

Committee on Standards in Public Life – Review of electoral regulation

20th August 2020

We welcome the CSPI's review of electoral regulation in the UK, particularly in light of how digital campaigning has transformed the way parties and campaigners engage with voters. Public trust in our democratic processes, especially in key political events such as elections and referendums, is contingent upon ensuring transparency, fairness and accountability. However, there have been a multiplicity of threats affecting public trust, and our democracy, more generally in recent years.

The Electoral Reform Society has been at the forefront of highlighting the issue of unregulated online political campaigning. Online campaign regulation and more broadly the role of money in politics are intimately connected with key issues on which the ERS has long campaigned: transparency of the UK's democratic processes, good quality information and political debate, and up to date electoral law.

About the Electoral Reform Society

The Electoral Reform Society is the UK's leading voice for democratic reform. We work with everyone – from political parties, civil society groups and academics to our own members and supporters and the wider public – to campaign for a better democracy in the UK.

Our vision is of a democracy fit for the 21st century, where every voice is heard, every vote is valued equally, and every citizen is empowered to take part. We make the case for lasting political reforms, we seek to embed democracy into the heart of public debate, and we foster the democratic spaces which encourage active citizenship.

Executive Summary

- The regulation of political finance in the UK should be based on the values of transparency, fairness and accountability. Their interpretation and application should be updated to account for the increase in online political campaigning, as a way of ensuring public trust and allowing the Electoral Commission to fulfil its important regulatory role effectively. Our submission outlines steps which can be taken to close some of the loopholes surrounding political finance, particularly online.
- The government's recent proposals on extending imprints to online election material are a welcome first step towards enhancing transparency, fairness and accountability, and will assist the Electoral Commission in its important monitoring and enforcement work. However, a clear timeline as to when the new digital imprints regime will be introduced needs to be set out as a matter of urgency.
- The Electoral Commission has a strong track record as an independent regulator and there are high levels of satisfaction among those who work with the regulator and among the public. Its roles in overseeing the delivery of elections and electoral registration have equipped it with considerable expertise, institutional capacity and ability to liaise with a variety of stakeholders (from election officials to third-party campaigners), which assist it in its role as regulator of election finance.
- The Electoral Commission's powers as regulator of election finance should be enhanced so that it can appropriately monitor and investigate those it regulates, including powers to obtain and share information outside a formal investigation, and to investigate breaches. The enhanced resources and powers granted to the Information Commissioner's Office (ICO) are an example of how a regulator can keep pace with changes brought about by online campaigning.
- Though the Commission supports compliance with campaign finance laws through the guidance and advice it provides, its enforcement and sanctioning powers should be increased so that they act as a deterrent against infractions, rather than being seen as the cost of doing business. We strongly believe the civil sanctions powers available to the Commission are completely out of date and inadequate for modern political campaigning.
- Currently, there are two separate regimes governing political finance laws: candidate finance is regulated under the Representation of the People Act 1983 (RPA 1983), with the police as enforcer; party and campaigner finance is regulated under the Political Parties, Elections and Referendums Act 2000 (PPERA 2000) and enforced by the Electoral Commission. The current disjointed and inconsistent regime risks creating 'enforcement gaps', given the lack of alternatives to police investigation and criminal prosecutions currently available under RPA 1983 for breaches to candidate finance laws.
- We believe the Electoral Commission should be responsible for enforcing candidate finance laws as well so that there is one simple, consistent and proportionate regime, rather than the current outdated dual regime. A civil sanction regime enforced by the Electoral Commission could help bridge this gap and improve fairness and accountability. Expanding the Electoral Commission's powers to include the enforcement of candidate finance laws could also enhance the transparency of candidate expenses, which are currently held by local returning officers rather than stored centrally as they are for parties and campaigners.

Question 1. What values do you think should underpin the regulation of donations and loans, and campaign expenditure by candidates, political parties and non-party campaigners in the UK, and why? Such values may include, though are not limited to, concepts such as transparency, fairness and accountability.

