

Written evidence from Dr Sam Power¹ (TEB 18)

Public Administration and Constitutional Affairs Committee The Elections Bill inquiry

Area 1 *The role of the Electoral Commission*

- 1.1 The Bill proposes three main amendments to the role of the Electoral Commission: the introduction of a ‘Strategy and Policy Statement’, amendments to the function of the Speaker’s Committee, and legislation to expressly prevent the Commission from bringing criminal prosecutions in England, Wales and Northern Ireland. I will take each in turn below.
- 1.2 The introduction of a Strategy and Policy Statement (with the requirement of an affirmative vote) which provides guidance to the Electoral Commission on how they must discharge their functions seems a retrograde step with regards to the Elections Bill’s stated aim of protecting democracy.
- 1.3 Electoral regulation is done in many different ways, by many different bodies, the world over. Most countries have some form of Electoral Management Body (like the Electoral Commission), others might empower an auditing agency, in some it is the job of a ministry, in fewer still it is left to the courts and in even less it is left to parliament to oversee elections.
- 1.4 It is, therefore, important to note that an Electoral Commission is not an absolute necessity in the regulation of free and fair elections. That said, in work commissioned by the Committee on Standards in Public Life, I surveyed 12 countries and found that the majority (seven) had some form of Electoral Commission, in three the role was performed by a combination of ministries and auditing offices, and two operated a hybrid system in which an independent commission is administratively subordinate to a specific ministry. Digging down on this a little further the view from international experts was the form of regulator ‘really doesn’t matter – as long as they are independent’.²
- 1.5 Retaining the independence of the Electoral Commission should be the guiding principle behind any reforms therein to the functioning of it. A Strategy and Policy Statement seems to move away from this guiding principle and to place *less* operational independence on our electoral regulator, with the Commission itself stating that it would put ‘a fetter on the Commission which would limit its activity.’³

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² Committee on Standards in Public Life (2021), *Regulating Election Finance: A Review by the Committee on Standards in Public Life*, (London: CSPL), p. 148.

³ Electoral Commission (2021), *Electoral Commission response to government plans to strengthen Parliamentary oversight of the Commission*, available at <https://www.electoralcommission.org.uk/media->

- 1.6 I would like to see a clearer justification of the ways in which a) this measure would not impinge on the independence of the Electoral Commission and b) the justifications behind this measure in the first place – beyond that ‘some across the House have lost confidence in the work of the Commission’⁴ – and the ways in which it will increase (parliamentary) confidence in its work.
- 1.7 In terms of the amendments to the Speaker’s Committee, the aforementioned guiding principle of the retention of independence remains. Therefore, the proposal that the Minister for the Constitution should attend Speaker’s Committee meetings is also worrying. Indeed, ministerial attendance at regulatory committee meetings would more likely impinge on the independence of the electoral regulator than improve said independence.
- 1.8 The modest alternative proposal, suggested by Dr Alistair Clark, to instead complement the Speaker’s Committee membership with several (three to five) Lay Members has much merit.⁵ Lay members will provide the voters with a voice in the Electoral Commission’s work – and it is worth remembering that it is ensuring public confidence in elections that guides electoral reforms more generally. There is also precedence here in the membership of the Independent Parliamentary Standards Authority (IPSA) and the CSPL.
- 1.9 In terms of preventing the Commission from bringing criminal prosecutions, there are instances in other countries where Electoral Management Bodies hold both civil and criminal sanctioning powers, but these are rare. It seems entirely sensible to me that civil sanctions are levied by the Electoral Commission, but criminal prosecutions are handled by the CPS and other relevant bodies (such as the police and courts). This should be supplemented with a consolidation of electoral law, such that candidate and party civil sanctions are applied by the Electoral Commission (and ideally under one piece of legislation) and, in turn, all candidate and party criminal sanctions fall under the purview of the police (and ideally under one piece of legislation).

Area 2 Reforms related to third party campaigning

- 2.1 The areas I will address in the below will be the four reforms that relate to restrictions on third party campaigning, namely: the introduction of a ‘lower’ tier of registration with the Electoral Commission, the restriction of third party campaigning to UK-based entities and eligible overseas electors, the ban on registering as both a political party and third-party and the restriction on coordinated spending between parties and third parties.
- 2.2 On the ‘lower tier’. This particular reform is based on the House of Lords Select Committee on Democracy and Digital Technologies, *Report of Session 2019-21*:

[centre/electoral-commission-response-government-plans-strengthen-parliamentary-oversight-commission](#), accessed 25/08/2021.

⁴ Smith, C. (2021), *Statement UIN HCWS100*, available at <https://questions-statements.parliament.uk/written-statements/detail/2021-06-17/hcws100>, accessed 25/08/2021.

⁵ Clark, A. (2021), *Elections Bill: A Modest Proposal to Improve the Speaker’s Committee on the Electoral Commission*, available at <https://blogs.ncl.ac.uk/alistairclark/2021/07/09/elections-bill-a-modest-proposal-to-improve-the-speakers-committee-on-the-electoral-commission/>, accessed 25/08/2021.

