

Response to the PACAC Inquiry into the work of the Electoral Commission

13th November 2020

The Electoral Reform Society welcomes the opportunity to respond to this inquiry into the work of the Electoral Commission. It is almost exactly 20 years since the Political Parties, Elections and Referendums Act 2000, which established an independent Electoral Commission, came into effect and it is important to review how our elections regulator can be empowered to tackle the challenges of the 21st century.

As part of our work on political campaigning and updating electoral law, the Electoral Reform Society has long called for increased powers for the Electoral Commission to ensure transparency, fairness, accountability and integrity in our political processes.

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 Electoral Commission plays a vitally important role within our electoral system and its establishment was a great step forward in modernising and enhancing transparency around political processes. The considerable expertise and institutional knowledge it has acquired over the past 20 years should be valued and, where appropriate and necessary, enhanced.
- A lot has changed since the Electoral Commission first came into being, not least the rise in online political campaigning, and, while it performs its role effectively, we believe that the Commission would benefit from additional resources and powers so that it can more effectively ensure compliance with the law and, in the relatively limited number of cases where wrongdoing does occur, take more swift and proportionate enforcement action.
- We make a series of recommendations as to how the Electoral Commission's existing powers should be enhanced, including through increasing the maximum fine it can impose. We also recommend that the Electoral Commission be given the role of monitoring and enforcing compliance with candidate finance laws, so that there is a single, simple regime for political finance regulation. Further consideration should also be given to whether the Electoral Commission's original public education role should be restored and/or enhanced. The Law Commissions'

recommendations on updating electoral law should be implemented without delay.

- The Political Parties, Elections and Referendums Act 2000 sets out the governance of the Electoral Commission, and we believe that appropriate rules are in place to ensure its impartiality and independence.
- Public and political confidence in a regulator are difficult to measure, but there is evidence to suggest that both politicians and the public interact positively with the Commission, and mechanisms are in place to ensure parties' views on matters affecting them can be communicated to the Commission. Those who interact directly and on the ground with the Commission (e.g. electoral agents and administrators) have high levels of satisfaction and confidence in the regulator.
- With elections due to be held across the UK in May 2021, careful planning must take place immediately to ensure appropriate measures are in place to guarantee the safety and security of voters, campaigners and election personnel; to ensure local authorities have sufficient resources to deal with the complex logistics of running covid-secure elections and communicate transparently with voters; and to cope with the likely increased demand for postal voting.

1. The effectiveness of the Electoral Commission in discharging its statutory obligations

a) What roles and functions within the UK electoral system should the Commission perform?

1.1. As the independent body responsible for regulating our democratic processes, the Electoral Commission plays a vitally important role within the UK electoral system. Its mandate is set out in the Political Parties, Elections and Referendums Act (PPERA) 2000,¹ and subsequent amendments, with the Commission being responsible for overseeing the delivery of elections and running national referendums (including testing the referendum question and appointing lead campaigners), regulating political finance, and registering political parties in the UK. The Commission also provides guidance, advice and support to electoral administrators and agents, parties, campaigners and candidates. Through its independent research and consultations, and public awareness work around voter registration, the Commission promotes public confidence and participation in our democratic processes and helps to ensure their integrity.

1.2. The Electoral Reform Society (ERS) strongly believes that the Electoral Commission should continue to perform these functions. Before the passage of PERA 2000, political parties were not required to register as such with an official body in order to be named on a ballot paper, and party and third-party political finance (donations and expenditure) was not regulated. The 2000 Act and subsequent establishment of the Electoral Commission were a great step forward in modernising and enhancing transparency around our political processes, following the recommendations of the Committee on Standards in Public Life.²

1.3. However, a lot has changed since PERA 2000 came into effect, not least the rise of online political campaigning, the increasingly globalised nature of politics, and the ability for wrongdoers to circumvent rules that were set over 20 years ago. In this context, we believe that the Electoral Commission's

¹ *Political Parties, Elections and Referendums Act 2000*. <https://www.legislation.gov.uk/ukpga/2000/41/contents>

² Committee on Standards in Public Life (1998). *The Funding of Political Parties in the United Kingdom*. <https://www.gov.uk/government/publications/the-funding-of-political-parties-in-the-united-kingdom--2>

resources and powers should be enhanced so that it can more effectively ensure compliance with the law and, in the relatively limited number of cases where wrongdoing does occur, take more swift and proportionate enforcement action.

b) Should the remit of the Electoral Commission be changed?

