

Written evidence from Dr Sam Power¹ (TEC 40)

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

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

- 1.1 The Commission is a highly effective regulator. In statutory terms the Commission is responsible for regulating political finance, overseeing elections and registering political parties. In slightly more amorphous terms, but as importantly, the Commission is responsible for promoting public confidence and participation in the United Kingdom's democratic processes and, by association, institutions.
- 1.2 In terms of regulating political finance the Commission's particular strengths lie in the over 20 years of institutional knowledge of how to interpret and discharge this regulation in an effective and proportionate manner. One of the most important things the Commission recognises is that campaigning in and of itself is a fundamental democratic good, more often than not conducted by good-hearted volunteers. In balancing its role in terms of sanctioning wrongdoing and encouraging participation, the Commission broadly delivers.
- 1.3 The updated statutory regime brought in as a part of the *Political Parties and Elections Act 2009* undoubtedly helps with this in its provision of slightly more malleability when it comes to enforcing the rules 'enabling us [sic] to be more proportionate as a regulator'.² This was also relayed to me in my own research by those within the Commission itself, 'with the exception of the three really big parties, the majority of other people in politics are volunteers. We don't want to criminalise people who don't do this as a day-to-day job when it is inadvertent [and] PPERA itself is really confusing a lot of the time...things that come through to me are not minor things which wouldn't be in the public interest. We don't make examples of people'.³
- 1.4 The Commission is also strong in these terms with regards to its searchable online database. There does, however, remain a good case to be made that this database can be improved by, for example, presenting more granular detail on the ways in which spending is conducted online.⁴ That aside, the detail provided – and the ease with

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² Electoral Commission (2012), *Use of New Investigatory Powers and Civil Sanctions*, available at https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Powers-and-sanctions-report-2012.pdf, accessed 08/04/2021.

³ Power, S. (2020a), *Party Funding and Corruption*, (Basingstoke: Palgrave MacMillan): 77.

⁴ See for example Dommett, K. and Power, S. (2019), 'The Political Economy of Facebook Advertising: Election Spending, Regulation and Targeting Online', *Political Quarterly*, 90(2): 257-265

which one can find this detail – means that comparatively speaking the database remains, according to other political finance experts, ‘effectively world leading at this point’.⁵

- 1.5 In terms of its role in overseeing elections, the Commission also performs effectively. This has been shown in recent research which concentrates on the perceptions of those that work on the ground to deliver elections. Electoral agents, for example, report high levels of satisfaction with the guidance provided by the Commission and with the manner in which elections are administered. They furthermore, are shown to have low levels of perception of electoral fraud.⁶
- 1.6 A regulator generally needs to do three things well to be effective: it needs to educate; it needs to investigate; and it needs to sanction. The latter two will be covered in more detail below, however, in terms of education the Commission could be conducting its role more successfully. Whilst the database is ‘effectively world leading’, the Commission’s website is not. There is a great deal of incredibly useful information available, which is not always easy to find. Many documents are simply connected via hyperlinks, which can take you to more detailed information. Yet traversing this online space is often akin to navigating a rabbit warren. A user will find themselves (often) at the destination that they need to be, but with little idea how one arrived, and even less concerning how to get back if needed.
- 1.7 Practicality is key with all this, but if further resource were provided then there is a good case that improving the website should only be stage one of a general enhancement of this educatory function. The Commission could, for example, collaborate with academic institutions in creating online courses that outline how to comply with the variety of electoral legislation and the Commission’s role in this.

Q2 What roles and functions within the UK electoral system should the Commission perform?

- 2.1 The roles and functions as highlighted above are all performed well by the Electoral Commission and I see little good reason to remove these and see them placed in another body with less institutional knowledge.

Q3 Should the remit of the Electoral Commission be changed?

- 3.1 I see little reason that the Commission’s remit should be fundamentally changed. There have been a number of discussions recently surrounding whether there is a case for a new digital regulator of elections given the recent trends in online spending and campaigning. If resourced properly, I can see this role as better suited to being brought under the Commission’s remit due to the previously stated experience the Commission has in terms of regulating elections.

Q4 What powers should the Electoral Commission have? Should the existing powers of the Electoral Commission be changed?

⁵ Power, S. (2020a): 130.

⁶ Fisher, J. and Sällberg, Y. (2020), ‘Electoral Integrity – The Winner Takes it All? Evidence from Three British General Elections’, *The British Journal of Politics and International Relations*, 22(3): 404-420.

