Response to the UK Government policy consultation: Protecting the Debate | Electoral Commission Search Response to the UK Government policy consultation: Protecting the Debate You are in the Our responses to consultations section Home Our responses to consultations On this page Applying electoral sanctions to existing criminal offences Intimidation of voters – undue influence Increasing transparency in digital election campaigning First published: 15 October 2018 Last updated: 29 August 2019 Overview This response sets our our advice on three proposed changes to electoral law to protect candidates and voters from intimidation. We are responding to this consultation as Parliament has given us a role to keep electoral law under review and to recommend changes where we think they are needed. Summary Applying electoral sanctions to existing criminal offences Candidates and campaigners have a key role in encouraging people to participate in elections and referendums. Activities for or against candidates and campaigners must not bring into question the integrity of the electoral process. We agree with the Government that allowing electoral sanctions to be applied as well as criminal sanctions could act as a strengthened deterrent against intimidating candidates or campaigners. Removing the right to vote would be a disproportionate sanction, but stopping someone from standing for election may not be a sufficient deterrent for people who do not want to become a candidate. The Government should consider whether increasing the maximum sentence for serious offences relating to elections, as recommended by the UK's Law Commissions, would also act as a strengthened deterrent against intimidation. Intimidation of voters – undue influence Voters should be protected from being intimidated to vote in a particular way or not to vote. We welcome the UK Government's review of the offence of undue influence and continue to support the modernisation and simplification of all aspects of this offence. Any changes to the current laws on undue influence must be clearly and simply defined with workable definitions. We continue to recommend that any changes should be made as part of a comprehensive reform of all electoral offences, as set out in the UK Law Commissions' 2016 recommendations. Many electoral offences are complex, out of date and not easily understood and reforming undue influence alone risks adding further complexity without addressing many of the problems with the legislation. We would be pleased to work with the UK government and with prosecutors and police, who can advise on how the law will work in practice. Increasing transparency in digital election campaigning We have recommended since 2003 that the imprint rules be extended to digital material. Extending the imprint rules to digital material is urgent. This gap in transparency is affecting voter confidence and our ability to enforce the rules. All non-printed election and referendum material should contain an imprint. Any new regulations should be drafted as general principles to make them platform neutral and to future-proof them for changes in technology. The UK Government should give the Electoral Commission wider powers to compel information outside of an investigation, including from digital platforms. The imprint rules for printed election material in the Political Parties, Elections and Referendums Act 2000 (PPERA) should be commenced for Northern Ireland. The imprint rules in Northern Ireland should be the same as the rest of the UK. Applying electoral sanctions to existing criminal offences Question 1: Do you agree that the new electoral offence should apply to electoral sanctions to existing offences of intimidatory behaviour, such as those identified by the CSPL, listed in Annex A, and equivalent offences in Scotland and Northern Ireland? We agree that electoral sanctions should be applied to these existing offences. It is important that people are deterred from intimidating candidates so that people can stand for election and campaign without fearing abuse

or intimidation. Voters must have confidence in the candidates standing in elections and those campaigning in a referendum. Seeing or hearing about intimidation should not stop them from voting, nor should it influence how someone votes. Applying electoral sanctions should deter some people from engaging in behaviour that intimidates candidates. Any changes to the legislation would need to be applied by the Welsh and Scottish Governments for the relevant elections in Wales and Scotland. The legislation in Northern Ireland would need to be changed by the UK Government through the Northern Ireland Office. We agree that the UK Government should examine existing legislation and make sure that the 'new' legislation reflects any future criminal legislation. Penalty for the new offence Question 2: We propose that the new electoral offence will attract the sanction of being barred from standing for elected office for five years. Do you agree? We agree that if an individual is found guilty of a specified offence they should be prohibited from standing or holding any elected office for a period of five years. Applying this sanction would make sure that there is consistency with other relevant sanctions for corrupt practices such as undue influence which is also about intimidation, although of voters. Without this sanction there would also not be consistency across different