

Unite the Union Response to Electoral Commission Consultation on Draft Code of Practice for Non-Party Campaigners



Purpose test

Question 1 and 2

We have some concerns about the framing of certain parts of the Code that explain what the purpose test is, and how organisations can know if it has been met.

‘Vote in a particular way’

The Code repeatedly uses the phrase *‘influencing voters to vote in a particular way’* as a euphemism for *‘meeting the purpose test’*. While *‘vote in a particular way’* can mean *‘vote for a particular party or set of candidates’*, it can also have a broader meaning.

For example, *‘vote for democracy’* or *‘vote for social justice’* are all exhortations to vote in a particular way, but would likely not meet the purpose test without supplementary messaging, as the *‘way’* in which people are being asked to vote is for a set of values that don’t align clearly with any particular Party or set of candidates.

Given its potential broader interpretation, the use of the phrase *‘vote in a particular way’* may muddy the waters, and could inadvertently be broadening the scope of the purpose test. We would suggest it would be clearer to stick more closely to the definition in PPERA and refer to voting for or against Parties, candidates or groups of candidates.

Campaigns intended to change parties’ or candidates’ views

We are concerned about the definition of the purpose test being stretched by the sentence:

“A campaign that is intended to change political parties’ or candidates’ views on a policy or issue may meet the purpose test if the policy or issue is so closely or publicly linked to a party, parties or category of candidates, that it is reasonable to regard the campaign as intending to influence voters to vote in a particular way.”

While there may indeed be a small number of hypothetical situations where this activity might meet the purpose test, the overwhelming majority of campaigning to persuade parties or candidates to adopt positions would not come close to meeting that test.

Almost all advocacy campaigns are simply that – persuading candidates or parties to take a position – and are not cover for influencing voters to vote for a party or set of candidates.

For example, if Party A happens to hold a policy position, and a non-party campaigner ran a campaign to persuade Parties B and C and their candidates to also adopt that position, that would meet the criteria in the sentence above (as the issue is closely linked to one party), but the intention of the campaigning would not have been to persuade the public to vote for one Party or the other so the purpose test would surely not be met.

Numerous charities and campaigns run election pledge cards and manifestos that they ask candidates and parties to endorse, with absolutely no intent to promote those candidates and we risk seeing a new 'chilling effect' on these widely-used advocacy campaign tactics if there are concerns this could be interpreted as meeting the purpose test.

It would be helpful to clarify the point further, by making clear that it would be unusual for this activity to meet the purpose test, and to explain in what circumstances such activity could be used as a means of influencing voters to vote for a Party or parties or sets of candidates. Examples of the sorts of activity that would and would not be covered would also be very helpful here.

Multiple aims

It's clear that campaign activity can at times have multiple aims, and we appreciate that has not changed in this Code. However, the wording in the Code:

"An activity can achieve other aims as well as being intended to influence how people vote. However, when determining whether an activity meets the purpose test, it is immaterial whether that activity can be reasonably regarded as intended to achieve another purpose or purposes as well"

is slightly different to the wording in the previous guidance, which said:

"Even if your primary intention is something else, your campaign will still meet the purpose test if it can be reasonably regarded as intended to influence voters to vote for or against a political party or category of candidates"¹.

We think the wording in the previous Guidance was more helpful for campaigners – largely because it's simpler and easier to understand. It makes it much clearer that the question is whether it can be reasonably regarded as intended to influence voters to vote for or against a political party or category of candidates.

The focus on the new language is on the primary aim (not the aim that meets the purpose test), whereas the older version emphasises the purpose test itself. We appreciate this is a nuanced difference, but we are concerned it may inadvertently have some degree of 'chilling effect' as campaigners stop doing some activity just in case it meets the purpose test, rather than focusing on the question of whether the purpose test itself is met by any activity.

Question 3

¹ <https://www.electoralcommission.org.uk/non-party-campaigners-where-start/purpose-test-intention>

Retrospective application and targeted spend

We think the clarification that ongoing campaign activity that took place within the regulated period, but before it was clear an election would be called, would likely not 'meet the purpose test' in the event of an unexpected General Election is very helpful to campaigners.

We would like to discuss further how the Code can provide reassurance to non-party campaigners who, in the event of a snap election, inadvertently incur 'targeted spend' without having had prior authorisation from the relevant Party.

It is not unlikely that we will see further General Elections called outside the usual 'early May' window, meaning that campaign expenditure for the preceding local or devolved elections would have been incurred within the 12 month retrospective period, but without 'targeted spend' authorisation having been given for an unpredicted General Election.

We appreciate the Commission has been clear that in situations like this, where organisations have operated in good faith but circumstances have changed, there would not be an 'enforcement' approach – but it would be helpful if we could explore whether there are ways this approach could be indicated in the Code. Otherwise, we risk organisations not campaigning in legitimate ways just in case a snap election is called.

