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The Political Parties and Elections Bill

Bill 141 of 2007-08

The Bill is designed to strengthen the Electoral Commission's investigatory powers and to provide the Commission with a wider range of sanctions to enable it to become a more effective and robust regulator of political party finance.

It also makes provision for reforming the governance of the Electoral Commission by allowing four of the Commissioners to be nominated by the political parties; restrictions on the employment of staff with recent political experience are also relaxed.

The law on candidate spending limits at a general election is amended, and the Bill makes provision for a return to the 'triggering' of such limits by candidates before a dissolution of Parliament. There are also measures to provide further regulation of donations to political parties and expenditure by parties.

Miscellaneous provisions make changes to the rules on the registration of voters if an election is held during the annual canvass period and provide for the administration of European Parliament elections by local authority returning officers.

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Isobel White

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Summary of main points

The appropriate funding of political parties has been the subject of debate for several years, as the major parties have struggled to finance national election campaigns. Major reforms in the *Political Parties, Elections and Referendums Act 2000 (PPERA)* introduced a system of national expenditure limits and disclosure of donations, overseen by an independent Electoral Commission. However, there have been renewed calls for reform, following the police investigation into the ‘cash for honours’ allegations in 2006. No charges were brought. Major parties had accepted loans during the 2005 election and subsequently, the *Electoral Administration Act* required all types of loans to be reported to the Commission regulated all types of loans above a certain threshold.

The former permanent secretary, Sir Hayden Phillips, conducted an inquiry, publishing a series of recommendations in March 2007. Inter-party talks were held following the Phillips review, but there was no agreement despite the publication by Sir Hayden of a draft set of recommendations in October 2007. The Conservatives argued for trade union funding of the Labour Party to be included within proposals to cap donations but the Labour Party did not agree with this approach and preferred to concentrate its focus on integrating national expenditure limits with local constituency limits.

In June 2008 the Lord Chancellor, Jack Straw, published a white paper, which noted that inter-party agreement on limiting donations was not possible at present and made a series of proposals to amend the regulatory regime, and to strengthen the powers of Electoral Commission.

This Bill takes forward the proposals for immediate legislation in the white paper, with some refinements. The following issues are dealt with:

1. **Reforming the governance arrangements of the Electoral Commission.** The minimum number of Electoral Commissioners is increased to nine and four of the Commissioners will be nominated by the political parties. The rules preventing staff with recent political experience from being employed by the Commission are relaxed so that these are reduced to five years for the Chief Executive and one year for all other staff.
2. **Strengthening the Electoral Commission’s investigatory powers and sanctions.** In order to carry out its regulatory functions the Commission is given additional powers to require the disclosure of documents relating to the income and expenditure of a party or individual and increased powers to enter the premises of a party or individual to inspect documents. A wider range of civil sanctions is also made available to the Commission if there have been breaches of PERA. These include fixed monetary penalties, discretionary requirements and stop notices.
3. **Amending the law on candidate spending limits to reintroduce the concept of triggering.** Candidates are subject to individual expense limits in constituencies. Prior to PERA, candidates who began campaigning before the dissolution of Parliament could find that this expenditure counted towards their limit. PERA made modifications, with the result that, in practice, dissolution became the key point from which expenditure was incurred. The Bill is designed to broadly return the law to the position prior to PERA, where campaigning by

candidates before dissolution will trigger expenditure which will count towards the limit.

4. **Requiring greater transparency about donations through intermediaries and unincorporated associations.** PPERA requires donation to political parties to be registered with the Electoral Commission and disclosed on the Commission's website. The Bill is designed to ensure that the original source of donations passed through intermediaries will also be recorded and disclosed to the Commission if required, and that parties will be required to certify that they have checked the source of donations.
5. **Allowing electors applying to vote on household canvass forms to be registered during the canvass period, so preventing disenfranchisement if an election is called.** This provision is designed to clarify the law on registration of electors in respect of an election held in the autumn annual canvass period.
6. **Allowing for the administration of European Parliament elections by local authority (rather than Parliamentary) returning officers.** This provision is designed to simplify electoral administration.

Since second reading of the Bill is scheduled in October, it is expected to be carried over to the next session of Parliament, which is due to begin on 3 December 2008.

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I The Electoral Commission

A. Background

Following concern during the 1990s about lack of transparency in relation to the financing of political parties and perceived growth in national campaign expenditure, the Labour Government enacted the *Political Parties, Elections and Referendums Act 2000* (PPERA). The main provisions were:

- Registration of parties, so that parties had to supply details of income and expenditure
- Disclosure of donations made to national parties, individual candidates and campaigning groups associated with parties
- National expenditure limits, supplementing constituency limits in force since the 19th century
- Creation of an Electoral Commission, partly to oversee the new rules, but without powers of prosecution

PPERA had been preceded by an inquiry into party funding conducted by the Committee on Standards in Public Life (CSPL), then chaired by Lord Neill, which reported in 1998. In its response, the Government included a draft bill.¹ Following some changes, the Bill became PERA. Proposals for an independent commission had also been made by the Home Affairs Select Committee, the fifth report of the Committee on Standards in Public Life (the Neill report) and the report of the Independent Commission on the Voting System (the Jenkins report). The main aspects of PERA were broadly welcomed by the main political parties, although individual provisions were the subject of some debate, such as expenditure limits on referendums.

This part of the paper examines the Electoral Commission and the proposals for amendment in the current Bill. The Electoral Commission was established in November 2000 and is governed by provisions in PERA. As an independent public body it reports directly to Parliament; its budget and corporate plan are supervised by the statutory Speaker's Committee. The Speaker's Committee was established under Section 2 of PERA and consists of nine members, three are *ex officio* and six are appointed. The Speaker (who is also the chairman), the chairman of the Justice Select Committee and the Lord Chancellor are the *ex officio* members. The Minister for Local Government is appointed to the Committee by the Prime Minister and the five other members are appointed by the Speaker.²

The responsibilities of the Committee are principally:

- To approve the Electoral Commission's five year plan;
- To examine the Commission's estimates;

¹ Home Office, *The Funding of Political Parties in the United Kingdom: The Government's proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life*, July 1999, Cm 4413

² The Speaker's Committee Third Report 2007, HC 288 2007-08

- To appoint the Commission's Accounting officer;
- To make an annual report to the House;
- To agree a ceiling on the number of Deputy Electoral Commissioners who may be appointed.

B. Committee on Standards in Public Life review

In 2006 the Committee on Standards in Public Life (CSPL) began an inquiry into the mandate, governance and accountability of the Electoral Commission. The Committee had been prompted to undertake a review of the Commission by a number of issues of public concern, particularly over the funding of political parties and a loss of confidence in the electoral process because of allegations of electoral fraud related to postal voting. On 15 February 2006 the Committee published a consultation paper setting out the key issues and questions on which it intended to focus during its inquiry. The CSPL noted that:

The responsibilities of the Electoral Commission have an impact on key issues such as voter registration, arrangements for postal voting and standards of propriety in financing political parties. Each of these issues has been the subject of recent public concern, and each contributes to citizen engagement in politics and the broader question of political legitimacy. There are other key issues which are less high profile but still relevant, such as the rules governing the conduct of referendums; the status, training and capacity of returning officers; and the public awareness work of The Electoral Commission and others.

For these reasons it is important to ask now, some five years after its creation and following the second general election to be held since its establishment, whether the Commission's mandate, governance arrangements and accountability framework are fit for the Commission's stated purpose of "*promoting integrity, involvement and effectiveness in the democratic process*".³

The Committee published its report on 18 January 2007 and called for radical reforms of the Electoral Commission.⁴ The then Chairman of the CSPL, Sir Alistair Graham, said

An effective Electoral Commission is a necessary and vital part of the modern institutional architecture. However it is clear that both the Electoral Commission's remit and operation need to radically change if we are to restore public confidence in the electoral process and in the regulation of party political funding.

Through a combination of deficiencies in its current mandate, that is too weak in some areas and too broad in others, combined with a lack of courage, competence and leadership in its regulatory and advisory approach, the Commission has not successfully performed these core duties. This has

³ *Review of the Electoral Commission: issues and questions paper*. Committee on Standards in Public Life, 2006. Available at http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/review_elec_com_iq%20pdf.ashx

⁴ *Review of the Electoral Commission*. Committee on Standards in Public Life Eleventh Report, Cm 7006, January 2007. Available at http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/356875_cm7006_web%20pdf.ashx

contributed to a loss of confidence by the public and political parties in the integrity of both the electoral process, and in political party funding.

Evidence to our inquiry demonstrated that the Commission should have shown greater focus and courage in alerting the risk to the integrity of the electoral process from legislative changes, principally the lack of safeguards against electoral fraud with the introduction of postal voting on demand.

On party funding, the evidence shows that uncertainty over the Commission's statutory role as a regulator, combined with its passive approach led to a regulatory failure on the issue of loans to political parties. Guidance was not provided, even when the issue was raised during the 2005 General Election, and no subsequent investigation or review as part of their statutory report on the Election was undertaken.⁵

The Committee made 47 recommendations. These included:

- A change in statute to streamline and refocus the Commission on its two core roles: as regulator of political party funding and as a regulator of electoral administration; with the aim of ensuring integrity and public confidence in both.
- The creation of statutory regional electoral officers (REOs) to monitor and report on performance and drive up standards of voter registration and fraud prevention and detection, by local electoral officers.
- Moving from the 19th century "head of household" system of voter registration to individual voter registration with an additional, objective personal identifier – to be implemented immediately following the next general election or 2010 at the latest.
- Removal of any uncertainty in the legislation that the Commission should act as a proactive regulator of political party funding rules.
- A new 'compliance unit' in the Commission to take prompt, pro-active and competent investigative action on party funding and campaign expenditure.
- A new system of administrative financial penalties that can be applied by the Commission for breaches of party funding rules regulations.
- A package of supporting measures to improve the governance and accountability of the Commission, including allowing the appointment of four electoral commissioners with contemporary experience of politics and the political process.

The Committee also recommended that, in order for the Commission to concentrate on its core regulatory roles, the responsibility for any electoral boundary setting work should be removed and its electoral policy work should be transferred to the Department for Constitutional Affairs (now the Ministry of Justice). The Commission should also no longer be required to encourage participation in the democratic process.

The Chairman of the Electoral Commission, Sam Younger, responded to the publication of the review saying that the Commission welcomed the report and supported nearly all the recommendations that it made, many of which were changes that the Commission

⁵ Committee on Standards in Public Life press notice, 18 January 2007. Available at http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/pn202final%20doc.ashx

had called for in its evidence to the Committee. However he did not accept that there was any basis for the accusation that the Commission had lacked courage and leadership.⁶ Sam Younger also responded to the Committee's criticism that

...the Commission has not fulfilled its role as a regulator of party political funding and campaign expenditure. Uncertainty over its statutory role (in PPERA) combined with a degree of timidity, has led to an administrative rather than a proactive risk-based regulatory approach. This has led to what the Committee regards as regulatory failure and has undermined the confidence of the public and the political parties in the regulatory framework...⁷

Younger said that, where there had been evidence that the parties had not followed the rules, the Commission had acted, but it would welcome changes to the sanctions available to help it regulate party finances.⁸ The Electoral Commission published its full response to the recommendations of the Committee on Standards in Public Life on 19 March 2007.⁹

1. The Electoral Commission's response

The Commission had argued in its own evidence to the CSPL that its mandate needed to become more focused and that its immediate priorities were to increase its effectiveness as the regulator of party and election finance, and the setting and monitoring of performance standards for electoral registration and administration. The Commission therefore welcomed many of the CSPL's recommendations. The CSPL had recommended that PPERA should be amended to 'make it clear that the Commission had a duty to investigate proactively allegations or suspicions of failures to comply with the regulatory framework' and that the Commission should establish a compliance unit which could take prompt investigative action. The Commission responded that it would be seeking to develop its Compliance Team within the existing structure and gave details of this in a press notice:¹⁰

Among a range of measures to boost public confidence and integrity in the democratic process, the Commission announced it was planning to actively track the campaigning activities of political parties and candidates at election time. Teams of compliance officials will collect 'on the ground' intelligence in areas where elections are taking place to better vet campaign spending returns and identify any breaches of electoral law...

[...]

These measures are part of a move by the Commission towards a more rigorous, investigative approach to enforcing the law following the completion of a full cycle of elections under rules introduced by the Political Parties, Elections and Referendums Act 2000 (PPERA). This will include a strengthened compliance team, fining political parties as a matter of course for submitting their accounts

⁶ Electoral Commission press notice, 18 January 2007. Available at <http://www.electoralcommission.org.uk/media-centre/newsreleasecorporate.cfm/news/615>

⁷ Review of the Electoral Commission. Committee on Standards in Public Life Eleventh Report, Cm 7006, January 2007, p3

⁸ Electoral Commission press notice, 18 January 2007

⁹ <http://www.electoralcommission.org.uk/templates/search/document.cfm/18596>

¹⁰ <http://www.electoralcommission.org.uk/media-centre/newsreleasecorporate.cfm/news/624>

late, as well as closer work with prosecuting authorities to bring parties and candidates to book if they break laws on funding, spending or conduct during elections.¹¹

The CSPL had recommended that the ban on the Commission employing staff who have been politically active during the previous ten years should be relaxed so that the time limit would be one year. The Commission saw no objection to a relaxation of the 10 year rule and suggested that perhaps restrictions should be removed completely except for senior managers. However, on the CSPL's recommendation that the rules concerning the appointment of Commissioners should be revised to allow the recruitment of individuals who had recent experience of politics and the political process, the Commission said that the issue needed further debate and outlined its concerns:

The existing rules were designed to protect the Electoral Commission's political independence and were the subject of considerable debate in Parliament at the time the Commission was established. At that time, a majority in both Houses took the view that the Commission's independence was best secured through a 10 year prohibition. If Parliament now takes the view that such a lengthy period of political inactivity is not required before seeking appointment as a Commissioner – for at least some members of the Commission – the key issue will be to define what the appropriate minimum period between an active political role and appointment as a Commissioner should be. We note that the Committee's report refers to 'recent experience' but does not consider in detail whether there should be any interval between an active political role and appointment as a Commissioner. We believe that this issue needs further debate.

We agree with the Committee that if changes are made to the current disqualification criteria sufficient safeguards should be in place to preserve and promote our ability to operate effectively and in a non-partisan manner.

As the report makes clear, the Commission has successfully established its independence in the public mind since its establishment: 'The Electoral Commission does appear to have established itself in the eyes of the public as a truly independent body. Experience from overseas and international best practice demonstrates that the independence of such bodies is highly prized and any erosion of this would be a significant loss for The Electoral Commission.'

To maintain our independence we believe that any Commissioners appointed with recent experience of politics and the political process would need to:

- be in a minority among the wider group of Commissioners
- not be eligible for appointment as Chairman of the Commission
- contribute to Commission proceedings and decision-making on the same basis as any other member, and not be part of a separate 'cadre' of Commissioners, i.e. they should be members of a 'unitary board' as referred to in recommendation 29
- not be nominated as formal representatives of their political party, in order to demonstrate a commitment to the Commission ahead of any party allegiance

¹¹ <http://www.electoralcommission.org.uk/media-centre/newsreleasecorporate.cfm/news/624>

- be appointed through a transparent appointment process that is consistent with the OCPA guidelines for other public appointments
- demonstrate the competencies expected of any other Commissioner, in addition to knowledge and understanding of the political world
- ensure adequate representation of minority parties especially those active in Northern Ireland, Scotland and Wales
- not be eligible to chair the Boundary Committee for England, so long as the Commission continues to be responsible for this function.¹²

2. The Government's response

The Government published its response to the Committee on Standards in Public Life review of the Electoral Commission on 20 November 2007.¹³ Although it agreed with the general thrust of the CSPL's recommendations concerning powers of the Commission to deal with breaches of the regulations on political party funding and expenditure, the Government merely said it was considering what steps to take next in this area and did not provide any more information about what these might involve. On the governance of the Commission the Government supported the principle of the group of recommendations made by the CSPL that would 'allow for political experience to be brought to bear on the Commission's work' and said it believed that 'allowing for a minority of Commissioners with experience across the political spectrum will improve the overall effectiveness of the Commission.'¹⁴

C. The white paper *Party Finance and Expenditure in the UK*

The white paper was published on 16 June 2008 (for details of its proposals concerning political donations and expenditure see page 34 below).¹⁵ In a statement to the House of Commons, the Lord Chancellor and Secretary of State for Justice, Jack Straw, said:

Strengthening the Electoral Commission will send a clear signal that politics and politicians are effectively scrutinised: never above the law. The Electoral Commission will have robust civil sanctions to deploy, with criminal proceedings as an alternative. The Commission will have more effective investigatory powers, enabling it to access information from anybody when it suspects a breach of the rules. Its governance arrangements will be overhauled better to ensure that greater practical experience is available to it.

The Committee on Standards in Public life, the then Constitutional Affairs Committee and Sir Hayden Phillips all recommended that the Commission would benefit from the knowledge and judgment of individuals with political backgrounds. Therefore, we propose, as the Committee on Standards in Public life recommended, the appointment of four commissioners with recent political experience and fewer restrictions on staff appointments. Far from politicising the

¹² The Electoral Commission response to the recommendations of the eleventh report of the Committee on Standards in Public life, p14

¹³ Cm 7272, <http://www.official-documents.gov.uk/document/cm72/7272/7272.pdf>

¹⁴ Ibid, p17

¹⁵ Cm 7329, available at <http://www.justice.gov.uk/docs/party-finance-expenditure.pdf>

Commission, that will enable it better to understand the people it regulates and so help it to do a more effective job.¹⁶

Francis Maude, speaking for the Conservatives, and Chris Huhne, for the Liberal Democrats, both welcomed the white paper's proposals for reform of the Electoral Commission.

The proposals in the white paper for changes to the *Political Parties, Elections and Referendums Act 2000*, which established the Electoral Commission, were as follows:

i. to clarify the Commission's role as an effective regulator of party funding and campaign expenditure, with the ability to provide advice and assistance to help parties and candidates comply with the spirit as well as the letter of the law, and to ensure a consistent approach to the law. While the final responsibility for compliance should remain with the parties themselves, parties should be able to expect to receive advice and assistance (including through the Commission's technical systems, such as those through which parties file reports) that are relevant to the specific circumstances they face and that help them to understand what they need to do in order to comply. This clarification of the Commission's role is intended to reflect a greater recognition that party funding rules are complex and that those charged with compliance are often volunteers who may lack financial skills.

ii. to provide the Commission with a widened range of sanctions and investigatory powers to enable it to become a more robust regulator. The Commission's powers to obtain information would be extended to allow it to require the production of information from relevant individuals not currently covered by the PPERA powers where it is appropriate to do so – for example, in relation to donors. This would need to be accompanied by appropriate checks on the use of the power;

iii. to reduce the current bar which prevents individuals being appointed as Electoral Commissioners if they have been engaged in political activity from a period of ten years to a period of five years [including the Chair of the Commission];

iv. in line with the CSPL's recommendation, to disapply the bar on past political activity for four Commissioner posts, to allow the appointment of a minority of Commissioners with recent experience of political life from the three main parties, and one of the smaller parties (with two or more representatives in the House of commons). As the CSPL intended, these Commissioners would not act as party representatives but would use their political experience to help enhance the Commission's effectiveness and credibility in the eyes of the parties and the public. The recruitment and selection process for all Commissioners would remain a matter for the Speaker's Committee; and the Government would consult with the Speaker and the parties on how best to legislate to enable these appointments;

¹⁶ HC Deb 16 June 2008 c693

v. to increase the overall number of Commissioners to ten, and to ensure that Commissioners with recent political experience will be in a minority on that Commission; and

vi. to reduce the current prohibition on the hiring of staff who have held office in a political party, made a reportable donation or been in paid employment in a party within the last ten years. The restriction would be revised to one year for all staff except the Chief Executive, who would be subject to a five-year restriction.¹⁷

D. Electoral Commissioners and the governance of the Commission

There are currently six Commissioners who are appointed by Royal Warrant to exercise the functions of the Electoral Commission. They are independent, non-partisan and are accountable directly to Parliament under the provisions of PPERA. Section 3 of PPERA sets out the procedure for the appointment of Commissioners: the motion for an Address on the appointment of a Commissioner cannot be made without the agreement of the Speaker and after consultation with the leaders of each party with two or more Members of the House of Commons. The Address must specify the period for which each Commissioner is to hold office and this period must not exceed ten years. There is provision for Commissioners to be re-appointed (or further re-appointed).

