DSC submission of evidence to the

Third Party Campaigning Review

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About the Directory of Social Change

The Directory of Social Change has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations. We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

DSC's interest in the Lobbying Act

DSC has an interest in the 'Lobbying Act' (the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014) as an independent charity in its own right, which is involved in a range of public policy debates, campaigns and media activities. After much careful deliberation and consideration by our Trustees, in July 2014 we decided not to register as a third party campaigner at the onset of the current regulated period, which began on 19 September 2014 and ended on 7 May 2015.

We have also been very concerned about the impact on small charities, both in terms of the Act's potential to silence legitimate campaigning activity and to impose an unnecessary and disproportionate regulatory burden. During the passage of the Act, DSC lobbied in Parliament, arguing that the legislation would place an unjustified regulatory burden on small charities.

Following the Act's passage, DSC has played an active role in explaining the legislation to charities, to give them confidence that they need not be 'gagged' by it, and has argued that charity law and the Charity Commission guidance CC9 should remain the first frame of reference for charity campaigning activities.

We have now experienced the first regulated period under the act in the lead up to the 2015 general election. Only a handful of charities registered with the Electoral Commission. Before the election we reported difficulties in finding evidence of a chilling effect on charities. With the continuation of our work in this area post-election we have found strong evidence that this act has silenced charities during an important time for their beneficiaries. While there may be a sector-wide sigh of relief that the regulated period is over, the next one is just around the corner, due to begin at the beginning of January 2016, four months in advance of the elections to the National Assemblies of Wales and Northern Ireland. We

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maintain that the following risks remain for charities, and particular the decision making of charity trustees, namely that they will:

a) be unaware of or unable to interpret the legislation and therefore will be in violation of the law (but with little certainty about that law being enforced).
b) be aware and choose to ignore it and be in violation of the law (again, with little certainty about that law being enforced).
c) waste inordinate resources trying to comply with the law, with little corresponding benefit to the public, their beneficiaries, their donors, or the state (indeed, additional costs for all).
d) be overly cautious and simply curtail their activities to avoid risk – hence dampening vital and legitimate engagement with politicians and the political process. There is a significant risk that this will result is a permanent weakening of campaigning activities over the long term, not just during the regulated period.

DSC's position on the Lobbying Act

During the passage of the Act DSC supported amendments tabled by Lord Phillips of Sudbury that would have exempted charities from the legislation. We continue to believe that charities should be exempt from the Lobbying Act and would support its wholesale repeal. This position on exemption simply reflects the reality that charities are already legally unique. They must act for the public benefit and are subject to a long-standing body of law and regulation which other types of organisations are not.

Charity law is already clear that no charity can have political purposes, or pursue their charitable objectives by politically partisan means. This clearly sets charities in Britain apart from other types of formally constituted organisations. It is already the job of the Charity Commission to apply this law. The limitations and boundaries of charity campaigning are covered by the Charity Commission guidance document CC9 as well as in the specific guidance produced with the Electoral Commission in advance of major elections. We remain unconvinced by largely theoretical legal arguments that registration with the Electoral Commission should be necessary for charities.

DSC maintains that the Charity Commission must be properly resourced to monitor and enforce existing charity law, and that it is wasteful and complicated to have charities answering to two regulators – the Charity Commission and the Electoral Commission – on this issue.

It is important to note that the repeal of the Lobbying Act, as promised by the Labour Party, would not resolve all the problematic issues. This is because the Act amends the Political Parties, Elections and Referendums Act 2000 (PPERA). The unique legal position of charity was arguably not properly considered in this legislation; nor were the legal ramifications of PPERA fully understood by the charitable sector at the time it was passed and subsequently.

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Responses to the questions posed in the call for evidence

Lord Hodgson, in addition to conducting a roundtable discussion which DSC attended, has asked 33 questions with respect to the Lobbying Act and we respond only to a select number which we feel are most important to charities. These are repeated in bold below, followed by DSC's response.

Q1 - In your view, is any regulation necessary? If so, what should it be trying to achieve? Which organisations or bodies should be regulated, in respect of what activity or expenditure? To what extent, if any, should there be and can there be transparency as to who is trying to influence the electoral process?

and

Q3 - Should the regulatory system take regard of the differences between third parties? Are there any other groups or third parties not currently required to register who should be required to register? Are there any other groups or third parties currently required to register who should not be required to register?