1.1. We believe that the regulation of political finance in the UK should be based on the three key values outlined above: transparency, fairness and accountability. Our polling on election integrity shows that these values are also supported by the public: When presented with 12 options on problems with British democracy, 48 percent of respondents chose election campaigns being free from the influence of large financial donors as one of the issues of importance to them; 42 percent said that all parties having fair access to elections was important; and 41 percent thought that online campaigning activities should be transparent and regulated.¹ But the interpretation and application of these values must be updated to account for the increase in digital campaigning techniques and consequently in the amounts being spent on social media platforms in recent years, which have threatened the effective implementation of these principles and have the potential to undermine public trust.

1. Electoral Reform Society (2018). Poll: 'Need' for voter ID should be least of our worries, say voters. 6 June.
<https://www.electoral-reform.org.uk/latest-news-and-research/media-centre/press-releases/poll-need-for-voter-id-should-be-least-of-our-worries-say-voters/>

1.2. With regards to transparency, voters should know how much money is being spent and received by parties and campaigners in an effort to engage them in democratic debate. The Electoral Commission should be able to monitor political finance easily through accurate and timely reporting of donations and spending, and thus ensure compliance with the law. However, reporting of spending online is subject to limited regulatory oversight. Parties, for example, do not need to provide a breakdown of social media spend, but can 'hide' online advertising under larger categories, such as market research, advertising and unsolicited campaign material. The invoices parties provide for online adverts do not specify to 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. The Electoral Commission made a recommendation, which we endorse, that spending returns should include more detailed and meaningful information on spending online.²

2. Electoral Commission (2018). Digital campaigning: Increasing transparency for voters.
https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Digital-campaigning-improving-transparency-for-voters.pdf

1.3. 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, there is a major loophole for foreign donors to fund party activities or campaigns in the UK, for example by breaking up large donations into smaller units – an issue that came to prominence during the 2019 European Parliament elections, through the alleged use of PayPal donations to hide country of origin.³ We recommend that parties and campaigners check the source and admissibility of the donations they receive,⁴ and that all donations, regardless of amount, are classed as such or at least that the £500 threshold for donations reporting is lowered significantly to prevent the rules being circumvented.

3. BBC News (2019). Brexit Party 'at high risk' of accepting illegal donations. 12 June.
<https://www.bbc.co.uk/news/uk-politics-48611704>

4. The Electoral Commission has also recommended this. Electoral Commission (2019). Political parties and non-party campaigners accepting payments online. 12 June.
<https://www.electoralcommission.org.uk/political-parties-and-non-party-campaigners-accepting-payments-online>

1.4. 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. The format in which donations are

published, frequently in inaccessible PDFs, rather than as live, fully searchable digital records, exacerbates this problem. 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 their 'one-off' nature which means that voters do not have another chance to take these factors into consideration and hold campaign directors to account, as they might with a general election.

1.5. 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 regulatory oversight. 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 are generated from their UK-based activity. It is therefore possible for an 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. Millions can also be pumped into campaign groups – including from foreign donors – outside of the regulated campaign period, without funding transparency.

1.6. The Electoral Commission made a series of recommendations, with which the ERS strongly agrees, on how to improve transparency around who pays for digital campaigns in its 2018 report.⁵ These include ensuring that spending money on election and referendum campaigns by foreign individuals or organisations should not be allowed, and that there should be enhanced controls – including by social media companies – on donations and loans to prevent foreign money being used in our democratic processes. The Electoral Commission has also long recommended that company donations should be funded only from UK-generated activities with checks to ensure companies can prove this – but this recommendation has not been implemented.

5. Electoral Commission (2018). Digital campaigning: Increasing transparency for voters. https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Digital-campaigning-improving-transparency-for-voters.pdf

1.7. In terms of fairness, political finance rules should apply to candidates, parties and campaigners in a way which fosters a level playing field for all – they should be able to raise funds, within the limits imposed by law, in order to conduct an election or referendum campaign and spend these in a way that is permissible by law. Political finance laws should not pose an unnecessary burden on parties and campaigners, preventing them from taking part in democratic processes.

