

IN THE MATTER OF
PART II OF THE TRANSPARENCY OF LOBBYING, NON-PARTY CAMPAIGNING AND TRADE UNION
ADMINISTRATION BILL
AND
THE VOLUNTARY SECTOR

OPINION

INTRODUCTION & SUMMARY

1. I am asked to advise the National Council for Voluntary Organisations (NCVO) as to the impact of Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill ('the Bill') on the work of charities and voluntary sector organisations (VSOs). NCVO is an umbrella organisation which champions and strengthens the voluntary sector. It has over 10,000 members, ranging from the largest charities to the smallest community organisations.
2. The Bill was introduced on 17 July 2013, the last day before the parliamentary recess. The Second Reading and Committee Stage are timetabled for immediately after the recess, from 1-3 September 2013. That means that there has been very little pre-legislative scrutiny of the bill.
3. There is widespread concern in the third sector that Part II of the Bill will have a significant adverse impact on the ability of charities and VSOs to participate in debates on matters of public interest, over extensive periods of time, because of the strictness, complexity and lack of legal certainty as to the extent of the proposed legal controls on what non-party campaigners can say or spend during a (very long and sometimes uncertain) 'regulated period' before an election. They are concerned that the impact of the Bill may be to have a huge impact on their day to day work and ability to speak up on issues of concern.
4. I understand the Cabinet Office has indicated that it does not intend that campaigning by charities or VSOs would be caught by this legislation. However, the view of the Electoral

Commission, the majority of charities, and my instructing solicitors (who are specialists in this field), is that many charities and VSOs do fall within the definition of a 'third party' for the purposes of election law, and will be caught by the provisions of the Bill.

5. In my view, for reasons which I set out below, NCVO is right in its perception that the provisions in Part II of the Bill are likely to affect the activities of many of their members, and to impose substantial new regulatory hurdles in relation to what they can say and restrictions on their ability to comment on matters of public interest for very substantial periods of time. The lack of clarity as to the extent of the controls, coupled with the criminal sanctions for non-compliance with them, mean that the provisions of Part II of the Bill are likely to have a chilling effect on the expression of views on matters of public interest by third sector organisations.
6. The application of Article 10 of the European Convention on Human Rights (ECHR) to speech during an election is a difficult area, and is made no more certain by the recent decision of the Grand Chamber in *Animal Defenders International v United Kingdom* App 488776/08, 22 April 2013. In my view, there is a good argument that the provisions of the Political Parties, Elections and Referendums Act 2000 (PPERA) as amended by the Part II of the Bill in its present form would go so wide and be so uncertain as to the extent of their restrictions on political/policy expression, over so long and so uncertain a period, as to be more than is 'necessary in a democratic society' and so to violate the provisions of Article 10.

THE EXISTING POSITION: CHARITY LAW

7. Some but not all members of NCVO are charities. It is of course inherent in the definition of a charity (now set out in the Charities Act 2006) that the organisation must be established for charitable purposes only, and be for the benefit of the whole or a section of the public.
8. An organisation will not be charitable if its purposes are political (in the sense of advocating a particular party or change in the law). However, as the Charity Commission guidance CC9 explains, provided it guards its independence from political parties, a charity can undertake political campaigning or political activity in the context of supporting delivery of its charitable purposes. This can include campaigns for changes to law or policy where such change would support the charity's purposes. Although such campaigning cannot be the

continuing and sole activity of the charity, it can be the only or main activity for a period of time, provided it always remains in pursuit of the charitable purposes.

THE EXISTING POSITION: ELECTION LAW

9. There are already controls in election law on what a 'third party' can spend during an election period on certain items of 'controlled expenditure'. Most political expenditure is governed by Part VI PPERA, as amended on a number of occasions, most recently by the Political Parties and Elections Act 2009 ('the 2009 Act'). The amendments introduced by the 2009 Act took effect with effect from 1 December 2010, and therefore have not yet been applied to expenditure at a general election.
10. It is this system of control which it intended be amended and expanded by Part II of the Bill. In order to contextualise the extent and impact of the proposed changes, the existing law is to set out below in some detail.

Local systems of control

11. Before considering PPERA, it should be noted that separate controls - derived from nineteenth century election law - apply to constituency-based expenditure, and these are contained in s75 of the Representation of the People Act 1983 ("the RPA") (as also frequently amended). The RPA restrictions relate to expenditure on campaigning for or against a candidate in a constituency. They are not intended to overlap with limits on national expenditure (see s8(1)(b)(ii) PPERA), and are not considered further in this opinion.

Controls on issue-based national campaigning during an election period

12. Expenditure on issue-based national political campaigning is regulated by Part VI of PPERA. This part of PPERA governs "controlled expenditure" by a "third party" on "election material" during a "relevant period". These controls apply in addition to the controls which apply to expenditure of or donations to a registered political party or its candidates.