Digital Technology and the Resurrection of Digital Trust, which suggested that the ‘Electoral Commission should explore whether it would be feasible to create a secondary registration scheme for campaigners who would otherwise fall below current spending limits...[they] would only be required to register the identity of their trustees or legally responsible persons and the identity of their five largest funders’.⁶ A lower threshold of £10,000, in the round, is to be welcomed. However, I have concerns about a tiered approach – especially as it is currently articulated in the Bill itself.

- 2.3 My understanding of the House of Lords recommendation is that all third parties should be subject to very basic, non-intrusive transparency standards that will be targeted in such a way as to not increase the administrative burden on smaller third parties (and disincentivises them from campaigning in the first place). However, the interpretation of the recommendation in the Bill is that this applies only to those that ‘spend in excess of £10,000 on controlled expenditure during a regulated period across, or in any constituent part/s of, the UK’.⁷
- 2.4 The worry in creating a lower (i.e. lesser) tier of regulation is that it risks making the law more complex than it need be. The issue that may be run into with regards to a ‘lower tier’ of regulation is that it adds to the complexity of existing electoral law – which is a contributing factor to the aforementioned administrative burden on campaigners – whilst adding little else of worth. In other words, if there are transparency concerns surrounding third parties that spend above £10,000 that said reform addresses, why not simply lower the threshold for disclosure?
- 2.5 There are three other suggested reforms which involve third parties: the restriction/ban placed on foreign third-party campaigning (over a £700 limit), a ban on third parties registering as political parties and restrictions placed on coordinated spending between third parties and political parties. These reforms either extend existing (sensible) principles in electoral law, or close loopholes therein such that they represent welcome reforms.

Area 3 Reforms related to political party finance and spending

- 3.1 There are two minor reforms in the Elections Bill which relate to political party financing: addressing concerns around notional expenditure and requirements for new political parties to declare their assets and liabilities (if over £500). On the latter, it seems entirely sensible that the requirement to keep a record of assets and liabilities – which already exists in electoral law – is brought forward to the moment a political party actually registers.
- 3.2 The reform around notional expenditure is based (largely) on a Supreme Court ruling, *R v Mackinlay and others*, as a result of election spending in the Thanet South constituency during the 2015 general election. Professor Justin Fisher has suggested that this ruling, ‘brought into sharp relief what expenses should be ascribed to candidates and which to national parties’, but also that whilst clearly a ‘precedent

⁶ House of Lords Select Committee on Democracy and Digital Technologies (2020), *Digital Technology and the Resurrection of Trust: Report of Session 2019-2021*, (London: HMSO), p. 98.

⁷ Elections Bill: Explanatory Notes (2021), available at <https://publications.parliament.uk/pa/bills/cbill/58-02/0138/en/210138en.pdf>, accessed 26/08/2021, pp. 15-16.

case’, reported that an unnamed party representative suggested that it ‘might be a precedent case for not being stupid’.⁸

- 3.3 That said the reform itself, in clarifying the rules around benefits in kind is a welcome clarification. It is worth remembering two things, 1) that legislation ought to encourage democratic activity rather than the inverse, 2) that electoral law is incredibly complex. Any (albeit minor) reform which is aimed at 1 and has the impact of lessening 2, should – as a rule of thumb – be seen as a move in the right direction.

Area 4 Information to be included in digital election material

- 4.1 The Elections Bill brings forward a new digital imprints regime, which will require those paying for digital political materials to show who they are – in a similar manner in which they are required to do on, for example, leaflets and posters. This is a welcome reform, as is the focus on both paid material and, for certain actors (e.g. registered political parties, candidates, future candidates, recognised third-party campaigners, referendum campaigners, holders of elected office and recall petition campaigners), organic (i.e. unpaid) material.
- 4.2 The digital imprint has long been the ‘easiest win’ (to the extent that there are ever ‘easy wins’) with regards to reform in addressing the challenge that digital campaigning presents. Research on partisanship has shown that supporters of certain parties, differ in their responses to messaging dependent on the source of said message.⁹ If it is easier for the public to identify who is sharing certain messages, this should be seen as a positive step forward.
- 4.3 We should be wary of any proposal, however, that expects any single transparency measure to increase public confidence in elections. Transparency in and of itself, without a clear focus on civic engagement, is unlikely to have the desired effect (and may even cause people to have *less* confidence in political systems).¹⁰ This is not to say transparency ought not underpin reforms, but to say that these reforms should be undertaken in concert with a renewed focus on citizen engagement and digital literacy campaigns.
- 4.4 We should also be alert to the possibility that this is a new reform, in an area in which there still remains much that we do not know.¹¹ We should not expect the digital imprint to be without teething problems. It would be sensible to build into the legislation periods of review in which – through a collaboration with academics, campaigners, other stakeholders and online platforms – any issues with the practical implementation of the imprint are discussed and requisite changes can be made.