1.4. Since its establishment, the Electoral Commission has acquired significant expertise and institutional knowledge, which informs its research and evaluation work, in addition to building excellent relations with electoral administrators. The ERS believes that the credibility and expertise of the independent regulator of our democracy should be valued and, where appropriate and necessary, enhanced.

1.5. Currently, the Electoral Commission is responsible for regulating political finance (funding and spending) in relation to political parties and third-party campaigners, as per PPERA 2000. The regulation of candidate finance law falls under the Representation of the People Act (RPA) 1983 and is enforced by the police. This dual, disjointed approach is primarily the result of the historic failure to consolidate, simplify and modernise electoral law, some of which has remained unchanged since the 19th century.

1.6. We believe that the Electoral Commission should be given the role of monitoring and enforcing compliance with candidate finance laws, so that there is one simple, consistent and proportionate regime for candidates, parties, and third-party campaigners. 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 sanctions regime enforced by the Electoral Commission could help bridge this gap and improve fairness and accountability, while freeing up police resources. 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.

1.7. As part of broader reform to online political campaigning, we believe that parties, third-party campaigners and (ideally) candidates should be required to submit more meaningful invoices for social media spending to the Electoral Commission, ideally in real time, so that it can more accurately monitor online political campaign activity. Currently, parties and campaigners can ‘hide’ online advertising under larger categories, such as market research, advertising and unsolicited campaign material, and the invoices do not specify to whom or where the adverts are targeted, potentially allowing national spending to be used for campaigning in marginal seats or for spending thresholds to be breached.

1.8. We are pleased that the government has demonstrated its commitment to extending imprint disclosures to online election material as an initial step to making digital campaigning more transparent. Following the closing of its technical consultation, we strongly recommend that a clear timeline as to the implementation of the digital imprints regime is set out without delay. Digital imprints should be the start of further reforms to ensure campaign rules are fit for the digital age.

3 This was repealed through the Political Parties and Elections Act 2009: <https://www.legislation.gov.uk/ukpga/2009/12/section/8>

4 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

5 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/>

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>

Committee on Standards in Public Life (2020). Review of electoral regulation. Written evidence. <https://www.gov.uk/government/publications/review-of-electoral-regulation-written-evidence>

6 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>

7 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>

8 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>

9 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/>

1.9. A further consideration for the Committee relates to whether the Electoral Commission's public education function could be restored/enhanced,³ so that it is not merely limited to promoting voter registration and providing basic information on the electoral system, but can encompass broader informational needs around participation, elections and civic education (e.g. systems of government). This would be a significant step towards enhancing public confidence in our democratic processes.

c) What powers should the Electoral Commission have? Should the existing powers of the Electoral Commission be changed?

1.10. As set out above, 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 in a timely manner. In addition to regulating candidate finance, 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.

1.11. 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,⁴ and this was recently backed by the House of Lords Democracy and Digital Technologies committee, the All-Party Parliamentary Group on Electoral Campaigning Transparency, and many others.⁵ 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.

1.12. As we have long argued in relation to the unregulated world of online political campaigning, the current sanctions the Electoral Commission can impose 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.⁶ Another example is the £20,000 fine imposed upon the Liberal Democrats for missing spending returns accounting for payments totalling £184,676.⁷ Multiple parliamentary committees, civil society organisations and others have called for the Commission's fines to be increased in recent years.⁸ 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.⁹

1.13. 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

10 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>

compulsory audit, no notice inspections, and demands for access.¹⁰ 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.