Definition of a third party

13. A "third party" is defined in s85(8) PPERA as any person or body other than a registered party which undertakes "controlled expenditure", but not in connection with the party itself or its own candidates.

14. There are legal restrictions on the types of individuals or organisations which may register with the Electoral Commission as a third party, set out in s88(2) PPERA. Many charities and VSOs fall within the category of bodies eligible to register as a 'recognised third party'. In essence, these are UK based legal entities, including UK-based registered electors, companies, LLPs, friendly industrial provident or building societies or unincorporated associations.
15. Non-UK based persons or bodies are not eligible to register as recognised third parties. A person or body not eligible to register as a recognised third party, or a person or body who has not in fact so registered is not permitted to spend more than £10,000 in England, or £5000 in Scotland, Wales or Northern Ireland on 'controlled expenditure' during a regulated period and commits an offence if it does so (see s94(3)-(5) PPERA).

Controlled expenditure

16. "Controlled expenditure" by a third party means expenses incurred by or on behalf of the third party in connection with the production or publication of election material made available to the public at large or any section of the public (in whatever form and by whatever means) during a "relevant period" (sections 85(2) and 87 PPERA).
17. "Controlled expenditure" excludes expenditure on those matters set out in s87 PPERA (principally, so far as is material, publications which are not advertisements in newspapers) but includes "notional controlled expenditure" as defined in s86 PPERA. The effect of s86 PPERA is that benefits or services in kind provided for free or at an undervalue are included at their full market value.

Election material

18. Section 85(3) PPERA defines election material as:

"material which can reasonably be regarded as intended to

- (a) promote or procure electoral success at any relevant election for -
 - (i) one or more particular registered parties,
 - (ii) one or more registered parties who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of such parties or
 - (iii) candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of candidates, or
- (b) otherwise enhance the standing
 - (i) of any such party or parties, or
 - (ii) of any such candidates

with the electorate in connection with future relevant elections (whether imminent or otherwise);
and any such material is election material even though it can reasonably be regarded as intended to achieve any other purpose as well."

Section 85(4) further defines what this means, including that promoting the prospects of one party or candidate can include prejudicing the prospects of others by prejudicing their standing with the electorate. It also states that it is immaterial that election material does not expressly mention the name of any party or candidate.

19. The following are significant matters to note about this definition:

- (a) It applies to all material which can 'reasonably be regarded as intended to' promote or prejudice a particular party's prospects at an election - subjective actual intention is not the only aspect of the definition;
- (b) it applies even to material which can reasonably be regarded as intended to achieve any other purpose as well;
- (c) It applies to material which can reasonably be regarded as intended to affect the electoral prospects of candidates by reference to whether or not they advocate particular policy positions, not just by reference to their membership of a particular party or parties;
- (d) It applies even to material which does not expressly mention the name of any party or candidate.

"Relevant periods"

20. Limits are imposed on controlled expenditure incurred by or on behalf of recognised third parties in England, Scotland, Wales or Northern Ireland during the "relevant periods" specified in Schedule 10 PPERA (s94(1) PPERA).

21. The definition of 'relevant period' is not straightforward, and it may not always be possible to predict whether a 'relevant period' has started in advance, before it has begun.

22. So far as general elections are concerned, the relevant periods are specified by paragraph 3 of Schedule 10 PPERA¹. Thus the "relevant period" of limitation is 365 days ending with the date of the poll for the relevant election, unless the election in question follows another parliamentary general election held less than 365 days previously, in which case the

¹ The relevant period is defined in relation to other elections by Part II of Schedule 10 PPERA.

"relevant period" is the period starting on the day after the date of poll for the earlier election and ending with the date of poll for the election in question.

23. Given that the current law is that parliaments should be of a fixed term, a third party might be thought to know when a poll would be. However, that is not always the case. A poll might be held earlier if a government broke down. (For example, a second parliamentary general election could only be held within 365 days of a previous one if a government had broken down). However, a third party body could not know that this would happen in advance. Consequently, it could never say for certain that expenditure would not fall within a "relevant period" until the end of that period. That means that all expenditure on 'speech activity' could potentially fall within a relevant period.
24. During the relevant period, the usual limit of controlled expenditure which a recognised third party can incur is £793,000 in relation to England, £108,000 in relation to Scotland; £60,000 in relation to Wales and £27,000 in relation to Northern Ireland (para 3 Schedule 10 PPERA)².
25. However, special limits apply if another election or elections (such as European Parliamentary elections, or elections to the devolved legislatures) is/are held during the period when a parliamentary general election is "pending". A parliamentary election is pending during the period beginning with the date on which Parliament is dissolved by section 3(1) of the Fixed-term Parliaments Act 2011 and ending with the date of the poll for that election. In cases of such combined elections, the "limits applying in special circumstances" specified in Part III of Schedule 10 PPERA apply. (These "combination provisions" are very complicated, and vary depending upon the combination of elections

