

Written evidence from Dr Alistair Clark (TEB 13)

Public Administration and Constitutional Affairs Committee The Elections Bill inquiry

Summary

The Elections Bill is extremely important, affecting the democratic rights of all electors in the UK. It provides some useful proposals for changes to electoral law. However, there are many difficulties with what it is proposing, and many missed opportunities to improve electoral law more generally with a view to improving the quality of elections. This Public Administration and Constitutional Affairs Committee inquiry is therefore welcome. There is an opportunity with this inquiry for PACAC to influence positively the development of this important Bill. This evidence presents discussion of some of these key areas – Voter ID; the Electoral Commission; Membership of the Speaker’s Committee; Regulation of Expenditure; Digital Election Material; Overseas Voting; Postal and Proxy Voting; and Other Matters. It is hoped that the Committee find this contribution useful in scrutinising and helping to improve this Bill.

Introduction

1. My expertise is in electoral integrity and administration, with several published research articles and reports on these themes, including an independent evaluation of electoral administration in the 2016 EU Referendum, commissioned by the Electoral Commission. I write in a personal capacity

(<http://www.ncl.ac.uk/gps/staff/profile/alistairclark.html#background>).

2. This submission focuses directly on the provisions of the Elections Bill, and related areas where the Bill is silent. It has not previously been published, although it refers to research and other evidence in highlighting points that the Committee should be aware of in its deliberations.

Voter ID

3. Voter ID has dominated discussion prior to this Bill’s publication. The arguments for and against voter ID have been well rehearsed, including by this and other parliamentary committees.¹ My arguments, with Toby James and Stuart Wilks-Heeg, are summarised in a recent Electoral Integrity Policy Briefing² and in a recent published article with Toby James.³ The Committee should be aware of and consider the evidence from these and other publications critical of these proposals. I would nevertheless bring several additional points to the attention of the Committee.

¹ In addition to PACAC’s 2019 Electoral Law inquiry, the House of Lords Electoral Registration and Administration Act 2013 Committee, and the Joint Committee on Human Rights have also taken relevant evidence in recent years.

² Available at: <https://www.electoralintegrityproject.com/policy-briefs> [10/8/2021].

³ Toby S. James & Alistair Clark (2020) ‘Electoral integrity, voter fraud and voter ID in polling stations: lessons from English local elections’, *Policy Studies*, 41:2-3, 190-209, DOI: [10.1080/01442872.2019.1694656](https://doi.org/10.1080/01442872.2019.1694656)

4. With Toby James, I have conducted several studies of polling station workers in parliamentary and local elections in England. What has been striking is *the consistency of findings* across different elections around the extent of any problem of electoral fraud and personation. Around 94-95% of polling station workers report no cases of being unsure of someone's identity, while around 99% of polling station workers say that they have no concerns about electoral fraud in polling stations.⁴

5. There are issues around the cost of the Voter ID policy. The Elections Bill Impact Assessment states that the cost of producing Poll Cards for the government's preferred option of Voter Identification is estimated to be £55m, while the cost of producing the optional Voter ID card is estimated to cost £15m.⁵ There is therefore a significant additional cost of around £70m, over what appears to be ten years, for the preferred forms of Voter ID. For comparison, polling cards in the 2015 general election cost only £9.85m.⁶ If a five-year term is assumed, there are likely therefore to be two general elections in that ten-year period. This means an extra £35m per election. The 2017 general election cost £143m to administer.⁷ This means elections will cost an additional 24.5% (approximately) on the government's own estimation and the cost of poll cards will increase by more than 300%. Why the cost of polling cards should increase so sharply is unclear. On the alternative assumption of three general elections in the same period, this means an extra £23.3m per election, and an extra 16.3% of costs. This is a considerable amount of public money to spend on a non-existent problem. *I recommend that the Committee pursue the cost of this policy as a matter for investigation (R1).*

6. Voter ID will introduce a considerable element of poll worker discretion about whether to accept a voter's identification. Evidence from the USA has suggested that poll workers do not apply voter ID rules equally in all locations, with the suggestion that in places minority voters are asked for more stringent identification.⁸

7. There is no equivalent research in Britain. The few pilots conducted on low turnout local elections were clearly insufficient in scale to understand how Voter ID would impact upon a higher turnout general election. I would however point the Committee to the table reproduced from our polling station research in PACAC's 2019 Election Law inquiry report, which noted that anything between 15-19% of polling station workers thought election law was too complex to understand quickly and easily, with higher levels of uncertainty in a general election.⁹ Given confusion over electoral law, variation in treatment due to Voter ID is therefore a clear risk in Britain, particularly in larger cities with higher ethnic minority populations.

