

Response to consultation on Code of Practice for Non-party s

You are in the Our consultations section Home Our consultations On this page Background How we developed the Code for consultation Main changes to the Code after consultation Themes raised through consultation Annex A First published: 19 April 2023 Last updated: 26 April 2023 Summary

Some individuals and organisations that are not political parties campaign on issues or causes around elections without standing candidates themselves. They play a significant role in providing voters with information and a diversity of voices. The Commission calls these individuals and organisations non-party campaigners. In electoral law they are called third parties. The Elections Act 2022 includes new requirements for registration and spending by non-party campaigners. The Act also introduces a duty on the Electoral Commission to produce a Code of Practice on the laws relating to non-party campaigner spending. Between 24 November 2022 and 20 January 2023, we conducted a consultation on the draft Code of Practice. The consultation received 17 responses from academics, trade unions, and a range of charities, and other non-party campaigners. We set out below a summary of the key themes and issues that emerged in the consultation, and how we have considered them all in updating the Code and in our wider work to support campaigners We are grateful to everyone who provided us with feedback. We have used this to inform the further development of the Code, and to make it as clear and helpful as possible. We recognise how important it is that the people who will use the Code support it. View the Code Background

The Elections Act 2022 requires the Commission to produce a Code of Practice on the laws relating to non-party campaigner spending. This is a legal guidance document that must include what qualifies as expenses, reporting controlled expenditure, and joint campaigning. The Code will apply to elections to the UK Parliament and the Northern Ireland Assembly. The Commission must have regard to this Code when exercising its functions under Part 6 of the Political Parties, Elections and Referendums Act 2000 (PPERA). It is a statutory defence for a non-party campaigner to show that they complied with this Code in determining whether their campaign activity was regulated. The law sets out statutory requirements on the Commission for conducting its consultation on the draft Code. This involves consultation with Speaker's Committee on the Electoral Commission, the Levelling Up, Housing and Communities Committee and 'such other persons that the Commission consider appropriate'. How we developed the Code for consultation

Before we commenced with the development of a draft Code, we held a series of roundtables with parties and campaigners to discuss the new laws affecting their activities. We used this pre-consultation phase to draw on their expertise, as well as our experience of regulating elections to produce a draft Code that would be subject to a public consultation. As well as inviting written and verbal feedback, during the formal consultation period we held a number of roundtables with individuals and campaigners. This included events in Wales and Scotland, to ensure we heard perspectives from the regulated community across the UK. Main changes to the Code after consultation Overall, feedback was positive, and stakeholders felt the Code was 'drafted clearly and concisely, given the complexity of the underlying statutory regime', but there were areas where it could be made easier to use. In some places additional clarity was sought; in others requests were made for further information to make it clearer for non-party campaigners to understand the law and how to apply it in practice. In response to this feedback, we have made changes to the draft Code. We go through the detail of these below, but in summary the main changes include: Updating the structure to make it easier for campaigners to read and

simpler to navigate – using more signposting to help them understand related sections of the law. Making it clearer that the purpose test is defined in PPERA, and adding in more detail on the four factors that should be considered when determining whether campaign activity is regulated. Clarifying how activity can be regulated retrospectively. Redrafting the section in the Code that sets out the meaning of the public and how campaigners can determine whether their activity is available to the public, or to a section of the public. Including more information to help campaigners understand the rules on joint campaigning and in what situations they apply. Within this report, we have highlighted where we agree with recommendations to improve the Code's purpose intelligibility. We have also set out why, in some circumstances, we have retained the draft Code's original wording. In some cases, we were unable to make the amendments suggested because they conflicted with the law in PPERA or with the scope of the Code-making power. In other cases, pieces of feedback were incompatible with each other. Many of the respondents asked for more examples and case studies to be included in the Code. While we have attempted to include a wide and comprehensive range of examples, our guidance can go into greater detail than it is possible for a Code of Practice that provides a statutory defence. We therefore intend to include detailed case studies and more examples in the guidance that will accompany the published Code. These will provide further support and clarity to non-party campaigners. Themes raised through consultation