The advertisement for the new Chair of the Electoral Commission in March 2008 was for a 3-5 year term, which is potentially renewable. This is a comparatively short term appointment; the Parliamentary Commissioner for Administration for example is appointed for a single term of seven years, and the proposed single term for the Comptroller and Auditor General is eight years.¹⁸ The trend has been for constitutional watchdogs to be offered only a single term to buttress the independence of the office.¹⁹

The Committee on Standards in Public Life review of the Electoral Commission examined the ban on the appointment of Commissioners who held or had held political office or who had made a donation to a political party during the past ten years and the similar ban on employing individuals at the Commission who had been politically active over the previous ten years. These statutory restrictions were originally designed to ensure the independence and impartiality of the Commission. The Commission itself and a number of academics, commentators and electoral administrators believed that the ten year rule should be retained as it protects the Commission's independence. However, all the main political parties argued that the Commission should have some more direct contemporary experience in its governance arrangements:

Almost without exception, those who have argued for some relaxation [of the ten year rule] are not seeking a majority of commissioners with such direct

¹⁷ *Party Finance and Expenditure in the United Kingdom: the Government's proposals*, Cm 7329, 2.22

¹⁸ See Public Accounts Commission 16th report *Draft Clauses on the Corporate Governance of the National Audit Office* HC 1027 2007-08
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpacomm/1027/102703.htm>

¹⁹ See Public Administration Select Committee *Ethics and Standards: The regulation of conduct in public life*, HC 121 2006-07, which recommended a non renewable term of up to seven years for ethics watchdogs. The Cabinet Office response accepted this recommendation. See HC 88 2007-08.

experience, recognising the balance to be struck and perceptions of independence. Rather they seek a significant minority that would reflect experience across the political spectrum. In summary, the principal arguments put forward are that:

- it is fundamentally untenable for a regulator to have a governing body which contains no-one with direct experience of the sector under regulation;
- for a regulator to be effective and credible it must have the confidence of those it regulates. The Commission will continue to fail to generate this confidence if its governance structure does not include people with direct, contemporary political experience;
- some aspects of the Commission's work that have led to justified criticism over the last five years would not have occurred with a governing body more in tune with the way political parties and the political process work in practice;
- true independence and impartiality is best ensured by input from experience of the various sides of politics and the political process and helps avoid unwitting bias to either the government or any particular political party; and
- the current restriction contributes to the unhelpful perception that politics is an untrustworthy and undesirable activity whose participants cannot be trusted to act in the public rather than politically partisan interest.²⁰

The CSPL recommended that the ten year ban should be reduced to one year for most staff and to five years for senior managers, and that the current restrictions on who may become an Electoral Commissioner should be revised so that four Commissioners who have recent experience of politics and the political process could be appointed. The Constitutional Affairs Select Committee, in its report on party funding published in December 2006, also recommended that PPERA should be amended so that a minority of Commissioners who had practical past experience of politics could be appointed. The Committee noted the evidence of its own Chairman, Sir Alan Beith, to the CSPL inquiry:

[He] said that the Commission had "been undermined...by the lack of political experience amongst the commissioners themselves, or indeed at any other level, because it is precluded by statute". He added "it would have been better and would still be better if the statutes allowed for some people experienced in politics to be a minority among the commissioners". This view was also shared by many other Members of this Committee who also gave evidence to the Committee on Standards in Public Life.²¹

The political parties giving evidence to the CSPL inquiry thought that there should be commissioners with political experience. The Labour Party fully supported the Commission but suggested that 'it does not have the voice of the industry represented as Commissioners. This is a significant weakness when it is dealing with issues concerning

²⁰ Review of the Electoral Commission. Committee on Standards in Public Life Eleventh Report, Cm 7006, January 2007, para 3.25

²¹ *Party funding*, Constitutional Affairs Committee first report 2006-07. HC 163, 2006-07, para 63

parties, and the electoral process.²² The Labour Party proposed that there should be twelve Commissioners, five of whom would be political appointments: one each by the three major parties in the House of Commons, one by the other minor parties in the House of Commons and one by the Association of Electoral Administrators.

Simon Hughes, giving evidence on behalf of the Liberal Democrats, wrote that ‘the extent to which the ban on previous political involvement is carried out, particularly by including all staff appointments, may not help the functioning of the Commission. We believe that there could be some Commissioners appointed from parties, although maintaining a majority of independent Commissioners and an independent Chairman.’²³ Oliver Heald, speaking for the Conservative Party, also thought that there should be additional Commissioners with political experience. In an oral evidence session he said ‘there is a case for having, say, three or four commissioners out of the nine who are people with party political experience. I think it would need to be even between the three main parties and perhaps one other.’²⁴

The CSPL subsequently recommended that the total number of Commissioners should be increased to ten and that the current restrictions on who could become a Commissioner should be revised so that four Commissioners with recent political experience could be appointed.²⁵ The Committee commented that

...other regulators do include people with direct contemporary experience of the regulated sector on their boards although they have protections in place against conflicts of interest. Any relaxation of the ten-year rule for the Commission must ensure similar protections. Some witnesses who argued for a relaxation of the rules referred to the need to recruit commissioners with “very recent” political experience or “no longer active politicians” or those “no longer holding an official position within a political party”. These views reflect the need to ensure that a commissioner does not have a direct conflict of interest with the issues or decisions dealt with by the Commission. The principal potential conflict is a direct interest in the fortunes, electoral or financial, of a particular political party. We do not believe that this extends as far as membership of a party. But it does clearly extend to a commissioner who continues to be an elected representative of that party or an appointed official or representative (i.e. a Peer taking the party whip). These restrictions should, in our view, remain.²⁶

In his review of the funding of political parties, published in March 2007, Sir Hayden Phillips also called for changes to the governance of the Commission and agreed with the CSPL recommendations about appointing additional Commissioners with political

²² http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/labour_party%20pdf.ashx

²³ http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/simon_hughes_mp%20pdf.ashx

²⁴ http://www.public-standards.gov.uk/11thinquiry/transcripts_evidence.aspx

²⁵ R28 and R29, *Review of the Electoral Commission*, Committee on Standards in Public Life Eleventh Report, Cm 7006, January 2007

²⁶ Para 3.33, *Review of the Electoral Commission*. Committee on Standards in Public Life Eleventh Report, Cm 7006, January 2007

experience.²⁷ Sir Hayden said that the reforms he proposed required the Commission to have a ‘close, informed understanding of the operation of political parties.’ He continued:

Since its establishment it has already developed considerable expertise, but it has, by law, been denied immediate and direct access to the one resource which would most help it. At present it is not possible for senior party politicians to serve as Commissioners. This rule was made for understandable reasons when the Commission was first established but I concur with the CSPL’s recommendation that four individuals with ‘recent experience of politics and the political process’ should serve as Electoral Commissioners...

Would the addition of these four Commissioners unbalance the Commission itself, causing it to be divided along party lines? It would not. The majority of Commissioners would not come from the political parties and the four with party experience would not be representatives of their parties. For the most part, I would envisage that they would be former politicians, men and women who understand party politics but whose primary allegiance as Commissioners would be to the public interest, rather than to a partisan cause. There are very good examples of this working well, for example, the former Honours Scrutiny Committee, and now the House of Lords Appointments Commission, and indeed the CSPL itself.²⁸

The Electoral Commission, however, remains opposed to the CSPL proposals to change the composition of the Commission and has said that it does not believe the proposals can be made to work ‘without compromising confidence in our independence’.²⁹ In its written evidence to the Committee on Standards in Public Life inquiry the Electoral Commission argued that it would be inappropriate for active politicians (or those recently retired from politics) to be Commissioners ‘as long as we continue to have an executive role on issues such as the regulation of political parties, the determination of boundaries and the administration of referendums.’³⁰ However it did acknowledge ‘the potential value of a closer relationship between the Commission and serving politicians; and the benefits of being able to employ staff with personal experience of working in the type of organisations we are regulating.’

In an article in the *House Magazine* the Chief Executive of the Electoral Commission, Peter Wardle, reiterated the Commission’s concerns about the Bill’s provisions to allow four of the Commissioners to be nominated by political parties:

We believe these changes would threaten public confidence in the Commission as an independent and non-partisan regulator. The Government’s proposals are not the best way to provide us with greater access to party political experience, and we have suggested it would be better to build upon the existing statutory Parliamentary Parties Panel to achieve this aim.³¹

²⁷ *Strengthening Democracy: Fair and sustainable funding of political parties*. The Review of the Funding of Political Parties, March 2007.

²⁸ *Ibid*, p24

²⁹ Statement on the Political Parties and Elections Bill, Electoral Commission news release, 17 July 2008

³⁰ http://www.public-standards.gov.uk/~media/assets/www.public_standards.gov.uk/electoral_commission%20pdf.ashx

³¹ “Putting the voter first”, *House Magazine*, 15 September 2008, p57

The Commission published a briefing on the provisions in the Bill in September 2008 in which it expressed deep concern about the proposals which would allow political parties to nominate four Electoral Commissioners. The Commission once again said that it believed that public confidence in the Commission would be undermined as a result of the proposals. The briefing also drew attention to the fact that the Commission's responsibilities extend across the whole of the United Kingdom but the proposals for politically nominated Commissioners are based on appointment by the parties at Westminster:

Our statutory responsibilities extend across the whole of the United Kingdom and we take seriously the need to understand and respond to the different political and legislative circumstances across the UK. The proposal that four new Commissioners should be appointed from the three main parties represented in Westminster, plus one from the smaller parties, is not compatible with maintaining the Commission's legitimacy as a UK-wide body. For example, only one of the six smaller parties currently represented in the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly would be represented on the Commission under these proposals.³²

The Commission also noted in the briefing that 'the aim of injecting more practical political experience into the Commission can be achieved via the proposed changes to the restriction on employment of staff...together with an enhanced and refocused Parliamentary Parties Panel.'³³

The Parliamentary Parties Panel was established by PPERA and its remit is to 'submit representations or information to the Commission about such matters affecting political parties as the panel think fit'.³⁴ The panel is comprised of representatives of all parties which have at least two MPs in the House of Commons. Minutes of the Panel's meetings can be found on the Electoral Commission's website.³⁵ The provisions setting up the Panel were added to PPERA at report stage in the House of Lords. Introducing the new clause the minister, Lord Bassam of Brighton, referred to the US Electoral Commission in his speech:

...with the passage of time, our conviction that it ought not to be possible to associate members of the electoral commission with any political party has grown stronger rather than weaker. Events on the other side of the Atlantic have reinforced our conviction. At every twist and turn we have seen someone with a party tag to their name and it has not done a great honour to the electoral process as a consequence. We should not go any further in jumping on the grave of an electoral system; nevertheless the point is worth making.

Having said that, it was clear both at Second Reading and in Committee that noble Lords were not without some qualms. The concern expressed was that the

³² *Political Parties and Elections Bill 2008*, Electoral Commission briefing, September 2008. Available at http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/64419/Party-Funding-Briefing-Final.pdf

³³ Ibid

³⁴ Section 4, *Political Parties, Elections and Referendums Act 2000*

³⁵ <http://www.electoralcommission.org.uk/about-us/corporate-structure-and-management/governance/parliamentary-parties-panel>

more impeccable the credentials of the electoral commissioners from the point of view of political impartiality, the less likely they were to have hands-on experience of the political process from the point of view of the parties. That point was echoed on all sides of the House.

The proposed new clause is designed to meet this point, and to meet it head on. It provides a forum and a legitimate opportunity for the political parties collectively to put their points to the electoral commission and to have them considered. The panel will not, of course, be in the nature of a supervisory body; nor is it considered wise to have it as a formal advisory body in the sense that the commission cannot proceed without consulting the panel and, by implication, clearing its proposals through it. The commission will, of course, wish to consult on general matters, but it will obviously cast its net a good deal wider than the handful of political parties represented on the panel. If we were setting up a formal advisory panel, its membership would have to be expanded rather more widely.³⁶

E. Provisions relating to the Commissioners in the Bill

Clause 4 of the Bill amends Section 3 of PPERA which governs the appointment of Electoral Commissioners and the Commission's chairman. A new sub-section (2) adds to the requirements which must be met in relation to the appointment procedures by requiring that each person whose appointment is proposed must be selected in accordance with a procedure put in place and overseen by the Speaker's Committee. This requirement is in addition to the existing ones which require that the Speaker must agree to the making of the motion and that the leaders of each party which has two or more members in the House of Commons must be consulted. The Speaker's Committee took an active role in the appointment of the new Chair of the Electoral Commission, Jenny Watson, who will succeed Sam Younger at the end of 2008. Ms Watson was appointed unanimously by a selection panel appointed by Mr Speaker and the Speaker's Committee subsequently endorsed the panel's recommendation. The Speaker's Committee's first report of 2008 gives details of the selection process.³⁷ Clause 4 also makes provision for the re-appointment of a Commissioner without the need to go through a new selection procedure if this re-appointment has been recommended by the Speaker's Committee.

Clause 5 allows for the appointment of four Electoral Commissioners with recent political experience. Sub-section (1) disapplies, for these four Commissioner positions, the restrictions which normally prevent a person who belongs to a political party or who has been engaged in recent political activity from being appointed but the prohibitions on appointing a serving officer or employee of a political party or the holder of a relevant elected office remain in place. Note that the definition of relevant elective office does not include a member of the House of Lords, so peers will be eligible for appointment.

Sub-section (2) inserts a new Section 3A into PPERA which makes provisions about the appointment of these new 'nominated Commissioners'. Each of the nominated

³⁶ HL Deb 20 November 2000 c574

³⁷ HC 961, 2007-08. Available at <http://www.publications.parliament.uk/pa/cm200708/cmsselect/cmspeak/961/96102.htm>

Commissioners is to be nominated by the leader of a party with two or more MPs in the House of Commons; three of the nominated Commissioners must be selected from the three largest parties. Only one nominated Commissioner from each party may be appointed; the fourth nominated Commissioner must therefore be nominated by the leader of a party which is not one of the three largest parties. The Bill excludes Members of the House of Commons who have not taken the parliamentary oath from being counted for the purposes of this section.³⁸ A nominated Commissioner is not allowed to be appointed as the Chairman of the Commission, nor can a nominated Commissioner be appointed to a Boundary Committee. However, there are no provisions to require nominated Commissioners to step aside from decisions which might affect their political party.

Clause 6 of the Bill makes provision for Section 1 of PPERA to be amended so that the minimum number of Commissioners is 9 (originally 5) and the maximum number is 10 (originally 9). The increase in the minimum number ensures that the four nominated Commissioners will always be a in a minority.

The political restrictions that applied to Electoral Commissioners and the staff of the Commission are relaxed under the provisions of **Clause 7**. Sub-section (1) amends Section 3 of PPERA which prohibits a person from being appointed as a Commissioner if they have engaged in certain political activities within the last 10 years so that this is reduced to within the last 5 years. A new paragraph 11A is inserted into Schedule 1 of PPERA by sub-section (2) of the Bill; this reduces the restrictions on the political activities of the staff of the Electoral Commission. Under PPERA staff could not be appointed to the Electoral Commission if they had been engaged in certain political activities within the last 10 years.

The Bill reduces this period to five years for the Chief Executive of the Commission and to one year for all other staff. The Chief Executive may not be a member of a registered political party. There is also provision for the termination of employment of any member of staff if they become engaged in any political activity which would have prevented their appointment. These political activities include being an officer or employee of a registered party either currently or within the relevant period (twelve months for all staff except the Chief Executive for whom the restriction is the last five years); holding a relevant elective office; being named as a donor within the relevant period or being named as a participant in the register of recordable transactions reported under Part 4 A of PPERA (i.e. in loans to political parties).

³⁸ Library Research Paper 01/116 *The Parliamentary Oath* provides background on the oath

II Regulatory and investigatory powers of the Commission

A. Background

The Electoral Commission is responsible for ensuring that organisations and individuals comply with the registration and financial regulatory requirements of PPERA; it must also ensure that they comply with the statutory reporting requirements of PPERA and the relevant parts of the *Representation of People Act 1983*.

In a report published in 2003 the Commission examined the working of PPERA and questioned whether it had been given sufficient powers to ensure that there was compliance with the provisions of the Act and whether the sanctions available to it were always appropriate for the offences committed under the PPERA. The report called for financial penalties for a wider range of offences:

3.52 In the two years since PPERA came into effect, there have been a number of examples of political parties or others breaching the requirements. A number of these might reasonably be regarded as 'minor' breaches – for example, paying a campaign expenditure invoice outside the specified period for payment – and the Commission did not consider that enforcement action would be appropriate. Of more concern is the failure of parties to report donations on time. We have no evidence to suggest that this has been deliberate. Nonetheless, repeated late reporting of donations undermines confidence in the regulatory regime, makes other parties question why they are making efforts to comply and damages the credibility of the Commission in enforcing the controls.

3.53 Where sanctions are available they may not be appropriate for the nature of the infringement. A criminal prosecution with a penalty of imprisonment should be reserved for the most serious offences. But that, effectively, is the only enforcement route open to the Commission as the legislation currently stands.

3.54 We therefore believe that in order to carry out our statutory responsibilities effectively in relation to the regulatory framework created by PPERA, we should be able to seek the imposition of financial penalties on parties, whether the forfeiture of any donations reported outside of the correct reporting period or fines to ensure compliance with the Act. Sections 65 and 147 already provide for the imposition of such penalties for other acts of non-compliance: section 65 makes provision for a court to order the forfeiture of a donation which a party had attempted to conceal, while section 147 provides for the Commission to seek the application of a fine to any party which fails to submit a financial return to the Commission by the relevant deadline. While we believe that the existing criminal offences and civil penalties should be retained, we consider that a more effective mechanism for dealing with non-compliance with PPERA would be the imposition of financial penalties in relation to a wider range of offences, such as submitting an incomplete donation return.³⁹

³⁹ http://www.electoralcommission.org.uk/files/dms/PPERAreport_9816-7984__E__N__S__W__.pdf

The Committee on Standards in Public Life inquiry looked at whether, in the light of the PPERA framework, the Electoral Commission had been ‘an effective and strategic regulator of political party funding and expenditure.’⁴⁰ The CSPL was clear that PPERA gave the Commission an overall regulatory role and also powers of investigation:

2.14 In relation to The Electoral Commission’s overall regulatory role the Act provides that:

The Commission shall have the general function of monitoring compliance with the restrictions and other requirements imposed by or by virtue of Parts III to VII; and the restrictions and other requirements imposed by other enactments to election expenses incurred by or on behalf of candidates at elections, or donations to such candidates or their elections agents.

