

Written evidence from Best for Britain¹ (TEB 03)

Public Administration and Constitutional Affairs Committee The Elections Bill inquiry

Executive Summary

Best for Britain is deeply concerned by certain measures included in the Elections Bill as introduced. It represents a distinct movement towards political control of elections and the UK's electoral processes and a pooling of powers in Ministers' hands at the expense of independent oversight, accountability and debate in Parliament, the courts or in public.

Despite that, there are parts of the Elections Bill as introduced that Best for Britain does not take issue with, and certain parts we positively support. We are pleased to see British citizens living overseas for more than 15 years being included in the franchise, we support measures to make digital campaigning more transparent and we welcome new and clarified penalties and definitions of 'undue influence' and the harassment of candidates and campaigners at elections. Improvements to the accessibility of polling stations are also welcomed.

Our evidence below details specific areas of the Bill that concern us and we have provided recommendations that the Committee may wish to consider.

1. Political influence in democratic freedoms and fairness

1.1 We have very serious concerns about new powers the Bill proposes to give to UK government ministers which calls into question the independence and impartiality of the UK's electoral systems and the regulator of political finance and elections.

1.2 Elections, and the systems and organisations in place to oversee them, must be impartial and independent of political control or influence to remain fair and free. Government ministers are themselves invariably senior members of a political party whose impartiality could be or could appear to be questionable in matters affecting their party's electability.

1.3 To perform its function impartially, the Electoral Commission must be independent of political or government control or influence. The electoral system and rules around campaigning and political finance must be clear and be seen to be fair to retain the trust of the electorate in the outcome of elections. The ability to curtail or set limits to free speech, open debate and accountability of government and electoral campaigners should be a matter for

¹ Best for Britain is a pro-internationalist civil society campaign group that strives for the best social, economic, environmental, and democratic outcomes for the British people. We believe this requires re-engagement with Europe, open, internationalist policies, and cooperation with business, all parties in parliament, and like-minded groups.

Best for Britain is registered with the Electoral Commission as a third party campaigner and has submitted election returns for election campaigning activity at the 2017 and 2019 UK General Elections and the 2019 EU Parliament Election. Though we take part in elections, the majority of our work is not and is not intended to be electioneering.

rigorous debate in parliament - both at a UK and devolved level - and should involve and take account of diverse voices outside elected politics. No single minister or government should have powers to make fundamental changes to our democracy without proper parliamentary scrutiny and accountability.

1.4 The Committee may wish to consider carefully the wider implications of two parts of the Bill in particular on our democracy and the powers and accountability of government:

- A. Part 3, Clause 12 and 13 regarding setting a 'Strategy and policy statement' for the Electoral Commission.
- B. Part 4, Clause 22 and 23 regarding 'Restriction on which third parties may incur controlled expenditure'.

Part 3 - The Electoral Commission

1.5 The effect of clauses 12 and 13 would be to provide the Secretary of State power to direct the Electoral Commission and require it to follow instructions from the UK government as to its activities and priorities. This directly calls into question the Electoral Commission's independence from government and from political control.

1.6 Clauses 12 and 13 as introduced give the Secretary of State power not just to set strategy and priorities for the Electoral Commission, but to set out "guidance relating to particular matters in respect of which the Commission have functions" and "any other information (for example, about the roles and responsibilities of other persons) the Secretary of State considers appropriate". This is extremely broad. These clauses would allow, for example, the Secretary of State to require the Electoral Commission to redirect its resources, change its guidance or processes or set boundaries and limits on its ability to make public statements. The result of this broad and wide-ranging new power could be to make the Electoral Commission a tool of the government of the day, to direct the Commission through its guidance and its strategic focus to create an uneven playing field for UK elections.

1.7 It is not necessary for a Minister to interfere directly in any specific Electoral Commission enforcement action or investigation for them to have influence over its outcome. A government frustrated at or in disagreement with the Commission's interpretation of the law could direct the Commission to change its interpretation, guidance or enforcement processes to allow an activity to be redefined as 'permissible' where previously the Commission considered it in breach of electoral law.

1.8 For example, third party campaigners like Best for Britain (as well as policy and single-issue campaigners, charities, think tanks and other civil society organisations) rely on the Electoral Commission's guidance to plan ahead. The majority of our work is not election-related and even while an election is taking place, a large part of our operations and day-to-day work is not related to or regulated by electoral law. When an election is announced, we

are subject to regulation and reporting requirements for any regulated activity we undertake during the 365 days prior to election day. In recent years, and in future, should the Dissolution and Calling of Parliament Bill become law, elections have been unexpected and regulated periods have been applied retrospectively. Campaigners like us are placed in the invidious position of having to assess past activities to decide whether it meets the definition of electioneering and whether it should be included in our election expenditure return. Current Electoral Commission guidance reassures campaigners “you are unlikely to be reasonably regarded as intending to influence people to vote in an election when you do not know or expect that the election is happening. Therefore, where this was the case, your activity is unlikely to have met the purpose test.”² A future government that wished to limit civil society or third-party campaigners’ involvement in elections could require the Commission to change this approach.

