

Written evidence from The Conservative Party¹ (TEC 32)

Public Administration and Constitutional Affairs Committee The Work of the Electoral Commission inquiry

The effectiveness of the Electoral Commission in discharging its statutory obligations (Q1)

The governance of the Electoral Commission (Q2)

What roles and functions within the UK electoral system should the Commission perform? (Q1, a)

1. In the Committee for Standards of Public Life 2007 review into the Electoral Commission, the Committee noted the two key pillars of our democratic system: (i) free and fair elections and (ii) healthy, competitive political parties. We believe that these pillars should remain the bedrock of any legislative and regulatory regime.
2. The Electoral Commission's primary function is an executive and administrative one, to oversee the compliance regime for national campaigning finance. In the performance of its functions, it should ensure that the prevailing laws are fairly and proportionately followed, allowing for an appropriate level of transparency on significant donations and significant spending.
3. Political parties and campaigners are essentially voluntary sector bodies, and local associations are almost entirely volunteers (e.g. association officers, members, councillors). As the CSPL stated in its 2007 review, "the regulator must... recognise that political parties are much more like large voluntary organisations than organisations in the public or private sector usually subject to regulation. Behind each career politician stands a regiment of dedicated voluntary party workers; even the local treasurers and election agents (who are subject to regulation) of the largest parties are almost entirely volunteers. The approach of the regulator must be sensitive and proportionate to the voluntary nature of much of political parties' infrastructure."²
4. The Commission should not be a lobbying organisation, nor should it supplant the role of Government and Parliament in determining the broader legislative and regulatory policy framework.

Should the remit of the Electoral Commission be changed? (Q1, b)

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² Committee on Standards in Public Life, Review of the Electoral Commission, 2007, p.2, ([link](#)).

1. The Electoral Commission is unaccountable. Ministers have no direct role. The Speaker's Committee in Parliament is ineffectual and has minimal influence.³ There is little outside challenge or scrutiny.
2. Its core business is to oversee reporting requirements, but in practice its remit is confused. It is often asked to intervene in areas over which has no role. It is disjointed from the direction of government policy.
3. It has conflicts of interest. It provides (often unclear) advice to political campaigners yet wants to prosecute breaches of its own unclear rulebook.
4. There is overlap and confusion with other regulatory regimes (notably data protection), and with the role of the Cabinet Office. To be fair to the Commission, the regulation of digital campaigning has been complex and convoluted because of the imposition of EU law.
5. The party-nominated Commissioners (board members) have minimal influence and are often not consulted.

Public and political confidence in the impartiality and ability of the Electoral Commission (Q3)

1. The Electoral Commission must focus on its core administrative and executive function. But it is not working as it should. As practical illustrations of problems with how the Electoral Commission operates.
2. Different staff members within the Electoral Commission will contact the Conservative Party on advice or investigations with no evidence of co-operation or co-ordination within the Commission. This results in multiple points of contact who have no shared information between them. It is often difficult to keep track of which Commission employee is dealing with which investigation, sanction or submission.
3. The advice provided by the Electoral Commission is often deficient or out of date. For example, the Conservative Party's auditors needed guidance on producing annual reports and accounts; they had guidance from early 2000's; when requested, the Commission did not have an up to date version that was equally as comprehensive. The more recent version lacked information, which resulted in confusion on areas of reporting which were missing in the more recent guidance.
4. Investigations into supposed breaches can take years — for example, the Conservative Party is still currently discussing issues with the Electoral Commission from 2016. The review into the Conservative Party's campaigning activities during 2015 general election

³ The Speaker's Committee sets a broad financial envelope for the Electoral Commission and has a degree of influence over senior appointments. Otherwise, there is little oversight over policy. As set out in Section 15 of PPERA, at the start of a Parliament it can scrutinise the Electoral Commission's Five Year Plan. But in practice, this oversight is weak. The Electoral Commission can diverge from that plan, and it is not clear if the Speaker's Committee can stop the Electoral Commission from undertaking a policy step that it was in disagreement with.

campaign only concluded two years later. The Electoral Commission finalised its inquiries into the EU referendum up to three years after the event.

