TRANSPARENCY OF LOBBYING, NON-PARTY CAMPAIGNING AND TRADE UNION ADMINISTRATION BILL

MEMORANDUM ON ECHR ISSUES FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

Introduction

1. This memorandum deals with issues arising under the European Convention on Human Rights in relation to the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill.

2. The Government has given detailed consideration to whether the provisions in the Bill are compatible with the European Convention on Human Rights (ECHR). On introduction, the Leader of the House of Commons made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with Convention rights as defined in section 1 of that Act. This note sets out a summary of the issues considered by the Government and the conclusion reached as to why the provisions are compatible.

CONTENT OF THE BILL

3. The Bill consists of three main parts:
   - Registration of Consultant Lobbyists (Part 1)
   - Non-Party Campaigning etc (Part 2)
   - Trade Unions' Registers of Members (Part 3)

Lobbying

Registration of consultant lobbyists

4. The broad policy aim behind this Part of the Bill is to ensure that information about who lobbyists are is publicly available. This should also be seen in the context of voluntary action (i.e. not underpinned by legislative provisions in the Bill) by Ministers to publish their diaries.

5. All persons carrying on the business of consultant lobbying must be entered on the register of consultant lobbyists (clause 1). This covers people who carry out lobbying in return for payment and in the course of a business and who make communications to a Minister of the Crown or Permanent Secretary about government policy (or legislation, the award of contracts etc) on behalf of another person or persons. There are a number of exceptions e.g. if the person is an official or employee of a foreign government, and nothing applies to a communication to the extent that its application would constitute an infringement of the privileges of either House of Parliament (clause 2 and Schedule 1). The Bill establishes a Registrar of Consultant Lobbyists who must keep and publish a register of consultant lobbyists containing a range of specified information including the registered person's client information (clauses 3 to 7 and Schedule 2). A person may be required to supply specified information (clause 9) and has a right of appeal against such a requirement (clause 11). It is an offence to carry on the business of consultant lobbying whilst unregistered or without

having properly complied with registration requirements (clause 12). If the Registrar is satisfied that the person's conduct amounts to an offence, the Registrar may impose a civil penalty on a person (clause 14) and this is subject to a right of appeal (clause 17).

Non-party campaigning etc

6. Part 2 of the Bill is concerned which regulating the activities of people/bodies which are not registered political parties. The broad policy aim is to ensure that there is a level playing field for those who are engaged in election campaigns and that the democratic process does not become distorted by wealthy groups. The Bill changes existing spending limits and introduces new provisions to protect against third parties acting in concert with political parties (and thus undermining the efficacy of spending limits on registered political parties) and against excessive localised spending.

Introducing restriction on targeted third party spending acting in concert with a party

7. The Bill also includes provision to ensure that third party spending targeted to support a particular political party above a certain level is counted towards the spending limit for that political party (e.g. where the third party 'acts in concert' with the party to boost the registered party's spending power during an election campaign). The relevant targeted expenditure limits are 0.2% of the maximum campaign expenditure limit in that part of the United Kingdom and are: in relation to England, £31,980; in relation to Scotland, £3,540; in relation to Wales, £2,400 and in relation to Northern Ireland, £1,080 (clause 29).

Reducing the national spending limits for third parties

8. Schedule 10 of PPERA contains limits setting the maximum amount that a recognised third party may spend in each part of the UK at a Parliamentary general election. The current spending limits are in relation to England, £793,500; in relation to Scotland, £108,000; in relation to Wales, £60,000 and in relation to Northern Ireland, £27,000. The Bill amends these limits to be 2% of the maximum that a registered political party could spend if it contested every parliamentary constituency in that part of the UK. This works out as £319,800 in relation to England, £35,400 in relation to Scotland, £24,000 in relation to Wales and £10,800 in relation to Northern Ireland (clause27(2)).

Introducing limitation on amount of spending in a constituency

9. The Bill introduces a new restriction on the amount which a third party may spend in a particular constituency in relation to parliamentary elections. At present recognised third parties are only limited in their total expenditure. A limit is imposed of 0.05% of the total maximum campaign expenditure limits in England, Scotland, Wales and Northern Ireland and 0.03% in the period commencing with the date Parliament is dissolved and ending with the date of the poll. This means the maximum which could be spent in a particular constituency during a regulated period would be £9,750 and, in the post-dissolution period £5,850 (clause 28).

Increasing the limit on spending incurred by third parties in favour of a candidate

10. To safeguard the position of candidates without access to substantial resources, the amount of expenses which may be incurred by a candidate before, during and after an election campaign is controlled by statute. All election expenditure by a candidate must go through an election agent who must submit an account after the election (Representation of the People Act 1983, ss.73, 76, and 81). Any expenditure incurred to promote the election of a candidate by a person other than the candidate or his or her election agent (i.e. by third parties) is prohibited (1983 Act, s.75). This applies to expenditure which is above the aggregate permitted sum (£500 in the case of a UK Parliamentary election and, in respect of local government elections, £50, with an additional 5p for every entry in the register of local government electors for the electoral area in question). It is an offence under section 75(5) to knowingly make false declarations or encourage others to breach these provisions etc. The aggregate limit on spending by third parties at a candidate level at relevant elections is to be raised from £500 to £700 to reflect inflationary increase since 2000 (clause 34(1)).