2.15 The Act then goes on, as recommended in the Committee’s Fifth Report, to provide the Commission with the investigative powers of inspection, entry etc in relation to fulfilling their function and which are consistent with powers provided to other regulators.⁴¹

These powers are provided for under Section 146 of PPERA.⁴²

However the CSPL noted that:

Currently the only sanctions the Electoral Commission has if parties do not comply with the legislation is to name and shame or, if the offence is sufficiently serious, to refer the matter to the Crown Prosecution Service (CPS) for a criminal prosecution.⁴³

The Committee on Standards in Public Life expressed surprise in its report that the Commission was uncertain as to whether it had a passive or active role as a regulator, but noted the evidence to the Committee of Lord Falconer of Thoroton, then Secretary of State for Constitutional Affairs:

The Electoral Commission’s role, as set out by PPERA 2000, was not to investigate. It was simply to be a recipient of information. They were in a sense exactly the same as the Register of Companies (Companies House). That was the way they were set up. Judgements about whether or not there have been breaches of electoral law by a particular political party ultimately are not to be made by The Electoral Commission; they are to be made by the prosecuting authorities.⁴⁴

⁴⁰ Review of the Electoral Commission, 11th report of the Committee on Standards in Public Life, Cm 7006, January 2007, para 2.16

⁴¹ Ibid, para 2.14 and 2.15

⁴² *Political Parties, Referendums and Elections Act 2000*. Available at <http://www.opsi.gov.uk/acts/acts2000/pt10-pb5-l1g146>

⁴³ Review of the Electoral Commission, 11th report of the Committee on Standards in Public Life, Cm 7006, January 2007

⁴⁴ Ibid, para 2.23 and 2.24

The CSPL however believed that the Commission required an investigative capability to carry out its regulatory duties:

...in order to be as effective as possible, a separate compliance unit should be set up to make prompt investigations of possible breaches of the regulatory framework on the basis of *prima facie* evidence, however received, of possible problems. This unit should have no role in the day-to-day work related to the administration of the regulatory controls. This is an arrangement that we understand is common among comparable regulators of political finance...⁴⁵

The CSPL therefore recommended that PPERA should be amended:

...to make it clear that the Electoral Commission has a duty to investigate proactively allegations or suspicions of failures to comply with the regulatory framework. We recommend that the term 'monitor' be replaced by 'regulate'.

The Justice Select Committee took evidence from Sam Younger (Chairman) and Peter Wardle (Chief Executive) of the Electoral Commission on 18 March 2008.⁴⁶ In response to a question about the refocusing of the Commission's mandate Peter Wardle gave further details of the improvements the Commission had made to its system for dealing with breaches of the regulations on party funding and expenditure:

We now have a separate enforcement team which was one of the recommendations that the Committee made. We have devolved dealing with a lot of our compliance work to our offices in Scotland, Wales and Northern Ireland so that parties fighting campaigns in those parts of the UK will deal in the first instance with our offices in Edinburgh, Belfast and Cardiff. We have introduced a system of issuing advisory opinions so that when an individual or a party is unclear as to how the law should be applied, if they approach us with what they intend to do, we will give them an opinion on how it should be treated and provided they follow what they said they would do, we would stick to that. So we remove any element of jeopardy that they may go ahead with something which could be quite significant for a political party in terms of its finance which the Commission then comes along and upsets. We have had quite a change of staff in this area. We have been able to hire a lot of staff with investigation skills in that area, which is not meant as a threat but is meant to say that in carrying out investigations, it is a complex area which demands skills and understanding of the area we are working in and the ability to gather evidence and balance the rights of the person being accused of something with the rights of the public to ensure that the law is enforced.⁴⁷

Later in the evidence session Peter Wardle was asked about the sanctions available to the Commission:

...essentially the two things we have to look at are whether there is evidence that the rules have been broken and what the public interest would be in pursuing different courses of action. To try to take an example, there is not a perfect

⁴⁵ Ibid, para 2.44

⁴⁶ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/439/8031801.htm>

⁴⁷ Ibid

history among the major parties of reporting all their donations on time. What the parties do is report on a quarterly basis all the donations they received and we did highlight, after the 2005 elections particularly, that all three of the major parties did not manage to include all the donations they had received in the quarter running up to the 2005 general election in their donation report immediately following. They should have done; as it happens there is no particular sanction available in the legislation. That is one of the areas I would apply a fine to in future, if we had the power to do that. When we looked into that we did draw a distinction between the case where a party treasurer said that actually what had happened was that the treasurer of such and such an accounting unit in one part of the country had changed, had conducted a review of their records, had sorted things out and had now, as they should have done, reported to head office who are responsible for reporting to us a number of donations which should have been picked up last year and we would take a reasonably lenient view of that as long as there was not a pattern of serial failure in that accounting unit. I would take a much stronger view in relation to donations which have come directly into the head office of the party. It is difficult to see how they were overlooked. There are examples where we certainly would look at the circumstances of the case each time and decide what is an appropriate response. If we have a more flexible range of responses it would be easier to do that.⁴⁸

B. Provisions in the Bill giving the Commission greater powers

Section 145 of the *Political Parties, Elections and Referendums Act 2000* (PPERA) made provision for the Electoral Commission to have 'the general function of monitoring compliance' with the requirements of the Act. **Clause 1** of the *Political Parties and Elections Bill*, although it does not impose a duty on the Commission, clarifies its regulatory role by amending Section 145 so that the Commission will be able to take such steps as it considers appropriate with a view to securing compliance. Clause 1 also allows the Commission to publish guidance which it considers necessary in order to comply with the requirements of PERA.

1. Investigatory powers

Section 146 of PERA relating to the investigatory powers of the Electoral Commission is replaced by **Clause 2** of the Bill which provides the Commission with increased investigatory powers. Subsections (1) and (2) insert and give effect to a new Schedule 19A to PERA; subsection (3) makes provision for the penalties for offences under the new Schedule. The new Schedule 19A (which is set out in **Schedule 1** of the Bill) will enable the Commission to require access to financial records and information and to enter premises to inspect and make copies of relevant documents.

Paragraph 1 (1) of the new Schedule 19A lists the individuals and organisations to which the investigatory powers apply. These are: a registered party (or if the registered party has accounting units, the central organisation of the party and an accounting unit of the party); a recognised third party; a permitted participant; a regulated donee; a regulated

⁴⁸ Ibid

participant; a candidate (other than at a local government in Scotland); a candidate's election agent and an organisation or individual formerly falling within any of these categories.⁴⁹ The Explanatory Notes to the Bill comment that 'these individuals and organisations are those considered to be the primary focus of the Commission's function of monitoring compliance as, together, they are the individuals and organisations on whom obligations under the 2000 Act are principally imposed.'⁵⁰

The rest of Paragraph 1 relates to disclosure notices. The Commission can issue a disclosure notice to the treasurer or another officer of a registered party, or to any of the other individuals listed in 1 (1), requiring them to provide the Commission (or a person authorised by the Commission) with any documents, or any information or explanation, relating to the income and expenditure of the party or individual in question that could be 'reasonably required by the Commission for the purposes of carrying out their functions.'⁵¹ Anyone who receives such a disclosure notice must comply with it within 'such reasonable time as is specified in the notice.' Sub-paragraph (5) allows a person authorised by the Commission to enter the premises occupied by a party or individual listed in 1(1) to inspect any relevant documents.

In Section 146 of PPERA the power to enter premises was restricted so that it could only be used 'in relation to registered parties, permitted participants and candidates at elections (excluding local and Scottish electoral candidates).'⁵² This power is now extended so that it can be used in respect of any of the organisations or individuals listed in Paragraph 1(1) of the new Schedule 19A, in other words it is extended to request information from other bodies or individuals such as donors.

Paragraph 2 of the Schedule gives the Electoral Commission a new power in cases where it 'has reasonable grounds to suspect' that an offence or contravention of requirements under PPERA has been committed. The Commission may issue a notice requiring any person to produce any documents reasonably required by the Commission for the purposes of investigating the suspected offence or contravention. This power is wider than that set out in Paragraph 1 because it extends to any person (not just the list of organisations and individuals in Paragraph 1(1)) and also the documents do not have to be related to income and expenditure but can be any 'reasonably required' by the Commission for the purposes of investigating the suspected offence. Paragraph 2(4) also gives the investigator authorised by the Commission the power to require a person to come and appear before the investigator and answer any questions that the investigator considers relevant. The Explanatory Notes indicate that the powers in Paragraph 2 are not limited to an individual or organisation suspected of having committed an offence or contravention but may be used against anyone who holds or is thought to hold information reasonably required for an investigation by the Commission.

Paragraph 3 allows a magistrate to issue a warrant to allow the police to search premises and take possession of documents relevant to the investigation if he is satisfied

⁴⁹ See the Glossary for definitions of these terms.

⁵⁰ EN, para 52

⁵¹ *Political Parties and Elections Bill 2007- 08*, Schedule 1, 1(3)

⁵² EN, para 54

by information given by the Commission that there are reasonable grounds for believing that an offence or contravention has been committed. The police may use 'such force as is reasonably necessary' and such a warrant is valid for one month. Any documents taken may be retained for three months unless criminal proceedings are instigated when they may be retained until the conclusion of the proceedings. The documents may also be retained until the conclusion of the civil sanctions set out in the new Schedule 19B to PPERA (contained in Schedule 2 of the Bill, see below).

Paragraph 5 allows the Commission to make copies of any documents produced, inspected or seized under the Schedule and paragraph 6 requires any authorisation of a person by the Commission must be made in writing.

Paragraph 9 gives the Commission the power to require that any documents kept in electronic form must be made available 'in legible form'. Any person on the premises must also give the inspector (the Commission or the person authorised by the Commission) any assistance required to enable the inspector to look at and make copies of the records held in this format. The inspector will also have the power to 'inspect and check the operation of any computer, and any associated apparatus or material that is, or has been, in use in connection with the keeping of the documents.'⁵³

Information subject to legal professional privilege is exempt from any requirement to produce information under any power granted by the Schedule (paragraph 10) and paragraph 11 deals with the admissibility of statements provided under the requirements of the schedule. Paragraph 12 makes it an offence to fail to comply with any requirement imposed under the schedule; obstructing someone carrying out functions under the schedule or providing false information are also offences.

2. Civil sanctions

The Bill aims to provide the Commission with a wider range of sanctions to enable it to be a more effective and robust regulator. The sanctions are based on those recently included in the *Regulatory Enforcement and Sanctions Act 2008* which made provision for a wider range of administrative sanctions to be available to regulators to give them more options and greater flexibility. For further details see Library Research Paper, RP 08/46, *The Regulatory Enforcement and Sanctions Bill 2007-08*.⁵⁴

The provisions of **Clause 3** give the Electoral Commission new powers to apply a range of civil sanctions if offences are committed under PPERA. Clause 3 replaces Section 147 of PPERA with a new Section 147 which inserts a new Schedule 19B into the Act. The new Schedule 19B is contained in **Schedule 2** of the Bill.

The new Schedule 19B sets out the range of new civil sanctions available to the Commission. These include fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings. The new Schedule explains when and how the Commission can apply the sanctions and what appeal processes are available.

⁵³ *Political Parties and Elections Bill 2007- 08*, Schedule 1, 2(9(b))

⁵⁴ <http://www.parliament.uk/commons/lib/research/rp2008/rp08-046.pdf>

a. Fixed monetary penalties

Part 1 of new Schedule 19B relates to fixed monetary penalties. The Electoral Commission is given the power, under Paragraph 1, to impose a fixed monetary penalty on a person, a registered party, a recognised third party or a permitted participant if it is satisfied beyond reasonable doubt that an offence under PPERA has been committed or there has been a contravention of a requirement imposed by PPERA. Sub-paragraph 1(6) makes provision that where an individual is issued with a fixed monetary penalty for an offence that could be punishable on summary conviction by a fine the penalty must not exceed the maximum amount of that fine.

Paragraph 2 allows a person who has been served with a fixed penalty notice by the Commission to make written representations in response. A notice to impose a penalty must give the recipient the opportunity to discharge it by payment of a sum less than or equal to the full penalty. Alternatively, the person may make written representations and objections to the Commission within 28 days (paragraph 3(2)), after which the Commission must decide whether to impose the penalty (in which case a further notice will be served) or not to proceed if it is no longer satisfied that an offence has been committed. A person on whom a fixed penalty is imposed may appeal to a county court against the decision on the grounds that it was based on an error of fact; it was wrong in law; it was unreasonable or on other grounds that might be prescribed (paragraph 2(6)).

Paragraph 3 of new Schedule 19B sets out the requirements for the information that must be included in the notice issued by the Electoral Commission of the intention to impose a fixed monetary penalty. This includes the grounds for the issuing of the notice; the right to make representations; the time period within which the liability may be discharged; the right of appeal against the penalty and the consequences of non-payment. There are provisions in paragraph 4 which limit the criminal proceedings that can be instigated against a person for an offence that can be dealt with by a fixed monetary penalty. Whilst under notice by the Commission that it intends to impose a penalty no criminal proceedings can be brought during the time period when the person can discharge their liability for the penalty by making a payment. Moreover, a person on whom the Commission has imposed a fixed monetary penalty for an offence under PPERA may not be convicted for the same offence.

b. Discretionary requirements

Part 2 of new Schedule 19B gives the Electoral Commission the power to impose discretionary requirements on a person, political party, recognised third party or permitted participant where the Commission is satisfied beyond reasonable doubt that they have committed an offence or contravention under PPERA. A discretionary requirement can be a requirement to pay a monetary penalty of an amount determined by the Commission (a 'variable monetary penalty'); a requirement to take steps to ensure that the offence or contravention does not continue or recur, or a requirement to take steps specified by the Commission to ensure that a position is restored to what it would have been if the offence or contravention had not taken place. (These last two requirements are 'non-monetary discretionary requirements'.) The Commission is prevented from imposing a discretionary requirement on the same person on more than one occasion for the same offence. As with the fixed monetary penalties the amount of a

variable monetary penalty cannot be higher than the maximum fine if the offence is punishable on summary conviction.

Paragraph 6 relates to the procedures that the Commission must follow in serving a notice of the intention to impose a discretionary requirement. Paragraph 7 sets out the information that must be included by the Commission in a notice of an intention to impose a discretionary requirement and paragraph 8 prevents a person who has had a discretionary requirement imposed on them from being convicted in a criminal court for the same offence. Paragraph 9 gives the Commission the power to impose a monetary penalty (a 'non-compliance penalty') on a person who fails to comply with a non-monetary discretionary requirement. A person served with a notice imposing a non-compliance penalty has the right of appeal to a county court.

c. Stop notices

Paragraph 10 in Part 3 of the new Schedule 19B allows the Electoral Commission to impose a 'stop notice' on a person to prohibit them from carrying on an activity which the Commission reasonably believes is likely to involve committing an offence or contravention under PPERA. The Commission can also impose a stop notice if it believes the person's activity is likely to lead them to commit an offence or contravention. In both cases the Commission must have reason to believe that the activity or possible activity is damaging to public confidence in the controls imposed by PPERA on the income and expenditure of registered parties.

The Commission can issue a 'completion certificate' (paragraph 12) once it is satisfied that the person on whom the stop notice has been imposed has taken the necessary steps set out in that notice. A person on whom a stop notice has been imposed may apply for a completion certificate at any time and the Commission will have to make a decision on whether to issue this within fourteen days of receipt of the application. Paragraph 13 allows for appeals against the imposition of stop notices and provides for such appeals to be heard by a county court. Under paragraph 14 it is made an offence not to comply with a stop notice.

d. Enforcement undertakings

Paragraph 15 allows the Electoral Commission to accept an enforcement undertaking from a person who it believes has committed an offence or contravention under PPERA. The person suspected may offer an enforcement undertaking which outlines the action they will take to ensure that the offence or contravention does not continue or recur, or to restore the position to that before the offence took place, or action that might be prescribed in an order by the Secretary of State. The undertaking will only take effect if the Commission accepts it. Sub-paragraph (2) makes provision for a person who has complied with the accepted undertaking to be exempt from other sanctions for the same offence.

e. Powers of the Secretary of State to make supplementary provisions by order

Under Part 5 of the Schedule the Secretary of State is given the power to make orders in relation to the new Schedule 19B to PPERA. Before doing so the Secretary of State

must consult the Electoral Commission and any other persons considered appropriate. Paragraphs 18 and 19 give details of what can be included in orders relating to financial penalties and enforcement undertakings. Paragraph 20 allows an order to be made to extend the time available in which to institute criminal proceedings against a person charged with an offence under PPERA and paragraph 21 allows an order to be made to set out details of the appeals process in relation to the sanctions available under the Schedule.

f. General and supplementary measures relating to sanctions

The Schedule limits the combination of sanctions against a person in paragraph 22. A fixed monetary penalty cannot be imposed on a person if they are already subject to a discretionary requirement or stop notice. Similarly, a person who has had a fixed monetary penalty imposed on them cannot be given a discretionary requirement or a stop notice.

Paragraph 23 prevents the Commission from taking account of a statement (which might be self-incriminating) made under the new Schedule 19A of PPERA (which gives the Commission investigatory powers and is contained in Schedule 1 of the Bill) when deciding whether to impose a civil sanction on that person.

The Electoral Commission is required to publish guidance about the enforcement of PPERA under paragraph 25. The guidance must include details of all the sanctions and the rights of appeal against their imposition. The Commission must also publish reports from time to time listing the cases in which they have imposed sanctions (paragraph 27). Paragraph 26 requires all financial penalties paid to the Commission to be paid into the Consolidated Fund and paragraph 28 lists the public bodies from which the Commission can request information whilst exercising the powers set out in the Schedule.

The Bill therefore gives the Electoral Commission a wide range of new powers. These are designed to be directed with reference to political parties and politicians. It is only since PPERA that the activities of parties, as private bodies, have been subject to detailed statutory regulation. These provisions would seem to extend considerably the likelihood that donors, party officers and holders of relevant elective offices, including MPs, will have regulatory contact with the Commission. The Commission itself is responsible for its use of the new investigatory powers. In a briefing issued in September 2008 it welcomed its new powers:

We have argued that the regulatory framework needs to be strengthened so we have the tools to do our job. The new suite of sanctions outlined in the Bill will greatly enhance the Commission's ability to act in a proportionate way to ensure compliance with the statutory requirements we regulate. They are set in a framework of procedural safeguards, including new rights of appeal.

Enhanced powers to obtain evidence during investigations, from individuals and organisations not regulated under the Political Parties Elections and

Referendums Act 2000 (PPERA) will enable us to conduct complete and robust investigations in conjunction with the relevant prosecuting authorities.⁵⁵

The briefing also called for changes to the forfeiture regime:

To bring our existing powers into line with the new set of flexible sanctions introduced by the Bill, we would like to see the stand-alone forfeiture provision in PPERA repealed and replaced by an amended forfeiture sanction to be included in the civil sanction regime under Schedule 2 of the PPE Bill.⁵⁶

The *Explanatory Notes* indicate that the Electoral Commission has estimated that 'the additional costs arising as a result of the changes to its powers and governance will amount to approximately £650,000 per annum. The Commission will consider the extent to which this can be met from within its existing settlement.'⁵⁷

III Political donations and expenditure

As noted at the beginning of this paper, PPERA introduced national regulation of party expenditure, following the recommendations of the Neill (CSPL) Committee. There were differences in emphasis between the Neill Committee recommendations and PPERA. In particular, PPERA implemented the following policies:

- Introduced national expenditure controls on referendums
- Made changes to the definition of candidates for election expenses purposes.

But PPERA did not contain proposals for tax relief on small donations called for by Neill.