1.8. Finally, it is important to ensure that those regulated are held accountable and comply with the law, through working with the regulator. Appropriate sanctions should be imposed if this is not the case. Currently, the Electoral Commission's sanctioning powers are limited – with its maximum fine of £20,000 potentially being seen as merely the 'cost of doing business' by well-resourced campaigners seeking to circumvent the rules. Further, the fact that online adverts can easily be purchased from overseas at the moment 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. The Electoral Commission (and, in the case of candidate finance, the police) must be able to obtain information from social media platforms (such as the registered address of the account paying for an advert) in order to monitor compliance with the law and

take action where necessary. In this work, it could collaborate with other international regulators, as the Information Commissioner has been able to do with regards to data privacy law.

1.9. We welcome the government's recent proposals on extending imprints to online election material, which will enhance transparency, fairness and accountability, and assist the Electoral Commission in its important monitoring and enforcement work. However, a clear timeline as to when the new digital imprints regime will be introduced should be set out as a matter of urgency, to avoid kicking the issue even further into the long grass, especially considering that the government first committed to introducing digital imprints more than 15 months ago, following a previous consultation.

1.10. The First Past the Post electoral system exacerbates many of the potential problems set out above. The fact that a candidate can win a seat/a party can win an election on a minority of the vote by a very small margin, means that the hyper-localised, precise targeting of spending and information made possible by unregulated online campaigning can have considerable impact on who represents and governs us. This undermines the value of a level playing field we highlighted above. First Past the Post encourages candidates and parties to focus their efforts on winnable marginal seats – the extent to which this is the case, however, is unknown given the disjuncture between candidate and party finance laws (with the former being regulated under the Representation of the People Act 1983), and the fact that current rules do not allow for an accurate picture of where and how parties are investing digital campaign resources, thus undermining the values of transparency and accountability.

The regulatory remit of the Electoral Commission

Question 2. Does the Electoral Commission have the powers it needs to fulfil its role as a regulator of election finance under PPERA? It would be helpful if responses would consider the Commission's role in a) monitoring and b) investigating those it regulates.

Question 3. What could the Electoral Commission do differently to allow it to perform its role as a regulator of election finance more effectively?

2.1. The ERS believes that the Electoral Commission's powers as regulator of election finance should be enhanced so that it can effectively monitor and investigate those it regulates. The Commission should be given enhanced powers in relation to obtaining information, investigating breaches and issuing appropriate sanctions, so that it can perform its role even more effectively, particularly given the challenges brought about by digital campaigning.

2.2. The Commission has a strong track record as an independent regulator and there are high levels of satisfaction among those who work with it, as stated by Professor Justin Fisher and the Association of Electoral Administrators (AEA) in evidence to this consultation.⁶ Through publishing guidance on the law and providing advice in response to queries, the Commission supports compliance with campaign finance laws and helps to prevent wrongdoing before it occurs. Nevertheless, where this is not the case, the Electoral Commission's enforcement and sanctioning powers should be increased so they can act as a meaningful deterrent against infractions.

6. Committee on Standards in Public Life (2020). Review of electoral regulation Written evidence Submissions 1 - 20. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905688/CSPL_Regulation_of_election_finance_-_written_submissions_1_-_20.pdf

2.3. The Electoral Commission does not currently have the power to obtain information from those it is seeking to regulate outside of a formal investigation, which limits its ability to assess whether or not an investigation is the most appropriate course of action. The Electoral Commission has called for this power to be granted to it,⁷ and this was recently backed by the House of Lords Democracy and Digital Technologies committee.⁸

7. E.g. Electoral Commission (2018). Digital campaigning: Increasing transparency for voters. https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Digital-campaigning-improving-transparency-for-voters.pdf

2.4. The Commission does not also currently have the explicit power to share information with the police or other regulators, which hinders its ability to take action more promptly.

