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Dear Mr Baxter,

I am writing to respond on behalf of the Liberal Democrats to the consultation on Ofcom's rules on due impartiality, due accuracy, elections and referendums.

These guidelines are important and shape the election campaigns they relate to. Broadcast decisions regarding who to include in debates, features and interviews are part of the campaign themselves, not simply a commentary on it.

The consultation document itself states that PEBs and PPBs:

"are, therefore, designed to offset the differential ability of parties to attract campaign funds."

Clearly then, the regulation around them should seek to deliver that principle, where a party's resource does not benefit, or hinder, the coverage they get.

Under the existing arrangements, the larger parties list has afforded some parties better parity than outside of election periods which are unregulated, with broadcasters being required to give 'due weight to the coverage of larger parties'.

The Liberal Democrats have certainly in previous campaigns received a fairer level of coverage for our policies and campaigns than we do outside of the regulated period.

The fact that paid for advertising on broadcast television is not allowed in the UK makes PPBs and PEBs important – they are the one occasion when content and messages produced by a party are shown to a mass audience in this way. It also means that in election periods, the rules and regulations that ensure fairness, impartiality and balance across broadcasters is important – as they govern the sole way parties appear on television. As such, the rules should not favour or hinder a party based on resource, and should be as objective as possible.

We understand the proposed changes and believe they could potentially improve the regulations in this area, but there are currently a number of areas of serious concern which we feel could result in a more imbalanced system that penalises smaller parties and parties with lower levels of financial and staff resources. This would undermine the intent and purpose of regulations and benefit the larger and best resourced parties.

Do you agree with Ofcom's proposal to remove the list of larger parties from Section Six of the Code and the PPRB Rules? Give reasons for your answer.

The removal of the larger parties list

In principle, a move away from the concept of a larger party list could be made to work, however the proposals set out in this consultation raise several points of concern.

Whatever framework is put in place should respond to the electoral landscape as it is, which is a complex multi-party system in which there are more than two parties credibly in a position of securing support and potentially forming part of a future government.

Decisions that are taken in respect to balance are in and of themselves part of the electoral process; for example, the decision and format of the leaders' debates in 2015 shaped the narrative of the campaign and the relevance of various parties.

Alongside this is the pressure on editors to produce programming that fulfils competing objectives. For example, it is arguably easiest to present an argument and then offer an opposing argument between two perceived polarities.

Examples of this approach are numerous across broadcast coverage where – usually – a Conservative politician is set in debate with a Labour politician. One producer, in a not entirely untypical comment, wrote to us that they had 'reverted to 2 MP panels ... which inevitably are Labour/Tory'. This is outside of an election period, but there is no reason that this would be different if such flexibility was given.

Such flexibility, and the differing decisions as to which (what would currently be larger) parties are included may make a simpler segment of television as it implies there are two positions, or that these are the two most important positions, which is not the case and actively goes against the multi-party politics we now have in the UK. The challenge must be for broadcasters to adapt to that reality, not to try and change the rules to suit the status quo.

This sort of consideration is explicitly mentioned in the consultation in **3.26** :

“Several broadcasters have argued that the requirement in Rule 6.9 of the Code to offer all candidates of the larger parties the opportunity to take part in constituency/electoral area broadcast items is unwieldy and unworkable, especially in short news items”

Again, in **3.29**

“The current political fragmentation also creates a logistical challenge for broadcasters”

It does, as does the “rate of change in UK politics”, but these challenges are a product of voters and their choices and should not be ignored for production conveniences –something that would fundamentally misrepresent the political reality.

How decisions would be taken if the larger parties list was removed

The consultation suggests in many places **1.7, 3.13, 3.20, 3.21, 3.22, 3.23, 3.24, 3.25, 3.26, 3.29, 3.30, 3.32, 3.38, 3.44**) as well as the Proposed Amendments to PPRB Rules (**14, 16, 21**) and the Proposed Amendments to Section Five and Section Six of the Code (**6.2**) that decisions will be informed by “evidence of their [parties'] past electoral support and/or current support”.

The determination of this is important given how extensively the language is included in the document, but there is little guidance as to what this evidence is. The only suggestion is made in **3.20**

“evidence of past electoral support (i.e. election results) and/or evidence of current support (e.g. opinion polls).”

There needs to be clear, objective criteria for what representation is secured with indicative levels of better defined support. Clearly there can – and should – be scope for common sense to be applied and parties to make their case if there are disagreements.

