

Fair elections under threat? The Loophole List

September 2019

Introduction

Political campaigning has shifted increasingly online in recent years, given the new and increased opportunities for engaging people and providing information to voters. While the practices of online campaigning – such as targeting voters on the basis of certain characteristics – are not entirely new, they have changed qualitatively in terms of scale, sophistication and reach.

Our election rules have not kept up with the shifting nature of campaigning, and our regulators appear powerless in the face of emerging threats. As Damian Collins MP, the chair of the House of Commons Digital, Culture, Media and Sport Committee, has said: *“You can use technology to effectively launder money into political campaigns in micro donations including from overseas and our electoral law was established to make sure voters could see who’s campaigning on what, who’s paying for it, who it’s there to promote. And yet technology allows people to sidestep all of those rules and regulations.”*¹

Despite recent scandals, online political campaigning remains an almost entirely unregulated Wild West. The key piece of legislation in this area, the Political Parties, Elections and Referendums Act 2000 (PPERA 2000), was written before social media even existed.

That means any snap election that takes place before our campaign rules are updated risks being severely undermined – whether in terms of public trust in our democratic processes or indeed materially, through interference, wrongdoing and exploitation of the many loopholes in Britain’s legal framework.

In this briefing we highlight just some of the loopholes that we believe pose a substantive threat to the freedom and fairness of elections in this country.

The APPG on Electoral Campaigning Transparency – of which the ERS is a part – will soon be publishing recommendations on the legal changes needed to close these loopholes.²

Here we describe some of the loopholes putting fair elections under threat in the event of a snap general election, unless action is taken.

Finance

1. Under the Political Parties, Elections and Referendums Act 2000 (PPERA 2000), any contribution of more than £500 (to a political party or campaign) must come from a UK-based individual or company. However, since sums below £500 are not classed as ‘donations’ in the law, parties are not required to check the source of the donation.³ This creates a major loophole for foreign donors to fund party activities or campaigns in the UK – e.g. by **breaking up large donations into smaller units**. Related risks were highlighted by the recent case of the Brexit Party receiving PayPal donations which lacked information on country of origin. The Electoral Commission have highlighted this as a concern.⁴

1. <https://www.bbc.co.uk/news/entertainment-arts-49278999>

2. <https://fairvote.uk/electoral-campaigning-transparency/>

3. Parties are required to check that multiple sums under the £500 threshold are not from the same source: “You should ensure that you have sufficient information from the crowdfunding provider and maintained your records in a way that enables you to ascertain if multiple donations have come from the same source.” Electoral Commission: Crowdfunding and donations permissibility factsheet. https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Factsheet-Crowdfunding-UKPGE-2015-.pdf

4. <https://www.electoralcommission.org.uk/political-parties-and-non-party-campaigners-accepting-payments-online-0>

5. <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-49726822>

2. Donations can also be channelled through the **use of Unincorporated Associations**, potentially masking many separate donations through a single entity. Unincorporated Associations only have to declare donations over £25,000 with the Electoral Commission, and have few legal reporting requirements. While one such trust was recently fined for failing to report donations⁵, the origins of these donations did not need to be reported.
3. The **lack of real-time donation reporting** during elections means that voters often only find out about potential conflicts of interests or influences driving the debate long after the voting. Donations are reported weekly during an election campaign (quarterly at other times) and spending returns are required only 3-6 months after an election, depending on the amount spent. In the case of a referendum, this is especially problematic given there is not another chance for voters to take these factors into consideration and hold campaign directors to account.
4. It is **harder to distinguish between 'local' and 'national' spend** (both of which are regulated by spending limits) with online campaigning. The invoices parties provide for online adverts do not specify who or where the adverts are targeted, potentially allowing national spending to be used for campaigning in marginal seats and for spending thresholds to be breached. Reporting of spending online is subject to limited regulatory oversight. **Parties are not required to break down their social media spend**, but can 'hide' online advertising under larger categories, such as market research, advertising or unsolicited campaign material.
5. The primary electoral law on spending is primarily focused on parties. But that creates a window for **campaign groups to act as proxies for formal parties**. Although there are rules around the involvement of third parties in campaigns during election periods, this recent legislation has caused concern amongst UK charities about the impact on their activity and yet appears to have done little to address the role of campaigns acting as proxies for parties online.
6. While UK campaigners are required to register with the Electoral Commission for election periods, **foreign states, organisations or individuals are able to influence UK campaigns with online ads** with little oversight. Millions can also be pumped into campaign groups – including from foreign donors – outside of regulated campaign period, without funding transparency. We have, for instance, little idea who is funding the Brexit debate – whether the People's Vote campaign or the various pro-No Deal Facebook groups which have funnelled millions into targeted social media campaigns, except through voluntary releases⁶. The Electoral Commission's report on transparency states: "*At the time when the rules were made in 2000, the UK Government and Parliament were worried about foreign donations to political parties. They had not seen the potential for foreign sources to directly purchase campaign advertising in the UK.*"
7. The fact that most of the online platforms on which adverts can be purchased are based overseas raises jurisdictional and regulatory enforcement concerns, making it hard to track down, verify and, if necessary, take action against foreign actors interfering in the UK's democratic processes. For example, in their report on the investigation into the use of personal data for political purposes, the ICO said "*The investigation into the activities of AIQ have presented a number of jurisdictional challenges. In their letter of the 5th March 2018, in response to a number of enquiries, AIQ stated that they were 'not subject to the jurisdiction of the ICO' and ended with a statement that they considered their involvement in the ICO's investigation as 'closed'.*"⁷

