therefore hard to assess whether the Bill delivers the Government's policy objectives. **You may wish to explore the exact policy aims of the Bill at Second Reading.**
7. Since the Bill extends the rules to cover activity that we do not currently regulate, we have also discussed the Bill with over 40 organisations across the UK including campaign groups, charities, trade unions, political parties, legal advisers, umbrella bodies and other regulators. We are grateful to these organisations for giving us their time. Our comments on the Bill do not of course represent the views of anyone other than the Commission.
8. **We have said to the Government that we are ready to advise it on how to help the Bill achieve the Government's policy objectives in a proportionate way**, but that the Bill as drafted raises some significant concerns. These are summarised below thematically under the headings 'Uncertainty and burdens for campaigners', 'Discretion and the risk of challenge' and 'Enforcing the rules'. Where possible we have suggested possible ways of dealing with our concerns, although in the limited time available to consider the Bill and meet with those that may be affected by it over the summer recess, we have not been able to consider or test these fully.

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<sup>3</sup> The current PPERA rules provide that campaigning at the next UK Parliamentary general election will be regulated from January 2014 onwards, under a combined regulated period that also covers the 2014 European Parliament elections. The Bill provides that the current rules will apply to the period from January to May 2014, and the new rules in the Bill will apply to the period from 23 May 2014 until May 2015.

## Uncertainty and burdens for campaigners

### Context – the current rules

9. Non-party campaigners are inherently more complex to regulate than political parties. Political parties have to register with us in order to stand candidates at elections, and naturally have a strong focus on election campaigning. They are therefore relatively simple to regulate. In contrast, non-party campaigners often have many other objectives beyond expressing views on political and policy issues. In effect, they are regulated under PPERA because of what they **do**, and not because they **are** a particular type of organisation. It is therefore particularly important that the rules on what **activity** is regulated are clear, so that those affected by them can tell whether and how they will be regulated.
  
10. The current PPERA rules on non-party campaigning are relatively narrow in scope (only covering 'election material') and the definition of what is covered is relatively clear, so we are able to produce guidance that builds on the legislation. However, it can still be hard for campaigners to understand what activity is regulated. For instance, activity by charities (which are not allowed to be party political under charity law) can be covered. A common example is where an organisation invites prospective candidates at an election to say whether they support its views, and then issues a leaflet setting out the names of candidates who have expressed support. This will be controlled as election material if it is distributed to the public, even though those producing the material may argue that their aim is only to comment on public policy, or to influence politicians' agendas, rather than to persuade the public to vote in a certain way.

### The changes in the Bill

11. The Bill makes major changes to the current rules. The new rules are closely modelled on those that currently apply to political parties, but will have to be read and applied in a quite different context because third parties are so different from political parties. The Bill:
  - **widens the range** of activities that are regulated, to include rallies and events, media work, market research such as polling, and transport for the purpose of obtaining publicity (schedule 3)
    - all these activities will be regulated if they are carried out for "election purposes" (clause 26, see also 'Interpreting the legislation' below)

- all the related costs of the activity will count against spending limits, including staff costs<sup>4</sup>
- **reduces the thresholds** for registering with us as a campaigner by 50% or more, to £5,000 in England and £2,000 in Scotland, Wales and Northern Ireland (clause 27)
- **reduces the limits** on what a campaigner can spend on regulated activity in each part of the UK in the year before a UK general election by 60% or more, to £320k in England, to £35k in Scotland, to £24k in Wales and to £11k in Northern Ireland (clause 27)
- places **new controls** on spending that only has a 'significant effect' in particular constituencies, or supports a single political party (clauses 28 and 29), and **new or amended reporting requirements** on donations towards regulated spending, and on campaigners' finances (clauses 32 and 33)

### The impact on campaigners

12. This means that, for campaigners to understand whether and how the Bill will affect their activity in the year before May 2015, they will have to:
- (1) assess whether any of their planned activity will fall into the new list of categories covered by the Bill and the new definition of 'for election purposes';
  - (2) estimate the likely costs of those activities, including staff costs etc, and how far the costs relate to activity in particular constituencies;
  - (3) consider whether their plans include coordinated campaigning with other organisations, because under both the current law and the Bill, the total coordinated spending will count towards the individual spending limit of each campaigner; and
  - (4) decide whether their plans will require them to register with us, and how to ensure they stay within the reduced spending limits.
13. This will be particularly challenging for campaigners because of the need to apply the definition of 'election purposes', which is new and untested in the context of non-party campaigning. In the limited time available we will aim to produce guidance to assist with this, and will offer advice on particular queries where possible, but our experience strongly suggests that it will not be straightforward to apply the new rules to many specific types of activities. Campaigners will face additional uncertainty if there is a legal challenge to