- 4.1 As mentioned above, to perform its role well the Commission should have the power to educate, investigate and sanction . The Commission currently has the authority to perform all of these functions and rather than either the provision of new powers, or the changing of existing powers, they should instead be supported to a greater degree.
- 4.2 In terms of education the Commission should be resourced well enough that it can improve its citizen outreach in a number of areas (see 1.6). In terms of investigation and sanctioning, there are many potential reforms.
- 4.3 In terms of investigation, the legislative distinction between the police (in terms of breaches of the *Representation of the People Act 1983*) and the Commission (in terms of the *Political Parties, Elections and Referendums Act 2000*) presents issues. Namely in the creation of situations in which certain breaches uncovered by the Commission can only be referred to the Crown Prosecution Service (or not). This creates the risk of criminalising otherwise well-meaning volunteers, or creating a prosecutory bar that is considerably higher than in cases which might be otherwise better served by civil sanctions.
- 4.4 Another area in which the investigatory function of the Commission could be improved is in terms of collaboration with other regulators. I agree with Katharine Dommett’s call for a regulatory liaison committee to encourage this, but also recognise that without further explicit powers/permission to share information/data the Commission – and other regulators such as the Information Commissioner’s Office and the Advertising Standards Agency – are somewhat hamstrung in this respect.⁷
- 4.5 In terms of sanctions, the Commission’s power to fine up to £20,000 is too low and should be significantly larger. These fines have been noted by the Commission as being seen as ‘the cost of doing business’.⁸ Care ought to be taken that this fine is not too high such that it could threaten the sustainability of a political party (and as such should be set at a level proportionate to income), or is simply seen as an absurd ‘nuclear option’ that is unlikely to be used and, as such, serves little purpose as a deterrent. The maximum fine as raised to £500,000 in *The Referendums (Scotland) Act 2020*, could be seen as a reasonable place to start in terms of thinking in this area.⁹

Q5 The governance of the Electoral Commission

- 5.1 There are others more expert in this area than me and, as such, I defer to them. I know, for example, that Professor Robert Hazell (UCL) and Marcial Boo are currently conducting research into the governance arrangements of ‘constitutional watchdogs’.

⁷ Dommett, K. (2020), *The system of electoral regulation remains ill-equipped for the digital age – action is needed from government, regulators, companies and civil society*, available at <https://blogs.lse.ac.uk/politicsandpolicy/multi-layered-electoral-regulation-reform/>, accessed 08/04/2021.

⁸ Electoral Commission (2017), *Conservative Party Fined £70,000 Following the Investigation into Election Campaign Expenses*, available at <https://www.electoralcommission.org.uk/conservative-party-fined-ps70000-following-investigation-election-campaign-expenses>, accessed 08/04/2021.

⁹ See Clark, A. (2020), ‘More Than IndyRef2? The Referendums (Scotland) Act 2020’, *Political Quarterly*, 91(2): 467-472.

Q6 Public and political confidence in the impartiality and ability of the Electoral Commission

- 6.1 One thing that we know with relative certainty is that that public opinion is mistaken in terms of knowledge of how the party funding regime in the UK actually functions, and that the public also hold contradictory views as to what effective reform in this area would look like.¹⁰ In this sense I would not necessarily consider the public to be all that useful a barometer in terms of the day-to-day functioning of the Commission.
- 6.2 Political confidence is an area in which there is a little more clarity. The Commission has something of a reputation problem, not entirely of its own making (and more as a function of its role), among the political elite. This has seen it critiqued from all ends of the political spectrum, and called everything from a ‘Blairite Swamp Creation’, to a body ‘which let the Tories off the hook’ in recent years.¹¹ As effectively a referee of elections, we ought to take ‘political confidence’ in this respect with a pinch of salt – the Commission is likely to be disliked by 50% of the political elite, 50% of the time (often in an openly partisan manner) dependent on the specific decision made.
- 6.3 However, another thing that we know with relative certainty is that one of the primary characteristics of a successful regulator in this (and similar) fields is genuine independence from the levers of power.¹² This not only allows electoral commission’s (more broadly) to perform effectively, but also to retain levels of public confidence in electoral processes. To return to the football analogy, whilst fans might bristle at certain refereeing decisions that are made – they retain far more confidence in the integrity of the game (in the round) than if referees were directly affiliated with, for example, those teams in the top four of the Premier League.