Purpose test Background

The non-party campaigning laws only apply to regulated campaign activity. Not all campaigning activities that non-party campaigners carry out are regulated. Spending on campaign activities by non-party campaigners is only regulated if it can reasonably be regarded as intended to promote or procure the electoral success of: one or more political parties or candidates who support or do not support particular policies or another particular category of candidates by influencing voters at an upcoming election to vote in a particular way. This is a statutory test set out in PPERA and is commonly known as the 'purpose test'. When we first drafted the Code we included detailed examples to illustrate how campaigners should apply the test. Feedback revolved around two key areas.

The scope of the purpose test

Some respondents raised concerns about the inclusion of the phrase 'influencing voters...to vote in a particular way' within the description of the purpose test. They felt that the draft Code appeared to widen the definition of the purpose test beyond that which exists in PPERA. In addition, unions and charities also raised concerns that the example which stated that a campaign aiming 'to change political parties' or candidates' views on a policy or issue' broadened the scope of the purpose test and would result in '[a]most all advocacy campaigns' undertaken by non-party campaigners being regulated. This, in turn, could deter such campaigners from participating in the democratic process. We have therefore updated the wording to clarify and provide assurances to campaigners that the Code does not widen the scope of the test beyond PPERA. In addition, a number of stakeholders explained that they found the four factors outlined in the Commission's existing guidance a practical and easy way to understand how to apply the test to their activities. Although these factors are not defined in legislation, they are consistently used by the Commission in determining whether an activity meets the purpose test. We have restructured this section around those four factors and used accompanying examples to illustrate how campaigners can apply the test. These changes will allow non-party campaigners to more easily and confidently determine whether an activity can be 'reasonably regarded' as meeting the purpose test and would therefore be regulated. Understanding how the purpose test applies for a retrospective regulated period

When

we drafted the Code, we included information to explain how non-party campaigners should consider any campaign activity that takes place before an election is announced. We know from our ongoing engagement with campaigners that this is something a number find increasingly difficult to apply in practice. There was widespread support for this 'very helpful' part of the Code. In particular, respondents welcomed the clarity that campaign activity that took place during a retrospective regulated period would only meet the purpose test if 'it could reasonably be regarded as intending to influence voters to vote in a particular way at a relevant election'. Some respondents asked for the Code to further clarify how campaign activity would be regulated in retrospective regulated periods where the retrospective period also covered local or council elections. This is called a 'combined regulated period'. We have therefore made clear that issue-based campaigning – as opposed to campaigning with the aim of influencing a voter to vote in a particular way – is unlikely to meet the purpose test in circumstances where there is no upcoming election, even if the activity subsequently falls in a retrospective regulated period. We have also provided examples of campaign activity that would be regulated as a result of a retrospective regulated period. Public activities and material not publicly available Background Election material that meets the purpose test and takes place during a regulated period will only be regarded as regulated campaign activity if the material is made available to the public, or a section of the public. The 'public' has no statutory definition in PPERA. s are therefore required to consider it to 'have its usual meaning'. We know that stakeholders find it hard to determine whether their activity is available to the public, or a section of the public, as opposed to a closed group, such as members, which can include large numbers of people. The rise of digital campaigning and the use of social media at elections in recent years has added additional complexity for campaigners when making their assessment. Supporting campaigners to understand what is regulated When drafting the Code, we aimed to provide additional clarity to support campaigners to understand what is regulated, and make it applicable to the modern realities of campaigning. This included how to assess material only made available to closed groups, such as members, or those who had agreed to receive such material. Whilst feedback on the draft wording was mixed, respondents largely found that our description of what would be considered 'material not publicly available' was 'not sufficiently clear'. A number expressed concern that the language gave them less certainty over when material would be considered publicly available, and therefore regulated. We have therefore made a number of changes to make it easier for campaigners to understand and apply to their activities. We clarified that canvassing and market research seeking views from members of the public public rallies and events and the production of material (digital or print) which is made available to the public at large or any section of the public, will only be regulated campaign activity where they meet the purpose test and take place during a regulated period, but the meaning of the public is an important part of determining whether these three types of activities are regulated. We have added a series of examples of common campaign activities and an explanation of when these would be considered available to the public (and therefore regulated campaign activity) or restricted solely to members or supporters. More generally, several respondents explained how difficult it was for smaller non-party campaigners or specific groups to restrict material to members or supporters in practice, particularly in online and digital spaces. They cited the increased administrative costs involved in controlling access to material and suggested the wording should

