



Joint Committee on Human Rights

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From Dr Hywel Francis MP, Chair

The Rt Hon Andrew Lansley CBE MP,
Leader of the House of Commons,
2, Horse Guards Road,
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12 September 2013

Dear Andrew,

Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill

The Joint Committee on Human Rights is currently scrutinising the Transparency of Lobbying Non-party Campaigning and Trade Union Administration Bill in light of the requirements of human rights law. The Committee has examined the information provided by the Government in relation to the Bill, in particular its Explanatory Notes (paragraphs 159-192). In order to further assist the Committee with its work, I would be grateful if you could provide responses to the questions below.

Human Rights issues raised by Part 1 of the Bill

The right to respect for private and family life (Article 8) – necessity of provisions addressing consultant lobbyists only

Part 1 establishes a register of consultant lobbyists. The register of consultant lobbyists will contain personal information such as the lobbyist's name, address, list of clients, &c., and will be publicly available. The obligation to provide personal data, and the collection and storage of personal data, engage Article 8 (the right to respect for private and family life) which protects personal data as part of the subject's private life. The European Court of Human Rights has held that the need to protect the electoral process is a legitimate aim.¹ Similarly, the Information Tribunal has held that there is a public interest in understanding the role of lobbyists and their relationship with Government.²

¹ Animal Defenders International v UK, 22 April 2013, para 111; Bowman v UK, 19 February 1998, para 41

² Department for Business, Enterprise and Regulatory Reform v Information Commissioner's Office and Friends of the Earth EA/2007/0072 and also Evans v Information Commissioner's Office and Ministry of Defence EA/2006/0064; ICO Submission to PCRC, August 2013 p.2;

While the legitimate aim is clear, the information provided by the Government (Explanatory Notes and Impact Assessment) does not set out the evidence-base to explain the reasons for the Government's view that problems of transparency, and "undue and secret influence",³ are due solely to the activity of consultant lobbyists. In its 2012 Report, the Political and Constitutional Reform Committee heard evidence that a lack of transparency surrounding third party lobbyists was not a significant enough problem for third party lobbyists to be singled out as the sole signatories to a statutory register.⁴

Q1: In order to assess whether the requirement to register and publish consultant lobbyists' information is proportionate and responds to a pressing social need, can the Government provide evidence to support its assessment, outlined in paragraph 163 of the Explanatory Notes to the Bill, that there is "undue and secret influence by consultants who are receiving payment to influence government policy"?

Q2: Can the Government explain why it considers that confining the scope of the registration provisions to consultant lobbyists alone is sufficient to meet its legitimate aims of improving transparency and tackling undue and secret third-party influence?

Information safeguards

Clause 9 and 10 provide powers for the Registrar to issue an information notice in order to obtain information from a consultant lobbyist, or someone he or she reasonably believes is a consultant lobbyist. The information notice must specify what information must be supplied and by what date, and must contain details of the appeals procedure. Clause 9(3) provides that Regulations may make provision prohibiting certain descriptions of information from being requested under an information notice. The Explanatory Notes to the Bill indicate that legal professional privilege information may be excluded.⁵

Q3: Please can the Government explain why the limits on the types of information which can be required to be supplied under an information notice are left by clause 9(3) to be specified by regulation rather than on the face of the Bill to provide better protection for such classes of information?

Human Rights issues raised by Part 2 of the Bill

Response by the ICO to Cabinet Office's Consultation on the introduction of a statutory register of lobbyists, April 2012, p.4

³ Explanatory Notes, para 163

⁴ Second Report from the Political and Constitutional Reform Committee, Session 2012-13, HC 153, para 45

⁵ Explanatory Notes, para 43

Legal certainty and the right to freedom of expression

Part 2 of the Bill concerning third party campaigning engages the right to freedom of expression, and in particular the freedom of political speech. As the Government acknowledges in its Explanatory Notes, this right attracts the highest level of protection because freedom of political debate is central to a democratic society, and any restriction on this right needs to be examined rigorously. This is well established by common law and human rights law.

The Committee understands, in principle, the legitimate aim that the Government seeks to pursue in relation to the regulation of non-party campaigning i.e. to protect the electoral process. However, it is particularly important that the rules on non-party campaigning are clear, so that those affected by them can predict with reasonable certainty whether and how they will be regulated. The current drafting does not appear to provide individuals and groups with sufficient clarity to know whether or not they will be affected by the Bill's provisions. It potentially covers a wide number of individuals, groups and campaigning activities, including those that campaign on policy issues only. The lack of certainty is particularly serious given the potential criminal liability that may arise as a result of a failure to comply with the rules, with a potential "chilling effect" on campaigning by individuals and groups. This risks diluting the quality of democratic debate in the run up to elections.