Reducing threshold for third parties to notify Electoral Commission

11. Where during a regulated period specified forms of controlled expenditure are incurred by or on behalf of a third party in a part of the United Kingdom above a certain threshold (specified in s.94(5) PPERA), that party must become a 'recognised third party' by giving the Electoral Commission a notice to that effect (s.88 Political Parties Elections and Referendums Act 2000 (PPERA)). These limits have effect in relation to spending for a relevant election. An offence is committed if expenditure is spent or authorised above these limits by a third party that is not recognised. The Bill reduces the limits from £10,000 to £5,000 in respect of England and from £5,000 to £2,000 for each of Scotland, Wales and Northern Ireland (clause 27(1)).

Record keeping, accounts and enforcement

12. The Bill also includes provisions to expand the monitoring and enforcement powers of the Electoral Commission to ensure that third party controlled expenditure is properly accounted for and to ensure that there is greater transparency in respect of donations to recognised third parties (clauses 31, 32, 34 and Schedule 4).

13. Recognised third parties are currently required to prepare returns which are submitted to the Electoral Commission setting payments in respect of controlled expenditure and relevant donations received during the relevant period (s.96 PPERA). The Bill will require third parties to also return a statement of accounts. Individuals, bodies who are already under existing statutory obligations to prepare accounts (companies, trade unions, charities) will be exempt from this requirement (clause 33).

<u>Trade Union Administrative Provisions</u>

14. The aim of Part 3 of the Bill is to amend the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) to require trade unions to keep fully audited and up-to-date lists of their members by:

- Enhancing the regulatory powers of the Certification Officer, creating a power to enable the Certification Officer to investigate list discrepancies;
- Requiring unions to undertake an annual audit of union membership;
- Requiring unions to provide evidence of how they will store and monitor membership data effectively.

15. Part 3 will:

- Introduce a statutory obligation on trade unions which are subject to section 24 of TULRCA (duty to maintain register of members' names and addresses) to supply an annual membership audit certificate to the Certification Officer[1];
- Require unions with over 10,000 members to appoint an assurer who will certify whether the union's system for compiling and maintaining the register was satisfactory for complying with section 24 throughout the relevant reporting period. Other unions will self-certify;
- Give powers to the Certification Officer to require the production of documents where he thinks there is good reason to do so and to appoint an inspector to investigate whether there is a breach of section 24 TULRCA;
- Give the Certification Officer powers to declare that a union has failed to comply with these duties and also to issue an enforcement order if the union is not compliant. The Certification Officer also has powers to issue an enforcement order where a person has failed to comply with a duty to supply documents or information. A declaration can be enforced as if it were a declaration of the High Court (or Court of Session in Scotland). An enforcement order can be enforced as an order of the High Court (or Court of Session in Scotland).

HUMAN RIGHTS ISSUES

LOBBYING

Personal information in the Register of Consultant Lobbyists

16. The Register of Consultant Lobbyists will contain personal information such as the lobbyist's name, address, list of clients etc. The Register will be publicly available (including on a website). **Article 8** ECHR (the right to respect for private and family life) protects personal data as part of the subject's private life. The obligation to provide personal data[2], and the collection and storage of personal data will engage Article 8 rights.

17. The information which the legislation requires to be provided and published in the Register is not of a highly personal or sensitive nature. It consists of client information (clause 4(3)),

[1] The CO is appointed by the Secretary of State under section 254 of TULRCA.
[2] *X v UK*, App No. 9702/82 (concerning the obligation to give data in response to a compulsory public census)

the individual's name and address of the individual's main place of business (or, if there is no such place, the individual's main residence) (clause 4(2)(c)) and any other name or names under which the person carries on business as a consultant lobbyist (clause 4(2)(e)). There is also a power (in clause 4(5)) to require the inclusion of such information as may be specified in regulations and, in accordance with section 6 of the Human Rights Act 1998, this must be exercised in a way which is compatible with Convention rights, including Article 8 rights. This regulation-making power might be exercised to require the inclusion of for example, the particular projects of a client which lobbying is in relation to or the particular communications which related to that client.

18. Any interference by the state in relation to the rights set out in Article 8(1) must be justified under Article 8(2). Given the statutory basis for the scheme, there is no doubt that any interference is in accordance with the law and this is in pursuance of a legitimate aim of the protection of the rights and freedoms of others because the aim is to safeguard the democratic process from undue and secret influence by consultants who are receiving payment to influence government policy. This is a pressing social need which is central to a well-functioning democratic society. We think that it is necessary and proportionate for such information to be collected and published because it is essential to identifying who relevant lobbyists are and ensuring transparency in this aspect of the political system.

Personal information which the Registrar may require to be supplied

19. Article 8 rights may be engaged by a requirement to provide public bodies with personal information. Therefore an issue arises in respect of the requirement on a lobbyist to supply information under a notice under clause 9, which could potentially include personal information such as correspondence and telephone records.