The Electoral Commission

⁴ For example see: James and Clark (2020).

⁵ Elections Bill Impact Assessment, p5.

⁶ Cabinet Office (2018) *The Costs of the 2015 UK Parliamentary General Election*, London: Cabinet Office.

⁷ Clark, A. (2019) 'The cost of democracy: The determinants of spending on the public administration of elections', *International Political Science Review*, 40, (3), pp354-369.

⁸ Lonna Rae Atkeson, et al. (2014) 'Who Asks For Voter Identification? Explaining Poll-Worker Discretion', *Journal of Politics* 76:4, 944-957

⁹ PACAC (2019) *Electoral Law: The Urgent Need for Review*, London: House of Commons HC244, pp9-10. The figure was greatest at 19% in the 2015 general election, giving some indication of levels of potential difficulties were this first rolled out in a parliamentary election.

8. The Bill provides for the Electoral Commission to be held to a ‘Strategy and Policy Statement’ approved by parliament, which will provide government ‘guidance’ on how the Commission should execute its functions. Independence of electoral management boards (EMB) or commissions has been linked to the ability to hold high quality elections in the research literature.¹⁰ This has been discussed extensively in the Committee’s inquiry into the Electoral Commission, and I do not rehearse these arguments in any further detail here.

9. The Bill’s proposal directly undermines the Electoral Commission’s independence, both institutionally and in terms of its functional exercise of its duties. The Electoral Commission’s functions and institutional relationships are already set out in PPERA (2000) and subsequent legislation. The Commission is already accountable to parliament, and to the devolved institutions as appropriate. There is therefore no need for an additional ‘Strategy and Policy Statement’. *I recommend that this proposal is dropped and the independence of the Electoral Commission maintained, in its current form (R2).*

10. The Bill seeks to prevent the Electoral Commission developing prosecutorial powers to investigate suspected offences and bringing them to Court. This appears purely symbolic. It is unclear that any provision is required in this area, since the Commission’s powers are legislated for by parliament. As the Bill’s explanatory notes (para 58) observe, prosecutorial powers have not been agreed by parliament, and they would appear unlikely to be so. *I would recommend that this unnecessary clause be dropped (R3).*

11. The Bill makes no effort to discuss how the enforcement regime might be improved. This is a missed opportunity. The Committee on Standards in Public Life’s (CSPL) recent *Regulating Election Finance* report makes a number of recommendations with regard to clarifying the sanctions available in electoral law, and enabling the Electoral Commission to execute its functions better in this regard.¹¹ *It is recommended that these are considered in depth by the Committee, as a contribution to improving this Bill and improving electoral law more generally (R4).*

¹⁰ van Ham C and Garnett HA (2019) ‘Building impartial electoral management? Institutional design, independence and electoral integrity’, *International Political Science Review*. 40(3):313-334.

¹¹ CSPL (2021) *Regulating Election Finance*, London: CSPL, Chs. 9 & 10.

Membership of the Speaker's Committee on the Electoral Commission

12. The Speaker's Committee's membership includes the Speaker of the House of Commons, the Chair of the Public Administration and Constitutional Affairs Committee (PACAC), a Cabinet Office Minister (ex officio), and various opposition members. It currently comprises nine members. Five of these are currently Conservative, with two Labour and one SNP member plus the Speaker. There are several concerns about the composition of the Speaker's Committee, including a lack of transparency around its business. Combined, these suggest that reform is necessary, albeit not in the manner proposed by the Elections Bill.