1.14. As mentioned in response to previous questions, the Electoral Commission does not investigate or sanction breaches which fall under the RPA 1983, which are enforced by the police and prosecution authorities. We believe that such a disjointed approach can lead to gaps in enforcement, with only the most serious cases being taken forward by the police or prosecution authorities. Allowing the Electoral Commission to regulate candidate finance and, where appropriate, impose civil sanctions would allow for a more consistent and proportionate approach, preventing an inappropriate escalation (e.g. referral to the Crown Prosecution Service) where this could be avoided.

2. The governance of the Electoral Commission

2.1. PPERA 2000 sets out the governance of the Electoral Commission stating that there shall be nine or ten Electoral Commissioners, one of whom is appointed to serve as chair (who cannot be a party political nomination), and who can serve a term not exceeding 10 years. Four commissioners are put forward by political parties represented in the House of Commons ('nominated commissioners'). Three commissioners have responsibility for Scotland, Wales and Northern Ireland (the Commission has regional offices across England, which provides some form of representation for this nation as well).¹¹ Section 3 of PPERA states that, with the exception of the nominated commissioners, an Electoral Commissioner must not, inter alia, be a member of a registered party, an officer or employee of a registered party or of any accounting unit of such a party, hold a relevant elective office or have been named as a donor in the register of donations kept by the Commission. This helps guarantee the impartiality and independence of commissioners. Commissioners form part of the non-executive Electoral Commission Board, meaning that they, among other things, set the overall strategic direction and priorities of the regulator, but are not involved in its daily regulatory and other activities. We believe that appropriate rules are in place in the Electoral Commission's governance to ensure its impartiality and independence.

2.2. PPERA also established the Speaker's Committee of the House of Commons, a cross-party committee of MPs, through which the Electoral Commission is directly accountable to parliament. The Speaker's Committee also oversees the appointment of commissioners and the Commission's overall strategy. From its establishment until the 2019 general election, the Speaker's Committee did not include a majority of members from the same party.¹² However, for the first time ever, this convention was broken following the 2019 general election, with the Speaker's Committee having a majority of MPs from the governing party. Given the threats posed in recent months to the Electoral Commission's own existence,¹³ this situation is significantly concerning. We urge your Committee to consider whether a majority of MPs from the governing or any single party should be allowed to sit in the Speaker's Committee.

11 <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/who-we-are/commissioners/selecting-our-commissioners>

12 Renwick, Alan and Kincaid, Charlotte (2020). Why we need an independent Electoral Commission. *UCL Constitution Unit Blog*, 7 October. <https://constitution-unit.com/2020/10/07/why-we-need-an-independent-electoral-commission/>

13 Malnick, Edward (2020). Chairman of election watchdog is forced out. *The Telegraph*, 3 October. <https://www.telegraph.co.uk/politics/2020/10/03/chairman-election-watchdog-forced/>

3. Public and political confidence in the impartiality and ability of the Electoral Commission

3.1. Ensuring that there is confidence in the impartiality and effectiveness of our elections regulator, and that it is perceived as impartial, is highly important. However, it is difficult to ascertain public knowledge of and confidence in a regulator, given it is unlikely that most people will directly interact with it (e.g. two-thirds of people reported having only heard a little or not at all about the Electoral Commission in its 2020 Winter Tracker research).¹⁴ Further, there is little to no external research on knowledge of confidence in the Electoral Commission among the public. Perceptions may be based on particular instances which have been reported on in the media and have come to public prominence, or specific individual interactions. Relying on such perceptions as a guide for reform may therefore not be the best course of action.

¹⁴ <https://www.electoralcommission.org.uk/sites/default/files/2020-10/Winter%20Tracker%202020%20-%20UK%20data%20tables.pdf>

3.2. As part of its annual Winter Tracker research, the Electoral Commission itself does conduct research into whether people have heard of the Commission and, if so, what words they associate with it. Its most recent tracker shows that only seven percent of people reported having heard a lot about the Electoral Commission, with 22 percent having heard a fair amount and 49 percent a little.¹⁵ Less than a third (29%) of respondents said they heard a great deal or a fair amount about the Electoral Commission – this compares to almost half of respondents (46%) who said this about Ofcom and 38 percent who said they heard a great deal/a fair amount about the Financial Conduct Authority. It should be noted that other, less publicly prominent regulators receive similar, if not lower, levels of awareness as the Electoral Commission.

