

Response to the UK Government consultation on a draft Strategy and Policy Statement for the Electoral Commission | Electoral Commission Search

Response to the UK Government consultation on a draft Strategy and Policy Statement for the Electoral Commission You are in the Our responses to consultations

section Home Our responses to consultations On this page Independence of the Electoral Commission Accountability of the Electoral Commission The Commission's approach to this consultation The Commission's response to the draft Strategy and Policy Statement Delivery of the Government's executive priorities Restatement of the Commission's existing functions and duties The Commission's role across the United Kingdom The principles of neutrality and impartiality Enforcement Guidance The responsibilities of other organisations First published: 16 September 2022 Last updated: 7 October 2022 Overview The Elections Act 2022 introduced a new power for the UK Government to put in place a strategy and policy statement for the Electoral Commission. The statement can contain UK Government guidance that the Commission is required to have regard to in the discharge of its functions. The UK Government has published a draft strategy and policy statement and is consulting on its content with three statutory consultees: The Electoral Commission, the Speaker's Committee on the Electoral Commission, and the Levelling Up, Housing and Communities Select Committee of the UK Parliament. The Commission has submitted the below consultation response outlining its views. Independence of the Electoral Commission The Electoral Commission is the statutory body which oversees elections and regulates political finance in the UK. It works to promote public confidence in the electoral system and ensure its integrity. As the UK's political finance regulator and the body that oversees free and fair elections, the way the Commission works and its decisions must remain independent, and its independence must be clear for voters and campaigners to see. This underpins fairness and trust in the electoral system, as well as public and cross-party confidence in the Commission's work. It is fundamental to maintaining confidence and legitimacy in our electoral system that an electoral commission remains independent from governments and acts impartially and with integrity to fulfil its duties. The introduction of a mechanism such as a strategy and policy statement – by which a government can guide the work of an electoral commission – is inconsistent with that role. Parliamentarians from all political parties made clear statements during the parliamentary consideration of the Elections Bill that the independence of the Electoral Commission is vital to the functioning of a healthy democracy. Ministers too were clear during the passage of the Bill, and with the Commission since Royal Assent, that they value and want to uphold the independence of the Commission. The opening section of the draft statement describes the Commission as the “independent regulatory body”. It goes on to state that the “statement does not seek to interfere with the governance of the Commission and the Commission remains operationally independent.” Members of the Commission Board wrote to the Secretary of State in February 2022 to set out their concerns about the proposed powers included in the Elections Bill (now the Elections Act), and this remains the firm view of the Commission. Accountability of the Electoral Commission The Commission values scrutiny of its work and welcomes and engages with the routes and processes that are already available to the UK Parliament and other legislatures to hold it to account. This includes frequent engagement with select committees and public bill committees through written and oral evidence sessions, in addition to regular scrutiny of financial and business planning by the cross-party Speaker's Committee on the Electoral Commission. Now that the Elections Act has become law, any strategy and policy statement drafted by the Government and designated under the Act

will form part of that process of accountability to the UK Parliament, in particular through the Speaker's Committee. Once a strategy and policy statement has been approved by Parliament, the Commission will have a duty to have regard to it in taking forward its work, and will ensure that this duty is met. The Commission will continue to act in an independent and impartial way in order to help maintain public confidence in elections across the UK. In taking independent decisions about how to deliver its important roles and functions – including statutory obligations not mentioned in the statement – the Commission will continue to balance the needs, views and interests of all members of the electoral community. These include each of the UK's parliaments and governments, but also electoral administrators, the regulated community of parties, candidates and campaigners, and voters themselves. The Commission will report annually to the Speaker's Committee on how it has had regard to the statement. The Commission will remain accountable to the Scottish Parliament and the Senedd for its work in relation to Scottish and Welsh elections, including work that is directly funded by the Scottish Parliament and the Senedd. The Commission's approach to this consultation

The Commission has UK-wide responsibilities, and important distinct responsibilities in each of the four parts of the UK. It is accountable to and funded separately by the UK Parliament, the Scottish Parliament and the Senedd. Its work is directed to meeting the needs of a broad range of stakeholders. Earlier this year the Commission set out its proposals for delivering these responsibilities in its five-year Corporate Plan for the period from April 2022 to March 2027, including a separate plan which covers the Commission's activities in Wales. These plans are the result of broad engagement with the electoral community, and they have been considered and approved by each of the three parliaments to which the Commission is accountable. The Commission's plans set out how it will deliver against five strategic objectives: Accessible registration and voting Transparent political campaigning and compliant political finance Resilient local electoral services Fair and effective electoral law A modern and sustainable electoral system