Opinion polls can be one such measure, but one example in the consultation document and not the proposed regulations themselves is not enough.

It is our view that real elections where people are voting should be included as part of the measure of current support – this could be demonstrated through parliamentary by elections and council by elections that are more recent than the last held elections. We note that Professor Tony Travers, of the London School of Economics stated of council by-elections,

“If you look at the aggregated local election results, particularly on all-out days we get in May each year, and look at the way the parties perform in those when you adjust those and look at what elections are taking place in a particular year they give you a very clear sense of whether an opposition party is likely to win at the next general. So they are in many ways a better guide now, in some ways, than opinion polls.” (Daily Politics, 13th January 2017)

Additionally, there are moments which fundamentally alter the political landscape -the referenda on Scotland’s independence and on Britain’s relationship with the European Union being two examples. Clearly, elections that were held before these – in many case years before these – are a more limited reflection on parties’ current standings, so the inclusion of past and current support as a measure is welcomed as it offers all parties the opportunity to present a credible case.

As an indicative example of the problem of subjectivity in this area, a member of the public complaining about the level of Liberal Democrat representation on a flagship political programme, received an email from the broadcaster stating:

“the Liberal Democrats, the party has just 9 MPs - they polled fewer votes than UKIP in the last election and have fewer seats than the SNP.”

This is a ridiculous explanation, using a measure of seats on the one hand, votes on the other and determining the Liberal Democrats thus did not warrant inclusion in the programme – it makes no logical sense as it could just as easily be argued that the Liberal Democrats have more MPs than UKIP and polled more votes than the SNP. There is a risk of similar decisions or justifications being given if a process lacks clear, objective, measures.

This concern is compounded by the proposal for individual broadcasters to determine themselves what balance should be struck between parties. This could lead to a variation between broadcasters on the basis of subjective decisions, which are made against a backdrop of currently vague guidance of “evidence of their [parties’] past electoral support and/or current support”.

The current proposal to allow parties to appeal to Ofcom is flawed in that aside from the allocation of PPBs and PEBs, which are scheduled ahead of time, many broadcast programmes and balance issues arise after airing. A complaint that a party was not included in – for example – a panel or discussion, may be upheld by Ofcom, but it is after the fact.

It is also difficult to balance; the inclusion of parties alongside Labour and the Conservatives is in itself a recognition that politics is now more multiparty – if, hypothetically, a panel was held with only these two parties, and a complaint from another was upheld it is hard to

restore balance - either another panel is held with the third party included, in which case the largest two parties have another opportunity to make their case or b) the third party is offered the chance to make their case, perhaps with a fourth party in which case the implication is that these are in some way lesser, or less distinctive views than previous. Given editors and producers tend not to tell uninvited parties of such programmes or segments, it is unlikely such issues could or would be flagged up prior to airing.

We are also not confident that a more subjective approach, allowing greater editorial freedom would not lead to unintended, sub-optimum outcomes. A key example we would suggest is the format of the leaders' debates in 2015, which ultimately ended up being the format proposed by the Conservative Party, with broadcasters being placed under considerable pressure to adapt the format to suit their preferences – something that ultimately did happen.

The only way to avoid this is a clear statement and guidelines ahead of election periods.

We advocated before 2010, through the 2010-15 parliament that the leaders' debates should be held against a set of objective criteria for who is included to remove the subjective arguments we saw in the lead up to that election. The leaders' debates in particular influenced the election campaign as they created a number of 'key moments' that dominated coverage around each of them. It is not good enough to allow one party's preference for a certain format to be used as an effective veto to influence the final shape of the debates. The same argument holds true for other aspects of broadcasting through the campaign and it can only be avoided by clear measures set ahead of the election period to define what performance is necessary for a party receive a certain level of coverage and parity with other parties.

It is our view that if the larger party list were to be removed that Ofcom should take a decision in line with clearly defined, objective measures, as to the number of PPBs/PEBs and editorial treatment that parties should receive in an election period.

The proposal to allow broadcasters discretion has an appeal but risks variation – however intentional or unintentional – and also suits the best resourced parties, the Labour Party and the Conservatives.

This is because representation will have to be made to more than one broadcaster which is something the best resourced parties will be able to do more easily. They will also have better resources to monitor all output across each network, something that less resourced parties will not have the same capacity to do.

In particular, the proposal in **3.27** is a well-intended proposal to:

“With greater flexibility, broadcasters could more easily reflect their local political landscape and comply with the principles of the rules without the need for a prescriptive one size fits all approach.”