13. The first issue is that, given its current composition, for the first time, the Committee has a single party majority on it. This is regrettable. Electoral matters should be based on cross-party agreement on the basis of more than just a simple majority. This would preferably be by unanimity.

14. Secondly, three of the MPs currently on the Speaker's Committee were investigated, and either acquitted or cleared, for elections expenses infractions in the aftermath of the 2015 general election. This is concerning. Good practice in membership of regulatory oversight boards indicates that members should not just be impartial and avoid potential conflicts of interest, but also have the appearance of being impartial to a concerned outsider.¹²

15. With all three MPs, their previous experience of being accused of electoral infringements may well have given them a legitimate interest in such matters. One of those MPs has rightly called for political parties to 'come together to create coherent, understandable [electoral] law'.¹³ PACAC has argued similarly in its 2019 report into Electoral Law. Nonetheless, it also risks infringing upon the appearance of independent and impartial scrutiny of the Electoral Commission, as defined above, given that at least one of those MPs has in the past publicly called for the resignation of managers at the Electoral Commission,¹⁴ while another has said that the Commission was 'not fit for purpose' after he was acquitted.¹⁵ This would appear to present a clear conflict of interest. *It is therefore recommended that only MPs with no such conflict of interest, apparent or otherwise, be appointed to sit on the Speaker's Committee (R5).*¹⁶

16. Thirdly, a key proposal is for the Minister for the Constitution to attend Speaker's Committee meetings. This is presented in the Bill's Explanatory Notes (paras 55 & 56) as necessary because the Minister for the Cabinet Office named in the legislation often cannot attend meetings. Therefore, the Minister who in practice acts in this area should be able to attend instead. In addition to this, at the time of writing (August 2021), one of the members of

¹² The Charity Commission defines conflicts of interest thus: 'Conflict of interest: a conflict of interest is any situation in which a trustee's personal interests or loyalties could, or could be seen to, prevent them from making a decision only in the best interests of the charity'. <https://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29/conflicts-of-interest-a-guide-for-charity-trustees> [13/8/2021].

¹³ <https://www.politicshome.com/thehouse/article/as-i-found-out-to-my-cost-the-electoral-commission-is-unfit-for-purpose> [9/8/2021].

¹⁴ <https://thelincolnite.co.uk/2017/05/karl-mccartney-exonerated-by-cps-after-tory-election-fraud-investigation/> [9/8/2021].

¹⁵ <https://www.politicshome.com/thehouse/article/as-i-found-out-to-my-cost-the-electoral-commission-is-unfit-for-purpose> [9/8/2021].

¹⁶ Alternative means for dealing with conflicts of interest can be found at: <https://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29/conflicts-of-interest-a-guide-for-charity-trustees> [13/8/2021].

the Speaker's Committee is also currently a Minister of State in MCHLG. This would make three ministers currently entitled to attend the Speaker's Committee.

17. The claim is that these reforms are due to concern for *parliamentary accountability* of the Electoral Commission (Explanatory Notes, para 6.). The Bill's proposal ignores the separation of powers that should exist between Parliament and the Executive. It is arguable that ministerial attendance at such an important regulatory committee should have no place in parliamentary accountability to begin with, not least since the independence of the electoral regulator is at stake. *Ministerial attendance, ex officio or otherwise, should be removed, and the Elections Bill should legislate for this (R6).*

18. I would make an alternative suggestion for reform of the Speaker's Committee. I first made this suggestion in PACAC's ongoing inquiry into the Electoral Commission. I reiterate it here as a serious suggestion to improve the provisions of the Bill and parliamentary oversight around the Electoral Commission.

19. While political parties are well represented on the Speaker's Committee, the voters' voice is notably absent from parliamentary accountability around the Electoral Commission. This is a major oversight. Voters are major stakeholders in the Commission's work. To address this, my recommendation is that:

the Speaker's Committee on the Electoral Commission is complemented by the addition of several Lay Members (3-5), with voting rights, to represent the views of voters in electoral processes and in oversight of the Electoral Commission (R7).

