Office of the Leader
of the House of Commons

1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7276 1005
Fax: 020 7276 1006
leader@commonsleader.x.gsi.gov.uk

Our Ref: MP325341

24 September 2013

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

Thank you for your two letters dated 12 September about your Committee's scrutiny of the Bill. I am happy to respond to the specific queries raised by the Committee about individual provisions within the Bill, and would also like to thank the Committee for engaging in detail with the Bill's content. Please also find enclosed a memorandum on the human rights issues which the Bill raises, which I hope is of further assistance to the Committee.

The Government's commitment to pre-legislative scrutiny has been demonstrated by the publication of a higher number of bills and measures in draft than under previous administrations. In the 2012-13 Session, we published 17 draft bills or sets of clauses, more than in any previous year-long session. While it has not been possible to publish a draft Bill on this occasion, the Government published a consultation paper setting out a proposal for a register of lobbyists which was considered by the Political and Constitutional Reform Committee before the Bill was introduced. Of course, the Government will continue to engage with Parliamentary and other experts, including your Committee, throughout Parliament's consideration of the Bill.

I have noted your concerns about the time available to consider the Bill. Of course, the text of the Bill was also introduced and published before the summer recess in July, significantly further in advance of Second Reading in calendar terms than would often be the case, and I know this additional time was appreciated by many Parliamentary and other stakeholders. Sitting dates are determined independently by the two Houses, but it is within the power of Select Committees to meet during Recess and indeed, the Political and Constitutional Reform Committee took the opportunity to do so. In addition, the Bill was considered in Committee of the Whole House, providing all Members of the House of Commons with the opportunity to contribute to the debate and listen to the arguments put by the Government.

Following the conclusion of this stage, I hope your Committee is reassured by the wide-ranging scrutiny undertaken by Members, and Committees, of this House so far and anticipated during the two days that have been made available for the Remaining Stages. I have no doubt that scrutiny by Peers and Committees of the House of Lords, and the Joint Committee on Human Rights, will also make an important contribution to the legislative process and I look forward to continuing to engage constructively with you on the substantive issues of what the Bill seeks to do and how it will work in practice, and any human rights implications.

Questions on Part 1 of the Bill: Registration of consultant lobbyists

Q1 and 2

The Government has greatly increased the transparency of decision-making by publishing unprecedented amounts of information, including about whom ministers and senior officials meet. The proactive publication of details of all ministers' and permanent secretaries' meetings with external organisations on a quarterly basis has revealed to the public who is meeting with the key decision-makers in Government.

What remains unclear to the public when they consult that information, however, is whose interests are being represented by consultant lobbyists in such meetings. While it is clear whose interests are being represented when other individuals and organisations meet ministers and permanent secretaries, consultant lobbyists may have many clients, any one of which they may be acting on behalf of.

The existence of a significant consultant lobbying industry itself demonstrates that certain organisations prefer to engage a third party to promote their interests rather than doing so themselves. Whilst there may be sound operational reasons for this, it is inevitably less transparent.

The impact assessment published alongside the Bill estimated that there are approximately 1000 consultant lobbyists operating in the UK. When those lobbyists engage with Government, it is not clear to the public whose interests are being promoted because there is no statutory requirement that they disclose the names of the organisations that have engaged them. The current self-regulatory nature of the consultant lobbying industry – whereby there is no requirement that any consultant lobbying firm must provide details of its activities or clients – perpetuates the lack of transparency. There are two voluntary registers, hosted by differing industry bodies between which there is little coordination or harmonisation. Those registers do not provide universal coverage of the consultant lobbying industry, are not hosted by a body with the capacity to monitor the accuracy and completeness of entries, and are not associated with proportionate and deterrent sanctions.

The nature of the consultant lobbying industry, and its system of self-regulation, is such that the availability of hard and tested evidence regarding its exercise of influence is limited. The register of consultant lobbyists will challenge that lack of transparency. A transparency asymmetry exists, where it is clear whose interests are being represented by organisations that make their own representations to Government, but not if an organisation engages a consultant lobbyist. By requiring that consultant lobbyists disclose the names of their clients, the statutory register will safeguard against the exercise of undue and secret influence by ensuring that all external

organisations that engage with ministers and permanent secretaries are subject to equivalent levels of transparency and scrutiny.

Q3

The Government wants to ensure that all classes of information which should be protected from disclosure are excluded from the requirement to disclose to the Registrar. As this is a new system of regulation and the first time that lobbyists have been regulated by statute, it is important that the legislation is flexible enough to allow government to learn any lessons which arise from the new system being introduced. This power will enable Government to make more detailed provision in order to further safeguard the rights of recipients of notices and to react to any views expressed by the industry and the Registrar as the legislation is implemented and after its implementation. The level of protection provided to the rights of recipients of information notices is not lessened by such restrictions being set out in secondary legislation instead of primary legislation.