² In UK-wide campaigning, third parties are required to divide expenditure which relates equally to all parts of the UK fairly as between the different nations of the UK. For example, there are 650 Parliamentary seats in the UK, 533 of which are in England; 59 in Scotland; 40 in Wales and 18 in Northern Ireland. If £130,000 was spent on campaigning at an election, this would amount to £200 per constituency, and would need to be attributed

£106,600 to England (£200 x 533)

£11,800 to Scotland (£200 x 59)

£8,000 to Wales (£200 x 40) and

£3,600 to Northern Ireland (£200 x 18)

which occurs, and the relevant dates of each. Advice on the applicable limits in relation to any particular election or combination of elections would need to be sought in relation to any particular combination which could occur).

Requirement to register with the Electoral Commission

26. Any third party which plans to spend more than £10,000 in England or £5,000 (each) on election materials in any of Scotland, Wales or Northern Ireland during the regulated period for a relevant election is required to notify the Electoral Commission in a form which complies with s88(3) PPERA (see s88(1) PPERA). It must renotify the Commission of its continued registration no more than 15 months thereafter to maintain the registration (s88(4) PPERA). It is perhaps important to note that such a third party does *not* have to tell the Electoral Commission where it will campaign or the subject matter of the campaign.
27. As noted above, any third party which spends more than these sums without registering as a recognised third party with the Electoral Commission will commit an offence under s94(5) PPERA. (If the third party is not an individual, then any person who authorised the expenditure to be incurred by or on behalf of the third party is also guilty of an offence if he knew or ought reasonably to have known that the expenditure would be incurred in excess of that limit).

Election returns

28. After a regulated election, each recognised third party must submit a spending return to the Electoral Commission, which reviews the returns and makes a summary of third party expenditure available on a "Register of Third Party Spending". Thus, at least a summary of such expenditure will be open to public scrutiny after the election. A recognised third party's return must be made within three months of the election for spending of up to £250,000 and within six months of the election for spending over £250,000 (s96 and 98 PPERA). Returns of spending over £250,000 must be audited by an independent auditor (s97 PPERA) and accompanied by a declaration by a responsible person that the return is complete and correct to the best of his or her knowledge information and belief.
29. A person commits an offence if he knowingly or recklessly makes a false return under s99 PPERA or the return does not comply with s99(1) at a time when he is the responsible person in the case of a recognised third party to which the return relates.

Permitted donors

30. There are also limits on the types of donations which a recognised third party can accept for its controlled spending, set out in section 95 and Schedule 11 PPERA. These rules are in material respects identical to those for registered political parties. Unlike in relation to political parties, however, loans to registered third parties are not regulated.
31. As well as setting out the total amount of expenditure by a registered third party, the returns which the responsible person must make under s96 PPERA must also state that all relevant donations recorded in the return as having been accepted by the third party are from permissible donors and that no other relevant donations have been accepted by the third party in respect of the relevant election or elections which took place during the regulated period (s99(3) PPERA).
32. Offences under PPERA may be the subject of criminal charges. By virtue of Schedule 19C PPERA³, the Electoral Commission may also impose civil penalties in the form of fines in relation to such offences.
33. It is this system of control which is to be re-amended by Part II of the Bill.

THE EFFECT OF PART II OF THE BILL

Overview

34. The object of Part II of the Bill is to tighten and expand the extent of controls on expenditure by third parties during the 'relevant period' before an election.
35. The definition of 'third party' contained in s85(8) PPERA is not amended by the Bill. Thus, any body, including a charity or VSO, which fell within that definition before the Bill will continue to do so if the Bill comes into force.
36. However, it is proposed that (i) the circumstances in which a third party will have to apply for 'recognition' and to register its expenditure on persuasive material with the Electoral Commission; (ii) the nature of activity in relation to which such registration of expenditure can be required and (iii) the extent of the reporting requirements under PPERA will all be

³ inserted by s3(2) and Schedule 2 of the Political Parties and Elections Act 2009 and the Political Parties, Elections and Referendums (Civil Sanctions) Order 2010 (SI 2010/2860) made under it

extensively expanded by the Bill, whereas the expenditure limits below which the requirement to register with the Commission as a 'recognised third party' and make returns will be markedly reduced.

Expanded definition of "controlled expenditure"

37. Firstly, it is proposed that the - already broad - definition of 'controlled expenditure' on election materials (currently set out in s85(2)-(4) PPERA) be substantially expanded.
38. The expansion affects both the range of activities covered, and the purposes in relation to which expenditure is controlled. Instead of the present definition of 'controlled expenditure' in s85(2) PPERA (discussed in paragraphs 16-19 above), it is now proposed that controlled expenditure include any expenditure which
 - (a) falls within Part 1 of a proposed new Schedule 8A PPERA and
 - (b) is incurred for "election purposes" as defined by the Bill.