20. Following good regulatory practice in other sectors,¹⁷ the inclusion of Lay Members has already become accepted standard practice in parliamentary oversight of bodies regulating political behaviour in the House of Commons. For example, the Speaker's Committee for the Independent Parliamentary Standards Authority (SCIPSA) has three Lay Members, while the House of Commons Committee on Standards has five Lay Members. Lay Members on both committees now have full voting rights. Crucially, this has helped counter the suggestion that parliamentarians are 'marking their own homework' on these committees. This provides precedent and would also be a desirable outcome in building public trust around the electoral process.

The Regulation of Expenditure for Political Purposes

21. The Bill introduces a requirement for all new political parties to declare their assets and liabilities (over £500) when registering with the Electoral Commission. This is welcome but should be extended to include not just political parties, but also referendum campaigners, who, by definition, will be new organisations. Given that there has been concern about the (mis)use of data in recent election and referendum campaigns, *the declaration should be extended to include a declaration of data held and costs involved in buying and developing that data (R8)*, as per recommendation 12 of CSPL's recent *Regulating Election Finance* report.¹⁸

22. The Bill's provisions to remove loopholes which allow foreign third-party campaigners are welcome. This unfortunately does not go far enough in seeking to prevent foreign interference in UK elections. The Intelligence and Security Committee's Russia report

¹⁷ For example, the General Medical Council (GMC) has six lay members out of 12 board members in total.

¹⁸ CSPL (2021) *Regulating Election Finance*, London: CSPL, pp.66-67.

highlighted how foreign money might enter the UK political system, including via donations to political parties.¹⁹ This is clearly still a risk. To be more explicit, *the Bill should in addition to its current proposals, integrate recommendation 17 from CSPL's recent report to ban foreign organisations or individuals from buying campaign advertising in the UK (R9).*

23. Regarding foreign interference, the Bill is silent on improving upon the current permissibility checks which would give voters reassurance about the source of political donations. This is a missed opportunity. Know Your Customer anti-money laundering regulations are implemented in financial transactions in all walks of life, including by Charities which, like political parties, are also voluntary organisations. It is simply astounding that such regulations are not in force for political donations. *They should be, and this Bill should provide the legislation for this to happen. CSPL has discussed this in detail, and made several recommendations (7-10 inclusive) in this regard. CSPL's recommendations should be included in the current Elections Bill before parliament (R10).*²⁰

24. The Bill's proposal's on Third-Party Campaigns are welcome. The Bill could however go further. *CSPL also explored these issues at length, making several recommendations (22-26). These should also be incorporated into the Bill (R11).*²¹

25. With all the Bill's proposals on the regulation of expenditure for political purposes, *it should be made clear that these provisions should also apply to referendum campaign groups in order to avoid creating loopholes (R12).* Currently, this does not seem to be the case.

Information to be Included in Digital Election Material

26. The Bill's inclusion of requirements for digital imprints is long overdue. The Bill however might have gone further in regard to digital election material. The detailed recommendations from the recent CSPL report would enhance electoral integrity around these issues considerably. *I recommend that CSPL's recommendations 13-17 be included in the Bill as it proceeds through its legislative processes (R13).*²²

Overseas Voting

27. In addition to removing the 15-year registration limit for Overseas Voters, the Bill also proposes extending the registration period from one year to every three years for Overseas Voters. With Toby James, I conducted research evaluating electoral administration in the 2016 EU Referendum.²³ This suggested that the process of checking Overseas Registrations annually was a time consuming one for EROs, in part because records are historical and manual rather than online. Moving to a three-year re-registration cycle may help with this.

28. Alongside Proxy Voting, the Bill continues to envisage the use of postal voting for Overseas Voters. There are several difficulties with the Overseas Voting process which suggest more thinking around this area would have been useful in improving the Overseas Voting process and could have been implemented in this Bill.

¹⁹ Intelligence and Security Committee (2020) *Russia*, London: House of Commons, HC632.

²⁰ CSPL (2021) *Regulating Election Finance*, London: CSPL, pp.54-60.

²¹ CSPL (2021) *Regulating Election Finance*, London: CSPL, Ch. 8.