20. However, we consider that the obligation to provide information is justified and proportionate in accordance with the provisions of Article 8(2). There is some analogy to the case of *M.S. v. Sweden*[3] in which the medical records of an individual were obtained without the consent of that individual by the Social Insurance Office in the course of assessing the individual's entitlement to compensation. This was recognised as a legitimate aim by the court. Here, the information which the Registrar may require must be in connection with the Registrar's duty to monitor compliance with the obligations under Part 1. We consider that there is no reasonably practicable way to monitor the activities of lobbyists unless the relevant individuals are required to provide personal information about their activities. Regulations may specify descriptions of information which the Registrar may not require a person to supply. It is likely that this will be used to ensure that the Registrar may not require the provision of information which is subject to legal professional privilege thus narrowing the types of information which may be requested and acting as a safeguard. There is a strong public interest in the activities of lobbyists who are trying to influence government policy and the awarding of contracts etc being transparent. Additionally, the

[3] (1999) 28 EHRR 313

Bill does not require a person to supply information if doing so would disclose evidence of the commission of a criminal offence (other than an offence under Part 1 or perjury) and prevents any statement made by a person in response to a requirement in an information notice being used in evidence against that person on a prosecution for an offence under Part 1 unless specified conditions are met.

21. The Data Protection Act 1998 regulates the processing of personal information about individuals and in effect, places limits on the type of information which the Registrar may request and how the Registrar deals with it. The Registrar must process such information in accordance with the data protection principles. This means that information will only be able to be processed fairly and lawfully and it must be adequate, relevant and not excessive in relation to the purpose or purposes for which it is processed. It must also be accurate and, where necessary, kept up-to-date.

Right to silence and right to be protected against self-incrimination

22. When the provisions of the Bill are commenced in full it will be an offence for a person to carry on the business of consultant lobbying whilst unregistered.[4] The Registrar may serve a notice on a person requiring them to supply specified information. If provided, such information may reveal that the person is guilty of an offence under Part 1 of this Bill and if the person fails to comply with the notice, this is an offence. Although **Article 6** does not include an express reference to the right not to be compelled to testify against oneself or to confess guilt, the European Court of Human Rights has held in *Funke v France*[5] that a person charged with an offence within the meaning of Article 6 has the right to remain silent and not to contribute to incriminating himself. In *Saunders v UK*[6]the Court said:

"The Court recalls that, although not specifically mentioned in Article 6 … the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities,

[4] It is currently intended that there will be a transitional period during which provisions will be commenced so that the Registrar and register come into existence, and during that time there will be no requirement to register, instead people would have the option of doing this on a voluntary basis. At a later point, the provisions will come into force in full and at that stage the prohibition on carrying out the business of consultant lobbying without being registered will be effective and underpinned by sanctions. During the transitional window when the provisions are partially commenced, there would be no sanction if lobbyists did not provide their identifying information for the register or their previous 3 months clients, but the register would allow them to do so voluntarily if they so wished. People who wished to cease the activity of consultant lobbying instead of registering would be able to continue to collect money and undertake lobbying up until the end of the transitional period. After that point, they would need to register if they engaged in any lobbying activity on a paid basis (including if they were paid prior to the full coming into force to do work after that date) but if they wished to avoid the registration requirement, they may simply stop undertaking their activities. The intention is to commence the provisions in a way which will avoid any retrospective effect arising.

[5] (1993) 16 EHRR 297 (para 44).

[6] (1996) 23 EHRR 313

thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6."

Therefore, an issue arises as to whether the imposition of an offence in respect of a refusal to comply with a notice served by the Registrar is compatible with Article 6.

23. In *Allen v UK*[7] a complaint of the obligation to disclose information to the Inland Revenue was declared inadmissible. In that case the applicant (a prisoner) was served with a notice under the Taxes Management Act 1970 requiring him to provide a certified statement of his assets and liabilities. After failing to comply and being issued with several warnings, the applicant finally submitted a statement. The applicant was later charged with 13 counts of cheating the public revenue of income tax and corporation tax. He challenged this on Article 6 grounds. While the Court noted that this was not a case of genuine forced self-incrimination (the applicant submitted a false statement, which was in itself an offence), the Court did note that:

"The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs ... In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under Article 6 § 1, even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it."

Clearly these principles squarely apply to the long-established Inland Revenue but some analogy may be made with the proposed new Registrar who will be requiring information about a person's affairs in order to carry out a public function.

24. The right to be protected against self-incrimination is qualified. In *Brown v Stott*[8] the Privy Council, in determining whether a breach of the right was proportionate considered factors such as whether the information required of itself proves guilt, the extent of the questioning permitted, the level of penalty (if any) for a failure to provide the information and whether or not there had been improper coercion or oppression. In *O'Halloran and Francis v UK*[9] , in order to determine if the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Strasbourg Court focused on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put. Having regard to

[7] App No.76574/01
[8] [2001] 2 WLR 817
[9] Application no.s 15809/02 25624/02

all the circumstances of the case, including the special nature of the regulatory regime in issue (the Court noted comments made in *Brown v Stott* that all who drive motor cars know that they are submitting themselves to a particular regulatory regime) and the limited nature of the information sought by a notice under section 172 of the Road Traffic Act 1988, the Court considered that the essence of the applicants' right to remain silent and their privilege against self-incrimination had not been destroyed.

