


ELECTIONS FOR SALE?

A hand in a blue sleeve is shown dropping a £50 banknote into a ballot box. The ballot box is white with a blue band across the front. The background is a dark red wall with blue geometric shapes at the bottom.

**DO CURRENT UK
SPENDING LIMITS
PREVENT PARTIES
BUYING ELECTIONS?**

A REPORT BY CHRIS BOWERS

Commissioned and funded by the Joseph Rowntree Reform Trust
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 Joseph Rowntree
REFORM TRUST LTD

PLEASE NOTE

This report was compiled on the basis of research undertaken between October 2016 and August 2017. On 2 June 2017, the Crown Prosecution Service announced that it would be launching legal proceedings against three people (Craig Mackinlay, Nathan Gray and Marion Little), who were charged with offences contrary to the Representation of the People Act 1983 relating to the Thanet South constituency at the 2015 general election. On 14 August 2017, Mr Justice Edis issued an order pursuant to section 4(2) of the Contempt of Court Act 1981 which severely limits the amount of information that can be divulged in news publications relating to the Thanet South 2015 election. Therefore, this report makes no reference to Thanet South other than in this paragraph.

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The purpose of this report is to consider whether the current laws governing the conduct of elections – in particular with regard to spending by parties and candidates – are taking effect as they were intended, and whether reform is required. It does not consider or decide whether wrongdoing has occurred in individual cases or more generally. Examples of relevant conduct are drawn for illustrative purposes from a number of political parties and campaigns. Where possible, a balanced approach has been taken to highlight underlying matters of general public interest rather than the actions of individuals or parties concerned.

The report was commissioned and funded by the Joseph Rowntree Reform Trust. It was researched, compiled and written by Chris Bowers, a journalist, writer and broadcaster with many years' experience in local and national politics. He was assisted in this task by a 'reference group' of people with differing experience of the political process whose names are listed above. The task of the reference group was to ensure that the final report, and its abbreviated version, formed a coherent contribution to political discourse in the UK with plausible and viable recommendations for updating the relevant electoral rules. In carrying out this task, the members of the reference group may have had to accept elements of the report's content that they do not necessarily agree with. Therefore, the participation of the members of the reference group should not be taken to imply that any or all of them endorse all the content of this report.

The author wishes to acknowledge the assistance in compiling this report given by many people, some of whom do not wish to be named. Particular thanks go to Tom Hawthorn and Kate Engles of the Electoral Commission, and the compliance officers of the three main parties – David Allworthy (Liberal Democrats), Alan Mabbutt (Conservatives), and John Stolliday (Labour) – all of whom gave their valuable time to answer questions.

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JOSEPH ROWNTREE REFORM TRUST

The Joseph Rowntree Reform Trust is a grant-giving body which funds political campaigns, education and lobbying in the UK to promote democratic reform, civil liberties and social justice. JRRT's values are rooted in liberalism and Quakerism. Recognising the equal worth of every person, JRRT stands for the defence of liberty, freedom of expression, freedom of conscience and freedom from all forms of oppression, be that political, religious, economic or social. It seeks to bring about significant changes in the political system, making it more accountable, democratic and transparent and to rebalance power for the well-being of society. Recent grants given by the JRRT include projects that aim to support: an increase in the number of women candidates at elections and to increase the number of women in Parliament across all parties, the fight for justice for politically active people who have been spied upon by undercover police, a mentoring project to increase the number of BAME candidates at elections and increase the number of BAME MPs across all parties, and the debate on electoral fraud and the practice of 'family voting'. JRRT has also supported the Liberal Democrat party. It should not be mistaken for the Joseph Rowntree Foundation, the Joseph Rowntree Charitable Trust, or the Joseph Rowntree Housing Trust.

Executive summary

Various Acts of Parliament, dating from 1883 to 2000, have sought to regulate the conduct of elections so that the result is determined by voters' assessments of policies, arguments and the credibility of politicians rather than by how much money an individual or party has. Yet there was widespread evidence from the 2015 UK parliamentary general election to suggest that the current rules may not be doing what they are supposed to do.

In particular, concern has been expressed that there is an array of loopholes and omissions of enforcement that are allowing candidates, parties and third party actors to bypass spending constraints, thereby jeopardising both the principle of the level playing field and the previously limited role of money in UK elections. The use of direct mailshots, staff working under instruction from head office, imported campaigners (many transported on official party 'battle buses'), market research possibly being used as a form of tacit telephone canvassing, the use of social media to target specific voters, and the collection and use of data have all been used in ways that have gained advantage for candidates in certain marginal constituencies. This is not illegal, as long as the costs of such activity are counted against a candidate's election allowance, and the candidate does not go above his/her designated spending limit. However, there is evidence of activities that have been apportioned to party (national) spending limits that ought to be assigned to the constituency and the candidate, and in some cases doing so would have pushed a candidate over the permitted spending limit. This prompts the worry that the parties, candidates or third parties can circumvent spending limits, and therefore breach the spirit, and sometimes the letter, of the current rules.

The fact that the Crown Prosecution Service decided not to prosecute all but three of the 30 individuals it investigated following police reports in the spring of 2017 does not mean the problem has gone away; arguably it highlights it. The CPS made it clear it was looking to ascertain not whether the rules had been breached, but whether there had been any intent to do so, and as it judged that it could not sustain a prosecution based on the evidence in all cases except one, it decided not to prosecute.

This report concludes that there is by definition a problem. The law is framed to promote confidence in the voting system by preventing significant differences in spending between candidates, and preventing significant over-spending on specific constituencies by parties, yet there is ample evidence that precisely this is happening, through both undetectable activities (like targeting voters via Facebook) and by candidate-specific expenses being counted against party limits. It also finds there is a lack of clarity, that the current rules create incentives that work against what they are supposed to achieve, and that the collection and analysis of data have become a central factor in modern-day election campaigning yet the purchase, accumulation, organisation and manipulation of

data can slip through the regulatory net. It also highlights how punishments do not fit crimes, and the enforcement of rules needs serious attention.

The recommendations for tackling these issues fall into two categories. The first is for wide-reaching reform to address the incentives behind pushing the limits of a candidate's spending allowance. Because the government – certainly the 2015-17 government and presumably the current one – is committed only to 'incremental reform' of the current system, the second category is an array of recommendations for tweaks and different approaches to enforcement.

The far-reaching solutions this report proposes are:

- ❖ a new legal framework for the use of social media in an election context, including the establishment of consistency between social media and the rules on paid-for political advertising on broadcast media, and a mechanism for accounting for targeted expenditure on a constituency basis through Facebook and other social media
- ❖ renewed consideration to be given to public funding of political parties and a proportional voting system, in order to level the election playing field structurally.

The raft of measures for 'incremental reform' include:

- ❖ an increase in candidate spending allowances in conjunction with a commensurate decrease in party allowances and greater apportionment of candidate-specific activities to the candidate's allowance
- ❖ a single body to investigate allegations of electoral wrongdoing
- ❖ lowering the bar for re-runs of constituency elections where rules have been breached
- ❖ a review of the purchase and use of personal data in a political context
- ❖ annual spending limits for parties
- ❖ establishing core guidance about apportionment of certain core expenses to party or candidate allowances and thereafter insisting that ignorance of these rules is no defence.

What's the problem?

A fundamental principle of democracy is that elections should be fair contests. They should be a presentation of visions, convictions, programmes and people to the electorate, with voters then deciding which of the available options they favour.

In Britain, money is not supposed to play a major part in it. In American elections, very expensive television advertising plays a crucial role, which in turn requires candidates to have access to big budgets. In British elections, TV advertising is banned. There are strict rules on how much money a party can spend on its national campaign and on any individual constituency. It is one of the last areas of activity where money is supposed not to play more than an incidental part, where a party's strength is measured in terms of how many volunteers it can call on alongside the credibility of its message disseminated via the media and local leaflets. It is even a criminal offence to pay someone to canvass for a candidate.

The spending limits for parties are set out in the Political Parties, Elections and Referendums Act 2000 (PPERA). Party expenses are regulated for the year leading up to the election (or just under a year in the case of 2015 – the regulated period began on 23 May 2014 so was 349 days). Candidate expenses are regulated by a different Act of Parliament, the Representation of the People Act 1983 (RPA). The amount a candidate can spend is limited in the 14 weeks leading up to the official campaign (the 'long campaign') and in the 5-6 weeks between the dissolution of Parliament and the election itself (the 'short campaign'). Note that for a snap general election there is no 'long campaign' and the year-long accounting period for parties must be carried out retrospectively, so there were some differences between the requirements for the 2015 election compared with 2017. (Much of the case-history information in this report is from the 2015 election, as the report was in preparation before Theresa May called the June 2017 snap election; where 2017 was different, this is made clear, although the differences are minimal because most rules and campaigning techniques were the same in both elections.)

At the 2015 general election the limit for *party* expenditure was £19.5 million for any party contesting all 650 seats. Assuming the figures given by the parties are accurate – and while they will never be totally accurate, there is no reason for major conspiracy theories in this area – no party gets near £19 million. In 2015, the Conservatives came closest with £15.6m, Labour spent £12.1m the Liberal Democrats £3.5, and Ukip £2.9m; for the Conservatives and Liberal Democrats, these figures represent a lower level of expenditure than in 2010.¹ Parties have exceeded £19.5 million in the past – Labour and the Conservatives both exceeded it in 1997, the last election before PERA established the first *party* spending limits – but none has come close to it since 2000.

¹ Electoral Commission, 'UK Parliamentary General Election: Campaign spending report', February 2016

There is a limit that can be spent in the short campaign *per candidate*, effectively per constituency given that each party can have only one candidate per electoral division. The amount varies according to the number of voters in a constituency, but is around £15,000. This figure was raised for the 2015 election for the first time since 2005 (largely as a result of postage costs having increased significantly, plus general inflation and candidate spending trends).² Despite this rise, parties face a much harder task to stay within this limit, and that is at the heart of the problem.

Because the current parliamentary voting system throws the focus onto a couple of dozen marginal constituencies, the parties understandably decide to focus their efforts on those rather than have an even spread of campaigning across the country (in reality, the larger parties typically target 60-100 seats but elections can be won and lost on smaller numbers). However, because there is a tight limit for spending in every constituency and, in effect, a long way to go before parties hit their limit for national spending, there is a considerable incentive to see which activities that are vital to fighting a constituency campaign can be passed off as party expenditure, thereby raising the amount of money available to candidates. It is these constituencies in which the problems occur – in the vast majority of constituencies, candidates, agents and parties act well within the rules, but in the battlegrounds which decide elections, there are vastly greater levels of expenditure and interference from party HQs, with the arising allegations of unfair and distorted competition.

There is a certain amount of evidence from the 2015 general election to suggest that quite blatantly constituency-specific activities were passed off as national expenditure. In his *The British General Election of 2015*, Philip Cowley wrote:

That the Conservatives usually outspend Labour and other parties is nothing new. Only the Conservatives have the funds to have four-page messages wrapped around local newspapers, for example. However, this advantage has become even more pronounced with the availability of digital and direct mail campaign techniques. Moreover, these are campaign techniques that will not be noticed in measures of campaign spending at constituency level. One rival campaigner estimated – with a sense of admiration and envy rather than complaint – that the Conservatives would be spending up to £100,000 on some seats that would be counted as ‘national’, not local spending – thus driving a proverbial coach and horses through supposed constituency spending limits.³

The perception is that there is no sanction against parties engaging in such practices. The Crown Prosecution Service decided to bring charges in just one of several constituencies in which it admitted to finding evidence of infringements in the 2015 election. The perception therefore persists that there are rules aimed at preventing elections being ‘bought’ by those with the most to

² Electoral Commission, ‘Report on the administration of the 7 May 2015 general elections’, July 2015, §3.148

³ Cowley, P, & Kavanagh, D, ‘The British General Election of 2015’, Palgrave Macmillan, 2016, p274

spend, but that these rules are barely enforceable. This perception undermines trust in public institutions and respect for democracy.

It is the possible causes of such perceptions that are the subject of this report. These are activities that the RPA and PPERA sought to rule out but have failed to do so, either because there are loopholes, or because technology has allowed for certain political campaigning activities that were simply not invented when PPERA was drawn up in the late 1990s. The government has gone some way to recognising this. In a debate on a Private Member's Bill in the House of Lords on 10 March 2017, the former cabinet minister Lord (George) Young, speaking for the government, offered talks to 'break the logjam'; and since he was responding to a call from Lord (Paul) Tyler about the necessity to clarify the party and candidate spending criteria, this placed the issues covered by this report firmly on the political agenda, albeit with a government commitment only to finding a way forward towards 'incremental reform' of party funding and spending rules.⁴ In addition, responding to the news that the Crown Prosecution Service would be taking legal action in one constituency, a Conservative Party spokesperson said, 'There is a broad consensus that election law is fragmented, confused and unclear, with two different sets of legislation and poor guidance from the Electoral Commission. Conservatives are committed to strengthening electoral law.'⁵ This report therefore ends with a series of recommendations for how the law can be updated and policed, albeit with the caveat that technological and internet advances mean it must be kept constantly under review.

It also looks at whether it makes sense for *party* spending limits to remain regulated by one Act (PPERA 2000) and monitored by one body (the Electoral Commission) while *candidate* expenses are regulated by another Act (RPA 1983) and monitored by another body (the police, in the shape of various different area forces). In particular, it is concerned with ensuring that, whatever body or bodies are responsible for enforcing electoral law, they should have credibility. When Arron Banks, someone with enough money to buy influence in politics, says quite openly, 'I don't give a monkey's what the Electoral Commission says' in response to a question about the Commission investigating alleged undeclared expenses by Leave.EU,⁶ there is potentially a credibility problem, however much one puts Banks' comments down to bravado. (Banks has also campaigned for Brexit, using the argument that the UK needs to take back control of its democracy, which suggests he would support measures to reinforce that democracy.)

What is *not* the subject of this report are clear breaches of the law. Undeclared expenses, whether deliberately or inadvertently omitted from an agent's election return, are potential criminal matters that have to be dealt with by the police, the Electoral Commission and other authorities. This report is concerned with activity that appears to breach the intention of the law but, under the existing

⁴ Hansard, 10 March 2017, column 1596

⁵ Quoted in The Guardian, 2 June 2017, 'Conservative candidate Craig Mackinlay charged over election expenses'

⁶ The Guardian, 2 April 2017, interview with Carole Cadwalladr

rules and enforcement procedures, can take place without risk of serious sanction to those involved or the election result.

What has blurred the boundary between wrongdoing and breaches of the intention of the law is the decision by the Crown Prosecution Service not to prosecute anyone from 2015 other than in one constituency. This decision effectively leaves a large amount of scope for infringements before a candidate, agent or party official would stray into the realm of 'wrongdoing'. The CPS chose not to prosecute because:

In order to bring a charge, it must be proved that a suspect knew the return was inaccurate and acted dishonestly in signing the declaration. Although there is evidence to suggest the returns may have been inaccurate, there is insufficient evidence to prove to the criminal standard that any candidate or agent was dishonest.⁷

The decision by the CPS not to prosecute suggests that the definition of 'wrongdoing' is breaking the rules with intent, rather than breaking them in the first place. While this is understandable at the level of not wanting to discourage private citizens from volunteering for formal roles in the political process, it does place the issue of enforceability at the heart of the credibility of the rules on election spending. This paper therefore sets out to be clear about what candidates and agents should know, so that ignorance cannot be used as a defence in future the way it clearly was over infringements in 2015, and that clear infringements should be subject to sanction.

It should be noted that many of the examples given in this report involve the Conservatives and the Liberal Democrats. This is because the

Conservatives' strategy at the 2015 general election was to target the Liberal Democrats' seats in the south of England, in particular the 14 Lib Dem seats in the west country. Therefore, much of the evidence comes from those campaigns. However, no party has a clean record on this, indeed there is anecdotal evidence to suggest that the SDP and Liberal parties pushed the boundaries in the 1980s, Labour pushed them in the 1990s, and arguably the Conservatives have simply caught up in terms of strategy. The focus when reading and digesting this report must therefore be on the lessons that can be learned about the regulatory regime, and not which party did what.