5. Advice when provided is often contradictory. For example, the Conservative Party previously requested greater clarity over the rules on aggregation of donations (of those under E500, with those above), but different answers were provided by different parts of the Electoral Commission (though this is now concluded).
6. Political parties often have to wait weeks for a response from the Commission; but parties are often given a very tight deadline at turning around requests for information.
7. Processes are more bureaucratic than they need to be. For example, quarterly donation reports are requested to be provided in Excel format as well as PDF format.
8. Guidance are not easily accessible to party volunteers who make up the majority of political activists

What powers should the Electoral Commission have? Should the existing powers of the Electoral Commission be changed? (Q1, c)

What, if any, reforms of the Electoral Commission should be considered? (Q5)

1. The Electoral Commission consistently lobbies for itself to be given more powers this is not an argument for doing so.⁴ Rather, this is public choice theory in action: quangos seeking to expand their remit for their own sake.
2. In light of the fundamental flaws with the operation of the Commission, we believe that reform is needed.
3. One option would be to amend legislation such that the Government would publish a regulatory policy statement, setting out the Electoral Commission's remit and goals (activities it should undertake and not undertake). This framework would be ratified by Parliament as a piece of secondary legislation. This mirrors the approach taken for regulators like Ofgem and Ofwat;⁵ similarly, the Government publishes each year strategic advice and priorities for the Office for Students.⁶ Parallel arrangements could be made in the devolved assemblies/parliaments in relation to the oversight of devolved elections.
4. Better use could also be made of the party-nominated Election Commissioners, especially in the development of guidance and broader operational policy. (It is worth noting that there are statutory restrictions on the party-nominated Commissioners getting involved in parties' day-to-day operations).

⁴ Whilst the Electoral Commission might deny it lobbies it has said: "We will continue to promote and build support for changes to our democratic processes through dedicated campaigns and collaborative working with key partners and stakeholders... This will include public relations and public affairs support" (Electoral Commission, Interim Corporate Plan 2020/21 - 2024/25, April 2020, p. 14-15).

⁵ As an illustration of how such legislation is framed, see Section 3B of the Electricity Act 1989, ([link](#)).

⁶ Office for Students, Guidance from government, ([link](#)).

5. Such a framework would allow for clear Ministerial and Parliamentary oversight, whilst providing a check and balance against election gerrymandering or conflicts of interest.
6. A second option would be to abolish the Electoral Commission. Its statutory donation/spending registration and reporting functions could be transferred to Companies House, who would retain civil sanction powers. Companies House registers large quantities of company information and make it available to the public for scrutiny; it follows up with penalties for the small minority of companies that fail to meet registration requirements; and it works closely with a number of legal bodies to tackle economic crime. The Electoral Commission's core functions could be easily absorbed.
7. Investigations of 'national/party' electoral fraud would be a matter for the police (who already have oversight of 'local/candidate' Representation of the People Act offences). There would be scope to establish a specialist police arm, such as within a body like the National Crime Agency or within a lead police force (akin to the City of London Police being the national policing lead for fraud) which would receive additional government funding for such functions. The Commission's broader policy, guidance and evaluation functions would be transferred to the Cabinet Office.
8. Either option would ensure there is a clearer strategic direction on the substance of electoral policy, whilst ensuring operational decisions are taken at arms' length from the elected representatives who may be personally affected by them.
9. Notwithstanding such potential reforms, we are supportive of the principle — already allowed under PPERA — of statutory guidance, which is drafted by the Electoral Commission following consultation, reviewed or amended by Government, and then presented to Parliament for approval. This allows for clarity and democratic oversight of changes to the law and would prevent some of the problems with unclear or inconsistent guidance that we have highlighted.
10. We would also wish to draw to the Committee's attention the constructive role of the Parliamentary Parties Panel, which is a useful cross-party forum for political parties to engage with both Government and the Electoral Commission. For example, the Government has recently used the Panel to engage effectively over legislative reforms to the Parliamentary Boundary Review process.
11. We recognise that a broader challenge is the fact that electoral law is fragmented and complex.⁷ We welcome the broader work of the Law Commission in seeking to consolidate electoral law, but we appreciate that the Government's immediate legislative