elections and referendums for someone being automatically disqualified from standing for election if they had been convicted of any of the offences listed in Annex A. Question 3: Do you think the new electoral offence should remove an offender's right to vote? We do not agree that an individual found guilty of intimidation should have their right to vote removed. Corrupt practices under the Representation of the People Act 1983 (RPA), which have a sanction of removing a person's right to vote, are those which abuse someone's right to vote. Intimidating a candidate or campaigner does not do this. However, stopping someone from standing for election for five years may not be enough of a deterrent for people who have no intention of putting themselves up for election. We think that this area needs to be explored further to see if there is another, more suitable, sanction that could also or instead be used. Prison sentences could be a more effective deterrent. A person who has been found guilty of any offence and is detained in prison is not allowed to vote. The UK's Law Commissions have recommended increasing the maximum sentence in cases of serious electoral fraud to 10 years. The Government should consider whether to apply this maximum sentence to intimidation offences set out in Annex A that are committed during election and referendum periods. Which elections would be covered? Question 4: We think that offences committed against candidates and campaigners during all types of polls should attract the additional electoral sanctions. Do you agree? If not, please explain. Intimidating candidates and campaigners is not acceptable at any poll. Offences committed against candidates and campaigners should attract the additional electoral sanctions for all types of poll. It is important to ensure consistency across all polls. Consistency will prevent confusion as to when, and at what elections, the sanctions apply. It will also send a clear message to campaigners and voters that intimidation is unacceptable behaviour and has serious consequences. Question 5: We propose that offences against campaigners during a referendum campaign should attract the additional electoral sanctions. Do you agree? If not, please explain. We agree that electoral sanctions should apply to offences against campaigners during a referendum campaign. Applying these electoral sanctions should deter some people from engaging in behaviour that intimidates campaigners. Who would be protected? Question 6: We propose that the existing definition of when someone becomes a 'candidate', with reference to any election campaign, would be clear and workable for the electoral offence. Do you agree? If not, please explain. We do not agree that the

existing definition of when someone becomes a candidate will be workable for the new electoral sanction. This is explained in our response to questions 8 and 9. Question 7a: Do you think the new electoral offence should extend to campaigners? If so, please explain which campaigners you think should fall within the scope of the new electoral offence, given the above considerations. If not, please explain. Question 7b: If you think that campaigners should be included, do you have a suggestion as to how this could be done for use in the relevant legislation? We agree that protection of new electoral sanctions should be extended to campaigners. When defining a campaigner, and who should fall within the scope of the new sanctions, the UK Government may want to consider the approach taken in the Postal Voting Bill. This is Private Members Bill introduced under the 10 minute rule and due a second reading on 26 October. Instead of using the term ‘campaigner’ it defines ‘a person who engages in activities for the purpose of promoting a particular outcome at a relevant election’. This was drafted with input from the Cabinet Office. We would be happy to work with the UK Government on any amendments to the legislation which would enable the new electoral sanction to be applied to campaigners. Applicable time period Question 8: Do you agree that protection should start from the period of notice of elections? If not, please explain. Question 9: Should there be a period before notice of election for a scheduled poll, for example during the long campaign period, during which this offence applies? If so, what would be a suitable time period of protection? If not, please explain. We do not agree that the provision should be tied to the notice of election. Protection should cover people who have publicly stated they are going to stand for election but their candidacy has not officially commenced for the purpose of electoral law. The earliest day someone can become a candidate for the purpose of electoral law (for example in relation to the regulation of their campaign spending) is either the last day for publication of the notice of election or, at a UKPGE, the day of dissolution of Parliament. Protection therefore could start at the point of becoming a candidate under electoral law. However a person might declare their candidacy publicly prior to this. For example the lead up to a UK parliamentary general election where there is a long campaign. During this period the spending rules apply and people are actively campaigning, but their candidacy has not officially commenced. This means that someone could be subject to intimidation during this time but before becoming a candidate under electoral law. They