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Select Committee on the Constitution

3rd Report of Session 2013–14

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

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

1. The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill is a constitutionally significant Bill, which affects electoral and broader democratic processes. We have several concerns about the Bill, both as to its legislative process to date and as to a number of substantive provisions in Parts 1 and 2.¹

Legislative process

2. The Bill was introduced into the House of Commons on 17 July 2013, the day before that House rose for its summer adjournment. The Bill had its second reading in the Commons on 3 September, the day after the Commons returned from its adjournment. It was considered by a Committee of the Whole House over three days during the following week and it completed its Commons stages on 9 October. The Bill is due to have its second reading in the House of Lords on 22 October.
3. The Bill has three substantive parts. Part 1 establishes a register of consultant lobbyists. The aim of Part 1 is to increase transparency by ensuring that people know whose interests are being represented by consultant lobbyists who make representations to the Government. The Government's initial proposals relating to lobbying were published in a consultation paper, *Introducing a Statutory Register of Lobbyists*, in January 2012.² Part 2 of the Bill amends the law pertaining to third-party campaigning in elections. Part 3 amends the law concerning the obligations of trade unions to keep their membership lists up to date and to compile and maintain a register of members.
4. There is general cross-party support for achieving greater transparency in relation to lobbying. However, there are concerns regarding the clarity and potential effects of aspects of the Bill. There is also concern that the Bill was introduced with undue haste, leaving no opportunity for pre-legislative scrutiny and inhibiting the ability of the House of Commons to afford the Bill properly informed consideration.
5. The need to improve the transparency of lobbying has been long recognised. In June 2007 the House of Commons Public Administration Select Committee began an inquiry into lobbying, which reported in January 2009.³ In March 2010, following allegations of improper lobbying activities by former ministers, the then Labour Government announced their intention to introduce a statutory register of lobbyists and ensure greater transparency. But this did not happen. The May 2010 coalition agreement promised a

¹ In our view no constitutional issues arise in respect of Part 3, on trade union administration.

² Cm 8233. The Bill's explanatory notes erroneously refer to this consultation document as a white paper (para 4).

³ Public Administration Committee, *Lobbying: Access and Influence in Whitehall* (1st Report, 2008–09, HC 36).

statutory register. In January 2012 the Government launched the consultation referred to above. The Government's summary of responses to the consultation was published in July 2012,⁴ when the Government said that a white paper and a draft bill would be introduced in the 2012–13 session of Parliament. However, neither a white paper nor a draft bill were published. Also in July 2012 the House of Commons Political and Constitutional Reform Committee (“PCRC”) reported on the subject, urging several modifications to the Government's proposals.⁵ The Government made what the PCRC described as a “cursory” response to its report on 17 July 2013, the day the Bill was introduced into Parliament.⁶

6. In June 2013 allegations were published in *The Sunday Times* and broadcast on a BBC *Panorama* programme, based on undercover video recordings, that four parliamentarians had potentially breached Parliament's codes of conduct by agreeing to act as paid advocates and/or to provide parliamentary services such as asking questions in return for payment. Shortly after the allegations were published media reports suggested that the Government would introduce new legislation on lobbying, including measures reforming third-party funding of election campaigns. The Government confirmed that they would bring forward legislation on these matters before the summer recess.⁷
7. The day after the Bill was introduced the PCRC began an inquiry into it. It reported on 5 September, two days after the Bill's second reading in the Commons.⁸ The PCRC supported the aims of increasing transparency in lobbying, and effectively and fairly regulating third-party campaigning. However, it said that Parts 1 and 2 of the Bill “are seriously flawed”.⁹ The committee explained: “This reflects the fact that the Bill has been introduced without adequate consultation with those it affects and without the proper involvement of Parliament, not least through pre-legislative scrutiny”.¹⁰ On these failures the PCRC concluded, “For Government to push through legislation in this way is contemptuous of Parliament”,¹¹ describing the process adopted as “an object lesson in how not to produce legislation”.¹²
8. In a series of reports we have stressed the importance of effective scrutiny both to the reputation of Parliament and for the quality of legislation. In *Parliament and the Legislative Process* we noted that “subjecting ... measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if

⁴ Cm 8412.

⁵ Political and Constitutional Reform Committee, *Introducing a Statutory Register of Lobbyists* (2nd Report, 2012–13, HC 153).