⁷ As the Law Commission's review of electoral law has asserted: "Electoral law in the UK has become complex, voluminous and fragmented... The law [on campaign expenditure], which is contained in the Representation of the People Act 1983 (the 1983 Act) and replicated in election-specific provisions, is extremely complex. The scheme of the 1983 Act is not obvious even to lawyers... At present, the law governing expenses returns, which report expenses, is confusing"; and "From a basic rule of law viewpoint, the law must be clear enough to achieve its policy aim of ensuring that candidates' conduct conforms to its requirements. Yet the law, which has been the subject of several amendments, has grown very complex" (Law Commission, *Election law: a joint consultation paper*, 2014, para 12.5-12.6, [link](#)).

priorities in the field of election law will be to deliver on its 2019 manifesto commitments.

12. This legislative complexity is clearly not the fault of the Electoral Commission, but the Electoral Commission's lack of guidance has not helped. For example, the Electoral Commission's 'situations' guidance on spending for political parties was a thin 14 pages in 2015.⁸ Only since September 2018 did the Electoral Commission start consulting on new statutory guidance on election spending by candidates and political parties, to make clearer the distinctions between candidate and party spend.⁹ The Supreme Court's 2018 Mackinlay judgement has since made the law even more complex, and legislative revisions are urgently needed to clarify the law on notional expenditure.

The enforcement regime for election finance offences

13. The Electoral Commission has civil sanctioning powers that apply to referendums and elections. More serious criminal matters can and are referred to the police, and then considered by a court of law. The courts already have the power to levy unlimited fines and indeed, jail sentences. We see no reason to change this. It is entirely appropriate that the most serious sanctions are overseen by a court of law.
14. The Electoral Commission has repeatedly issued press comments claiming that political parties just see fines as a "cost of being in business". This is wholly incorrect and is a derogatory comment which damages public trust. Being fined brings with it significant political and reputational risk and damage to a governing or opposition party. The courts have powers to issue unlimited fines, and even jail sentences. No professional staff member or voluntary party member would knowingly wish to break the law and risk such penalties. Nor would they knowingly want to attract the associated negative publicity to their professional reputation, or to their party organisation.
15. Although the Information Commissioner has been given powers following an EU Regulation to issue far greater fines, this has merely resulted in such large fines being challenged legally (e.g. as evident by the fines against British Airways, and Marriott hotels); ultimately, these cases are likely to end up in the courts anyway. If the Electoral Commission were to have such powers, we would expect a similar situation. This would lead to more litigation and court disputes and would not be an improvement on the current regime. Whilst beyond the scope of this Committee's review, we would simply note that the Information Commissioner practices are not a good model of a regulator to emulate.
16. One of the 'Macrory' principles of regulatory enforcement (which underpinned the basis of civil sanctions regime introduced via the Regulatory Enforcement and Sanctions Act

⁸ Electoral Commission, *UK Parliamentary General Election 2015 (GB and NI): Situations and procedures*, 2015, ([link](#)); by the 2017 election, it had been expanded to 29 pages, with added sections on campaign spending ([link](#)).

⁹ Electoral Commission, *Draft Codes of Practice for candidates* and *Draft Codes of Practice for political parties*, September 2018, ([link](#)).

2008) is that sanctions should not be focused solely on punishment but should ensure that the offender changes their behaviour and moves back into compliance. We suggest that the Electoral Commission's enforcement regime could make greater use of advice, warnings, statutory improvement notices and enforceable undertakings.