would not be protected by the electoral sanctions if it was to start from the period of notice of election. The Government should consider whether there needs to be a defined start date from which the new electoral sanctions could be applied. For example, it could be for the prosecution and sentencing judge to determine if a person was subject to intimidation because of the fact they were a candidate, based on the specific circumstances in each individual case. Question10a: Do you agree that protection, under the new electoral offence, should end seven calendar days after the close of poll? Question10b: If not, when do you think protection under the new electoral offence should end? If the protection of a new electoral sanction were to end seven days after the close of poll, there is a risk that elected representatives could be subject to intimidation. This could mean that they are prevented from carrying out their elected mandate. Ideally, there would be no end date to the application of the new electoral sanctions. The Government should ask further advice from the police, prosecutors and the judiciary should advise on how this could be achieved in practice. Question 11: Do you agree that protection, under the new electoral offence, should apply during the referendum period, as determined by the relevant referendum legislation? If not, please explain. The protection should start once the relevant

legislation setting the date of the referendum has come into force. Once the date of the referendum has been set in legislation everyone knows when polling day is and that referendum is definitely going ahead. Therefore, regardless of whether the regulated period for referendum campaign spending has started, campaigners can start campaigning and may be at risk of being intimidated. Ensuring the offence applies only in appropriate cases Question 12: Do you agree that a new electoral offence should only be applicable in cases where a candidate or campaigner is intimidated because they are a candidate or campaigner? We agree that the new electoral sanction should only apply when a candidate or campaigner is intimidated because they are candidate or campaigner. We think that the police, prosecutors and the judiciary should advise on how this could be achieved in practice as they will be the enforcers of the new electoral sanctions. Intimidation of voters – undue influence Simplifying the law on undue influence Question 13: Do you agree that the law of undue influence requires greater clarity in its application? If not, please explain. We agree the law of undue influence requires greater clarity and we support a revised and more clearly defined offence. Simplifying undue influence would deliver one of the UK's Law Commissions' proposals, recommendation 11-4, for comprehensive electoral law reform. The Government should also bring forward proposals for implementing the other recommendations published in February 2016. There must be trust and confidence in the integrity of the electoral process. Modern and clear electoral law offences are a central part of ensuring this. People who must comply with the law, and those who enforce the law, need to understand what behaviour is prohibited and the associated punishments. We said, in our 2015 response to the Law Commissions' consultation on electoral law reform that the offence of undue influence is perhaps one of the most complex of all electoral law offences and we would support simplification. We also supported the simplification and modernisation of the offences of treating and bribery. These are also complex offences closely linked to undue influence. We remain concerned that the changes proposed by the UK Government would not go far enough to simplify the current range of electoral offences. We continue to recommend that any changes to undue influence should take place as part of a comprehensive reform of electoral offences, alongside a simple, modernised process of challenging an election. Reforming undue influence alone risks adding further complexity without addressing many of the problems with the legislation. Question 14: If it is decided to simplify the existing offence of undue influence, we do not propose to materially change the element of the offence relating to physical acts of violence or threat of violence. Do you agree? If not, please explain. We agree that physical acts of violence or threat of violence should stay in the offence of undue influence. However it should be simplified and clearly defined. We think that the suggested definitions of physical acts of violence or threat of violence set out in the consultation document are a useful basis for simplification. Question 15: Any act, whether lawful or unlawful, which is intended to cause harm to the individual and is carried out with the intention to make a person vote, vote in a particular way, or deter them from voting and should be captured within this offence. Do you agree? If not, please explain. We agree these should be covered by the offence. The UK Government should also revisit and simplify the definition of harm. The Oxford Dictionary contains three definitions of "harm": physical injury, especially that which is deliberately inflicted; material damage and; actual or potential ill effects or danger. It is important that it is clear which of these definitions apply to the offence of undue influence. Our understanding is that harm is meant to be broader than just physical injury. Therefore, any definition of harm put forward by the UK Government should