Questions on Part 2 of the Bill: Non-party campaigning etc

Q4

Controls on third party spending were first set out in Part 6 of the Political Parties, Elections and Referendums Act 2000 (PPERA). The purpose of these controls is to seek to limit national expenditure by third parties in support of or in opposition to political parties, in the same way as the controls in section 75 of the Representation of the People Act 1983 (RPA) seek to control expenditure by third parties in support of or in opposition to individual candidates.

A number of countries have controls on the activities of third parties, which are necessary to ensure that the outcome of elections is not determined by who has the wealthiest supporters and to prevent third parties being used by political parties as a way around other controls.

In the context of possible future changes to the regulation of party funding, the 13th report of the Committee on Standards in Public Life (CSPL) noted that, despite the PPERA and RPA controls, the activities of third parties would need further close attention because of the risk that they may be used by political parties to evade spending limits. The Government thinks that this risk may also arise under the current arrangements given the relatively more onerous reporting obligations on political parties. The differences in the regulatory regime for party and non-party campaigners was also an issue which was highlighted as a potential gap in the rules in the Electoral Commission's 2013 report '*A regulatory review of the UK's party and election finance laws – Recommendations for change*'. Even where third parties are not acting in concert with political parties, the amount that they spend, if it is directed to supporting a particular party or group of candidates, can have a significant impact on election results. In line with the legitimate

aim of ensuring that the amount of money spent is not the most important factor in succeeding in elections it is therefore necessary to control the amount that third parties spend in connection with influencing the outcome of elections.

The provisions within the Bill take forward measures that are consistent with the recommendations of the CSPL and Electoral Commission reports, and which in the Government's view are necessary to maintain the effective control of third party spending at elections, in order to pursue the legitimate aim of securing greater financial equality between parties and candidates contesting elections. Those measures include the following:

- The Electoral Commission recommended that the activities which amount to controlled expenditure for third parties should mirror those for political parties, to include activities such as media work and rallies. We have introduced this measure.

- The CSPL highlighted the importance of guarding against the risk that significant donors might use third parties to aid political parties and evade party spending controls. That is why, at present, third parties campaigning nationally during regulated elections are subject to rules on donations similar to that of political parties. But the CSPL considered that the existing donation reporting arrangements may need strengthening to improve transparency. They noted that, at present, registered third parties only need to report donations related to controlled spending, and are only required to do this once at the end of every campaign, as part of a return to the Electoral Commission after the relevant election, rather than at the regular intervals required of the political parties.

  The Bill therefore introduces measures which are necessary to achieve this increased transparency. The Bill proposes that third parties provide information about large donations in advance of the election, in quarterly and weekly donation reports – as is the practice with political parties. This will improve transparency, allowing the public to see who donates to third parties before an election. It also introduces requirements for third parties to submit accounts, creating transparency about all the income and expenditure of third parties during the election regulated period. Both these measures are necessary and proportionate controls to ensure the transparency that will ensure information is publicly available on money spent at elections and the source of that money and to aid enforcement.

- To ensure the effectiveness of the controls on third parties as a whole, a number of associated measures have also been introduced. Third parties must under the existing regulatory regime comply with particular spending limits according to whether they are campaigning in England, Scotland, Wales or Northern Ireland; the aggregate UK limit amounts to approximately 5% of the maximum campaign expenditure limit for political parties - £988,000. This is a level that no third party has ever come close to exceeding. It is recognised that spending amounts much lower than this limit can have a significant impact on electoral results and therefore the limits are too high to be effective at present. In order to combat the risk of increasing amounts of third party expenditure being used to influence elections, the Bill therefore reduces the spending limits for third parties to 2% of the maximum campaign expenditure limit for political parties, which though a far lesser amount, is still at a level only two third parties have previously ever exceeded.

- In addition, the Bill introduces a limit on how much a third party may spend in each constituency. This is to prevent disproportionately large amounts of money from distorting the political process: under existing PPERA rules, there is nothing to stop third parties from directing their entire expenditure at a single constituency or region. The constituency limits are still considerable when considered against the smaller geographical area they now apply to. Moreover, it is important to bear in mind that campaigning for or against a particular candidate is subject to the RPA rules on candidate expenditure. The legitimacy of such limits was considered in the ECHR case of *Bowman v*

UK[1], and the principle of such limits was upheld. The Bill does not displace those longstanding rules. Those provisions specify that when campaigning for or against a candidate, third parties may only spend up to £500 (the amount is proposed to increase to £700 in the Bill). New constituency limits will prevent excessive third party spending that is not directed at a particular candidate, but is otherwise focussed on a particular constituency or area, from undermining those longstanding and important rules.