focus on who the non-party campaigner intended to see the material. However, we do not think that this approach, focusing on the intention of the non-party campaigner, is compatible with the law as set out in PPERA. Rather PPERA is concerned with the factual reality of whether the campaign material is 'made available' by the non-party campaigner to the public, or a 'section of the public'. Some respondents raised concerns about situations where material shared by campaigners with members and supporters could inadvertently become available to those outside of these groups, for example if copies of members' magazines or screen-grabbed images of digital content shared to closed groups were shared more widely without the campaigner's permission. We will seek to address these concerns in more detailed case studies and examples in our guidance that will sit alongside the Code.

Notification and reporting thresholds

Background

The Elections Act introduces new requirements for spending and reporting by non-party campaigners. Non-party campaigners intending to spend more than £10,000 on regulated campaign activity in the period before a UK Parliamentary general election (UKPGE) or a Northern Ireland Assembly election must notify the Commission. This is known as the 'notification threshold'. A non-party campaigner that is permitted to spend more than £700 on regulated campaign activity may spend up to £10,000 across the UK without notifying the Commission. Registered non-party campaigners who spend more than £20,000 in England, or more than £10,000 in Scotland, Wales, or Northern Ireland, must record and report their spending and donations. These are known as the 'reporting thresholds'. They are defined in PPERA as the 'lower tier expenditure limits'. Given their vital role in providing voters with information and a diversity of voices, it is important that non-party campaigners understand the law and are not deterred from campaigning. In our drafting of the Code, we wanted to take the opportunity to provide campaigners with clarity over the new requirements.

Understanding the notification and reporting thresholds

The majority of respondents gave feedback that the draft Code effectively explained what is meant by notification and reporting thresholds, with one submission welcoming this 'appropriate and helpful guidance'. We have therefore made minimal amendments to this section of the Code. A few respondents asked for greater clarity on when non-party campaigners who meet the reporting threshold would be required to submit quarterly donation reports to the Commission. Under the Fixed-term Parliaments Act 2011, registered non-party campaigners were required to submit quarterly donations returns to the Commission, beginning 12 months before a scheduled election date. Following that Act's repeal, the date of the next UK parliamentary general election is no longer scheduled in law. We have amended the wording to provide more clarity that we are referring to the final year before a UK parliamentary general election, specifically 'when a UK parliamentary term enters its fifth year'. One submission noted the risk of non-party campaigners unwittingly exceeding the notification and reporting thresholds as a result of the rules on joint campaigning, without incurring spending directly themselves. We have highlighted this risk in the revised Code, and have also signposted non-party campaigners to the section on joint campaigning to help campaigners understand the link between the joint campaigning rules and the notification and reporting thresholds.

What type of spending is controlled

Expenditure

Background Controlled expenditure is any spending incurred in respect of regulated campaign activity. We know that non-party campaigners can find it difficult to understand how to assess, calculate and account for their spending, and what qualifying expenses fall within, and outside the regulatory regime. When we drafted the Code, we included detailed information on how to consider campaign activity before an election is announced, the reusing of items from a previous election, items

