Restrictions on political expenditure by non-party campaigning organisations

The snap general election will be the second to be fought under the scope of expanded rules concerning non-party campaigning, following changes introduced by the controversial 'Lobbying Act' 2014.

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Simon Steeden and **Rosamund McCarthy** explore how the new rules affect charities, trade associations, trade unions, and other campaigning organisations

Despite speculation, Theresa May's announcement of a snap general election on 8 June took most of the country by surprise.

Many organisations will see the election as a chance to push forward their agenda and build relationships with potential future MPs, ministers and parties of government. This might include businesses and trade associations seeking to influence commercial policy of the next government, charities and campaigning organisations seeking to promote their issue-based campaigns and acquire pledges of support from candidates, and 'pop-up' groups of individuals campaigning locally or nationally on particular policy issues, with Brexit likely to be central to the agenda.

However, the unexpected nature of the election campaign will have left many of these organisations feeling unprepared to ensure compliance with the range of different rules that might apply to their activities in the run up to the election. Recent penalty fines issued by the Electoral Commission for non-compliance with non-party campaigning rules in the run-up to the 2015 General Election and 2016 EU Referendum may compound some of those anxieties.

But what are the rules that apply to non-party campaigning in the run-up to the election, and what kind of activity is regulated?

Regulation of non-party campaigning

Non-party campaigning prior to a general election is regulated by the Political Parties, Elections and Referendums Act 2000 ('PPERA'), as amended and expanded in 2014 by the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act (often referred to as the 'Lobbying Act').

Under PPERA, non-party campaigners are required to register with the Electoral Commission if they incur 'controlled expenditure' over a prescribed threshold during the 'regulated period' prior to an election. Once registered, an organisation is subject to limitations and disclosure obligations in relation to its regulated spending and any donations it receives towards that spending.

When is registration with the Electoral Commission required?

PPERA requires organisations to register with the Electoral Commission as a recognised third party if they intend to spend more than £20,000 in England or £10,000 in Wales, Scotland or Northern Ireland on 'controlled expenditure' during the 'regulated period' before an election.

The rules can apply to a wide range of organisations, including political parties, trade unions, trade associations and think tanks, as well as businesses, charities and issue-based campaigning organisations.

Controlled expenditure: the purpose test

'Controlled expenditure' under PPERA includes all expenditure on 'qualifying expenses' which 'can reasonably be regarded as intended to promote or procure electoral success at any relevant election' for:

- one or more particular political parties;
- one or more political parties which advocate (or do not advocate) particular policies, or which otherwise fall within a particular category of parties; or
- candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies, or who otherwise fall within a particular category of candidates.

It is worth noting that this does not cover expenditure on just one candidate, which by and large falls under the different regime of the Representation of the People Act 1983 (the 'RPA').

The test of 'reasonably regarded as intended to promote or procure electoral success' is referred to in Electoral Commission guidance as the 'purpose test'. It is not necessary to expressly name a party or candidate in order to satisfy the purpose test if,

for example, wording or imagery is used which is associated with particular parties or candidates. PPERA is also clear that the purpose test will be satisfied if expenditure is incurred which can reasonably be regarded as intended to prejudice the prospects of any party, parties or candidates (because doing so could be regarded as promoting or procuring the success of their competitors).

Qualifying expenses: the activity test

For controlled expenditure to be incurred, expenditure which satisfies the purpose test must also be incurred on regulated campaign activity, meaning that it is incurred on an activity which falls within one of the following categories of 'qualifying expenses':

- production or publication of material which is made available to the public, or any section of the public (in any form and by any means);
- canvassing, or market research, seeking views from members of the public;
- press conferences or other media events;
- transport of persons by any means to any place(s) with a view to obtaining publicity;
- public rallies or other public events other than AGMs and certain public processions/protests in Northern Ireland; and expenses in respect of such events including premises hire, provision of goods, services or facilities.

All staff time costs associated with the activities listed above will also be qualifying expenses.