PPERA has been subject to a number of criticisms and reviews, including a major review by the Electoral Commission in 2003.⁵⁸ There has been concern that party spending on elections has not decreased, and that major parties have been reliant on large donations from individuals, or contributions from trade unions.

Library Research Paper 07/34 *The Funding of Political Parties* covers much of the background to this current Bill and accompanying white paper. In particular, it describes:

- the types of public funding already available to political parties
- the current statutory regulation of donations
- the introduction of legislation on loans, following the 'cash for honours' affair
- reviews of party funding by the Electoral Commission in 2004 and the Constitutional Affairs Select Committee in 2006

⁵⁵ *Political Parties and Elections Bill* September 2008 Electoral Commission http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/64419/Party-Funding-Briefing-Final.pdf

⁵⁶ Ibid

⁵⁷ *Explanatory Notes to Bill 141*, para 98

⁵⁸ *PPERA - recommendations for change*. Electoral Commission, 2003, para 5.9 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/56732/PPERA-report.pdf

- the review of party funding by Sir Hayden Phillips which reported in 2007⁵⁹

Standard Note 4611 *Election Expenditure Controls* sets out the current rules governing national expenditure by parties and constituency expenditure by candidates.⁶⁰ Standard Note 4527 *Party Finance: A Chronology* looks at developments in terms of individual events.⁶¹

A. The Phillips review

1. The report in March 2007

As noted in Research Paper 07/34, the Phillips review published a final report on 15 March 2007. The Review had been established by the former Prime Minister, Tony Blair, on 15 March 2006, following intense media focus on loans made to political parties. The report's summary set out a series of points which it saw as a basis for agreement for further negotiation between the three major parties.⁶²

Sir Hayden recommended further talks among the three major parties, with some independent moderation. The review recommended:

- The status quo was no longer sustainable
- There should be a cap of £50,000 on donations to parties nationally
- Expenditure limits for general elections should be reduced
- An increase in public funding should be introduced, linked to measures of popular support for parties and democratic engagement
- Party funding should become more transparent
- Controls on expenditure by third parties should be increased
- The regulatory role of the Electoral Commission should be strengthened

Sir Hayden identified two main obstacles:

1. The design on a limit of donations which took account of trade union funding of the Labour Party.
2. The practicalities of limiting general election expenditure, particularly in marginal constituencies.

2. The breakdown of inter party talks

On 30 October 2007 Sir Hayden announced that talks between the three main political parties on measures to reform political party funding were suspended without

⁵⁹ <http://www.parliament.uk/commons/lib/research/rp2007/rp07-034.pdf>

⁶⁰ <http://www.parliament.uk/commons/lib/research/notes/snpc-04611.pdf>

⁶¹ <http://www.parliament.uk/commons/lib/research/notes/SNPC-04527.pdf>

⁶² *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*. The Review of the Funding of Political Parties, March 2007 http://www.partyfundingreview.gov.uk/files/strengthening_democracy.pdf

agreement.⁶³ He published the draft agreement on party funding that he had put to the parties in August 2007.⁶⁴

The Labour Party maintained that the Conservatives had terminated the talks by withdrawing. However, the Opposition stated that the breakdown was due to disagreement on the treatment of trade union funding for the Labour Party. In a Commons debate on party finance on 4 December, the Conservative MP, Andrew Tyrie, argued that all the background papers prepared as part of the Hayden Phillips enquiry should be released and that the key question was regulating donations rather than expenditure.⁶⁵

Professor Justin Fisher, an adviser to the Review, noted that the draft agreement proposed that rather than trade union affiliations being regarded as collective contributions, they should instead be seen as individual contributions to the Labour Party by affiliated union members. This would require individuals to affiliate separately with clear explanations on union membership forms and annual reminders to existing members. In relation to party expenditure, the proposal was for spending controls to apply to the whole Westminster electoral cycle, with the differentiation between national and local expenditure disappearing. The Neill (CSPL) Committee had considered removing that differentiation, and requiring national parties to keep track of overall expenditure. The Committee decided against this, arguing that the burden on voluntary party workers would be too great, and that the removal of local limits would result in even more expenditure being targeted on marginal seats.⁶⁶ Justin Fisher assessed the outcome as follows:

Whilst the Liberal Democrats were involved in the talks, in truth the real debates have been between Labour and Conservative and disinformation has been spread by both sides.⁶⁷

The Queen's Speech of 6 November 2007 promised that the Government would bring forward proposals on the regulation of party finance and expenditure, but no further details were made available at this stage.⁶⁸

There was further public and media interest in party funding in November 2007 when the *Mail on Sunday* revealed that Labour had received £380,000 from businessman David Abrahams who used friends and colleagues to donate the money to protect his privacy. At this point, the Prime Minister, Gordon Brown, indicated interest in a cap on donations, which would include trade union funding of Labour, as part of a wider settlement on party funding.⁶⁹ Further information on subsequent events is given in Library Standard Note

⁶³ Inter-party talks suspended without agreement, *The Review of the Funding of Political Parties*, 30 October 2007 <http://www.partyfundingreview.gov.uk/htmls/news.htm>

⁶⁴ Proposals for the funding of political parties: draft agreement put to political parties, August 2007. Available at <http://www.partyfundingreview.gov.uk/htmls/download.htm>

⁶⁵ HC Deb 4 December 2007 c731

⁶⁶ *The Funding of the Political Parties in the UK* Cm 4057 1998, para 10.39

⁶⁷ "Party funding: back to square one (and a Half), or every cloud has a silver lining?", *The Political Quarterly*, January-March 2008

⁶⁸ www.commonleader.gov.uk website has more details

⁶⁹ "Hain admits more errors on funding", *Financial Times*, 4 December 2007

4527 *Party Finance: A Chronology*.⁷⁰ Briefly, the General Secretary of the Labour Party, Peter Watt, resigned. There were press suggestions that prosecutions were unlikely, at the end of April 2008.⁷¹ At the end of June 2008, there were reports that a file had been passed to the Crown Prosecution Service.⁷²

3. Recent developments

There was an Opposition Day debate on party funding on 4 December 2007, where debate between Labour and Conservative MPs was dominated by allegations and counter allegations about the activities of the former Labour General Secretary, Peter Watt, and of Lord Ashcroft respectively. Francis Maude, for the Conservatives, concentrated on the effects of Labour dependence on trade union funding and the need for a cap on donations; David Heath, for the Liberal Democrats, emphasised the importance of all party agreement for any legislation. The Justice Secretary, Jack Straw, argued that there was a need for accountability and transparency on all sides before politicians could regain a level of public trust. He said:

In the Gracious Speech, we announced that we would produce proposals in respect of party funding and regulation. The case for a comprehensive and fair package is overwhelming. It is set out in the report by the Constitutional Affairs Committee and in Sir Hayden Phillip's report and his later draft agreement. My Rt Hon Friend, the Prime Minister, expressed his backing for it at the weekend. A White Paper is currently being prepared; we shall publish it as soon as possible and present legislation thereafter.⁷³

In April 2008 two separate reports were published calling for reform of the party funding process. On 23 April 2008 Michael Pinto-Duschinsky produced a report published by the think tank, Policy Exchange, which argued that national election costs had almost halved since 2000, and that the methodology of the Phillips enquiry was flawed. The report also argued that incumbent councillors and MPs were able to use publicly funded allowances to assist with re-election and therefore this form of expenditure required regulation.⁷⁴

On 28 April 2008 the Joseph Rowntree Reform Trust published a report, *Purity of elections in the UK: causes for concern*. The report concluded that there had been a decline in public confidence in the electoral process and that there was a widespread view that 'a fundamental overhaul of UK electoral law, administration and policy is urgently required'. Chapter 4 of the report looked at expenditure in marginal constituencies.⁷⁵ It argued that there was substantial evidence to suggest that money could have a powerful impact on the outcome of general elections, particularly where targeted at marginal constituencies over sustained periods of time.

⁷⁰ <http://www.parliament.uk/commons/lib/research/notes/SNPC-04527.pdf>

⁷¹ "Police clear businessman", *Guardian*, 28 April 2008

⁷² "Three Labour Party general secretaries named in donations investigations file", *Times*, 27 June 2008

⁷³ HC Deb 4 December 2007 c718

⁷⁴ "Paying for the Party: Myths and Realities in British political finance", Michael Pinto-Duschinsky, Policy Exchange, April 2008

⁷⁵ *Purity of Elections in the UK: Causes for Concern* by Stuart Wilks-Heeg, Joseph Rowntree Reform Trust, 2008. Available at <http://www.jrrt.org.uk/Purity%20of%20Elections%20in%20the%20UK.pdf>

B. The white paper *Party Finance and Expenditure in the UK*

The Lord Chancellor Jack Straw, published the white paper foreshadowed in the Queen's Speech on 16 June 2008. This was entitled *Party Finance and Expenditure in the United Kingdom: The Government's proposals*.⁷⁶

The main proposals were summarised in the Ministry of Justice website:

The government plans to introduce immediate legislation to:

- bring in more effective controls on candidates' spending through the reintroduction of 'triggering' for candidate spending;
- strengthen the Electoral Commission so that it is better equipped to regulate party spending and political donations - both giving it stronger powers and reforming its governance so that it can benefit from Commissioners with recent experience of politics ;
- increase the transparency of donations to ensure that the ultimate source is revealed, including by closer regulation of unincorporated associations.

However, the white paper also discussed the feasibility of introducing a donation cap and/or further public funding for political parties. It concluded that limiting donations would require a corresponding increase in public funding, and a consensus on this did not exist at present.

In his statement to Parliament, Mr Straw said:

The excessive spending by parties and candidates gives rise to the wider problems with party finance that we see today. Repeated independent reviews—including those from Sir Hayden Phillips, the Committee on Standards in Public Life and the then Constitutional Affairs Committee—have called the problem a “spending arms race”, although some individuals, I know, still question its existence. But a spending arms race is evident within each electoral cycle. As Sir Hayden's report said, spending by the two largest parties was £90 million in the 12 months preceding the 2005 election, up from £65 million in the 12 months before the 2001 election. That was despite the campaign limit being set at £20 million for each party. Although the parties did not act unlawfully, their ability to spend well above the campaign limit under the Act reveals a problem with the rules. In the interests of democracy, we need finally to achieve what all parties had sought to do through the 2000 Act, and to stop this damaging arms race...

[...]

There has been widespread concern that a loophole in the 2000 Act has allowed certain unincorporated associations to obscure the original source of donations to parties. Therefore, as the Phillips review proposed, those will be better regulated, as will third-party campaigning organisations.

⁷⁶ Cm 7329 June 2008, available at <http://www.justice.gov.uk/docs/party-finance-expenditure.pdf>

Let me turn to spending by parties. In 2000, when I took through the Political Parties, Elections and Referendums Act, all believed that we were, in the words of Lord Neill's report, "buttressing" the existing restrictions on spending, including those in the Representation of the People Act 1983 and its predecessors. What we did not foresee at the time was the likelihood of significant increased and unregulated candidate spending as a result of the detailed drafting of the Bill, although the late Lord Mackay of Ardbrecknish, who was on the Conservative Front Bench, sought to alert us to the problem by tabling a clarifying amendment on behalf of his party.

The White Paper proposes a return to the system of "triggering", which will regulate all candidate spending directed towards electoral success, and which was a key feature of the last Administration's 1983 Act. A stronger, more focused Electoral Commission will help to avoid the previous uncertainty about the rules. In parallel with that, we propose to re-examine the list of activities that are defined as campaign spending.

Let me turn to the question of introducing donation caps in return for enhanced state funding. To do that, we would have to carry with us not only all the main parties, but the public—the taxpayer—as well. That is not happening at present. We are very ready to have the debate, and, indeed, to discuss donation caps at a lower level than Sir Hayden recommended, but that will require us to come together to allow discussion between the parties and the public. I intend to introduce a Bill before the summer recess, but with Second Reading taking place in the early autumn and the other stages being carried over into the next Session. That will provide ample opportunity both for comments to be made to us and for scrutiny to be carried out.⁷⁷

In response, the Shadow Lord Chancellor, Francis Maude, said:

Will the Justice Secretary agree that the discussions came very close to overall agreement, but foundered on the key issue of whether trade union donations should be subject to donation caps on the same basis as other donations? Will he now place in the Library the minutes and the background papers to the review, which will show that it was Labour's refusal to allow further work on trade union funding that brought the talks to an end? Does he recall that he and Peter Watt—the then Labour general secretary—refused point blank even to discuss giving trade union members the right to a real choice in whether to pay the political levy? *[Interruption.]* Well, does the Secretary of State remember the revelation that a Lib Dem MP received a ballot paper for Labour's leadership contest, having unwittingly become a Labour party member through a trade union? Will he not acknowledge that when trade unions routinely declare that 100 per cent. of their members—and in two cases, more than 100 per cent.—are paying the political levy, the idea that these are voluntary individual donations to Labour are laughable, especially when polling shows that fewer than half of union members even vote Labour, let alone want to support it financially?

Does the Secretary of State accept that his proposal to reintroduce "triggering" was not even part of Sir Hayden's draft agreement? Is not this change designed to make it more difficult—a caption in the White Paper makes this clear—for

⁷⁷ HC Deb 16 June 2008 c692-3

candidates to campaign effectively, and thus to benefit sitting Labour MPs? Does the Secretary of State not understand that it would be an atrocious abuse of power for the Government to force through restrictions on what parliamentary candidates can spend from money they have raised privately, while sitting MPs can spend ever-more taxpayers' money on promoting themselves?⁷⁸

For the Liberal Democrats, Chris Huhne said:

We Liberal Democrats welcome new investigatory powers for the Electoral Commission, its proposed new governance arrangements and transparency for unincorporated associations. In general, however, I have to say that this is a woefully inadequate package, and the Secretary of State is getting scant reward for his modesty from the official Opposition. There is nothing in this statement that will stop the arms race between the parties....There are no caps on donations or local spending, and is public confidence not at a low because the Labour and Conservative parties are seen to be in the pockets of big business or the trade unions?⁷⁹

IV Donations and expenditure at constituency level

A. Introduction

Following the creation of national limits in PPERA, attention has moved to developments at the constituency level, both in terms of donations and expenditure. It has become increasingly common for major parties to target their campaigning on key marginals. A shift in party behaviour became noticeable in the 1990s,⁸⁰ but this trend became particularly visible in the 2005 general election campaign. Justin Fisher at Brunel University has undertaken research into campaigning at constituency level since 1992. A clear trend towards a decline in volunteer effort, replaced by professional campaigning techniques is evident, as well as direction of constituency campaigns by central party professionals.⁸¹

There is evidence to suggest that donations to local parties have increased in volume, and that in turn expenditure in marginal constituencies has grown, placing pressure on the system of regulation of election expenses.

The white paper and this Bill introduce further regulation of donations and expenditure at the constituency level, along with more transparency in relation to donations from unincorporated associations and intermediaries, and a strengthening of the regulatory body, the Electoral Commission. This represents part of the package presented by Phillips, but not all, given the failure to reach all party agreement. There is a new Government initiative in respect of the trigger for election expenditure in the constituency

⁷⁸ HC Deb 16 June 2008 c693-4

⁷⁹ HC Deb 16 June 2008 c696

⁸⁰ "From foot slogging to call centres and direct mail", Justin Fisher and David Denver, *European Journal for Political Research*, 2008 (forthcoming)

⁸¹ "Constituency campaigning in 2005: ever more centralisation?" Justin Fisher in *Political Communications: The British General Election of 2005*, D Wring and J Green eds 2007

not featuring in the Phillips draft agreement. The background is explained below, before an introduction to the concept of triggering election expenses is given.

B. The regulatory background

Donations at local level are regulated by PPERA. Library Research Paper 07/34 *Party Funding* gives full details.⁸² Briefly, donations over £1,000 received by the local accounting unit of a party must be declared to the Electoral Commission on a quarterly basis. Donations may only be accepted from a permissible donor (see the Glossary at the end of this paper for definitions of these terms).

PPERA set out requirements for third parties (such as pressure groups or trade unions) to declare donations, should they register to participate in an election campaign.⁸³ This is required to ensure that parties do not circumvent the transparency requirements of PPERA by benefiting from funding by associated campaigning groups. Third parties have separate limits on spending at both national and local level, distinct from limits on political parties. The rationale is to allow those who are not actually standing for election some freedom of expression within the context of the electoral campaign, while regulating the overall limit to ensure that such third parties do not have excessive spending power. See Library Standard Note 4804 *Third Parties donations and expenditure: regulation by PPERA* for more information.⁸⁴

1. Unincorporated associations

Third parties may also fund political parties directly and one method is donations by unincorporated associations. The term simply refers to bodies which do not have a regulated legal form. Some political parties are themselves unincorporated associations, and the term can encompass tenants' associations, clubs, residents' groups etc.

Under PPERA, members associations may give funds to support a political party without a requirement to name the association's members. These associations are defined in PPERA as organisations whose members consist solely or mainly of party members, excluding the party itself, or its accounting units.⁸⁵ Members associations are 'regulated donees' required to register donations over £5,000 and include, for example, organisations affiliated to the Labour Party, such as the Fabian Society and, for the Conservatives, the Campaign for Conservative Democracy and the Constituency Campaigning Services Board.⁸⁶

Unincorporated associations may be classified as members associations, but only where they consist wholly or mainly of party members. Otherwise such associations may make

⁸² <http://www.parliament.uk/commons/lib/research/rp2007/rp07-034.pdf>

⁸³ *Guidance for recognised third parties: Controlled expenditure and donations*, 7 March 2005

http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0014/14081/Guidance-Third-Parties-Expenditure_23684-11271__E__N__S__W__.pdf

⁸⁴ <http://www.parliament.uk/commons/lib/research/notes/snpc-04804.pdf>

⁸⁵ Schedule 7, para 1(6).

⁸⁶ PPERA, Schedule 7, para 10(2). Keith Ewing notes that very few Members' Associations have declared donations of over £5,000. *The Cost of Democracy: Party funding in modern British politics*, p97

donations, which must be recorded by the receiving party, as with any donation. However, there is no requirement to register the identity of the persons who form such an association, which by its nature does not have to file accounts.

PPERA provides that fines imposed on unincorporated associations are paid out of their funds.⁸⁷ Similarly, there are provisions for proceedings against an unincorporated association in section 151(1).