⁶ The Leader of the House of Commons apologised on the floor of the House of Commons for the Government's year-long delay in responding the PCRC's report: HC Deb, 3 September 2013, col 173.

⁷ HC Deb, 4 June 2013, cols 1363 and 1365 (Chloe Smith MP); HC Deb, 5 June 2013, col 1513 (Prime Minister).

⁸ Political and Constitutional Reform Committee, *The Government's lobbying Bill* (7th Report, 2013–14, HC 601).

⁹ *Ibid.*, page 3.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para 2.

¹² *Ibid.*, para 3. Other House of Commons select committees have voiced similar concerns in relation to the Bill, notably the Committee on Standards (1st Report, 2013–14, HC 638). The chairman of the Joint Committee on Human Rights has written to the Leader of the House of Commons expressing the joint committee's “unhappiness” at the way the Bill is “being rushed unnecessarily” (letter of 12 September 2013).

bad law is to be avoided ... Parliament has a vital role in assuring itself that a bill is, in principle, desirable and that its provisions are fit for purpose.”¹³ In *The Process of Constitutional Change* we reiterated that “if Parliament cannot be seen to be scrutinising proposals with the thoroughness they deserve, public confidence in parliamentarians is likely to be further undermined.”¹⁴

9. Effective parliamentary scrutiny matters in relation to every bill. But it is of manifest importance where legislation is of constitutional significance. The present Bill directly affects the ability of people and organisations to engage with the Government and to participate in political and electoral campaigning. Given these factors it is essential that the legislative process accords with the highest standards. As such, **the handling of the Bill to date is a matter of significant concern.**

Part 1: Registration of consultant lobbyists

10. Moving from process to substance, Part 1 of the Bill provides for a new scheme of registration of “consultant lobbyists”. The scheme applies only to third-party lobbyists, and not to in-house lobbyists. Clause 2(1) defines “consultant lobbying” as the business of making certain communications on behalf of another person or persons in return for payment. The communications in question are oral or written communications to a minister or permanent secretary relating to Government policy, legislation or contracts, or the exercise of any other function of the Government (clause 2(3)). Concerns have been expressed about the restriction of the scheme to consultant lobbyists and about the way in which the Bill seeks to define consultant lobbying.
11. First, the scope of Part 1 of the Bill is limited. It does not regulate the practice of lobbying generally. **The House may wish to consider whether the narrow scope of Part 1 is appropriate.** Evidence received by the PCRC suggests that it may not be: even those who consider that “transparency in lobbying is a significant problem” do not appear to be of the view that the specific matter of consultant lobbyists meeting ministers and permanent secretaries needs legislative correction.¹⁵ Indeed, some witnesses told the PCRC that if this really is the problem that needs addressing, it does not require legislation to fix it and could be dealt with simply by the Government changing the rules that apply to ministers and permanent secretaries.¹⁶ The PCRC agreed with this analysis.¹⁷
12. Not all of the activity of consultant lobbyists will be caught by the scheme of Part 1. Communications with officials other than permanent secretaries are not included. The House may want to know why communications with special advisers, for example, should not be included within the scope of the Bill. Also excluded from the scheme of Part 1 are activities undertaken by consultant lobbyists as to advising, coaching and briefing clients on strategy and communications. These omissions may be significant: the Chartered

¹³ 14th Report, 2003–04, HL Paper 173, para 1.

¹⁴ 15th Report, 2010–12, HL Paper 177, para 37; see also our report *Parliamentary Standards Bill* (7th Report, 2008–09, HL Paper 130), para 23.

¹⁵ Political and Constitutional Reform Committee, *The Government’s lobbying Bill* (7th Report, 2013–14, HC 601), para 7 (evidence of Alexandra Runswick, Director of Unlock Democracy).

¹⁶ *Ibid.* (evidence of the Association of Professional Political Consultants).

¹⁷ *Ibid.*, para 8.