25. On the one hand, it is entirely possible that the information which the Registrar requires to be produced would in itself prove the guilt of the person concerned. However, on the other hand, (1) an information notice may not require a person to supply information if doing so would disclose evidence of the commission of a criminal offence, other than an offence under Part 1 of the Bill or a limited range of perjury offences, and expose the person to proceedings for that offence; (2) the level of penalty may, in serious cases, be a fine imposed after criminal proceedings or may be only a civil penalty[10]; (3) there is no reason to think that there would be any improper coercion or oppression. We also consider that it is relevant to consider that the power to require the supply of information and accompanied by an enforcement regime, are crucial to the ability of the Government to ensure that lobbying is regulated. We consider that there is no other practicable way to ensure that the relevant information is produced. In that connection we note that the enforcement regime is similar to that which applies in the Data Protection Act context and this is perfectly legitimate. In particular, the Commissioner may investigate the way in which personal data has been handled and may serve the data controller with an information notice requiring him to supply specified information (see section 43 of the Act).

26. In our view, in all the circumstances, the requirement and enforcement regime are proportionate.

Reverse burden of proof

27. Clause 12(5) provides a defence for a person charged with one of the lobbying offences in subsections (1) to (4) if they show that they exercised all due diligence to avoid committing the offence. A person is able to show that they have exercised all due diligence if sufficient evidence of the fact is adduced to raise an issue with respect of it, and the contrary is not proved beyond reasonable doubt. This defence imposes a 'reverse burden' on the defendant. It will require the defendant to prove the matters set out on the balance of probabilities.

28. Article 6(2) does not prohibit rules which transfer the burden of proof to the defendant to establish a defence, provided the overall burden of establishing guilt remains with the

[10] The policy intent behind having both a civil and criminal regime is that criminal sanctions will be reserved only for the most serious cases and, in relation to those it is important to have the additional consequences which go with criminal offences such as the stigma attached to a criminal offence and the deterrent factor of a criminal record. For less serious actions civil sanctions would be used, thus creating a hierarchy of sanctions.

prosecution. We consider that in this instance, the normal criminal burden of proving that an offence has been committed will remain on the prosecutor.

29. In *R v DPP Ex p Kebilene*[11] Lord Hope held that a statute which imposed a persuasive burden requiring the accused to prove, on the balance of probabilities, a fact which is essential to guilt or innocence, requires further examination. The reverse burden in relation to this defence falls into this category. It is relevant to note that this is a reverse burden only in relation to a limited aspect which is an exemption to the offence. We consider that the reverse burden is confined within reasonable limits. In this regard the Court said that three questions should be considered: (1) What do the prosecution have to do to transfer the onus to the defence? (In this case, nothing, it is up to the defendant as to whether or not he wishes to rely on the defence); (2) Does the burden imposed on the accused relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within the knowledge of the defendant or to which he has ready access? (The matters here are within the defendant's knowledge); (3) What is the nature of the threat faced by society which the provision is designed to combat? (Ultimately we are concerned with threats to the transparency and integrity of the democratic process, which is a matter of great public importance). There is at least one instance[12] where a court has applied section 3 of the Human Rights Act 1998 to read a statutory burden as an evidential, rather than a legal, burden. In all the circumstances, we do not think that the courts would read this provision down in a way that altered the burden of proof.

30. *Requiring payment for registration*

Article 1 of Protocol No. 1 (protection of property) is engaged by the power of the Registrar to charge fees in connection with the making, updating, and maintenance of entries in the register. "Contributions" within the meaning of the second paragraph have been held to include, for example, compulsory contributions to state benefit schemes[13] and employers' associations[14]. We think the payment of a fee contributing to the administration of the Register would be a "contribution" for these purposes. States are accorded a very wide margin of appreciation in this field.

31. Fees are to be imposed simply to ensure that the maintenance of the Register of Consultant Lobbyists is not a drain on the public purse. The level of fee is to be set at an amount which covers the costs incurred by the Registrar in exercising his functions in relation to this so should not be excessively high. We do not expect this to be a significant annual fee, so this will not therefore be a bar on someone carrying out their business activity particularly in light of de minimis fee exemption which means that only lobbyists who are VAT registered will be liable to pay the fee. It is not unusual to impose fees to require people to contribute

[11] [1999] 3 WLR 972, HL
[12] *R v Lambert* [2001] 3 WLR 206
[13] E.g. *Van Raalte v Netherlands* (1997) 24 EHRR 503 (paras 34 and 35)
[14] *X Co v Netherlands*, App No 7669/76

to the cost of operating a scheme (see for example, section 26 of the DPA 1998). In all the circumstances, we consider that this strikes a fair balance.

Discrimination against lobbyists as a group

32. It has been suggested that Government plans to require consultant lobbyists to register would discriminate between in-house lobbyists and people or firms who are hired by a company etc to lobby on their behalf.[15] In particular, it is suggested that this Bill will be contrary to **Article 14** (prohibition of discrimination).

33. Article 14 is a parasitic right. It provides for a right not to be discriminated against only in respect of the other rights laid down in the Convention and its Protocols. In this case, as can be seen from the above, there are Article 8, Article 1 of Protocol 1 and Article 6 issues in play here so there are respects in which the provisions are within the ambit of another Convention right.