The Commission's response below therefore focuses on where the guidance set out in the draft strategy and policy statement departs from these agreed, balanced and independent plans that have already been considered and approved by respective parliaments. It comments on the approach the Government has taken to using this new legislative power; highlights some areas where amendments are required; and notes practical issues relating to the workability of the draft statement. The Commission has not yet been required to have regard to a strategy and policy statement. Once a final statement has been approved by Parliament and designated, the Commission will give consideration to it, and to what bearing the statement should have on the Commission's existing and approved plans. This response focuses on what is specifically within the draft statement. However, the Commission would welcome the opportunity to discuss with the Government how best to bring about wider improvements to the democratic system. For example, paragraph 13 refers to combatting foreign interference in UK elections. The Commission has recommended changes to the law (echoed by recommendations by the Committee on Standards in Public Life) that would bring about significant improvements in this area, but this requires action from the Government to bring forward legislation to strengthen the regulatory framework. Similarly, paragraph 25 refers to clarity on the law. Since 2016 the law commissions have recommended changes to clarify the law. These have been widely welcomed and supported. The Commission would welcome the opportunity to work with the Government to develop workable proposals for modernising and simplifying legislation that would bring clarity where it is greatly needed. In the view of the Commission,

these and other issues can better be progressed by working together rather than through a strategy and policy statement. The Commission's response to the draft Strategy and Policy Statement As this is the first draft strategy and policy statement to be considered for approval by Parliament, it is particularly important to ensure it is absolutely clear, so that the Commission is able to account for it when reporting back to Parliament on how it has had regard to it. There are a number of aspects to the approach taken by the Government which may raise issues if taken forward in the final statement. Specifying the Commission's priorities The statement in some places – most notably paragraphs 4 and 5 – appears to seek to substitute the independently agreed priorities for the Commission with a requirement to have regard to the Government's view of what those priorities should be and how they should be resourced. The first section of the draft statement seeks to set out "the Government's view of the Electoral Commission's priorities and functions that support the Government's priorities in relation to elections, referendums and other matters in respect of which the Commission has functions". This wording is different to the description of the scope of the statement in new section 4A of the Political Parties, Elections and Referendums Act 2000 (PPERA). This provides that a statement may set out firstly the Government's strategic and policy priorities in relation to elections, referendums and other matters in respect of which the Commission has functions; and secondly the roles and responsibilities of the Commission to enable the Government to meet those priorities. It will be important to understand how this wording in the statement reconciles with the wording in the Act. This will be particularly important for proper parliamentary scrutiny of the statement. In addition, although the statement indicates that "this is not an exhaustive list of all the Commission's duties and responsibilities and does not suggest that the Commission should cease to carry out any of its other statutory duties", it makes clear that some of the responsibilities that Parliament has legislated to give to the Commission should be considered a lesser priority. It specifically says in paragraph 3 the Government's view that "these priority functions should be the focus of the Electoral Commission's work and allocation of resources". Commission's priorities summary The Government should make clear how its statements on priority setting are consistent with the Commission's independence and with the Act. In particular, it should be clear that the Commission should not be fettered in the exercise of those of its statutory duties that are not covered in the statement and that the Commission remains free to prioritise and resource those other functions in accordance with its independently agreed plans. Delivery of the Government's executive priorities Under the heading "Executive priorities in relation to elections as approved by Parliament" Section 2 of the draft statement sets out the UK Government's priorities in relation to elections, including reference to the Conservative Party's 2019 general election manifesto (paragraph 7). This includes guidance that the Commission should "support the Government's delivery of legitimate executive priorities in relation to elections during this Parliament, including changes brought by the Elections Act 2022 and as listed below" paragraph 8). The Commission will continue to deliver the statutory functions and responsibilities that Parliament has given it, including changes brought by the Elections Act 2022, and the Commission will respond to and reflect any changes to legislation that Parliament has approved. As the statutory regulator, the Commission will also continue to provide independent advice to the Government and Parliament about the implications of proposals for changes to policy or legislation, drawing on relevant experience and expertise. However, the effect of this section of the

statement would be to legally require the Commission to have regard to supporting the delivery of policies that have not yet been approved by Parliament. It would not be appropriate for an independent regulator to be given such direct responsibility for delivering the policy priorities of the Government, including manifesto commitments or other policy proposals that may not yet have been considered or approved by Parliament.

Delivery of gov policies summary The strategy and policy statement should be amended to make clear that the Electoral Commission will not be required to have regard to supporting the delivery of policies that have not yet been approved by Parliament.