Expansion in activities in relation to which expenditure 'qualifies' as election expenditure

39. The proposed terms of Schedule 8A PPERA are set out in Schedule 3 to the Bill. It is intended that the range of speech/policy activities in relation to which expenditure may now potentially be controlled be significantly expanded, by reference to a list of matters to be set out in Part 1 of Schedule 8A, in relation to which all expenses (direct and indirect) are 'expenses qualifying for election purposes'.
40. In relation to any such activities, matters amounting to 'expenditure' are extensively and expansively defined. All expenses including staff costs and costs of production are 'qualifying', and since one cannot be sure in advance when a 'relevant period' under Schedule 10 PPERA runs from, this is likely to mean that any staff time associated with any of the activities set out in Part 1 of Schedule 8A PPERA will have to be apportioned and accounted for. Moreover, since donations in kind must be included, it is possible that even expenditure of volunteer time on such matters would have to be quantified and included.
41. If the Bill is passed in its present form, the list of activities in relation to which expenditure is controlled would no longer be limited, as in the present s85(2) PPERA, to "election material made available to the public or a section of the public". Instead, expenditure would be 'controlled' in relation to the very extensive list of matters set out in part 1 of proposed

Schedule 8A PPERA ('expenses qualifying for election purposes') if the expenditure was also incurred during a relevant period for 'election purposes'.

42. In summary, the list of matters where associated expenses in cash or time 'qualify' would include
- advertising *of any nature* (whatever the medium used) and include all expenses in respect of such advertising and disseminating of it, including "anything incorporating such advertising and intended to be distributed for the purpose of disseminating it";
 - unsolicited material addressed to electors (whether or not by name);
 - any manifesto or other document setting out the policies (or the third party's view on the policies) of one or more registered parties or any category of registered parties or candidates;
 - market research or canvassing conducted for the purpose of ascertaining polling intentions;
 - the provision of any services or facilities in connection with press conferences or other dealings with the media;
 - transport (by any means) of people with a view to obtaining publicity in connection with an election campaign;
 - rallies and other events including public meetings organised so as to obtain publicity or for other purposes connected with an election campaign.
43. In summary, almost any expenditure in cash or time on speech or advocacy material is *capable* of 'qualifying' as expenditure for election purposes, subject to two exceptions, the ambit of which is unclear.
44. Paragraph 2 Schedule 8A contains the two exclusions from matters capable of falling with the definition of controlled expenditure. First, by virtue of para 2(1)(a) and 2(2), newsletters or similar publications are excluded if they are issued by or on behalf of the third party with a view to giving electors information about the opinions or activities of, or other personal information relating to, their elected representatives or other existing or prospective candidates (except in relation to Members of the European Parliament or existing or prospective candidates for such an election within the four months leading up to the election to the European Parliament).

45. However, the scope of this exception is uncertain. It is difficult to see when a document would amount to a 'newsletter' giving 'information', and when it would amount to 'advertising of any nature' or a 'manifesto setting out the policies of parties or candidates'.
46. Expenditure on unsolicited material that is about the third party's activities or objectives and addressed to its relevant supporters is also excluded from potentially relevant expenditure (para 2(1)(b)). "Relevant supporters" are defined as donors by standing order or direct debit, subscribers, or active participants (para 2(3)).

What is to be meant by 'for election purposes'

47. The second proposed expansion of matters in relation to which expenditure is controlled by the Electoral Commission is in a broad definition of what is meant by "election purposes". Under PPERA as it presently stands, expenditure is only "controlled" in relation to "election material". In the existing definition in s85(3)-(4) PPERA "election material" (see paras 18 & 19 above), this is defined (in summary) as *material which could reasonably be regarded as having the intention of affecting the prospects of success of a party or parties or candidate or candidates (or those who advocate or do not advocate particular policies) during an election campaign.*
48. "For election purposes" is to be defined as meaning *for the purpose of or in connection with affecting the prospects of parties or candidates (which continue to be defined as in the present section 85(3))* (see clause 26(3) of the Bill). It is an oddity that the amendments to PPERA proposed by the Bill also include a new definition of an 'election campaign' by a third party to be included as s85(2A) PPERA, defined as meaning 'a campaign conducted for election purposes'. However the system of control of expenditure is not by reference to expenditure on a 'campaign' but expenditure for 'election purposes'.
49. The proposed definition of that which is 'for election purposes' appears to be broader than the previous definition of election material by reference to apparent intention: something which is 'in connection with' affecting (the prospects of candidates at an election) is at least arguably wider than that which is 'reasonably regarded as intended' to do so.
50. For example, a charity which continues to advocate a particular long-standing policy at election time may not be 'reasonably regarded as intending' to promote the prospects of a

party or candidates who also advocate that policy. Nonetheless, if the charity issues materials which advocate that policy during the relevant period (the existence of which may not be known until it has begun), that could reasonably be regarded as something done 'in connection with' affecting the prospects of a party or candidate which also advocates that policy during the election campaign.

