

Committee on Standards in Public Life

Review of Electoral Regulation

Evidence submitted by Professor Justin Fisher (Brunel University London)

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Q1 What values do you think should underpin the regulation of donations and loans, and campaign expenditure by candidates, political parties and non-party campaigners in the UK, and why? Such values may include, though are not limited to, concepts such as transparency, fairness and accountability.

- 1.1 At the outset, the question that should underpin all such regulations is *What do you want to achieve?* rather than *What do you want to stop?*
- 1.2 Debates about the regulation of political finance focus too often on the latter question resulting in sub-optimal outcomes. Too much emphasis is frequently placed upon seeking to close loopholes (real or hypothetical) and too little emphasis is placed upon using party finance legislation to promote and enable healthy party competition.
- 1.3 Regulators should work with the regulated, rather than against them. One of the successes of the Commission since the mid-2000s has been its practice of working with those it regulates in order to promote compliance and understanding of the legal framework, rather than acting as a body which seeks to hinder parties.
- 1.4 Fundamentally, political activity and campaigning is a good thing. It engages citizens in democratic life. It is also frequently undertaken by volunteers. That activity should therefore be encouraged, rather than being restricted to an excessive degree. The aim must be to strike a balance between the desire to ensure that politics is conducted in an equitable and transparent way, and the need to protect privacy and avoid the excessive intrusion of the state into voluntary activity. The answer to the first question (*What do you want to achieve?*) is therefore more important for a healthy democracy than an undue focus on the second (*What do you want to stop?*).
- 1.5 That said, regulation is both inevitable and desirable in order both to encourage participation, but also deliver free elections (the meaning of 'fairness' is disputed in this context). To that end, in an election, primacy should be given to those standing for election. It is they (rather than non-electoral participants) who are accountable, with accountability being exercised via the ballot box.
- 1.6 There should also be an underlying principle that any regulation designed to deliver these demands can be implemented and operated effectively. This is important because it influences both the effective

operation of democratic activities like elections, as well as confidence in the probity and effectiveness of these activities – both by political actors and citizens.

1.7 Finally, policy-makers and legislators should recognise that while citizen opinion is very important, public perceptions in respect of probity are frequently exaggerated.¹ Moreover, where problems exist, they are rarely universal. As a consequence, recourse to public opinion alone is rarely a good guide to political reform.

Q2 *Does the Electoral Commission have the powers it needs to fulfil its role as a regulator of election finance under PPERA? It would be helpful if responses would consider the Commission's role in a) monitoring and b) investigating those it regulates.*

2.1. On balance, no. While a balance must be struck between supporting the democratic process and ensuring that wrongdoing is investigated and punished, recent cases have exposed the relative weakness of the Commission's position – especially in relation to investigation. A specific example relates to the Commission's investigations into the spending returns made by the Conservative Party at elections in 2014, 2015 and 2016.² Two matters are worthy of note.

2.2. First, the report makes it clear that the party under investigation was able to delay the process resulting in the Commission ultimately having to apply to the High Court for documents and an information disclosure order.³ While those under investigation must have a legal right to protection against a regulator exceeding their powers, it is apparent from the report that the case for delay made by the party was not a sound one. The implication of this is that the Commission should have stronger powers of investigation available to it to prevent unnecessary delaying tactics by those under investigation, and time-consuming (and expensive) recourse to the courts in order to fulfil its regulatory function.

2.3. Second, (and in relation to question 9 below), some of these allegations in this report were related to alleged breaches of the Representation of the People Act. The Commission has no specific investigation powers it can use to enquire into potential breaches of the RPA rules, and enforcement of those rules falls to the police and prosecution authorities. In the absence of investigatory powers, the matter was referred to the Crown Prosecution Service, and as a result, some candidates were subject to police investigation, where arguably, there was unlikely to be any successful prosecution.