include all three of the definitions listed above. The consultation question does not refer to the offences of loss, damage or temporal and spiritual injury. These are captured under the existing offence of undue influence. It should be clear whether these will be included under the definitions of harm or duress, or removed from the offence entirely. We would be concerned if they were removed entirely. Question 16: We propose to retain reference to ‘direct and indirect’ acts which cause the elector harm. Do you agree? If not, please explain. We believe that this reference should be retained. What constitutes ‘direct and indirect’ acts must be clearly defined. We believe an ‘indirect’ act is difficult to define and must be considered as part of clarifying the offence of undue influence. We think that the suggested definitions of direct and indirect acts which cause an elector harm set out in the consultation document are a useful basis for simplification. Question 17: We propose that the redefined offence retains reference to offences committed by or on behalf of a perpetrator in relation to acts that cause the elector harm. Do you agree? If not, please explain. We agree that reference should be retained to “offences committed by or on behalf of a perpetrator”. Question 18: We propose that the scope of section 115(2)(a) continues to include those acts which are carried out before and after the election. Do you agree? If not, please explain. We agree that this offence should cover acts carried out before and after the election. There should be no uncertainty as to what is an offence. In our 2015 response to the UK’s Law Commissions’ consultation on electoral law reform, we asked that additional consideration be given to the issue of when electoral offences can be committed. We still hold this view. The law currently takes a variety of different approaches to when electoral offences can be committed. Some offences may be committed ‘before, during or after an election’, some can only be committed ‘before or during an election’ and others can only be committed ‘at an election’. There may be justifiable reasons for different approaches being taken for each offence, or it may be that a more consistent approach should be taken. Either way, we would like to see greater clarity in the law on the timing of when offences are committed to ensure greater consistency. People who must comply with the law, and those who enforce the law, need to understand what behaviour is prohibited and the associated punishments. Question 19: Do you agree that the offence should continue to cover actions of duress? If not please explain. We agree that the offence should continue to cover duress with a clear definition. We said in our 2015 response to the UK’s Law Commissions’ consultation that duress should be retained. Consideration should be given to its definition to avoid complicated drafting and to separate it from ‘duress’ as used in criminal and contract law. The law should stop anyone from forcing a person to vote for a particular candidate or to not vote at all. However, it is important that when defining a simplified undue influence offence, it does not conflict with the right to freedom of expression. Many people will legitimately want to persuade others to vote for certain candidates, and any restrictions on this freedom will need careful consideration. We are conscious that there are some electors who may be more vulnerable to pressure or undue influence because of their personal position within a family, social group or wider community, who might benefit from greater protection. We would expect any modernised definition of undue influence or duress to be capable of identifying and being applied to this type of influence. Question 20: Any redefined offence would still look to cover actions of trickery. Do you agree? If not, please explain. We agree that the actions of trickery should remain and should be clearly defined. The UK government could use the simplified definition of the actions of trickery set out in the consultation document rather than the existing definition: ‘any fraudulent device

or contrivance'. We think that the suggested definitions of the actions of trickery set out in the consultation document are a useful basis for simplification. Intimidation at polling stations Question 21: Do you agree that the scope of the offence should remain the same, subject to including a specific reference to intimidation at polling stations? If not, please explain. Question 22a: Do you agree that the offence should specifically capture intimidatory behaviour carried out inside or outside of the polling station? If not, please explain. Question 22b: If so, do you agree that the definition should include behaviour which falls below the current requirement of physical force, violence or restraint? We do not agree with adding a specific reference to intimidation at polling stations to the offence of undue influence. Simplifying and modernising the offence of undue influence, and providing clear definitions, should ensure intimidation at polling station is covered without needing to make a specific reference to it. However, if the UK Government decides to include specific reference to intimidation at polling stations there must be a clear, workable definition of what activity should and should not be prohibited. We