



Electoral Commission
3 Bunhill Row
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Dear Sir/Madam

**Good Law Project Ltd & Ben Bradshaw MP v Electoral Commission
2016 EU Referendum – Spending by the CRC / Mr Richard Cook
Pre-action letter in respect of proposed judicial review proceedings**

We refer to our letter dated 16 September 2018 and your response dated 24 September 2018.

This is a formal pre-action letter sent pursuant to the Pre-Action Protocol for Judicial Review. Please provide a full response by no later than 4pm on 19 October 2018.

The challenge concerns the Electoral Commission's failure to take action in respect of apparent unlawfulness in relation to spending reported by the Democratic Unionist Party ("**DUP**") in the 2016 EU Referendum, as set out in their letter of 2 August 2018 and confirmed by letter of 10 September 2018. In particular it concerns the failure to take action in respect of:

- (i) the fact that substantial referendum expenses reported by the DUP appear in fact to have been incurred by the Constitutional Research Council ("**CRC**"), an unincorporated association, without it registering as a permitted participant or reporting its spending and donations as required by Part VII of PPERA 2000; and,
- (ii) the DUP's apparent failure to enquire properly into whether the person or persons making the donation to it were permissible donors, as required by Part IV of PPERA 2000 as a precondition to accepting the donation.

As to the first issue, it is clear from the information currently available that spending in the 2016 EU Referendum has not been properly reported and that the requirements of PPERA 2000 have therefore been contravened. At the very least that information certainly meets the threshold of "*reasonable grounds to suspect*", such that the

Commission is empowered to investigate further. The Commission's failure to take any action to date appears to have resulted from its belief that because the money was treated as a 'donation' to the DUP it could not therefore constitute a referendum expense incurred by the CRC, but that has now been held by the High Court in Good Law Project Ltd v Electoral Commission [2018] EWHC 2414 (Admin) to be an error of law.

As to the second issue, the DUP's own Treasurer is on record as saying that he had "never heard of" the CRC before or since, that it was not "his business" nor that of "anybody in our party" to find out anything about the membership of the CRC before accepting their donation, and that "the people whose duty it is to monitor and regulate these things" were "the Electoral Commission". Either he was misrepresenting the steps the DUP took to comply with Part IV of PPERA 2000 before accepting the donation, or he was not and the DUP accepted the donation in breach of those requirements. In those circumstances there are clearly reasonable grounds to suspect that a contravention and/or an offence has been committed.

The Commission nevertheless announced on 2 August 2018 that there were no grounds for opening an investigation. Our client seeks an order quashing that decision (and any subsequent decision to maintain that position) on the grounds that it was vitiated by an error of law and/or is unreasonable. There are ample grounds for action in relation to the above matters; at the very least there are grounds for further investigation as to whether:

- (i) the CRC contravened Part VII of PPERA;
- (ii) having done so it should now be ordered under Schedule 19C paragraph 5 to take steps to file the information it would have been required to file if it had complied;
- (iii) the DUP contravened Part IV of PPERA; and,
- (iv) having done so it should now be ordered to forfeit the donation.

The facts

The DUP received a donation of £435,000 from the CRC. £282,000 of this donation was made on the basis that it would be spent on an advertisement in the London Metro. The other sums donated may or may not have been paid contingent on their being spent on particular purposes.

The DUP failed to make sufficient enquiries into the source of the donations beyond that they were made by an organisation called CRC.

The Electoral Commission has failed to conduct an investigation into the irregularities set out above, and as such has failed in its duty to regulate the EU Referendum fairly.

Despite additional evidence suggesting irregularities have taken place, it has by letter of 10 September addressed to Mr Bradshaw MP maintained its position.

Details

On 24 February 2017 the BBC reported that the DUP had “*confirmed it received a Brexit donation of about £435,000*” from the CRC, and that Sir Jeffrey Donaldson MP had said that “*about £425,000 was spent on the Brexit campaign*”, with “*around £9,000 [being] transferred to the party’s funds with the agreement of the [CRC]*”.