Q3 *What could the Electoral Commission do differently to allow it to perform its role as a regulator of election finance more effectively?*

3.1. This question appears to be based on a presumption that the regulator itself is ineffective. That should be demonstrated rather than assumed. Surveys of electoral agents repeatedly demonstrate good levels of satisfaction with the Commission as a source of advice and guidance in respect of electoral administration and finance.⁴

1 vanHeerde-Hudson, J. & Fisher, J. (2013) 'Parties heed (with caution): Public knowledge of and attitudes towards party finance in Britain', *Party Politics*. 19 (1): 41-60; Fisher, J & Sällberg, Y. (2020) 'Electoral Integrity – The Winner Takes It All? Evidence from Three British General Elections' *British Journal of Politics & International Relations*. Published Online Early DOI: 10.1177/1369148120912668

2 Electoral Commission (2017) Investigation in respect of the Conservative and Unionist Party campaign spending returns for the 2014 European Parliamentary Election, and 2015 Parliamentary Election, and in respect of parliamentary by-elections in Clacton, Newark and Rochester and Strood, 16th March 2017, accessed at: https://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/222935/Report-in-respect-of-the-Conservative-and-Unionist-Party.pdf on 22nd July 2020.

3 Electoral Commission (2017) *Investigation in respect of the Conservative and Unionist Party campaign spending returns for the 2014 European Parliamentary Election, and 2015 Parliamentary Election, and in respect of parliamentary by-elections in Clacton, Newark and Rochester and Strood* p.12 paragraphs 36-8

4 Fisher, J. & Kumar, J. (2020) *Attitudes of Electoral Agents on the Administration of the 2019 General Election*. Report produced for the Electoral Commission; Fisher, J. & Sällberg, Y. (2017) *Attitudes of Electoral Agents on the Administration of the 2017 General Election*. Report Produced for the Electoral Commission.

Q4 Are there aspects of the Electoral Commission's role which detract from its function as a regulator of election finance?

4.1 No. There may be a case to be made that the Commission's role should be expanded rather than contracted. When it was established, the Commission played both an educational as well as a regulatory role. Early on in its life, this was re-focused to be more of a regulatory one.⁵ In my view, this was probably an error. Support for, and the regulation of, elections and party finance is a critically important role. There is a need for a central body that oversees all of that. Notwithstanding, such a dual role can produce conflicts, whereby the Commission is responsible for investigating potential breaches of electoral law, while simultaneously seeking to enhance public confidence in the political process. The two are not necessarily irreconcilable, but the tensions must be recognized.

Q5 Are there aspects of the rules which affect or detract from effective regulation of election finance?

5.1 Yes. There are three aspects. 1) Poorly drafted or conceived legislation – especially in relation to referendums;⁶ uncertainty over the legal boundaries in respect of national and candidate election expenditure;⁷ and the failure to adopt fines of a sufficient size to effectively deter parties from breaches of the law.

Q6 What are the Electoral Commission's strengths and weaknesses as a regulator of election finance?

6.1. The strength of the Commission is the active work it undertakes with those it regulates to build understanding of the law and ensure compliance. An indication of that strength is best demonstrated not by levels of satisfaction amongst professional compliance officers, politicians or commentators, but by those working on the ground in elections, many of whom are volunteers. Surveys of electoral agents repeatedly report satisfaction with the information and guidance provided by the Commission as well as high levels of satisfaction with electoral administration, and low levels of perception of electoral fraud.⁸ Variations in such attitudes are generally driven by electoral success or failure, party difference and geography.⁹

6.2. The statistics cited above on convictions present an incomplete picture. Some convictions have failed because of weaknesses in the legislation. Notwithstanding, the number of prosecutions is arguably the wrong criterion to apply. The role of regulators is to deliver compliance, and in this case, healthy party competition. So, the principal measure of success should not be how many convictions there are, but how much compliance occurs.

Q7 Are the Electoral Commission's civil sanctions powers to fine up to £20,000 adequate?