We note that the Government has recently given a number of assurances in relation to Part 2 of the Bill.

Q4: Can you please provide the Committee with the Government's analysis of the necessity of the measures in Part 2 of the Bill, in order to satisfy the requirements of Article 10(2)?

Q5: Will the Government consider redrafting the meaning of "controlled expenditure" in clause 26, and the qualifying expenses listed in Schedule 3, to specify more clearly that the third party campaigning falling within this definition must be directly connected with the promotion of, or opposition to, the electoral success of a political party or candidate?

Q6: Can you please explain the rationale for removing the "intent" requirement of current third party campaigning under PPERA? Has the Government considered the implications of the removal of intent from this part of the Bill for making determination of an offence more difficult?"

Q7: The Government has given recent assurances that third party campaigning on policy issues only would continue to be exempt. Can this assurance be provided on the face of the Bill, perhaps by redrafting the definition of "controlled expenditure" in clause 26 of the Bill?

Q8: In light of reports that the Government intends to amend Part 2 of the Bill, please can the Government provide the Committee with a full analysis of the compatibility of any Government amendments tabled with the requirements of Articles 10 and 11 ECHR? In particular, the Committee would be grateful for the Government setting out the necessity of the proposed measures.

Freedom of association

In its Explanatory Notes to the Bill, the Government states that it is "content that the spending limits are high enough to be proportionate and do not act as a significant bar on the ability of groups to assemble and associate with others".⁶ However, the Government does not provide reasons to explain the broad definition of "controlled expenditure", or to explain the need to cut the amount of permitted expenditure. Without this reasoning, it is not possible to fully assess the proportionality of the measure.

Q9: The Government states that "the (spending) limits are high enough to be proportionate" (at paragraph 180 of the Explanatory Notes). Can you please provide the Government's analysis of the necessity of the measures in Part 2 of the Bill, in order to satisfy the requirements of Article 11?

Q10: Can the Government provide its reasons to explain the justification for the reduction of third party spending limits?

Human rights issues raised by Part 3 of the Bill

The right to respect for private and family life - Information safeguards

Clause 37 provides that the independent assurer has a right of access at all reasonable times to the register of the names and addresses of the union's members and to all other documents which the assurer considers may be relevant to help assess whether the union has complied with the membership audit requirements. The Certification Officer and any investigator have powers to require the production of the register of the names and addresses of trade union members and any other relevant documents.⁷

The Government's Explanatory Notes state that the duty of confidentiality contained in clause 38 of the Bill "together with the protections conferred by the Data Protection Act 1998 and section 6 of the Human Rights Act 1998, are in accordance with law and the powers conferred to obtain and use these membership details are necessary and proportionate to enable the Certification Officer, assurer and inspector to carry out their functions under TULRCA and are therefore justified under article 8(2) of the

⁶ Explanatory Notes, para 180

⁷ Clause 38 of the Bill

ECHR.⁸ However, the Government does not set out in the Explanatory Notes its analysis of the legitimate aim of and pressing social need for these measures.

Freedom of association

In its Explanatory Notes, the Government sets out that the Certification Officer, independent assurer and any inspector are bound by duties of confidentiality, by the DPA and by section 6 of the HRA. The Government explains that "in the light of these safeguards, the provisions in the Bill regarding union membership lists should not undermine the right of individuals to join a trade union and do not negatively impact on an individual's right to freedom of association".⁹ However, the Government does not set out the legitimate aim, or pressing social need, as required to justify any interference with Article 11 rights.

Q11: Can the Government provide its analysis of the compatibility of the measures in Part 3 of the Bill with the requirements of both Articles 8 and 11 ECHR? In particular, can the Government explain the legitimate aim of, and pressing social need for, such measures for the purposes of assessing the proportionality of any interference with Articles 8 and 11 ECHR?

It would be helpful if we could receive your reply to these questions by 24 September 2013. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format to aid publication. I look forward to hearing from you.

Yours
Hywel

**Dr Hywel Francis
Chair**

⁸ Explanatory Notes, para 188

⁹ Explanatory Notes, paras 185-187