6. E.g. <https://www.theguardian.com/politics/2018/aug/18/founder-superdry-donates-1-million-pounds-peoples-vote-brexit-deal> and <https://www.opendemocracy.net/en/dark-money-investigations/arron-banks-and-missing-11m-for-brexit>

7. AIQ is a data analytics company that worked with some campaigns during the EU referendum. <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>

8. E.g. <https://www.bbc.co.uk/news/uk-northern-ireland-44869627> and <https://www.theguardian.com/uk-news/2018/jul/30/transparency-international-uk-hospitality-corrupt-regimes-azerbaijan>

8. As noted by Transparency International (TI), there is clear evidence of foreign governments and interests seeking to interfere in our democratic process.⁸ TI UK add that foreign governments may be seeking to break the rules on campaigning by funding those who are not political parties or candidates at elections. The rules require that companies must be carrying out some business in the UK (and registered in the UK or any EU member state) in order to fund political parties or campaigns, but **they do not need to prove that the funds come from their UK activity**. It is therefore possible for any unscrupulous power to set up a UK company, begin trading a nominal amount of cashflow through it, and then use this as a vehicle to fund elections.
9. Since 2013, the Electoral Commission has recommended that **company donations should be funded only from UK-generated activities – but this recommendation has not been implemented**. The Atlantic Council and TI have both raised this as a gaping hole in the law, exacerbated by a lack of due diligence checks at public sector register (but not active regulator) Companies House.
10. Data is playing a huge role in political campaigning today. This makes datasets a huge campaign asset. They can be purchased outside of a campaign period thus not requiring declaration. **Given that we are frequently in de facto election mode, this means that donation and spending limits can be evaded by donating just out of an official campaign period**. Official campaigners and parties do not have to provide audits of their sources of assets at the beginning of a campaign period, meaning almost ‘anything goes’ regarding any preexisting assets at the start of a campaign. When data is the primary battleground, this is a major loophole.

Lax sanctions and dispersal of responsibilities

Whilst the Electoral Commission are responsible for national campaigns the police are responsible for local candidate activity. The EC can investigate breaches and impose a civil sanction (monetary fine) if wrong-doing is found. The police can also investigate breaches and refer for criminal prosecution.

11. Crucially, the **Electoral Commission do not have powers to obtain information outside of a formal investigation** – e.g. from social media companies, when these are suspected to have broken the rules (such as breaching spending limits). By contrast, the Information Commissioner was given these powers in 2018.
12. There are **differing priorities in the various organisations charged with dealing with electoral offences**. In the case of the Metropolitan police, concerns over ‘political sensitivities’ over Brexit may have undermined the ability of the police to investigate criminal allegations on what is a live political issue – perhaps understandably given public concern over the need for the police to focus on other crimes.⁹
13. As noted by FairVote UK and the ERS, the current Electoral Commission **sanctions for wrongdoing can be viewed as the ‘cost of doing business’**. Leveraging maximum fines of £20,000 after campaigns have finished, in relation to spending in the millions, constitutes a major flaw in the legal framework. When sanctions are weak – and at any rate, it is not the directors who are liable, as noted – the rules we do have are undermined.

9. <https://www.bindmans.com/news/politicians-to-bring-a-claim-against-metropolitan-police-over-june-2016-brexit/>
The Met later ruled contrary to the Electoral Commission, finding ‘no evidence’ of crimes by Leave.EU and Arron Banks.

