

Parliamentary Briefing

Second Reading in the House of Lords of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill

18 October 2013

The National Council for Voluntary Organisations (NCVO) is the largest membership organisation for the voluntary sector in England.

With over 10,000 members, NCVO represents all types of organisations, from large 'household name' charities to small voluntary and community groups involved at the local level.

This briefing focuses on Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill:

- The bill contains provisions to amend the rules covering 'non-party campaigners' – people and organisations other than political parties in the run up to an election.
- These rules could affect charities and other voluntary organisations because of their non-partisan campaigning activity; that is campaigning for changes to law or policy where such a change would support their charitable objectives.
- This is an entirely normal and legitimate activity for charities and voluntary organisations to pursue, provided they do not give support to a political party, or candidate.
- The rules will also affect a range of voluntary organisations and community groups that undertake similar activity.
- Under the current rules of the Political Parties, Elections and Referendums Act (PPERA 2000), some of this activity is already regulated by the Electoral Commission when an organisation has been deemed to produce 'election material'.

For many charities and voluntary organisations, influencing public policy and raising awareness of the issues affecting the people and causes they support is a routine and important part of their work and central to their charitable objectives and mission.

For further information please contact:

Chloe Stables, Parliamentary and Media Manager at NCVO by telephone on 0207 520 2474 or email Chloe.Stables@ncvo-vol.org.uk

Elizabeth Chamberlain, Policy Manager at NCVO by telephone on 0207 520 2559 or email Elizabeth.Chamberlain@ncvo-vol.org.uk

NCVO would be happy to provide the following:

- Further briefing on any of the areas discussed in this briefing
- Support with drafting amendments or case studies of particular campaigns
- A face to face meeting at your convenience

Executive summary:

- Even after amendments during the Commons stages, the provisions of the bill are very **broad in scope**. We are concerned that legitimate day to day activities of charities and voluntary organisations engaging with public policy would be caught by these rules. This means that the number of regulated charities, voluntary organisations and other groups will increase substantially.
- As a whole, the bill is incredibly **complex and unclear**. It may be difficult for charities and other voluntary groups to understand if any of their activities would be caught, and this runs the risk of discouraging campaigning activity.
- The lack of a clear interpretation in relation to the definition of ‘controlled expenditure’ creates **unbearable amounts of uncertainty for organisations**, which could be unwittingly caught by the new rules.
- The **question of proportionality** needs to be sufficiently addressed by Ministers. In particular, the impact of widening the scope of regulated activity while reducing the amount that campaigners can spend before they have to register, and reducing the spending limits. Both the registration thresholds and the spending limits must be restored to the current levels.
- The bill gives **substantial discretion to the Electoral Commission**. This creates an unnecessarily burdensome regulatory regime and may leave charities, voluntary organisations and the Electoral Commission open to legal challenge.
- We continue to have **serious concerns around red tape**. The bill introduces a number of excessive reporting requirements and stringent spending limits for those caught within the scope of the bill. The bill will considerably increase the regulatory and administrative burden for registered campaigners.
- There are also **serious concerns about the absence of pre-legislative scrutiny**, as expressed by the Commons Political and Constitutional Reform Committee and the Joint Committee on Human Rights.
- The **timing of the bill** is also problematic for charities and other voluntary organisations: if enacted the provisions will come into force in May next year leaving only a matter of weeks for organisations to prepare for the new rules.