What the Electoral Commission says

Spending does not need to be counted against both the candidate's and party's spending limit. An item of spending will fall into one category or the other:

- Items that promote the candidate are likely to count towards the candidate's spending limit
- Items that promote the party are likely to be covered by the rules on party campaign expenditure. For example, posters with the party name and not the candidate's name.

Electoral Commission, 'UK Parliamentary General Election 2015: Guidance for Candidates and Agents' Part 3, page 14

⁷ Crown Prosecution Service statement, 10 May 2017

It is also important to note that this report does not present an exhaustive record of cases which cause concern, merely a set of examples to highlight how the rules may not be performing the job they were written to do.

No system will be perfect, but if the public cannot believe that it is the power of ideas and messages, and the credibility of candidates, which decides elections – not the scale of parties' spending – then the whole basis on which governments and individual MPs assert their mandate is perilously undermined.

Areas of concern

The amount of money a *candidate* can spend at an election has been regulated since 1883, when the Corrupt and Illegal Practices Act came into force. But the first time political *parties* had the amount they could spend on a campaign regulated came in the Political Parties, Elections and Referendums Act 2000, which expanded on some of the areas left unregulated by the Representation of the People Act of 1983.

At the 2015 general election, the Conservatives targeted a few dozen seats, particularly 23 they felt they had to win to achieve enough MPs to prevent Labour forming the post-election government. Most of these seats were held by the Liberal Democrats, who were in coalition with the Conservatives in the run-up to the election. This approach was known as the ‘black widow strategy’ after the Australian spider that eats its mate.⁸ Many of the examples of conduct considered in this report took place in Lib Dem seats targeted by the Conservatives, though it is important to stress again that the principle behind the activity is more important than which parties were involved, and all three leading parties were fined by the Electoral Commission for failing to comply with spending rules at the 2015 election.

Investigations by Channel 4 and other media and researchers have centred on a number of areas of concern. However, it is important that the areas under investigation should not simply be those that make for the best news story. Moreover, Channel 4 in particular has looked to unearth wrongdoing, whereas this report looks at the areas of activity where the spirit of both PPERA and the RPA appears to be being frustrated. There appear to be four areas of activity in which this may be happening: direct mailshots, imported campaigning, telephone canvassing, and social media. In addition, there is a growing area that warrants some attention for its potential to influence elections in the immediate future: the use of personal and geographical data.

Direct mailshots

The advent of ‘mail merge’ techniques allowed for mass mailouts to look personalised, and this became a technique used by political parties to make a general letter look like it was written to a specific person. The extent to which recipients recognise the signs of an apparently personalised letter that has gone to lots of people is open to question, but the option to personalise a letter to a voter allows for factors that are specific to a constituency to be included. The question is then at what point the line is crossed that takes a letter from being a national communication that can legitimately be counted as party expenditure, to being a targeted letter that should be counted as part of a candidate’s expenditure.

⁸ Ross, T, ‘Why the Tories Won: the inside story of the 2015 election’, Biteback, 2015

The following example comes from the constituency of St Ives in west Cornwall, but is almost identical to others sent out at the same time (and very similar to letters sent out under Theresa May's name in 2017). St Ives was represented from 1997 to 2015 by the Liberal Democrat Andrew George. Six days before the election, a number of people in the constituency received the following 'personalised' letter:

RT HON DAVID CAMERON
PRIME MINISTER

1st May 2015

Dear [Name of constituent inserted]

On Friday, either Ed Miliband or I will be the prime minister of the United Kingdom. And [Name of constituent inserted] – because you live in a marginal constituency, your vote will be critical in deciding who governs Britain.

WE'VE COME A LONG WAY SINCE 2010

Five years ago, the Labour Minister in charge of spending taxpayers' money left us a note saying: "I'm afraid there is no money".

Five years on, Britain is now one of the fastest growing economies in the world. We are getting our national finances back under control. We have halved our deficit as a share of our economy. More people are in work than ever before.

This economic progress has not happened by accident. It is the result of difficult decisions, hard work and sacrifice from the British people, and of patiently working through our long-term plan. But all the work of the past five years will come to a halt if you don't act with your vote.

ED MILIBAND AND THE SNP WILL COST YOU

Ed Miliband would lead a weak and chaotic government. And this isn't just because he and Labour haven't learned any lessons on the economy since leaving behind that note five years ago.

The most troubling reality of Mr. Miliband is that the only way he can become Prime Minister is with the backing of the Scottish National Party – giving Nicola Sturgeon and Alex Salmond an effective veto over anything the UK government does. Which means on every vote, and every Budget, Ed Miliband will have to buy off the SNP's support. And it will be all of us who pick up the bill – in higher taxes, more debt and a stalled economy.

YOUR VOTE WILL BE THE DIFFERENCE

[Name of constituent inserted], you have the power to stop Ed Miliband and the SNP. You can do it by voting Conservative in St Ives.

A vote for the Liberal Democrats in St Ives this time is a huge risk. Their support has collapsed and Nick Clegg has said he is equally likely to back Labour anyway – meaning a Lib Dem vote locally would serve to help Ed Miliband get enough seats to do a deal with the SNP and form a government.

The Conservatives only need to win 23 more seats to form a majority government – and guarantee Ed Miliband and the SNP do not get into Downing Street. St Ives is one of those 23 marginal seats.

So how you vote on Thursday here in St Ives will determine who governs Britain for the next five years, not just what happens in your local area.

[NAME OF CONSTITUENT INSERTED], I NEED YOUR SUPPORT.

[Name of constituent inserted], don't risk everything we have achieved over the last five years. The only way you can stop Ed Miliband and the SNP taking us back to square one is to vote Conservative here in St Ives.

Yours sincerely,

[signature]

Rt Hon David Cameron
Prime Minister

P.S. [Name of constituent inserted], please give me your support by voting Conservative on Thursday. You will be backing the competent team who have built a stronger economy and have a clear plan to keep going.

At the election, Andrew George's majority of 1,719 for the Liberal Democrats was wiped out, and Derek Thomas won the seat for the Conservatives with a majority of 2,469. When no mention of the above letter was discernible from a look at the election return submitted by Derek Thomas's agent, a St Ives constituent wrote to the Electoral Commission asking whether it could legitimately count as national expenditure. On 27 May 2016, an Electoral Commission guidance advisor replied via a letter that, from its contents, appears to be a standard response to enquiries of this kind:

Dear [Name of constituent who wrote]

Thank you for raising the issue of the 'personal' letter from David Cameron. We have seen various iterations of this letter to different voters in different parts of the country. In each case the text is identical except that the name of the addressee and town or city appears to have been added through a 'mail merge' process often used for junk mail and enabling an apparently personalised letter to be sent to people around the country. The letter does not appear to deal with any specific candidates or local issues, and has been distributed in different parts of the country, though targeted it would seem at particular constituencies.

The law does not differentiate between local and national campaigning, but between candidate and party spending. Not all spending in, or targeted towards, a constituency is automatically candidate spending. The broad rule we suggest applying is whether the material mentions a candidate, a specific constituency, specific local issues, or in some other way is seeking to promote a particular candidate. The letter appears to us to promote the party on a national level, referring to national policies, the national political landscape, and makes no reference to local issues or local candidates. The fact that the letter was sent to voters in particular constituencies does not make it candidate spending – parties may and do target national campaigning messages in particular constituencies.

We are satisfied that the letter in question can be reasonably regarded as national campaign spending and reportable by the party rather than any particular candidate(s). The differentiation between party and candidate spending can be a difficult one to establish, and we are grateful to you for sharing your concerns, but I hope this response helps to explain our view.

I hope the above is helpful to you. If you do have any further questions, please do not hesitate to contact us on 0333 103 1928 or e-mail the party and election finance inbox at pef@electoralcommission.org.uk.

Kind regards

[Name of official]

Guidance Advisor

The Electoral Commission

This email, which is based on the Electoral Commission guidance given in advance of the election,⁹ appears to contradict both itself and the Commission's own guidance.

In the second paragraph, the guidance advisor writes: 'The broad rule we suggest applying is whether the material mentions a candidate, a specific constituency, specific local issues, or in some other way is seeking to promote a particular candidate.' One term not used is 'principal purpose', which appears in the relevant guidance: 'In deciding whether an activity was promoting the candidate or the party you should consider what the principal purpose is.'¹⁰ The guidance goes on to say that if an activity has a dual-purpose, then its cost may be apportioned 50:50 between candidate and party allowances. The discrepancy may be irrelevant, because the name of the constituency, St Ives, is mentioned five times in the letter, in two cases as 'here in St Ives'. It may not mention any specific local issues, but by mentioning the constituency so often, and being addressed by name to a voter in that constituency, it seems hard to argue that it is solely a national campaigning tool. In any case, it is hard to see how the 'principal purpose' of the letter could have been to do anything other than get the Conservative candidate in that constituency elected. Despite media coverage focusing on the national result, there is no 'national result' in the UK system – only a series of isolated elections that send representatives to the House of Commons (which then has the responsibility of making national decisions). Therefore, the purpose of a letter to electors within a given constituency can only be intended to bring about the election of the local candidate. There is also the fact that, under PPERA rules, only one candidate from any party can be fielded in a parliamentary constituency, so an argument could be made that a party targeting named voters in a named constituency which it says has decisive status in the overall election could only be working for one specific candidate.

⁹ Electoral Commission, Guidance for candidates and agents, Part 3 of 6, page 14

¹⁰ *ibid*

If naming the specific constituency would require it to be considered attributable to candidate expenditure, it is worth asking whether, if the letter had not used the name of the constituency but had said 'in the west of Cornwall' or 'here in the west of Cornwall', it would have got around the requirement not to mention 'a specific constituency' (in the guidance advisor's words) and thus be legitimately attributable to party spending. Whatever geographical designation is used, the implicit force of the letter rests with St Ives being not only a marginal constituency but one of just 23 in the country which could determine whether the Conservatives gain an overall majority or not. It is therefore hard to see how David Cameron's letter could not count as candidate-specific expenditure – at least in part – under the Electoral Commission's own guidelines.

Interviews conducted for this report suggest a rule of thumb has emerged whereby parties – all parties, not just the Conservatives – treat material that is created, bundled and sent from head office as party expenditure, even if some of it focuses on a specific constituency. The assumption that this is legitimate conveniently avoids the need for candidates' agents to liaise with party HQ on what central costs they need to note on a candidate's return (which is not to say that no HQ spending ever finds its way onto candidate election returns – it clearly does). This is an area that needs clarification, in particular which expenditure (if any) should be counted against the party allowance and which should be attributed to the candidate.

One possible approach that has been suggested to solve this problem is to make the determining factor between 'candidate' and 'party' expenditure relate to the recipient rather than the sender. In other words, if the communication were personalised, as opposed to being sent to just an unspecified member of a mass of electors, then it should count as 'candidate' expenditure. Obviously party members would have to be excluded, so the costs attributable to the candidate's expenditure allowance would only relate to unsolicited mail (by being a member of a party, letters received from party officers must be considered solicited).

But even if that criterion were applied, then another example of constituency-specific communication would still be outside the scope of candidate expenditure: the 'wraparound' newspaper advertisement.

A wraparound happens when an advertiser – in this case a political party – buys effectively the front two pages and back two pages of a newspaper to give it its own cover. Wraparounds must clearly say that they are paid-for advertising but are meant to create the impression among buyers and potential readers that the advertiser's product is the main story on that day's/week's front page and thereby gain credibility for the 'story' being pushed by the advertiser. The content is frequently highly subjective, but advertising content normally is. The question in an electoral context is whether the cost of the wraparound should be put down to candidate or party expenditure.

The Electoral Commission has tended to take the view that, as long as a wraparound makes ‘no reference to local issues or local candidates’,¹¹ its cost can be attributed to the party’s spending allowance. This is consistent with the Commission’s guidance to candidates and agents, but what happens if a wraparound mentions a constituency? This is where the guidance advisor’s letter in the St Ives case above is mildly at variance with the guidance, which does not include mention of ‘a specific constituency’ as cited in the St Ives letter. In addition, a story by BuzzFeed the day before the 2017 election, claiming somewhat breathlessly that it had unearthed ‘a new loophole’ in spending requirements, quoted a Commission official as saying it was happy to wave through the cost of literature under the party’s allowance if the constituency is mentioned but not the candidate.¹² It appears that the St Ives letter’s ‘a specific constituency’ was a personal formulation, and that the practical application of the Commission’s guidance is that references to specific constituencies can still allow the activity to be counted as party spending as long as they don’t refer to candidates or specific local issues. In reality, this makes the border line very blurred.

While there does seem some clarity on this issue, it still seems unsatisfactory. In particular, if the Electoral Commission says – as it does in its guidance – that activity with a dual-purpose may have its cost apportioned 50:50 between candidate and party allowances, it would help to know what sort of cases such a 50:50 apportionment would cover. Is it just for elections where there are parliamentary and council elections in the same place on the same day, or should a mention of a specific constituency qualify at least part of the costs to be apportioned to the candidate’s allowance? Such clarification is likely to be useful for the conduct of future elections.

Imported campaigning

The rules on electoral spending are intended to allow an election campaign to be fought on the basis of arguments and the willingness of activists to campaign for their party’s beliefs, and not to be trumped by large amounts of money. That is fine when people are campaigning in their own constituencies, but once they cross the border into another seat, it becomes a grey area.

The idea of people campaigning in seats that are not their own is not new. Ever since parties started targeting constituencies they thought were winnable, they have encouraged their volunteers living in no-hope seats to travel from their home to the nearest target seat to give their time and effort where it is likely to be most productive. As long as such travel is funded by the activist, the cost does not count against the candidate’s limit.¹³ This is understandable, because the cost of driving to a

¹¹ Quote taken from Electoral Commission, ‘Investigation in respect of the Conservative and Unionist Party campaign spending returns for the ... 2015 UK Parliamentary General Election’, March 2017, paragraph 100

¹² BuzzFeed, ‘The Tories are exploiting a new loophole to launch a last-minute Facebook ad blitz’, 7 June 2017

¹³ Electoral Commission, ‘UK Parliamentary general election 2015: guidance for candidates and agents’, Part 3, page 9

neighbouring constituency, or the equivalent bus or train fare, is effectively an extension of voluntary campaigning. After all, to take a slightly flippant example to make the point, if an activist who does lots of delivering needs a new pair of shoes more quickly than might have been the case if they had done no delivering, they wouldn't dream of putting part of the cost of the new shoes down as an expense – notional or not – of the campaign; it would be part of their contribution to the cause.

It is where the party pays the costs of an activist's travel that the already grey area develops more shades of grey. This is where the Channel 4 team investigating the so-called 'battle buses' has been so active. By way of example, Channel 4 calculated that the Conservatives' battle bus at the 2015 election cost £1133 per day, and that it went to 31 seats, mostly in the south west but also to some marginal constituencies elsewhere. So should the costs of this activity be attributed to the 31 seats in which the bus stopped for its passengers to campaign?

The Electoral Commission examined the battle bus phenomenon as part of its investigation into spending returns for the 2015 general election. And it was unequivocal in what it found:

Coaches of activists were transported to marginal constituencies to campaign alongside or in close proximity to local campaigners. In the Commission's view, there was a clear and inherent risk that activists might engage in candidate campaigning. Further, it is apparent that candidate campaigning did take place during the Battlebus2015 campaign.¹⁴

Yet although it criticised the assumption that the entire costs of the battle bus could be put down under a party's allowance as 'inaccurate', the Commission did not determine what proportion of spending on the battle bus campaign activity should have been reported by the *candidate* and what proportion by the *party*. It also offered no guidance as to which aspects of battle bus expenditure could legitimately be apportioned to which spending allowance, which means the question is very much still open, especially in the light of the Crown Prosecution Service's decision not to prosecute any candidate for breaches of reporting of battle bus spending.