51. However, it is not clear that 'in connection with' (affecting prospects at an election) is broader than 'that which is reasonably regarded as intended' (to have that effect). The real vice of the new definition is the lack of clarity, and the consequent lack of certainty as to when expenditure (of time and/or money) ought to have been included as 'for electoral purposes', and consequently quantified and accounted for to the Electoral Commission, on pain of criminal penalty.
52. It is proposed by clause 26(6) of the Bill that it would thereafter be a defence for a person charged with an offence of incurring unauthorised controlled expenditure under s85(2) PPERA as amended to show that he had complied with any code of practice issued by the Electoral Commission under paragraph 3 of Schedule 8A of PPERA, but no draft Code has been published in connection with the Bill.

Reduction in "controlled expenditure" limits before registration required

53. Whilst the matters falling within the definition of 'controlled expenditure' have been expanded, the financial limits above which a third party campaigner must register with the Electoral Commission, and the amounts which an organisation or consortium of organisations can spend have been substantially reduced.
54. At present, third parties have to register as a 'recognised third party' if they propose to spend above £10,000 in England, or £5,000 in all or any of Scotland, Wales or Northern Ireland in the relevant period before a general election. Under the terms of clause 27(1) of the Bill, it will be an offence for a body not registered as a recognised third party to spend more than £5,000 in England, or £2,000 in Scotland, Wales and Northern Ireland without registering, and an offence for any third party to fail to make a return in relation to any such expenditure.

55. The Bill also proposes to limit the overall amount a non-party can spend on election material in the regulated period (which continues to be defined in Schedule 10 PPERA). For a general election campaign, the limit is reduced from £988,500 across the United Kingdom to £390,000. Clause 28 of the Bill proposes that constituency limits on expenditure also be introduced (in addition to those in s75ff RPA) though however it is divided, all election campaign expenditure must fall within the £390,000.

56. Clause 29 of the Bill contains provisions limiting controlled expenditure targeted at a particular registered political party by non-party campaigners. (This focuses on expenditure intended to benefit a particular party or any of its candidates and not intended to benefit any other registered party or any of its candidates, and will not affect charities which are, by definition, non-party political).

Increased regulatory burden for registered 'recognised third parties'.

57. Finally, clauses 31 and 33 and Schedule 4 of the Bill propose significantly increased regulation of the requirements for reporting by recognised third parties, including reporting of "reportable donations" (as defined in Schedule 11 PPERA and as proposed to be defined in proposed s95A(5) PPERA).

58. These include quarterly reports of donations above a certain size to recognised third parties in relation to controlled expenditure, and more frequent weekly reports during regulated periods (which are - as noted above - very long, uncertain in ambit, and can be up to a year in duration).

59. The reporting requirements are onerous, and include statements of the nature and value of gifts in kind. It is arguable that a substantial gift of time by a volunteer in relation to a qualifying activity under Part 1 of Schedule 8A PPERA would amount to a 'reportable donation', and therefore fall to be quantified and reported. Sanctions for non-compliance with reporting requirements can be criminal penalties, civil liability imposed by the Electoral Commission or forfeiture of an amount equal to the value of a relevant donation.

ISSUES

Whether the Bill will affect charities and voluntary organisations

60. In my view, it is beyond doubt that PPERA does - and the amendments proposed by Part II of the Bill will - affect charitable and voluntary organisations' ability to undertake political/policy lobbying and campaigning.
61. Nothing in the Bill amends the definition of an eligible 'third party', and many charities and VSOs will fall within that definition. Much of the activity which charities and VSOs undertake is, by its nature, policy-orientated and therefore 'political' in the widest sense. In my view, many materials produced by charities and VSOs compatibly with the guidance in the Charity Commission Guidance CCR9 are capable of falling within the definition of 'election materials' (in s85(3) PPERA as it stands), or of being for an 'election purpose' (in s85 (2A) and s85(3) PPERA as prospectively amended by clause 26 of the Bill).
62. For example, an anti-poverty charity which advocates continuing to spend a particular proportion of GDP on overseas aid and publishes material saying so during the relevant period could 'reasonably be regarded' as intending to promote or procure electoral success for a party or parties or candidates who advocate the same in connection with future elections, even though such material could reasonably be regarded as also intended to achieve another purpose such as maintaining a high level of public expenditure on poverty reduction abroad. Thus, expenditure on materials of this kind during the year before a general election could well fall within the definition of 'election materials' in PPERA as it stands.
63. Production of such material is at least as likely to be treated as 'for the purposes of *or in connection with*' promoting or procuring the success of candidates who share the charity's stance on that policy position. Thus expenditure on the wide spectrum of activities in prospective Schedule 8A to PPERA is highly likely to fall within s85 PPERA as amended too.
64. The proposed definition of electoral purposes is so broad that many activities which a charity or VSO might be minded to undertake in any event could fall within it if they also fall within the ambit of proposed Schedule 8A PPERA, if undertaken for 'election purposes'.

