

Public Administration and Constitutional Affairs Committee

The Work of the Electoral Commission

Evidence submitted by Professor Justin Fisher (Brunel University London)

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Declaration of Interest: I have conducted commissioned research via Brunel University London on behalf of the Electoral Commission at each general election since 2005 and following the 2016 referendum.

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Executive Summary

- The Electoral Commission should continue to perform its current roles and functions.
- The enforcement of candidate spending should come under the remit of the Commission.
- Both the investigatory powers and the fines available to the Commission should be extended.
- Consideration should be given to whether the administration and funding of elections should fall under the Commission's remit.
- Consideration should be given to creating an Electoral Commissioner responsible for sub-national government.

1a. What roles and functions within the UK electoral system should the Commission perform?

- 1.1 When considering this question, it is worth reflecting on the fact that until the Electoral Commission was established by the Political Parties, Elections and Referendums Act 2000 (hereafter PPERA), there was no regulation of political funding beyond the submission of candidates' spending returns, the submission of details about trade union political funds to the Certification Office, and the publication of companies' political donations in their annual reports. There was no required declaration of individual donations, no prohibition of foreign donations, and no limits on national campaign spending. The principal legislation in respect of party and election finance was passed in 1883 and reflected nineteenth century electoral norms. Oversight of both political funding and elections was minimal.
- 1.2 PPERA represented a fundamental shift in UK electoral regulation and required the establishment of the Electoral Commission to deliver it. That continues to be the case.

- 1.3 The Commission’s role should be extended beyond its current remit of overseeing elections and referendums and regulating political finance in the UK. In addition to its current roles and functions, the following additional roles should be considered:
- 1.4 The quality of electoral administration in the UK is uneven.¹ 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.² Coupled with that, while the Electoral Commission collates candidates’ election spending returns, these are rarely 100% complete.
- 1.5 Given the close relationship between national and candidate spending,³ there is a good case for the enforcement of candidate spending coming under the remit 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.
- 1.6 I would also advise discussion of whether the administration and funding of elections should fall under the Commission’s remit. At present, there is an unsatisfactory arrangement whereby the Commission has oversight, but may be perceived as being responsible when errors are made by local authorities. Consideration of the change was discussed soon after the establishment of Commission.⁴ At the time, it was decided that responsibility should remain with local authorities. There is a case to re-examine that question.

1b. Should the remit of the Electoral Commission be changed?

- 1.7 In addition to the points made in paragraphs 1.1 to 1.6 above, consideration should be given to whether the Commission should play a solely regulatory and oversight role. When the Commission was established, it played both an educational as well as a regulatory role.⁵ Early on in its life, this was re-focused to be more of a regulatory one. In my view, this was probably an error. Support for, and the regulation of, elections and party finance are critically important roles. 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.

¹ See, for example, Clark A (2017) Identifying the determinants of electoral integrity and administration in advanced democracies: The case of Britain’. *European Political Science Review* 9(3): 471–492.

² Fisher, J & Sällberg, Y. (2020) ‘Electoral Integrity – The Winner Takes It All? Evidence from Three British General Elections’ *British Journal of Politics & International Relations*. 22 (3): 404 –420.

³ Fisher, J. (2015) ‘Party Finance: The Death of the National Campaign?’ *Parliamentary Affairs*. 68 (Supplement_1): 133-153; Fisher, J. (2018) ‘Party Finance’ *Parliamentary Affairs: Britain Votes 2017*. 71 (Issue suppl_1): 171–188; Fisher, J. (2020) ‘Party Finance in 2019 – Advantage Conservative Party’ *Parliamentary Affairs: Britain Votes 2019*. 73 Supplement_1: 189-207.

⁴ Electoral Commission (2002) *Funding of Electoral Services Review*.

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.

1c. What powers should the Electoral Commission have? Should the existing powers of the Electoral Commission be changed?

- 1.8 The Commission's investigatory powers and those related to fines should be enhanced. Recent cases have exposed the relative weakness of the Commission's position 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 2016.⁶ Two matters are worthy of note.
- 1.9 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.⁷ 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.
- 1.10 Second, some of these allegations in this report were related to alleged breaches of the Representation of the People Act (RPA). 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 (CPS), and as a result, some parliamentary candidates were subject to police investigation, where arguably, there was unlikely to be any successful prosecution. Such a situation may be avoided in the future if the Commission was given investigatory powers over candidate spending.
- 1.11 The maximum fines available to the Commission should be increased. The current maximum of £20,000 risks making the fine part of the 'costs of business' However, caution must be paid not to make the fine so large as to potentially threaten the entire operation of a party. Such a case occurred in Georgia, when in 2012, the regulator imposed the largest party finance sanction ever in a Council of Europe member state⁸ 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.

⁶ 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.

⁷ 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.

⁸ Fisher, J. & Klein, L. (2013) *Party Finance in Georgia. Recommendations for Reform – Final Report*. Report Produced for the Council of Europe.

- 1.12 Relatedly, I would advise against the Commission being able to bring prosecutions before the courts for potential offences under election finance laws. 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.⁹ 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.
- 1.13 Overall, it is also important to remember that the effectiveness of the Commission is in part driven by the quality of legislation for which it is responsible. Specifically: poorly drafted or conceived legislation – especially in relation to referendums; uncertainty over the legal boundaries in respect of national and candidate election expenditure; and the failure to adopt fines of a sufficient size to effectively deter parties from breaches of the law. Such matters can only be addressed by Parliament.