Channel 4's political correspondent Michael Crick has suggested that the choice of selective areas in which the battle bus spent most of its time means it is against the spirit of the law for the cost of the battle bus to be counted as *party* expenditure, which is how all parties appear to have treated it, but instead should be noted against candidate allowances on the basis of which constituencies the bus called at. This argument would apply to all parties, as the Conservatives weren't the only party to count its battle bus against party spending allowances – Labour, for example, used its battle bus for

¹⁴ Electoral Commission, Investigation in respect of the Conservative and Unionist Party campaign spending returns for the ... 2015 UK Parliamentary General Election, March 2017, page 27

a ‘three-seat challenge’ of seats in London but attributed the cost of the bus to its national or party spending.¹⁵

Crick’s argument seems a hard one to sustain. Battle buses are generally fitted out for non-candidate-specific campaigning and are always going to be in one constituency at any moment in time. If it were considered constituency-specific expenditure, then any constituency through which a battle bus drove might have to be logged and an amount attributed to the expenditure allowance of the party’s candidate there; indeed by the same logic any national campaign poster would have to be counted as specific to the constituency in which the billboard on which it was posted was located. And all large parties engage in similar activity with their battle buses, posters and other national electioneering tools by deploying them in areas where they are likely to be most effective.

Where there seems a stronger argument to be made is how to apportion the cost of accommodating and nourishing voluntary activists who have been bussed into a target constituency. Crick makes this argument too, and the findings of one of his Channel 4 investigations present a case in point.

According to a Channel 4 report first broadcast on 20 April 2016, 50 activists arrived in the constituency of Cornwall North on the Conservatives’ battle bus on 5 May 2015. When they arrived, they were given leaflets from the local campaign, and a script drawn up by Conservative Central HQ. According to Channel 4, the script read:

Hi [insert name of voter], my name’s [name of caller] and I’m calling on behalf of Scott Mann, your Conservative candidate. As you know, it’s election day on Thursday. Everyone’s talking about how this seat is one of just 23 we need to win to make sure David Cameron is in No 10, working through our long-term economic plan. A vote for anyone else in North Cornwall will mean Ed Miliband held to ransom by the SNP.¹⁶

The activists carried leaflets with them which they put through the doors of residences where there was no answer, and sometimes handed over to people who did answer. The leaflets showed David Cameron on one side and Scott Mann on the other. The imprint says the leaflet was promoted by Scott Mann’s agent, Rachel Beadle.

The script is very similar to the letter sent to electors in St Ives. The big difference is that this mentions the name of the candidate, and the accompanying leaflet is promoted by the candidate’s agent. By the Electoral Commission guidance given both by its guidance advisor to the voter in St Ives – ‘The broad rule we suggest applying is whether the material mentions a candidate ... or in some other way is seeking to promote a particular candidate’ – and by the Electoral Commission on wraparounds, it is hard to see how this activity cannot count as candidate-specific, and therefore any expenses connected with it ought to count against the constituency spending limit. Channel 4

¹⁵ Channel 4 News, 17 May 2016, available online via www.electionexpenses.co.uk

¹⁶ Channel 4 News, 20 April 2016, available online via www.electionexpenses.co.uk

reported that the 50 activists who worked in North Cornwall on 5 May were all put up at the Eden Project youth hostel at a cost of £1083 (it produced the hostel bill), yet there was no evidence of either battle bus or youth hostel costs in Scott Mann's electoral expenses declaration. Mann's election return showed him £256 inside his candidate spending allowance. Therefore, had even just 25% of the £1083 for the youth hostel been declared, the Mann campaign would have breached its candidate spending allowance.

Channel 4 said it sought guidance from the Electoral Commission on how to apportion the cost of campaigners imported by party-funded transport. It says the Electoral Commission told it: 'If activists were being bussed in to particularly campaign for a candidate, then – according to the guidance we provide – a candidate would have had to make a fair and honest assessment of this, and include that in their spending return.'¹⁷ In other words, the Mann campaign failed to declare an expense that would have, by any reasonable assessment, taken it over the permitted spending limit, yet the Crown Prosecution Service declined to press charges because it was not confident of proving intent to do wrong. Without making any judgement about the legitimacy of the CPS's decision, this appears to leave the application of the rules with a serious credibility issue.

Crick also made the point in his report that North Cornwall was not an isolated case. He interviewed a campaigner on the Conservative battle bus, Maher Kahtan, who was filmed saying: 'When we travelled to any constituency, we were talking about the same candidate, and we were encouraging the people to vote for our candidate, not to talking about the Conservative or ... about the prime minister or the cabinet – no, we were talking about what he was going to do if he won the seat.'¹⁸

This is backed up by social media evidence the Electoral Commission found that showed activists from the battle bus 'holding campaign material promoting individual candidates as opposed to the party'.¹⁹ And evidence that the former Liberal Democrat MP for Torbay, Adrian Sanders, says he submitted to the police following his defeat in 2015 by the Conservative, Kevin Foster, tells a very similar story. Sanders says a Channel 4 researcher provided him with a three-page script provided to each activist on the Conservatives' battle bus when it visited Torbay. Page 1 covered national issues, page 2 regional issues, and page 3 local facts and figures for the Torbay area including information about the Conservative and Liberal Democrat candidates.²⁰ Yet all battle bus activity was apportioned to national or party expenses.

Sanders also highlights another expense that is relevant to how the battle bus relates to the candidate-specific declaration: canvass cards used by volunteer campaigners brought in by the battle

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ Electoral Commission, Investigation in respect of the Conservative and Unionist Party campaign spending returns for the ... 2015 UK Parliamentary General Election, March 2017, page 26

²⁰ Sanders, A, private conversation with the author of this report

bus. Sanders says canvass cards directly attributable to the battle bus were declared on Foster's short campaign return. The item was listed on the printer's invoice as 'Kevin Foster to print 2,276 laser print A4 canvass cards re: battle bus Torbay @ 0.056 per sheet.' He further notes that the cost of this invoice had been divided between the Foster campaign, councillor campaigns and the campaign for an elected mayor. Because, he says, the battle bus didn't visit all 15 wards of the councillor campaigns or the mayoral campaign, and was only used to promote the general election candidate (Kevin Foster), Foster's return should show the total invoice value of £127 and not the £42.06 shown.²¹

As already noted, the claim that, because the battle bus only visited part of the area covered by the council, the three-way split between Foster, council candidates and the mayoral candidate is unjustified, seems hard to sustain. Of greater significance is the fact that the canvass cards used by the battle bus activists appear on the candidate's declaration at all. Given that they were candidate-specific expenses, it is hard to see how the costs of accommodation – and possibly even any meals offered – should not be declarable. Sanders says no such items feature on the Foster declaration.²² (On the subject of meals offered, there is anecdotal evidence that the Conservatives got round the need to declare their volunteers' dinners by staging a series of 'memorial dinners' in honour of some figure from the Conservatives' past; the Electoral Commission guidance says 'You do not need to include the costs of events that are for party members only'²³ so if such dinners did take place, the only question would be whether anyone checked that all attendees were indeed party members and not a mixture of members and other helpers.)

Of similar significance is the declaration by the winning Conservative candidate for Gower in 2015, Byron Davies. His campaign in the highly marginal Labour-Tory battleground was visited by the battle bus, and he declared £500 for the bus as part of his candidate-specific expenses. The payment is a 'notional' one (meaning no money was ever paid by Davies's campaign) and it even includes an invoice from the Welsh Conservatives that appears with Davies' election return, made out to Tom Giffard, Davies's agent. The figure of £500 is less than half of the daily cost Channel 4 came up with (£1133), but if the bus visited two constituencies that day it would be roughly legitimate, and perhaps the greater significance is that it appears at all. It's also worth noting that Anna Soubry, the Conservative MP for Broxtowe, listed £140 as having been spent on 'Refreshments for Team 2015 activists' under the 'Accommodation and administration' section of her election return ('Team 2015' was the name of the Tory battle bus in the early days of the campaign).

The most benign conclusion from this is that there seems to be an understanding in some branches of political parties that costs incurred for imported volunteer campaigning are declarable, while in

²¹ Sanders, A, private conversation with the author of this report

²² *ibid*

²³ Electoral Commission, 'UK Parliamentary general election 2015: guidance for candidates and agents', Part 3, page 9

other branches that understanding is absent. The inconsistency may be an honest mistake, and some form of clarity in the Electoral Commission’s guidance is obviously needed. But it does rather beg the question as to whether expenses incurred on imported campaigning have been declared where there is room for them on a candidate’s election return and left off where the candidate is already close to his/her spending limit. Whatever the interpretation, this is a situation crying out for firm guidance from the Electoral Commission on what elements of the cost of a battle bus operation should be attributed to a candidate’s allowance and which can reasonably be left to the party’s allowance.

There is one other area of imported campaigning that doesn’t fit everyone’s definition of campaigning because the campaigners are largely unseen: the designation of certain head office staff to work on specific target seats. The perception is that the larger parties had certain staff from their party HQs working specifically on certain marginal seats, whether based at HQ or sent out to work from the constituency campaign office. Again, there is nothing wrong with this as long as the costs of such head office personnel are attributed to the candidate’s election return. Again the perception is that it seldom was, which means a significant amount of candidate-specific expenditure simply disappeared under the party allowance.

Telephone canvassing

If the aim of the legislation is to prevent elections being ‘bought’ by those with the most money, then telephone canvassing needs to be above board. Justin Fisher’s research into trends in the different political campaigning techniques showed 32% of constituencies used telephone canvassing in 1992, while 60% used it in 2005.²⁴ Given the dwindling numbers of people willing to go out door-knocking, still less to travel to a distant constituency and go door-knocking, the role of telephone canvassing can only grow.

In theory, telephone canvassing should not be an issue for a report such as this that is dealing with money. After all, paid-for canvassing is illegal, so telephone canvassing not carried out by volunteers is similarly illegal (see panel).

Prohibition of paid canvassers

If a person is, either before, during or after an election, engaged or employed for payment or promise of payment as a canvasser for the purpose of promoting or procuring a candidate’s election –

- (a) the person so engaging or employing him, and
- (b) the person so engaged or employed,

shall be guilty of illegal employment.

Representation of the People Act 1983, Section 111

²⁴ Fisher, J, ‘Legal regulation and political activity at the local level in Britain’, table 7.3b, in ‘The Funding of Political Parties: Where Now?’ edited by Ewing, K, Rowbottom, K, and Joo-Cheong-Tham (Routledge, 2012)

Therefore, a party volunteer sitting in their home, calling some numbers brought up on a voter identification software program, is acting well within the law (as long as he/she does not call numbers registered with the Telephone Preference Service, and all calls are made from an identifiable telephone number). Whether they pay per call made or make 'free' calls as part of a line rental package is largely immaterial, as the cost of calls would only have to be listed as a 'notional' expense if it went above £50 (the notional gift waiver), and all parties assume that volunteer canvass calls from private phones fell well within this limit.

There is potentially a legal loophole to do with the definition of 'canvasser'. If someone were to argue that a canvasser appearing on a doorstep asking for their party's support is engaging in a different activity to someone phoning for the same purpose, then paid-for telephone canvassing might be deemed legal. However, the suggestion that parties are getting round the prohibition of paid-for canvassing by dressing phone canvassing up as market research (see below) suggests there is a general acceptance that phoning someone to persuade them to vote for a particular candidate is not an activity that can be legitimately paid for. It would probably help if the Electoral Commission clarified this, but it seems beyond doubt that paying someone to canvass voters over the phone is a criminal offence, and that a party that paid a call centre to make calls on its behalf would be guilty of such an offence (unless it could somehow prove that calls were made solely by volunteers).

Despite this apparent clarity, there is a grey area of growing suspicion. There is evidence that some parties might be using market research as a way of trying to influence voters as a way of getting round the restriction on paid-for telephone canvassing. This has become known as 'push polling'.

Concerns have been raised by *The Canary* and Channel 4 News that a London-based company, Return Marketing, may have hired people for both the 2015 general election and 2016 EU referendum to phone voters, ostensibly asking for market research information but formulating questions in a way that attempts to persuade them to vote a certain way.

The Canary is an online crowd-funded investigative news service that claims to investigate some of the stories that traditional media don't address. After it was approached by a former freelance contractor of Return Marketing, The Canary ran a story on 31 May 2016 saying their source, who they named 'Alex' to protect his/her identity, had been asked to read scripted questions that clearly encouraged people to vote for a particular party. Alex was quoted as saying:

The questions were designed to be misleading and to push answers in favour of the ... party. They misled people about other political parties and left out candidates for minority parties in most constituencies.

Calls were made to voters in a specific constituency, and the instruction Alex was given was always to put the favoured candidate first, followed by the candidate from the main opposing party, and

then to mention ‘some other candidates from some minority parties’ without giving the names of those candidates or parties. Alex says he/she recalls making calls to three marginal constituencies (which he/she named) but the candidates’ election returns in those three constituencies contain no reference to Return Marketing, nor indeed to any expenditure on telephone polling or canvassing.

The Canary’s article was based on just one source, but there were anecdotal accounts in online forums in which other casual staff who said they had worked for Return Marketing claimed they had been asked to make calls that appeared to be pushing voters towards particular candidates.

The Canary also found evidence that a second company, Blue Telecoms, had been commissioned by a political party to carry out telephone polling in South Wales. A Linked-In post by Blue Telecoms’ company director Sascha Lopez said:

Blue Telecoms were originally approached by ... to help with a small number of local campaigns in South Wales, including Gower and Cardiff North ... We worked with their technical team to implement up to the second live reporting, and their voter targeting team to target specific areas and demographics with changes made at a moment’s notice.²⁵

It is possible that this was all above board, that Blue Telecoms simply asked a series of questions about voter priorities and intentions, which is allowed, in order to enable the party to assess whether their campaign was on track. All parties do that. The concern comes from the fact that, despite ‘helping with’ campaigns ‘in key constituencies’ (Blue Telecoms’ words), there are no mentions of Blue Telecoms’ activity in the election returns of Gower and Cardiff North, despite the company running ‘a 100 seat call centre’. The costs would have been considerable – if a company was running a 100-seat call centre, reaching around 1600 voters a day, and paying their contractors £8 per hour (all figures from Blue Telecoms), that would have been around £6,400 for one eight-hour day. That’s more than 40% of the average candidate spending allowance.

Some people interviewed for this report raised concerns about telephone canvassing where the ‘evidence’ was at best circumstantial. This is no basis for casting aspersions as to the legitimacy of a campaign, but it does testify to a culture of suspicion that needs addressing. For example, one respondent reported many of his supporters saying they had been phoned by people asking them to vote for a rival party yet no telephone canvassing expenses were declared on the rival candidate’s election return. This is likely to have been because all calls to voters in that constituency were made by volunteers and therefore no expenses were incurred (if voters had been asked to vote for a certain party, then the calls would have to have been by volunteers, as paid calls that attempted to persuade would have amounted to a criminal offence). But the fact that activities such as those reported by the Canary and Channel 4 News (especially those involving the 2017 election – see page

²⁵ Linked-In post: <https://www.linkedin.com/pulse/successful-conservative-party-call-campaign-sascha-lopez>

28) have come to light contributes to a perception that the rule limiting persuasive calls solely to volunteers may not be being observed across the board.

Once again, it's important to stress that if there has been any wrongdoing, this is a matter for the police and Electoral Commission and not this report. This report is concerned with where the law may be framed in a way that allows practices to be legitimate which are clearly at variance with the spirit of the law, in particular that elections in this country should not be 'bought' by the richest parties. Here three reports by Channel 4 are significant.

On 21 June 2016, Channel 4 News broadcast a report fronted by Michael Crick in which under-cover reporters had gone into a north London office described as one of three used by Return Marketing.²⁶ It was following up on information from the source of the Canary report, and given the timing, the under-cover researchers found themselves listening to telephone polling about the referendum. One contractor – it is not made clear whether a present or past caller for Return – is filmed saying, 'There was a question in there, [which the respondent had to answer with a rating of] one to five, and it was: the EU costs £350 million a week, how important is that to you?' The significance of the formulation of the question lies in the figure of £350 million, which was used prominently by the Leave campaign but criticised equally prominently by the Remain campaign as being misleading or untrue. Channel 4 obtained seven scripts, five of which included questions whose formulation included details about the costs of EU membership that the Remain camp hotly disputed. One script had a question that was only to be put to undecided voters: 'The EU costs each family £700 per year. How important is the cost of the EU?' Not only is the figure contentious, but logically the cost is not necessary to the question – the question could simply have been 'How important is the cost of the EU to you?' The presence of the first part gives rise to suspicion that the caller might be trying to push the receiver of the call in a certain direction.