This, though, opens up the prospect of parties having to challenge on a very local level. Parties with greater resources for more full time, professional staff at a local level to monitor and challenge such decisions will benefit at the expense of less resourced parties.

It is crucial to reflect that this is not just about parties making representations for their own coverage – representations could be made to exclude others. The model proposed in this consultation risks stacking the cards against less resourced parties and introducing an unintended imbalance to coverage which is regulated exactly to avoid such bias.

The concept of introducing individual editorial freedom to break away from a one size fits all approach is on the face of it reasonable, but seriously risks discriminating against smaller, or less resourced parties, and relies on a fair, informed editorial decision being taken on the electoral landscape in sometimes small, local areas. The fact that sometimes even with the best intention these decisions can be wrong, or not fully informed is recognised in this proposal document through section **3.30**.

We also believe that there needs to be explicit recognition of the differing electoral aims of parties. Some parties stand in all or most areas of the United Kingdom and seek to govern the UK in Westminster. Others stand only in some regions and nations. This distinction in parties' aims, audience and relevance to viewers should be recognised in these guidelines.

Clearly, broadcasters and programmes that are regional or national in nature will be tailored towards their audience, and there are times when parties that only stand in certain regions or nations are a relevant part of a UK wide debate. This however, should not mean parity in UK wide broadcasts for parties that explicitly do not seek to govern the whole UK or offer themselves as option for most voters across the UK through their decision to only stand in certain regions or nations.

Do you agree with the proposal laid out in paragraph 3.30 that Ofcom produce an annual digest of electoral support? Give reasons for your answer.

This is something of a case of what is good for the goose should be good for the gander. If Ofcom is to produce a 'digest' which is intended to assist smaller broadcasters with editorial decisions, why can this not extend to making a decision on parties' standings more generally?

If such a document is required, to mitigate against the risk that editors or broadcasters who are less informed of the political landscape feel less able to take decisions on balance, then surely the natural solution to this should be a more objective measure, and explicit judgement against this from Ofcom?

Do you agree with the proposed amendments to Section Six set out in Annex 5 a) in relation to larger parties and b) to include BBC broadcasting services and BBC ODPS? Give reasons for your answer.

We raise the same concern with the ambiguous definition of 'evidence of past electoral support and/or current support.' This should be better defined with proper objective measures.

Do you agree with the proposed amendments to the PPRB Rules set out in Annex 4 a) in relation to larger parties and b) to include BBC broadcasting services? Give reasons for your answer.

We raise the same concern with the ambiguous definition of 'evidence of past electoral support and/or current support.' This should be better defined with proper objective measures.

We believe in particular there should be a distinction made between parties meeting the proposed criteria¹ to secure a PEB and those parties that have demonstrated a level of reasonable support.

It should be made clear that parties who meet the criteria in terms of the number of seats they stand in and secure a defined level of support should receive more than 1 PEB, in contrast to those standing in the required number of seats but receiving exceptionally low levels of support.

We believe that this should go further with clear criteria set for how many PEBs a party will receive in line with objective, transparent criteria. E.g. X PEBs will be allocated to parties that have demonstrated support through Y. This should be a range of measures that allow for objective decisions to be taken and can be easily understood (e.g. opinion polls, seats, by election and other recent electoral results).

In terms of the proposed changes to airing times of the PPBs and PEBs, we oppose the proposal to expand the airing window to 11.30pm, which we believe falls outside what could reasonably be considered 'peak time' as previously defined. We also believe there should be a requirement for slots that are allocated to be comparable so there are not instances of one party's PPB/PEB being allocated at 7pm, and another at 11.25 – which could happen under these proposals.

We believe that more flexibility in PPB and PEB slots should be available – either in operating similarly to radio guidelines, so and length up to 4'40" could be chosen or through shorter slots of 1'40 and 0'40 to give parties more flexibility in their broadcasts.

Do you have any comments on Ofcom's proposed amendments set out in Annex 5 for the purpose of regulating BBC broadcasting services and BBC ODPS in the area of due impartiality and due accuracy?

No.

Yours sincerely,

¹ "contesting one sixth or more of the seats up for election in the case of first-past-the-post, multiconstituency elections such as a General Election. For proportional representation systems of election (such as the European Parliamentary Elections), the minimum qualifying requirement for the allocation of one PEB should be set, reasonably and fairly for each election, according to criteria which have regard to the particular system of voting, the number of seats available for election, the number of constituencies/regions, and the number of candidates nominated by the party."