¹⁵ Ibid.

3.3. When asked to choose the words that best describe the Electoral Commission, 27 percent of those who said they had heard of it said that it is independent; 25 percent that it is important; 23 percent that it is professional. Only six percent of respondents said that they perceive the Electoral Commission to be biased and only eight percent said it is uninfluential.

3.4. One must also proceed with caution when determining the extent to which ‘political confidence’ in the Electoral Commission should inform reform of the regulator. One of the purposes of the Commission is to regulate political parties themselves, and they may have an incentive to diminish, or at least not enhance, its powers. Nonetheless, parties themselves acknowledge the salience of the Commission’s work by referring to its research, for example, to back up specific policies (such as voter ID). Further, in its conduct, the Electoral Commission proceeds in a politically impartial way, taking action on the basis of its rigorous processes and as a result of investigations, regardless of party political affiliations.¹⁶

¹⁶ See for example: https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Labour-UKPGE-Investigation-Report.pdf, <https://www.electoralcommission.org.uk/liberal-democrats-fined-ps18000-breaches-campaign-finance-rules> and <https://www.electoralcommission.org.uk/conservative-party-fined-ps70000-following-investigation-election-campaign-expenses>

3.5. There are also mechanisms already in place for representing parties’ views on the Electoral Commission on matters affecting them in the form of the four Parliamentary Parties Panels, which meet quarterly and represent the different areas of the UK (Westminster and the devolved nations).¹⁷

¹⁷ <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/who-we-are/how-we-make-decisions/party-panels>

3.6. Finally, with regard to those actors who do interact with the Electoral Commission directly/on the ground (e.g. electoral administrators and agents, party volunteers, candidates, parties and campaigners), research has shown that there are high levels of satisfaction with and confidence in the Electoral Commission. 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. In his response to the CSPL review of electoral regulation, Professor Justin Fisher – an expert on political campaigning and party finance – stated that electoral agents report ‘satisfaction with the information and guidance provided by the Commission as well as high levels of satisfaction with electoral administration, and low levels of perceptions of electoral fraud. Variations in such attitudes are generally driven by electoral success or failure, party difference and geography.’¹⁸ In their response to the same consultation, the Association of Electoral Administrators (AEA), the professional body representing electoral administrators, said that the Electoral Commission ‘is an excellent provider of guidance, supporting resources and good practice, providing a consistency of approach across the UK. The guidance it produces for ROs, EROs and administrators is invaluable, and its work goes a long way to ensuring the smooth conduct and transparency of various elections, referendums, and electoral registration.’¹⁹

18 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

19 Ibid.

4. The international reputation of and comparators for the UK Electoral Commission

4.1. The Electoral Reform Society has not conducted extensive comparative research into the international reputation of and comparators for the UK Electoral Commission. However, as stated above, over the past 20 years, the Electoral Commission has acquired considerable knowledge, expertise and credibility in the field, which is not the case for many countries across the world. For example, the Electoral Commission’s database has been described as ‘effectively world leading’ by international political finance experts.²⁰

20 Power, Sam (2020). *Party Funding and Corruption*. Basingstoke: Palgrave Macmillan. <https://www.palgrave.com/gb/book/9783030375799>

4.2. With regards to the more enhanced educational role which the Commission might play, we would like to highlight the New Zealand Electoral Commission as an example of how this role might be developed further. The NZ Commission undertakes extensive public information campaigns around most referendums, which go beyond mere prompts to register to vote and the presentation of the arguments of the main advocates and opponents of a referendum issue.²¹

21 Renwick, Alan and Palese, Michela (2019). *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved*. https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184_-_doing_democracy_better.pdf

5. What, if any, reforms of the Electoral Commission should be considered?

5.1. In our responses to questions 1b and 1c, we set out the primary areas for reform of the Electoral Commission, including enhancing its powers and resources, and giving it the role of regulating candidate finance law and enforcing related offences.