2. The governance of the Electoral Commission

- 2.1. The 2009 Political Parties & Elections Act introduced party-nominated Commissioners. At the time, I had reservations about the inclusion of party nominees as Commissioners, since the appointment of party nominees ran the risk of diminishing the independence of the Commission.
- 2.2. In addition, the allocation of the fourth appointments (for smaller parties) is based solely on representation at Westminster. This remains problematic, since the Commission is also responsible for oversight of elections at other levels of government. The current allocation of four appointments arguably continues to fail to recognize the multiparty character of much of modern British politics.
- 2.3. That said, the appointment of party nominees does not appear to have damaged the independence of the Commission, and while the issue of the fourth nominee remains, there may be a more imaginative solution than simply extending party representation. For example, given there are Commissioners with responsibility for Scotland, Wales and Northern Ireland, a Commissioner responsible for other levels of government in the UK may provide a solution.

3. Public and political confidence in the impartiality and ability of the Electoral Commission

- 3.1. It is important to recognise that while citizen opinion is very important, public perceptions in respect of probity are frequently exaggerated, thereby impacting upon any judgements about impartiality and ability.¹⁰ Where

⁹ 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.

¹⁰ 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

problems exist, they are rarely universal. As a consequence, recourse to public opinion alone is rarely a good guide to political reform.

- 3.2. 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 just by levels of satisfaction amongst professional compliance officers, politicians or commentators, but by those working on the ground in elections, the vast majority of whom are volunteers.¹¹
- 3.3. At every general election since 2005, I have conducted surveys of electoral agents from all the major parties contesting those elections.¹² These surveys repeatedly demonstrate high levels of satisfaction with the Electoral Commission. For example, in 2019, of those electoral agents who expressed an opinion, 78% of agents agreed that the rules in respect of election spending and donations, were clear; 72% viewed the Electoral Commission as a useful source of advice; 75% thought Electoral Commission guidance for candidates and agents was clear and easy to use; and 75% thought Electoral Commission written information on the verification and count was clear and easy to use.¹³
- 3.4. Further evidence of positive evaluations of the Commission's work were evident in the 2016 Referendum.¹⁴ Both quantitative and qualitative work with permitted participants revealed generally good levels of satisfaction with the Commission's guidance and the administration of the referendum, though it should be noted that levels of satisfaction were not as high as observed at elections. Equally, the most serious issues highlighted pertained to deficiencies in the legislation related to the referendum rather than its administration.
- 3.5. Overall, surveys of electoral agents and referendum participants repeatedly report high levels of satisfaction with the information, advice and guidance in respect of electoral administration and finance provided by the Commission as well as high levels of satisfaction with general electoral administration, and low levels of perception of electoral fraud.¹⁵ Variations in such attitudes

Integrity – The Winner Takes It All? Evidence from Three British General Elections' *British Journal of Politics & International Relations*. 22 (3): 404 –420

¹¹ In 2019, some 84% of electoral agents for the Conservative, Labour Liberal Democrats, Scottish National Party, Plaid Cymru and the Brexit Party were volunteers. If we confine this to the three main parties fielding candidates in Great Britain, the figure is 86%. Fisher, J., Fieldhouse, E & Cutts D. (2020) *British Constituency Campaign Study 2019*.

¹² Fisher, J., Fieldhouse, E., Denver, D., Russell, A. & Cutts, D. (2005) *The General Election 2005: Campaign Analysis*. Report produced for the Electoral Commission; Fisher, J., Cutts, D., & Fieldhouse, E. (2010) *Attitudes of Agents on the Administration of the 2010 General Election*. Report Produced for the Electoral Commission; Fisher, J., Cutts, D., Fieldhouse, E. & Rottweiler, E. (2015) *Attitudes of Electoral Agents on the Administration of the 2015 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; Fisher, J. & Kumar, J. (2020) *Attitudes of Electoral Agents on the Administration of the 2019 General Election*. Report produced for the Electoral Commission.

¹³ These percentages exclude those respondents answering Don't Know/Did Not Use. For original tables, which include these responses, see Fisher, J. & Kumar, J. (2020) *Attitudes of Electoral Agents on the Administration of the 2019 General Election*. Report produced for the Electoral Commission.

¹⁴ Fisher, J. & Rottweiler, B. (2016) *Research among permitted participants at the EU referendum*. Report Produced for the Electoral Commission.

¹⁵ 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*

are generally driven by electoral success or failure, party difference and geography.¹⁶

4. The international reputation of and comparators for the UK Electoral Commission

- 4.1. In terms of reputation, I can only comment in respect of my experience of working with the Council of Europe on party and election finance regulations in the Czech Republic, Georgia and Poland, and with the Electoral Commissions (or equivalent) of Albania, Ethiopia, Japan, Tunisia and the Ukraine. In all cases, the UK Electoral Commission was regarded very positively – especially in respect of its approach for working with those whom it regulates.
- 4.2. As a comparator, the Committee may wish to look at Canada, where there is a well-established Electoral Commission.

5. What, if any, reforms of the Electoral Commission should be considered?

- 5.1. I have not seen a strong case to suggest that significant reform of the current responsibilities or structure of the Electoral Commission is either desirable or practical. However, as outlined in my evidence, the following proposals may enhance the Commission's effectiveness:
- 5.2. The enforcement of candidate spending should come under the remit of the Commission.
- 5.3. Consideration should be given to whether the administration and funding of elections should fall under the Commission's remit.
- 5.4. Consideration to be given to whether the educational role of the Commission should be restored.
- 5.5. The Commission's investigatory powers should be enhanced.
- 5.6. The maximum fines available to the Commission should be increased.
- 5.7. Consideration should be given to the appointment of a Commissioner responsible for sub-national government.

Electoral Agents on the Administration of the 2017 General Election. Report Produced for the Electoral Commission.

¹⁶ Fisher, J & Sällberg, Y. (2020) 'Electoral Integrity – The Winner Takes It All? Evidence from Three British General Elections' *British Journal of Politics & International Relations*. 22 (3): 404 –420.