agree that electoral law should include offences that deter and punish intimidation and coercion of voters, which can be used by police forces and prosecutors in addition to general public order offences. However, we also agree with the 2016 UK's Law Commissions' concerns about lowering the bar of undue influence to include any behaviour which could be reasonably considered as intimidation at a polling station. The Law Commissions highlighted that perceptions of what is "intimidation" will vary, and therefore must be clearly defined. This will ensure that rights to free speech and assembly are not infringed. It would also be important to ensure that people understand what is "outside a polling station". Consideration of additional electoral law offences We want the UK Government to consider creating the following postal voting offences: In our response to the recommendations from Sir Eric Pickles' 2016 review of electoral integrity we supported extending the offences contained in Section 66 of the RPA to postal voting. The secrecy of the ballot protections that apply to in person voting, would then apply to postal ballots. There should be greater consistency and equivalency between offences which may be committed in a polling station or at a count, and elsewhere, including in a voter's home. We recommend that the UK's Governments should change the law so that candidates, parties and campaigners are not allowed to handle or take completed absent vote applications or postal ballot packs from voters, but ensure sufficient safeguards are in place to protect legitimate assistance. Increasing transparency in digital election campaigning The PPERA and the RPA contain powers for the Secretary of State to make regulations requiring imprints on non-printed election and referendum material. This applies to digital material, and it can also include audio material. Our view is that any new regulations should cover all non-printed material. Question 23: Do you as a voter believe that the current system as applied to printed election material promotes transparency and gives confidence in our systems? The imprint rules for printed election material ensure voters can check the source of election material, and allow the police, prosecutors and us to enforce the spending rules. Extending the imprint rules to digital material is urgent. This gap in transparency is affecting voter confidence and impacting our ability to enforce the rules. The imprint rules have two purposes. They ensure that voters can find out who is behind the election material they receive. And they allow the police, the CPS, the Procurator Fiscal, the PSNI and us to track campaigners' spending so that we can enforce the spending rules. Without the imprint rules, campaigners could run campaigns without ever having to identify themselves as the source. This is currently the case with digital material.

At the beginning of 2018, we contracted the research company GfK to carry out research with the public. Our aim was to find out what the public knew and understood about political finance regulation in the UK and digital campaigning at elections and referendums. The findings confirmed the need for digital imprints. It showed that participants were more likely to pay attention to digital material, were concerned about its source and thought the imprint rules should be extended to digital material. Question 24: Should the imprint rules in PPERA be commenced for Northern Ireland? The imprint rules in PPERA should be commenced for Northern Ireland. Voters in Northern Ireland should know who is behind campaign material. The imprint rules in section 143 PPERA originally applied across the whole of the United Kingdom in February 2001. Following representations from the Labour, Conservative and Liberal Democrat parties, the Election Publications Act 2001 suspended the provisions from April 2001. This was because a large amount of election material for the 2001 UK Parliamentary general election had already been printed without an imprint, so could not be used. In 2006, SI 2006 No. 3416 reinstated section 143 PPERA provisions in Great Britain only. We do not know why the Order did not extend the provisions to Northern Ireland. Where party and non-party campaigner election material in Northern Ireland lacks an imprint, we have no powers to investigate and sanction a campaigner under PPERA. This means there is no deterrent in Northern Ireland, as there is in the rest of the UK, for failing to include one. The UK government must commence the imprint rules for Northern Ireland. Question 25: Should the imprint rules for Northern Ireland elections be the same as for the rest of the United Kingdom? The imprint rules for all campaigners in Northern Ireland should be the same as for the rest of the United Kingdom. Making the imprint requirements in the Electoral Law Act 1962 the same as those in section 110 RPA would provide further clarity. This would help simplify electoral law as the UK's Law Commissions have proposed. Currently in Northern Ireland an earlier version of Section 110 RPA is in force for imprints on candidate material for UK Parliamentary and Northern Ireland Assembly elections. This is because the Election Publications Act 2001 suspended the application of the new version of section 110 RPA (introduced under section 136 and Schedule 18 PPERA). Under SI 2006/3416, the new version of section 110 RPA was brought into force only