The BBC also provided a breakdown of how that money was spent, apparently drawn from the Electoral Commission’s records of the referendum expenses declared by the DUP:

*“£282,000 on advertising in Metro newspaper in support of Brexit
£99,616 on promotional material
£32,750 with Canadian IT and consultancy firm
£10,823 spent in Northern Ireland”.*

Further, the invoice filed with the Electoral Commission in support of the spending of £282,000 makes clear that it related to a single advertisement placed in the Metro newspaper on 21 June 2016.

On 26 June 2018, BBC Northern Ireland broadcast a documentary (“Spotlight: Brexit, Dark Money & the DUP”) in which it further reported that:

- (i) The advertising in the Metro newspaper was arranged directly by Mr Richard Cook of the CRC, rather than by anybody at the DUP; and,
- (ii) When interviewed about the donation from the CRC, the DUP’s Treasurer (Mr Gregory Campbell) had said: “*How would I be or anybody in our party be expected to know who the individuals are that are involved in the organisation? Why, why would it be my business to find out? [...] This is all nonsense, just nonsense. [...] If the Electoral Commission had come back and said there was something seriously amiss here, we would have had to say ‘right guys, where did this money come from?’ or ‘who gave it to you?’*”.

The interview with Mr Campbell was conducted by SourceMaterial.org (as mentioned in the Spotlight documentary itself) and we hold a recording of the full interview. In the full version of the interview, Mr Campbell is recorded:

- (i) being asked who the CRC was (“*they are not a website in their own name, so who are they, apart from your man that was in the papers?*”) and answering: “*Presumably they are a right-of-centre, pro-leave the EU, but if you rewind a year before that, David Cameron initiated a mail shot [...]*”
- (ii) being asked whether he had heard of the CRC “*before they came*”, and answering “*I haven’t heard of it before and I haven’t heard of it since. It doesn’t*

make any difference. The important people are the Electoral Commission”; and,

- (iii) *being asked “You are treasurer of the party, so you can accept money from people you haven’t heard of?” and answering “And who are the people whose duty it is to monitor and regulate these things? The electoral commission.”*

On 2 August 2018 the Commission wrote a letter to BBC Northern Ireland referring to the allegations in the Spotlight documentary and expressing the conclusion that “*we do not have grounds to open an investigation into the allegations about breaches of electoral law*”. That letter was published and no investigation was opened.

However, from documents recently disclosed by you on 28 September 2018 in response to a Freedom of Information Act request, it appears that on 27 June 2018 your officers discussed the allegations concerning the DUP’s failure to verify that the donation came from a permissible donor and concluded that “*what [Mr Campbell] appears to have said is sufficient for us to have concerns*”. Rather than treating those concerns as grounds for opening an investigation into whether a contravention had been committed, the Commission simply wrote to Mr Campbell on 27 June 2018 reminding him of his obligations and saying “*I trust this letter assists you.*”

Issue 1: CRC/Mr Cook

The first aspect of the challenge concerns the Electoral Commission’s failure to take action in respect of undeclared referendum expenses incurred by the CRC.

The available evidence appears to show that the DUP’s declared referendum expenses of £425,000, or in any event certainly the £282,000 spent on advertising in the Metro newspaper, were in fact directed and controlled by the CRC in such a way as to require them to be treated as referendum expenses incurred by the CRC.

1. Following the decision of the High Court on 14 September 2018, it is clear that a person will be treated as incurring referendum expenses if (a) he brings upon himself an outflow of economic benefit, (b) he does so with a view to procuring a particular outcome in the Referendum, and (c) the outflow of economic benefit is specifically directed to one of the types of expenditure in Schedule 13 to PPERA 2000, such as advertising.
2. In particular, the High Court held at paragraph 72 that “*a payment made to a supplier of advertising services to defray the cost of such services purchased from the supplier seems to us on any reasonable understanding of the words to be a payment made ‘in respect of’ advertising, even if the person who makes the payment is not the person who contracted to purchase the services. Indeed, it would also be natural to describe a payment to the purchaser as a payment ‘in respect of advertising’ if it is made specifically in order to fund the purchase of advertising.*”