²² CSPL (2021) *Regulating Election Finance*, London: CSPL, Ch. 6.

²³ Clark, A. and James, T. S. (2016) *An Evaluation of Electoral Administration at the EU Referendum*, London: Electoral Commission.

29. Our research into the EU Referendum highlighted specific issues with the Overseas Voting postal vote system. These included: late receipt of voters' postal voting applications at the local authority; late dispatch of postal ballot packs to voters; overseas voters not receiving postal ballot packs in time to return them to be counted; and reports of the international postal vote licence not being recognised in some countries.²⁴ These were not new issues.

30. The Bill is silent on other forms of Overseas Voting that might have been utilised to avoid such difficulties in future. There are several options.²⁵ These variously include: Consular Voting, Issue of Postal Ballots via Consular Networks, or electronically; and online voting. Many countries have in-person consular voting. Some such as Italy, have postal ballot papers issued and returned via their Consular network before being sent to Italy for counting. US Citizens can receive absentee ballots via email, fax or internet download depending on their State of registration.²⁶

31. It is regrettable therefore that the Bill did not provide for online methods of both electronic ballot download and online voting. This seems like a missed opportunity. This would have the potential in the longer run to reduce costs and administrative burdens impacting on both overseas voters and electoral administrators.

32. I would therefore recommend that the Bill incorporate enabling provision to examine issues around online ballot paper delivery and overseas voting (R14), to both make this system easier for voters to negotiate and also avoid further primary legislation in the foreseeable future.²⁷

²⁴ Clark, A. and James, T. S. (2016) *An Evaluation of Electoral Administration at the EU Referendum*, London: Electoral Commission, pp16-17.

²⁵ See for example: <https://aceproject.org/ace-ar/topics/va/comparative-review/voting-procedures-in-use-for-external-voting> [9/8/2-21] and the International IDEA Handbook, *Voting from Abroad* (2007) <https://www.idea.int/es/publications/catalogue/voting-abroad-international-idea-handbook> [9/8/2021].

²⁶ <https://travel.state.gov/content/travel/en/international-travel/while-abroad/voting.html> [9/8/2021].

²⁷ Similar enabling provision was recently made for electronic voting in Section 6 of the Scottish Elections (Reform) Act 2020. See: <https://spice-spotlight.scot/2020/06/02/scottish-elections-reform-bill-whats-to-see-ahead-of-stage-3/> [9/8/2021].

Changes to Postal and Proxy Voting

33. The Bill proposes changes to indefinite postal votes, with electors holding such an indefinite postal ballot being required to reapply every three years. The Bill's documentation justifies this in the name of checks to prevent fraud.

34. There are two issues with this. Firstly, given a 4-5 year parliamentary term, this requirement effectively means that postal voters will have to reapply in advance of every parliamentary election. Voters are unlikely to realise this until close to polling day. This will increase the workload of electoral administrators considerably in advance of their busiest event, leading to pressure on election delivery.

35. Secondly, the process of reapplying envisaged by the Bill seems unnecessarily cumbersome for both voters and administrators. An alternative approach could be taken by the Bill. If it is really felt that some form of reconfirming indefinite postal votes is necessary, this could instead be done in a similar way to the Annual Canvass for electoral registration. This would see administrators write to the relevant voters every three years to *confirm their preference* towards their postal vote, not reapply. This would have the effect of confirming the voter's details, but also mean that a rush of applications pre-deadline is avoided and that no-one need miss any postal vote deadlines. *I recommend the Committee examines this alternative method of confirming postal vote preferences, rather than reapplication (R15).* This point about confirmation rather than reapplication also applies to Proxy Voting.

36. The Bill proposes restricting the number of people that someone can act as a Proxy for to four, within which no more than two can be domestic electors. In other words, and since the number of Overseas or service voters is likely to be small, in most cases this means that these proposals effectively restrict Proxies to two voters only. This is, ultimately, another restriction of the ballot. *I recommend that the Committee consider whether this restriction of the ballot for those unable to cast their vote in person is justified given the limited evidence of problems (R16).* It would be preferable for provision to be made for local remedies to deal with local problems, with specific measures for when and how such provision might be used.