in Great Britain (not Northern Ireland). Principle and purpose Question 26: What are your views on whether imprints should be required on all digital electoral material or only where spending on such material has been over a certain threshold? All digital election and referendum material should include an imprint. Any new regulations should ensure that individuals expressing personal opinions are not covered. All digital election and referendum material should include an imprint. The current rules for printed election material do not specify a minimum spending threshold before a campaigner must add an imprint. We do not think that any new rules for digital material should be different from the rules for printed material. Specifying a spending threshold creates other problems. A campaigner may spend very little, or nothing (apart from staff time), on creating a campaign message that reaches a lot of voters because that they can achieve wide organic reach. We do not think it is right that because they have spent nothing on creating and distributing the message, they should not have to identify themselves as its source. Further, we would not know what, if anything, a campaigner has spent on digital election material. s are not required to report their spending during an election or referendum campaign. This means we would not know whether a campaigner had passed the threshold, and therefore whether they had committed an offence by not including an imprint. This would undermine the purpose of extending the requirement to digital

material, and make it difficult for the police and us to enforce the new rules. It is important that any new imprint rules do not affect voters' right to engage in political debate online during election and referendum campaigns. Any new rules should not cover individuals expressing personal opinions. When should imprints be required? Question 27: Should any new rules on digital material only apply to what we would already consider to be "electoral material" or should broader categories be considered? The UK Government should use the regulation-making powers in the PPERA and the RPA to make imprints on non-printed election material a legal requirement. Regulating broader categories of political advertising requires more thought and more scrutiny. Extending the imprint rules to non-printed material is urgent. Therefore, we think that the UK Government should use the existing regulation-making powers in the PPERA and the RPA. But those powers only allow the Secretary of State to draft regulations that apply to "election material" as defined in the PPERA, and to material that is intended to promote or procure the election of a candidate in the RPA. Regulating wider forms of political advertising would require amending primary legislation, which would take much longer than introducing regulations. Regulating broader categories of political advertising requires more thought and more scrutiny. This would be a much different form of regulation than the current rules. The UK's governments and legislatures would need to consider which principles should underpin any new rules for regulating wider political speech. They would need to ensure that the rules do not curtail free speech, and to consider the practicalities of enforcing any new rules. We think that more would need to be done to explore this idea. Question 28: Do you agree that the requirement for imprints on election material can arise all year round, not just during election periods? We agree with the Government's interpretation of the PPERA imprint requirements. Sections 143 and 143A do not specify a particular time period when the imprint rules apply. The requirement to include an imprint arises where the material can be reasonably regarded as intended to promote or procure electoral success for particular parties or categories of candidates, and the material relates to an election. These two tests may be met before the regulated period for that election has started. We think that the RPA imprint requirements apply during the specific timeframe when people are formally treated as candidates. Under section 110 RPA, imprints are required on any material which can be reasonably regarded as intended to promote or procure the election of a candidate at an election. Section 118A defines the earliest date on which a person can become a candidate for a UK Parliament or local election. There are no candidates before that date. Therefore, it is the earliest date on which an imprint is required. This means, for example, that there are no imprint requirements for material promoting a candidate in the long campaign period at a UK Parliamentary general election. We think the Government should consider this further, because there is an inconsistency in the law if the pre-candidacy spending rules apply whilst imprint requirements do not apply. What forms of digital communications should be covered? Question 29: Should we prioritise regulating certain forms of digital communications over others? If so, please give reasons. Certain forms of digital communication should not be prioritised over others. Digital campaigning is constantly evolving. If certain digital communications are prioritised, they may become outdated in the next few years. This would make any new rules outdated and unworkable. Political campaigns use a variety of digital channels to communicate their campaign messages to voters. They currently use email, websites, website advertising, search advertising and social media posts. Digital campaign messages can consist of text, photo, graphics, video, audio, slideshows, and various combinations of these formats. We have observed