3. Sir Jeffrey Donaldson MP's account (as reported by the BBC on 24 February 2017) of the sum of £9,000 being "*transferred to the party's funds with the agreement of the Constitutional Research Council*" suggests that the remaining £426,000 was never transferred into the DUP's possession. It would appear to follow that the CRC must have made the payment to the supplier (Associated Newspapers Ltd) directly to defray the cost of the advertising services, and that it thereby incurred a referendum expense on the basis identified by the High Court above.
4. In any event, from Mr Campbell's subsequent account in the SourceMaterial interview - "*we got an amount of money to use as an advert in the referendum campaign, we used it to the purpose it was given and accounted for it after we had spent it*" - it would appear to follow that the payment was made (in the High Court's language) specifically in order to fund the purchase of advertising, and thereby constituted a referendum expense incurred by the CRC for that reason too.
5. Indeed, the report in the Spotlight documentary that the advertisement in the Metro newspaper was in fact placed by Mr Cook of the CRC, rather than by any officer of the DUP, suggests that the CRC retained a close degree of control and direction over how its money was spent.
6. It is also more consistent with the inherent probabilities of the situation that the CRC, rather than the DUP, made the relevant purchasing decision(s). In particular:
 - a. It is implausible in principle that the DUP, if given a 'no strings' donation of £435,000 (apparently the largest political donation in the history of Northern Ireland), would have taken receipt of only £9,000 of it to use for the purposes of defraying party expenses or in any electoral campaigns, instead spending almost all of it immediately in the 2016 Referendum.
 - b. It is particularly implausible that the DUP if given a free choice would have chosen to spend £282,000 – a sum more than twice as large as its total declared party spending across the last three Parliamentary general elections combined – on a single newspaper advert aimed at commuters in London.
 - c. By contrast, there is an obvious reason why persons wishing to spend money with a view to procuring a particular outcome in the Referendum would have wanted to channel that spending through the DUP while retaining control of it: namely, the prospect of preserving their anonymity because of the existence of s.71E PPERA 2000 if the amounts were properly to be treated as donations to the DUP.

The consequence of the above information and of the High Court's recent decision is that:

1. The CRC (or, if different, whoever in fact was responsible for the relevant 'donations') incurred referendum expenses during the referendum period of very substantially above a level which required it to register as a permitted participant under s.117 PPERA 2000;
2. It therefore contravened the spending limits set out in PPERA 2000 by incurring those expenses without registering;
3. If it had registered as it was required to do, it would have had to file a return as required by s.120 PPERA 2000 which recorded full details of all referendum expenses incurred, and (by virtue of s.120(2)(d) PPERA 2000) all relevant donations received by it.

Even if that were not clear, the information available at the very least gives rise to reasonable grounds for suspecting that contraventions (and possibly offences) have been committed.

The action which the Commission is empowered to take in relation to the CRC's apparent contravention would include (under Schedule 19C paragraph 5(c)) ordering that steps be taken "*to secure that the position is, so far as possible, restored to what it would have been if the offence or contravention had not happened*" (Schedule 19C paragraph 5(c)). That would include ordering the CRC to file the return it would have had to file under s.120 PPERA 2000 if it had registered as a permitted participant as it was required to do, including details of all referendum expenses incurred and all relevant donations received, so that spending and donations relating to the 2016 Referendum are properly recorded and reported.

To the extent that the Commission's inaction to date was based on the mistaken belief that money treated as a donation to the DUP could not also be treated as a referendum expense incurred by the donor, that has now been confirmed to be erroneous in law. The Commission has not identified any other reason for disputing the above analysis.

In those circumstances the Commission's decision to take no action is unreasonable and liable to be quashed.

Issue 2: The DUP donations

The second aspect of the challenge concerns the steps taken by the DUP to verify that the donation came from a permissible donor, and in particular its Treasurer's comments in that regard.

Section 54 PPERA 2000 provides that a registered party must not accept a donation if either (i) the donor is not a permissible donor, or (ii) the party is unable to ascertain

the donor's identity. Section 58 empowers the Commission to apply for an order that a donation received in breach of that provision be forfeited.