Restatement of the Commission's existing functions and duties Restatement of the Commission's existing functions and duties Anything included in the final strategy and policy statement approved by Parliament will require the Commission to have regard to it and be accountable not only to Parliament but also potentially through the courts. Care must be taken not to needlessly introduce uncertainty or confusion over the Commission's functions or duties, through restating them in different and expanded wording. This creates confusion for stakeholders and the public, and will also increase the potential for legal challenge on the nature of the Commission's functions and obligations under the statement; any differences in description may be exploited to undermine or challenge the Commission's decisions. Furthermore, in some parts of the statement examples are given to illustrate a general point but the duty of the Commission extends across the full range of its activities. For example, paragraph 18 refers to responsiveness to the public and the public interest which is central to all parts of existing agreed plans, yet the only example given in the statement refers to support for Returning Officers. Similarly, paragraph 19 refers to value for money which is also a core element of the Commission's legal duties and existing plans, yet the only example given in the statement refers to relates to use of powers under section 10 PPERA. It is not clear why these individual examples have been highlighted given that the Commission aims to operate consistently across all its functions in these and other areas.

Summary: Restatement of the Commission's existing functions and duties The strategy and policy statement should be amended to accurately reflect the wording of the Commission's responsibilities, as legislated for by Parliament, to avoid needlessly creating confusion for stakeholders and risk of legal challenge.

The Commission's role across the United Kingdom The draft statement includes reference to the Commission's responsibilities across all parts of the United Kingdom. As currently drafted this would require the Commission to have regard to "the importance of acting for all parts of the UK equally" (paragraph 23). The Commission's published and approved corporate plans set out clearly how it will deliver its statutory functions and priorities in each part of the UK, and across the UK as a whole. This includes responsibilities carried out in the devolved nations with accountability to the UK Parliament, and also those activities for which the Commission is funded by and directly accountable to the devolved parliaments. It is unclear what acting "equally" for all parts of the UK would mean in practice, how this relates to the responsibilities in other parts of the UK and to other legislatures, how this could be assessed or what it is specifically intended to achieve. The Commission's work programme varies depending on the scheduled and unscheduled polls taking place, and also the needs of stakeholders and priorities of the respective governments. In addition, while work on particular polls and governmental policy priorities are funded by their respective parliaments, some cross-cutting aspects of the Commission's work are funded by the three parliaments, paid on the basis of a jointly agreed formula. This therefore creates a risk that UK

Government guidance through this statement has a bearing on work undertaken for the other legislatures to which the Commission is accountable. The draft statement does not currently recognise this complexity. Summary: The Commission's role across the United Kingdom The strategy and policy statement should be amended to ensure that the purpose and intent behind the requirements relating to "all parts of the UK" are clear for Parliament, devolved legislatures, and the Commission. The principles of neutrality and impartiality The principles of neutrality and impartiality The draft statement includes an explanation of the Government's view of the core principles that should be prioritised by the Commission in the exercise of its functions. This includes guidance that the Commission should "uphold and demonstrate the principle of political impartiality by ensuring that the Commission and its staff communicate and treat all operations, decisions, regulated entities and political matters neutrally and impartially" (paragraph 16). The Commission's current approved corporate plans set out clearly its view and understanding of the importance of acting impartially and with integrity, including taking decisions on the evidence and being transparent about the reasons for them. As an expert body, we base our policy positions and recommendations on independent and impartial analysis. It is unclear what additional expectation is required of the Commission to act 'neutrally' as well as 'impartially'. It is also unclear how 'neutrality' could be seen to be consistent with the Commission's functions, including for example its role in advising governments and parliaments on changes to improve the democratic process. The principles of neutrality and impartiality The strategy and policy statement should be amended to ensure wording on impartiality is consistent with the Commission's existing legal role. Enforcement Enforcement The draft statement includes several references to proportionate enforcement including: "the need to avoid disproportionate sanctions against genuine mistakes where reasonable steps have been taken to comply with the new digital imprint regime" (paragraph 14) "the need for the Commission to balance the impact of its enforcement policy on providing an effective deterrent for deliberate breaches of electoral law and not unduly discouraging participation in public life" (paragraph 20a) "The Commission should be sensitive and proportionate to the voluntary nature of much of political parties' infrastructure" (paragraph 20a) "best practice from other regulators (such as the 'Macrory principles'), including where appropriate the use of requests for improvements before resorting to fines and the need to conduct investigations in a timely manner" (paragraph 20b) The Commission is already required by law to prepare and publish guidance on the use of its powers to investigate and sanction potential offences and contraventions of PPERA. The Commission has consulted on and published this guidance in its Enforcement Policy . This clearly and publicly sets out the Commission's approach to enforcement activity, which already covers the factors of proportionality and deterrence, including that it will: Regulate in a way that is effective, proportionate and fair. Use advice and guidance proactively in order secure compliance and to give those it regulates a clear understanding of their regulatory requirements. Undertake supervisory work to ensure that regulated organisations and individuals meet their legal requirements. Take enforcement action, including using investigatory powers and sanctions, where it is necessary and proportionate to do so in order to meet its enforcement aims and objectives. Take the facts of each situation into account. Including such specific guidance as to how the Commission should ensure proportionate enforcement of the law, and what factors it should consider when investigating potential criminal offences, risks impacting the operation of the Commission's duty to take decisions on enforcement action in line