1.9 A clear example of how governments do use their powers to improve electoral conditions for their party is contained elsewhere in the Elections Bill. Clause 16 (Notional expenditure: use of property etc on behalf of candidates and others) proposes to amend existing electoral law so that “property, goods, services or facilities” which are “made use of on behalf of a candidate” are only reportable as notional expenditure by the candidate in their election return if such notional expenditure is directed by the candidate or their agent. This change would seem to be as a direct result of investigations undertaken into the Conservative Party’s 2015 UK General Election campaigning and specifically its use of a ‘battle bus’ and party staff to campaign on behalf of candidates in their constituencies. The Electoral Commission investigated and fined the Conservative Party £70,000³ for submitting inaccurate election expenses as it declared the ‘battle bus’ expenditure on the party’s national return only and not on individual candidates’ returns. This would seem to be an example of the party of government seeking to change the law to suit its own election campaigning methods and strategies.

1.10 We advise the Committee to consider the checks and balances, scrutiny and accountability and indeed the limits on Ministers’ powers that should be set to make sure a future government could not take electoral advantage of these new powers to control the independent regulator of elections and political finance. We agree with the Electoral Commission’s own statement that “there should be no actual or perceived involvement from government in [the Electoral Commission’s] operational functions or decision-making. Our independence must be clear for people to see, as this underpins fairness and trust in the electoral system.”⁴

²Purpose test: The regulated period in an early UK Parliamentary general election, Electoral Commission guidance, <https://www.electoralcommission.org.uk/non-party-campaigners-where-start/purpose-test-regulated-period-early-uk-parliamentary-general-election>

³Conservative Party fined £70,000 following investigation into election campaign expenses, Electoral Commission, 16 March 2017, <https://www.electoralcommission.org.uk/conservative-party-fined-ps70000-following-investigation-election-campaign-expenses>

⁴A strategy and policy statement for the Electoral Commission, The Electoral Commission, 5 July 2021, <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/a-strategy-and-policy-statement-electoral-commission>

Part 4 - Regulation of Expenditure

1.11 The effect of clause 22 would be to ban organisations or individuals that are not listed in Section 88 of the Political Parties, Elections and Referendums Act 2000 (PPERA) from spending more than £700 on election campaigning in the 365 days prior to polling day. Clause 23 gives a minister the power to change by statutory instrument the list contained in s.88 PERA to add, remove or define ‘permitted participants’ at elections.

1.12 The combination of these two clauses 22 and 23 in effect gives the government of the day power to exclude a type of organisation or a category of individuals from spending more than £700 on election campaigning anywhere across the UK during the 365 days prior to election day.

1.13 In our opinion, a fair, free and open election is one in which all voices may be heard and diverse opinions are shared and debated for the benefit of voters who are making up their minds as to how to use their votes. It is right to set restrictions on election campaigning to ensure that only individuals and organisations with a true connection with the UK may spend money on election campaigning. But to give ministers, themselves senior members of a political party seeking election, power to exclude voices from elections without full parliamentary debate or consultation is a deeply concerning step.

1.14 These clauses, particularly clause 23, would place freedom of speech as expressed through election campaigning under direct political control. A future minister could, for example, ban trade unions as a category from spending money on election campaigning. When viewed alongside the Police, Crime, Sentencing and Courts Bill which contains controversial harsh criminal penalties for activities relating to noisy protests⁵, it raises the possibility that a future government could seek to ban individuals and not just categories of organisations. For example, a government frustrated by organised protests against its policies, could argue that persons convicted of a particular offence related to ‘noisy’ or ‘antisocial’ protests no longer deserve the right to campaign at election time.

1.15 We advise the Committee to recommend the amendment of the Bill to remove clause 23. We suggest that changes that affect such a fundamental part of our democracy and freedom of speech as who may or may not take part in elections should be a matter for parliamentary debate, scrutiny and accountability through primary legislation and not via a statutory instrument on the whim of the government of the day.

2. Chilling effect of extra regulation on civil society participation in elections

2.1 The Committee has heard previously from charities and civil society representatives in its recent inquiry into the Electoral Commission⁶ that the existing electoral legislation regime

⁵Of Davids And Goliaths: The Perils Of Politicians Drunk On Power, Naomi Smith, Best for Britain, 17 March 2021 https://www.bestforbritain.org/of_davids_and_goliaths

exerts a ‘chilling effect’ on charity and civil society campaigners at election time. Issues raised in evidence to the Committee include the fear of getting it wrong, the vagueness of the definition of what constitutes election campaigning and the burden of complying with electoral regulation and reporting as well as staff time and costs incurred in doing so. It is troubling and a great loss to our democracy and political debate in the UK that responsible organisations who have policy expertise and insight they could add to democratic debate are being inhibited and discouraged from speaking to voters.