5.2. A final, broader area of reform relates to the simplification, modernisation and consolidation of electoral law, in line with the recommendations made by the Law Commission of England and Wales and the Scottish Law Commission.²² As set out in our response to the predecessor committee’s inquiry into electoral law, simplifying, updating and consolidating electoral law

22 Law Commission and Scottish Law Commission (2020). *Electoral Law: A final report*. <https://www.lawcom.gov.uk/document/electoral-law-a-final-report/>

23 ERS (2019). Response to PACAC on Electoral Law Inquiry. <https://www.electoral-reform.org.uk/latest-news-and-research/parliamentary-briefings/pacac-electoral-law-inquiry-written-evidence/>

is long overdue and will assist with improving voters' experience.²³ It is essential that we have robust, clear and coherent electoral laws that are understood by all those participating in our electoral contests, but we also have to ensure that these rules are upheld. Such a consolidation will also greatly assist electoral administrators, providing them with more clarity and flexibility as to the implementation of electoral law, which is particularly important given the challenges they have faced in recent years – from severe cuts to their budgets to having to hold multiple unscheduled polls over a short period of time.

5.3. While not affecting the Electoral Commission directly, updating electoral law will have repercussions for the work it undertakes, in relation, for example, to voters' experience of the poll or to providing guidance and advice to electoral administrators and agents.

6. Effect of Covid-19 on UK elections

6.1. Elections are due to take place in May 2021 across the United Kingdom, given the decision to postpone elections this year in light of the coronavirus pandemic. While this was an entirely appropriate decision, it means that there will be many different elections taking place at the same time. Careful planning must take place immediately to ensure appropriate measures are in place for these important elections.²⁴

24 Some areas have already started putting planning measures in place, e.g. the Welsh Parliament: <https://gov.wales/elections-planning-group-report-september-2020-html>

6.2. At the best of times, elections are a complex logistical exercise, something which has been exacerbated by the cuts made to council budgets and resources in recent years,²⁵ with electoral services being stretched almost beyond repair. While local authorities have admirably stepped up in the past to run unscheduled polls effectively, we should not take their hard work for granted, particularly given the extra measures that will have to be put in place to run Covid-secure elections.

25 Butler, Patrick (2020). Tory council leaders warn of severe cuts in England. *The Guardian*, 12 November. <https://www.theguardian.com/society/2020/nov/12/tory-council-leaders-warn-of-severe-cuts-in-england>

6.3. It is likely that the demand for postal voting will increase, as we witnessed in the US presidential election. Postal voting plays an important role in expanding access to the ballot box – from disabled people to older voters and others who are unable to get to a polling station. This will in turn affect local authorities' planning and resources, for example with regards to having to print and post extra postal ballots, so as to ensure they arrive on time to be received back by election day, or to ensuring that polling stations comply with social distancing and hygiene measures.

6.4. Research has shown that some measures can be put in place in advance to hold 'safe and democratic elections under pandemic conditions'.²⁶ First, transparency of electoral administration, for example by consulting well in advance of polling day (including among vulnerable and harder to reach groups) on any special measures that are put in place to sanitise polling places and safeguard voters. Second, accountability of electoral authorities, so that voters have access to a robust complaints system if things go wrong, and that those in charge of an election can be alerted promptly. Third, communication of what voters can expect at the polling station and what alternatives have been put in place (e.g. postal or proxy voting arrangements). Additional considerations include measures to guarantee the safety of all election personnel (which may involve recruiting additional staff) and to enhance the funding and resources available to electoral administrators to run Covid-secure elections.

26 Birch, Sarah (2020). It is possible to hold elections in a pandemic, but we have to start planning for them now. *ERS Blog*, 15 September. <https://www.electoral-reform.org.uk/it-is-possible-to-hold-elections-in-a-pandemic-but-we-have-to-start-planning-for-them-now/>