This all begs the question as to whether the script had been formulated by supporters of the Leave campaign as a form of subliminal telephone canvassing. The under-cover filming also revealed an instruction to callers written on a whiteboard in the Return offices 'Questions are verbatim' – in other words, don't deviate from the script you've been given. And as the callers were clearly being paid and were not volunteers from the Leave campaign, if the script amounted to de facto telephone canvassing, it would be illegal.

Yet if market research on voter intentions is legal but telephone canvassing is illegal, where is the border line? Crick's report sought the view of Andrew Hawkins, the Chairman of the polling company ComRes. He was broadcast talking about the scripts Channel 4 had obtained from Return:

²⁶ <https://www.channel4.com/news/by/michael-crick/blogs/referendum-pushpolling-influence-result>

Claims are made that are clearly contested claims around Britain's contribution to the EU and presented as fact. That would in my view doubtless fall foul of the Market Research Society's own code of conduct, and it would suggest that there is as much of an attempt to persuade the respondent with those questions as there is to find out what the respondent actually believes.²⁷

Hawkins appears to be referring to clause 33d of the Market Research Society's code of conduct, which says: 'Members must take reasonable steps to ensure that participants are not led towards a particular point of view.'²⁸ Although this is only a code of conduct, the existence of it for marketing purposes and its widespread use in the market research industry suggests that this wording offers scope for tightening the existing rules on the border between genuine voter intention surveys and de facto telephone canvassing. In other words, if a call is made by a paid caller seeking information for a forthcoming election which attempts to lead the recipient of the call to a particular point of view, that would amount to persuasion, thus break the code, and take the call into the territory where it would be tantamount to paid-for telephone canvassing. That would be illegal.

Return Marketing denied they were working for any of the Leave campaigns, and the allegations levelled against them remain just that: allegations. But if public confidence in elections is dependent – at least in part – on rules that prevent elections being 'bought', then the blurred boundary between telephone canvassing and voter intention polling must be addressed.

The second Channel 4 report highlights why the issue of 'push polling' could have a major influence on the outcome of elections. Broadcast on 24 October 2016, it looked at the use of 'big data' in the 2016 US presidential election.²⁹ Thanks to data on spending, TV viewing and other preferences collected in advance of the election (see page 36 below), the two parties built up a clear picture of the kind of messages various voters were susceptible to. With such a picture in use as the basis for campaign messages, it is a very short step to formulating a script for a telephone market research agent to use when conducting a survey that is ostensibly voter intention research but in reality a form of push polling or telephone canvassing.

A set of more blatant allegations of paid-for telephone canvassing, based on evidence collected at the 2017 election, was made in June 2017 by Channel 4 News.³⁰ Using an under-cover infiltrator in a call centre to gather film footage, the broadcaster claimed to have uncovered an operation run by Blue Telecoms under contract from a political party, and used by that party during the election campaign in a way which may have broken data protection and election laws. Among the practices highlighted by Channel 4 were quite clear canvassing on behalf of specific election candidates carried out by paid callers (using scripts that showed a close resemblance to scripts given to

²⁷ *ibid*

²⁸ Market Research Society, Code of Conduct page 16

²⁹ Available at <https://www.youtube.com/watch?v=CgYvf3Ckdso>

³⁰ Channel 4 News, 22 June 2017

volunteer canvassers), as well as misleading calls claiming to be from an ‘independent market research company’ which does not apparently exist. What is interesting about the timing is that this happened well after the Canary and Channel 4 reports that highlighted the illegality of paid-for telephone canvassing. If the allegations prove to be true, this is a matter of wrongdoing for the Electoral Commission to deal with, but it still raises the question about how existing rules that prohibit paid telephone canvassing can be enforced, as not every example of it will be exposed by an undercover campaigner with a hidden camera working for a national television news bulletin.

So while the rules on telephone canvassing seem to be very clear – paid-for telephone canvassing is not allowed – the rules on market research, and the difficulty in policing them short of a number of whistle-blowers emerging shortly after an election, mean that there is ample scope for telephone canvassing to take place in ways that are barely even subliminal. Given the growing importance of personal data, to which information gleaned by phone in modern-day electoral techniques is added, there is clearly a need for the rules to be tightened.

Social media

Something that can certainly not be held against those who drew up the two Acts of Parliament that set out the current electoral rules are campaigning technologies that were not in operation – perhaps has not even been invented – at the time the Acts were drawn up. One area that falls into this category is social media. Facebook, the vehicle that accounted for 99% of social media activity at the 2015 general election,³¹ dates from 2004; PPERA dates from 2000. This applies to the whole range of social media techniques – while social media and other digital activities were present in the 2010 election campaign, the 2015 election was the first where digital was used sufficiently widely to have played a part in influencing the final outcome.

It’s important to stress which parts of social media are of relevance to this report and which are not. Much social media is free, notably tweets and individual posts on Facebook. So while George Osborne made ample use of Twitter in the final two weeks of the 2015 campaign, mainly to make highly specific spending pledges to attract journalists who would then write about them, anyone could do that regardless of financial means. The aim of this report is not to castigate those who have the best ideas first, but to ensure that an unfair advantage is not gained by those who have money. Therefore, the use of free social media is outside the remit.

Even the parts of social media that are paid-for don’t necessarily infringe the letter or spirit of existing rules. All parties have teams of paid staff who run the Twitter and Facebook accounts of their prominent politicians, and the Conservatives used a paid-for feature on Facebook under the

³¹ Electoral Commission, ‘UK Parliamentary General Election: Campaign spending report’, February 2016, §3.32

heading 'How our manifesto will help you, your family and your area' which was an interactive facility designed to show what the party's policy platform would mean for individuals and localities. There are grey areas in both these activities. Should the cost of promoting a prominent politician count against that politician's candidate allowance? – there is probably a case for saying party leaders should be exempt because they are the face of their party (and, in Labour's and the Conservatives' case, the potential Prime Minister), but the case is stronger that other politicians should apportion to their candidate allowance at least a part of the cost of paid staff promoting them. Facilities like the Conservatives' 'How our manifesto will help you, your family and your area' site are fine if all they do is show what national policies will do, say, to a person's income, but if they stray into the area of showing what the party's economic strategy would mean for a named town, then this would be very much area-specific campaigning and ought to have at least some of the costs attributed to the candidate spending allowance of the Tory candidate in that town. In general, however, these uses of social media are not of major concern.

The branch of social media that is most relevant is that which offers political parties the chance to target voters in paid-for online advertising, and at the 2015 election this facility was offered by Facebook. Because Facebook users volunteer a lot of personal detail about themselves, Facebook can build up personal profiles which it uses to sell advertising to companies that want to get to specific markets. Those same profiles allow political parties to target certain people based on gender, age, and a range of preferences, and, to highly specialised degree, location. This allows parties to focus on their target seats ('geo-targeting'), and on marginal voters within target seats (demographic targeting).

Targeting through Facebook can take different forms. It could be a straight advertisement (in the form of an e-poster or a campaign video), it could be a 'boost' for a free post put out by party HQ or one of its candidates or supporters, or it could be through the 'like' function, notably a small message in a person's Facebook news feed saying that someone listed as a friend 'likes' the party. And by directing such advertising towards a specific demographic profile or geographical area, it can be highly specific in getting to narrowly defined areas of the electorate, in particular floating voters in marginal seats. We know the Conservatives made ample use of this in 2015, indeed their director of digital operations at the 2015 and 2017 elections Craig Elder admitted in a public presentation just after the 2015 election:

It was really important that we were able to use and focus on channels that were going to help us reach out to people in small towns and villages as effectively as we were able to in larger urban areas. And Facebook's advertising, and its data targeting capabilities, meant we were really able to focus on exactly who we wanted to speak to, focusing our efforts on

those in the closest, marginal constituencies that would decide the election, and tailor our messages depending on who we were speaking to in terms of age, gender and so on.’³²

Elder makes more detailed admissions of this in Tim Ross’s account of how the Conservatives won the election (see below).³³

Because the current rules were written before the advent of social media as a campaigning tool, profile targeting on social media is a form of activity that appears to be passed off as a party expense, and often at greater cost-effectiveness than mailshots or phone canvassing. It can also be largely invisible: however unreliable a guide to the numbers a candidate will poll on election day, the presence of rosette-wearing campaigners on the streets and posters in windows and gardens gives a rough indication as to levels of campaigning activity, whereas social media campaigning takes place in the privacy of a living room or a person’s smartphone. As such, the campaigning material can’t be seen or challenged by others, other than by it going inadvertently to a sympathiser of a rival party who reports it.

Martin Moore has studied the Conservatives’ use of Facebook in the 2015 election campaign. He notes that the Conservatives spent £1,209,593 on Facebook in the election. This is not the sum total of the Tories’ spending on Facebook; election returns from Conservative candidates show that some of them declared individual expenditure on Facebook, and some agencies will have used social media on behalf of political parties without rules on ‘third parties’ requiring them to declare it as having been spent on any one platform. Again, there would be nothing wrong with the Conservatives spending £1.2 million on Facebook if it were genuinely non-specific to any candidates, or if it were itemised among specific candidates and counted against their allowances. But Elder’s admissions coupled with a lack of transparency in accounting for Facebook spending suggests that much of that £1.2 million was indeed spent on specific targeting, and therefore should have been counted against candidate spending allowances. Moore ventures the opinion: ‘This communication may be compromising the principles of fair and open elections in the UK. Its use and apparent success also suggests that existing electoral legislation and regulation are fast becoming outdated and un-policeable.’³⁴

³² Elder, C, addressing the Campaigning Summit Berlin, May 2015 available at <https://www.youtube.com/watch?v=i-BPRArB5gg>

³³ Ross, T, ‘Why the Tories Won: the inside story of the 2015 election’, Biteback, 2015

³⁴ Moore, M, ‘Facebook, the Conservatives and the risk to fair and open elections in the UK’ in *The Political Quarterly*, Vol 83 No 3, Jul-Sep 2016

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Facebook Ireland, Limited

INVOICE

Invoice #: [REDACTED]
 Invoice Date: 05-May-2015
 Billing Period: APR-15
 Account Id / Group: [REDACTED]
 Payment Terms: NET 30
 Page: 1 of 2

BILL TO: CONSERVATIVE AND UNIONIST PARTY

ATTN: Accounts Payable

VAT Reg.No: [REDACTED]

Advertiser: CONSERVATIVE AND UNIONIST PARTY

Customer I.O. #:

ID Line#	Description	Total
1	Campaign 06	2.07
2	Campaign 14	297.69
3	Campaign 16	1,000.00
4	Campaign 17	1,000.00
5	Campaign 18	1,000.00
6	Campaign 19	861.65
7	Campaign 20	14,147.34
8	Campaign 21	10,000.00
9	Campaign 22	548.42
10	Campaign 23	481.83
11	Campaign 25	7,673.26
12	Campaign 24	58,051.07
13	Campaign 26	1,000.00
14	Campaign 27	5,000.00
15	Campaign 28	1,000.00
16	Campaign 29	1,000.00
17	Campaign 30	1,673.89
18	Campaign 31	9,843.26
19	Campaign 32	2,000.00

INVOICE NUMBER MUST BE REFERENCED ON ALL PAYMENTS

Customer to account for any VAT arising on this supply in accordance with Article 196, Council Directive 2006/112/EC.

Remit Check To:
Facebook Ireland Limited

Bank Details:
[REDACTED]
Acct Name:
[REDACTED]
Account Number:
[REDACTED]
SWIFT Code:
[REDACTED]

Remit Payment to:
[REDACTED]
For invoice queries contact:
[REDACTED]
Intermediary Bank:
[REDACTED]
Intermediary Bank's SWIFT Code:
[REDACTED]

Subtotal: 120,998.54
Freight: 0.00
VAT@0%: 0.00

Invoice Total: 120,998.54
Invoice Currency: GBP

An example of a Facebook invoice, in which the use of (presumably) targeted social media is hidden in numbered campaigns, thus making it impossible to see what was spent where.

Facebook gives advertisers the option of focusing advertising generally to within a 10-mile radius. Its impact is dependent on how many people are on Facebook, but Craig Elder says 55 per cent of the UK population were active Facebook users by 2015; 'this isn't 55 per cent of people who use a computer, it's 55 per cent of people'.³⁵ This appears to be based on Facebook having 32 million users

³⁵ Ross, T, 'Why the Tories Won: the inside story of the 2015 election', Biteback, 2015

in the UK, among its total worldwide users that are believed to make up about a quarter of the world's population. Elder has admitted that 'we could do demographic targeting, and interest targeting, to focus in on people and present different content',³⁶ and Facebook's own 'success stories' page on what it did for the Conservatives boasts that 'Using Facebook's targeting tools, the party was able to reach 80.65 per cent of Facebook users in the key marginal seats.'³⁷

Given the extent to which Facebook was used for specific targeting, and how much the Conservatives spent that was apportioned under the party's allowance, a strong suspicion is left that, at the very least, the spirit of the PPERA spending limits was breached when so much of the £1.2 million appears to have been devoted to specific target seats.

The Electoral Commission devotes a short section to social media in its report on campaign spending at the 2015 general election, but admits, 'The ability to fully identify spend by campaigners on online campaigning at the 2015 UKPGE is limited.'³⁸ This is partly because of the newness of online and digital campaigning techniques, but also because neither the Political Parties, Elections and Referendums Act nor the Representation of the People Act provides any controls on the use of social media or digital campaigning methods. However, the Commission does say quite clearly:

... any such regulated spending by political parties would be subject to existing spending limits and reportable after the election. It is likely to be reportable as advertising or unsolicited campaign material and this applies whether it is conducted online, via social media or in another format (the same applies in the rules for non-party campaigners and/or candidates).³⁹

In other words, even though social media and digital campaigning are not listed in the relevant Acts, the purposes to which they are put – namely advertising and unsolicited campaign material – are covered, and therefore the expenditure should be appropriately accounted for. And the sentence in brackets about this applying to 'non-party campaigners and/or candidates' implies that *any* costs connected with social media activity deployed to mention a local candidate or specific local issues (Electoral Commission guidance quoted on page 13)⁴⁰ should be counted against a candidate's personal spending limit.

Yet even if the existing legislation provides for the uses to which social media is put, there is still the problem of transparency and enforcement. The Electoral Commission itself admits that the only declared social media expenditure came from 'identifiable social media providers', in other words Facebook and to a limited extent YouTube and Twitter. And as the above invoice shows, so much can

³⁶ *ibid*

³⁷ <https://www.facebook.com/business/success/conservative-party>

³⁸ Electoral Commission, 'UK Parliamentary General Election: Campaign spending report', February 2016, §3.29

³⁹ *ibid*, §3.28

⁴⁰ Electoral Commission, Guidance for candidates and agents, Part 3

be redacted or couched in non-traceable terms that even the data currently provided by social media platforms doesn't tell us very much.

An interesting development in this context is the Labour Party's 'Promote' tool. This is a piece of software developed by the party centrally, aimed at allowing candidates to use Facebook to send tailored messages to demographically and geographically targeted voters in their constituencies. It was designed to allow Labour to spend its energies targeting the people it could most influence, ie. potential Labour voters, rather than addressing all voters. The significant element is Promote's post-election reporting mechanism – at the end of the campaign, Promote generates a notional invoice which is sent to every candidate, showing what was spent on Facebook campaigning in their constituency, so it can be apportioned to the candidate's allowance. Labour embarked on Promote after the 2015 election, expecting to have it ready for 2020, but then rushed it out when the 2017 election was called; senior party officials say it was both highly beneficial and very popular with agents. It's too early to say whether its reporting mechanism could solve the transparency problem (for example, if all parties were to operate a Promote-like system, could we be sure it would cover *all* a candidate's spending on Facebook and other social media targeting?), but at first glance it seems to offer a potential framework for keeping targeted social media expenditure open and transparent.