2. Donations channelled through third parties

Section 54 (1) (b) of PPERA requires political parties to refuse donations where the party is unable to ascertain the identity of the donor, whether because the donation is given anonymously, or the identity of the donor has been concealed. However, the party is not placed under a specific duty to investigate the source of the donation. The issue came to public prominence when it became apparent in November 2007 that the businessman David Abrahams had made donations of £650,000 to the Labour Party through personal intermediaries in an effort to protect his privacy. The then General Secretary, Peter Watt, resigned after admitting that he had known that intermediaries had been used.⁸⁸

C. Trends in constituency donations 2001-2005

The academics Ron Johnston and Charles Pattie have undertaken an analysis of cash donations to constituency parties in England and Wales from 2001-2005, using data on donations available on the Electoral Commission website. A comparison is therefore possible between the level of donations in the pre-election period Jan-June 2001, with Jan-Jun 2005. In summary:

Cash donations to constituency parties England and Wales 2001 and 2005 (£)

	Conservatives	Labour	Liberal Democrat
Jan -June 2001	716,050	553,579	287,933
Jan -June 2005	2,496,872	1,094,646	719,471

Cash figures for each year. Source: Electoral Commission website as cited in Johnston and Pattie.⁸⁹

The total cash value therefore has increased, although there has been no adjustment for inflation. Johnston and Pattie conclude:

All three parties reported more donations in the five month period including the 2001 general election than in the subsequent six month period - the Conservatives and Labour many more. This was even more the case in the six month period including the 2005 general election; fully 42 per cent of all donations to the Conservatives by value over the five years were received in that period, as were 30 per cent for Labour and 25 per cent for the Liberal Democrats. An impending election was clearly the stimulus for larger numbers of donations to

⁸⁷ Section 153 PPERA

⁸⁸ For further details, see Library Standard Note 4527 *Party Finance: A Chronology* at <http://www.parliament.uk/commons/lib/research/notes/SNPC-04527.pdf>

⁸⁹ Ron Johnston and Charles Pattie "Funding local political parties in England and Wales: Donations and constituency campaigns" *British Journal of Politics and International Relations* 2007 Vol 9

be solicited and obtained; for Labour, the donations received then were on average much larger in value than those received in the adjacent six months.⁹⁰

They found that there were major differences in the sources of cash donations. The Conservatives' major donor sources were named individuals and corporations whereas, for the Labour Party, the major source was trade union contributions and payments from constituency parties. The biggest source for Liberal Democrats was named individuals, but they also received significant amounts from local government councillors. Bearwood Corporate Services was the largest individual donor over the period 2001-5. The next most important funding source for Conservative constituency donations was the Midlands Industrial Council, an unincorporated association, followed by the donor Lord Leonard Steinberg. Johnston and Pattie noted that these three donors accounted for 39 per cent of all donations made to local Conservative parties from July 2004 to June 2005.⁹¹

The Joseph Rowntree study of April 2008 also summarised the Johnston and Pattie research, indicating divergent trends in donations to local parties:

Using the Electoral Commission's register of donations to political parties for the period February 2001 to December 2005, Johnston and Pattie (2007) isolate the donations and directly to local parties and identify striking variations in the practice of Labour and Conservative donors. Donations made to constituency Labour parties from 2001 to 2005, particularly donations from individual trade unions, were often directed at relatively safe seats in Labour's 'heartlands' rather than at key marginal seats. By contrast, Conservative donors appeared to be "more strategic than their Labour counterparts."⁹²

Unincorporated associations are responsible for significant amounts of donations to political parties. Between 16 February 2001 and 31 March 2008, cash donations by unincorporated associations amounted to £9,886,908.77 and non cash to £ 657,532.71. The total is £ 9,886,908.77, derived from searches on Electoral Commission website.⁹³

Most attention has focused on Conservative funding raising, with respect to unincorporated associations. Professor Keith Ewing noted in his 2007 study of British party funding that by 2006 the Midlands Industrial Council had transferred £955,789 in cash donations to the Conservative Party nationally and locally. Similarly, Bearwood Property Services Limited had donated over £1m to the Conservative Party nationally and locally. Bearwood is a company and is not therefore an unincorporated association, but is often linked by commentators with the MIC as a mechanism to channel funds to Conservative constituency associations. Professor Ewing set out the available information about Bearwood:

⁹⁰ Ibid, pp365-395

⁹¹ Ron Johnston and Charles Pattie "Funding local political parties in England and Wales: Donations and constituency campaigns," *British Journal of Politics and International Relations* 2007 Vol 9 pp373

⁹² Ibid pp59-60

⁹³ <http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm> Late donations are not included within this total, nor is the cost of a visit to World Economic Forum at Davos by David Cameron

According to research at Companies House by the *Sunday Telegraph*, Bearwood Corporate Services Ltd is 'owned by Bearwood holdings which is itself 99 per cent owned by Astraporta UK, and investment firm entirely controlled by [Lord] Ashcroft'.⁹⁴

The Shadow Lord Chancellor, Francis Maude, noted in a debate on 4 December 2007 that the names of the members of the Midlands Industrial Councils had been disclosed publicly.⁹⁵

Reports that Lord Ashcroft, currently Conservative Deputy Treasurer, had been responsible for significant donations to Conservative candidates in 36 marginal seats surfaced after the 2005 general election.⁹⁶ Lord Ashcroft set out his electoral strategy in his autobiography in 2005, explaining how he had decided to donate money directly to constituency parties which were in potentially winnable seats, rather than to the central Conservative party. Candidates applied to him to take part in the scheme, which resulted in each receiving between £20,000 and £40,000 for their local associations.⁹⁷ Lord Ashcroft's residence for taxation purposes has been the subject of controversy since he was appointed to the House of Lords in 2000 by the Prime Minister, at the request of the Conservatives, on the understanding that he would become resident in the UK.⁹⁸

Labour also receives donations from unincorporated associations, which include bodies such as the Fabian Society and local Labour groups. The *Daily Telegraph* reported in December 2007 that Labour had received more than £300,000 from Muslim Friends for Labour, an unincorporated association; its head, Mohammed Sarwar, agreed to make the names of its members public.⁹⁹ A search of the Electoral Commission database for donations from unincorporated associations to Labour gives a total of £ 2,200,016.50 in cash donations and £ 175,544.17 in non-cash donations from 16 February 2001 until 31 March 2008.

The Standards and Privileges Select Committee report, *Conduct of Mr John Horam*, highlighted the requirement of Members who had solicited donations for their constituency parties to register these in the Registrar of Members' Interests.¹⁰⁰ The donations must also be registered with the Electoral Commission. For further information about the duties of Members to register donations, see Library Standard Note 1119 *Donations to Members of Parliament*¹⁰¹. The *Electoral Administration Act 2006* allows for a single system of registration of donations with the Parliamentary Commissioner for Standards. This one stop shop has not yet been brought into effect.

⁹⁴ Keith Ewing, *The Cost of Democracy: Party Funding is Modern British Politics*, 2007, p110-111.

⁹⁵ HC Deb 4 December 2007 c702

⁹⁶ "This is on the frontline", *Guardian*, 30 November 2007. 37 constituency associations received donations from Bearwood Corporate Services in the first quarter of 2005, according to the Electoral Commission website. One of these was a constituency seat in the Scottish Parliament, Edinburgh Pentlands.

⁹⁷ *Dirty Politics*, *Dirty Times: My fight with Wapping and New Labour* by Michael Ashcroft, 2005 pp 289-295

⁹⁸ For further information see Library Standard Note 4582 *The Disqualification from Parliament (Taxation Status) Bill*. Available at <http://www.parliament.uk/commons/lib/research/notes/snpc-04582.pdf>

⁹⁹ "Labour donor's secret £300,000", *Daily Telegraph*, 10 December 2007

¹⁰⁰ HC 420 2005-06

¹⁰¹ <http://www.parliament.uk/commons/lib/research/notes/snpc-01119.pdf>

Parties' accounting units are only required to make a return of their accounts to the Electoral Commission if their annual turnover is £25,000 or more. Pattie and Johnston have surveyed returns to the Electoral Commission by constituency parties in 2004 and 2005, finding that only a minority of local parties in England had an annual turnover exceeding that figure. Virtually all those over £25,000 were Conservative. They also found some discrepancies between the total value of separately reported donations and the value of donations recorded in local party accounts.¹⁰²

There has been controversy as to the extent to which expenditure in a local campaign affects the outcome. The standard academic analysis has been that incumbency was not a substantial factor in electoral success, as national trends predominate in a general election campaign. Therefore, the campaign at constituency level was considered largely irrelevant.¹⁰³ However, the academics Johnston and Pattie have argued for some years that campaign expenditure and activity in a constituency does have an effect.¹⁰⁴ They have summarised available evidence in a recent¹⁰⁵ They cite academic research by Denver and Hands which found that while Labour and the Liberal Democrats concentrated their efforts most intensively on in their target seats in 1992, 1997, and 2001, the Conservatives tended to campaign as intensively in their safe seats as in their target ones.¹⁰⁶ Johnson and Pattie found that "substantial long campaigns [in constituencies] sustained by large donated sums appear to have been rare before the 2005 election".¹⁰⁷

Lord Ashcroft concluded from his study of the 2005 general election campaign that target seats needed to be much more narrowly selected for any expenditure to have an effect.¹⁰⁸ Lord Ashcroft also noted in his autobiography his frustration at the pattern of spending in the Conservative campaign in 2001, leading to his decision to target his donations directly to constituency parties.¹⁰⁹ But targeting particular seats may not always have the desired outcome. Other academic researchers have found that although Labour had 90 target seats in 1997, they won 65 non target seats with a similar electoral swing, raising doubts about the effectiveness of targeting by party headquarters.¹¹⁰ There appears to be no clear pattern of voting to indicate that Lord Ashcroft's donations had a quantifiable effect. The Conservatives did relatively well in some of these

¹⁰² "Conservative constituency parties' funding and spending in England and Wales 2004-5", *Political Quarterly*, July – September 2007

¹⁰³ See for example, Butler and Kavanagh, *The British General Election of 1992* p245. Johnston and Pattie cite the standard literature in *Putting Voters in their place: Geography and Elections in Great Britain* 2006

¹⁰⁴ Johnston and Pattie evidence to Home Affairs Select Committee report *Funding of Political Parties* HC 1992-3; "Where's the difference? Decomposing the impact of local election campaigns in Great Britain" *Electoral Studies* vol 16 no 2 1997

¹⁰⁵ *Putting Voters in their place: geography and elections in Great Britain. 2006* See Chapter 6 "Party campaigns and their impact"

¹⁰⁶ Ibid pp206-7

¹⁰⁷ Ron Johnston and Charles Pattie "Funding local political parties in England and Wales: Donations and constituency campaigns" *British Journal of Politics and International Relations* 2007 Vol 9 p390

¹⁰⁸ *Smell the coffee: a wake up call for the Conservative Party, 2005*
<http://www.lordashcroft.com/pdf/GeneralElectionReport.pdf>

¹⁰⁹ *Dirty Politics, Dirty Times: my fight with Wapping and New Labour* by Michael Ashcroft, 2005 p280

¹¹⁰ John Curtice and Michael Steed "The results analysed" in *The British General Election of 1997* Butler and Kavanagh, cited in *Putting Voters in their place* by Johnston and Pattie

constituencies, but not in others and the relationship between voting and expenditure locally remains complex.

Johnston and Pattie's most recent research suggests that a challenger's spending during an election campaign has a much greater impact than that of the incumbent, providing challengers with a significant 'catch up' effect.¹¹¹ Justin Fisher has produced evidence from a survey of election agents since the 1990s to indicate that new technology has taken the place of volunteers and professional campaigns have been more effective in targeting voters.¹¹²

1. Pressure for reform

The demand for transparency in relation to donations from unincorporated associations and through intermediaries is relatively recent. The recommendations from the 2003 review of PPERA by the Electoral Commission did not include any on unincorporated associations and indeed the question of their further regulation was not discussed in the report.¹¹³ And although the *Electoral Administration Act 2006* made changes to PPERA, the Government did not take the opportunity to address these issues. However, individual Labour MPs began to press for further regulation following the 2005 general election and following publicity about the funding of constituency parties by Lord Ashcroft and others. In particular, the former MP, Peter Bradley, who had been defeated at The Wrekin in 2005, drew attention to the scale of the funding given to the Conservative constituency party there, which Lord Ashcroft estimated amounted to £50,000.¹¹⁴¹¹⁵

One of the recommendations of the Phillips review draft agreement was for unincorporated associations which donate to political parties to be required to identify the persons who make the decisions to donate money.¹¹⁶ Following the media attention on David Abrahams' donations to the Labour Party in November 2007, attention was also focused on the question of channelling donations through intermediaries.

The Conservative Party has argued that the Opposition party has particular financial needs when campaigning in marginal seats, where the incumbent has the ability to communicate achievements to constituents, as well as represent their interests. There has been particular controversy over the introduction of the Communications Allowance

"How much does a vote cost? Incumbency and the impact of campaign spending at English general elections", *Journal of Elections, Public Opinion and Parties*, 18 (2) 2008 R.J. Johnston and C.J. Pattie, cited in *Purity of Elections in the UK: Cause for Concern*

¹¹² *Political Finance and Local Political Activity presentation* by Justin Fisher, Political Finance Workshop 29 May 2008, Institute for Advanced Legal Studies

¹¹³ *PPERA 2000: Recommendations for Change*, Electoral Commission, June 2003
http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/56732/PPERA-report.pdf

¹¹⁴ *Dirty Politics, Dirty Times: My fight with Wapping and New Labour* Michael Ashcroft 2005 pp 294. See "Undeclared gifts 'bought seats'" *Observer*, 26 March 2006 and evidence to the Constitutional Affairs Committee report on party funding, December 2006, from Peter Bradley.

¹¹⁵ "Funding local political parties in England and Wales: Donations and constituency campaigns" in *British Journal of Politics and International Relations* itemises donations and expenditure with respect to The Wrekin in 2005 Vol 9 2007 p389

¹¹⁶ *Proposals for the funding of political parties: Draft agreement put to the Conservative, Labour and Liberal Democrat parties by the Secretariat of the inter-party talks on the funding of political parties in August 2007*, Recommendation D8.

for MPs. The Conservatives have complained that the Allowance favours incumbents, as Francis Maude claimed in the most recent debate on party funding on 4 December 2007:

How monstrous it would be if, at a time when the amount that sitting MPs can spend promoting themselves in their constituencies out of taxpayers' money has increased so much, their competitors would be barred by law from spending money that they themselves had raised from private supporters. I know that Labour MPs and Lib Dems are feeling a little vulnerable at present, but even they must see how indefensible such a move would be.¹¹⁷

Library Standard Note 4615 *Communications Allowances* gives further details.¹¹⁸ The governing party also has the advantage of setting the date of the general election, since there are no fixed term elections for the Commons.

Michael Pinto-Duschinsky's report in April 2008, cited above, also highlighted public funding of local councillors through allowances and the provision of political assistants, which he argued also helped incumbents to defend their seats.¹¹⁹ Research by Johnston and Pattie suggests that Liberal Democrat councillors in particular are responsible for a large proportion of donations to Liberal Democrat constituency parties.¹²⁰

D. Spending limits in constituencies

Recent evidence of increased funding of selected constituency parties has focused attention on the enforcement of election expenditure limits for candidates during an election campaign.

1. Interaction with national expenditure limits

PPERA superimposed a system of controlling national expenditure of political parties onto an existing system of regulating expenditure in constituencies. Section 72(7) of PERA explicitly provides that expenditure which would be included in an election expenses return by a candidate is not to be considered as campaign expenditure. The system of national expenditure limits introduced in 2001 is described in Library Standard Note 4611 *Election Expenditure Controls*.¹²¹ As Professor Keith Ewing has noted, much of the impetus for regulation was the 'extraordinary inflation [of national party expenditure] in the period between 1992 and 1997'.¹²²

The exact amount spent by parties in support of their election campaigns is the subject of some controversy. National campaign spending appeared to decline for the first time at the 2001 election, as noted by the Joseph Rowntree study of April 2008:

¹¹⁷ HC Deb 4 December 2007 c708

¹¹⁸ <http://www.parliament.uk/commons/lib/research/notes/snpc-04615.pdf>

¹¹⁹ <http://www.policyexchange.org.uk/images/libimages/377.PDF> pp36-38

¹²⁰ "Funding local parties in England and Wales: Donations and Constituency Campaigns", *British Journal of Politics and International Relations* Vol 9 2007 p371

¹²¹ <http://www.parliament.uk/commons/lib/research/notes/snpc-04611.pdf>

¹²² *The Cost of Democracy: Party Funding in Modern British Politics*, K D Ewing, 2007

National election spending rose sharply at each election after 1979, with the record level of expenditure in 1997 representing the culmination of a spending 'arms race' in British politics during the 1990s (Ewing, 2007, p.5). The sharp fall in 2001 was as much a reflection of the perilous financial state of the parties as it was a direct product of the imposition of expenditure caps, since all three main parties spent well within the imposed limits.¹²³

National expenditure rose again in 2005, according to the analysis produced by Joseph Rowntree from Electoral Commission data, but not to the levels seen in 1997, where total campaign spending, national and local for all parties appeared to have been over £90 million. It should be noted that the increase in expenditure from 2001 reflected to some extent an extension of the regulated national campaign period from 111 days in 2001 to 365 days in 2005. In 2001, PPERA had only come into effect in February and so party spending before that date was unregulated.¹²⁴

The official Electoral Commission report *Election 2005: campaign spending: The UK Parliamentary general election*¹²⁵ calculated that political parties had spent over £42m across the UK nationally, according to the returns to the Electoral Commission, with the Labour and Conservative parties accounting for 84 per cent of the £41m spent in Great Britain. Candidates spent just over £14.1m in total with the average amount being just under £4,000, well within the constituency limits, which vary according to the number of electors on the register, ranging from £10,000 to £12,000. Further detail on the calculation of the limit is given below on page 55.

But constituency expenditure has been on a downward trend, combined with more specific targeting of marginals:

Taking a longer-term perspective, the average campaign expenditure of candidates from all three parties in 2005 was about a third of the level of spending at the 1945 election (see table 4.1). However, there is also a second significant trend: the geographical targeting of campaign spending. As table 4.2 shows, all three parties spend considerably more in seats they are defending at a general election and considerably less in seats in which they start as the third-placed party.¹²⁶

Michael Pinto-Duschinsky has argued that long term spending patterns do not equate to a spending arms race in the 2000s. His report for the Policy Exchange in April 2008 stated that in the most recent electoral cycle, 2001- 05, the highest-spending political party, the Conservatives, spent 4 per cent less in real terms than in 1966-70. His calculations are based on combining local and national expenditure, and the party expenditure during the whole period following the general election, both campaign and routine. Dr Pinto-Duschinsky found that over this forty year period Labour had increased its expenditure

¹²³ *Purity of Elections in the UK: Causes for Concern* Joseph Rowntree Reform Trust Ltd 2008 Stuart Wilks-Heeg p55. See also Figure 4.1

¹²⁴ For further information, see the Constitutional Affairs Committee report on party funding, HC 163 2006-7 <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/163/16302.htm>, para 43

¹²⁵ *Election 2005: campaign spending. The UK Parliamentary general election*, Electoral Commission, 2006 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/47183/CampaignSpendingweb_20371-14985__E__N__S__W__.pdf

¹²⁶ *Ibid* p57. See tables 4.1 and 4.2

so that the spending gap between the two parties had narrowed considerably. National party expenditure had taken over from local constituency spending, with a decline in local activity and membership in both of the leading parties.