Area 5 Tangential matters on which the Bill is silent

⁸ Fisher, J. (2020), ‘Party Finance in 2019: Advantage Conservative Party’, in Tonge, J., Wilks-Heeg, S. and Thompson, L. (eds.), *Britain Votes: The 2019 General Election*, (Oxford: Oxford University Press), pp. 191-192.

⁹ Ford, R. (2014), ‘Of Mousers and Men: How Politics Colours Everything We See’, in Cowley, P. and Ford, R. (eds.), *Sex, Lies and the Ballot Box: 50 Things You Need to Know About Elections*, (London: Biteback).

¹⁰ Power, S. (2020), ‘The Transparency Paradox: Why Transparency Alone will not Improve Campaign Regulations’, *The Political Quarterly*, 91(4), pp. 731-738.

¹¹ Power, S. and Mason, B. (2021), ‘Mobilizing or Chasing Voters on Facebook? Analysing Echo-Chamber Effects at the UK Parliamentary General Election 2019’, *Parliamentary Affairs*, online first.

- 5.1 The above evidence presents a discussion on three areas the Bill explicitly addresses concerning reforms to the Electoral Commission, political financing and online campaigning. Whilst the reforms to the Electoral Commission represent a retrograde step, certainly in terms of the operational independence of the Commission, the reforms in the latter two areas should (broadly) be welcomed. However, there is much that the Elections Bill does not address, and in these three areas it largely represents reform around the edges of what is both possible and desirable. I will conclude this evidence, with a brief reflection on areas which the Bill might address.
- 5.2 To act as an effective regulator the Electoral Commission needs to perform three functions, and it needs *independence* and *resourcing* to perform these functions well: it needs to *educate*, it needs to *investigate* and it needs to *sanction*. There are reforms that could be made which address each of these functions.
- 5.3 The recent CSPL review, *Regulating Election Finance*, had a number of recommendations with regards to improving the educatory function of the Electoral Commission which would be incredibly welcome, these include: the Commission focusing some resources on upgrading their website (and database) and providing an interactive guidance resource (with online walkthroughs and training modules) for campaigners.
- 5.4 With regards to improving the investigative function of the Electoral Commission, a Bill might include: extending the Commission's powers to compel documents, information and further explanation and giving the Commission explicit powers to share information with the police and other regulators.
- 5.5 In terms of sanctioning there is a strong case for increasing the maximum fine the Electoral Commission can levy in line with those enacted in the *Referendums (Scotland) Act 2020* or, the slight amendment as proposed by the CSPL, '4% of a campaign's total spend or £500,000, whichever is higher'.¹² The Electoral Commission's regulatory powers should also be expanded to include sanctioning candidates for civil offences.
- 5.6 There are many areas of reform in the world of political financing that the Elections Bill might consider from changes to registration requirements for third parties, to updating the reporting categories in the Electoral Commission database to better reflect the nature of spending in current political campaigns (see below).
- 5.7 However, the Elections Bill might also have addressed wider public concern surrounding the way in which political parties are funded. Whilst reform has been considered (and rejected) before – and this is an incredibly complex area to find agreement¹³ – there are ways in which we might think about limiting large donations to political parties (from both the left and the right, individuals and institutions) and have it implemented in such a way that it encourages a greater civic engagement (from both parties and the public).¹⁴

¹² Committee on Standards in Public Life (2021), p. 16

¹³ Power, S. (2017), 'The British party funding regime at a critical juncture? Applying new institutional analysis', *Politics*, 37(2), pp. 134-150.

¹⁴ Power, S. (2020), *Party Funding and Corruption*, (Cham: Palgrave MacMillan).

- 5.8 The implementation of the digital imprint scratches the surface of reforms that might be brought forward to address the challenge that is presented by political campaigns that are increasingly happening online. Reforms should focus on requiring campaigners to provide more detail to the Electoral Commission on the ways ‘digital intermediaries’ spend money on platforms such as Facebook and Google.¹⁵ This might include the ways in which these messages were targeted, and how much was spent in each campaign. Alongside this, new categories should be created on the Electoral Commission spending return database which reflect current realities in political campaigns, inclusive of spending on digital.
- 5.9 Moreover, advert libraries should be a legal requirement for all social media companies wishing to run political advertising in the UK. These advert libraries should include: precise figures for the amounts spent rather than banded ranges and more granular detail about the kinds of people targeted with said advert.
- 5.10 The above represent a range of reforms that have not been considered by the Elections Bill, and highlight my view that the Elections Bill (whilst inclusive of some welcome changes) is a missed opportunity to fundamentally rethink the way elections in this country are regulated and funded. However, my primary concern with regards to the Bill is that it adds to the complexity of electoral law rather than detracts from it. This is because it has the potential to add a further Act to the already voluminous legislation in this area. The primary focus should be in the consolidation of electoral law so that it is not held over multiple pieces of legislation and is (somewhat) easier to understand.

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¹⁵ Dommett, K. and Power, S. (2019), ‘The Political Economy of Facebook Advertising: Election Spending, Regulation and Targeting Online’, *The Political Quarterly*, 90(2), pp. 257-265.