34. However, we disagree that there is any fundamental difference in treatment here. Where a lobbyist is in-house, it is already clear who they are lobbying on behalf of i.e. their employer. The Government is very clear that this Bill needs to be seen in the context of other voluntary action which is also taking place: the publication of Ministerial diaries. The Ministerial diary, when published, will achieve the aim of transparency by showing that the Minister in question met an employee of a company etc. If consultant lobbyists are not required to register and say who their clients are then there is no transparency about who they are representing when they meet a minister. Therefore there is a legitimate justification for treating the two types of lobbyists differently.

35. In addition, the positions of in-house lobbyists and consultant lobbyists are quite different in transparency terms so it is arguable that they are not in an analogous position.

NON-PARTY CAMPAIGNING

Spending limits

General principles

36. There are some general principles relevant to spending limits applicable to third parties during an election.

[15] http://prweek.co.uk/uk/news/1114023/Government-plans-exempt-in-house-lobbyists-register-could-illegal/?DCMP=ILC-SEARCH

37. Under **Article 10**, political expression attracts the highest level of protection because freedom of political debate is at the heart of the creation and development of a democratic society. In *R (ProLife Alliance) v BBC*[16], Lord Nicholls said:

"Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts."

38. In *Bowman v UK*[17] the applicant (who was the director of an anti-abortion campaign group) distributed leaflets prior to a parliamentary election and was prosecuted for an offence that prohibited expenditure of more than £5 by unauthorised persons before an election in the conveyance of information to electors. The applicant challenged the prosecution on human rights grounds. A majority of the court held that the limitation on the amount of money that could be spent amounted to a restriction on freedom of expression. This was prescribed by law and pursued the legitimate aim of securing equality between elections candidates. However, the restriction was not proportionate to the aim pursued since it was not necessary to limit her expenditure to as low an amount as £5 in order to achieve the aim of securing equality between the candidates, particularly in view of the fact that there were no restrictions placed on the freedom of the press to support or oppose the election of any particular candidate or upon political parties and their supporters to advertise at national or regional level provided that such advertisements were not intended to promote or prejudice the electoral prospects of any particular candidate in any particular constituency. There had therefore been a violation of Article 10.

39. In assessing whether the restriction was necessary in a democratic society and proportionate, the Court considered freedom of expression in the light of the right to free elections protected by **Article 3 of Protocol 1** to the Convention. It emphasised that free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. Freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature"[18]. It was therefore of particular importance that in the period preceding an election, opinions and information of all kinds are able to circulate freely. However, as is recognised in *Bowman*, in certain circumstances it is possible for the right under Article 3 of Protocol 1 to come into conflict with the right under Article 10. In the run up to an election it may therefore be necessary to place restrictions on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of legislature" as is protected by A3P1. In that case, the limitation on expenditure was disproportionately low.

40. States have a wide margin of appreciation when it comes to the organisation of their electoral systems and the way in which to strike a balance between rights under Articles 10

[16] [2004] 1 AC 185 (para 8)
[17] Application No. 24839/94, (1998) 26 EHRR 1
[18] *Mathieu-Mohin and Clerfayt v Belgium* (judgment of 2 March 1987), series A no. 113, p24, para 54 as referred to at para 42 in *Bowman*.

and 3 of Protocol 1.[19] The Court has recently demonstrated a similar allowance in the related context of paid political advertising. In *Animal Defenders International v UK*[20], the Court had to decide whether a restriction on advertising on TV and radio went too far in restricting the right to participate in public debate. It weighed in the balance, on the one hand, the applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media. The Court allowed the UK a considerable margin of appreciation[21] in relation to its regulatory regime in this context and, amongst other things, noted that there was no European consensus on how to regulate paid political advertising in broadcasting. The Court considered that convincing reasons had been given for the ban on political advertising in the United Kingdom and that it had not amounted to a disproportionate interference with the applicant NGO's right to freedom of expression.

The particular spending limits introduced or adjusted by this Bill

41. Applying these principles, we consider that all of the spending limits in this Bill are compatible with Article 10:

a) New restriction to ensure that third party spending targeted to support a particular political party above a certain level is counted towards the spending limit for that political party (e.g. where the third party 'acts in concert' with the party to boost the registered party's spending power during an election campaign) **(**clause 29): This provision is necessary to ensure that the integrity of the system of regulating campaign expenditure is not undermined by parties receiving additional support from third parties acting in concert with them outside of the scope of the system. In all other respects, third parties remain able to spend up to their maximum controlled expenditure limits, or, where expenditure is not for election purposes, to spend as much as they wish in persuading people of their views. It is only where a political party is involved that these particular provisions bite.

b) Reduction in the national spending limits for third parties **(**clause 27(2)): The Bill substantially reduces these limits, by more than 50% in the case of each region of the UK. However, we consider that the limits are still quite high (£319,800 in relation to England,

[19] *Bowman* at para 43 referring to *Mathieu-Mohin and Clerfayt v Belgium*, judgment of 2 March 1987 at paras 52 and 54.

[20] Application no. 48876/08 (judgment of the Grand Chamber April 2013), in which Animal Defenders International complained that it had been unjustifiably denied the opportunity to advertise on TV or radio and the Grand Chamber found that there had been no violation of Article 10.