37. There is an inconsistency about the amount that offenders can be fined for, for example, proxy voting offences and the amounts that can be levied in different parts of the UK. For example, in England and Wales, a person committing offences regarding proxy voting can be served with an 'unlimited fine' (explanatory notes, para 192), while in Scotland and Northern Ireland this is limited to Level 5. Consequently, an unlimited fine seems unreasonable. *This, and fines for other offences, should be brought into some degree of consistency.* Thus, if level 5 is appropriate for an offence in Scotland and Northern Ireland, then it seems unreasonable to impose unlimited fines in England. *English and Welsh practice in this regard should be brought into line with Scottish and Northern Irish scales throughout the Bill (R17).*

Other Matters

Ballot Secrecy

38. The emphasis on ballot secrecy for postal and proxy voting in the Bill is very welcome. It is however a missed opportunity. While the supporting documentation rightly notes that there are already measures in place for polling stations, these are under pressure from the trend towards ballot selfies and those being posted on social media. *The Bill might have taken the opportunity to clarify the position around this (R18).*

Summary of Recommendations

R1: The Committee should investigate the cost, and cost-effectiveness, of the implementation of Voter ID.

R2: The proposal for a ‘Strategy and Policy Statement’ is unnecessary and should be dropped from the Elections Bill.

R3: The proposal to prevent the Electoral Commission developing prosecutorial powers is unnecessary and should be dropped.

R4: The Committee should consider Chapters 9 and 10 from CSPL’s recent *Regulating Election Finance*, and the associated recommendations, as a means of improving and clarifying the enforcement regime in electoral law.

R5: Only MPs with no conflict of interest, apparent or otherwise, should be appointed to sit on the Speaker’s Committee.

R6: Ministerial attendance, ex officio or otherwise, should be removed from the Speaker’s Committee on the Electoral Commission, and the Elections Bill should legislate for this.

R7: The Speaker’s Committee on the Electoral Commission should be complemented by the addition of several Lay Members (3-5), with voting rights, to represent the views of voters in electoral processes and in oversight of the Electoral Commission.

R8: The declaration upon registration of new parties should be extended to include a declaration of data held and the costs involved in buying and developing that data.

R9: The Bill should integrate recommendation 17 from CSPL’s recent report to ban foreign organisations or individuals from buying campaign advertising in the UK.

R10: The Bill should provide the legislation for Anti-Money Laundering legislation to be implemented in relation to political finance. CSPL’s recommendations (7-10 inclusive) should therefore be included in the current Elections Bill before parliament.

R11: CSPL’s recommendations on Third Party campaigning (22-26) should also be incorporated into the Bill, in addition to its current proposals on this issue.

R12: It should be made clear that these provisions on regulating political expenditure should also apply to referendum campaign groups in order to avoid creating loopholes.

R13: On digital election material, CSPL’s recommendations 13-17 should be included in the Bill to reinforce its proposals further.

R14: I recommend that the Bill incorporate enabling provision to examine issues around online ballot paper delivery for Overseas Voting

R15: A system of reconfirmation of postal and proxy votes preferences should be investigated, instead of the currently envisaged reapplication processes.

R16: The Committee should consider whether the restrictions on Proxy Voters are justified given the limited evidence of problems, and whether local remedies might provide a better solution.

R17: The Committee should consider potential inconsistencies in the amounts that offenders can be fined, and seek to bring consistency between the ‘unlimited’ amounts in England and Wales, and those in Scotland and Northern Ireland.

R18: The Bill should use the opportunity to clarify the law around ballot secrecy and the trend for ballot selfies.

Conclusion

The Elections Bill will affect the electoral rights of everyone registered to vote. It is therefore fundamental to voters’ rights. It makes some useful proposals. In many areas it can nevertheless be improved in order to provide more clarity and consistency in electoral law. The Committee has a key opportunity to improve and influence the development of this Bill with this inquiry. This submission makes a contribution to these debates and recommends several areas for action for the Committee to consider. It is hoped that the Committee finds it useful for its deliberations.

August 2021