Another element of transparency is being able to identify where advertising material comes from, both for responsibility purposes and so it can be challenged by others if it is in some way inappropriate. All printed matter at elections must carry an imprint showing the printer, publisher and promoter of a given piece of literature. By contrast, much paid-for social media advertising neither carries the detailed imprint required on printed letters and leaflets nor even a US-style 'paid for by X campaign'. The Electoral Commission admits in its report into the administration of the 2015 general election that the growth of social media raises transparency issues over who is responsible for information sent by social media: 'Current law only requires an "imprint" on printed campaign materials, but we advise campaigners to use imprints on other kinds of materials as good practice.'⁴¹ But that is advice, and while it might be sensible to follow it, an offence under the Act cannot be committed solely for ignoring advice. If an imprint is required, that would then force responsibility to be taken either by the national party or by the candidate's agent, which in turn would help indicate where the cost of any electronic election materials should be noted. A digital version of an imprint would mean the inclusion of certain metadata in order to be able to trace the advertisement to its source.

There is a broader issue about the transparency of Facebook, in particular the fear that it is a big beast that has so far escaped meaningful regulation. Speaking to the BBC, Chi Onwurah, the former Head of Technology at Ofcom, said, 'They have no competitors, we don't even know what market it

⁴¹ Electoral Commission, 'Report on the administration of the 7 May 2015 elections', July 2015, §3.164

is they should be being regulated in. We're all dancing around this huge 10-tonne elephant which is Facebook, and nobody knows who's responsible.'⁴² The Trump campaign in the 2016 US presidential election is believed to have spent \$70 million on Facebook activities, and both the Trump campaign and the Leave campaign in the 2016 UK referendum claim the use of Facebook was 'decisive' in their victories.⁴³ One of the ways to ensure Facebook is not used to circumvent rules on fair financing in elections is to require more specific data on the use parties make of Facebook to target voters, but for that to happen Facebook must be required to declare more information that it has so far been willing to do. It generally cites 'client confidentiality' for refusing to give information, which may be legitimate at the moment, but if governments make the submission of certain information by social media platforms a condition of election activity, and are willing to ban Facebook (and others') activity if the company refuses to agree, then monitoring the amount spent on particular constituencies – and particular groups of voters – ought to be possible.

Linked with the question of Facebook is the subject of 'fake news'. Often treated as a joke topic because of the amusing nature of many fake news stories, deliberately faked stories are believed to have played a part in the 2016 US presidential election, including false information bulletins saying that Republican voters should vote on 8 November and Democrat voters on 9 November (polling day was 8 November).⁴⁴ In this regard, Facebook appears to play the role of a publisher which takes on trust the veracity of information posted by its subscribers without checking it, unless it falls foul of certain algorithms designed to weed out dubious content. The Conservative MP Damian Collins, who since 2016 has chaired the House of Commons Culture, Media and Sport Committee, said:

Historically there have been quite strict rules about the way information is presented. Broadcasters have worked to a very strict code in terms of impartiality and there are restrictions on the use of advertising, but on something like Facebook you have a media which is increasingly seen as the most important and most valuable media that campaigns invest in in an election period but which is totally unregulated.⁴⁵

Collins also says his committee would be looking for Facebook to take a lead in tackling fake news, but that if it refuses to do so his committee would seek 'to create a legal obligation' on social media companies 'to combat fake news and other unhelpful and illicit material'. It remains to be seen whether this proves a real or idle threat. What appears to be clear is that fake news is a far more serious matter than is generally assumed, as the ability to put out information that is wrong and maliciously intended to influence voters is alive and well, and this can suppress the vote and pervert the course of elections.

⁴² 'Panorama', BBC Television, 8 May 2017

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ *ibid*

Given the likely growth in social media and digital campaign techniques, these seem some of the major areas that warrant serious attention if egregious breaches of the spirit of the rules are not to become further embedded.

But more broadly, what is apparent is that the rules around election communication – in both PPERA and the RPA – are built very much around leaflets and other printed matter, yet leaflets are a declining part of election activity, while electronic communication is a growing part. That means the whole issue of how elections are to be conducted fairly without a decisive advantage being available to those with most money needs to be reviewed, along with how enforceable the rules on electronic communication are likely to prove. It will be a hard area to police, and creative solutions – possibly along the lines of making large amounts of data available to all registered parties to create a roughly level playing field, or forcing platforms like Facebook to be more open about who has been sent electoral material – may have to be explored.

Data collection and analysis

It is easy to look at direct mailshots, imported campaigning, telephone canvassing and social media, and look at the costs of these activities to the various parties. But one of the features that determines the effectiveness of these techniques is how much data a party has in the first place, and what use it can put it to. In fact, it is probably no exaggeration to say that a substantial and smart investment in data and appropriate analysis well ahead of an election leads to a situation where parties and candidates need to spend only a limited amount in the short campaign to be remarkably effective. This means that expenditure figures on mailshots, social media etc based on the short campaign could be largely misleading.

The adage about the American economy – that when the US sneezes Europe catches a cold – appears to apply in British politics too. Techniques that are tried and found to work in American elections tend to make their appearance in UK elections around five years later. This is largely because there is a lot more money in the American electoral campaigns, so the US political landscape can act as a laboratory for other countries, but the need to ensure that money doesn't offer an unfair advantage is particularly important with techniques tried in the US. The manager of the successful campaign to elect Barack Obama for a second presidential term in 2012, Jim Messina, was commissioned via his company The Messina Group by the Conservative Party for the 2015 election. Labour also had an ex-Obama man working on its 2015 campaign, David Axelrod, but he appears to have focused more on messaging rather than data and digital techniques. Nonetheless, Labour commissioned the digital branding and campaigning agency, Blue State Digital, to give it what it thought was a modern-day digital presence in the two years leading up to the 2015 election. On its website, Blue Stage Digital says that, 'in 2014 alone, 5.6 million more actions were taken by email subscribers, including everything from sharing messages on social media to signing petitions to

donating to the campaign's fund.⁴⁶ Overall, Labour's use of data for directing its messaging appears to have lagged behind the Conservatives' data strategy in 2015; it remains to be fully assessed how much Labour had caught up by 2017.

The primary requirement for all large-scale political operations these days is therefore to establish a large database of information, especially about voters in marginal constituencies, along with information about how they respond to certain messages and other stimuli. In the 2012 US presidential election, both parties collected large amounts of data on the electorate – emanating from credit card and supermarket purchase information, magazine subscriptions, television viewing habits, social media activity, etc – and hired data analysis companies to work out the characteristics of each voter to see what kind of messages they would be susceptible to. From this a form of 'triage' was performed, dividing voters into those definitely for 'us', those definitely against 'us', and those still undecided. The undecideds could further be broken down into those who were likely to vote for 'us' but needed a push, those who were genuinely undecided, and those who were leaning towards 'them' but might be susceptible to the right kind of electoral charm offensive. The result was that canvassers who went to an area didn't knock on every door in a given street but had a list of addresses it was deemed worth calling at, with the rest to be ignored. The canvassers were also data collectors, not just about voting intentions, but about all sorts of other information available from the trappings of a house, such as intensity of religious fervour, specific interests (sport, special needs, etc) and other indicators of wealth and outlook.⁴⁷

Such techniques, in particular the growth of databases, made their first significant impact in Britain in the 2015 election, and are likely to play a crucial role in future general elections. Messina is reported to have bought in lots of data which allowed for a more targeted approach to the Conservatives' canvassing in 2015. But when was this data bought? And for how much money? If it was bought more than a year in advance, it is likely to have escaped all detection. And as national data bought by a party's head office, it will have been swallowed up in the *party* spending allowance, even though its most decisive usage will have been for the benefit of *candidates* in marginal seats. In an interview with *The Spectator* three days after the 2015 general election, Messina said 'I think we spent a total of £30 million on the election,'⁴⁸ but he didn't specify over what time period; the period is crucial given that £30 million is over 50 per cent more than the amount permitted in the year leading up to general election polling day.

In other words, the potential for large sums of money to buy data that could be of vital importance in attracting floating voters in the marginal constituencies may be slipping under the radar, and thereby circumventing the purpose for which spending limits were set. There are also broader

⁴⁶ <https://bluestatedigital.com/our-work/labour-party/>

⁴⁷ Channel 4 News 24 October 2016, available at <https://www.youtube.com/watch?v=CgYvf3Ckds0>

⁴⁸ <https://blogs.spectator.co.uk/2015/05/jim-messina-interview-how-the-pollsters-got-it-wrong-and-why-labour-lost/>

privacy issues surrounding the whole process of buying, aggregating, structuring, organising, manipulating and evolving data (and associated models) that may not be financial issues but may present a form of unfair competition, and possibly illegal competition if it breaches data protection rules. Much of this is speculation, but there is enough evidence to indicate that the potential for getting round the rules is considerable.

The role of data and digital techniques clearly played a massive part in the EU referendum of 2016. Dominic Cummings, the digital manager of the Vote Leave campaign, is on record as saying that Vote Leave put 98 per cent of its funds into digital campaigning:

It is actually hard, even for very competent and determined people, to track digital communication accurately, and it is important that the political media is not set up to do this. There was not a single report anywhere (and very little curiosity) on how the official Leave campaign spent 98% of its marketing budget. There was a lot of coverage of a few tactical posters.⁴⁹

In another comment, Cummings said:

One of the reasons why so few in London saw the result coming was that the use by campaigns of data is hard to track even if you know what to look for and few in politics or the media know what to look for yet. Almost all of Vote Leave's digital communication and data science was invisible even if you read every single news story or column ever produced in the campaign or any of the books so far published.⁵⁰

If data is increasingly crucial to the effectiveness of an election campaign, the cost of collecting such data clearly has to be considered. For those with money, the data is just bought. There may be ethical considerations connected with whether it is right to sell data to an entity with the means to pay for it when such data has come from the supermarket choices, credit card purchases, TV viewing habits and even search engine history of private individuals. This is where the upholding of data protection rules could have an increasing bearing on ensuring a level playing field for elections.

The same goes for those without money who look to collect data, and here an example from Dominic Cummings' running of Vote Leave is relevant. Cummings has admitted that, because the Leave side was widely expected to lose the 2016 referendum as it was behind in the polls for most of the campaign, 'we had to take many calculated risks; one of our central ideas was that the campaign had to do things in the field of data that have never been done before.'⁵¹ As well as developing a new web-based canvassing software program (known as 'Vics' – Voter Intention Collection System),

⁴⁹ Cummings, D, *How the Referendum Campaign was won*, Spectator, 9 January 2017,

<https://blogs.spectator.co.uk/2017/01/dominic-cummings-brexit-referendum-won/#>

⁵⁰ <https://dominiccummings.wordpress.com/2016/10/29/on-the-referendum-20-the-campaign-physics-and-data-science-vote-leaves-voter-intention-collection-system-vics-now-available-for-all/>

⁵¹ *ibid*

Vote Leave tried to make up for having less voter data than the Remain camp by running a competition for people to predict the winner of every match in the 2016 European football championships that began on 10 June 2016, two weeks before the referendum. Vote Leave had calculated that those who would enter such a competition were demographically very likely to vote for Britain to leave the EU but normally ignored politics, so having access to them could be crucial to the final result. Cummings managed to get a £50 million prize for the winner, a sum that fitted with the Leave campaign's message that EU membership costs the UK £350 million per week, thus £50 million per day, but that was a neat synergy which the campaign never tried to make into the primary reason for doing it. The primary purpose was always data gathering, indeed entrants were asked to give a postcode, an email address and a phone number, as well as say how they intended to vote in the referendum.

Even though Cummings and his associates were fairly up-front about the underlying reason, does this form of data collection breach the idea of fair elections? If so, is the £50 million prize money in effect a form of electoral spending that should be counted against an allowance? The Data Protection Act makes it clear that personal data gathered for one purpose cannot be used for another without the person being explicitly informed. The government website Gov.uk says on the first page of its data protection guidance for businesses, 'when you collect someone's personal data you must tell them who you are and how you'll use their personal information, and they have the right to see the information and correct it, if it's wrong. Also [you must] say if the information will be used in other ways, such as being passed to other organisations.'⁵² It is possible Vote Leave did have some small print on the entry form (attempts to find the form 10 months later proved fruitless), which means it could argue it had covered itself against breaches of data protection rules. But small print or not, there is still the suspicion that data was gathered for one professed purpose for actual use in another, which is illegal under the Data Protection Act.

The use of databases clearly cannot be wished away, and perhaps it shouldn't be – those who have decided which way they are going to vote, or who live in constituencies where the result is a foregone conclusion, will be spared the hassle of being targeted as data analysis increasingly directs political campaigners to the most valuable areas for them. Campaigning tools may come and go – who knows: Facebook may have hit its peak in 2015 as other social media vehicles emerge – but the background role of data looks set to grow in importance. The question is how the use of data can be monitored so it does not allow those with the largest sums of money to buy elections.

There are various ways of tackling this, some of which are explored in this report's recommendations (see page 62). It is possible the EU's General Data Protection Regulation, due to come into effect in May 2018 to replace the current Data Protection Act, will clamp down on some

⁵² <https://www.gov.uk/data-protection-your-business/overview>

of the questionable practices, as the regulation is designed to protect individuals' reputation and offers them a 'right of erasure' of information relating to them. Irrespective of what sort of Brexit deal is negotiated, British businesses are likely to remain compliant with the GDPR, especially if they wish to trade with EU countries, but whether that will extend to politics remains to be seen.

The key to monitoring the collection and use of data may lie in a beefed up role for the Information Commissioner's Office, the body that ensures compliance with the Data Protection Act. Indeed fighting the prevalence of 'big data' in society in general could become as much of an argument in tackling the use of big money in political campaigning as simply the need to ensure the richest don't 'buy' elections. After all, civil liberties and privacy issues go hand in hand with the freedom to choose one's government and leaders, so ensuring a person's right to withhold personal data may be a more important measure to be considered than finessing already complicated rules on what parties can and cannot spend money on during defined election periods. In this context, it is interesting to note that the new Information Commissioner, Elizabeth Denham, announced in May 2017 that she was opening a 'high priority' formal investigation into the use of data analytics for political purposes. Denham said in a blog:

Given the big data revolution, it is understandable that political campaigns are exploring the potential of advanced data analysis tools to help win votes. The public have the right to expect that this takes place in accordance with the law as it relates to data protection and electronic marketing.⁵³

Given that Denham recently confronted Facebook over privacy issues, she could prove to have a crucial role to play in ensuring British elections are fair, transparent and not influenced by big money.

⁵³ <https://iconewsblog.wordpress.com/2017/05/17/information-commissioner-elizabeth-denham-opens-a-formal-investigation-into-the-use-of-data-analytics-for-political-purposes/>

Points of reference

So much for outlining the problem – what of the potential solutions? Before being able to draw any conclusions or make recommendations, it is important to understand the context in which these activities take place. And for that it's necessary to establish certain points of reference.

What was PPERA designed to do?

Like many electoral Acts of Parliament, the need for the kind of spending limits that came to be set out in the Political Parties, Elections and Referendums Act of 2000 had been building up for some time. At the October 1974 general election, the Conservatives spent around £100,000. By the time of the next election in May 1979, that had increased 20-fold to around £2 million, thanks largely to the party using an advertising and marketing agency (Saatchi & Saatchi). Eight years later at the 1987 election, the Conservatives spent £9 million, more than twice Labour's figure of £4.4 million. By 1997, the Conservatives' general election bill had risen to £28.3 million, but Labour's had risen to a comparable £26 million. Yet the biggest discrepancy was between the two biggest parties and the rest: the Conservative and Labour expenditures of £28.3 and £26 million dwarfed the Liberal Democrats' 1997 spending figure of £2.1 million.⁵⁴

Having won the 1997 election with a landslide majority, Labour set about trying to ensure that money couldn't buy future elections. It expanded the terms of reference of the Committee on Standards in Public Life, then chaired by Lord (Patrick) Neill, so it could examine and make recommendations on the funding of political parties in the UK. This formed the committee's fifth report, published in October 1998. In his letter to the Prime Minister, Tony Blair, presenting the committee's report, Neill wrote:

Many members of the public believe that the policies of the major political parties have been influenced by large donors, while ignorance about the sources of funding has fostered suspicion. We are, therefore, convinced that a fundamentally new framework is needed to provide public confidence for the future to meet the needs of modern politics and to bring the United Kingdom into line with best practice in other mature democracies.⁵⁵

In the months in which PPERA was being prepared at the close of the 20th century, senior Labour figures were openly admitting that they wanted to end the Conservatives' financial advantage in elections. Labour had brought in a limited form of state funding of political parties in 1976 under its deputy leader Ted Short, leading to the term 'Short money' becoming established in the British political lexicon. Short money is given to opposition parties who have a minimum representation in

⁵⁴ Neill, Lord of Bladen, 'Fifth Report of the Committee on Standards in Public Life', October 1998 (Cm 4057-I)

⁵⁵ Ibid, piii

Parliament (combined with receiving a certain number of votes), essentially to help them cover the administrative costs of providing an opposition to hold the government to account.