Q5

Under clause 26 (which amends section 85 of PPERA) in order to be "controlled expenditure", spending by a non-party campaigner must be: a) on the materials or for one of the activities set out in Schedule 3 (which inserts a new Schedule 8A into PPERA), and: b) incurred "for the purpose of or in connection with" promoting or procuring electoral success for, or enhancing the standing (in connection with an election) of, parties or candidates. The Government is therefore of the view that it is already clear that "controlled expenditure must be "directly connected with the promotion of, or opposition to, the electoral success of a political party or candidates".

However, the Government recognises the anxiety that has been caused by the slight change to the existing definition, and we have therefore committed to reverting to a definition based on the existing concept that controlled expenditure must "reasonably be regarded as intended to" promote or procure such success. The Electoral Commission tell us that this test is well understood by the Commission and by campaigners, and avoids concerns about a widening of the type of campaign captured by the Bill.

Q6

It is important to note that the existing test in section 85 is an objective test of intent – can expenditure "reasonably be regarded as intended to" promote or procure electoral success? It does not depend on establishing the actual, subjective intent of a campaigner. Similarly, clause 26 proposes a test which relies on an objective assessment of expenditure by a third party; is it "in connection with" promoting electoral success? (This is in addition to an assessment of actual, subjective, intent; is it "for the purpose of" promoting electoral success?) This test is one that is already used in section 72 of PPERA in relation to the campaign expenditure of political parties.

The Government carefully considered the meaning and effect of the revised test, and what implications that may have for the criminal offences contained in PPERA. In the Government's view, under either the current PPERA, or the proposed terminology of the Bill, the test for the campaigner and the regulator, the Electoral Commission, is whether the expenditure can reasonably be considered to be promoting or procuring electoral success (the Electoral Commission guidance, for example, considers the existing definition to include material that "promotes or opposes policies which are so closely and publicly associated with a party or

[1] Application No. 24839/94, (1998) 26 EHRR 1

parties that it is not reasonable to argue that the item isn't" controlled expenditure). It is the Government's clear view, therefore, that the determination of an offence need not be any more difficult under the test in clause 26 than it is under section 85 as currently formulated.

However, as noted above, the Government recognises the anxiety that has been caused by the change to the test, and will be bringing forward amendments.

Q7

As explained above, the Government will be bringing forward amendments to revert to the existing test in PPERA. If a policy campaign (either because of the nature of the policy or of the campaign) cannot reasonably be regarded as intended to promote or procure electoral success of any parties or candidates they will not need to register. It is in that way that the vast majority of policy, charitable and other third party campaigns are currently, and will remain, outside the non-party campaigning regime. That is the position and will remain the position in the future.

The Government does not think that a specific exemption for "campaigning on policy issues" would be helpful. It would introduce an additional, potentially ambiguous, definition for campaigners and the Electoral Commission, which may be liable to lead to increased confusion and risk introducing a significant loophole for expenditure that is presently, and should continue to be, controlled.

Q8

We will provide the Committee with the analysis requested when we table the amendments to Part 2.

Q9

The Bill reduces the national third party spending limit from 5% of the maximum campaign expenditure limit for political parties, to 2% (£319,800 in England, £35,400 in Scotland, £24,000 in Wales and £10,800 in Northern Ireland – a national total of £390,000). It also introduces a limit on the proportion of national spending which may be used in a particular constituency. As noted above in relation to Article 10, the provisions pursue the legitimate aim of securing equality between candidates, preventing distortion of system by powerful interest groups and preventing the circumvention of spending limits lawfully imposed on political parties and we are content that they are, in accordance with the requirements of Article 11, necessary and proportionate.

Q10

The existing spending limit was fixed in PPERA at 5% of the maximum campaign expenditure limit for political parties, on the recommendation of the Neill Committee (fifth report of the Committee on Standards in Public Life). The CSPL report considered whether a national statutory spending limit at all would constitute an infringement of the right to freedom of expression enshrined in Article 10, and concluded it would not.

The need for national spending limits was felt necessary because "*there are any number of ways in which the spending limits on the political parties could be evaded. The parties themselves could set up...a wide range of front organisations. Alternatively, even without any collusion between the parties and outsiders, individuals or organisations could engage in large-scale propaganda that was clearly intended either to promote the election of one party or to discourage the election of another*."