[21] See for example, para 111: Accordingly, it is relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision (*Hirst v. the United Kingdom (no. 2)* [GC], § 61; and *Scoppola v. Italy (no. 3)* [GC], § 83, both cited above). By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State (*Ždanoka v. Latvia* [GC], cited above, § 134). The State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case.

£35,400 in relation to Scotland, £24,000 in relation to Wales and £10,800 in relation to Northern Ireland) and sufficient to enable spending which has a real impact. It in no way deprives third parties of the ability to make any real contribution, as in *Bowman*. In particular we note that means of electronic communication offer a very inexpensive way of conveying ideas such that limits on spending are in some respects not as much of a constraint as they were at the time of the *Bowman* case. At the parliamentary general elections since the PPERA rules were introduced, only three third parties have exceeded the proposed lower limits (one doing so at each election). Only four other third parties have even spent more than half of the proposed new limits (each having done son once).

c) New restriction on the amount which a third party may spend in a particular constituency in relation to parliamentary elections (clause 28): At present recognised third parties are only limited in their total expenditure. A limit will be imposed so the maximum which could be spent in a particular constituency during a regulated period would be £9,750 and, in the post-dissolution period £5,850. We have undertaken some analysis on costs of mail shots, printing, events etc and we are content that this will enable third party campaigners to operate without undue restriction on their right to freedom of expression in a particular constituency. What will be prevented is disproportionate localised spending which may be seen to undermine the rules in relation to candidate spending (which was the subject of the *Bowman* case). It may be noted that the new constituency limits are set at a very significantly larger level than that which may be spent in relation to a particular candidate in a constituency.

d) The existing limit on spending incurred by third parties in favour of a candidate is to be increased from £500 to £700 (clause 34(1)). This pursues the objective of ensuring that candidates without access to substantial resources are not at a major disadvantage and as it represents an increase in the threshold, we do not think this triggers any significant human rights issues.

e) The reduction in the threshold for third parties to notify the Electoral Commission about their controlled expenditure is simply a trigger for notification requirements and we do not consider that this engages Article 10 clause 27(1).

Article 11

42. In this context it is also worth noting the particular links between Articles 10 and 11. In *United Communist Party of Turkey v Turkey*[22], the Strasbourg Court said:

"…Article 11 must … also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedom of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties

[22] (1998) 26 EHRR 121 (paras 42-61)

in view of their essential role in ensuring pluralism and the proper functioning of democracy."

43. **Article 11** ECHR protects the right to freedom of association and peaceful assembly, primarily a right not to be prevented or restricted by the state from meeting and associating with others, save to the extent permitted by Article 11(2).

44. The right to freedom of association with others includes the right to associate with political parties and groups pursuing particular aims. The imposition of limits on what a third party may spend in relation to an election in support of a political party restricts their freedom to associate with particular political parties and, conversely, members of political parties are restricted in their freedom to campaign. We therefore consider that Article 11 rights are engaged by the imposition of spending limits in relation to campaign funding.

45. Such spending limits are "prescribed by law" because they are based in statute and are prescribed in a way which is sufficiently precise and accessible to enable the individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a spending over the limits would have. As noted above in relation to Article 10, the provisions pursue a legitimate aim of securing equality between elections 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 proportionate.

Retrospective effect?

46. We do not consider that a retrospectivity issue arises on clause 27 (which changes the spending limits about what may be done during a period *before* an election) because the offence in s.94(2) will only be committed if expenditure is incurred in excess of the limit *as it stands at the time the expenditure is incurred*.[23]

Definition of controlled expenditure

47. Changes to the definition of controlled expenditure will mean that more things (such as for example, costs associated with the organisation of rallies and events) will count towards spending limits and require control. This engages Article 10 and 11. It is difficult to assess how much is currently spent on such items and therefore the level of impact that this will have. As noted above, spending in general is well within the proposed limits. Therefore, our judgment is that, when looked at in the round, the spending limits are sufficient to enable funds to be allocated within the limits so as to enable effective participation in the political process to take place (clause 26).

Reverse burden of proof

[23] If there were any retrospection here, this would give rise to Article 7 issues (no-one may be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence under national law at the time the criminal offence was committed).

48. An issue arises in relation to the new defence which is to be inserted in s.94 of PPERA by clause 26(6) so that a person charged with the offence of knowingly exceeding the expenditure limit has a defence if he can show that (1) a code of practice issued by the Electoral Commission giving guidance as to the kinds of expenses which are controlled was complied with in determining the campaign expenditure to be included in a return, and (2) that the limit would not have been exceeded on the basis of the items and amounts entered in that return. This defence imposes a 'reverse burden' on the defendant. It will require the defendant to prove the matters set out on the balance of probabilities.

49. As for the due diligence offence in Part 1 of the Bill, we consider that the normal criminal burden of proving that an offence has been committed will remain on the prosecutor. It is relevant to note that this is a reverse burden only in relation to a limited aspect which is an exemption to the offence. We consider that the reverse burden is confined within reasonable limits. Considering the questions raised in *Kebilene*: (1) What do the prosecution have to do to transfer the onus to the defence? (In this case, nothing, it is up to the defendant as to whether or not he wishes to rely on the defence); (2) Does the burden imposed on the accused relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within the knowledge of the defendant or to which he has ready access? (The matters are all within the defendant's knowledge); (3) What is the nature of the threat faced by society which the provision is designed to combat? (Ultimately we are concerned with threats to the integrity of the democratic process, which is a matter of great public importance). In all the circumstances, we do not think that the courts would read this provision down in a way that altered the burden of proof.