17. For example, the Conservative Party was fined £6,000 in January 2018 owing to the late delivery of a Q4 2017 report. The return was delivered one day late, owing to staff illness. This was not a proportionate sanction given the nature of the breach. Had this been a pattern of behaviour (repeated and lengthy late returns), then it might have been. But otherwise, this illustrates a heavy-handed approach by the Commission in its use of fines.
18. Political parties and referendum participants of all sides have been fined for breaches of technical reporting requirements, across general elections, the EU referendum and the Scottish independence referendum. This suggests we also need to look at whether the actual reporting timetables and processes are fair, manageable and reasonable.
19. Questions also need to be raised about the advice given by the Electoral Commission (and the conflicts of interest within a body responsible for advice and enforcement of its own advice).
20. Whilst the remit of this inquiry does not extend to party funding, we would observe that political parties are required to raise money to fund their operations and campaigning, and this requires the regulatory system to be receptive to the principle of political donations. There is no public support for the state funding of political campaigning, since it would divert taxpayers' money away from public services. However, the Electoral Commission appears hostile to the concept of parties raising money from donors.
21. As we have previously noted, regulation needs to be proportionate to recognise that most political activism is by local volunteers. Political parties across the spectrum receive the bulk of their donations from individual members, and local clubs, councillor groups and political societies. Smaller, voluntary sector organisations tend to be set up as unincorporated associations. It is healthy for democracy for parties to raise money from such small-scale fundraising. But as a consequence, heavy-handed compliance regimes (that might be suitable for 'big business') is not in the public interest and undermines democratic participation.

Prosecution powers

22. The Electoral Commission has neither the capacity nor the competence to act as a prosecutor. There are too many conflicts of interest and would end up 'marking its own homework'. This should remain a matter for the police and the independent Crown Prosecution Service, overseen by the courts.

23. Whilst there are precedents of other bodies than the Crown Prosecution Service operating as prosecutors, we also understand that the judiciary are concerned about the operations and skillsets of them. We note for example, there has been controversy over the conflict of interest the RSCPA has in bringing prosecutions.¹⁰
24. There is a fundamental conflict of interest if the body which provides operational advice and drafts guidance on the law, then has a role as an arbiter and prosecutor of that law.¹¹
25. Prior to the 2005 general election, the failure of the Electoral Commission to issue an advisory opinion on the application of PPERA in relation to soft loans to the Labour Party was instrumental in the decision of the police and Crown Prosecution Service not to prosecute over the 'loans for peerages' scandal. But had the Electoral Commission been the prosecutor, it would have put them in an even more conflicted position.
26. The Conservative Party did not campaign in the 2016 EU Referendum. But we note that since the referendum, there has been criticism of how the Electoral Commission has acted over the legal advice it gave, for failing to ask for evidence from the accused¹², its document handling¹³, and its enforcement decisions.¹⁴
27. We would also add that the Electoral Commission has not handled itself well when it has referred prosecution cases to the police. Claims of criminal breaches of spending rules by Vote Leave and BeLeave were investigated and thrown out by the Metropolitan Police in May 2020.¹⁵ Indeed, Vote Leave followed the advice from the Electoral Commission on making donations to other campaigns such as BeLeave, illustrating the potential conflicts of interest within the Commission.
28. Claims of criminal breaches by Leave.EU were similarly rejected by the police. The National Crime Agency also announced in September 2019 that there was "no evidence that any criminal offences have been committed".¹⁶ This decision to throw out the case

¹⁰ The Environment, Food & Rural Affairs Select Committee has concluded: "The Committee does not believe that the current model in England and Wales where the RSPCA brings private prosecutions alongside its investigative, campaigning and fundraising functions provides the necessary separation to ensure that there is no conflict of interest. The Committee recommends that the RSPCA should continue its important work investigating animal welfare cases and working closely with the police and statutory authorities. It should, however, withdraw from acting as a prosecutor of first resort where there are statutory bodies with a duty to carry out this role. We are not convinced by its arguments that it is in a better position than the CPS to prosecute animal welfare cases" (EFRA Committee, *Animal welfare in England: domestic pets*, November 2015, para 164-165, [link](#)). Such criticism have a clear read across to the Electoral Commission.

¹¹ *The Guardian*, "Elections watchdog got law wrong on Brexit donations, court rules", 14 September 2018, ([link](#)).

¹² "It is astonishing that nobody from Vote Leave has been interviewed by the commission in the production of this report, nor indeed at any point in the past two years" (Vote Leave spokesman in response to Electoral Commission report, *BBC News*, 17 July 2018, [link](#)).

¹³ *Daily Telegraph*, "Electoral Commission in row with Met police, after they are accused of failing to hand over documents", 3 July 2019, ([link](#)).