Labour committed itself to the state funding of political parties in the mid-1980s, but did not implement that pledge when it got into government in 1997. However, it did press ahead with the introduction of spending limits for parties, which it enshrined in PPERA. Presenting the PPERA Bill to the House of Lords, Labour's Home Office Under-Secretary of State Lord (Steve) Bassam said:

The core purpose of this Bill is nothing less than to reinvigorate our democracy. Over the past decade or so public confidence in our democratic institutions has suffered as a result of the now well documented instances of financial sleaze that at times seemed to pervade the political life of our country. This is not the time or the place – or perhaps the day – to point the finger at particular individuals or particular parties ... But the secretive funding of our political system, including funding from a number of foreign sources which had no direct stake in the future of this country, has undoubtedly left a sour taste.⁵⁶

The aim was clearly to restore confidence in democracy by stopping the parties with greatest access to funding sources buying an election as opposed to winning it on the merits of their programme of policies, and to make funding and expenditure transparent. Therefore, while campaigning techniques are constantly changing, the principle that elections should be won and lost on arguments rather than money remains the same. And if PPERA is not ensuring that elections cannot be won as a result of disproportionate spending by one party, then by definition it is failing.

Does money actually influence election campaigning?

There is an implicit assumption that more money equates to greater effectiveness in campaigning. If that assumption is undermined, then exceeding the expenditure limits becomes a less serious transgression in terms of influencing the election. Here the work of Justin Fisher, professor of politics at Brunel University, is relevant.

Fisher has pinpointed a number of trends in election campaigning, in particular a greater focus on target seats, the 'takeover' of local campaigns by national offices, and a shift from traditional campaigning techniques (delivering leaflets, door-to-door canvassing, etc) to more modern centralised techniques (computer-addressed mailshots, telephone canvassing, social media). This latter shift has been not simply enabled by advances in technology, but also made essential by dwindling amounts of voluntary labour willing to knock on doors or collect voter numbers outside a polling station on a rainy polling day. Interestingly, one of the few areas where voluntary labour has bucked the trend and gone up is when it's imported from other constituencies, which rather reinforces the point about centralised campaigns focused on a handful of target seats.

⁵⁶ Hansard, 3 April 2000, column 1086

In a study of four general elections (1992, 1997, 2001 and 2005) which fall neatly into two either side of PPERA (2000), Fisher found a decline in traditional campaigning – which is free to parties as it relies on voluntary labour – and a rise in modern campaigning, which costs money. He says, ‘Money is becoming more significant as parties increasingly focus on forms of campaigning that incur expenditure.’⁵⁷

In terms of effectiveness, the evidence of the four elections up to 2005 suggests that Labour and the Liberal Democrats were more effective in their use of money than the Conservatives. However, Fisher highlights two reasons for this: the Conservatives were not as good at targeting in the four elections he studied, thereby putting more money into safe and hopeless seats than their rivals; and the figures relate to the election (short) campaign itself, which leaves out much of the spending in the months leading up to a general election, spending that can be very effective in terms of preparing voters for the short campaign. We know that the Conservatives spent large sums of money in the latter months of 2014 before even the ‘long period’ of the 2015 election campaign limits came into effect, and they focused their targeting on 23 seats, most of them held by the Liberal Democrats.

Fisher’s work has to be treated with some caution the further back one goes, because his broad conclusion is that it took the Conservatives until 2015 to really get the hang of effective targeting of seats and resources.⁵⁸ For example, the analysis of the 2010 election by Fisher and four other electoral trends researchers concludes that, while the Conservatives outspent Labour and considerably outspent the Liberal Democrats, Labour and the Lib Dems made up at least part of the deficit in more effective volunteer campaigning.⁵⁹ Although his analysis into the 2015 election has yet to be published, he says the Tories’ mastery of the art of targeting suggests their greater financial resources did give them a distinct advantage.

The basic conclusion of the research by Fisher et al can be summarised as: just because a party has money does not mean it has electoral effectiveness, but the more it targets key seats the more the money it has becomes a factor. His research confirms the value of a continued role for voluntary campaigning, but again only where effectively targeted. This is why importing voluntary labour to a constituency can be highly effective – parties like Labour and the Liberal Democrats, who can call on more people willing to deliver literature and knock on doors, can have their advantage reduced or wiped out if the Conservatives are able to bus in volunteers at no cost to the candidate’s spending

⁵⁷ Fisher, J, ‘Legal regulation and political activity at the local level in Britain’ (page 114) in ‘The Funding of Political Parties: Where Now?’ edited by Keith Ewing, Jacob Rowbottom and Joo-Cheong-Tham (Routledge, 2012)

⁵⁸ Fisher, J, private conversation with the author of this report

⁵⁹ Fisher, J, et al, ‘You Get What You (don’t) Pay for: The Impact of Volunteer Labour and Candidate Spending at the 2010 British General Election’, Parliamentary Affairs Advance Access, April 2013

limit. This in turn makes the case for regulation of expenditure that covers imported campaigning if we are to guarantee fair elections based on fair financing.

Fisher's work is based on the effectiveness of techniques. Although he does not ignore the availability of volunteers to do the work, this does not feature prominently in his work, yet this is also a crucial element in why the issue of effectively increasing a constituency campaign allowance could influence the outcome of an election. Despite surges in membership of Labour, the Lib Dems and Greens in 2015-16, the general trend is that all party political membership is falling, indeed in early 2017 membership of Labour and the Greens was on the decline again. The Conservative Party is suffering the double-whammy of having a membership that is falling and ageing, meaning its resource of volunteers is declining. Tim Bale, professor of politics at Queen Mary University in London, told Channel 4 News that Conservative Party membership was 'down to about 150,000 in mid-2015 but only 5-10% of them do any actual work between elections, and while a few more turn out at elections, it falls well short of staffing a full campaign.'⁶⁰

It therefore seems clear that the role of money is crucial to the outcome of elections, and is likely to become more so in the foreseeable future. Fisher's work also suggests that the role of money is exacerbated under a first-past-the-post voting system as it allows for money to be used highly effectively in the handful of seats which will decide an election. This makes the case for a realistic tightening of the current rules.

What difference does it really make?

There are breaches of rules that people get away with in all walks of life, along with pushing of boundaries which might not quite breach a rule. If such breaches matter, it's either because the rules are unenforceable and therefore will be applied inconsistently, or because the breaches do actually make a difference. It is important to ask whether the liberties taken with the current rules on electoral spending are a matter of an Act of Parliament that needs to be better worded to allow for enforceability, or whether actions never intended to be allowed when PPERA was drawn up are genuinely influencing election results.

To answer this question, two further questions have to be asked: has the counting of expenditure against national allowances that can legitimately be considered to be constituency-specific made a difference to the numbers of people voting one way or another, and if so, has the difference been in sufficiently large numbers for it to have influenced which party has won a given constituency? This latter question is not the same as 'Would the expenditure logged as national have pushed a constituency campaign over the permitted limit if it had had to be logged as constituency expenditure?' – breaches of the law are a matter for the enforcement authorities, even if we must

⁶⁰ quoted on Channel 4 News, 21 April 2016

bear in mind their reluctance to prosecute in the absence of *intent* to breach the law. Our concern here is whether the way the law is being interpreted is creating an unfair climate for elections.

In addressing the first of these questions (whether the additional activities not included on a candidate's return would have affected voter turnout and choices), there is very little reliable evidence indicating one way or another. However, it is interesting to note that Mike Wood, the Conservative MP for Dudley South, wrote a thank you letter to activists the week after the 2015 general election, in which he said of the battle bus:

It made a big difference. In every one of the three wards in Dudley South where the battle bus campaigned on Wednesday morning, turnout was at least 10% higher than any of the other three wards (where Labour's trade union them [sic] was trying to turn out the vote). Not only did we end up holding on in Dudley South, but all three local election candidates won with majorities of over 1,000. None of that would have happened without all of the fantastic activists on the battle bus who came to help me the day before the election.

This is just one anecdotal observation, and there may be some exaggeration to make Wood's volunteers feel better about the time they devoted to his campaign. It's also an act of faith to suggest that the 10 per cent higher turnout (if that's what it was) would in its entirety have increased the Conservatives' vote – other parties may have benefited too, perhaps even from people so put off by the battle bus that they made the effort to vote against the Tories. But even allowing for all that, it seems clear that there is some advantage that was gained from activities that should, in whole or part, have been counted against candidate-specific spending limits. This may only be 5 per cent, or even 3 per cent, but in some cases that would have been enough to tip the balance in one party's favour, in the case of the 2015 election the Conservatives'.

Bearing in mind these back-of-an-envelope figures of 5 and 3 per cent, what difference would that have made to the result in some of the constituencies where the alleged apportionment of candidate-specific expenditure to party returns has been questioned?

- ❖ In Amber Valley, the Conservatives' battle bus visited on Saturday 2 May, five days before polling day. This was a Labour-Tory marginal which the Conservatives had won in 2010 with a 536-vote majority. The Conservatives held the seat, with the victorious Nigel Mills ending up £1073.47 inside his candidate spending limit, but without any record of the battle bus or costs associated with activists. So based on a 5 per cent difference, would the seat have gone Labour without the visit of the battle bus? The answer is possibly – the Conservatives polled 20,106 votes (44.0%) as against Labour's 15,901 (34.8%), giving a Tory majority of 4205. That means, all else being equal, that it would have taken 2103 voters who actually voted Conservative to have voted for Labour's Kevin Gillott, that's 4.6 per cent of the total turnout in Amber Valley and 5.8 per cent of those who voted for the leading two candidates.

- ❖ In Torbay, the Conservatives polled 19,551 (40.7%) while the Liberal Democrats polled 16,265 (33.8%). So it would have taken 1644 voters who actually voted Conservative to have voted Lib Dem for Adrian Sanders to have held the seat, that's 3.4 per cent of those who voted and 4.6 per cent of those who voted for the leading two candidates.
- ❖ In North Cornwall, the Conservatives' victory was big enough to be beyond the 5 per cent threshold. Scott Mann won with 21,689 votes (45.0%), ahead of Dan Rogerson with 15,068 (31.2%). That means that 3311 Tory voters would have had to vote Lib Dem for Rogerson to have retained his seat, that's 6.9 per cent of those who voted and 9.0 per cent of those who voted for the leading two candidates.
- ❖ In St Ives, Derek Thomas overturned Andrew George's majority, polling 18,491 votes (38.3%) to George's 16,022 (33.2%). That means 1235 Tory voters would have had to vote Lib Dem for George to have retained his seat, which is 2.5 per cent of those who voted and 3.6 per cent of the votes for the leading two candidates.
- ❖ In Sutton & Cheam, a constituency in which the *Canary* informer 'Alex' alleges 'push polling' calls were made by Return Marketing without there being any record of this on the election return, the Conservatives took the seat from the Liberal Democrats with a 3921 majority, Paul Scully winning with 20,732 votes (41.5%) ahead of Paul Burstow with 16,811 (33.7%). Therefore, 1961 people who voted Conservative would have had to vote Lib Dem for the Lib Dems to retain the seat, that's 3.9 per cent of the total turnout and 5.2 per cent of those who voted for the leading two candidates.
- ❖ In Gower, where the battle bus expenditure was declared but whatever 'help' that was given by Blue Telecoms was not, the Conservatives took the seat from Labour on a tiny majority of 27 after two recounts. Byron Davies polled 15,862 votes (37.1%) as against Liz Evans' 15,835 (37.0%). That means that if just 14 Tory voters had voted Labour (0.03% of the total turnout and 0.04% of the votes cast for the two leading candidates), Labour would have held the seat.

All these results come from the 2015 election, but one could take case histories from 2017 to make the same point. They all happen to be examples of seats which the Conservatives won, but similar examples could be taken from other parties' successes in marginal seats. The point is that the margins of victory are close enough for practices that make a very small difference to influence the result (in 2017, 10 constituencies were won with majorities of less than 100, and 52 were won with majorities of less than 1000).

These snapshots and the accompanying numbers are very rough, and the assumptions underlying them are open to challenge – for example, it takes no account of voters who may have voted for the Lib Dems opting to vote Labour or Green. And in examples from constituencies won by other parties,

there may be other factors that would have to be taken into consideration in a similar analysis of whether activities not envisaged under the relevant Act might have influenced the result. But the aim is to show what sort of margins are at stake in the constituencies where activity has taken place that appears to contradict the spirit of PPERA. The conclusion from this crude number-crunching is that, if the activities that fall outside the spirit of PPERA are responsible for influencing the behaviour of 5 per cent or more of voters in those constituencies, the results of constituency polls can be affected, and, in elections eliciting a government majority of just 12 or no overall majority at all, the national impact could be affected too.

Does the punishment fit the crime?

If there are rules by which all candidates and parties have to adhere, the punishment for breaking those rules must be commensurate with the unfair advantage gained. Clearly a minor breach of a rule that is unlikely to have made a difference to the result should trigger a sanction at the level of a slap on the wrist. But if a candidate or party breaks a rule that might have influenced the result, the winning candidate should not be allowed to keep the prize, otherwise rules can be broken with the sanction factored or budgeted into the cost of the campaign ('the cost of doing business'⁶¹ as the chair of the Electoral Commission John Holmes described). In addition, a breach of a rule in a marginal constituency will have a much greater effect than the same breach in a 'safe' seat, so the rules have to be framed in a way that allows the punishment to fit the crime in all constituencies, as the law cannot be framed to allow for the difference between marginal and safe seats.

Despite having an impressive 27-page Enforcement Policy,⁶² the Electoral Commission clearly wants to take a soft touch approach to the issue of errors by lay officials of political parties, and agents generally fall into that category: most are volunteers assisting their party as part of their contribution to the democratic system. This is right up to a point, in that if we want to keep money out of our electoral system, volunteers have to play a major part, and the body overseeing the fair conduct of elections has to act in a way that doesn't make the job of being an agent or treasurer of a political party into a nightmare that scares off potential volunteers. But nor should affluent parties be able to hide behind lay treasurers and volunteer agents by deliberately taking liberties with the law and then using the defence that it was an honest error by a well-meaning party volunteer.

Because of the way the law has evolved, the Electoral Commission is responsible for a party's overall spending (as it falls under the Political Parties, Elections and Referendums Act), while the police are responsible for investigating alleged irregularities in a candidate's spending (as it falls under the Representation of the People Act). The Electoral Commission can therefore not act over breaches of candidate expenses, other than to urge the police to investigate them. The implication of the Crown

⁶¹ Comments to media, 16 March 2017

⁶² Electoral Commission, Enforcement Policy, effective 5 April 2016

Prosecution Service's decisions on whether to prosecute any of the people against whom evidence was presented by 17 police forces in the spring of 2017 is that the threshold for an election to be ordered to be re-run is very high. A cynic might argue that the rules on spending can therefore be broken with impunity as long as no evidence of intent can ever be proven. It is a delicate matter that presents no easy answer, but the current situation cannot be considered acceptable as the laws appear to have no traction and therefore serve merely to separate those with a conscience from those who see the only crime as being caught. A solution to the problem might involve some of the electoral penalties being downgraded from criminal to civil offences, as that would provide protection for lay officials from disproportionate sanctions while still making it clear that breaches of electoral rules are offences. But it would still leave unresolved the situation that offences that could influence the result of a constituency election would not be penalised by the election being ordered to be re-run.

There is in theory the option of filing a petition to an election court. This was the mechanism used in 2010 when the Labour MP for Oldham East and Saddleworth, Phil Woolas, was disqualified from being an MP for having breached section 106 of the Representation of the People Act; a by-election was called, effectively a re-run of the constituency election from May 2010 (albeit with Woolas not allowed to stand). The fact that Woolas breached the RPA – in his case the section that makes it illegal to make a false statement about another candidate that could influence the election – and it is the RPA that regulates candidate spending, suggests that failure to respect spending requirements could be a reason for a petition. However, exceptional circumstances have to apply if a petition is filed more than 21 days after the result is declared and spending returns don't have to be submitted until 35 days after the declaration; it is very rare for cases to be heard by an election court (only four have been heard this century); only five out of the 12 heard since the second world war have led to a re-run or change of result; and not one of those five involved the declaration of expenses. The bar for using this mechanism for spending irregularities is therefore very high.