There has been criticism of the methodology behind the Policy Exchange report as not including within its analysis the funding of constituency parties since 2003, or Liberal Democrat spending patterns.¹²⁷ However, Dr Pinto Duschinsky has in turn criticised the methodology of the Phillips review when it concluded that general election expenditure by the two major parties was increasing substantially.¹²⁸ Phillips examined party income and expenditure between 2001-2005 only and this analysis appeared to show substantial year on year increases.¹²⁹ There is further analysis in Library Standard Note 4611 *Election Expenditure Controls*.¹³⁰

During the 2005 general election campaign, the differentiation between local and national spending appeared to decline, as national expenditure was focused increasingly on target marginal seats, in the form of direct mail, voter telephone calls etc.¹³¹ The contrast between the regulation of national limits for 365 days before the general election, with the much shorter period for local campaigning was also noticeable. Research commissioned by the Electoral Commission found that both Labour and Conservative had adopted strategies of targeting marginal constituencies, with activities beginning more than a year before the date of the election.¹³²

The Constitutional Affairs Select Committee report on party funding found that average spending at constituency level was declining since 1997:

73. While the accounts show escalating campaign costs at the national level, at the local level, very few candidates spend the total expenditure permitted. In 2001 the constituency level spending limit ranged from £6,846 to £11,957, depending upon the size and nature of the constituency. However, the average spending per candidate was only £3,582 and total candidate spending in 2001 fell 17% in real terms compared with 1997. Only 21% of candidates spent more than 80% of the permitted accounts while 53% spent less than 30% of the limits. In the 2005 General Election, candidates spent just over £14.1 million in total, compared to £11.9 million at the 1997 General Election. Almost 40% of all candidates spent less than two fifths of their statutory limit, with only 15% spending over four-fifths of their limit.¹³³

¹²⁷ "Flawed on funding" [Chris Huhne], *Guardian*, 25 April 2008

<http://www.guardian.co.uk/commentisfree/2008/apr/25/flawedonfunds> See also Jack Straw in HC Deb 16 June 2008 c692-3

¹²⁸ <http://www.policyexchange.org.uk/images/libimages/377.PDF> p27 and p36

¹²⁹ See *Interim Assessment :part 2*, The Review of the Funding of Political Parties October 2006, Annex D at http://www.partyfundingreview.gov.uk/files/Part_2_Annexes_and_References.pdf

¹³⁰ <http://www.parliament.uk/commons/lib/research/notes/snpc-04611.pdf>

¹³¹ Justin Fisher "Campaign Finance" in *Britain decides: the general election of 2005* eds Geddes and Tonge

¹³² "The general election 2005: campaign analysis, 25 August 2005", by Justin Fisher et al at http://www.electoralcommission.org.uk/files/dms/TheGeneralElection2005CampaignAnalysisReportFINA_L_19223-14162_E_N_S_W_.pdf

¹³³ HC 163 2006-07 <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/163/16302.htm>

E. Regulation of constituency expenses before PPERA

Before the enactment of PPERA, there was considerable uncertainty about the time when the calculation of a candidate's election expenses was triggered. Two statutory definitions are involved: that of a candidate and that of election expenses. Section 118 of the *Representation of the People Act 1983* (RPA) defined the term candidate as follows:

Interpretation of Part II.

In this Part of this Act, unless the context otherwise requires— ..

“candidate”—

(a)

in relation to a parliamentary election, means a person who is elected to serve in Parliament at the election or a person who is nominated as a candidate at the election, or is declared by himself or by others to be a candidate on or after the day of the issue of the writ for the election, or after the dissolution or vacancy in consequence of which the writ was issued;

(b)

in relation to an election under the local government Act, means a person elected or having been nominated or having declared himself a candidate for election, to the office to be filled at the election;

The definition of election expenses was chiefly based on section 76(1) of the *Representation of the People Act (RPA) 1983*:

No sum shall be paid and no expense shall be incurred by a candidate at an election or his election agent, whether before, during or after an election, on account of or in respect of the conduct or management of the election, in excess of the maximum amount specified in this section, and a candidate or election agent knowingly acting in contravention of this subsection shall be guilty of an illegal practice.

These sections had been in force in different acts, since the *Corrupt Practices Act 1883*. There was no definition of ‘conduct or management of the election’. Enforcement depended on the interpretation of mainly nineteenth century case law, which could be irrelevant for modern campaigning techniques. Moreover schedule 3 of the RPA, which listed the items to be defined as an election expense, was generally agreed to be outdated. The Neill Committee stated that it “largely reproduced the equivalent schedule in the 1883 act and, in some instances, is almost comically out of date”, listing telegrams, but not mobile phone expenditure.¹³⁴ The Home Office issued no circulars to guide election candidates and agents about the proper interpretation of the law.¹³⁵

The RPA 1983 set a maximum figure (which was varied from time to time by the Secretary of State) for the amount a candidate or agent could spend and therefore expenditure on national campaigning fell outside the controls.¹³⁶ There was also no

¹³⁴ Cm 4057, October 1998 para 10.2

¹³⁵ HC Deb 15 July 2008 c375w

¹³⁶ For further details see Library Standard Note 3413 *Election Expense Limits*
<http://www.parliament.uk/commons/lib/research/notes/snpc-03413.pdf>

definite rule which determined when the rules on expenditure came into play. In *Law and the Electoral Process*, published in 1988, H F Rawlings notes:

To avoid setting expenses running before formal adoption, a practice has developed in the case of parliamentary elections of calling selected but unadopted candidates 'Prospective Parliamentary Candidates' or PPCs. The word 'prospective' probably has no legal significance *per se* as the law is concerned with substance rather than form, but it may be useful as an indicator of the intention of the person involved, and thereby evidence that he has not yet declared himself a candidate and fully entered the battle...Consequently, it appears to be accepted that expenditure undertaken by a PPC will not normally be considered as counting towards election expenses.¹³⁷

1. The Fiona Jones case

The uncertainties were highlighted in the Fiona Jones case of 1999. Ms Jones was elected for Newark in the 1997 general election, but after a trial in the crown court, both Ms Jones and her agent, Desmond Whicher, were convicted of making a false declaration of election expenses on 19 March 1999 and Ms Jones was initially disqualified as an MP. The Court of Appeal overturned the convictions on 22 April. Having reviewed the mainly nineteenth century case law, the Appeal judgment noted:

There is no simple and decisive test to determine whether an expense is or is not an election expense within the meaning of the Act...but there may be some expenses about which reasonable people...could reach different conclusions...In this intermediate area, questions of judgement may arise. But no crime can be committed unless it is clearly shown that an election expense which should have been included has either been omitted or understated.¹³⁸

The Neill Committee noted in its 1998 report that there was no statutory definition of when a constituency election campaign actually began:

10.11 Another class of problems in connection with the existing arrangements for limiting candidates' expenditure at the local level concerns precisely what is supposed to be covered by the limits. In the first place, there is considerable doubt among individual candidates and the political parties about when, for purposes of the RPA 1983, a constituency election campaign is to be deemed to have begun. There is only a limited body of case law bearing on the subject, and interpretations of the Act vary considerably from constituency to constituency and from candidate to candidate.¹³⁹

¹³⁷ *Law and the Electoral Process*, H F Rawlings, Sweet & Maxwell, 1988, p141

¹³⁸ *R v Jones [1999] 2 Cr App Rep 253 CA, R v Whicher* Court of Appeal 22 April 1999

¹³⁹ *The funding of political parties in the United Kingdom*, Committee on Standards in Public Life Fifth report <http://www.archive.official-documents.co.uk/document/cm40/4057/volume-1/volume-1.pdf>

The Government response to the Neill Committee on Standards in Public Life noted that it was giving consideration to whether the law on election expenses needed clarification following the Fiona Jones case.¹⁴⁰

F. The changes made by PPERA

PPERA, as initially introduced in January 2000, altered the definition of candidate so that it covered only candidacies declared after a writ for the parliamentary election has been issued or after the last day for the publication of the notice of election for local government elections (25 days before the poll). The significance for incurring election expenses is that until the candidate is identified, expenses cannot count towards the overall limit.¹⁴¹

The then Minister, Paddy Tipping, explained at the standing committee stage of PPERA that new provisions would deal with the uncertainty about deciding when a candidate's election expenses had begun following the Fiona Jones case. Other reasons advanced were to provide clarity to local government elections when it had been unclear when the expenditure started and a distinction in the wording of the *Representation of the People Act 1983*, section 118(a) between those elected and those who stood as candidates, which appeared to exclude the latter from the definition of expenses.¹⁴² The Labour MP Martin Linton spoke in the short debate, pointing out that 'candidates can have a real problem in not knowing when their candidacy starts and perhaps inadvertently forgetting to use the word "prospective".¹⁴³ Mr Linton favoured combining local and national expenditure in a single limit, but this was not accepted by the Government.

There were some refinements to the drafting of the clauses during the Lords stages of the Bill.¹⁴⁴ The new provision was supported by the Opposition. Their spokesman, Lord Mackay of Ardbrecknish, moved a probing amendment in the Lords but accepted Government assurances from Lord Bach that it was unnecessary. Lord Bach explained the technical changes made to the definition of election expenses in PPERA as follows:

Clause 131 introduces new Sections 90A to 90D of the 1983 Act which set out a revised definition of election expenses. That revised definition is carried over to Section 76 of the 1983 Act, as amended by Clause 129 of the Bill, which sets limits on candidates' election expenses. The combined effect of Clauses 129 and 131 is that Section 76 of the 1983 Act no longer refers to election expenses incurred, "on account of, or in respect of, the conduct of management of the election". Instead, the limits on election expenses will apply to such expenses as defined in Sections 90A to 90D of the 1983 Act; that is, expenses incurred with, "a view to, or otherwise in connection with, promoting or procuring the candidate's election at the election".¹⁴⁵

¹⁴⁰ R v Jones [1999] 2 Cr App Rep 253 CA and R v Whicher, judgment dated 22 April 1999, cited in para 7.35 of Cm 4413 *The Government's proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life* Home Office July 1999

¹⁴¹ Bill 34 of 1999-2000, clauses 123 and 124

¹⁴² SC Deb 10 February 2000 c363-366

¹⁴³ Ibid c365

¹⁴⁴ HL Deb 24 October 2000 c228. This was Lords Committee stage

¹⁴⁵ HL Deb 22 November 2000 c906

The term "whether before, during or after an election", which had appeared in s76(1) was therefore not specifically replaced.

The 2008 white paper from the Ministry of Justice noted that

During the passage of PPERA through Parliament, concern was expressed that the replacement of the 1883/1983 triggering provisions by controls on spending only during the election period would lead to significant growth in unregulated local expenditure. An amendment to deal with this risk was moved at Lords Report stage by the opposition peer Lord Mackay of Ardbrecknish. This was resisted at the time by the Government on the grounds that the proposed PPERA provisions were already designed to ensure that when election expenditure was incurred before the dissolution of Parliament, but the resulting resources were used after dissolution, such expenditure would count towards the candidate's limit. However, this did not deal with expenditure which was incurred and the resources used, before dissolution by a person who later became a candidate. Such expenditure was therefore largely unregulated. Since changes to the regime made by PPERA, concern has been voiced that unregulated expenditure of this sort has occurred on a significant scale.¹⁴⁶

Lord Mackay noted in his speech that PPERA would remove the definition of election expenditure in s76(1) of the RPA, without offering a satisfactory substitute.

The key to when a candidate's election commences is that it should start from the first moment that he or she, or anyone on their behalf--I stress "on their behalf"--takes any action to promote their candidature for an election at which they are subsequently nominated. It could not be simpler. The expenses to be covered would be those for the promotion of the candidature and the conduct or management of the campaign.

I have not cooked this point up out of thin air. People who for many years have operated election law at constituency level are concerned about the change the Bill makes to the 1983 Act and they feel that there may be a serious problem of which the Government have perhaps not thought.¹⁴⁷

The changes in PPERA did provide for expenses incurred before the election to be calculated towards the candidate's limit where they had funded goods or activities directly linked to facilitating the candidate's election. These are set out in sections 90A-C of the RPA 1983, as inserted by section 134. However, it could be argued that the practice of 'nursing' a constituency was no longer regulated. Nursing is a shorthand term for activities by the prospective parliamentary candidate to highlight his work and campaigns in the constituency before the writs for an election were issued.

The authoritative legal guide, *Parker's law and conduct of elections*, states that the PPERA changes did allow expenses incurred before dissolution to count, indicating that PPERA had not necessarily clarified the law:-

¹⁴⁶ *Party finance and expenditure in the United Kingdom*, Ministry of Justice, June 2008
<http://www.justice.gov.uk/docs/party-finance-expenditure.pdf>

¹⁴⁷ HL Deb 22 November 2000 c903

The significance of the definitions is largely in the context of election expenses. Under the previous definitions, expenses incurred before the election had started and relating to it could be counted as election expenses but only in respect of the successful candidate. However, express provision is now made in the definition of 'election expenses' in section 90A(2) of the 1983 Act (as inserted by section 134(1) of the Political Parties Act) to cover expenses incurred before the date when someone who subsequently was a candidate at an election 'became' a candidate for the purposes of the definition. Accordingly, it does not matter that the new definitions start to operate at a later stage. Under the new rules, expenses can count as 'election expenses' irrespective of the time when they were incurred and whether or not the candidate in question was successful.¹⁴⁸

1. The implementation of the PPERA changes

It proved difficult to test the efficacy of the new rules, since the usual manner of challenge is through an election petition, usually brought by a defeated candidate. There has been concern for many years that the process of petitioning is antiquated and inappropriate for modern elections. Indeed, a recent article in *English Historical Review* cites evidence that the costs of petitions were acting as a disincentive to challenges even in the late nineteenth century.¹⁴⁹ Parties are reluctant to use petitions because the process involves considerable costs and requires urgent action. Petitions must normally be made within three weeks of the election result. It is normally the local party activists who will compile evidence suggesting an overspend. There have been a number of petitions since 2005 in respect of alleged fraud in registration and applications for postal voting, but in respect of local elections only. See Library Standard Note 3667 *Postal Voting and Electoral Fraud* for more details.¹⁵⁰

Election courts to hear petitions relating to parliamentary elections were established in the nineteenth century, as the Commons ceded the power to investigate disputed results to the courts.¹⁵¹ There does not appear to have been an election court in respect of a Westminster parliamentary election on the grounds of exceeding expenditure limits since the petition against the election of the SDLP MP Joe Hendron in 1992.¹⁵² The alternative route is a criminal prosecution under s176 of the RPA 1983, the most recent being the Fiona Jones case in 1999.¹⁵³ Here, a prosecution can begin up to a year after the alleged election offence. Where the Electoral Commission is given evidence of a suspected breach of the RPA, this would be passed to the police for investigation. It has no specific role in investigating alleged breaches.

¹⁴⁸ *Parker's law and conduct of elections*, para 5.61.

¹⁴⁹ "The Elimination of Corrupt Practices in British Elections? Reassessing the impact of the 1883 Corrupt Practices Act", *English Historical Review* cxxiii.500 Kathryn Rix, February 2008

¹⁵⁰ <http://www.parliament.uk/commons/lib/research/notes/snpc-03667.pdf>

¹⁵¹ For further details about the process of petitioning, see Part D of Library Standard Note 3667 *Postal Voting and Electoral Fraud*

¹⁵² *McGrory v Hendron* 1983. *In re Parliamentary election for Belfast West Constituency on 9 April 1992* *McGrory v Hendron and another* High Court 22 February 1993. Both the MP and his agent were granted relief, despite technical breaches of the RPA 1983

¹⁵³ *R v Jones* [1999] 2 Cr App Rep 253 CA [1999] Mohammad Sarwar was also the subject of criminal proceedings under section 176, but the allegations related to bribery of a rival candidate. Mr Sarwar was acquitted in March 1999 "Sarwar cleared of election bribery" 26 March 1999 *Times*

2. Electoral Commission reform proposals 2003

The Electoral Commission proposed reform in its 2003 policy review of PPERA where it noted that some parties, agents and electoral administrators felt that the start date was too near the date of the poll, leaving a significant period of campaigning unregulated.¹⁵⁴ It did not recommend a return to the pre PPERA position, noting:

5.9 We support the clarity introduced by the new definition of a candidate, and do not accept that it would be beneficial to return to the previous system, under which there was considerable ambiguity and in which it was effectively left to an individual candidate to determine when they should begin to count their election expenses. However, we consider that the current regulated period for election expenses is too short. We believe that it should be possible to maintain clarity while also ensuring that election expenses are regulated for a longer amount of time in advance of the election.¹⁵⁵

It recommended a clear cut-off date of four months before the poll, accepting that there were difficulties with this approach for general elections, where national campaigning was subject to a 365 day limit. The Commission also produced a more wide ranging review, *The Funding of Political Parties*, in December 2004, which is summarised in Library Research Paper 07/34.¹⁵⁶

The Government accepted the Commission recommendation on a cut-off date and in clause 29 of the *Electoral Administration Bill 2005-06* included a new clause 90A to the RPA 1983, which introduced a four month limit for all elections, including parliamentary.¹⁵⁷

The Commission's 2003 review also considered the definition of election expenses, again amended by PPERA, and again it considered unsatisfactory. It thought that some items could reasonably be excluded from the definition of election expenses, for example use of a candidate's own computer, or the cost of posters produced for previous elections. It recommended as follows:

In order to provide greater clarity for candidates about election expenses, we recommend that an enabling power allowing the Secretary of State to prescribe by Order a list of items that qualify (or do not qualify) as election expenses be added into RPA. This list of expenses should be in a similar format to the list of items of party expenditure at Schedule 8 to PPERA, and should go a significant way to ensuring greater clarity about election expenses.¹⁵⁸

¹⁵⁴ PPERA- recommendations for change 2003, para 5.7

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/56732/PPERA-report.pdf

¹⁵⁵ PPERA- recommendations for change 2003, para 5.9

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/56732/PPERA-report.pdf

¹⁵⁶ <http://www.parliament.uk/commons/lib/research/rp2007/rp07-034.pdf>

¹⁵⁷ Bill 50 of 2005-06

¹⁵⁸ para 5.16 of PPERA-recommendations for change 2003

3. **The *Electoral Administration Bill 2005-06***

However, during the passage of the *Electoral Administration Bill*, there was concern that the four month period would be unworkable in practice, since, as the Liberal Democrat peer, Lord Rennard, commented at Lords committee stage, 'you cannot expect political parties, largely staffed by voluntary rather than professional agents, to operate as though at any time they might be within four months of an election.'¹⁵⁹ In response, Baroness Ashton, for the Government, brought forward amendments on 15 May 2006 at Lords' report stage to remove the four month provisions, not only for Westminster but also for the devolved institutions:

The Government are tabling these amendments following robust debates in both your Lordships' House and the other place. As I said in Grand Committee, the Government were not wedded to the four-month period, and I am pleased that we have worked together and achieved consensus on this issue.

The issue we were trying to address by introducing the four-month period for candidates' election expenses was that of unregulated spending taking place in advance of the candidate's election expenses period beginning, and not being counted towards the candidate's limit. These amendments will revert to the current length of the candidate's election expenses period.

A candidate's election expenses will count against his or her statutory expenditure limit from the point at which he or she becomes a candidate. In the case of a candidate at a general election, that is the period between the dissolution of Parliament and polling day. In the case of a local election, it is from the last date for publication of the notice of election until polling day. ...

We recognise that the Bill does not address the problem of unregulated amounts of money being spent by candidates in the months or weeks leading up to the point at which a general election is called. We know how much more sophisticated we have become in political campaigning and how much more effort we invest in campaigning in marginal seats. There is an issue about potentially large amounts of money being spent that cannot be recorded in the most appropriate way. We have not been able to come up with an early solution to the problem; noble Lords will know that I have been receptive to ideas from any part of your Lordships' House and beyond. However, along with working towards a consensus with the parties and Members of the other place, we have talked to Sir Hayden Phillips who has been asked by the Prime Minister to conduct a review of party funding.

It has been confirmed that Sir Hayden's review will extend to looking at the expenses of parties and candidates during an election period. This approach makes sense, in that all facets of party funding and election spending will be examined across the piece. I am sure that with this comprehensive approach, we will be able to find a solution to the problem.¹⁶⁰

4. **The *Electoral Administration Act 2006* changes**

The *Electoral Administration Act 2006* therefore inserted a new section 90ZA, defining election expenses, into the RPA 1983 and removed sections 90A-90B, which had been inserted by PPERA. A new section 90ZB defined election expenses for Scottish local

¹⁵⁹ HL Deb 22 March 2006 cGC 184

¹⁶⁰ HL Deb 15 May 2006 c70

government elections. Schedule 4A was also inserted by the 2006 Act, which listed a series of items to be classified as election expenses. This offered more clarity in respect of items to be included in the election expenses return. The Schedule provides that it is immaterial whether items are used before or after adoption as a candidate, as long as they are used within the relevant period. The *Explanatory Notes* to the Act stated that the lists of items in the schedule were based on those used for political parties' national campaign expenditure, under PPERA.

