The Clerk of the Public Administration and Constitutional Affairs Committee 17 May 2016

Publication of material on website and s.125 Political Parties, Elections and Referendums Act 2000 : third note

1. This note further supplements the note I sent on 3 May, and supplements my note of 9 May 2016. It takes account of views expressed by the Electoral Commission in its letter of 11 May commenting on the letter of 6 May from Sir Jeremy Heywood.

2. The Electoral Commission takes the view (which I respectfully share) that allowing continued access to a website that was published before the 28 day period, whether or not any new content is subsequently added, is likely to amount to 'publishing' within the meaning of section 125(4) of the Political Parties, Elections and Referendums Act 2000. The Commission takes the view that making relevant material available in this way would be likely to be prohibited under section 125(2) unless an exception under section 125(3) applies.

3. I agree, if I may say so, that the exception under section 125(3)(a) is the most likely to be generally relevant. There are, of course, exceptions under section 125(3)(c) and (d) which would allow the Government to publish information relating to the holding of the poll, and to issue press notices. Section 125(3)(a) provides, in effect, that the prohibition in section 125(2) does not apply to "material made available to persons in response to specific requests for information or to persons specifically seeking access to it".

4. The Electoral Commission takes the view that, in respect of material searchable on the internet, the exception in section 125(3)(a) "would cover content that was originally published prior to the 28 day period, which remained available to anyone specifically seeking access to that content within the 28 days". The Commission goes on to say that "provided the website is designed in such a way that members of the public need to take active steps to seek access to the content" the exception under section 125(3)(a) would apply, and accordingly there would be no breach of the prohibition in section 125(2).

5. The Commission is, of course, right to say that the exception would cover the case of material made available to persons 'specifically seeking access to it'. The issue is, therefore, what is meant by 'specifically seeking access'. The Commission suggests that if the website

is so designed that members of the public 'need to take active steps to seek access to the content' then the exception will apply.

6. With the greatest respect, I do not think that takes one much further, since the question remains as to what is meant by taking 'active steps to seek access'. Simply clicking on a website does not strike me as 'specifically seeking access', whereas gaining access to information hidden behind a password by a person who knows what to look for and clicks on a particular icon might well be. It seems to me that 'specifically' has to be given some weight, and that to provide the information to a person who has responded to a generic signpost on the website (as would occur with general browsing) is not covered by the exception. Even less would this be true of being directed to the material by a search engine. If the exception were to cover such visits to a website, then the exception would deprive section 125(2) of any effect, since the material would remain published on the website and readily available to all. There would, in substancet, be no difference between the period before the statutory 'purdah' and thereafter.

7. It seems to me that the exception under section 125(3) was designed for the provision of specific information in response to the reasonably determined researcher looking for information which he knows is there. The exception was not designed to cover the provision of general information the way to which is flagged up on a website and the existence of which is not necessarily known by the person seeking access. Given the existence of the exceptions in section 125(3)(c) and (d) (relating to information about the poll and press releases), there is no need to give any wider interpretation to section 125(3)(a) than is justified by the natural and ordinary meaning of 'specifically'. Moreover, the exceptions ought to be read in a restrictive way, to avoid undermining the basic prohibition in section 125(2). I feel bound to say that the risk that such undermining may occur is the inference to be drawn from Sir Jeremy's letter.

8. I do not disagree with the Electoral Commission's analysis, but I do not think the Government's proposals satisfy the 'active steps' proviso the Electoral Commission has itself suggested. Neither do they fall, in my view, within the 'specifically seeking access' exception in section 125(3)(a) of the 2000 Act.

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