Institute of Public Relations, for example, told the PCRC that “The Government’s lack of engagement with the industry is reflected in a poorly drafted and narrow definition which does not accurately reflect the work undertaken by lobbyists”.¹⁸ Likewise, Gavin Devine, chief executive of MHP Communications, told the committee: “The only conclusion one can reach about the Bill is that the Cabinet Office has no understanding of what companies like MHP Communications actually do”.¹⁹

13. Another aspect of the limited scope of Part 1 is that no provision is made for any code of conduct. A number of non-statutory codes exist in the lobbying industry, where they are promulgated by professional bodies. While the PCRC agreed with the Government that a statutory code is unnecessary, a number of “hybrid” options are possible, such as requiring registered lobbyists to have signed up to a non-statutory code or, as a lesser option, requiring registered lobbyists to note in the register which (if any) non-statutory codes of conduct they had agreed to adhere to.²⁰
14. All parties, including the Government, have been concerned that the Bill should do nothing to affect the ordinary activities of members of the two Houses of Parliament. As introduced into the House of Commons the Bill included provisions making express reference to this, one of which deliberately echoed the words of Article 9 of the Bill of Rights. The House of Commons Committee on Standards reported on these provisions and urged that they be removed from the Bill or otherwise amended.²¹ This was done at report stage in the Commons.²² This is to be welcomed, for reasons given by Lord Judge CJ in evidence earlier this year to the Joint Committee on Parliamentary Privilege. In brief, the concern is that if one Act of Parliament provides that “nothing in this Act shall be construed as affecting Article 9 of the Bill of Rights” but there is no such provision in subsequent Acts, the courts may be drawn to interpret a later Act as if it did in some way affect Article 9.²³ A better approach, given that Article 9 already has the clear force of law, is not to seek to re-legislate it, but to leave it alone. This is the approach which, following amendment, the Bill now adopts.
15. The Government are of the view that MPs and peers are excluded from the scope of the registration scheme in Part 1 and that the Bill is clear on the point. Schedule 1 to the Bill explains the meaning of the terms used in clause 2 to define consultant lobbying. In order to be caught within the definition of consultant lobbying it is clear that the lobbyist must be in receipt of payment (clause 2(1)(a)). During its passage through the House of Commons, Schedule 1 was amended to provide that, for this purpose, payment “does not include any sum payable to a member of either House of Parliament”

¹⁸ *Ibid.*, para 16.

¹⁹ *Ibid.*, para 19.

²⁰ *Ibid.*, paras 55–60.

²¹ Committee on Standards, *The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill* (1st Report, 2013–14, HC 638).

²² The provisions in question were paragraphs 1 and 2 of Schedule 1 to the Bill, as introduced to the House of Commons. The relevant debate of the House of Commons is at HC Deb, 8 October 2013, cols 75–94. At col 91 the Leader of the House (Rt Hon. Andrew Lansley MP) stated that “the normal activity of a Member of Parliament will not be captured by the definition of consultant lobbying”.

²³ See Committee on Standards, *The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill* (1st Report, 2013–14, HC 638), para 12.

whether in the form of a salary, an allowance or an expense.²⁴ **We agree with the Government that, as amended, Schedule 1 makes plain that the scheme of Part 1 does not extend to the ordinary work of members of the two Houses of Parliament.**

Part 2: Non-party campaigning

16. Part 2 of the Bill tightens and extends various controls on third-party campaigning (i.e. political campaigning by groups other than political parties and by persons other than candidates). It does so by amending the Political Parties, Elections and Referendums Act 2000 (“PPERA”).
17. **The provisions of Part 2 directly affect the fundamental common law right to freedom of political expression. The House will wish to ensure that there is appropriate justification for interfering with that right.**
18. An overall concern with Part 2 is whether its provisions are necessary. The Electoral Commission, for example, told the PCRC that the Government had not “clearly set out the rationale” for Part 2 of the Bill.²⁵ To the extent that a problem may be identified to which Part 2 is the solution, it may be a problem only in theory. For example, the Bill would reduce the overall amount that a third party may spend on campaigning in the United Kingdom in a regulated period (that is, the year before a general election) from £988,500 to £388,080. Yet in each of the 2005 and 2010 general elections, only two third-parties exceeded this lower limit (in 2005, Unison and the Conservative Rural Action Group and in 2010, Unison and Vote for Change Ltd).²⁶ The PCRC concluded that the Government had neither explained the need for Part 2 nor had “provided a satisfactory account of the basis on which the new levels for registration and expenditure by third parties have been set”.²⁷
19. At present, section 85 of PERA defines the “controlled expenditure” of third parties as expenses incurred in relation to the production or publication of “election material”. Clause 26 of the Bill extends the definition of controlled expenditure of third parties to embrace all expenditure that “can reasonably be regarded as intended to promote or procure electoral success” for a particular party, for a party that advocates a particular policy or for a candidate that holds a particular opinion. This wording, which echoes other provisions of PERA, was introduced into clause 26 at report stage in the House of Commons. The clause had previously been worded more loosely, such that spending incurred “for election purposes” was to fall within the definition of controlled expenditure of third parties. Clause 26 was amended because of concerns expressed by a broad range of parties that the original wording was so ill-defined that it could lead to a significant “chilling effect” on third parties’ freedom of political expression.²⁸ Despite the rewording of

²⁴ Schedule 1, para 4(2).