Q7 The international reputation and comparators for the UK Electoral Commission

- 7.1 It has already been stated in this evidence that elements of the party funding regime overseen by the Commission are ‘effectively world leading at this point’ (1.4). And in general terms I would see the mere existence of the Commission as something which is held in high regard internationally.
- 7.2 This is not the case in many democracies across the world, and those without are often critiqued by international organisations for these reasons. In Denmark, for example, the comparator institution is a government ministry which means that a) sanctions are rarely forthcoming (due to anxieties about being seen as overly political) and b) Denmark has been admonished by bodies such as the Group of States Against Corruption (GRECO) in terms of the functioning of its party funding regime.¹³

¹⁰ See vanHeerde-Hudson, J. and Fisher, J. (2013), ‘Parties Heed (with Caution): Public Knowledge of and Attitudes Towards Party Finance in Britain’, *Party Politics*, 19(1): 41-60; Power, S. (2016), ‘What Do You Do When the Voters are Wrong? Party Funding Reform’, in Cowley, P. and Ford, R. (eds.), *More Sex, Lies and the Ballot Box: Another 50 Things You Need to Know About Elections*, (London: Biteback)

¹¹ Power, S. (2020b), ‘The Transparency Paradox: Why Transparency Alone will not Improve Campaign Regulations’, *Political Quarterly*, 91(4): 733.

¹² De Sousa, L. (2010), ‘Anti-Corruption Agencies: Between Empowerment and Irrelevance’, *Crime, Law and Social Change*, 53(1): 5-22.

¹³ Power, S. (2020a): 164-182.

- 7.3 In very general (comparative) terms, most countries (47.5%) covered by the International Institute for Democracy and Electoral Assistance's Political Finance Design Tool have specifically empowered Electoral Management Bodies (EMB) which oversee the functioning of elections/examine financial reports.¹⁴ Of those countries with an EMB, 15.3% have created a special organ with these functions. Of those countries without an EMB, 14.1% have opted for auditing agencies, 8.5% judicial bodies, 10.7% ministries and 3.4% leave this work to parliamentary units. In 13% of countries reviewed there were no specific oversight authorities.
- 7.4 In terms of models of best practice Elections Canada (the Canadian EMB) has a relatively good balance between its education, enforcement and sanctions role.¹⁵ Lessons can also be drawn from the sub-state level, and the Electoral Commission of Queensland, Australia has an interesting approach to both disclosure (in terms of enacting state-level legislation) and outreach programs.¹⁶

Q8 What, if any, reforms of the Electoral Commission should be made

- 8.1 As highlighted a number of times above, reforms should focus on ensuring that the Commission forms its three primary functions of education, investigation and sanctioning as best as can be reasonably expected given restrictions due to its statutory powers, and in the resources available to it.
- 8.2 Clear and defined reforms as to how well the Commission performs its education and outreach function can be made specifically with regards to the accessibility of the website and the means and manner of resources available to interested parties (this might be in the form of walkthrough videos or university sponsored online courses). In terms of sanctioning there is a strong case that the current £20,000 maximum fine in terms of its civil sanctions regime is too low.
- 8.3 That aside, any reforms made to the Commission should pass a relatively simple four question test. If the answer is in the affirmative to any of the below, the suggested reform should be reconsidered:
1. Do the proposed reforms weaken the Electoral Commission's role in terms of educating the public, or educating those delivering elections?
 2. Do the proposed reforms make it more difficult for the Electoral Commission to investigate wrongdoing?
 3. Do the proposed reforms weaken the Electoral Commission's sanctioning regime?
 4. Do the proposed reforms weaken the impartiality of the Electoral Commission and threaten its independence from political pressure?
- 8.4 If the reforms pass this four question test, a further question ought to be asked which can guide said reform:
1. Are the suggested reforms practical given the resources provided?

¹⁴ The Political Finance Design Tool is available at <https://www.idea.int/political-finance-tool-new>, accessed 08/04/2021.

¹⁵ The Elections Canada website is available at <https://www.elections.ca/home.aspx>, accessed 08/04/2021.

¹⁶ The Queensland Electoral Commission website is available at <https://www.ecq.qld.gov.au/>, accessed 08/04/2021.

8.5 These five simple questions ought to be the guiding principles of any changes made to the Commission.

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