It's worth a word here about the R in PPERA. This paper has largely steered clear of referendums, but when it comes to sanctions for breaching the rules, the bar is set much higher for referendums than for parliamentary elections. If a candidate has overstepped the spending limit, he/she could be disqualified and a by-election ordered by way of a re-run. But that is relatively simple as it amounts to just one 650th (possibly soon to be one 600th) of the parliament. By contrast, the bar for a referendum being reordered is a much higher level of wrongdoing – one that has never been tested so can't be defined – as any re-run would affect the whole of the referendum electorate. It would be dangerous for this report to get into the territory of a second referendum on the UK's membership of the European Union as that is largely a matter of party politics, but if reports such as those that circulated in certain media in February 2017 alleging that an American data company may have offered services-in-kind to the Leave campaign worth thousands of pounds which were never declared on the official Leave referendum return, it rather begs the question about where the boundary lies for ordering a new vote. This is also a very delicate area, because the bar has to be

high enough to prevent malicious deliberate abuse by saboteurs to get one side into trouble, but low enough for illegal activity liable to influence the result to run the risk of the vote having to be held again.

Conclusions

Before making recommendations, it's important to draw conclusions from the evidence presented above.

1. There is by definition a problem

The law is framed to promote confidence in the voting system by preventing those with the greatest financial resources from using such wealth to influence elections, yet there is ample evidence that this is happening, both through undetectable activities (Facebook and other digital techniques) and wrongly attributing candidate-specific activities to party spending allowances. There is therefore by definition a problem, and doing nothing ought not to be an option.

The fact that there have been very few prosecutions over the alleged breaches of spending rules at the 2015 election does not mean everything is satisfactory. The law is intended to promote confidence in the democratic process, and even if no-one was prosecuted, the evidence presented by Channel 4 News, The Canary, this report and other sources, along with the concerns and calls for reform expressed by Unlock Democracy, the Electoral Reform Society and others suggest that the intention of the law is not being realised.

2. There is an absence of clarity

There is clearly a whole range of interpretations of the existing rules as they apply to party-specific and candidate-specific expenditure, which leads to different ideas of good practice from constituency to constituency. The Electoral Commission's guidance appears to be inadequate and inconsistent when it comes to mailshots; expenses for imported campaigning (including reasonable refreshments and accommodation if necessary) should certainly be included in candidate expenditure even if the actual operational costs of a battle bus aren't; clearer guidance is needed on the use of market research that is commissioned by a political party in an election period; and some framework is needed for the targeting of messages to electors through social media. Finding solutions will be harder than identifying the problems, but greater clarity will be needed if the present legal spending limits are to guarantee that levels of finance cannot influence elections.

3. The current system encourages a presidential-style election

Under the British electoral system, voters vote for their MP, not for the prime minister. They can take into account who they would like as prime minister when they make their choice from a handful of local candidates, and many do, but they are still voting for their MP. Yet the fact that the current rules allow for national figures, indeed national party officers, to be counted under party

expenditure limits when working for specific candidates means there is an in-built financial incentive to use national assets in local election campaigns rather than local assets (a situation exacerbated by the rules on accounting for 'third party' staff). The financial framework works against the enactment of the constitutional situation.

A number of agents were interviewed for this report, most of whom asked not to be named, but their observations are of relevance. One agent in a 2015 Labour/Conservative marginal said they 'lost control of local messages' at constituency level because there was such a financial incentive to have everything done from national HQ. The agent could be by-passed, as election communications went straight from head office to voters – with most costs attributed to national expenditure – and a tendency for the formulation of the message to be in the hands of the party leader and his advisers, rather than the candidate. Another agent said certain literature sent from London to be delivered locally was simply not delivered, because the agent judged it would not resonate with local voters.

As one Liberal Democrat commentator put it, the ability to count the presence of national figures under party expenditure 'is the exact opposite of how politics should change to become healthier. Presidential-style concentration on national figures rather than the attributes of local candidates helps the lazy, incompetent and clueless local candidates slip through while also handicapping the bright, arduous and skilled constituency candidates.'⁶³

Such tales argue in favour of tighter national limits and more generous constituency limits, although whether current behaviour stems from financial considerations alone is open to question. The desire of party central offices to keep control of the electoral message means that even a redistribution of the limits might not overcome basic control-freakery from party HQ over what information is disseminated to voters.

4. The collection, analysis and use of data is now a fundamental issue

As political campaigning techniques become more centralised and electronic, and less localised and paper-based, the role of personal data relating to all 46 million Britons with the right to vote is becoming ever more important. This makes the rules on data protection – and their enforcement – a central part of guaranteeing a fair election. This is not distinct from the issue of money but a parallel and interrelated issue. There are not only questions relating to the use to which data are put and how any costs connected with this are apportioned, but also questions relating to whether big money can buy big data and therefore create an unfair advantage for the richest parties.

5. Enforcement is at the heart of the credibility of the rules

⁶³ Pack, M, 'Constituency expense limits are dying off in the UK, but neither politicians nor the regulator will act', March 2015

At present, the Electoral Commission and the police share responsibility for enforcing the provisions of the various Acts that make up election rules. But it begs the question as to whether it's wise to have one responsible for PPERA and the other for the Representation of the People Act? Is the Electoral Commission equipped for its policing job? In its 2013 and 2015 reports, it requested the power to levy 'sanctions for offences related to candidate spending',⁶⁴ to go with the investigatory powers it already has, but it has yet to be granted these powers. And do the police really want to enforce electoral rules? The police can surely be forgiven, when it comes to prioritising what they focus on, for placing the pursuit of threats to people and property higher up their priority list than whether a political party spent more than it should have done on an election campaign. There is also the question of police and crime commissioners being overtly of one party, which could compromise the perception of police neutrality in investigating electoral wrongdoing.

All this suggests the monitoring and enforcement of election rules might sensibly be taken out of mainstream policing and given to a specialist police unit run either by the police or independently, for example by the Electoral Commission. A specialist electoral enforcement agency would have the advantage of building up a resource of election-specific knowledge, and thereby avoid the current fragmented system whereby police forces sometimes have to pick up the reins of a specific investigation without much prior experience, leaving senior officers having to learn the electoral ropes from scratch.

6. Campaign spending periods need to be reassessed

The focus in this report is on the 'short campaign', the period from when Parliament is dissolved (31 March in the case of 2015) to polling day (7 May). But much spending happens well before this period. The period in which parties have to account for their spending was set at one year by the Political Parties, Elections and Referendums Act (2000), but the scope for money to buy the foundation stones of a more effective campaign well before even a year prior to polling day is considerable. There is anecdotal evidence that the contribution the American strategist Jim Messina made to the Conservatives' 2015 election operation came in 2013, when he persuaded the Tories to buy in masses of consumer data which allowed the party to build up a profile of all voters and thereby use time and resources in the short campaign far more effectively. Even if this is a slight simplification of what actually happened, there is ample scope for money to buy large amounts of evidence before the period when it becomes subject to limits. And in a snap general election, there is no 'long period' for candidates, and the year-long accounting period for parties has to be carried out retrospectively for the 365 days preceding the election date. This means a party could spend

⁶⁴ Electoral Commission, 'A regulatory review of the UK's party and election finance laws', June 2013, recommendation 43

large sums of money on ‘structural’ projects in the early years of a parliament, and then find itself in breach of election spending limits if a snap election is triggered.

7. It is important not to overregulate

It’s very easy to look at a situation where actors are riding roughshod over rules and conclude that the answer is greater regulation. But overregulation in this context has the potential to discriminate against smaller parties that couldn’t afford the lawyers, accountants and trained administrators needed to stay within the rules. If the aim is to fight to keep money out of elections and preserve the role of those willing to put in their own time out of a sense of conviction and community, the rules must not be so overbearing that the good people decide it’s not worth doing. Overregulation might also inhibit effective communication by campaigners and the provision of important information and arguments to voters.

This is why the adage ‘be careful what you wish for’ is valid here – a knee-jerk response to the problem without thinking through the potential side-effects of the solution might create more problems in the long run. The Electoral Commission’s guidance talks in many places about situations in which a candidate or agent should make ‘an honest assessment’ or ‘a fair and honest assessment’ of the value of an item; this leaves ample scope for skulduggery, but replacing honest assessments with validated declarations could be creating a greater administrative burden that plays into the hands of the parties which can call on greatest financial resources. The solution may be a case of defining what we want to achieve and seeking the best way of getting there, even allowing for the presence of some loopholes.

8. A proportional voting system would solve a lot of the problem

This is the elephant in the room. There is a very simple way of knocking many of the questionable practices on the head: a proportionally representative electoral system. It is one of the acknowledged side-effects of the first-past-the-post voting system that elections are decided by the floating voters in the marginal constituencies. This can sometimes mean fewer than 100,000 people decide an election in which 46 million are enfranchised. This in turn provides an incentive for parties to target the marginal constituencies, and it should not surprise anyone that they stretch the rules to their limit, and perhaps beyond.

A proportional voting system would make all votes – or at least most of them – of equal value, thereby avoiding the situation in which a handful of marginal constituencies decide elections. It is not the aim of this report to get into the arguments for and against proportional voting systems, especially as even under PR there would still be the need for spending rules to avoid elections being bought by the richest parties (and even under a mixed-member proportional system such as those

used for the devolved institutions in Scotland, Wales and London, there would remain marginal first-past-the-post constituencies). But it's important to acknowledge that many of the problems highlighted in this report would largely disappear overnight under PR.

9. Compulsory voting may be worth considering

There is generally a predisposition against compulsory voting, on the basis that politicians should merit people turning out to vote, not demand it. Yet there may be a lot to be said for compulsory voting as a way of reducing the impact of money. This is because so much money and effort is spent by parties in 'getting out the vote' on election day, which wouldn't be necessary if voters were legally required to vote, thereby freeing up more money for getting the message out. It would also force parties to target all age groups among the electorate, and not focus most efforts on those age groups who are most likely to vote. Lessons from Australia could be useful in this context.

10. The situation must be kept under constant review

Technology and human inventiveness are constantly changing the reality that affects the rules of electoral engagement. This report has highlighted how Facebook has allowed for fairly precise targeting of voters without the law having caught up with it, but the social media landscape is forever evolving, to the point where Facebook is already considered the social media platform for older people. Social media can be a bona fide vehicle for promoting traditional forms of campaigning, such as highlighting the existence of public meetings, demonstrations or campaign action days. But what happens when it's used to get round existing rules? For example, how much longer will the ban on TV advertising last in a climate where parties are already putting adverts on YouTube and getting all their supporters to use social media to promote them? And what of artificial intelligence and its likely impact on election campaigning? – this is largely speculation at present, but the potential for it to have a major impact is immense.

Any framing of election rules must either keep track of technological advances or set a very strict framework so the spirit of the rules cannot be circumvented. It would be wrong to update a law based on speculation as to what technological advances could do to electoral techniques of the future (will we have driverless cars with robots doing canvassing, or drones knocking on doors to collect data?), but technological progress has the potential to undermine the principle that money should not buy electoral advantage. Casual evidence suggests that most democracies in mainland Europe review their electoral rules more frequently than the UK, so reviews within fixed maximum time periods are worth considering.

Recommendations

There seems little doubt that there is a problem – this is far from the only report saying the current rules are not fit for purpose – but identifying the problem is often easier than putting it right. This report therefore makes a number of recommendations.

These recommendations fall into two categories: recommendations for wide-reaching reforms which seek to tackle the problem – or aspects of it – at source, even if it means a radical shake-up of the current funding regime, and recommendations that involve tweaking the existing system. As the 2015-17 government committed to finding agreement on ‘incremental reform’ and ‘small-scale measures’⁶⁵ in party funding and spending rules, it is reasonable – though not entirely safe – to assume that this commitment pertains in the current parliament. Therefore many of the recommendations set out here are for changes that meet the definition of ‘incremental reform’. Not all of them are alternatives or mutually exclusive, indeed some will only work in combination with others. However, given that the overall aim is to ensure the principle is upheld that elections cannot be bought, it is only right to highlight a handful of more far-reaching options which would remove much of the problem at source.

Wide-reaching reforms

A legal framework for social media

In principle, social media is simply a campaigning tool that has developed over the past 15 years which ought to be subject to the same rules as any other campaigning tool. In practice, it has developed into such a prominent tool that a legal framework for the use of social media in elections appears to be unavoidable. This framework should cover at least two principal areas:

- ❖ The establishment of consistency between social media and the rules on paid-for political advertising on broadcast media. This would force a definition of advertising that would set a viable boundary between, on the one hand, a candidate setting out his/her stall via a simple video posted on a site like YouTube with a link to it on the candidate’s site, and, on the other, a full-blown corporate advert. This would not be easy, but if there is a ban on television advertising which can drop into someone’s living room without the residents necessarily having chosen to watch it, a ban on social media advertising that drops into someone’s news feed has to fall largely into the same category.

⁶⁵ Hansard, 10 March 2017, columns 1620 & 1621

- ❖ The imposition of an obligation on social media providers to make clear which constituencies are being targeted in social media activity. This would not necessarily change existing activity, but it would make it easier to track targeted expenditure. For example, Facebook knows from its records which parties targeted which areas, but at present it is allowed to keep such data confidential citing ‘candidate confidentiality’ – this will have to be reviewed. There may be privacy issues to be negotiated, but it is clear that unless something is done to force the cost of demographic and geo-targeting through Facebook into candidate allowances, this massive loophole in existing rules will continue to be exploited at the cost of establishing a level playing field.

Public funding of political parties

This is a recommendation that goes hand-in-hand with much stricter rules on donations to political parties, essentially to regulate from the input end the amount of money political parties are ever likely to spend. In other words, it would limit what parties could spend on elections by drastically reducing the amount of money they could receive in donations, thereby ensuring they simply wouldn't have more than a certain amount of money. The Committee on Standards in Public Life, in recommending a measure of limited public funding for parties, stipulated that such reform should only be instituted if accompanied by a clear cap on individual and corporate donations, thereby limiting the extent to which influence and access may be bought. Going down this route would be particularly attractive if the growth in untraceable social media activity and data collection and analysis makes the regulation of spending according to party and candidate categories unviable. As such, it could be seen as a form of admitting defeat, but as long as some form of spending limits were continued, it would create a level playing field while reducing the need to regulate everything a party can and cannot do. There would have to be a framework for distinguishing between everyday expenditure and election expenditure, and this could be tricky, but if the system could be made to work it might open the field of electoral campaigning to greater creativity.

The big issue with funding political parties out of state coffers is political feasibility, especially at a time when politics and politicians are not held in particularly high regard. However, this ought not to be an immovable obstacle. The idea of public funding of politics came close in 2011; it stumbled on the fear that it would sit badly at a time of economic austerity and cutbacks, yet political parties could be funded by a redistribution of existing government expenditure. For example, the current government advertising budget is around £300 million (it was £289m in 2015), and some of the expenditure from it could be considered quasi-political in nature. Just one third of that amount would fund the parties' general election expenditure, or one fifteenth if one reckons on one general election every five years.

A proportional voting system

This is a highly controversial subject, especially after the resounding rejection of the AV system in the 2011 referendum (although even the ‘No’ campaign recognised in its literature that AV is not a proportional system so the result of that referendum may be of limited relevance), and therefore focusing too much attention on PR might detract from other reforms floated in this report for which a majority would be more easily assembled. However, if one were to introduce a system similar to the Additional Member Systems used in Scotland and Wales, it would keep the constituency link while putting a premium on national campaigning in order to get MPs elected through the top-up mechanism. While this wouldn’t make all votes of equal value, as all the additional members in strong Labour or Conservative areas would most likely come from the same parties as the directly elected members, it would vastly reduce the scope for focusing on a few dozen marginal seats, and thus ease the pressure on candidates’ spending allowances in key constituencies. There would still be a need for spending limits, but less incentive to circumvent them for the reasons in use under first-past-the-post.