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<sup>4</sup> In this respect the Bill differs from the rules on political parties, whose staff costs are not regulated (schedule 3 'new schedule 8A', paragraph 2 cf. schedule 8, paragraph 2(1)(d) PPERA)

our interpretation of the law. These factors will create a lot of complexity and uncertainty for those who may be covered by the rules. Some brief examples of the sort of issues that may emerge under the Bill as drafted include:

- a small community organisation in Wales intends to campaign about a local planning issue in the year before the election. The organisation has a part-time employee whose work includes organising meetings, writing publicity material and liaising with the media. How much of this person's work will count as 'for election purposes'? The organisation will need to register with us if its regulated spending exceeds £2,000 and must keep within spending limits of £24,000 within Wales and £9,750 within any one constituency.
- a voluntary organisation is seen as having expertise in a policy area on which several political parties make policy announcements in the run-up to the election. The media frequently ask the organisation for its views on the issues and the parties' policies, and sometimes invite it to provide interviewees for broadcast coverage. Will the cost of reactively setting out the organisation's views count as 'for election purposes'? If so, a proportion of the salaries of the organisation's press and policy teams would be regulated and will require the organisation to register with us.
- three national organisations plan a protest march and rally to draw attention to concerns about a policy issue on which political parties have different positions. Will the event be judged to be 'for election purposes'? If so, the associated costs (including publicity, transport, media work, and infrastructure costs such as policing and first aid) could easily exceed a national spending limit for the year before the election, and the total spending of all the organisers could count against each organiser's individual spending limit.
- a website includes a blog which comments on the activities and views of politicians from various parties in the run-up to the election. Some politicians believe the blog is biased against them or their party. Will the cost of producing the blog, and a proportion of the cost of maintaining and promoting the website and associated social media activity, count as 'for election purposes'? Our current view is that it is doubtful that the blog's website is covered by the PPERA exemption from the non-party rules for "the publication of any matter relating to an election, other than an advertisement, in a newspaper or periodical".

14. The uncertainty created by the Bill seems likely to affect a wide range of organisations. Small campaign organisations with a local or regional focus that are not currently affected by the rules on non-party campaigning will face significant new regulatory burdens, even if spending only a few hundred pounds a month over the year before the election on controlled activities. Larger organisations with a variety of activities and objectives will face several challenges:
- the need to assess whether each type of activity they undertake during a regulated period is ‘for election purposes’ will be a new requirement, and if their assessment is found to be inaccurate (whether by us or by the courts) they may breach the rules unintentionally
  - even if the large majority of what they do is not regulated, they will only need to spend a few thousand pounds on regulated activity over the year to be drawn into the regulatory regime
  - if it is judged that one substantial activity, such as an event, is ‘for election purposes’, this could use up or exceed the relevant spending limit. It is not clear that the new spending limits have been based on any evidence of the costs that campaigners incur in carrying on the activities that are to be regulated. The new spending limits for the UKPGE are also inconsistent with existing limits for other elections in the UK<sup>5</sup>.
15. It has been suggested to us that these effects could be particularly significant in Scotland, Wales and Northern Ireland, where civil society has often had a prominent role in the development and discussion of new policy and legislation in recent years.
16. The regulatory burden created by the Bill is likely to be significant. The Impact Assessment states that the estimated cost of compliance with the Bill changes for registered campaigners will be in the range from zero to £800. This assumes among other things that campaigners will need two hours to become familiar with the new definition of regulated activity since it is “a relatively clear and simple requirement”, and that a day of additional information recording will suffice to deal with the new requirement. On the basis of our experience of the effort that campaigners need to make to comply with the current rules, and of our discussions with organisations that

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<sup>5</sup> For example: the spending limit for the four month regulated period for Scottish Parliament elections is £75,800 whereas the new limit on spending in Scotland for the twelve months before a UK general election will be £35,400.

may be affected by the new rules, we do not think these estimates are credible.

17. The Impact Assessment also estimates that the changes to registration thresholds will lead to between zero and 30 additional campaigners needing to register in 2015 compared to 2010. It is difficult to estimate the likely level of additional registration given the uncertainty around the scope of activity covered by the Bill, but again this appears likely to be a severe underestimate on the basis of our recent discussions with campaigners.
18. The uncertainty and burdens that the Bill will create for campaigners could be mitigated by recasting the Bill's definitions of what is covered, in a way that provides more clarity about Parliament's expectations of when each type of regulated activity should be seen as being 'for election purposes'. This will not be straightforward given the complexity of the issues, and would require careful testing with those potentially affected by the definitions.
19. It has been suggested to us in discussions on the Bill that where it is difficult to set precise rules to regulate activity, imprecise legislation can still have a 'dampening effect' and deter activity that might be caught by the rules. Such arguments are for Parliament to consider. However, in our view it is important that the law should be certain and predictable, particularly in the context of elections.