There are some limited exceptions to qualifying expenses, including security costs; publications in newspapers and periodicals (other than advertisements); BBC broadcasts and other licensed radio and television broadcasts (as distinct from on-demand videos); translations from Welsh to English; reasonable non-reimbursed personal travel expenses; reasonable expenses attributable to disability; and volunteer time.

The public test

Even if expenditure satisfies both the purpose test and the activity test, controlled expenditure will only be incurred on the production or publication of material, canvassing or market research and public rallies or events if the activity is public-facing. The Electoral Commission refers to this as the 'public test' and interprets this as being satisfied if the activity 'is aimed at, seen or heard by, or involves' the public, or a section of the public.

The Electoral Commission guidance for the 2015 General Election suggested that the public test will not be satisfied where activities are only directed at an organisation's 'members' or 'committed supporters', including regular donors by direct debit, people with an annual subscription and people 'actively involved' in the organisation. However, people who are on the organisation's mailing lists or have signed up to social network sites will not be considered 'actively involved' on that basis alone.

The regulated period

The 'regulated period' under PPERA is generally the period of 365 days before a general election, and Electoral Commission guidance in relation to the 2017 General Election makes clear that the Commission considers the regulated period to have started on 9 June 2016, one year before the poll on 8 June 2017.

However, the election was not announced until 18 April, with Theresa May before then consistently ruling out the possibility of an election being held before 2020, in accordance with the Fixed Term Parliaments Act. So, in most cases it is unlikely that organisations will have incurred expenditure before 18 April which could reasonably be regarded as intended to promote electoral success of any party or candidates, bearing in mind that any such spending would have been incurred at a time when it was not expected that a general election would be held for more than three years.

There will be some exceptions to this general position. In particular, the Electoral Commission takes the view that spending which can reasonably be regarded as intended to promote the electoral prospects of any party, parties or candidates in the earlier 2017 local, mayoral or Northern Ireland Assembly elections, or any by-elections since 9 June 2016, will be controlled expenditure for the purposes of the regulated period

before the General Election. This is consistent with the definition of 'controlled expenditure' under PPERA, which includes any spending during the regulated period which meets the 'purpose test' in respect of any 'relevant election', including local elections.

Nonetheless, for the substantial majority of organisations which will not have incurred potentially regulated expenditure in respect of earlier local and by-elections, it is likely that they will be able to analyse their activities and spending only from 18 April onward. The resulting truncated 'effective' regulated period of less than two months should mean that far fewer organisations will incur sufficient controlled expenditure to require registration with the Electoral Commission than might have been expected in a typical 365-day regulated period, before a long-anticipated general election held at the end of a five-year Parliament under the Fixed Term Parliaments Act.

Expenditure limits

As explained above, where an organisation incurs expenditure that satisfies the purpose test, the activity test and (where necessary) the public test, this will be controlled expenditure under PPERA. If all of the controlled expenditure incurred by an organisation during the regulated period exceeds a registration threshold, it will need to register with the Electoral Commission.

Where an organisation registers as a third party with the Electoral Commission, limits then apply to the total amount of controlled expenditure it can incur. These limits are:

- £319,800 in England;
- £55,400 in Scotland;
- £44,000 in Wales;
- £30,800 in Northern Ireland.

Constituency level expenditure

In addition to the national expenditure limits described above, the Lobbying Act 2014 introduced a new limit of £9,750 on controlled expenditure which is 'wholly or substantially confined' to a particular constituency or constituencies. This will be the case if the expenditure has 'no significant effect' in any other constituencies. This limit on focused constituency level expenditure was introduced to prevent third-party campaigners expending large amounts on marginal constituency strategies. It proved to be one of the most controversial aspects of the Lobbying Act, due to concerns about how the new rules will be interpreted and their impact on campaigning activities which have particular local resonance, such as campaigning about fracking, HS2 or the closure of local hospitals or other services. It may not always be clear whether local campaigning activities which relate to wider national campaigns should be seen as 'wholly or substantially confined' to particular constituencies. Where they are, the £9,750 expenditure limit might be hit a long time before the national limits become problematic. This is particularly likely bearing in mind that controlled expenditure incurred on national campaigns must be shared between all constituencies before adding any focused constituency spending and assessing whether the constituency limit is hit.