Regulation of third party campaigners is necessary to ensure that the political system is transparent and fair, ensuring that no one party is able to exert influence unfairly over political processes. We believe that the regulation of non-party campaigners is necessary to avoid a situation where less powerful or resourceful actors are 'pushed out' and denied fair access to the democratic process. However, careful consideration needs to be paid to how the 'non-party campaigner' is defined for the purposes of this act and therefore what kinds of organisations should be regulated. The present definition is based on an assumption that organisations can use money to generate support for a particular political interest, political party or politician. On this assumption therefore a system that looks at spending would be logical.

Charities are bound by the Lobbying Act as Third Party Campaigners. Charities are also regulated by charity law and thereby exist only for charitable purposes that are in the public benefit and as such are forbidden from undertaking activity which is "directed at furthering the interests of any political party" (CC9). This does not mean that they are prevented from undertaking lobbying activities that further their charitable purposes. It is the role of the Charity Commission to uphold the definition of charity and investigate in rare cases where this is broken.

Any expenditure on campaigning or lobbying cannot be undertaken by a charity with a view to supporting a particular party, political view, or politician which this act seeks to regulate. It is therefore impossible for the Lobbying Act to regulate the activities of charities and cannot possibly generate more transparency in how charities use their money to conduct campaigning and lobbying activities. It simply does not capture charity spending because it is only interested in spending that aims at influencing the success of political interests and actors. Such activities are not undertaken by charities, and cannot be. If they are, they are in

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violation of charity law. For charities, and we stress that we refer to charities only, the Lobbying Act is an unnecessary piece of legislation which duplicates the system of regulation already in place for charities and adds no value whatsoever – in fact it adds costs in the form of confusion, bureaucracy and resources expended trying to understand the issue.

Q7 - In your view, what are the overall costs versus benefits (financial and other) to a third party itself of registering with the Electoral Commission?

There is little benefit to a charity registering with the Electoral Commission other than the added piece of mind that trustees may feel knowing that they have registered and may therefore worry less about being in breach of the Act. The low number of registrations could be seen as evidence that there is little benefit or necessity of registering. Registering under the Act does not, and can never, promote more transparency in how charities use their funds as explained above because charities by law cannot engage in partisan support for political parties or candidates. It does not have any benefit for the beneficiaries of charities.

Conversely, the Act has been costly and highly damaging for charities both in financial terms and in terms of their ability to meet their charitable objects and help their beneficiaries. The vast majority of charities are very small (82% exist on an income less than 100,000) and are often staffed by one individual or a small team, often entirely on a voluntary basis. They tend therefore not to have the capacity to properly analyse laws or have resources available to seek the legal advice. Some have and this has meant spending much needed funds on something other than their beneficiaries just to understand whether or not they need to register with a regulator which in fact regulates something that they are not involved in. For those that have registered, the Act has created a new layer of complicated bureaucracy and has cost charities their highly limited resources.

Worst of all, the majority that have not registered are working in a highly uncertain environment and many have curtailed their activities as a result. The act has erected a barrier to charities being able to best meet the needs of their beneficiaries and implicitly has had a negative impact on vulnerable people, animals and the environment. This comes at a vital time when there is increased dialogue between society and policy makers. It therefore denies charities huge opportunities to create meaningful change for their beneficiaries.

Q9 - In your view, has there in fact been a 'chilling effect'? If you consider there has been a chilling effect, why? Do you have any examples of this? If you do not consider there has been a chilling effect, why not?

In our experience, solid evidence indicating a chilling effect was hard to find in the early stages of the first regulated period. However we have sought out and found some evidence to support this and believe there has been a chilling effect among charities. This remains difficult to ascertain robustly as people are reluctant to admit or speak out about having been 'chilled' – at least in public or on record. This only illustrates the necessity of

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exempting charities from this law – it would send a clear message that compliance with charity law and CC9 is the first port of call for charities.

We have found that those charities with a large number of associated groups or activists are particularly risk adverse when it comes to campaigning because they fear they are unable to control those groups' activities. This speaks to the problems with coalition campaigns that arise from the legislation. For example we have had extensive discussions with a charity[1] which delivers many of its services using university-based student groups. They have scaled back their campaigning efforts in fear that one of their associated groups could unwittingly fall foul of the law with consequences for the charity. Because this is a small charity with few resources, they have scaled back their activities and are not comfortable resuming a normal level of activity even now that the regulated period is over.

We have become concerned that the chilling effect is in fact having a permanently dampening effect on charity campaigning, even after the regulated period is over. This has indeed been exhibited in a number of the charities we have been in contact with. This is very concerning as it means that even when not subject to regulation, charities are avoiding or scaling back campaigning activities and not representing their beneficiaries in important policy circles. It is possible that each subsequent regulated period will have a cumulative effect, as charity campaigning is further weakened during each election.