with its enforcement policy. Further, it is already open to anyone to challenge an enforcement decision if they are not satisfied that the Commission has acted proportionately or consistently with this published statutory policy. The inclusion of specific factors in the statement could lead to an increased risk of legal challenge to operational decisions about investigations and enforcement. It could be seen to establish an alternative set of standards that may undermine the Commission's statutory enforcement policy. It could also create legal uncertainty over the application of regulatory requirements on the regulated community and affect voter confidence in the electoral system.

Enforcement summary The strategy and policy statement should be amended to remove points of guidance on the operation of the Commission's enforcement responsibilities, which risk undermining its approved statutory enforcement policy.

Guidance The draft statement includes several references to the development and publication of guidance and performance standards by the Commission to support campaigners, Returning Officers and Electoral Registration Officers to comply with the law: "In particular, the Commission should support Returning Officers in ensuring the secrecy of the ballot inside polling stations, by making it clear in both advice and guidance that any breach of the secrecy laws or attempt to influence someone's vote while in the polling booth is an offence." (paragraph 5a) "In particular, with regards to guidance on qualifying expenses in Part 1 of Schedule 8A of PPERA, the Commission should include clear and comprehensive guidance about the test of who should count as "the public at large or any section of the public"." (paragraph 13b) "The Commission should also support compliance with the regime and recognise the importance of protecting free speech by individuals when producing the statutory guidance for the digital imprint regime." (paragraph 14) "For example, the Commission must have regard to the importance of accurate and prompt election results through supporting Returning Officers' conduct of counts and setting adequate performance standards for Great Britain." (paragraph 18) "the Commission should provide guidance that sets out the rules as simply as possible and offers practical advice, with illustrative examples, of how to comply with the rules, as legislated by Parliament" (paragraph 24)

Guidance issued by the Commission reflects the processes and requirements set out in law that have been approved by Parliament. It sets out where statutory requirements or offences are specified in legislation, and also makes clear where it is suggesting best practice that goes beyond any minimum requirements set out in law. These points of practice set out in the statement are already incorporated in the Commission's agreed corporate plans and current guidance. The Commission continuously reviews and updates its advice, guidance and performance standards, including consulting with campaigners or electoral administrators to ensure it understands and meets their needs. While the Commission may provide illustrative examples where it is possible and likely to be helpful for campaigners or electoral administrators, it may not be appropriate or possible in all instances, such as for unscheduled polls or in relation to new types of campaigning.

Summary: Guidance The strategy and policy statement should be amended to remove points relating to the content or format of the Commission's guidance or performance standards.

The responsibilities of other organisations The draft statement includes several references to other organisations with statutory responsibilities for delivering elections or enforcing the law, for example: "The Commission should support this work and candidates facing intimidatory or abusive behaviour by updating guidance in the 'Joint Guidance on Intimidation for Candidates' jointly produced with the National Police Chiefs Council, Crown Prosecution Service and the College of Policing."

(paragraph 11) “Where decisions are taken by the prosecuting bodies not to take forward prosecutions, and where the Commission is aware of a decision not to prosecute and it is appropriate to do so, the Commission should ensure the record is clear that individuals or organisations do not remain under criminal investigation.”

(paragraph 21) The Commission would be required to show how it has had regard to the statement, but will not have powers to direct other organisations to ensure that they also follow these specific points of guidance. For example, the Commission cannot require the National Police Chiefs Council, Crown Prosecution Service and the College of Policing to update their guidance, and yet would be accountable through the strategy and policy statement for ensuring it is updated. In areas where it already works to support the police the Commission will continue to do so, but as it cannot seek to direct police priorities it is not clear what more the statement aims to require it to do. Similarly, there is no requirement for the police or prosecuting authorities to tell the Commission if they have decided not to bring a prosecution. Even if that were common practice, it would not be appropriate for the Commission to act as a spokesperson for another enforcement or prosecuting authority by communicating their decisions. Other organisations summary The strategy and policy statement should be amended to ensure that the Commission is not given inappropriate responsibility for the actions or decisions of other bodies. The Government should also ensure that any other bodies referenced in the strategy and policy statement are satisfied that their roles and powers are accurately represented.