8. House of Lords Select Committee on Democracy and Digital Technologies (2020). Digital Technology and the Resurrection of Trust. Report of Session 2019-21. <https://committees.parliament.uk/publications/1634/documents/17731/default/>

2.5. The current Electoral Commission sanctions for wrongdoing can be viewed as the ‘cost of doing business’. Leveraging a maximum individual fine of £20,000 after campaigns have finished, in relation to spending in the millions, constitutes a major flaw in the legal framework. Perhaps the most well known example of this are the £61,000 fines the Electoral Commission imposed upon Vote Leave in 2018 for overspending during the EU referendum campaign.⁹ Another example is the £20,000 fine imposed upon the Liberal Democrats for missing spending returns accounting for payments totalling £184,676.¹⁰ The government’s recent imprints proposals have highlighted the contrast between the Electoral Commission’s limited sanctioning powers in relation to parties and campaigners, and the unlimited fines which can be levied by the police against candidates.¹¹ Multiple parliamentary committees, civil society organisations and others have called for the Commission’s fines to be increased in recent years.¹² Most recently, the House of Lords Democracy and Digital Technologies committee recommended increasing the Electoral Commission’s maximum fine to £500,000 or four percent of a campaign’s total spend, whichever is greater.¹³

9. Electoral Commission (2020). Investigation: Vote Leave Ltd, Mr Darren Grimes, BeLeave and Veterans for Britain. <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations/investigation-vote-leave-ltd-mr-darren-grimes-beleave-and-veterans-britain>

10. Electoral Commission (2016). Investigation: Liberal Democrats 2015 UK Parliamentary general election campaign spending return. <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations/investigation-liberal-democrats-2015-uk-parliamentary-general-election-campaign-spending-return>

11. Cabinet Office (2020). Transparency in digital campaigning: Technical consultation on digital imprints. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908358/Digital_imprints_consultation.pdf

12. See, for example, Electoral Reform Society (2019). Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century. <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century/#sub-section-9>

13. House of Lords Select Committee on Democracy and Digital Technologies (2020). Digital Technology and the Resurrection of Trust. Report of Session 2019-21. <https://committees.parliament.uk/publications/1634/documents/17731/default/>

14. Electoral Reform Society (2019). Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century. <https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century/#sub-section-9>

15. See also recommendation 36 of the House of Lords Democracy and Digital Technologies committee: <https://committees.parliament.uk/publications/1634/documents/17731/default/>

2.6. The enhanced resources and powers granted to the Information Commissioner’s Office (ICO) following the implementation of the EU General Data Protection Regulation (GDPR) and associated UK Data Protection Act 2018 (DPA 2018) might serve as an example of how a regulator can keep pace with changes brought about by online campaigning. The GDPR and DPA 2018 allow the ICO, inter alia, to fine organisations up to four percent of global turnover, or £17 million, and grant them the powers of compulsory audit, no notice inspections, and demands for access.¹⁴ It is striking that we now have a regulator with substantial powers to protect data privacy, but no such powers have been granted to the regulator entrusted with protecting our democracy.

2.7. Under PPERA 2000, the Electoral Commission regulates the funding and spending of political parties and other campaigners, but not the direct funding of and spending by candidates, which fall under the Representation of the People Act 1983 (RPA 1983) and are enforced by the police. Granting the Electoral Commission the power of monitoring and enforcing candidate finance laws would provide for a more coherent, proportionate approach and eliminate some of the existing gaps in regulation and enforcement.¹⁵ It would also free up police resources and remove their involvement in contentious electoral matters, with which they may not be best placed to deal.

Question 4. Are there aspects of the Electoral Commission’s role which detract from its function as a regulator of election finance?

4.1. We do not believe that the Electoral Commission’s roles of overseeing the delivery of elections and electoral registration detract from its function as regulator of political finance. Quite the contrary, in fact. These aspects of its role are mutually beneficial and have equipped it with considerable expertise, institutional capacity and ability to liaise with a variety of stakeholders (from election officials to third-party campaigners), which assist it in its role as regulator of election finance.

Question 5. Are there aspects of the rules which affect or detract from effective regulation of election finance?