¹⁴ *BrexitCentral*, "Darren Grimes' total exoneration leaves the Electoral Commission with huge questions to answer", 11 August 2019, ([link](#)).

¹⁵ *Daily Telegraph*, 8 May 2020, ([link](#)).

¹⁶ NCA press release, 24 September 2019, ([link](#)). The Metropolitan Police also stated in September 2019 that whilst there had been some "technical breaches" there was not sufficient evidence of a criminal breach (*Daily Telegraph*, 13 September 2019, [link](#)).

was upheld by the High Court in April 2020.¹⁷ The Electoral Commission was forced to retract its claims.¹⁸

29. Unrelated to the EU referendum, the Electoral Commission referred the Conservative Party's (then) Registered Treasurer to the Metropolitan Police in March 2017 for alleged breaches of PPERA and made the very serious allegation that a criminal offence may have been committed. However, at no point did the Electoral Commission provide any evidence to substantiate this claim that he had knowingly signed an incorrect return, despite stating in their press release that “the evidence gathered during the course of the investigation has given the Commission reason to suspect that an offence may have been committed.” The Metropolitan Police subsequently concluded that there was no case of wrongdoing.¹⁹ The individual's professional body also concluded that there was no case of wrongdoing. Despite this exoneration, the Electoral Commission refused to issue any comment recognising this individual had been cleared — even though it had named the individual on its website in its 2017 press release, where those allegations still remain on its website to the present day.²⁰ This does not inspire any confidence in the competence, fairness or judgment of the Commission and raises a significant question mark of how fair-minded the Commission would have approached this case if they had then the powers they now wish for.
30. Indeed, we are unclear today of what has happened with the criminal prosecution referral into the Liberal Democrats' chief executive announced by the Electoral Commission in December 2016.²¹ If the individual has been cleared by the Metropolitan Police, the Electoral Commission should update and correct the public record, rather than leaving the claims of criminal conduct standing on its website — to the detriment of the individual's reputation and undermining public trust.
31. We observe that the proposal for the Electoral Commission to become a prosecutor has come from the Electoral Commission itself. This has not been a proposal endorsed by the Speaker's Committee or by Parliament, nor something that the Government has been consulted over. This highlights serious flaws within the accountability of the Electoral Commission namely, it is accountable to no-one.
32. If the Electoral Commission seeks to give itself prosecution powers, we would encourage the Government to legislate to stop this. But the fact that primary legislation would be required again illustrates the problems with the underlying governance and accountability of the Electoral Commission. Our proposals for the Government and Parliament to set out a regulatory policy framework would address such governance problems.

¹⁷ Cited by *Guido Fawkes blog*, 29 April 2020, ([link](#)).

¹⁸ *Electoral Commission press release*, “Joint announcement by The Electoral Commission, Mr Robert Posner, Mr Arron Banks and Ms Elizabeth Bilney”, April 2020, ([link](#)).

¹⁹ Statement by Blackford LLP, 11 May 2019, ([link](#)); and *Evening Standard*, “Tory treasurer cleared of false campaign spending claims”, 10 May 2019, ([link](#)).

²⁰ Electoral Commission press release, 16 March 2017, ([link](#)).

²¹ Electoral Commission press release, 7 December 2016, ([link](#)).

33. In 2007, the Committee on Standards in Public Life recommended that the Electoral Commission lose its responsibilities in 2007 over reviewing local government boundaries in order to "fundamentally focus" on its "core regulatory roles".²² This recommendation was implemented by then Labour Government. We also note that the Committee recommended that the Commission should not have a statutory duty to encourage democratic participation in order to focus on its regulatory tasks, nor a role in undertaking policy development in relation to electoral legislation. These points are still valid: the Electoral Commission should continue to focus on its core tasks.