²⁵ See Political and Constitutional Reform Committee, *The Government’s lobbying Bill* (7th Report, 2013–14, HC 601), para 64.

²⁶ House of Commons Library Research Paper 13/51, pp 20–21.

²⁷ Political and Constitutional Reform Committee, *The Government’s lobbying Bill* (7th Report, 2013–14, HC 601), para 67.

²⁸ See, for example, the evidence of Unlock Democracy, the National Union of Journalists and the National Council for Voluntary Organisations, summarised by the Political and Constitutional Reform Committee, 7th report, 2013–14, paras 64–65.

clause 26 **the House will wish to consider whether the extension of the scope of controlled expenditure of third parties is necessary, given the constitutional right to freedom of political expression.**

20. Part 2 extends to the whole of the United Kingdom but, in the words of the explanatory notes, “deals only with reserved matters and does not need the consent of the devolved legislatures”. It appears that neither the Electoral Commission nor the devolved legislatures were consulted about Part 2 before the Bill was introduced to the House of Commons. Yet, despite the fact that the Bill deals with reserved matters, its provisions may have significant consequences for Northern Ireland, Scotland and Wales. Suppose, for example, that a third party wishes to campaign in Northern Ireland for or against reform of the law relating to same-sex marriage in that jurisdiction.²⁹ Such a campaign, even though it would be directed primarily at the Northern Ireland Assembly, could reasonably be regarded as entailing expenditure intended to promote or procure electoral success for a candidate at Westminster (not least because, as the law currently stands, Members of the Legislative Assembly may be candidates at Westminster elections). Campaigning in Northern Ireland on such a matter during the regulated period for a Westminster general election (which is one year) could engage the Bill’s provisions on controlled expenditure for third parties.
21. The Scottish independence referendum will take place on 18 September 2014: the regulated period for that referendum campaign therefore overlaps with the regulated period for the May 2015 UK general election. The Deputy Leader of the House of Commons (Tom Brake MP) explained in the Commons that the Government’s view is that “spending in the Scottish referendum is a matter for the Scottish Parliament. Such expenditure could not, in our view, reasonably be regarded as intended to promote electoral success and would not therefore be controlled” under PPERA as amended by the Bill. He added: “We believe that expenditure incurred during the regulated period for the referendum would be treated as referendum expenditure and not controlled expenditure for the election, unless there was a clear or direct link to a campaign in the election”.³⁰ Yet it is surely likely that third parties will campaign in the Scottish independence referendum in a manner that seeks to make links to the general election that will follow eight months later. **The House may wish to seek further clarification of the potential consequences of Part 2 on campaigning in Northern Ireland, Scotland and Wales.**
22. Also in Part 2 is clause 35, which extends the regulatory duties of the Electoral Commission. The Commission appears not to have been consulted about this in advance of the Bill’s introduction to Parliament, and has expressed concerns about the rationale for clause 35 and about whether the Commission has the resources which it would need to fulfil its extended remit effectively.³¹ **The House may wish to consider the implications of clause 35.**

²⁹ This example was used in the House of Commons by Mark Durkan MP, former leader of the SDLP.

³⁰ HC Deb, 9 October 2013, col 194.

³¹ See Political and Constitutional Reform Committee, *The Government’s lobbying Bill* (7th Report, 2013–14, HC 601), paras 86–89.

APPENDIX: DECLARATIONS OF INTERESTS

The following interests were declared in respect of this report—

Lord Lang of Monkton

*Chairman of Prime Minister's Advisory Committee on Business
Appointments*

Baroness Wheatcroft

*Member of Advisory Board, Pelham Bell Pottinger (which has a lobbying
arm)*

*Member of UK Advisory Board, Huawei Technologies (UK) (which uses
lobbyists)*

Trustee of Policy Exchange