7.1 No – they should be larger. A figure of £20,000 risks making the fine part of the 'costs of business' But, caution must be paid not to make the fine so large as to potentially threaten the entire operation of a party. This is a good example of the tension between the questions identified in question 1. Such a case

5 Fisher, J. (2006) *Research in support of the Committee's 11th Enquiry: Review of the Electoral Commission*. Report produced for the Committee on Standards in Public Life

6 Fisher, J. & Rottweiler, B. (2016) *Research among permitted participants at the EU referendum*. Report Produced for the Electoral Commission

7 Fisher, J. (2018) 'Party Election Expenditure Election Effects: National vs. District Level and the Regulatory Challenges' in J. Mendilow & E. Phelippeau (eds) *Handbook of Political Party Funding*. Cheltenham: Edward Elgar. pp. 55-77; Fisher, J. (2020 Forthcoming) 'Party Finance in 2019 – Advantage Conservative Party' *Parliamentary Affairs: Britain Votes 2019*

8 Fisher, J. & Kumar, J. (2020) *Attitudes of Electoral Agents on the Administration of the 2019 General Election*. Report produced for the Electoral Commission; Fisher, J. & Sällberg, Y. (2017) *Attitudes of Electoral Agents on the Administration of the 2017 General Election*. Report Produced for the Electoral Commission.

9 Fisher, J & Sällberg, Y. (2020) 'Electoral Integrity – The Winner Takes It All? Evidence from Three British General Elections' *British Journal of Politics & International Relations*. Published Online Early DOI: 10.1177/1369148120912668

occurred in Georgia, when in 2012, the regulator imposed the largest party finance sanction ever in a Council of Europe member state¹⁰

Q8 *Does the Commission's civil sanctions regime interact with the police criminal prosecution regime to form an effective and coherent system for deterring and punishing breaches of election finance laws?*

8.1 No. The bar for the CPS acting on a breach is justifiably high, while the level of fines available for civil sanctions is arguably too low. As a consequence, there is a risk of breaches not being adequately captured by either.

Q9 *In what circumstances would the regulatory regime be strengthened by the Commission bringing prosecutions before the courts for potential offences under election finance laws?*

9.1. Based on past experience, this would be inadvisable. When the Commission was first established, the only sanctions available were those of criminal prosecution. There was a reluctance to invoke these resulting both in non-compliance going unpunished, and the behaviour of the regulated, cognisant of the fact that criminal prosecution is unlikely to be used.¹¹ A better solution is a wider range of civil sanctions being available to the Commission, with the most serious cases being referred to the Crown Prosecution Service.

Q10 *Should the Electoral Commission's regulatory powers be expanded to include the enforcement of candidate finance laws?*

10.1 Yes. The quality of electoral administration in the UK is uneven. There is evidence both in the UK and US that where electoral administration is devolved, the level of electoral integrity varies. In the UK, this is particularly the case in very urban areas.¹² Coupled with that, while the Electoral Commission collates candidates' election returns, these are rarely 100% complete.

10.2 Given the close relationship between national and candidate spending,¹³ there is a good case for the enforcement of candidate spending coming under the umbrella of the Commission. The separation is an historic anachronism – while candidate spending has been regulated since 1883, national party spending has only been so since 2001.

10 Fisher, J. & Klein, L. (2013) *Party Finance in Georgia. Recommendations for Reform – Final Report*. Report Produced for the Council of Europe

11 Fisher, J. (2006) *Research in support of the Committee's 11th Enquiry: Review of the Electoral Commission*. Report produced for the Committee on Standards in Public Life pp.5-6.

12 Fisher, J & Sällberg, Y. (2020) 'Electoral Integrity – The Winner Takes It All? Evidence from Three British General Elections' *British Journal of Politics & International Relations*. Published Online Early DOI: 10.1177/1369148120912668

13 Fisher, J. (2015) 'Party Finance: The Death of the National Campaign?' *Parliamentary Affairs*. 68 (Suppl 1): 133-153; Fisher, J. (2018) 'Party Finance' *Parliamentary Affairs: Britain Votes 2017*. 71 (Issue suppl_1): 171–188; Fisher, J. (2020, forthcoming) 'Party Finance in 2019 – Advantage Conservative Party' *Parliamentary Affairs: Britain Votes 2019*.