65. The ambit of the definition of 'electoral purposes' is uncertain. The important issue is that the purpose of a publication or activity does not need to be the sole, or even the primary purpose of the publication/activity in order for it to be 'an election purpose'; and if anything, this is emphasised by the words 'in connection with' in clause 26 of the Bill.
66. Since the expenditure limits for compulsory registration with the Electoral Commission as a 'recognised third party' are so radically reduced, a significantly greater number of persons and organisations will now fall within the requirement to register.
67. It is likely that a large charity or coalition of charities could very easily bring itself within the extensive reporting regime for recognised third parties by even one 'policy drive' activity (eg organising a rally, or one big poster campaign) which could later prove to count as controlled expenditure. The effect of Part II of the Bill is therefore likely to be to impose extensive and expensive audit and recording requirements on VSOs in relation to a wide range of activities.
68. Further, since the 'recognised period' as defined in Schedule 10 PPERA remains a complex and uncertain one, the complex reporting requirements, together with criminal penalties for inadequate compliance are likely to deter many charities and VSOs from participating in policy advocacy work which might arguably amount to 'controlled expenditure' during the 'recognised period'.
69. Moreover, the bureaucratic burden of apportioning and accounting for expenditure and time in relation to a wide range of activities is likely to be vastly expanded by the Bill's proposals, and this will therefore limit the range of activity which charities and VSOs can undertake because the regulatory costs of participation will be so significantly increased.

Examples

70. There are a number of easily-envisaged examples of activities which charities or VSOs might ordinarily undertake, where the new law might lead to uncertainty as to whether they can lawfully be undertaken without accounting to the Electoral Commission for expenditure of money or staff time on publications or activities. That is because these normal activities could well fall within the definition of "expenses qualifying" as controlled expenditure, and (under the broadened definition of 'election purposes') might well be regarded as being incurred for election purposes during the relevant period before an election.

Example 1: fundraising or advice material echoing the policy suggestions of a health charity.

71. For example, a health charity might publish fundraising or advice leaflet which echoes policy suggestions on the dangers of smoking. If smoking legislation became a party political issue in an election campaign, then (depending on its wording) the material could amount to 'advertising' or 'unsolicited material addressed to electors' within proposed paras 1(1) or 1(3) of Schedule 8A PPERA.
72. The publication of fundraising/advice material on its own would probably not fall within the definition of advertising. But it might be regarded as advertising if the leaflet in fact calls for or states that the charity calls for stricter smoking legislation.
73. In most circumstances, it is hard to see how a leaflet of this kind could be treated as being produced 'in connection with election purposes'. However, the landscape might change if (for example) the charity knew that restrictions on tobacco packaging might be a contested election issue, or made statements in the fundraising/advice material advocating such restrictions. Material advocating a change in the law to require cigarettes to be sold in plain packaging clearly could be regarded as advertising, and could be a matter "in connection with" promoting support for candidates or parties who shared that policy goal.
74. The issue would be the overlap between 'election purposes' and other purposes. Whilst production of fundraising/health advice leaflets in themselves would probably not amount to qualifying expenses, they might fall within the list of relevant matters if they were enclosed with the advocacy material (potentially amounting to "advertising of any nature", within Schedule 8A para 1(1)). Or, if copies were delivered to households within a year of an election - perhaps as inserts in a health or local magazine - and included reference to the desirability of plain packaging, they might be treated as 'unsolicited material addressed to electors' - the leaflet might fall within Schedule 8A para 1(2) as 'unsolicited material addressed to electors ... intended for delivery to households ...'.
75. It would not be clear whether expenditure of time or money on such leaflets would qualify as 'controlled expenditure', and the charity would not be sure when the 'relevant period' for accounting for controlled expenditure might potentially start, since it could not be sure when the election would be called.

76. In such circumstances, the charity might be uncertain as to whether the leaflet costs would fall within the definition of 'controlled expenses'. The combined cost of leaflets and campaign material, including costs in connection with preparing, producing and designing them, could very quickly approach the £5,000 limit - especially in combination with other activities which the charity might legitimately undertake, for example in relation to canvassing people on their views on plain packaging for cigarettes (Schedule 8A para 1(4)).
77. The charity might therefore be deterred from making its views on packaging known, for fear of triggering an obligation to register as a recognised third party with the Electoral Commission, with the consequent complex and bureaucratic requirements for apportioning and accounting for the costs (eg of staff time) in preparing the leaflets, and for fear of criminal sanctions if it made a mistake in connection with these requirements.
78. The consequence could be to stifle comment on a matter of legitimate public concern, for an extended period of time.