2.2 The Elections Bill proposes to extend the burden of regulation to more and smaller organisations while doing nothing to provide the clarity that these organisations need. Clause 22, as discussed above, extends regulation to any organisation wishing to spend more than £700 in a regulated period and Clause 24 (Recognised third parties: changes to existing limits etc) reduces the spending threshold at which organisations must register with the Electoral Commission from £20,000 to £10,000 in any regulated period.

2.3 To put this into perspective, an organisation that spends £10,000 across the UK could have spent as little as £15 per UK parliamentary constituency. Or £27 per day across the entire country for the 365-day regulated period. After the snap general election in 2019, the winning party declared election spending totalling more than £16 million.

2.4 Transparency in election campaigning is important, and it is right that campaigners spending significant sums of money campaigning at election times should show that they are sticking to the rules and voters may know where and how money is being spent to influence their votes. However, Clause 24, and in a less direct way Clause 22, are likely to cause smaller organisations that may expect to spend relatively small sums find themselves facing the same burdens that larger and more established charities and civil society campaigners have raised concerns about.

2.5 The Bill seems to anticipate these concerns and makes provision for a lower tier system for registration with the Electoral Commission for those campaigners intending to spend between £10,000 and the per-country spending limit in any of the UK’s constituent nations. The explanatory notes for the Bill state “lower tier third-party campaigners will be subject to the minimum of regulation necessary to ensure that they are a UK-based or an eligible overseas entity.”⁷ This is welcome, as a mitigation, but is unlikely to dispel the fears and concerns that many organisations have expressed and in any case does not solve the problem of adding regulatory burdens that inhibit organisations from taking part in elections.

2.6 We advise the Committee to consider whether the small amount of increased transparency in elections achieved by reducing the threshold for registration with the

⁶Oral evidence: The work of the Electoral Commission, HC 43, Public Administration and Constitutional Affairs Committee, 20 July 2021, <https://committees.parliament.uk/oralevidence/2616/pdf/>

⁷Paragraph 67, Explanatory Notes, Elections Bill, <https://publications.parliament.uk/pa/bills/cbill/58-02/0138/en/210138en.pdf>

Electoral Commission outweighs the potential harm done to the UK’s national debate when organisations fear using their voices at election time.

2.7 We further advise the Committee to seek evidence from smaller charities and civil society organisations to understand whether the ‘lower tier registration’ proposal reduces concerns they may have around the burdens involved in regulation for election campaigning they may wish to undertake.

2.8 A further concern civil society campaigners may have is with the extension contained in clause 25 (Joint campaigning by registered parties and third parties) of ‘joint campaigning’ rules to political parties. Joint campaigning rules currently only apply to third party campaigners. The joint campaigning rules cover campaigners who enter into a common plan or purpose where decision making over election spending is pooled between two or more campaigners. They require those campaigners to declare that relationship and submit extra election spending returns for the spending involved in the joint campaign.

2.9 The joint campaigning rules are another area of electoral law that cause confusion and fear of getting it wrong. The definition of a joint campaign is very loosely defined and rests on whether a particular activity can “reasonably be regarded as intended to achieve a common purpose” rather than necessarily just the intent of the campaigner in initiating the activity. This lack of clarity, and deep concern amongst campaigners about getting it wrong and inadvertently crossing the line or even being accused of crossing the line has a clear chilling effect on entirely legitimate practices.

2.10 Friends of the Earth’s Dave Timms had this to say about joint campaigning rules in his oral evidence to the Committee’s recent inquiry into the work of the Electoral Commission: “We find them probably the most problematic and most worrying aspect of the legislation’s impact on legitimate civil society activity”⁸ and other witnesses at the same session explained how their member organisations tend to simply “step away” from campaigning at election time rather than risk becoming embroiled in this extra regulation. Chris Weavers of NASUWT said in his evidence to the Committee: “We have certainly been more cautious around joint campaigning since the introduction of legislation. It has not precluded being involved at all, but there is certainly a concern that when expenditure is potentially outside our direct control, we may become liable for expenditure that we were not aware of and could not actively be controlled, so it does have an effect. The smaller organisations that are less able to manage those relationships actively will be more fearful than us, but it is a concern across the board.”