5.1. As outlined in our response to questions 2 and 3, the Commission’s limited enforcement and sanctioning powers, combined with the outdated inconsistencies in finance law between what is regulated under PPERA 2000 and the RPA 1983, means that the regulation of election finance is not as effective as it could be.

5.2. As mentioned above, we believe that the Electoral Commission should be given enhanced powers to oversee political finance, ensure compliance and take action against wrongdoing. This should apply to candidates, as well as political parties and campaigners.

Question 6. What are the Electoral Commission’s strengths and weaknesses as a regulator of election finance?

6.1. The Commission’s strengths are its independence, its expert knowledge in matters relating to elections (and referendums) and campaign finance, the quality guidance it provides to electoral administrators (which the AEA described in its submission as ‘outstanding’), and the high levels of satisfaction reported by electoral agents and administrators. Further, the Electoral Commission enjoys high levels of public trust and performs important public service roles, including: its research outputs and online resources; encouraging voter registration and promoting awareness of electoral events, which could not be fulfilled by other bodies given the need for UK-wide coordination.

6.2. The Commission’s main weakness as a regulator of election finance are its limited powers in obtaining and sharing information prior to/during a formal investigation, and the limited sanctions it can impose for wrongdoing.

6.3. Another weakness relates to the gap in enforcement between offences committed under PPERA 2000 (which are the responsibility of the Commission) and those committed under the RPA 1983 (which are a matter for the police), which is primarily the result of the historic failure to consolidate, simplify and modernise our current ‘complex, voluminous and fragmented’ electoral law, as recommended by the Law Commissions and countless others in recent years.¹⁶ As mentioned above, we believe the Electoral Commission should be given the role of monitoring and enforcing compliance with candidate finance laws.

6.4. A final weakness relates to the jurisdictional issue raised by online campaigning, with infractions potentially being committed by foreign actors

16. Law Commission and Scottish Law Commission (2020). Electoral Law A joint final report. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/03/6.6339_LC_Electoral-Law_Report_FINAL_120320_WEB.pdf

and/or on internationally-based digital platforms. The Electoral Commission should have the ability to work with international partners, as the ICO does, to prevent and/or punish wrongdoing.

The enforcement regime for election finance offences

Question 7. Are the Electoral Commission’s civil sanctions powers to fine up to £20,000 adequate?

7.1. As noted above, we strongly believe that the civil sanctions powers available to the Commission are completely out of date and inadequate for modern political campaigning, especially online. The Commission’s sanctioning powers should be sufficiently high to act as a deterrent against wrongdoing, similar to those granted to the ICO following the implementation of the GDPR and DPA 2018.

Question 8. Does the Commission’s civil sanctions regime interact with the police criminal prosecution regime to form an effective and coherent system for deterring and punishing breaches of election finance laws?

8.1. The ERS does not have a position on this issue.

Question 9. In what circumstances would the regulatory regime be strengthened by the Commission bringing prosecutions before the courts for potential offences under election finance laws?

9.1. The ERS does not have a position on this issue.

Enforcement of candidate finance laws

Question 10. Should the Electoral Commission’s regulatory powers be expanded to include the enforcement of candidate finance laws?

10.1. As mentioned in response to previous questions, we believe that the Electoral Commission should be responsible for enforcing candidate finance laws so that there is one simple, consistent and proportionate regime.

10.2. Having the police as regulator of candidate finance laws risks creating ‘enforcement gaps’, given the lack of alternatives to police investigation and criminal prosecutions currently available under RPA 1983 for breaches to candidate finance laws. A civil sanction regime enforced by the Electoral Commission could help bridge this gap and improve fairness and accountability.

10.3. Expanding the Electoral Commission’s powers to include the enforcement of candidate finance laws could also enhance the transparency of candidate expenses, which are currently held by local returning officers rather than stored centrally as they are for parties and campaigners.¹⁷

17. APPG on Electoral Campaigning Transparency (2020). *Defending Our Democracy in the Digital Age*. <https://fairvote.uk/wp-content/uploads/2020/01/Defending-our-Democracy-in-the-Digital-Age-APPG-ECT-Report-Jan-2020.pdf>