50. New offences to be inserted into PPERA as new sections 95E(1) (clause 32(2)) and 99A(3)(b) (clause 33(6)) make it an offence for a person to fail to comply "without reasonable excuse" with the requirement in relation to the delivery of quarterly or weekly donation reports, or the delivery of accounts. The existence of the "without reasonable excuse" defence reflects that elsewhere in PPERA, introduced by section 13 of the Political Parties and Elections Act 2009. Article 6(2) is potentially engaged in respect of these offences as the burden of proof is on the defendant to show that he has a reasonable excuse for failing to comply. As with the defence in clause 26(6), we are content that the reverse burden is confined within reasonable limits. It is reasonable to expect a responsible person who is required by PPERA to ensure compliance with the requirements imposed on the relevant recognised third party to do so. This is necessary in order to ensure effective controls on the funding and expenditure of third parties campaigning at elections. A defendant responsible person will have the opportunity to put forward any reasons why they consider that they had a reasonable excuse for non-compliance, which are matters within their knowledge.

Reporting and information requirements

51. Clauses 31-33 and Schedule 4 impose new reporting requirements and obligations to provide information. This concerns personal information so, as with the reporting of

lobbying activities in Part 1, engages Article 8. However, we consider that these requirements are justified:

a) Clause 32 and Schedule 4 introduce quarterly and weekly reporting requirements for recognised third parties to prepare reports of donations in a particular period which are intended to bring them more into line with requirements already applying in relation to political parties (ss.62 and 63 PPERA). There is a strong public interest in the transparency of political donations. This is really also just a change in the approach to reporting to make third parties report in advance instead of after the event (there are already controls on donations to recognised third parties in Schedule 11 to PPERA).

b) Clause 31 makes relatively small amendments to section 88 of PPERA which makes provision about which third parties are recognised for the purposes of Part 6 of PPERA and are therefore subject to controls relating to third party national election campaigns. These concern companies, trade unions, building societies, limited liability companies, friendly societies and unincorporated associations so that 'relevant participators' such as directors and governing bodies are specified in a notification. This is simply to give a more complete picture of all those involved in the relevant activity.

c) Clause 33 imposes additional accounting requirements which are intended to ensure that a true and fair picture is given of the income and expenditure of a third party and its assets and liabilities. Steps have been taken to ensure that this requirement does not impose a disproportionate burden. It does not apply to individuals or those who are already required to publish their accounts under an existing statutory obligation.

Enforcement

52. New section 95F in clause 32 introduces a power of forfeiture in connection with concealing the existence or true amount of a donation. Since someone might ultimately be deprived of their property as a result of this provision, it engages Article 1 of Protocol 1 but we think such a measure is necessary and proportionate. It is essential to have a sanction underpinning the reporting provisions to ensure that they are effective and there are comparable powers of forfeiture in related contexts already. The power is modelled on the forfeiture provision in s.58 PPERA which applies for political parties and in relation to third parties where they receive an impermissible donation (Schedule 11, para 7 PPERA).

TRADE UNION ADMINISTRATION

Access to register of members

53. The essential object of Article 11 ECHR is to protect the individual against arbitrary interference by public authorities with the exercise of the right to freedom of association. In addition, national authorities may, in certain circumstances, be under positive obligations to secure the effective enjoyment of those rights (*Demir and Baykara v. Turkey*[24]).

[24] no. 34503/97 (Grand Chamber), para 110

54. The following essential elements of the right of association have been established: the right to form and join a trade union (see, for example, *Tüm Haber Sen and Çınar v. Turkey*[25]), the prohibition of closed shop agreements (see, for example, *Sørensen and Rasmussen v. Denmark*[26]), the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others v. the United Kingdom*[27]) and the right to collective bargaining (*Demir and Baykara v. Turkey*[28]).

55. Under clause 36, trade unions which are subject to the obligation in section 24 of TULRCA to compile and maintain a register of members are subject to a requirement to provide annually a membership audit certificate.

56. Under sections 24ZE, 24ZH and 24ZI of TULRCA (introduced by clauses 36, 37 and 38) a union and other persons may be under a duty to disclose details of individual membership (including names and addresses) to persons other than the individual member namely, the assurer, Certification Officer or an inspector appointed by him.

57. The assurer and any inspector who is not a member of staff of the Certification Officer are subject to obligations of confidentiality in relation to this information through section 24ZG and 24ZI of TULRCA. The Certification Officer is a public authority for the purposes of the Human Rights Act 1998 and so he is subject to the obligation in section 3 of that Act to act consistently with Convention rights.

58. The Data Protection Act 1998 (DPA 1998) defines "sensitive personal data" as specifically including data relating to an individual's political opinions and membership of a trade union (section 2).