in our monitoring of election and referendum campaigns the evolution of social media advertising from posts consisting of text only to embedded video. This shows why it is important that any new imprint rules for digital and other non-printed material should cover all kinds of digital communications. This will also help to future-proof the new regulations for changes in technology and media. How should the imprint be incorporated? Question 30: What sort of mechanisms for including an imprint should be acceptable? Are there any technical difficulties that would need to be overcome to include text which is not accessible without a further step? Question 31: Would you find an imprint in an overarching space such as a 'bio' sufficiently visible? We support the principle that a campaigner's full details should be part of the campaign message itself. We do not think that an imprint in an overarching space is sufficiently visible. Until now we have said in our guidance that it is acceptable to include a full imprint on a 'bio' or 'profile' page if it cannot be part of the message itself. We took this approach during the Scottish Independence Referendum because it was a pragmatic solution to the (then) 140-character limit . It has worked until now. But advertisers can remove the imprint from 'bio' or 'profile' information at any time. This is not a solid basis for transparency. And it is a platform-specific solution, which may not work for newer forms of social media. We think that the law should move away from platform-specific solutions. Digital media and digital campaigning are constantly evolving, and this includes technical facilities to put an imprint on election ads. Therefore, any new imprint requirement should be 'platform-neutral'. In other words, it should apply to any kind of digital campaign message on any platform, and it should be part of the message itself. On platforms with word or character limits, like Twitter for example, a video or photo embedded in or attached to the message would allow a full imprint to be displayed. This could also be achieved with the dropdown boxes some platforms use to give users information about the advertising they see. Question 32: How can these mechanisms be future-proofed in expectation of developments in media and technology? Any new regulations should be drafted as general principles to make them 'platform-neutral'. The regulations should say that the technical design of digital imprints must allow machines to read, record and store them. The Government should consider carefully how to specify in regulations the circumstances in which non-printed material is, or is not, considered to be published. In the longer term, the UK government should consider amending the regulation-making powers in the PPERA and the RPA so that the rules can be kept up-to-date with technological developments. This could include giving us the regulation-making powers or a power to make a Code of Practice for imprints. We think that any new regulations should apply to all digital material on different platforms and media. This could be achieved by drafting general principles for including an imprint rather than specific rules for different media. This approach would help to make the new regulations 'platform-neutral' and future-proof them. The explanatory notes and memorandum for the regulations could contain examples of how they apply to different forms of digital advertising. We can use our guidance to explain at elections and referendums how the rules apply to the digital channels that campaigners are using at that time. Regulations made under the powers in section 143 PPERA and in section 110 RPA may specify the circumstances in which non-printed material is, or is not, considered to be published. This will be an important part of future-proofing the regulations, and we think the Government should consider carefully how to specify those circumstances. We will work with the Government on how to specify them. Any new requirement should say that the technical design of digital imprints must allow machines to read, record and store them. A number of organisations have recommended

creating a central database of all election and referendum advertising. The technical design of digital imprints should allow them all to be stored in one place, should this be necessary at some point in the future. At this stage, we think that the right approach is to use the regulation-making powers in the PPERA and the RPA to make imprints on digital material a legal requirement. But advances in technology mean that both we and the UK government will need to keep the rules under regular review. It is likely that the UK government will need to amend them at some point despite its best efforts to future-proof them. For this reason, the UK government should consider whether to introduce primary legislation, when the opportunity arises, to amend the regulation-making powers in the PPERA and the RPA. The current powers were drafted at a time when print advertising was the main form of election advertising. They require the Secretary of State to model regulations for non-printed material after the rules for printed material. This may not give the Secretary of State