### **Discretion and the risk of challenge**

20. As noted above, the Bill's new definition of regulated activities is closely modelled on the equivalent definition for political parties. However, when the definition is applied to organisations with a wide range of objectives other than political campaigning it has to be read in that new context.
21. The new definition no longer includes some significant elements of the current definition of election material<sup>6</sup>. Instead, the Bill simply provides that spending on a relevant activity is controlled if it is incurred "for election purposes", which are defined as "*for the purpose of or in connection with*" promoting electoral success for a party or group of candidates.

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<sup>6</sup> The current definition states among other things that something is to be treated as election material if it is "*made available to the public*" and "*can reasonably be regarded as intended*" to promote electoral success, "*even though it can reasonably be regarded as intended to achieve any other purpose as well*"

22. The explanatory notes to the Bill state that this wording “does not rely solely on the intent of the third party; the **effect** of the expenditure must also be considered”, and that spending can be controlled “**regardless of whether those incurring the expenditure intended it for another purpose**”.
23. Our view, and the view of others with whom we have discussed the definition of “election purposes”, is that in the context of non-party campaigning it is capable of a very wide range of reasonable interpretations. It could be read narrowly, so that activity is only covered if it is quite clearly promoting a particular party or group of candidates. Or it could be read very widely, so that activity is covered if it relates to or discusses a policy that someone could see as being associated with a party or group of candidates, and even if the activity is not directed at the public. A wide reading could cover many types of activity that are not currently regulated.
24. It is part of our regulatory role to provide those who may be affected by the law with clear guidance on our view of what it means. We have done this for the current rules on election material, setting out a ‘purpose test’ and ‘publicity test’ that campaigners can use to determine whether we would regard their material as regulated. We also provide advice on specific cases on request.
25. As noted above, we will also produce guidance to try to help campaigners understand our interpretation of the scope of the new regime. However, we think that the breadth of the new definition means that there is a high risk of our interpretations being challenged, particularly in the early years of the new regime before case law develops. For instance, taking one of the examples outlined above, a march and rally on a policy issue:
- if we advise the organiser before the event takes place that we consider the event to meet the definition of ‘for election purposes’, that could effectively amount to prohibiting the event, depending on its cost and the amount of other regulated spending that the organiser has already incurred during the regulated period. The organiser might choose to mount a legal challenge on the basis that the event could reasonably be seen as not being for election purposes, or to proceed with the event with a view to challenging any regulatory action we might then seek to take
  - if we take the view that the event is not ‘for election purposes’, we might equally be challenged by others who believe that the event should be regulated

26. There is also scope for challenges to our interpretation of other aspects of the Bill that are new or will need to be read in a new context, such as the provisions on spending focused on particular constituencies.
27. We aim to take careful and reasonable decisions about our guidance on regulatory issues, and would not therefore expect most challenges to succeed. However, the prospect of a series of challenges to our decisions during an election campaign clearly adds to the uncertainty for campaigners discussed earlier in this submission, and may not improve public confidence in the effectiveness of the rules. Where a challenge on a key point remains unresolved during the intense final stage of an election campaign, this would cause severe and ongoing uncertainty for campaigners, and indeed for political parties.
28. In our view there is also an issue of principle here. The new definition has been framed in a way that leaves a great deal of scope for us to interpret the meaning of the legislation, subject to being over-ruled by the courts as the result of a challenge. This effectively gives the Electoral Commission a wide discretion in deciding what the new regime means in practice.
29. We are independent of Government and directly accountable to Parliament, and it is important that an independent body should be responsible for deciding when the rules on party and election finance have been broken, and how breaches should be dealt with. It follows that we have a role in advising those affected by the rules how we interpret the law, and how to comply. But we do not think it is appropriate for us to have the sort of wide discretion over the meaning and scope of the regulatory regime that the Bill as drafted appears to provide. Electoral law avoids giving a wide discretion to unelected officials, whether those who run elections or those who regulate campaigning, precisely because of the high risk of being drawn into political controversy and challenge.
30. There is a possible parallel here with the power that the Charities Act 2006 gave to the Charity Commission to define the concept of 'public benefit' in guidance. This is in some respects a politically contentious definition and the guidance has been the subject of debate and challenge over a number of years, despite substantial case law and precedent predating 2006. We think the present structure of the Bill has the potential to create problems in a similar vein, particularly since the legislation will be new and initially untested.