Example 2: Publication of a charity's 'manifesto for the next government' on its website

79. Expenditure on production and publication of such a manifesto could be regarded as advertising with paragraph 1(1) of schedule 8A. . However, unless the charity's manifesto explicitly compared its views with those of parties or candidates, it would not be a manifesto setting out the policies of parties or candidates or the third party's views on them, and so would not fall within paragraph 1(3). Since this would be a national document it would not fall within the exception in paragraph 2(1)(a) of Schedule 8A.
80. If this document did fall within para 1(3) of Schedule 8A, it could in my view be regarded as being 'in connection with election purposes', since the aim of such a document (particularly if called 'a manifesto') would be to encourage electors to compare the charity's views with those of parties and candidates and vote for those whose views were most closely aligned with that of the charity. However, there is also an argument that the charity is simply setting out the policies that it would advocate for *any* future government, which would be a legitimate part of its campaign/policy work.

81. This is another finely balanced example, where it is possible to see that uncertainty as to whether expenses incurred would fall within PPERA as amended by Part II of the Bill might have a chilling effect on the charity's campaigning activity.

Example 3: Publicly acknowledging on a charity's website when a political party has adopted a policy and urging others to follow suit.

82. This could be regarded as advertising with para 1(1) Schedule 8A. This is another area where it is unclear whether this would be regarded as being 'in connection with election purposes'. It could be argued that it is actually to influence the policies of parties/candidates ("all come within our camp") rather than promoting the prospects of those already inside it. But this is another area where the law would be unclear.

Example 4: Organising a public meeting or demonstration in support of a policy which one or more parties has adopted

83. Rallies and events of this kind would not fall within PPERA as it stands, as a meeting cannot be regarded as 'material'. However, if the law were amended by Part II PPERA, then expenditure of time or money on such an event would be capable of falling within paragraph 1(7) of Schedule 8A PPERA. It would depend upon whether it fell within the 'relevant period' (which cannot be anticipated in advance since the organiser could not be sure whether a general election would be held within a year). It would also depend upon whether the event was organised for purposes connected with an election campaign (to be defined in new s85(2A) as "a campaign conducted by the third party for election purposes").

84. There would therefore be a difficult issue as to whether the meeting or demonstration was held in support of the policy generally, or in support of the party which had adopted the policy in question. However, it would not matter if the event was not expressly described as supporting the policy of a particular party, or the particular party, since clause 85(4) as amended will provide that

"a course of conduct may constitute to doing of one of the [things specified in s85(3) - ie promoting/procuring success for, or enhancing standing of, a party or candidate] even though it does not involve any express mention being made of the name of any party or candidate".

Nor would it matter if the meeting or demonstration was held at a time when it was anticipated that it would be a considerable time before an election was actually held if (as it

turned out) an election was held within a year of the meeting, since s85(3) applies whether or not an election is imminent. It might turn out, for example, that a big charity could spend a sum which could use up all its 'controlled expenditure' on an event or events of this kind, because it did not anticipate that an election was imminent, but then it was called, and expenditure on the event would be treated as qualifying for 'controlled expenditure'. The reporting requirements to the Electoral Commission would mean that the costs of any such activity would be significantly increased by the need to audit and account for all expenditure, in cash, kind and donation (including of time), in case an election was called it subsequently proved to be part of a 'relevant period' for the purposes of controlled expenditure.

85. In short, in many cases, it is not possible to say without reviewing the context and content of materials whether expenditure on them could be 'qualifying expenses' as defined in Schedule 8A of PPERA. It would depend how broadly "electoral purposes" was interpreted in practice, the precise wording of particular documents and a precise chronology of events.

Article 10 and freedom of expression

86. I have been asked to consider whether PPERA as amended by Part II of the Bill could be considered to violate the right to freedom of expression under Article 10 ECHR. In my view, there is a strong argument that it could.

87. The Convention has particular resonance in the context of interpreting legislation designed to ensure the integrity of the democratic electoral system, because the governments signing the ECHR did so in the wake of the assaults on democracy which preceded the Second World War. The governments signatory acceded to the Convention

“... Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend ...”
(Preamble to the ECHR).

88. Rights under Article 3 Protocol 1, to 'free elections ... under conditions which will ensure the free expression of the people in the choice of the legislature' are therefore foundational, and ascribed a particular importance: those rights are seen as guarantees of respect for pluralism of opinion in a democratic society: *Zdanoka v Latvia* (2007) 45 EHRR 17 (Grand Chamber) at [115].