2.11 Bringing political parties into the joint campaigning regulations is likely to have a similar damaging effect on civil society and charities’ willingness to participate and interact with politicians and parties at election time and at any other time a snap election is possible. Elections and party manifestos are a key time when civil society campaigners, experts in their

⁸Ibid

fields, may seek to provide their expertise to inform and educate the political process. If they feel they can no longer work with or be seen to work with politicians or parties that would be a huge loss to policy-making, our national debate and the UK's democracy.

2.12 Clause 25 is likely to have a similar effect on political parties themselves and campaigners who advocate electoral pacts, cooperation between political parties and politicians across party lines and those like Best for Britain who may wish to promote tactical voting campaigns at election time. Best for Britain research earlier this year found 64 per cent of voters say political parties that broadly agree with each other, should work together at election time rather than stand against each other⁹. This change to joint campaigning rules will create barriers and burdens of extra regulation for parties who may wish to cooperate with each other towards a shared electoral or policy aim. It almost certainly will put off third party campaigners who intend to work with parties to encourage cooperation.

2.13 We advise the Committee to recommend that the definition of 'joint campaigning' be clarified in legislation. The Elections Bill is an opportunity to provide clarity and reassurance to campaigners and parties about what does and does not constitute a joint campaign. We believe our democracy is strengthened through cooperation. Parties and politicians should be encouraged to work with each other to find solutions to the UK's challenges and civil society should feel supported in engaging with politics and adding their expertise and voices to national debate.

3. Interaction with the Dissolution and Calling of Parliament Bill

3.1 The Elections Bill should be considered not simply in the context of the electoral legislation it proposes to amend or add to. The Dissolution and Calling of Parliament Bill currently being considered by Parliament would, if passed, have a direct effect on how the Elections Bill functions in respect of the regulation of campaigners.

3.2 The Dissolution and Calling of Parliament Bill would repeal the Fixed Term Parliaments Act and give explicit powers to choose the date of general elections to the Prime Minister. Though elections in 2017 and 2019 were both snap early electoral events, giving the Prime Minister power to choose the date of all future UK parliamentary elections increases the likelihood that election dates will not be known 365 days in advance.

3.3 The effect of this uncertainty will be that most, if not all, future regulated periods for general elections will be retrospectively applied. In combination with the Elections Bill and the particular clauses discussed above, civil society campaigners will find themselves at a double disadvantage - both more likely to be required to enter electoral regulation due to the lowering of thresholds and more likely to have to manage that regulation as applied retrospectively to actions undertaken with no knowledge of the election to come. Political

⁹Number Cruncher Politics polled 3,004 UK adults for Best for Britain between 8th and 18th March 2021. Responses are weighted to the profile of the population.
<https://www.bestforbritain.org/proportionalrepresentationpoll>

parties operate as 'regulated entities' all year round and have larger in-house compliance teams, access to electoral law experts and many have funds for legal counsel. Charities and civil society campaigners, no matter the size, do not expect nor intend to undertake regulated activity all year round and do not have the same capacity for compliance nor the same expertise to draw on in electoral matters.

3.4 We advise the Committee to consider any provisions of the Elections Bill that could or would impose extra or new regulation on non-party campaigners alongside the added and compounding burden of the likelihood of snap elections and retrospective regulated periods. We believe it is unfair and unreasonable to impose retrospective burdens on organisations whose main interest and work is not election related and we believe this imposition places a heavy barrier to entry for smaller or less electorally-experienced campaigners who wish to campaign at election time.

Summary of recommendations

1. We advise the Committee to consider the checks and balances, scrutiny and accountability and indeed the limits that should be set to make sure a future government could not take electoral advantage of these new powers (contained in clauses 12 and 13) to control the independent regulator of elections and political finance.
2. We advise the Committee to recommend the amendment of the Bill to remove clause 23. We suggest that changes that affect such a fundamental part of our democracy and freedom of speech as who may or may not take part in elections should be a matter for parliamentary debate, scrutiny and accountability through primary legislation and not via statutory instrument on the whim of the government of the day.
3. We advise the Committee to consider whether the small amount of increased transparency in elections achieved by reducing the threshold for registration with the Electoral Commission for third party campaigners outweighs the potential harm done to the UK's national debate when organisations fear using their voices at election time.
4. We further advise the Committee to seek evidence from smaller charities and civil society organisations to understand whether the 'lower tier registration' proposal reduces concerns they may have around the burdens involved in regulation for election campaigning they may wish to undertake.
5. We advise the Committee to recommend that the definition of 'joint campaigning' be clarified in legislation. The Elections Bill is an opportunity to provide clarity and reassurance to campaigners and parties about what does and does not constitute a joint campaign.
6. We advise the Committee to consider any provisions of the Elections Bill that could or would impose extra or new regulation on non-party campaigners alongside the added and compounding burden of the likelihood of snap elections and retrospective regulated periods.

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