The Electoral Commission was given power under Schedule 4A to prepare a code of practice on expenses. This Code would be subject to the negative procedure for SIs and the Secretary of State may amend the list by order, after consultation with the Electoral Commission. However, to date, no Code has been issued. The Electoral Commission wished to have some time to refine its approach to the definitions before any Code was issued.¹⁶¹ The Electoral Commission instead issues guidance on its website, most recently in its guidance to candidates and agents in by elections.

5. The Phillips review

After the 2005 election, the Labour Party began to press for earlier regulation of constituency expenditure, highlighted in the Party's evidence to the Phillips Review.¹⁶² Their evidence suggested that one method of regulation might be a return to the pre PPERA system whereby local candidate campaign expenditure limits were triggered, if expenditure were in support of a parliamentary candidate.

The Phillips review investigated the question of unregulated constituency expenditure in some detail:

Concerns have been expressed to me, not only that this offers a ready loophole for avoidance of any tightening of the national limits, but also that there is already saturation spending in marginal constituencies, and a disproportionate advantage gained in others by a large injection of funds for one party, sometimes from a single donor who may thus gain influence over local policies.

I take these concerns seriously, but I am also conscious of the difficulties which any extension of regulation into local party activity will entail. Targeting marginals is an inevitable consequence of our electoral system, and any attempt to impose tight controls on spending in marginals may well prove forlorn. Constituency boundaries, of course, vary in different types of election, and parties themselves do not necessarily organise their accounting units by constituency. Moreover, most local party officers are volunteers, and it is essential to be realistic about the risks and liabilities which they can reasonably be expected to assume.¹⁶³

The draft agreement of August 2007 recommended that definitions of constituency expenditure should be tightened so as to bring the costs of direct mail targeted at a

¹⁶¹ Source; Information from Electoral Commission official. See also HC Deb 15 Sep 2008 : c2028w

¹⁶² *Labour Party submission to Sir Hayden Phillips' Review on the future of party funding: for discussion and debate on the future of party funding* December 2006

¹⁶³ Phillips review of party funding *Strengthening democracy* March 2007
http://www.partyfundingreview.gov.uk/files/strengthening_democracy.pdf

constituency and an apportionment of the costs of central telephone canvassing targeted at a constituency within the scope of reportable spending.¹⁶⁴

Justin Fisher, who acted as adviser to the review, has noted:

Much political activity occurs in constituencies prior to the 'official campaign', especially in marginal seats. That being so, some change in the rules was sensible. The Conservatives, however, argued that this was not possible because their party workers were essentially amateurs and it would be unreasonable to impose additional burdens upon them. On the face of it, this is not an unreasonable position but to argue against any extension of the campaign period was an excessive response. The Conservatives also claimed that this spending offset the incumbent advantage of Labour MPs in sending out letters to constituents. ...Labour's claims on this matter are also open to question. Research on local party campaigning shows clearly, for example, how preparation for election has been increasing in marginal seats by all parties.¹⁶⁵

Fisher advised that Labour should avoid the over-regulation of constituency expenditure, drawing attention to the need to retain voluntary work within its local parties:

Equally, Labour should resist the temptation to attempt to seek partisan advantage by over-regulating constituency spending, in an attempt to protect its marginal seats in the next general election. Moreover, their proposals will harm their own volunteers just as much, if not more than their opponents. Put bluntly, who would want to be a volunteer agent legally responsible for campaigns for a whole year, if not more?¹⁶⁶

In support of his argument, Fisher cited research in 2001 which found that 37 per cent of local Conservative parties in England had permanent agents, while the equivalent for Labour was five per cent.¹⁶⁷ Further research indicates that 76 per cent of agents in the 2005 election were volunteers, with 42 per cent appointed within 6 months of the election date, and 17 per cent just before the campaign.¹⁶⁸

G. The current regulatory regime under RPA and PPERA

The **definition of a candidate** for the purposes of election expenses is set out in section 118A of the RPA. The precise timing depends at the point at which the candidate is formally declared as a candidate, whether by himself or others:

- In the case of a candidate at a general election at Westminster (or Scottish Parliament or Northern Ireland Assembly), the definition takes effect from

¹⁶⁴ Phillips review of party funding draft agreement August 2007 B9

http://www.partyfundingreview.gov.uk/files/IPT_Draft_Agreement.pdf

¹⁶⁵ "Party Funding: back to square one (and a half) or every cloud has a silver lining?" *Political Quarterly*, January-March 2008

¹⁶⁶ Ibid

¹⁶⁷ "The relative electoral impact of central party co-ordination and size of party membership at constituency level", *Electoral Studies* vol 25 no 4 2006 pp 664-76

¹⁶⁸ "Unsung heroes: constituency election agents in British general elections", *British Journal of Politics and International Relations* 8(4) 2006 Justin Fisher, David Denver and Gordon Hands

dissolution of Parliament, if the candidate has already declared himself as a candidate by that time. If he has not, then the definition takes effect as soon as he is so declared, between dissolution and the last day for the Statement of Nominations issued by the Returning Officer.¹⁶⁹

- In the case of a by election at Westminster, it is either the date of the occurrence of the vacancy, if the candidate has already been declared as such, or as soon as they are declared as a candidate up to the last day for the Statement of Nominations issued by the Returning Officer.
- In the case of a local election (and constituency candidates for the Greater London Authority), it is either from the last date for publication of the notice of election where a candidate has also been declared or as soon as they are declared as a candidate up to the last day for the Statement of Nominations issued by the Returning Officer nominations in the electoral timetable
- In the case of individuals included in a party list for the purposes of the European Parliament or London Assembly election, it is the date on which the party submits the list.¹⁷⁰

Election expense limits. The procedures for calculating election expense limits are set out in section 76A of the RPA. Currently, the limits are £7,150 for both borough and county constituencies, plus 5p and 7p respectively for each elector on the electoral register.¹⁷¹ There is a separate by election limit of £100,000, established in PPERA to take account of the exceptional level of campaigning in this type of election.¹⁷²

Each candidate is required to have an agent under section 67 of the RPA (which may be the candidate himself). **Election expenses** are defined in section 90ZA and Schedule 4A.

The Electoral Commission offer guidance on their interpretation:

4.6 A candidate's election spending is defined as:

any expenses incurred at any time in respect of any matter specified [below] which is used for the purposes of the candidate's election after the date when he becomes a candidate at the election.

This applies regardless of whether the money was spent before or after the date a person becomes a candidate. Therefore, money spent **before** the regulated period on goods/services that are used for the purpose of the candidate's election **during** the regulated period should be included within a candidate's election expenses return. This ensures that anything spent on items procured some time in advance of the election is accounted for....

¹⁶⁹ For details about the electoral timetable applicable to parliamentary and local elections, see Library Research Paper 07/31 <http://www.parliament.uk/commons/lib/research/rp2007/rp07-031.pdf>

¹⁷⁰ *Election expenditure and donations: guidance for candidates and agents* Electoral Commission, Para 1 http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0019/13717/NEWG_uidanceforcandandagentsexpanddonations_16452-10977__E__N__S__W__.pdf

¹⁷¹ For more information, see Library Standard Note *Election expense limits* 3413 at <http://www.parliament.uk/commons/lib/research/notes/snpc-03413.pdf>

¹⁷² Section 76(1B)(2)(aa)

The Electoral Commission guidance on the categories of spending in Schedule 4A is as follows:

Categories of spending

4.14 The EAA introduced categories that constitute election spending, which are considered election spending and count against a candidate's limit. The categories are:

- advertising
- unsolicited material addressed to electors
- transport
- public meetings
- services of an election agent or other staff
- accommodation and administrative costs¹⁷³

Further information about the definitions of these categories is available in the guidance produced by the Electoral Commission *Election expenditure and donations: guidance for candidates and election agents*.¹⁷⁴

The Commission guidance explains that offences under the RPA are investigated by the police:

Reporting offences

Note: Neither the (Acting) Returning Officer nor the Electoral Commission have any discretion to investigate allegations of offences under electoral law. If it is believed that an offence has been committed, and the complainant is prepared to substantiate this allegation through a written statement, this should be brought to the attention of the police. The (Acting) Returning Officer will be able to provide appropriate contact details for the police. Reporting allegations to the police should not be considered unless the complaint is substantiated by evidence and the complainant is prepared to make a written statement.¹⁷⁵

Within 35 days of a parliamentary poll, the election agent is required to submit to the Returning Officer and the Electoral Commission an **election expenses return** detailing expenditure by category under section 75(5). Making a false declaration in respect of election expenses is an offence under section 82(6) with a maximum penalty of 6 months imprisonment. Under section 87A(1) of the RPA, the Returning Officer must send a copy

¹⁷³ *Guidance for candidates and agents: UK Parliamentary by elections 2008* p38 at http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0015/14154/Guidance-candidates-and-agents-ByElec-FINAL08.pdf

¹⁷⁴ *Election expenditure and donations: guidance for candidates and election agents* http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0019/13717/NEWGuidanceforcandandagentsexpanddonations_16452-10977__E__N__S__W__.pdf

This guidance is undated but takes into account the changes following the *Electoral Administration Act 2006*

¹⁷⁵ *Ibid* para 3.57

of the return to the Electoral Commission. The form of the election return is set out in the Electoral Commission guidance.¹⁷⁶

With respect to donations, a failure to return a donation from an impermissible source or unidentifiable source is an offence under section 56(3) and 56(4) of PPERA. Electoral Commission guidance lists permissible donors:

A permissible donor or lender must be one of the following:

- an individual registered in a UK electoral register (including bequests)
- a UK registered company which is incorporated within the European Union (EU) and carries on business in the UK
- a Great Britain registered political party
- a UK registered trade union
- a UK registered building society
- a UK registered limited liability partnership that carries on business in the UK
- a UK registered friendly society
- a UK based unincorporated association that carries on business or other activities in the UK¹⁷⁷

Candidates must list donations over £50 in the elections return, according to Schedule 2A of the RPA. Schedule 7 of PPERA regulates donations to members of a political party, to holders of elective office, and to members associations, ensuring that donations must only be accepted from a permissible source.

The Electoral Commission guidance states:

5.5 The RPA 1983 defines a donation as any of the following:

- any gift (including a bequest) to the candidate or their election agent of money or other property
- any sponsorship provided in relation to the candidate (see paragraph 5.10)
- any money spent (other than by the candidate or their election agent or any sub-agent) in paying any election expenses
- any money lent to the candidate or their agent other than on commercial terms
- the provision for the use or benefit of the candidate of any property, services or facilities (including the services of any other person) other than on commercial terms

5.6 Common examples of donations may include:

¹⁷⁶ See *Appendix D Sample return of candidate's election expenses in Guidance for candidates and agents: UK Parliamentary by elections* at http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0015/14154/Guidance-candidates-and-agents-ByElec-FINAL08.pdf

¹⁷⁷ *Donations and loans: Guidance for regulated donees in Great Britain* September 2006 Electoral Commission http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0019/13708/Regulateddoneesfinalwebwforms_23375-17349__E__N__S__W__.pdf

- a cash donation of £1,500 to meet a candidate's expenses made by the constituency association
- a cheque for £100 given by a supporter
- stationery supplies worth £65
- payment of costs of a newspaper advertising campaign
- a 50% discount offered on printing of election materials
- free use of an office valued at £200
- free use of a hire car valued at £100

Donations from a political party to a candidate, or from a candidate to the campaign, also require to be recorded:

5.12 As candidates must report the sources of all the campaign donations they receive over £50 in value, it is important that proper records be kept of all funding sources. This includes monetary (referred to below as 'cash') and in-kind contributions (referred to below as 'non-cash' or 'notional'), funding **from a candidate** to pay for aspects of their campaign and any contributions **from the candidate's political party**, whether this comes from the central party or a local constituency party.¹⁷⁸

Candidates and agents must make checks to ensure that the donation is permissible:

5.17 Candidates and their election agents have **30 days** from the date a donation is received in which to make any enquiries and take any action regarding the donation, i.e. to decide whether or not to accept the donation (see paragraph 5.35). If they decide not to accept the donation, they must take the necessary steps to deal with it within the 30-day period. If the donation has not been returned within that time, they will be deemed to have accepted the donation.

There is separate Electoral Commission guidance for regulated donees.¹⁷⁹ The term includes:

- Members of registered political parties who receive donations for political campaigning.
- Members associations
- Holders of relevant elective office, including MPs and councillors

All are regulated under PPERA. The guidance makes clear that where a regulated donee accepts a donation of more than £200, he should record the full name and address of the donor. If the source of a donation over £200 is impermissible, this needs to be registered

¹⁷⁸ *Guidance for candidates and agents: UK Parliamentary by elections* at http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0015/14154/Guidance-candidates-and-agents-ByElec-FINAL08.pdf The statutory reference is Schedule 2A of the RPA

¹⁷⁹ *Donations and loans: Guidance for regulated donees in Great Britain* September 2006 Electoral Commission http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0019/13708/Regulateddoneesfinalwebwforms_23375-17349__E__N__S__W__.pdf

with the Electoral Commission under Schedule 7 of PPERA, together with donations of over £1,000. The requirement to register donations applies, regardless of whether an election campaign period is in force.

V The expenditure and donations provisions in the Bill

A. Triggering of election expenses

The white paper said:

3.55 Given the operation of the last seven years, the Government now believes that there is broad consensus that candidates' expenditure should be regulated for a longer time period in line with the Electoral Commission's recommendation. One option available would be to return to a system based on candidates 'triggering' limits on spending at a general election, similar or identical to the system prior to PPERA.¹⁸⁰

Peter Facey, the Director of Unlock Democracy, a campaigning group on party funding, commented as follows on the triggering provisions:

The fact that one of the few concrete proposals that the government is putting forward is to go back eight years, to reinstate a system that did not work, defies belief. The triggering rules, whereby expenses limits on candidates only kicked in once they officially declared themselves, were abolished in 2000 because they were widely known to be unenforceable.¹⁸¹

The white paper considered that triggering could work alongside the Phillips proposals for controlling national spending. It stated that the Electoral Commission would be given a new power to issue guidance about when and the circumstances in which, candidate spending limits are triggered. This would help avoid some of the uncertainty associated with the implementation of the previous version of the regime.

However, the white paper contained no proposals describing how the new triggering regime would be enforced in the 650 separate constituencies at the next election. There were also no proposals to reform the system of election petitions or criminal prosecutions under the RPA, despite calls from election administrators for a reform of election offences.¹⁸²

Clause 10 of the Bill amends Section 90ZA of the RPA to alter the definition of election expenses. The changes remove the words which restricted the definition of candidate to a candidate adopted after dissolution at a general election. Candidates in by elections and local government elections are excluded by the new rules, under clause 10(3).

¹⁸⁰ Cm 7329 June 2008 Para 3.55

¹⁸¹ <http://www.opendemocracy.net/blog/ourkingdom-theme/anthony-barnett/2008/06/17/party-funding-white-paper-defies-belief>

¹⁸² "The Modernisation of Electoral Law seminar" 19 May 2008 HS Chapman Society seminar <http://www.4-5graysinnsquare.co.uk/news/index.cfm?id=1957>

The current text of section 90ZA is as follows, with proposed additions and deletions in bold:

90ZA (1) In this Part of the Act “election expenses” in relation to a candidate, at any election means (subject to subsections **(1A)** and (2) and section 90C below).any expenses incurred at any time in respect of any matter specified in Part 1 of the Schedule 4A which is used for the purposes of the candidate’s election **after the date when he becomes a candidate at the election**

(1A) In relation to a candidate at-

- (a) a parliamentary by election or**
- (b) a local government election**

A reference in this Part of this Act to election expenses does not include expenses incurred in respect of any matter which is used on or before the date when the person becomes a candidate at the election.

(2) No election expenses are to be regarded as incurred by virtue of subsection (1) above or section 90C below in respect of any matter specified in Part 2 of Schedule 4A

(3) In this section and in section 90C below, “for the purposes of the candidate’s election” means with a view to, or otherwise in connection with, promoting or procuring the candidate’s election at the election.

(4) For the purposes of this Part of this Act, election expenses are incurred by or on behalf of a candidate at an election if they are incurred-

- (a) by the candidate or his election agent, or
- (b) by any person authorized by the candidate or his election agent to incur expenses.

(5) In this Part of the Act, any reference to election expenses incurred by or on behalf of a candidate at an election includes expenses-

- (a) which are incurred as mentioned in subsection (1) above before the date when he becomes a candidate at an election, but
- (b) which by virtue of that subsection fall to be regarded as election expenses.

The Bill substitutes as follows:

(5) A reference in this Part of this Act to a candidate at an election, in relation to election expenses, includes (where the context allows it) a reference to a person who becomes a candidate at the election after the expenses are incurred.

...

In this Part and Part 3 of the Act, any reference (in whatever terms) to promoting or procuring a candidate’s election at an election includes doing so by prejudicing the electoral prospects of another candidate at an election.

(7) Schedule 4A has effect.

(8) This section does not apply to a local government election in Scotland.

According to the *Explanatory Notes*, the removal of the words **after the date when he becomes a candidate at the election** would enable election expenses to apply to expenses used by a person prior to the dissolution of Parliament. Such expenses would be caught provided they are incurred for the purposes of the candidate's election.¹⁸³ In addition, the new subsection (5), with its reference to the context, is intended to catch expenditure by prospective candidates if intended to promote their election.

According to *Parker's Law and Conduct of Elections*, the current wording of section 90ZA(1) does already provide for expenses incurred before the dissolution or formal adoption to count, if the materials for which expenditure has been incurred is to be used during the election campaign (after dissolution). The relevant extract is reproduced above on page 49. The Bill's amendments to section 90ZA place greater emphasis on expenditure incurred on items actually used before dissolution of Parliament. However, considerable judgement will be required by party officials and volunteers in interpreting the new sections. Although the Electoral Commission is permitted to produce guidance, certainty will only be achieved through case law on the subject. But the PPERA changes have not yet been reviewed by the courts in respect of parliamentary elections in the previous eight years, so no recent case law is available.

The position when one prospective candidate incurs expenses, but resigns before formal adoption, may need some elucidation. It would appear that expenses incurred by a prospective candidate who then withdraws before formal nomination are not transferable to the new candidate. In response to a PQ from the Conservative spokesman, Francis Maude, Michael Wills, junior minister at the Ministry of Justice, noted that 'incumbent MPs seeking re-election would be subject to the new regime'. He also noted that the Communications Allowance could not be used for party political campaigning.¹⁸⁴ Complaints about the misuse of the Communications Allowances are made to the Parliamentary Standards Commissioner. However, complaints that such expenditure has 'triggered' the expenditure limits would presumably be referred to the police, as an RPA offence, or to the Commission as breaching their guidance. Whether the limit has been breached may not be evident until the campaign begins after dissolution.

Manuals used by the political parties before 2000 advised prospective parliamentary candidates to concentrate on promoting party policy rather than the candidature.¹⁸⁵ Before PPERA, there was no statutory regulation of party expenditure. PPERA now provides that campaign expenditure by a local accounting unit of a national party (not falling within the election expenses return) counts towards the overall limit, which applies for 365 days before an election. In practice, expenditure by individual constituency associations is difficult to regulate effectively. See Library Standard Note 4611 *Election Expenditure Controls* for more details.