89. The rights protected under Article 10 (to '... receive and impart information and ideas') have a similar foundational quality. Article 10(1) provides that:

"Everyone has the right to freedom of expression. This *right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority* and regardless of frontiers ..." (emphasis added).

90. However, Article 10 is qualified. Article 10(2) expressly states that the exercise of Article 10 rights

'carries with it duties and responsibilities' and

'may be subject to such ... restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...'.

91. Political expression is particularly closely protected by the ECtHR, and particularly in the context of elections. For example, in *Bowman v UK* (1998) 26 EHRR 1, an anti-abortion activist wanted to inform electors of the opinions of individual candidates standing for election with regard to abortion (since this was an issue on which the parties allowed a free vote, and this enabled voters to influence the law on abortion by their choice of candidate). Ms Bowman arranged to have leaflets printed and distributed throughout the UK in the run-up to the 1992 general election. She was then tried under section 75 Representation of the People Act 1983 (as it then stood), for spending more than £5 in the run-up to the election conveying information to electors with a view to promoting or procuring the election of the candidate. The European Court of Human Rights (ECtHR) held that Ms Bowman's rights under Article 10 had been disproportionately restricted. Although the limitation did not directly restrain freedom of expression, but only limited the amount of money which unauthorised persons could spend on publications and communication during the short election period, and although it served a legitimate aim of securing equality between candidates, this amounted to a disproportionate infringement of her right to freedom of expression under Article 10 in the light of the right to free elections. The ECtHR concluded that Ms Bowman had no other means open to her to serve her purpose of informing the public upon the candidates' attitudes to abortion other than publishing and restricting leaflets.

92. It should be noted that in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 [A38], the House of Lords determined that the blanket

ban on political advertising on television and radio under the Communications Act 2003, s.321(2), did not contravene Article 10 ECHR, and that the majority of the Grand Chamber of the ECtHR agreed (notwithstanding a later ruling to the effect that an absolute prohibition on political advertising is a contravention of Article 10).⁴

93. Part of the rationale for the *Animal Defenders* decision was the extent of Parliamentary scrutiny of the need for the blanket ban. At para.33 of *Animal Defenders*, Lord Bingham observed that “it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so”. The European Court of Human Rights agreed, not least because Parliament had decided that more nuanced tests of what would amount to 'political advertising' would be too difficult to apply with sufficient certainty.

94. The limits on expenditure have, of course, now been increased in PPERA (and it is likely that the exceptions in Part 2 of proposed Schedule 8A are intended to meet the *Bowman* situation). However, the range and lack of clarity in relation to the activities in relation to which expenses may 'qualify' for control; the lack of clarity in relation to the 'relevant period' over which expenditure must be accounted; and the substantial increase in the range of bodies required to register as recognised third parties (by reduction of registration limits) and increase in reporting requirements on such bodies impose onerous restrictions on freedom of expression. That is particularly so when breach of these requirements is subject to criminal penalty and/or forfeiture of assets.

95. There are two reasons, therefore, why in my view PPERA as amended by Part II of the Bill may fall foul of Article 10 ECHR.

96. The first is that the restriction on freedom of expression must be 'prescribed by law', but - for the reasons I have set out above - I consider the proposed framework lacks sufficient clarity to give it the 'quality of law'. For Convention purposes 'law' must have the necessary qualities of accessibility and foreseeability to enable those affected to regulate their conduct by reference to it (see eg *Sunday Times v UK* (1979) 2 EHRR 245 at [49]:

"Firstly, the law must be adequately accessible: the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a

⁴ [TV Vest As & Rogaland Pensjonistparti v. Norway](#) (2009) 48 EHRR 51.

given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct".

97. Given the lack of clarity about what is meant by 'for political purposes', and the as to the length of the 'relevant period', it is not possible to say with sufficient certainty what steps must be taken in relation to recording and reporting expenditure associated with particular activity in advance, so as to enable organisations to avoid criminal penalty.
98. This uncertainty about what the law requires is likely to have a chilling effect on freedom of expression, by putting small organisations and their trustees/directors in fear of criminal penalty if they speak out on matters of public interest and concern with a view to affecting the law on relevant issues.
99. Secondly, the restrictions and restraints are so wide and so burdensome as arguably to amount to a disproportionate restraint on freedom of expression, notwithstanding the legitimate aim of ensuring equality between candidates so that all voices can be heard in an election. That is particularly the case given that they affect advertising 'in any form' - unlike *Animal Defenders*, these restrictions do not just go to one medium. It is very far from clear, given the Parliamentary timetable, that there has been any proper consideration of the impact of this decision on freedom of expression and participation in policy debates by civil society bodies.
100. In my view, therefore, there is a serious case for saying that the proposals in Part II of the Bill as it presently stands violate the right to freedom of political expression.

HELEN MOUNTFIELD QC

Matrix Chambers

30 August 2013