Enforcement of candidate finance laws

34. In light of our previous comments, we would not support the Electoral Commission taking over responsibility for aspects of Representation of the People Act enforcement, which should remain a matter for the police.
35. This reflects the fact that any such offences will be local and on the ground rather than taking place at a national level.
36. We also note the systemic failures of the Electoral Commission to recognise electoral fraud in the London Borough of Tower Hamlets. As the 2016 review into electoral fraud by (then) Sir Eric Pickles observed: "Despite years of warnings on misconduct in Tower Hamlets, the Electoral Commission gave the Borough's electoral system a gold-star rating for electoral integrity in its inspection reports. We still have a series of tick-box inspections of town hall electoral registration departments that are as ineffectual as those once practiced by the now abolished Audit Commission. Indeed, after the February to April 2015 Tower Hamlets election court hearing and judgment, both the Electoral Commission's backward-looking annual report and the forward-looking corporate plan made no substantive reference to the Tower Hamlets case or learning the lessons from it. One can only conclude there was an attitude of denial".²³
37. This laxness has not changed. As of July 2020, we understand that the initial drafts of the Electoral Commission's new Performance Standards for Electoral Registration Officers made no direct reference to tackling electoral fraud.
38. This is not to say that the enforcement of Representation of People Act offences could not be improved. We note the points made by the Pickles review into the failure of the Metropolitan Police to follow up on the 2015 Tower Hamlets election court with criminal prosecutions, despite the corrupt mayor being found guilty of multiple breaches

²² Committee on Standards in Public Life, Review of the Electoral Commission, 2017, pp.45, 49, 50.

²³ Sir Eric Pickles MP, *Securing the Ballot*, August 2016, paras 219-220, ([link](#)). The reports notes Parliamentary answers from the Electoral Commission on the performance of Tower Hamlets: "The Commission monitors the performance of electoral registration officers (EROs) in Great Britain, including their plans for preventing and detecting electoral malpractice. The most recent report of performance against the standards set by the Commission found that the ERO for Tower Hamlets exceeded this standard in 2010" (*Hansard*, 27 February 2012, Column 29W) and "Between 2008 and 2013, the ERO for Tower Hamlets was assessed as 'meeting' or 'above' all the ERO standards (including the integrity standards) each year" (*Hansard*, 15 July 2015, PQ 5938).

of election fraud to a criminal standard of proof in an Election Court sitting in the Royal Courts of Justice.

39. The subsequent inspection report by the HM Inspectorate of Constabulary into the failures of the Metropolitan Police concluded: "The policing of the election and the subsequent investigation was deficient in too many areas. There was a lack of corporate responsibility, a lack of training and insufficient resources for the SET [Special Enquiry Team] investigation. In essence, the MPS did not consider the election and investigation a priority... There was an otherwise uncoordinated approach to all the investigations."²⁴
3 Lessons clearly must be learned, but we simply do not see how the Electoral Commission would have been more proficient in Tower Hamlets, given its unwillingness to recognise the corrupt culture in the (then) mayoralty.
40. The Pickles review recommended work to ensure a greater consistency of approach by the police. It also recommended looking at how electoral fraud can interact with other financial or benefit fraud (for example, most fraudulent electoral registration applications are made in relation to financial fraud, rather than to change the result of elections). This cross-cutting approach is another reason why enforcement of Representation of the People Act offences sits better with the police and CPS, rather than the Electoral Commission.

The Committee would also be interested in submissions on the effect of COVID-19 on UK elections.

41. The Conservative Party supports the decision of the UK Government to delay the May 2020 elections, however, we are confident that Covid-secure elections can take place in May 2021 with proper preparations (with measures in polling stations such as social distancing, regular cleaning, availability of hand gel, etc). We would not support the introduction of all-postal voting as this would significantly increase fraud risks. Postal voting on demand already allows any individual to vote by post if they wish. We are supportive of any move to uprate local election expenses once again in line with inflation from their last increase, given political parties and candidates may face slightly increased costs of campaigning due to a greater emphasis on postal and electronic means of communication, over in-person campaigning.

Conclusion

In short, we would argue that the work of the Electoral Commission needs to be more focused and targeted, and there should be greater clarity over its governance and accountability. This will require legislative change to deliver. We hope these points will be useful.

December 2020

²⁴ HMICFRS, *Operation Lynemouth: Final Report*, March 2019, p.48, ([link](#)).