



Alexandra Forgaard  
Government Legal Department  
DX 123242 Kingsway 6

By Email [Alexandra.Forgaard@governmentlegal.gov.uk](mailto:Alexandra.Forgaard@governmentlegal.gov.uk)

Dear Ms Forgaard

### **Good Law Project v. Electoral Commission**

You should by now have received the order of Mrs Justice Lang DBE dated 18 January 2018 (which we received on Monday 22 January 2018), in which she held that the Claimant's analysis of the correct interpretation of the incurring of referendum expenses "*is arguable*". The Court nevertheless declined to hear the challenge on the basis that the original decision had been superseded by the Defendant agreeing to reopen the investigation ("*the Claimant may bring a further claim once the Defendant makes its new decision*").

It seems to us that this puts the Electoral Commission in a very difficult position. As regulator, it will no doubt be concerned that in the Court's view, the Electoral Commission has arguably interpreted (and is arguably interpreting) the relevant legislation on campaign expenditure wrongly (Ground 1 of claim). Consequently, it may have discharged, and may continue to discharge its core regulatory functions incorrectly. This question is one that we envisage the Electoral Commission would of its own volition wish to have resolved. Put another way, in the absence of a Court declaration as to the correct meaning and effect of the legislation, there is a real risk not only that the Electoral Commission will investigate past expenditure on an erroneous basis, but even more worryingly, will fail to regulate any subsequent referendum or, indeed, general election on an erroneous legal basis. In that regard, we note that if a referendum or even general election were to take place before a Court had ruled on the question, and assuming the Electoral Commission proceeded on the basis of its current view of the meaning and effect of the legislation, it would act under the shadow of the High Court having expressed the view that such an approach is arguably wrong. It seems to us therefore, that a responsible regulator would want to have the point of law decided as soon as possible, as this is the only

way by which it can proceed with any certainty to regulate any future referendum or election.

In our view, it is clear therefore that the issues are not academic. The Electoral Commission must apply the legislation to any future referendum or general election. You will be aware of course, that there is a real possibility of a further referendum or even general election taking place at some point in the near future.

Additionally, and for the avoidance of doubt, as we have already explained, our view is that the question is not academic as regards the investigation into Vote Leave since, if the Claimant is correct, then Vote Leave has exceeded its spending without need for any further investigation. Further, an issue arises as to the legality of how referendum expenditure was regulated during the campaign (Ground 3).

We do not think that the suggestion of Lang J. that all these questions be postponed until after the Electoral Commission has finally made a decision in relation to Vote Leave deals with the issues raised. Even assuming a subsequent challenge did take place because, for example, the Electoral Commission again decided that Vote Leave and BeLeave/Veterans for Britain were not working together (Ground 2), such a challenge would not deal with the question of the legality of how the referendum was regulated (Ground 3) but more importantly, could be too late to assist the Electoral Commission in its approach to a subsequent referendum or general election.

To elaborate, depending on when your client reaches a decision in relation to the facts of this case (as to which you have given us no indication), what conclusions it reaches and on what legal basis it reaches them, how long it takes for the dispute to be brought back before the Court thereafter, and what if any subsequent steps are required as a result of the Court's ruling, it may well not be possible for the issues of principle to be resolved before your client is required to regulate a further referendum or election which gives rise to the same legal point.

We anticipate therefore that your client – in common with our client – will wish the issue of the correct operation of the statutory scheme to be considered by the court in good time, and before any future elections / referendum, for the purposes of obtaining a declaration as to the correct meaning and effect of the relevant statutory provisions.

Your client will no doubt agree that it is wholly unsatisfactory that another election or referendum take place with participants in doubt as to what the law permits, and with some having a different view from others. This would generate considerable, material – and most importantly avoidable – confusion. The Electoral Commission's published guidance does not currently deal with the issue of donations between campaigning bodies; the Electoral Commission's position on that issue is set out only in the Summary Grounds of Resistance, a document prepared for the purposes of court proceedings and not published as guidance.

We therefore propose either of the following courses.

First, we jointly request that the Court provide declaratory relief in relation to the statutory interpretation point outlined in Ground 1 and given effect to in Ground 3.

The alternative, second, is that the Electoral Commission swiftly issue guidance on the position. We assume that this would be on the basis of its current view of the statutory provisions. We would then challenge that guidance by way of amendment of this claim. This would reduce time and cost.

We intend to renew the application for permission to preserve the claim. However, we are willing to write to the Court to explain our proposal so that any contested hearing can be averted should the Electoral Commission decide that it does want to obtain legal certainty for the purpose of discharging its functions lawfully.

We would be grateful to hear from you as soon as possible.

Yours faithfully

**DEIGHTON PIERCE GLYNN**