Where a donation is said to be made by an unincorporated association (such as the CRC), it is particularly important for the recipient to establish whether that is in fact the case or whether the donation is in truth being made by one or more individuals. That is because without such a requirement it would be open to individuals to circumvent the requirement to declare their own involvement by giving the name of a purported organisation which has no legal existence. To that end, the Commission's published guidance on "*Permissibility checks for political parties*" states, among other things, that:

- (i) an unincorporated association is a permissible donor if it has more than one member, the main office is in the UK, and it is carrying on business or other activities in the UK;
- (ii) an unincorporated association should generally have an identifiable membership, rules or a constitution, and a separate existence from its members; and,
- (iii) recipients "*should consider whether the donation is actually from individuals within it (rather than the association) or if someone within the association is acting as an agent for others. If you think this is the case, you must check the permissibility of all individuals who have contributed more than £500 and treat them as the donors.*"

As noted above, Mr Campbell is recorded as saying the following in his interview with SourceMaterial:

"Q. The organisation was the constitutional research council... so who are they, apart from your man that was in the papers?"

"A. Presumably they are right of centre, pro-leave the EU [...]"

"Q. Had you heard of the CRC before they came?"

"A. I haven't heard of it before and I haven't heard of it since. It doesn't make any difference. The important people are the Electoral Commission [...] And who are the people whose duty it is to monitor and regulate these things? The Electoral Commission. It's their verdict that counts. Not what you think, or what I think, or what somebody else thinks. [...]"

"A. How would I or anybody in our party be expected to know who the individuals are that are involved in the organisation? Why would it be my business to find out?"

On 27 June 2018, Louise Edwards of the Commission referred internally to a discussion of the allegations made in the programme, saying: "*Note the programme only broadcast partial comments, with no context. Nonetheless we think that what he*

appears to have said is sufficient for us to have concerns. We are preparing a letter to Mr Campbell to go in my name that reminds him very clearly of his legal responsibilities under the permissibility rules. This letter will go to Mr Campbell today."

The Commission wrote to Mr Campbell on 27 June 2018 referring to the comments attributed to him in the Spotlight documentary, and saying:

"There is a duty on the party and you as registered treasurer to ensure that any donation accepted by the party is from a permissible source (section 56 PPERA). If the party and treasurer do not comply with the legislation relating to the permissibility, and the acceptance or return of a donation, the party and the registered treasurer may each be guilty of a criminal offence.

When reporting donations to the Commission, you as the registered treasurer are required to make a declaration as to the completeness and accuracy of the report that you are delivering to us. Anyone knowingly or recklessly making a false declaration under this section commits an offence.

As you will appreciate from this reminder of your legal obligations as treasurer, it is not correct to say that the Electoral Commission is responsible for ensuring your party only accepts permissible donations.

I trust this letter assist you. If you have any further questions regarding your obligations as registered treasurer, regarding donations or any other aspect of the rules, please do not hesitate to contact our advice service on 0333 103 1928."

Mr Campbell replied on 3 July 2018 asserting that he was "fully aware" of his legal duties in relation to the permissibility of donations. He did not, however, say anything about what steps he or his party actually took to discharge those duties.

The Commission then announced on 2 August 2018 that it had no grounds for opening an investigation.

That decision is unreasonable.

1. The information publicly available gives rise at the very least to a prima facie case that the DUP did not verify that the donation came from a permissible donor. Mr Campbell's openly-stated position is that he had never heard of the CRC before or since and that he did not consider it his business to establish who was involved in it, but that "*Presumably they are a right-of-centre, pro-leave the EU [...]*". It would appear to follow that he and his party did not take steps to establish (i) that the CRC had more than one member, (ii) that it had its main office in the UK, (iii) that it carried on business or other activities in the UK, (iv) that it had an identifiable membership, rules, or a constitution, and a separate existence from its members, or (v) whether the donation was in truth from the association or from one or more individual members of it.

2. In any event, in circumstances where the Commission itself positively concluded that Mr Campbell's statements gave rise to concerns, it was unreasonable not to treat that as sufficient grounds for taking any steps to establish what Mr Campbell and the DUP had actually done to comply with their legal duties.
3. These points are all the more stark in circumstances where the donation is, the BBC has reported, the largest known donation in Northern Ireland's political history.

That decision, too, is liable to be quashed and a decision made as to whether an application for forfeiture of the amounts unlawfully donated should be made.

Your response

We wrote to your client on 16 September 2018 asking for confirmation that you would address issues relating to the incorrect treatment of the relevant spending. In your reply on 24 September 2018 you argued that it was premature for our client to raise such issues because the Commission was seeking permission to appeal the High Court's Judgment of 14 September 2018.