59. Under section 4(4) of the DPA 1998 data controllers (which would include the Certification Officer, an investigator appointed by him and the union's assurer) are required to comply with the data protection principles (as contained in Schedule 1) in relation to personal data held by them. The first data protection principle requires that personal data must be processed fairly and lawfully. Consistently with paragraphs 5 of Schedule 2 and paragraph 7(1)(b) of Schedule 3 to the DPA the assurer, Certification Officer and any inspector he appoints under section 24ZI will be able to process personal data, including sensitive personal data, insofar as this is for the exercise of functions under the sections of TULRCA introduced by the Bill. Nothing in the Bill will disapply the safeguards provided by UK data protection legislation so it will only be possible for the Certification Officer, an inspector or an assurer to exercise their powers consistently with the protections in the DPA.

[25] no. 28602/95, ECHR 2006 II, (2006) 46 EHRR 374
[26] Application 52562/99 and 52620/99 ECHR Reports of judgments and decisions 2006-1
[27] 2 July 2002, EHRR 20, para 44
[28] supra

60. Consequently, in light of the safeguards discussed above it is the view of BIS that the provisions of the Bill regarding the disclosure of 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.

61. Article 8(1) ECHR is also engaged as the details of a member held by the union under section 24(1) relate to that member's private life. We consider that the requirements to disclose are consistent with the derogation in article 8(2) because the application of the DPA will ensure that the correct balance between the interest in ensuring compliance with the duty in section 24 of TULRCA and the interest of the member to a private life is achieved. In addition, the assurer and any third party inspector are subject to obligations of confidentiality which will ensure that the member's details are only used consistently with article 8 ECHR.

Investigatory powers (clause 39)

62. Sections 24ZH and 24ZI of TULRCA respectively allow the Certification Officer to request documents where there is a good reason to do so and to appoint an inspector to investigate where it appears that there are circumstances suggesting that the union has failed to comply with a requirement of section 24 of TULRCA or the new duties in section 24ZA or 24ZB. An inspector can require the production of documents and also require answers to questions on those documents. Where the union or a person subject to these new duties fails to comply, the Certification Officer may issue an enforcement order in accordance with the powers conferred by section 24C (introduced into TULRCA by clause 39). The Certification Officer does not have powers to impose criminal sanctions where these duties are not compiled with, although an enforcement order can be enforced in the same way as an order of the High Court (or Court of Session in Scotland).

63. Information obtained through use of these powers could be relevant to the prosecution of an unrelated criminal offence. Section 24ZK(3) and (4) provides that evidence which is obtained under the exercise of these powers may only be used in a subsequent prosecution to the extent that the person makes a statement inconsistent with a statement given under exercise of these new powers. We consider that, to the extent that Article 6(1) ECHR and the right against self-incrimination is engaged, the limitations in section 24ZK are consistent with them because there are no criminal sanctions which compel the person to supply the information, there is no obligation to disclose information which is subject to legal professional privilege and because of the limited use that can be made of this information in any prosecution.

64. Article 8(1) of the ECHR provides that everyone has the right to respect for his correspondence and we consider that this may include the documents which the union and others are under a duty to produce when requested to do so by either the Certification Officer or an inspector. Whilst the Certification Officer may impose an enforcement order under section 24C of TULRCA if a person fails to comply with this duty, he may only do so

consistently with the protections conferred on the person by section 24ZK and 24C. In addition, the protections in the DPA will apply to the extent that the documents contain personal data. We consider that these are necessary and proportionate powers to enable the Certification Officer to carry out his functions under the Bill in the interests of ensuring that the membership of trade unions is correctly recorded and are therefore justified under article 8(2).

65. Article 1 of the First Protocol to the ECHR is engaged to the extent that documents which the union and others may be required to produce under these powers are possessions within the scope of that article. These persons are entitled to the peaceful enjoyment of these possessions but this is a qualified right and it does not impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. To the extent that this Article is engaged in relation to these investigatory powers, we consider that the powers are justified by the public interest in ensuring that a trade union's register of members is kept in accordance with the requirements of section 24 of TULRCA. The limitations in sections 24ZK and 24C on the duty to provide documents are sufficient to ensure that derogation from article 1 protocol 1 is proportionate.

Declarations and enforcement orders

66. Article 6(1) of the ECHR provides that in the determination of civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Rights determined in public or administrative proceedings can be civil in character if the outcome is directly decisive of a right of a private nature. We consider that the Certification Officer's powers to issue a declaration or enforcement order under sections 24B and 24C of TULRCA are within the scope of article 6(1).

67. Before making a declaration under section 24B of TULRCA the Certification Officer must give the union an opportunity to make written representations, and may give the union an opportunity to make oral representations. The Certification Officer must also give written reasons for making the declaration. An enforcement order under section 24B can only be made following a declaration.

68. Similarly, before making an enforcement order under section 24C the Certification Officer must give the trade union or the person who may be the subject of an order an opportunity to be heard. An enforcement order under section 24C must specify the requirement or duty with which the person has failed to comply, and the date by which compliance is required. Any decision of the Certification Officer under section 24B or 24C can be appealed to the Employment Appeals Tribunal.

69. Consequently, in light of the right of a person to make representations before the Certification Officer makes a determination or order; the duty on the Certification Officer to provide written reasons for his decisions; and the right of appeal to the Employment Appeal

Tribunal it is the view of BIS that the Bill's provisions are consistent with the right of a union or any individual to a fair and impartial hearing.