31. As with the issue of uncertainty for campaigners discussed earlier in this submission, these concerns could be addressed to some degree by specifying more clearly in the Bill the intended scope of the new definition of regulated activity.

### **Enforcing the rules**

32. The Bill's changes to the controls on non-party campaigning raise some significant practical issues about enforcement, and Parliament may wish to consider what impact it expects these changes to have in practice.
33. For example, where a campaign appears to be at risk of exceeding a spending limit if an activity is considered to be 'for election purposes', would Parliament expect us to intervene to stop that activity happening, for instance by telling an organisation to cancel an event (as in the illustration above) or take down a website? We already take some steps to monitor campaigning at major elections, and have powers to issue 'stop notices' in cases where we think that a potential breach could pose "a significant risk of seriously damaging public confidence in the effectiveness" of the PPERA controls. However, this test of "significant risk" is intentionally high for obvious reasons, and we expect that Parliament would want us to act only in cases where it is quite clear that this high test has been met. In practical terms, even with significant additional resources we would not be able to identify every case of potential non-compliance in advance.
34. At the other end of the scale, the wider scope of the new regime and the lower registration thresholds mean that campaigners could be in breach of the rules even if spending only a small amount each month on staff costs relating to policy or media work. We would expect to take a proportionate approach to minor breaches, but the resources needed to identify campaigners that may be affected, and help to bring them into compliance, will be substantial. Parliament may want to consider the balance between the benefits of bringing small-scale campaigners into the regime, and the associated burdens and costs. The balance could readily be adjusted by raising the proposed registration thresholds.
35. We see particular enforcement challenges in the new controls on spending targeted at particular constituencies. These rely on the concept of spending having 'no significant effect' in other constituencies. As with the definition of 'for election purposes', the concept of 'no significant effect' is capable of a wide range of reasonable interpretations in the context of non-party campaigning at constituency level, and our interpretation may be challenged

accordingly. Most non-party campaigners are not of course organised on a constituency basis. Obtaining the information necessary to identify potential cases of non-compliance at constituency level, and particularly the evidence needed to be able to sanction breaches, is likely to be so difficult that these provisions may be unenforceable in practice.

## **Other issues**

### Minimising regulatory burdens

36. As already noted, the scope of the new rules is likely to bring many more organisations into the regulatory regime. Organisations that expect to exceed the registration threshold will have to register with us, and will then have to record and report their spending (including spending by constituency and spending that supports a single party, which will have to be managed in conjunction with that party), check the permissibility of donations they receive towards regulated spending, and report such donations periodically before the election, rather than afterwards as at present.
37. The new requirement for weekly reporting after Parliament has been dissolved is likely to be particularly onerous and potentially impracticable for large organisations with branches or other complex structures. These new donation reporting rules are modelled on those that apply to political parties. Our recently published regulatory review included recommendations<sup>7</sup> to simplify the reporting rules for parties, and if these are adopted for the proposed new regime they would help to reduce the new burdens imposed on campaigners.
38. The Bill also requires organisations to submit a statement of accounts covering the regulated period with their post-poll spending return, unless other legislation already requires them to publish accounts of a certain standard (it seems likely that charities will benefit from this exemption, but that companies publishing abbreviated accounts may not). The new requirements appear onerous, in that the accounts will have to be produced within a few months of polling day and will cover a period of time that is not a standard accounting period. The Bill provides for us to mandate common standards for these accounts, but we do not expect to be able to do this in time for 2015, given the timing of the Bill and the diverse organisations that will be affected by the new requirements.

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<sup>7</sup> Paragraphs 3.9 – 3.20.

### The Commission's regulatory remit

39. The Bill includes a change to the Commission's regulatory remit. The Commission's Board and Accounting Officer were not consulted on the change, and we are concerned that it has been brought forward without consultation and with no clear rationale. We are particularly concerned that the introduction of a "duty ... to take all reasonable steps" to ensure compliance will increase the risk of challenge to any of our regulatory decisions, including those involving political parties. This in turn will affect our ability to deal promptly with spurious or politically motivated unfounded allegations.

### The Commission's resources

40. The Impact Assessment published by the Government acknowledges that the Electoral Commission is likely to need additional resources in order to regulate the new rules. We think its resource estimates are significantly understated, and will discuss this with the Speaker's Committee on the Electoral Commission which is responsible for our funding.