Incremental reforms

Consider changing the balance of party and candidate limits ...

There is a case for sticking with the current party and candidate limits, but increasing the amount that can be spent by a candidate in a give-and-take adjustment that sees party expenditure limits fall. Some activists interviewed for this report stressed that fighting an election on a candidate’s limit of around £14,000 is increasingly hard. The raising of the by-election spending limit in 2001 – from a variable figure of around £25,000 to a flat £100,000 – was a way of getting around the problem by lowering the bar so that it became easier to clear, but doing the same for parliamentary constituencies at a general election is likely to bring more money into marginal seats, and thus allow for money to buy electoral advantage. Therefore, any *raising of the candidate-specific limit* should go hand-in-hand with *reducing the party-specific limit* so the trade-off between the two involves no increases in overall spending, other than increases linked to inflation.

... while also revising the determining factor of party/candidate distinction

But a quid pro quo of increasing the candidate expenditure limit has to be that more activities that clearly benefit a specific constituency are accounted for under the candidate’s allowance. In terms of literature, this means apportioning more leaflets that are clearly aimed at specific seats to the candidate’s allowance, not the party’s.

At present, the determining factor for what can be attributed to local and national expenditure is based on the content of the material, with a further assumption that party head offices seem to have evolved that appears to say that anything sent out from party HQ can be treated as a party expense. A better way would be to *shift the emphasis to the recipient*, thereby making the person at whom election material is targeted the determining factor. That would mean that the cost of a letter sent to a specific voter would have to be assigned to candidate-specific spending (even if the material does not mention the name of the candidate), while material aimed across more than, say, two constituencies would count as party expenditure. The revised definitions would have to be carefully worded as there are grey areas in making the intended recipient the determining factor, and it would have to refer to unsolicited material only (thereby excluding communications to party members), but this approach would be more in tune with the spirit of what the distinction between candidate and party spending limits was intended to achieve.

Remove certain head office exemptions from spending limits

The exemption that allows national staff payroll bills to be excluded from party spending limits creates an incentive for national activity to trump local activity, which is exactly the opposite of the spirit behind the spending limits set out in PPERA. This exemption should be removed, even if it involves a slight increase in the party's spending limit (but only a slight one or nothing will be achieved). For practical purposes, a distinction would probably have to be made between 'everyday staff' who keep a party ticking over 52 weeks a year even when there are no elections, and 'election-specific staff' who work on a general election or are even brought in for it; solely the election-specific staff would have to have their costs included in the party's spending limit. The definitions for this distinction would have to be agreed, including how long someone can be hired before they cease to be short-term electoral staff.

There is also the question of national party staff being sent to help specific candidates' campaigns. At present this falls under the Electoral Commission's requirement for candidates and agents to make 'an honest assessment' as to how much time a national officer spends on a campaign. Anecdotal evidence from all parties suggests an amount of time just big enough to keep the checkers happy is put on the return, but this is normally a considerable underestimate, leading to a massive benefit for the candidate that has no impact on their spending allowance. As enforcement of true timesheet records is very difficult, removing the exemption of national staff from party spending limits would mean a campaign staff member's time would have to appear on one return or the other. This would also reflect the position faced by registered non-party campaigners, who are required to declare the cost of their national staff at elections.

The same principle applies to literature sent out from a party's head office. If it is general party literature, then it does not have to be counted against a candidate's spending allowance. However, the economies of scale available from mass orders placed by head office create a financial incentive

for candidate-specific literature to be printed centrally, which is fine as long as the cost of such literature is apportioned to the candidate's allowance. The evolution of the idea that, if it comes from head office or has the party compliance officer's imprint as opposed to the agent's imprint, it can be passed off as party expenditure needs to be halted and declared inadmissible to all parties and agents.

Impose common accounting procedures

Part of the problem is that there is too much variety allowed in accounting procedures. If the Electoral Commission were to standardise the requirements of agents and local party treasurers, perhaps through more guidance and common forms, this would aid transparency. It would have to be done in a way that doesn't make it harder for lay treasurers and agents, yet if it were done simply but well, it could make their life easier.

Annual reporting limits for parties

The current rule for parties is that they have to account for their expenditure in the year leading up a general election. In an election such as 2015, they had a start date so could plan and keep records accordingly. But in a snap election such as 2017, they have to go back to account for their expenditure retrospectively for the year leading up to the election date. This seems both unwieldy and unfair, especially if a party spends a large sum of money updating its personnel or procedures knowing an election is three or four years away and then finds it had to account for the expenditure as part of a snap election regulated period. A much simpler and fairer system would be to have annual limits which follow fixed dates (the obvious ones would be a January-December calendar year, the 6 April to 5 April financial year used by HMRC, or an election based year, eg. from the beginning of June to the end of May given how many elections are fixed for the first Thursday in May).

Lower the bar for ordering a re-run of elections

If the election rules exist to act as a deterrent to improper practice, there must be a reasonable sanction when the rules are breached. And when rules are breached in a way that may cause the outcome of an election to be influenced, the obvious sanction is to order a re-run of a constituency election. This is difficult territory as the bar for re-running an election is very high, generally the committal of a criminal offence by the person elected or losing a case in an election court, but there appears to be a large area in which offences could be committed that influence an election without it reaching the domain of criminal activity or prompting a petition to an election court. It would be wrong to set the bar for re-running an election too low, as that would lead to a surfeit of by-elections triggered by minor infringements (and each by-election costs the public purse something in

the region of £150,000),⁶⁶ but with opinion polls suggesting a fair bit of support for ‘recall’ of MPs who have somehow failed in their duty, setting a lower level of error to force greater adherence to the rules could prove to be a popular measure among the public – even if it might prove hard to get through the House of Commons.

Revise the rules on detail required in expense receipts

A certain amount of redacting and couching expenses in general terms is legitimate and inevitable in order to protect confidentiality, but the current rules allow for so much redacting that information that legitimately belongs in the public domain is withheld. For example, receipts given to the Electoral Commission by political parties for hotel stays often have substantial detail redacted, making it impossible to determine the purpose of the spending concerned and against which spending allowance it should be counted. Some receipts have been redacted but generally in a way that only blacked out personal details such as credit card numbers. And there is the case of the Facebook invoice reprinted on page 31 which shows certain campaigns that go well beyond a candidate’s spending limit but are merely listed as a numbered campaign, thereby making it impossible to see whether targeted mailings that should have been listed on a candidate’s election return have been omitted. If public confidence in elections being conducted fairly is to be established and maintained, transparency must be an essential attribute, which requires a clear framework for consistency in accounting for expenditure on both analogue and digital media. Facebook, in particular, should not be allowed to hide behind ‘client confidentiality’ as a reason for keeping communications at targeted voters secret.

Tighten the rules on telephone canvassing

This is another grey area, because it would be wrong to prevent political parties conducting their own voter intention surveys to check how their campaign messages are going down, and these require the professional services of a polling organisation that has to be paid (although there is a case for putting a deadline on such surveys a certain number of days before polling day). But if paid-for canvassing is illegal, as it currently is, there have to be clearer ways of eradicating clear abuses of telephone ‘push polling’ to prevent subliminal or semi-subliminal canvassing taking place. An obvious place to seek a remedy would be through the Market Research Society’s code of conduct, perhaps adapted for the purposes of election polling to highlight the areas of political questioning that would fall foul of mere seeking out of voting intentions. The harder it proves to guarantee that ‘push polling’ is not taking place, the stronger the case becomes for a ban on opinion polling in the last few days of an election campaign to reduce the risk of last-minute de facto paid-for canvassing.

⁶⁶ Figure extrapolated from ‘Returning Officers’ expenses England and Wales Statement of Accounts 2015 to 2016’, House of Commons

Social media

This is partially covered in the section on wide-ranging reforms, but there are numerous aspects of social media in election campaigning, and it is a very difficult area to police as it is changing constantly. For example, it is worth investigating whether to tighten the rules that apply to 'third parties' (agencies and pressure groups working in support of political parties at election times) to require them to itemise what activity they undertake that could be considered targeting. Not only would this be fair in establishing a level playing field, but it would prevent parties getting round some of their activities that might take them above permitted spending limits by getting third parties to do the work for them. There have to be clear rules on imprints on social media political adverts so the funder is identified, and there ought to be a repository for all social media adverts so if anyone finds they have been targeted but they cannot trace the ad, it ought to be in the central repository. Given that the current Information Commissioner has had experience of trying to regulate Facebook, she would appear to be vital in finding a workable solution to the fair use of social media at elections.

Data collection and analysis

Clearly the rules pertaining to the collection, analysis and use of data for electoral purposes will be vital for ensuring a level playing field for future elections. It should be stressed that the aim here is not to discriminate against those with the most imaginative ideas, merely to prevent those who have most money gaining an unfair (and decisive) advantage. This report makes no concrete recommendations, but it advocates that the following ideas (and more) be meaningfully investigated:

- ❖ Whether to run a scheme whereby a certain amount of data (anonymised or not) is made available to all registered political parties, so the ability to buy in such data would no longer give an advantage to the richest parties. What parties then did with the data would be up to them, but money wouldn't be as much of a factor.
- ❖ Whether the data protection rules need better enforcement, perhaps with a department of the Informational Commissioner's Office specifically dedicated to the use of data for electoral purposes. This could also be part of, or linked in with, the specialist electoral investigations unit idea floated under 'Meaningful enforcement' (below) in order to save on costs and pool specialist knowledge.
- ❖ Whether a separate 'political opt-out' (or 'opt-in') is required for all surveys that lead to data being collected that will or might be used for political purposes. This would create the complication of having two levels of data – one for commercial/sales purposes, the other for

political purposes – but given that the Data Protection Act requires data only to be used for the purposes for which it was gathered, this should not be a problem. One area to watch for is whether data held offshore could get round any new rules, as happens with telephone data (anyone who registers their number with the Telephone Preference Service is entitled not to receive sales calls, but in reality this can only be enforced for sales calls made within the UK, and many calls are now made from overseas call centres).

Meaningful enforcement

Currently the Electoral Commission has jurisdiction over the enforcement of party spending limits but ‘has no direct responsibility for candidates’ compliance with the statutory spending limits and/or the accuracy of the candidates’ returns’.⁶⁷ Because candidates come under the Representation of the People Act and not PPERA, any breaches of the statutory spending limits relating to them are matters for the police (and the RPA doesn’t even require that any investigation must be carried out by the police). It seems daft to have two different authorities. There is also the potential conflict of interest that has arisen now that we have political police and crime commissioners, who might find they are in ‘hire and fire’ mode over a chief constable who has a decision to make on whether to investigate alleged wrongdoing on the part of the commissioner’s party. There is a further conflict of interest under the current rules, in that an application for an extension to the 12-month deadline for electoral spending investigations has to show there has not been ‘undue delay’ in looking into alleged irregularities – if the party under suspicion is the same party of which the PCC is a member, the PCC has an incentive to go slow on the investigation. This conflict must be removed in some way.

The strong interrelationship between party and candidate expenditure suggests it would be more sensible to have one authority investigating both, which may or may not prompt both candidates’ and parties’ limits falling under the same Act. This single authority would allow a group of experts to become experienced in electoral enforcement, rather than forcing detectives to learn many new cases from scratch as electoral issues are only a peripheral part of their normal job. This new monitoring authority could be the Electoral Commission if it is given adequate resources. It could be an off-shoot of the police, perhaps a specialist electoral investigations unit. However, it would be best if it were not directly answerable to the police, as being independent of the police would remove the conflict of interest that a police and crime commissioner might have.

There is also a strong case for raising the £20,000 limit on fines that the Electoral Commission can levy on political parties who break the rules (the Commission has asked for the figure to be raised on several occasions). While the figure of £70,000 levied against one party in 2017 made headlines for appearing to be quite large, it was an amalgamation of fines for five offences, any one of which carries a maximum penalty of £20,000. As the Commission chair John Holmes observed, there is a

⁶⁷ Paragraph 12 of the judgement by Judge Justin Barron at the Kent Police hearing in Folkestone, 1 June 2016

danger of the larger parties treating such fines as ‘the cost of doing business’, so any penalty must be heavy enough that it is not simply budgeted for, without being so high as to discriminate against smaller parties.

Candidate returns to be held by Electoral Commission

Whatever the overall distribution of responsibilities between the police and the Electoral Commission proves to be, it would make sense for all candidate returns to be held – if only in electronic form – by the Electoral Commission. The credibility of the current rules relies on the transparency of the procedures, and if anyone wanted to peruse the candidate return of a given constituency, they have to go to the council or administering authority for that election, normally a council office which could be at the other end of the country. As the principal body charged with ensuring elections in the UK are fair, it seems natural that candidate returns should be available via the Electoral Commission.

Adopt the ‘ignorance of the rules is no defence’ principle

If the Crown Prosecution Service is only going to prosecute if it can prove intent to break the rules, prosecutions are going to be very sporadic, as the presence – indeed encouragement – of voluntary officials in politics means ‘an honest mistake’ is likely to be a viable defence in most cases. In order to protect the credibility of the rules and promote public confidence in the electoral process, the Electoral Commission should draw up clear guidelines for the apportioning of as many types of expenses as is practicable, and make it clear that failure to observe these guidelines will be considered an offence – even if only a civil one – and will be treated as such, possibly with an order to re-run a constituency election if the offence is considered to have influenced the result. In other words, it would mean setting out certain core rules of electoral engagement and saying of these rules: ‘Ignorance of them is no defence, and therefore breaching them will be subject to punishment’.

Change the deadline for prosecutions

The current rules on prosecuting a person or party for a breach of financial limits is one year from the date that all returns have to be submitted (35 days after polling day). Only if there are ‘exceptional circumstances’ can this period be lengthened, and even then by a maximum of 12 more months. In 2015, polling day was 7 May, which meant all electoral returns had to be in by 11 June. But if transparency requires candidate returns to be viewed in conjunction with party returns – which it does if certain expenses apportioned to the party return should have been on a candidate’s return – then one year is too short. The Electoral Commission published its report on campaign spending on 20 January 2016. That meant there were just four and a half months from the first

information on party spending disseminated to the media (20 January 2016) to the deadline for the Crown Prosecution Service to press charges (11 June 2016). Given that the CPS needs about three months from the time a police force presents findings on an investigation to the point at which the CPS lays charges, there is effectively just one month for interested people to scrutinise the results and report them for investigation, if an investigation is to take place within the permitted timeframe. That is clearly inadequate.

A more fitting deadline would be a given number of months (the obvious being 12) after the publication of the campaign spending figures, so for the 2015 election, the deadline would have been 20 January 2017.

Regular reviews

The speed with which social media and other forms of technology are advancing means that rules which allow for a largely fair election in one year cannot be relied upon to guarantee a similarly fair election five years later. A body should therefore be charged with ensuring that the rules that apply to spending limits are reviewed before each general election, or perhaps every five years given that snap elections interfere with five-year parliaments. If this report's suggestion that a new authority should be given responsibility for investigating allegations of abuses of spending limits were taken up, that same authority might well have the same skills required to ensure the rules and limits are fit for purpose, and thus be qualified to take on this role.

Compulsory voting

This is a slightly left-field recommendation because it would not solve the problem on its own. However, if voting were compulsory, the considerable sums of money parties spend on polling day mechanics (getting out the vote) would be saved, freeing up more to go on policy messages. Removing the need to 'get out the vote' would also take away an element of the political system that not everyone is comfortable with, namely chasing up people to see if they have voted, offering them lifts to polling stations, and having rosette-wearing politicians asking for voter numbers as people go in to vote. Compulsory voting would also deliver a stability of turnout; one of the features of the 2017 general election was the sudden emergence of a vastly higher proportion of young voters. If failure to vote were subjected to a fine (even a fairly nominal one), there would be a wider spread of age groups, which would force parties into pitching their messages to the full spectrum of the electorate rather than favouring those age groups who traditionally vote in larger numbers. In August 2016, the departing US ambassador to Australia John Berry praised Australia's electoral system and said he would be strongly recommending compulsory voting be introduced in America; that is obviously just one person's view, and Berry was contrasting Australia with the US, not the UK,

but his conversion over his three years in Canberra suggests the pros and cons of compulsory voting as experienced in Australia would be worth examining.

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