Misinformation and data

Technological development has led to the proliferation of information sources online and has transformed how voters consume campaign content. The quantity of information makes it harder for people to assess the quality of content and know where to place their trust. But this makes it easier than ever to hide knowledge in plain sight. There have been warnings from official sources of concerted election interference campaigns¹⁰ and, at least in other countries, misinformation has had a wide reach during elections.¹¹

10. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/fake-news/oral/80607.pdf>

11. <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>

14. Campaigners are increasingly using citizens' personal data to create detailed profiles, which are then used to micro-target voters with highly personalised campaign adverts and information. As 'dark ads' are visible only to the creator and the individual or group being targeted, **different voters can be targeted with conflicting information without the sender facing scrutiny** beyond what the social media giants deem appropriate. As BuzzFeed and other outlets have noted, existing transparency rules are easily evaded.

Combined with the lack of a breakdown in social media spend at local and national levels, this makes it hard to know which messages are being communicated to voters and where. It also means that inaccuracies or falsehoods can go unchallenged, and purveyors of false or misleading information cannot be held to account if their identity cannot be verified.

In this regard, the role of third-party campaigners and external data analytics agencies in collecting, organising and analysing online personal data for use in elections is opaque. There is little information on what data-gathering take place before the regulated election period – personal data can be gathered and databases acquired/amassed before the start of an official campaign. In the case of the EU referendum, online data gathering exercises for political purposes were at times conducted through online 'quizzes' and 'prize draws' with the sole purpose of use for social media micro-targeting, unbeknown to potential voters.¹²

12. <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf>

15. Currently there is a **near-total lack of regulation of online political advertising**. This means that, as Full Fact have put it: *"Any election or referendum conducted under the current rules would be vulnerable to abuse. Currently, it is possible for a candidate to run a thousand different political campaigns in the same election, promising something different to each group it targets. If we do not act, we risk undermining the principle that democracy is a shared experience."*¹³

13. <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century>

a. Since 1999, the Advertising Standards Authority is not responsible for the regulation of or complaints about election and political advertising. This means that there is a significant gap in the regulation of political advertising, with all political adverts apart from those on broadcast media (which are banned in the current system) effectively unregulated.

b. There are a number of steps which should be taken to prevent the spread of misinformation, one of which is the inclusion of an 'imprint' (a disclosure stating who paid for and promoted campaign material) for digital campaign material as is the case with offline election material. Despite a consensus that this should be implemented, the government has still failed to legislate.

Under enormous pressure following revelations from the Cambridge Analytica scandal and the EU referendum, Facebook, Twitter and Google introduced some transparency to political advertising, for example by including imprints on political ads, allowing users to see who paid for and promoted political material, and by setting up advertising databases, which allow users to see which political adverts are running on their platforms (though these tools are not available in all countries).

16. There is no legal oversight or standard setting for these tools. **There is no requirement that they are accurate, up to date or indeed can be scrutinised by academics, journalists and civil society.** Further, Facebook’s database, for example, does not provide information on the number of users reached by political adverts and whether and which targeting settings were used; it does not pick up on adverts by individuals; and in some cases it makes it hard to find out who is actually behind an ad.¹⁴

14. <https://www.theguardian.com/politics/2019/apr/03/grassroots-facebook-brex-it-ads-secretly-run-by-staff-of-lynton-crosby-firm>

Analysis by Mozilla of Facebook’s new ad transparency tool in the run-up to the European parliamentary elections found that *“anyone looking was unable to find out who was buying EU election ads on Facebook and who they were targeting, ultimately rendering Facebook’s efforts lip service. [...] For example, Facebook says ‘You can search data for all active and inactive ads about social issues, elections or politics.’ But when put to the test, technical or data issues affected a user’s ability to reliably retrieve data from multiple searches.”*¹⁵

15. <http://www.netimperative.com/2019/07/mozilla-exposes-12-major-bugs-in-facebooks-transparency-api/>

17. The **lack of a single national database of online ads** – instead dispersed between private companies and voluntary efforts – means it can be difficult to piece together a picture of where parties may be offering contradictory messages to different groups. This threatens the concept of a national debate.

Conclusion

Money in politics is not a new phenomenon, but the move to increased use of online campaign activity has created new avenues for existing loopholes to be exploited or for new problems to emerge.

As talk of a fresh general election or referendum heats up, the need to bring Britain’s outdated election laws into the 21st century is urgent.

As things stand, our elections are vulnerable to foreign interference, disinformation and illicit donations. We cannot leave the task of protecting our democracy’s future to the whim of today’s tech giants.

When our primary election rules were being drafted in 1999, just 13% of households had internet access. Nearly 20 years on, campaigning has totally changed.

As things stand, much of the campaigning sphere is an unregulated ‘wild west’ that threatens the principles of transparency, fairness and the notion of a level playing field. The ease with which our rules can be broken or dodged has been revealed in a spate of recent scandals. It does not have to be this way.

It is time for a full review of our dangerously outdated campaign rules. Without reform, we are leaving the door wide open to democratic failure.