Material not publicly available

Questions 5 and 6

Member and supporter activity and materials

We think that the framing of the definition of material for members and supporters is not sufficiently clear in the Code, and that it risks inadvertently broadening the definition of what is regulated, and causing confusion. The Code says:

“Where access to those activities or material is restricted by the non-party campaigner to members or known supporters, this will not be regulated.”

We think there is a risk that the use of the words *“access.....restricted”* changes the meaning to something that was not intended. Access to a member magazine is not restricted to the recipient – a family member or colleague may pick it up. However, the magazine was clearly intended for the member or supporter who received it.

The implication of the language here is that only materials that can *only* be accessed by the member or the supporter are exempt from regulation – effectively limiting member comms to digital materials that are password protected.

We do not think this was the intention of this section, which we think is seeking to differentiate between materials intended for the member or supporter (for example an email, letter or member magazine) and materials that the member or supporter is sent with the intention that they share it publicly (for example, if a member were sent a poster in the post).

We would suggest a better framing might be along the lines of:

“Where the activities or material are intended for the members or supporters of a non-party campaigner, this will not be regulated.”

Conferences

We welcome the clarity that Annual Conferences of non-party campaigners are not regulated.

Language

More broadly, we have always found the terms ‘public test’ and ‘purpose test’ to be clear and helpful, and don’t see a need to move away from them. It has been useful to unions in knowing that they need to assess whether activity meets both tests. The issue has not been with the language around the ‘public test’ and the ‘purpose test’, but about how to decide whether those tests are met.

What type of spending is controlled expenditure?

Questions 12 and 13

The Code provides clarity about what is controlled expenditure.

The difficulty comes in quantifying the cost of activity – particularly smaller-scale activity done by organisations for whom political campaigning is not the main part of their work.

It's relatively straightforward to quantify the cost of a staff member working 50% of their time on a campaign. It's much harder to quantify the cost of sending a single press release or an email. Organisations may spend more time working out the costs they need to declare than the staff spent on the activity in the first place.

It would be helpful to include some illustrative examples of how to cost small-scale campaign activities.

Targeted expenditure

Questions 14 and 15

We are extremely concerned by the prominence given in the Code to the sentence on campaign activity that is not overtly partisan, and to the change in tone from previous guidance:

“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.”

Previous guidance has made it clear that it is highly unlikely that anything that does not mention a Party's name would be regarded as targeted expenditure, while acknowledging that it is possible:

“In almost all cases, your spending on regulated campaign activity will only count as targeted spending if you name a political party or its candidates in a way that can be regarded as intended to influence voters to vote for only that political party.”²

The combination of the change in language and the increase in prominence is quite a substantial change, that we think will have the unintended effect of widening the definition of targeted expenditure. This risks a 'chilling effect' on campaigners on issues that happen to be endorsed by a political party.

An unintended broadening of the definition could also have a perverse effect, and give political parties the right to veto issues-based campaigning by non-party campaigners.

The inclusion of this also risks misconstrued or vexatious complaints from the public.

² https://www.electoralcommission.org.uk/sites/default/files/2019-09/Generic%20UKPGE%20NPC%20Targeted%20spending_o.pdf

It potentially risks charities, who are not legally allowed to campaign in support of a political party, being deemed to have undertaken ‘targeted expenditure’ for running a campaign with no mention of a political party.

We think this will be almost unenforceable, except in the rarest of clear-cut cases. It is difficult to imagine how a framework could be developed to decide which political parties ‘own’ any particular policy issues and whether those policies are synonymous with that Party in the public’s mind - and that lack of clarity will cause confusion and concern for non-party campaigners, and lead to a ‘chilling effect’.

We think the framing in the previous guidance was much clearer for campaigners, and kept the focus on the kind of campaign activity that makes up the overwhelming majority of ‘targeted expenditure’ – that which is overtly in support of a particular party.

The previous guidance made it clear that in almost all cases only materials that overtly mention a political party would be regarded as targeted expenditure – but left open the possibility that there are some limited circumstances where other campaigning could potentially be regarded as targeted expenditure. We would propose that this is the wording used in the Code:

“In almost all cases, your spending on regulated campaign activity will only count as targeted spending if you name a political party or its candidates in a way that can be regarded as intended to influence voters to vote for only that political party.”

About you

Question 21

About Unite the Union

This submission is made by Unite, Britain and Ireland’s leading union with over 1.4 million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government and the not-for-profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

Unite is an affiliated organisation to the Labour Party but primarily runs a large number of independent industrial and political campaigns on a daily basis that are in the interests of our members and are separate to this.

For more information contact Roisin McDermott, Industrial Political Coordinator