Key points for Second Reading

Definition of controlled expenditure

- It is crucial that charities and other voluntary organisations have absolute clarity on whether and when their campaigning activities will count towards controlled expenditure and therefore be regulated by the Electoral Commission.
- Following intense criticism during the Commons stage of the bill, government brought forward amendments to the definition of controlled expenditure, aimed at clarifying the scope of the rules.
- The government amended the definition by reverting to a form of words close to that under existing legislation (s85 PPERA). The amended test of controlled expenditure will only cover qualifying expenditure that can be ‘reasonably regarded as intended’ to promote or procure electoral success of any particular party or candidate.
- Furthermore, various statements made on the floor of the house during Commons debates made clear that government’s intent is to ensure charities and other voluntary groups are still able to campaign on policy issues, and will still be able to support specific policies that might also be advocated by political parties.
- However on the basis of legal advice, discussions with the Electoral Commission and following consultation with NCVO members, it is our view that the amendment proposed (and passed) by government during the Commons stages does not go far enough.
- The lack of a clear interpretation in relation to the definition of ‘controlled expenditure’ creates unbearable amounts of uncertainty for organisations, which could be unwittingly caught by the new rules.
- The question remains open whether or not legitimate non-partisan campaigning by charities and other voluntary groups, and awareness-raising on policy issues, would be caught by the new rules.
- The government amendments will not result in controlled expenditure only being incurred where there is ‘*bias towards a particular party or candidate*’ and ‘*the clear purpose is to advocate support or directly benefit such party or candidate*’.
- Legal advice provided to NCVO suggests that the new definition of ‘controlled expenditure’ would be considered as substantively the same as the test under the Act as currently in force (PPERA).
- The legal advice recognises that this has created difficulties for charities and voluntary sector campaigners in the past and these difficulties will ‘not materially be mitigated by the changes made by the amendments.’
- This is reinforced by a briefing from the Electoral Commission which says: ‘In some circumstances, a charity campaigning on policy issues may therefore quite legitimately fall within the scope of the rules on non-party campaigning, even though its activity is

fully compliant with the restrictions that charity law places on party political campaigning.’

- In our view, many organisations will need to consult the Electoral Commission before undertaking campaigning activity in an election period in order to ensure they are not falling foul of the new regulations.
- This amount of uncertainty is unbearable, especially for small community groups.

Why is the PPERA wording not sufficient?

- The test of controlled expenditure under PPERA has itself created difficulties for voluntary sector campaigners in the past. This is because s85 of PPERA includes activities that can reasonably be regarded as intended to promote or procure electoral success of a particular party or candidate, based on whether or not the party or candidate holds particular views or advocates particular policies. The party or candidate does not need to be named in order for the activity to be caught.
- The test applied by the Electoral Commission is an ‘objective test’ and looks at the likely effect of the activity as well as the intent. So, if something is likely to make people think better of candidates or parties who support that issue, it may well be covered even if the reason behind it was different, such as awareness-raising.
- The Charity Commission has acknowledged that charities may fall within PPERA even if their campaigning activities comply with charity law and the rules on political activities by charities.
- Furthermore, at the time of the 2010 general election, the definition of controlled expenditure only applied to ‘election material’ and expenditure thresholds were set at reasonable level.
- The bill has significantly expanded the list of activities, and considerably lowered the thresholds. With continued ambiguity in Clause 26, the overall effect will be that more charities and voluntary groups will be subject to the enhanced and much more onerous rules.

Registration thresholds and spending limits

- The bill considerably lowers how much non-party campaigners can spend before having to register with the Electoral Commission. Under the bill, if a non-party campaigner spends more than £5,000 in England (£2,000 in Scotland, Wales and Northern Ireland) then it must register with the Electoral Commission as a ‘recognised third party’.
- This is a significant reduction from the current £10,000 in England (£5,000 in Scotland, Wales and Northern Ireland).
- The lower registration thresholds proposed in the new bill will be damaging particularly for small community groups that are not charities. We are particularly

concerned this would mean that even smaller organisations undertaking limited activity would be required to register.

