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House of Lords SW1 0PW

5 December 2018

Proposed Code of Practice for the use of personal information in political campaigns

I write on behalf of my Parliamentary colleagues in our Constitutional & Political Reform Team.

Our primary concern is with the levels of transparency – and therefore of financial and legal accountability – in fast developing forms of digital political campaigning. We welcome the initiative now taken by the Information Commissioner's Office insofar as it addresses this issue.

A number of other consultative and investigative exercises have taken place over recent months, and we have contributed to a parallel consultation by the Cabinet Office, concentrating on the section *"Increasing Transparency in Digital Campaigning"* in the paper *"Protecting the Debate: Intimidation, Influence and Information"*. I attach a copy of our response.

We hope that this will give you sufficient evidence of our approach to these issues, and that you will appreciate our anxiety that the current defects in electoral law should be addressed as a matter of urgency, and certainly before another General Election or National Referendum.

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Encl.

Submission for The Cabinet Office Consultation

Protecting the Debate: Intimidation, Influence and Information

Section 3: Increasing Transparency in Digital Campaigning

Introduction

1. We recognise the urgency of this exercise, in view of the widespread concern at the extent to which the legislative framework for campaigning has been left behind by technological advances. The huge increase in expenditure devoted to this form of communication with the electorate between the 2015 General Election, the 2016 EU Referendum and the 2017 General Election – dwarfing the amounts spent on other more traditional media – demonstrates its increasing significance, and its potential to distort the previously agreed balance of regulation and freedom of speech. We do not advocate new forms of censorship but we reiterate the long established consensus of the need for transparency and limitations on the extent to which money can buy political and electoral influence.

Timing

2. Nobody can be sure that the country will not face another General Election – or another national Referendum – in the next six months. It would be irresponsible for Government and Parliament not to legislate to ensure that commonly acknowledged defects in the present legislation, relating to these matters, were not addressed before such campaigns took place. Specifically, we are aware that the Electoral Commission recommended reforms several years ago, and an attempt to address the lack of identification of on-line campaign material was made in the legislation for the 2014 Scottish Independence Referendum. We do not understand why the Government has taken so long to reach this point.
3. We have not had the benefit of seeing the evidence of the Electoral Commission to the Cabinet Office consultation on this Section; we are very appreciative of the crucial role played by the Commission in advising on, monitoring and enforcing all this legislation. We therefore reserve the right to offer a further response once we have had an opportunity to assess the Commission's submission, with especially reference to the immediate need of review and reform.

Who should take responsibility?

4. We too have noted recent efforts by all the platforms providing digital communication to respond to the risks to the integrity of the electoral process which may develop. They are, of course, perfectly at liberty (like any more conventional publisher) to refuse to carry a particular message. However, we

firmly believe that there is a wider responsibility which such commercial organisations cannot be expected to carry.

5. It has been a core function of the law of the land for some 150 years to ensure that (a) money spent to seek to secure an electoral outcome is restricted, reported and transparent, and (b) the identity of those seeking to influence the views of electors should also be publicly available. For that reason the answer to Question 23 has to be an affirmative, and the natural corollary is that the same principle ***MUST*** apply to digital communications.

Northern Ireland

6. We cannot support any continuing special measures for Northern Ireland, in relation to the introduction of the PPERA imprint rules, now the security rationale for the previous differences has bee substantially removed for several years (Questions 24 & 25).

Lessons from Elsewhere

7. We welcome the emphasis in the consultation paper on taking advantage of previous experience elsewhere, especially in the 2014 Scottish Independence Referendum and the 2018 Irish Abortion Referendum, in circumstances which most closely UK electoral practice. We will be most interested to learn what lessons the Electoral Commission have obtained from these events.

When should imprints be required?

8. The sheer volume of digital messages in the recent major UK-wide electoral events suggests that the practicalities of effective monitoring will have to determine the answers to Questions 26, 27 & 28. The global nature of much of the digital communication activity adds to this problem of scale. Given that a prime function must be to be able to identify illegal foreign interference, and ineligible funding or provision of services in kind, this too requires a comprehensive approach. Ideally, both for clarity and for the most effective supervision by the Electoral Commission, the same regulation regime should apply as widely as possible. There are, however, obvious risks. One original digital message from a private individual, for example, can be repeated thousands of times, perhaps by a campaign group or political party. How can that be appropriately regulated? The recent report published by the Constitution Society (***"Data and Democracy in the Digital Age"***) provides relevant data and comments on these aspects of the challenge to the regulator.

The powers of responsible bodies

9. The apparently overlapping roles of the Electoral Commission, the Crown Prosecution Service and the Police cause unnecessary confusion, even for very experienced campaigners. However, the required rationalisation goes far beyond the scope of this consultation exercise, and will only be achieved when the full reform of the whole body of electoral law is comprehensively reviewed and consolidated, along the lines recommended by the Law Commission. In the meantime there is an obligation on Government not to make the current situation even worse, either by creating more potential lacuna or duplication, or failing to enable the responsible bodies to impose effective penalties. Enforcement can only be effective if the failure to obey the law results in real financial impact and/or a challenge to the electoral outcome. Given the huge suns invested by campaigning parties and groups in digital messaging the limits of financial penalties are laughably inadequate.

Conclusion

10. This consultation process is better late than never. Its eventual recommendations may well require urgent Parliamentary approval and legislation. We will wish to examine the evidence submitted by the Electoral Commission on the complicated practicalities involved in the issues referred to above; our colleagues in Liberal Democrat Headquarters will also examine some of these issues, and this submission should be read alongside their response.

11. Our approach to the eventual proposed legislation will, therefore, be necessarily pragmatic. However, we reiterate our conviction that the long-standing commitment to transparency, clarity and financial limitation in all forms of electoral campaigning requires urgent action to close this ever-widening loophole.

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On behalf of the Liberal Democrat Constitutional & Political Reform Parliamentary Team.

19 October 2018