Q12 - When should spending be regulated? What should the length of the regulated period for a UK general election be, and why? What should the length of the regulated period for elections to the Scottish Parliament, Welsh Assembly, Northern Ireland Assembly and the European Parliament be, and why?

The decline in charity campaigning will likely be very quick to happen considering that the elections to which the act applies in fact means that during the five year life of a parliament, charities will more often than not find themselves subjected unnecessarily to this law. It does not make sense to have regulated periods which stretch over such a long period of time.

As charities are interested in creating long term social change in the public interest, so too their campaigns may often be long term. As many charity campaigns are on-going and it is not feasible to expect charities to operate their campaigns in waves, scaling back whenever a regulated period comes along and then immediately picking up again in the wake of an election, only to scale back a few months down the line. As discussed in the previous question, this can only lead to a long-term dampening of charity campaigning and a weakening of civil society's ability to protect vulnerable people. As this campaigning does not fit in with the definition of third party campaigning used in this act, charities should be made exempt.

[1] For the sake of anonymity we do not wish to reveal the name of this charity. Please contact us for further discussion if you would like to know more about this.

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Q13- Do you have a view as to levels of spending that might influence an election? What level of spending in your view would 'unduly' influence the election?

No level of spending by a charity will ever influence an election if it is acting within the law. As explained above, charities do not seek to influence elections, it is not part of their charitable purpose and are prohibited from doing so under charity law which is upheld robustly by the Charity Commission. For other organisations, there is no magic figure at which spending starts to influence elections. It makes sense however to use the present constituency spending limits as a means for the electoral commission to monitor the "big fish" instead of wasting resources trying to regulate the smaller influencers that perhaps have less of an impact. These constituency limits allow people to reasonably engage in the political system while ensuring that those actors that have a disproportionate amount of power are regulated.

Q14 - Are the spending limits right for the different parts of the UK? How easy is it to allocate spending to the different parts of the UK? Is the current balance between the expenditure limits for political parties and third parties appropriate?

Total spending limits are highly questionable and restrictive, and seem to arbitrarily limit campaigning outside of England. Overall spending limits appear to be somewhat linked to population size though proportionately more favourable towards Scotland, Wales and Northern Ireland. For example the population of Northern Ireland is approximately 1.8 million or 3.4% of the population of England. However the spending limit of £30,800 in Northern Ireland represents 9.6% of the spending limit in England. Regardless, it does not make sense that a campaign in Northern Ireland will necessarily cost 10% of that of a campaign in England and have the same impact.

Q20 - Are the current thresholds for registration (£20,000 in England, or £10,000 in each of Scotland, Wales and Northern Ireland) the right levels?

No. Similarly to our response to Q14, these limits seem to suggest that in order to have a similar level of impact, an organisation in England would need to spend twice as much as an organisation outside of England. It is understandable that a campaign in London might be more expensive given the increased cost of wages, rent and travel etc. However it might be reasoned that, for example a campaign in Yorkshire, where costs tend to be lower than in London, has an unfair advantage compared to one across the border in Scotland.

Q25 - What is the best way for the Electoral Commission to regulate the system?

As the law stands at the moment, the Electoral Commission is unnecessarily duplicating the regulatory work of the Charity Commission. The best way for the Electoral Commission to regulate Third Party Campaigners is to firstly reconsider what type of organisations are covered by the act and to exempt those, such as charities, that do not fit in with its definition of a 'third party campaigner'. DSC's principle of **Responsible Regulation** is based on the idea that regulation should be appropriate, proportionate and enabling for charities.

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The Lobbying Act in this sense is highly irresponsible as it places a double regulatory burden on charities, subjecting small charities to amounts of bureaucracy that they do not have the resources to deal with. This is harming their beneficiaries.

DSC's Principle of Responsible Regulation

DSC believes that voluntary activity should be regulated responsibly. Some regulation is necessary to safeguard and maintain the interests of the general public, the beneficiary, and of the organisations and individuals being regulated. However, it should have a demonstrable benefit and should aim to empower and strengthen voluntary activity rather than control it unnecessarily.

We believe that:

a) Regulation should be proportionate – it must strike a balance between perceived risk and intended benefit. It should recognise the diversity of voluntary sector activity and be developed and applied in a proportionate way.

b) Regulation should be appropriate – it must be informed by the characteristics, capacity, and needs of the organisations and individuals that are being regulated. Insofar as is possible it should be focussed, rather than acting as a blunt instrument that has unintended effects.

c) Regulation should be enabling – it should seek to empower rather than control voluntary activity. The reasons for the regulation and the regulation itself must be properly understood by those institutions which are applying it. It should be accessible and intelligible to those being regulated. It should seek as far as possible to encourage self-regulation rather than focus simply on enforcement

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