- The briefing from the Electoral Commission highlights that the threshold changes will ‘create significant new burdens for small scale campaigns and for us as the regulator’ and, in their view, ‘the current registration thresholds should be restored unless the government can show the need for the reductions.’
- Once registered, non-party campaigners have to comply with a set of heavy reporting and requirements.
- The bill will reduce the total that registered campaigners can spend on regulated activity in the year before the general election by 60%-70%. All relevant spending on the defined activities will count towards these thresholds.
- Both the registration thresholds and the spending limits must be restored to the current levels. We do not understand the rationale that has been used to set these limits, in particular the change to the lower limit does not make sense if the policy intent is to make ‘sure our political system doesn’t fall prey to opaque and unaccountable groups who spend millions in trying to decide who wins an election’ (Andrew Lansley, *The lobbying bill will make our democracy more accountable*, Telegraph, 3 September 2013).
- Although this is an existing problem under the 2000 Act, the question of how to sensibly regulate groups working in coalition remains to be addressed. At the moment expenditure by coalitions is aggregated (this means that each member has to account for the full amount spent for the joint campaign, regardless of their individual contribution).
- This requirement is already problematic for many organisations and as a result of the lowered spending threshold will force the larger organisations to leave many joint campaigns, while also deterring smaller charities and voluntary organisations to work together for fearing of dealing with the financial and administrative burden. This could be solved by requiring each member of the coalition to account only for their direct financial contribution.

Activities

- The definition of controlled expenditure also cannot be isolated from the list of activities to which it is potentially applied. This has been significantly expanded under the bill.
- The list in Schedule 3 includes not only ‘election material’ (such as advertising, leaflets sent to the public, manifestos and policy documents, and websites) but a broad range of activities such as press conferences and media events, transport, market research and canvassing, rallies and public events. All relevant costs are covered, including staff costs (which are not regulated for political parties).

- Once again, these changes, combined with reduced expenditure and limits, are likely to result in more charities and voluntary organisations being required to register with the Electoral Commission, despite their activity remaining non-partisan, and more exceeding the maximum limits on controlled expenditure.
- Many of the activities have been brought in to the regime for the first time and are therefore untested. This adds further to the uncertainty and unpredictability.

Constituency limits

- Constituency limits have also been introduced. In the relevant period, a non-party campaigner may only spend up to 0.05% of the total of the maximum campaign expenditure limits in any particular parliamentary constituency. For UK Parliamentary elections, the maximum spending is £18.96m in Great Britain so the cap equates to roughly £9,480 for each constituency.
- Again, this lower limit will cause issues for smaller organisations, and should be re-examined.
- In addition, the Electoral Commission briefing suggests that ‘the constituency controls may be unenforceable within the timescales of an election, given the difficulty of obtaining robust evidence to determine and sanction breaches.’

Reporting of donations to recognised third parties

- The bill introduces a number of administrative and reporting requirements, which are likely to cause a significant bureaucratic burden.
- The bill increases the regulation of reporting by introducing a requirement for quarterly reports of donations to recognised third parties.
- During ‘regulated periods’ (i.e. after Parliament is dissolved) more frequent weekly reports of donations to recognised third parties will be required. Even if an organisation does not receive a reportable donation, it is still required to submit a nil return for the relevant period.
- In addition, some charities, such as Mind or Age UK, take the form of a federated structure. Under the proposals, each part of the organisation will have to account for their campaign work and make a separate return to the Electoral Commission.

Lack of pre-legislative scrutiny and overall timetable of the bill

- In addition, the Compact (the agreement between government and the voluntary sector) commits government to ‘respect and uphold the independence of charities and other voluntary organisations to deliver their mission, including the right to campaign, regardless of any relationship, financial or otherwise, which may exist.’ There are serious concerns that the bill’s proposals will place limits on this independence.
- We also have concerns about the lack of pre-legislative scrutiny and the lack of consultation with organisations that might be affected by the changes in order to ensure they are clear and workable. Government is committed to the national Compact which states that ‘where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach.” We do not believe that this has been followed.
- The timing of the bill is also problematic for charities and other voluntary organisations: if enacted the provisions will come into force in May next year leaving only a matter of weeks for organisations to prepare for the new rules.