provided free of charge or at a discount and on overheads that we know campaigners are most likely to use. The types of campaign spending and activity that must be reported. The majority of respondents told us that they found this section of the Code clear, and that it '[provided] clarity about what is controlled expenditure'. Some respondents explained that the phrase 'long running campaign' in the draft was unclear, and did not help them to understand whether existing campaigns would be regulated. We have therefore replaced 'long running campaign' with 'ongoing campaign', to make it clear that it is not the length of time that a campaign has been running that would determine whether or not it was regulated. Campaigns that begin before an election is announced, and remain unchanged following an election being announced, are unlikely to be regulated so long as their activity does not meet the purpose test. Some respondents suggested that our explanation of when an ongoing campaign's activity might become subject to regulation and incur controlled expenditure was not sufficiently clear. We have therefore revised this section to provide assurances that, during a regulated period, an ongoing campaign would need to alter its activity in such a way so as to meet the purpose test in order for its activity to become regulated. Assessing, calculating and accounting for spending and expenses. Several responses asked for additional case studies and tools to help campaigners, calculate and account for their spending. This included a request for a spending calculator tool within the Code as well as detailed examples that illustrate spending in various different scenarios, including small-scale costs, such as the staff time cost of sending a single email or social media post. We appreciate the value to campaigners of having detailed examples and case studies to refer to. However, it is not possible to address every possible scenario within a statutory Code. We will therefore seek to address this in the additional guidance and case studies that will sit alongside the Code to help non-party campaigners assess what expenses need to be reported. Several respondents asked us to provide more clarity on what costs would be considered 'overheads' and for the Code to be more explicit about how they should report such expenses. We have amended the wording to give assurances that spending on overheads that remains the same before and during the regulated period is not likely to be regulated. Targeted expenditure. Background. Regulated campaign spending by all registered non-party campaigners during the regulated period for a UKPGE that is aimed at promoting the electoral success of one particular registered political party or any of its candidates is called targeted spending. We know that non-party campaigners find the laws on targeted expenditure complex to navigate in practice. In our drafting, we wanted to provide as much clarity to support them to understand the targeted spending limits and in what situations authorisation from a political party would be required. Understanding targeted spending. While some respondents felt that the 'targeted spending' concept had been clearly defined, responses from charities and trade unions raised concerns that the draft Code appeared to expand the range of activities that might incur targeted spending. In particular, they were concerned by wording that related to '[a] campaign on a particular issue that is so closely and publicly linked to one particular political party that it is synonymous with that party is likely to be considered targeted spending.' They argued that this broader definition of targeted spending risked a 'chilling effect' on campaigners. Some respondents were concerned that campaigners whose policy positions were adopted by a political party would inadvertently find their campaigns regulated as a result and be discouraged from continuing to campaign. There were concerns that this could effectively give political parties 'the right to veto issues-based campaigning by non-party

campaigners'. We recognise that the original drafting unintentionally risked both confusing and deterring potential non-party campaigners – particularly those carrying out issues-based campaigns. We have therefore changed the wording to: 'campaign activity on a particular issue that is so synonymous with one particular political party that it can be reasonably regarded as intended to influence voters to vote for only that political party or its candidates, will be considered targeted spending.'

This provides clarity and reassurance of the law. The targeted spending limits for non-party campaigners and when authorisation is required. In general, respondents felt that this section of the draft Code was clear. One respondent noted that the draft Code did not mention Section 94D PPERA, which covers how to calculate the lower limit for targeted expenditure. They said this law was confusing for campaigners. The draft Code refers to specific targeted expenditure limits in s94D PPERA but as with other variable expenditure limits set out in PPERA, it would not be suitable to include within a statutory Code as the limit for targeted expenditure is subject to change at each election. We therefore intend to provide further clarity in our accompanying guidance, which we can keep updated with the relevant limits for each election.