enough discretion in the future to introduce regulations that are up-to-date with developments in technology. In the longer term, the UK government should also consider either transferring the regulation-making powers to the Electoral Commission, or giving us a power to make a Code of Practice for imprints. We would be responsible for ensuring compliance with the new digital imprint requirements. And we have a duty to keep the law under review. We would therefore be best placed to know if and when the regulation-making powers needed to be used to update the regulations. Alternatively, a power to make a Code of Practice would allow us to provide additional statutory guidance for campaigners on how and when to include an imprint on digital material. And this should be able to be amended more easily than the requirements in legislation. Who should be responsible for including the imprint? Question 33: Should those who subsequently share digital electoral material also be required to include an imprint and, if so, whose details should be on it - theirs or the original publisher? Individuals who subsequently share material on a personal basis should not have to include an imprint. But where campaigners distribute a new election or referendum message that involves sharing material from another, unrelated organisation because they think it will enhance their electoral chances, they should have to include their own imprint on the new message. Individuals who want to share material from campaigners they know and trust. We think this is an important aspect of democratic engagement. Individuals would be deterred from sharing election material online if they knew they had to put their own imprint on it. As long as the material they share has the campaigner’s imprint on it, this is enough. Enforcement and redress Question 34: Do you think the responsible bodies have sufficient enforcement powers? Our current powers would be adequate for enforcing any new digital imprint regulations in the course of an investigation, but not where we haven’t opened an investigation. The UK government should give us wider powers to compel information, including from digital platforms. The UK government should increase the maximum fine we can impose for breaches of the imprint rules. The UK government should give us the power to investigate and sanction breaches of the candidate rules in the RPA. We have powers to investigate and sanction campaigners for breaching the imprint rules in section 143 PPERA. This includes being able to fine a campaigner up to £20,000 for failing to include an imprint. Only the police and prosecutors are able to investigate, prosecute and sanction breaches of the imprint rules in section 110 RPA. We consider the powers we have to enforce the imprint rules for printed materials to be adequate. We can compel any person or organisation to give us information during an investigation. In most cases where there is a clear case of a failure to include an imprint, we would open an

investigation. We would expect to be able to do the same with digital platforms under our existing powers. However, outside of an investigation we can only compel bodies regulated under PPERA to give us information about income and expenditure. Our powers to require information do not extend to third parties such as newspapers or digital platforms. This means that currently we would not be able to obtain information about the source of an advert which had no imprint. The ability to find out the identity of campaigners outside an investigation is also relevant for enforcing the spending rules. We think that we should have the power to compel digital platforms, and others, to give us information we need to perform our statutory functions, such as advertisers' contact details or amounts spent on distributing election material. This would allow us to effectively monitor campaign activity and take action to prevent non-compliance where possible at an early stage. We have previously said that our maximum fine of £20,000 for each offence is too low. When considering how much to fine a campaigner for failing to include an imprint on campaign material, one of the factors we take into account is how many people may have seen it. Digital campaign messages can potentially reach many more people than a newspaper advert. And as they can be delivered directly to a handheld device, voters have less control over whether they see them. Our maximum fine should reflect these factors. It should therefore be increased. We have previously recommended that we should be given powers to investigate and sanction breaches of the candidate rules in the RPA. We have seen some high-profile alleged breaches of the candidate rules, mostly at national elections, where referral for criminal prosecution was not considered to be in the public interest. But it may have been appropriate to investigate further and issue a civil sanction if we had had the power to do so. This is why we repeat this recommendation here. Related content Consultation: Equality, Diversity and Inclusion Strategy Statutory consultation on guidance for Returning Officers: Assistance with voting for disabled people Draft guidance for Returning Officers: Assistance with voting for disabled voters (statutory consultation) Our response to the Assembly Commission's consultation 'Creating a Parliament for Wales' Read our response to Assembly Commission's consultation from April 2018