Constituency campaigning and the Representation of the People Act

It is not entirely clear how the constituency expenditure controls under PPERA interact and overlap with the local controls contained in the RPA. As mentioned above, the RPA imposes restrictions on expenditure incurred on campaigning for or against a candidate in a constituency. They are not intended to overlap with limits on national expenditure, with the Electoral Commission guidance on PPERA making a distinction between 'local campaigns' against one or more candidates in a particular constituency, and 'general campaigns' against particular parties or categories of candidates.

The commission suggests that local campaigns are regulated by the RPA and the police, with general campaigns regulated by PPERA and the Electoral Commission. However, this may not always be a clear distinction and there is a danger that compliance with the rules under PPERA will not always prevent a campaigning organisation from breaching the separate limit under the RPA of £700 expenditure incurred 'with a view to promoting or procuring the election of a candidate' by any person not authorised by the candidate's election agent. This limit applies to most types of expenditure incurred after the dissolution of Parliament and may be particularly relevant where

local hustings are organised which do not include all of the candidates contesting the election.

Working in coalitions

Where an organisation works in coalition with others, all election expenditure of the coalition will be attributed to all coalition members, meaning each coalition member individually may be under the spending limits for registration, and yet all coalition members could nonetheless be required to register with the Electoral Commission. There is provision in PPERA for a 'lead campaigner' to register as such with the Commission and take responsibility for reporting the controlled expenditure of specified 'minor campaigners' within a coalition. However, it is not clear to what extent the lead campaigner can rely in good faith upon the information provided to it by any minor campaigners (by way of defence in any enforcement proceedings), meaning this continues to be an area in which particular care should be taken.

It is also unclear from the legislation precisely when co-operation between two or more campaigners will be sufficient to constitute joint working. The Electoral Commission's guidance in 2015 suggested a guiding principle that campaigners should make 'an honest and reasonable assessment, based on the facts, whether you and another non-party campaigner are spending money as part of a common plan or arrangement'. But this assessment is not always straightforward, and the Electoral Commission has said itself in relation to similar rules governing the 2016 EU Referendum campaign that 'to reduce complexity and allow the Commission to provide clearer advice and guidance to campaigners, the government and parliament should clarify what constitutes joint spending'.

Company law restrictions on electoral expenditure

Where a company is incurring controlled expenditure under PPERA, it may also be subject to separate controls on political expenditure under the Companies Act 2006.

Under Part 14 of the Companies Act 2006, a company is required to pass a resolution of its members authorising it to make any political donation or incur any political expenditure. The definition of political expenditure under section 365 of the Act overlaps substantially with the purpose test of 'controlled expenditure' under PPERA.

The authorisation for the expenditure must come from the members of the company or, if the company is a subsidiary, the members of its holding company. The directors of the company could incur personal liability if authorisation is not obtained.

Importantly, there is a de minimis threshold of £5,000 before political donations will be caught by the rules, but no equivalent for political expenditure. This means that even if a campaigning organisation structured as a company is not required to register as a recognised third party under PPERA, it may still require a members' resolution to incur political expenditure falling below the PPERA registration thresholds.

Applying the new rules and avoiding the pitfalls

BWB will be working with our clients throughout the election period to help ensure that their important and worthwhile campaigning activities can continue unabated by the web of regulation imposed by PPERA, the RPA and company law.

There will be practical steps which can be taken to seek to avoid the pitfalls and to ensure that, where these rules apply, the law is obeyed and where it does not, freedom of speech and planned campaigning is not stifled.

Find out more

Please refer to the Charity Commission's guidance on campaigning and political activity by charities (CC9), at **www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9**

The Electoral Commission has provided guidance for non-party campaigners at **http://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/non-party-campaigners/2017-elections.**