Joint campaigning Background At recent elections we have seen low levels of campaigners engaging in joint campaigning. We know from our conversations with stakeholders that they find the law in this area to be complex, with the effect of limiting joint campaigning activities. We therefore wanted in the Code to provide as much certainty as possible over the current laws. We aimed to make this section of the Code as accessible to campaigners as possible to give campaigners greater confidence about whether their cooperation with fellow campaigners will fall under joint campaigning rules. In particular, we made clear that, while a common plan is a necessary precondition, any such plan must also include an intention to incur controlled expenditure in order to be considered joint campaigning. How to consider whether activity is joint campaigning

Consultation responses to this question were broadly positive, as respondents felt that the draft Code went 'a long way to reassuring non-party campaigners which activities do and do not constitute joint campaigning'. The clarity provided about the campaign activities of umbrella organisations was also particularly welcomed. The existing examples were well received and noted as helpful but further examples were requested, specifically about voluntary organisations working together on non-regulated activity during a regulated period and about what does not constitute joint campaigning. We have included clarification on when a non-party campaigner donates to another non-party campaigner. However, we will seek to incorporate further examples into the supplementary guidance that is published alongside the Code. Several respondents took the opportunity to express their views of the legislation itself: that the laws around joint campaigning ultimately deter greater participation by non-party campaigners. One respondent argued that this deterrence 'curtails legitimate and useful co-operation and engagement between actors in civil society'. While not strictly about the content of the Code, this provided a context highlighting the need for the Code to be as clear as possible for non-party campaigners. Factors that should be taken into account when considering activities

In general, respondents felt that the draft Code helped them understand what factors to take into account when considering whether an activity is joint campaigning. However, the charity sector raised concerns that the draft Code did not set out definitively what might constitute proof of a plan or arrangement between non-party campaigners where there was the intention to incur spending. Respondents raised significant fears that, without a standard way of demonstrating joint campaigning, non-party campaigners could be subject to future enforcement

action. Regarding the definition of 'intent', one submission drew attention to the risks of non-party campaigners within a joint campaign having different intentions regarding their incurring of controlled expenditure. We understand that it is important for non-party campaigners engaged in a joint campaign to be clear about what spending falls under joint campaigning. We have made clear in the revised Code that any spending which goes beyond or is incurred outside of an agreed plan between parties involved in a joint campaign, is not part of the joint campaign that needs to be reported. Further detail on this topic will be provided in the supplementary guidance that accompanies this Code.

Lead and minor campaigners We have also included an additional section focused specifically on the roles of lead and minor campaigners in joint campaigning arrangements. This should support non-party campaigners to understand how such an arrangement would impact spending rules and notification requirements. This also may help campaigners to understand how undertaking joint campaigning could reduce regulatory and administrative burdens on smaller campaigners. Given the innumerable formal and informal ways in which collaboration between non-party campaigners could be organised and take place, it is not feasible to include a prescriptive list of evidence within the Code that might illustrate the existence of a plan or arrangement with the intent to incur controlled expenditure. We will explore the possibility of providing templates within our guidance to support campaigners to evidence plans and document arrangements.

Conclusion The duty on the Commission to prepare a Code of Practice for non-party campaigners is an important part of the Commission's work to ensure that campaigners understand and are confident in applying the law to their activities. Non-party campaigners play a vital role in our democracy, and we are committed to providing them with as much clarity as possible to ensure they are not discouraged from active campaigning. The rules around regulated non-party campaigner activity are complex. Many respondents welcomed how various sections of the draft Code provided 'clarity' and 'appropriate and helpful guidance'. We have used their expertise and insight to make the Code as clear and as helpful as possible.

Next steps The final Code has been presented to the Secretary of State for Levelling Up, Housing and Communities for their consideration. The minister may make modifications to the Code. A statement of reasoning is required to detail any changes that have been made. The Code is then subject to the negative procedure in Parliament, which means that once it is laid, it will be approved unless either House rejects it within 40 days of it being laid. Following approval, the Code of Practice for Non-party s will come into force.

Annex A Consultation responses We received 17 responses to our consultation, including responses submitted via our online questionnaire and those received via email. This included: 7 responses from trade unions 3 from third sector organisations, or bodies representing third sector organisations 2 from academics 1 from a political party 1 from a public relations firm 1 from an interest group 2 anonymous responses