The *Explanatory Notes* accept that there will be a greater regulatory burden:

¹⁸³ *Explanatory Notes to Bill 141*, para 36

¹⁸⁴ HC Deb 17 September 2008 c2291W

¹⁸⁵ *The Conservative Agents' Election Manual 1995* Conservative Central Office 1995, para 3.2

103. Under the provision that relates to candidate spending, candidates will be required to report all spending incurred for electoral purposes, not just that which is used between dissolution of Parliament and the election. The level of spending to be reported will be the same, as the spending limit will not change, but the time period during which campaign activities are reportable is likely to be longer. Whilst this may increase the administrative burden for some candidates and their agents, the burden will be no greater than it was under the pre-2000 triggering regime and this change to reporting requirements is considered to be a necessary consequence of effective regulation.

The argument that the burden will be equivalent to the pre2000 regime is likely to come under scrutiny, given the greater complexities in the definition of election expenses since 2000 and the existence of a regulatory body in the form of the Electoral Commission. Constituency parties will also need to determine whether a donation is given to a candidate, or to the party, as different controls apply in the PPERA or the RPA. The distinction will be less straightforward if the election expenses return covers expenditure for a longer period, as parties will need to decide at an earlier stage whether expenditure is party or constituent related.¹⁸⁶ Section 72(7) of PPERA excludes from the definition of campaign expenditure, any expenditure which should be included within an election expenses return, even when a candidate has not yet been selected.

Constituency parties which have concerns about breaching the candidate expenditure limit may instead prefer to allocate spending to the party rather than the candidate. Such spending is aggregated under PPERA to form part of the national expenditure limit of the party. As discussed earlier, in 2005 parties did not reach the maximum expenditure limits set under PPERA.¹⁸⁷ There may therefore be scope to transfer spending from candidate to party. Expenditure in support of a party locally, which is not designed to promote a particular candidate, is not likely to fall within an election expenses return, although each case would need to be considered individually.

Originally, the white paper suggested that the new definition would apply from second reading of the Bill:

The Government will consider whether provision to re-introduce triggering could be brought into effect so as to avoid pre-emption; for example, to capture expenditure incurred on or after the date of second reading of a Bill, pending subsequent parliamentary approval of its passage.¹⁸⁸

However, the Bill does not attempt to implement new requirements from the date of second reading, only from the date of royal assent.¹⁸⁹

¹⁸⁶ http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0019/13708/Regulatteddoneesfinalwebwforms_23375-17349_E_N_S_W_.pdf

¹⁸⁷ *Election 2005: campaign spending: the UK Parliamentary general election* March 2006 Electoral Commission

¹⁸⁸ Cm 7329 June 2008 Para 3.57

¹⁸⁹ See clause 10(5) of Bill 141

There are no provisions in the Bill which would enable apparent breaches of section 90ZA to be investigated. The standard procedures for alleged offences under section RPA remain an election petition, or a criminal prosecution, under section 176. As noted above, prosecution for exceeding parliamentary election expense limits is very rare, the last case being that of Fiona Jones in 199, discussed above on page 47.

The Electoral Commission has a statutory duty to monitor the election returns from individual candidates, and at the 2005 general election, provided an analysis of spending by type of category.¹⁹⁰ However, the Bill does not give the Commission power to investigate breaches of the RPA, as opposed to PPERA offences. Such breaches would be investigated by local police forces. There is a general section 145 power in PPERA for the Commission to monitor compliance with election expenses.

Instead, the Commission's role will be to provide guidance. **Clause 11** inserts within Schedule 4A a power for the Electoral Commission to offer guidance specifically on the circumstances in which election expenses are incurred in section 90ZA(3). This refers to promoting or procuring the candidate's election. Section 90C relates to expenditure in kind. No draft of the guidance is available at this stage.

The *Guardian* reported in August 2008 on a suggestion from the Electoral Commission that it would not be in a position to finalise guidance on the question of triggering until after a full consultation period following royal assent. The *Guardian* suggested that the guidance would therefore be unlikely to take effect before the date of the next general election.¹⁹¹ The Commission briefing published in September 2008 noted:

We have some concerns about the practicality of the provisions in the Bill as they currently stand, but believe that it may be possible to address these issues with the right combination of statutory rules and Commission guidance. It is important that Parliament ensures the legislation is drawn as clearly as possible to minimise the scope for avoidance or confusion, otherwise it will be difficult for the Commission to deliver effective guidance.¹⁹²

a. Candidate spending at devolved and local elections

The white paper considered that different circumstances applied for elections to the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, where fixed term elections apply. Therefore, a fixed time frame to regulate candidate expenditure would be more appropriate and the limit of four months appeared to have all party support. However, there were no plans to change the law in respect of local elections, as the white paper doubted that a problem existed at that level.¹⁹³ In the event, the Bill contains no specific provisions for devolved elections and excludes local elections in new section 90ZA(1A). However, it is planned to introduce the new limit of

¹⁹⁰ *Election 2005: campaign spending: The UK Parliamentary general election*, Electoral Commission March 2006

¹⁹¹ "Blow to Labour over bid to cap Tory spending", *Guardian*, 1 August 2008

¹⁹² *Political Parties and Elections Bill* September 2008 Electoral Commission http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/64419/Party-Funding-Briefing-Final.pdf

¹⁹³ *Party finance and expenditure in the United Kingdom*, Ministry of Justice June 2008 paras 3.59-3.61

four months for devolved bodies through secondary legislation following royal assent.¹⁹⁴ By elections to the Commons would not be included within the new triggering provisions, as noted above.

B. Donations to parties

The Bill attempts to provide more regulation and transparency both in respect of donations by unincorporated associations and in respect of donations through intermediaries. The white paper noted as follows:

4.64 With the benefit of hindsight, the arrangements in PPERA for the regulation of unincorporated associations would appear to be inconsistent with the spirit of the legislation which was intended to make political party funding transparent, as called for by the Neill Committee. The Government believes that it is right to ensure that the ultimate source of money donated to parties is transparent and will consider how the legislation might be amended to enable the Electoral Commission to take a more rigorous approach to ensuring that donations from unincorporated associations comply with the principles underpinning PPERA.¹⁹⁵

Clause 8 inserts into PPERA a new responsibility for donors to political parties to clarify the source of the donations. Donors giving over £200 will be required to make a declaration as to whether another person is providing them with any money or to her benefit worth more than £200. The *Explanatory Notes* state that “if the person states that they are receiving such a benefit, but are nevertheless the true donor, they must state why they believe that to be so”, presumably to provide evidence as to why the transaction is not a donation through intermediaries. Donations without the appropriate statement must be returned, and the party or treasurer will be guilty of an offence, if this requirement is not complied with. The amendments insert a new section 54A into PPERA and add a subsection to section 54.

Section 54A(5) would make it a criminal offence for a person to knowingly or recklessly make a false statement about a donation. Unincorporated associations are not specifically referred to. However, associations which make donations over £200 will be expected to identify a responsible person who will make the declaration. There is no requirement to name all members of an unincorporated association, simply those making donations over £200 which are intended to fund a party or individual.

Schedule 3 applies the new requirements to regulated donees (including candidates and holders of relevant elected office) and members associations by amending Schedule 7 of PPERA. It also applies the requirements to donations to registered third parties, by amending Schedule 11 of PPERA. This will mean that registered third parties will be required to verify and record donations. Finally, the same requirements are imposed on third parties campaigning in a referendum, known under PPERA as permitted participants, in amendments to Schedule 15. Schedule 20 of PPERA is amended to specify the penalties for false declarations, up to a year of imprisonment.

¹⁹⁴ Information from Ministry of Justice

¹⁹⁵ Cm 7329 June 2008

Parties are required under section 54A(6) to take all reasonable steps to verify the declarations. The party must provide a statement confirming that reasonable steps have been taken when making a donation report to the Electoral Commission. **Clause 9** however gives political parties and/or treasurers a defence if they can show they took all reasonable steps to verify that the donation was from a permissible person.

The *Explanatory Notes* accept that there will be an extra administrative burden

105..The main impact of this policy will be the extra administrative burden placed on donors in completing the declaration, and on recipients, who will have to process the declarations and take reasonable steps to verify them. The simplicity of completing and processing declarations should ensure that the administrative burden is not significant. The Department estimates that the total cost to all donors and political parties will be approximately £7,000-£10,500 per annum. This will be justified by the need to ensure that the real source of money donated to parties is disclosed.¹⁹⁶

The question of proportionality is likely to arise. Small parties and registered third parties may lack the administrative structures to retain declarations, and to satisfy themselves as to the source of the donation. It appears that the declarations will be retained by the parties, members associations, registered third parties, and permitted participants, rather than sent to the Electoral Commission, but there is no requirement for the declarations to be kept for a number of years. Prosecutions would prove difficult without appropriate documentation, however. In its September 2008 briefing, the Commission expressed concern on proportionality:

However, we believe that the benefits of these changes will be quite limited, since all they do is place additional procedural requirements on donors and recipients. They will not extend the current restrictions on concealing donations, nor will they add materially to the transparency of party funding as the new declarations will not be sent to the Commission or made public. However, they will impose potentially substantial new regulatory burdens on parties and donors. It is not presently clear whether the benefits of these provisions will be sufficient to justify those new burdens.¹⁹⁷

Although political parties are not subject to freedom of information legislation, and so presumably will not be required to release the declarations on request, they are subject to data protection legislation which allows for subject access and requires fair processing of personal data.

¹⁹⁶ *Explanatory Notes* to Bill 141

http://www.publications.parliament.uk/pa/cm200708/cmbills/141/en/index_141.htm

¹⁹⁷ *Political Parties and Elections Bill* September 2008 Electoral Commission
http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/64419/Party-Funding-Briefing-Final.pdf

VI Other electoral provisions in the Bill

A. Elections falling within the canvass period

The annual canvass of electors is conducted during the autumn and is compiled on the basis of residence at an address on 15 October in that year. The new register must be published by 1 December. During the autumn of 2007, when there was considerable speculation that there would be a general election, electoral administrators found themselves faced with the real possibility of an election taking place during the annual canvass period. There was much disquiet amongst electoral administrators about whether a general election held before 1 December 2007 would use the register drawn up in October 2006 (with the 'rolling register' additions made during the year) or whether the 2007 canvass information could be used.

The Electoral Commission subsequently issued guidance to electoral administrators which stated that the 11 day rule for registering to vote before an election did not apply to the annual canvass. In other words electors may have completed canvass forms but they would not be added to the register until the new register was actually published in full by 1 December 2007. This meant that any elector not on the old register would have had to register by 'rolling registration' by 17 October 2007 in order to vote at a general election held on 1 November 2007 or he would be disenfranchised. Electoral Registration Officers were advised by the Electoral Commission to use the information about new voters on returned canvass forms to contact them and ask them to fill in a rolling registration form. As long as this was done by 17 October 2007 then they would appear on the register and would have been able to vote at an election on 1 November 2007. An extract from the Electoral Commission Circular EC 25/2007 is given below:

The "eleven day rule" and the annual canvass

134. The 11 day rule for registering electors in an election period remains in effect during the annual canvass.

135. The Commission's view is that the eleven day rule does not apply to alterations to the register resulting from the canvass form, but it can apply to an application for 'rolling' registration that is determined during the canvass period. We recognise that this is far from an ideal situation and one which we have brought to the attention of the Ministry of Justice.

136. Our reasoning for this position and our recommendations for action by the ERO in these circumstances are outlined below.

The Canvass

137. The annual canvass must be conducted by reference to residence on 15 October in any given year. Where a canvass form gives the details of a person entitled to vote, but who is not already registered, that person is deemed to have made an application for registration on 15 October, regardless of the date on which the form is actually completed.

138. Applications to register to vote made via a canvass form must be listed and are subject to the 5 day objection period. As such applications are deemed to have been made on 15 October, this means that, in 2007, the determination cannot be made until 22 October at the earliest.¹⁹⁸

The Electoral Commission also issued a further circular, EC 32/2007, *Elections during the canvass period*, which gave further advice to EROs:

Summary of Commission's recommended approach

The ERO should be actioning all rolling registration applications received during the canvass period. In the event of an election being called, a notice of alteration published 5 days before the poll will add these electors to the register for polling day.

All rolling registration forms before the eleventh working day before the poll for any election should be processed and included on this notice of alteration.

EROs should send rolling registration forms to new residents included on canvass forms as appearing to be eligible to register. These rolling registration forms could be pre-printed with the details already given by the person completing the canvass form so that the potential elector need only review the details, date and sign.¹⁹⁹

The Commission stated in the circular that it did not consider 'that publication of an early revised register is a route that should be considered at any point during the canvass period, even in the event of a UK Parliamentary election.'²⁰⁰

Electoral administrators made representations to the Electoral Commission and the Ministry of Justice about the problems of an election falling within the canvass period and **Clause 12** of the Bill makes provision for the published register to be amended before the election is held to show details of new electors or other changes. Clause 12 inserts a new Section 13BB into the *Representation of the People Act 1983* which allows the new provisions to take effect if a general election is called between 1 July and 1 December. Sub-section (1) of the new Section allows the Electoral Registration Officer to treat a form returned under the annual canvass as an application for registration under the 'rolling' registration procedure if an election is called during the canvass period. Sub-section (2) provides that the application for registration during such a period should be regarded as being made on the date the canvass form is received by the Electoral Registration Officer, or the date the notice of election is published, whichever is later.

Sub-section (4) specifies that the Electoral Registration Officer must make the appropriate alterations to the register by way of a notice and that if an elector's entry on the register in another area needs to be deleted this register must also be amended by the appropriate Electoral Registration Officer. A notice altering the register must be

¹⁹⁸ [http://www.electoralcommission.org.uk/files/dms/EC25\(2007\)-Managingthecanvass2007_27221-19656__E__S__W__.pdf](http://www.electoralcommission.org.uk/files/dms/EC25(2007)-Managingthecanvass2007_27221-19656__E__S__W__.pdf)

¹⁹⁹ [http://www.electoralcommission.org.uk/files/dms/EC32\(2007\)-Electionsduringthecanvassperiod_27503-20245__E__N__S__W__.pdf](http://www.electoralcommission.org.uk/files/dms/EC32(2007)-Electionsduringthecanvassperiod_27503-20245__E__N__S__W__.pdf)

²⁰⁰ Ibid

issued on the 5th or 6th day before the election unless a revised register has been published. Sub-section (2) of Clause 12 allows the Electoral Registration Officer to delay the publication of the new register from 1 December to 1 February the following year if an election has taken place during the canvass period.

B. Local returning officers for elections to the European Parliament

The *European Parliamentary Elections Act 2002* makes provision for the Returning Officers for each electoral region at European Parliament elections to be an Acting Returning Officer for a Parliamentary election. In other words the person designated as the regional Returning Officer is also the Acting Returning Officer for a constituency or constituencies within the region. Regulations made under the 2002 Act require the Returning Officers for each Parliamentary constituency wholly or partly contained in an electoral region to be responsible for the conduct of the election in that region (the printing of ballot papers; the postal ballot and the counting of votes in that constituency). Electoral administrators have pressed for a change to the legislation so that European Parliamentary elections can be administered by local authority returning officers in their local authority areas. Administrators have argued that this will make electoral administration easier, particularly in relation to the working of the system for postal ballots and the checking of personal identifiers. A change would also ease the administration of any combined elections.

Clause 13 of the Bill therefore provides a new definition of 'local returning officer' for Section 6 (5A)(a) of the *European Parliamentary Elections Act 2002*. The local returning officers for European Parliament elections held in England, Wales and Scotland will therefore in future be the returning officers for local authority elections in these countries. In Northern Ireland the returning officer for the European Parliament elections will continue to be the Chief Electoral Officer.

The next elections to the European Parliament will take place on 4 June 2009. Under the provisions of the *Representation of the People Act 1983*, as amended by the *Local Government and Public Involvement in Health Act 2007*, the Government has the power to combine, by means of an order, local elections (including elections to the Greater London Authority) and European Parliamentary elections. The Government has consulted on whether the local elections due to take place in England on 7 May 2009 should be combined with the European Parliament elections on 4 June 2008.²⁰¹ In 2004, when the last European Parliamentary elections were held, the date of the local elections was changed from 6 May 2004 so that they were held on the same day as the European elections on 10 June 2004. If the Government is to make an order moving the date of the local elections in 2009, the order must be made by 7 November 2008.

²⁰¹ *Moving the date of English local government elections to the date of the European Parliament elections in 2009*, Department for Communities and Local Government, May 2008. Available at <http://www.communities.gov.uk/documents/localgovernment/doc/826101.doc>

VII The Bill's territorial extent and commencement

The Bill extends to the whole of the UK, although the Secretary of State is given a power in clause 8 (declaration as to source of donations) to modify the provisions in relation to Northern Ireland. The rationale is the different arrangements for disclosure of donations to political parties in Northern Ireland. The identity of donors is currently only disclosed to the Electoral Commission. For further background see Library Standard Note 4513 *Political Developments in Northern Ireland*.²⁰²

The *Explanatory Notes* comment on application to Gibraltar:

7. Some of the amendments made by the Bill are to provisions in the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act") which extend to Gibraltar. The amendments do not extend there, but there is a power in section 12 of the European Parliament (Representation) Act 2003 which could be used to extend them to Gibraltar.²⁰³

The *Notes* also accept that a legislative consent (Sewel) motion of the Scottish Parliament may be required, if there are amendments to the Bill which affect its devolved areas. The principal area is the conduct of local government elections. The Bill will not affect the National Assembly for Wales.

Some of the clauses are designed to come into force on royal assent. The main clauses are:

Clauses 4 and 5 which relate to the selection of Electoral Commissioners

Clause 7 which relate to political restrictions on staff

Clause 10 which relates to the triggering of election expenses

Clause 11 which relates to Commission guidance on election expenses

It is expected that the Bill will be subject to carry-over procedures, given its introduction into the Commons so late in session 2007-08. Further details on carry-over are given in Library Standard Note 3236 *Modernisation: Carry-over of Public Bills* ²⁰⁴

VIII Glossary

A full glossary is available from the Electoral Commission website at <http://www.electoralcommission.org.uk/glossary>. Some summarised definitions are given below to assist with the interpretation of the Bill and associated commentary.

Accounting unit

A constituent or affiliated organisation that is responsible for its own financial affairs separately from those of a political party's central organisation.

²⁰² <http://www.parliament.uk/commons/lib/research/notes/snpc-04513.pdf>

²⁰³ Bill 141-EN

²⁰⁴ <http://www.parliament.uk/commons/lib/research/notes/snpc-03236.pdf>

Members association	Any organization whose membership consists mainly or exclusively of members of a registered party, otherwise than a registered party or central or accounting unit of a party, defined in para 1(6) of Schedule 7 to PPERA
Permissible donor	Donations to political parties must be from a permitted person or company, as defined in s54(2) of PPERA. See page 56 for details.
Permitted participant	Permitted participants are individuals or organisations that campaign for a particular outcome in a referendum.
PPERA	<i>Political Parties, Elections and Referendums Act 2000</i>
RPA	<i>Representation of the People Act 1983</i> (a consolidation act).
Recognised third party	An organisation or individual that is not fielding candidates at an election but which nonetheless intends to campaign in support of a candidate, party or group of candidates. Registration with the Commission is required if expenditure above a certain limit is planned.
Registered party	Parties which are registered with the Electoral Commission in order to contest elections.
Regulated donee	An individual receiving a donation which is subject to regulation by PPERA. This includes party members, or those holding a relevant elective office.
Relevant elective office	An individual holding office, subject to the donation requirements of PPERA, defined in 1(8) of Schedule 7 to PPERA. This includes MPs, local councillors and mayors, members of devolved institutions but not peers. See page 57 for details.
Triggering expenses	Actions which trigger or set off the election expenses limits under the RPA.
Unincorporated association	A body which has no recognised legal existence; e.g. is not a company or friendly society. Political parties tend to be unincorporated.