That is not a good reason for the Commission to take no action. The High Court's Judgment represents the law unless and until it is overturned. Even if there were an outstanding appeal with good prospects of success, that would not justify the Commission taking no action at all in the meantime. In any event the High Court has since ruled (on 4 October 2018) that the appeal has no real prospect of success and has refused permission.

You also suggested that your "*ability to say anything about the matters you raise in your letter is limited*" because of s.71E PPERA 2000, which you say prevents the Commission from disclosing "*any information relating to donations that may or may not have been made to the DUP during 2016*".

That is an inadequate response for three reasons:

1. First, s.71E PPERA 2000 only concerns information about donations. It does not prevent the Commission from disclosing information relating to referendum expenses incurred by the CRC, or about whether the CRC should have registered as a permitted participant under Part VII of PPERA 2000 but did not.
2. Second, s.71E PPERA 2000 concerns information about donations received by a Northern Ireland recipient which "*has been obtained by the Commission in the exercise of their functions under this Part*". It does not prevent the Commission from explaining, without reproducing any such information, what

steps it has taken to investigate possible contraventions of the Act and why it considers that no further action is necessary.

3. Third, s.71E PPERA 2000 in any event contains an exception permitting the disclosure of information “*for the purposes of any criminal or civil proceedings*”. The facts set out above demonstrate a prima facie case that the requirements of the legislation have been breached. If the Commission maintains its decision to take no action, it will need to explain in the ensuing judicial review proceedings the basis for that decision. It may be possible to do so without disclosing any information falling within s.71E PPERA 2000, but if it is not, then that information may lawfully be disclosed. In those circumstances, the proper pre-action approach – consistent with the fact that as per the Treasury Solicitor’s Guidance the duty of candour applies “*to every stage of the proceedings including letters of response under the pre-action protocol*” – would be to disclose that information now, for the purposes of ensuring that the proceedings are properly focused on the real issues in dispute.

We therefore invite you to provide a full response by no later than 4pm on 19 October 2018.

Other matters

The Claimant

1. The Good Law Project Ltd. It has standing to challenge the Commission’s decision for the same reasons as were found to be sufficient in the judicial review proceedings which have just concluded.
2. Ben Bradshaw MP.

Interested Parties

We envisage that the DUP will be an Interested Party in the ensuing proceedings. The CRC may also be an appropriate Interested Party, although because of the lack of clarity as to its status it is presently unclear to us how it is to be joined or served with any correspondence or documents.

Action that the Defendant is expected to take

We invite the Commission to reconsider its decision of 2 August 2018 to take no further action in respect of the two issues identified above, failing which we will seek an order that that decision be quashed.

Costs

In the event that the Electoral Commission is not willing to take the action requested above, and in recognition of the general public importance of the issues raised in this claim and the clear public interest that they be resolved, the Defendant is invited to agree to costs capping. We suggest a non-reciprocal cost capping order, which

provides that costs recoverable from the Claimants be limited to £5,000 and costs recoverable from the Defendant be limited to £225 per hour, £110 per hour and £200 per hour for leading counsel, junior counsel and solicitors respectively, following the decision of Ousely J in R(Medical Justice & others) v SSHD CO/5386/2016 .

This we suggest is reasonable having regard to the first Claimant's position as a vehicle for crowd funding with limited additional financial resources to be able to fund litigation of this type, and to the second Claimant's position as an MP who is acting as a representative of the electorate in this important case, on the basis that his costs liability will be covered by the first Claimant. If the case is granted permission – which we have no doubt that it will be – then the issues dealt with will be ones of great public importance. Indeed, for the Electoral Commission too it will be important to know whether its understanding of the law as it is currently applying it, is correct.

If necessary, the first Claimant is happy to provide evidence of its financial resources. However, it is clear that it would be unable to proceed with the case in the absence of a cost capping order, and that any funds to cover *inter-partes* costs liability will be reliant on fundraising alone. The Claimant is intending to fundraise what it can to cover this. Accordingly, it proposes that this be capped at £5,000.00.

Yours faithfully,

DEIGHTON PIERCE GLYNN