The proposed limit – 5% – was considered "quite generous" by the CSPL, and they noted concerns that groups of third parties could outnumber expenditure by candidates or political parties. That argument remains valid today. The existing spending limit is so high as to be ineffective as a spending limit which creates a balance between campaigners and reducing it strikes a better balance between third party campaigners and parties contesting elections, and seeks to combat the risk of increasing amounts of third party expenditure being used to influence elections. The Government therefore thinks that a reduction to a lower, but still very significant, sum is justified.

Question on Part 3 of the Bill: Trade unions' registers of members

Q11

You note the right of access the independent assurer has to the register of names and addresses and other relevant documents (clause 37) and the powers of the Certification Officer and his inspector to require production of the register and relevant documents (clause 38). You also note that the Explanatory Notes do not set out the Government's analysis of the legitimate aim of and pressing social need for these measures.

The existing duty on unions to compile and maintain a register of members' names and addresses and to ensure as far as reasonably practicable that the entries are accurate and kept up to date (section 24 of the Trade Union and Labour Relations (Consolidation) Act 1992) has been around in various forms since 1984. During the debate in House of Commons Committee on 11 September 2013, there was cross-Party agreement that it is necessary for unions to maintain such registers. We are not changing the existing duty and it is clear that its legitimacy is not being questioned.

The reason for the provisions in Part 3 of the Bill is to ensure that there is an effective enforcement regime. There are a number of inadequacies at the moment which need to be addressed. The Certification Officer (CO) can only make enquiries to determine whether a union has failed to comply with any of the requirements of section 24 in response to a complaint from a member. A member must be proactive about asking to view the register and is only likely to be able to identify whether their own details are correct. A union member does not know who should or shouldn't be on the register in the first place. Nor can they know the up-to-date details for other members. Finally, the CO may not be able to establish whether there are inaccuracies because the union is under no obligation to disclose documents.

Membership registers are not static. There is a high degree of churn in union membership – in terms of joiners and leavers. It is also likely that there will be regular changes needed to individual member addresses, particularly where a union is large. There is reason to be concerned that, without systems in place for regular maintenance, membership registers will quickly become out-of-date.

The duty to compile and maintain a register of up-to-date names and addresses reflects the importance placed on a union being able to contact its members. The new regime will give greater visible assurance that a union is correctly maintaining its membership data. At the moment, however, the CO, the union member or the wider public cannot know whether unions are compliant with the duties in section 24, except in the limited circumstances where a member has claimed that a union is non-compliant. Even then, a declaration would only address the breach alleged and this may be more limited in scope that the state of the membership register as a whole.

It is a legitimate aim, therefore, for Government to introduce legislation to ensure that the duty in section 24 is complied with and for this to be achieved through an effective enforcement regime. It is necessary for the CO, assurer and any inspector to have access to the membership register and to be able to require information in order to perform their functions introduced by Part 3. So the pressing social need for the introduction of the rights of access to information in Part 3 is to ensure that the new enforcement regime can function. However, in making provision for this, Government has been mindful of the need to ensure that what is introduced is proportionate and consistent with the permitted derogations in Articles 8 and 11.

Part 3 of the Bill contains explicit safeguards to ensure that the CO, the union's assurer and any inspector appointed can only have access to information which is required in order for them to carry out their functions. Assurers and inspectors are also bound by obligations of confidence in relation to their handling of this information. Names or addresses of union members can only be disclosed with the member's permission, where required by the Certification Officer, inspector or assurer to discharge their functions, or as part of a criminal investigation or proceedings.

Additionally, existing obligations for the handling of sensitive data will continue to apply as they do now. The CO is a public authority for the purposes of the Human Rights Act 1998 and is subject to the obligation in section 6 of that Act to act consistently with Convention rights, including articles 8 and 11 ECHR. Furthermore, where information obtained by the CO, an assurer or an inspector is personal data or sensitive personal data, they will be required to comply with the principles contained in the Data Protection Act 1998.

So, in response to question 11 we consider that the measures introduced by Part 3 of the Bill are consistent with the rights conferred by Articles 8 and 11 ECHR, as they are prescribed by law and pursue the legitimate aim of the introduction of effective enforcement measures to ensure that the duty in section 24 is complied with. This enforcement regime is only workable if the CO, assurer and inspectors have access to the register of members and related information so there is a pressing social need to introduce powers to permit this. The protections in place to ensure that the information is only used for these purposes mean that the enforcement measures are proportionate.

I am grateful for this opportunity to assist the Joint Committee on Human Rights' consideration of the Bill and will be happy to provide further information as required.

Rt Hon Andrew Lansley CBE MP
Leader of the House of Commons

Dr Hywel Francis MP
Chair, Joint Committee on Human Rights