

Candidate expenditure in the 2015 UK Parliamentary General Elections (UKPGE)

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| **Meeting date** | **13 April 2016** |
| **Agenda item** | **10** |
| **Purpose of paper** | Decision  |
| **Decision recommended** | That the Commission accept the recommendations in paragraph 2.1 and authorise the Director of Party and Election Finance & Legal Counsel to implement the actions recommended. |
| **Key risks** | Without increasing our focus on candidates, our reputation as an effective regulator may be undermined  |
| **Resource implications** | Increased workload and additional staffing time on this function in the wider context of Commission priorities and best use of limited resources  |
| **Communication and next steps** | If the Commission accepts the recommendation, we will begin work on recommendations 1a and 1b, timed to ensure all internal planning and implementation is in place for the 2020 UKPGE (any required regulations will be progressed as quickly as possible). Recommendation 2 will be implemented through inclusion in publications and other public comments where appropriate. |
| **Programme** | **Programme 4 – PEF Development Projects** |
| **Author**  | **Dan Adamson, PEF Monitoring and Analysis Manager** |

1. Executive summary
	1. This paper sets out our key learning from the candidate spending return process for the 2015 UKPGE, and the wider context in the light of increased public interest in this aspect of the regime. This paper deals only with UK Parliamentary General Elections, and the recommendations relate to a change of approach for the 2020 UK Parliamentary General Election. Our intention would also be to apply the approach to subsequent:
* Elections to the Scottish Parliament, Welsh Assembly, and Northern Ireland assembly
* Police and Crime Commissioner elections
* Mayoral elections
	1. For the forthcoming elections in May 2016 we will look to see what aspects of the changes in approach we can apply within current resourcing and planning.
	2. We do not propose to change our approach to local government elections.
	3. The paper makes recommendations for action to improve:
* compliance by candidates and agents;
* delivery of information to the Commission by acting returning officers (AROs); and as a result
* our ability to effectively regulate this aspect of the party and election finance regime in future.
	1. This is directly related to our objective of transparency in party and election finance, with high levels of compliance, and confidence that:
* there is transparency about party and election finance, so that people know where money comes from and how it is spent
* the rules on party and election finance are followed, and those who do not follow them are dealt with appropriately and effectively
1. Recommendations
	1. The Commission Board is invited to accept these recommendations:

1a That we develop and implement a detailed plan of improvements that can be made to guidance and forms for the reporting of candidate spending (including through making regulations where applicable) and increase the level of monitoring we conduct on returns; the speed with which we do so; and our ability to take appropriate action where necessary

1b That we increase the priority we afford to candidate returns in our relationship with AROs in future, and particularly in our communications with AROs after general elections; make improvements to the delivery process; begin chasing, logging and checking returns as soon as the 35 day deadline has passed

2 That we continue to seek to persuade Parliament to implement our regulatory review recommendation that we should be given investigatory powers and civil sanctions for Representation of the People Act 1983 (RPA) offences and become the overall regulator of political finance by taking on responsibility for financial offences in RPA

1. Background
	1. Candidate spending (and local non-party campaigner spending) at UK Parliamentary General Elections is regulated under the RPA. The regime places duties on candidates and agents, Acting Returning Officers (AROs) and, through section 145 of PPERA, the Commission.
	2. The ARO is not under any duty by law to chase candidates and agents for missing returns, to examine or otherwise check the returns, or to take any action if a return is incomplete or appears inaccurate. The regime envisages that, once the returns are made public, any member of the public (including other candidates) can then pursue the matter if concerned about a return.
	3. The Commission is also not under any duty by law to chase candidates and agents for missing returns. The Commission’s duty under section 145 is to:

‘monitor, and take all reasonable steps to secure, compliance with…the restrictions and other requirements imposed by other enactments in relation to election expenses incurred by or on behalf of candidates at elections, or donations to such candidates or their election agents.’

* 1. Our investigatory powers and civil sanctions do not apply to RPA offences. The regime envisages that, once the returns are made public, any member of the public (including other candidates) can then make a complaint to the police if concerned about a return.
	2. More information about the regime is included in Annex A.
	3. Although the Commission does not have a clearly defined regulatory role in the regime, and no powers to investigate or sanction non-compliance, we have recognised the absence of other regulatory provision and sought to do as much monitoring as our resources allow in relation to the regime. We also investigated two candidate return cases after the 2010 UKPGE, and since 2010 we have made a series of observations and recommendations in respect of this regime. These are summarised in Annex B.
1. Summary of issues
	1. The number of candidates involved in a UKPGE has been around 4000 in recent elections. Capacity across the Commission to examine returns is limited and we monitor at a level that can be applied across the UK.
	2. Our ability to identify issues is also limited by the fact that we do not receive supporting invoices and other documents from AROs along with the returns, though we may request those.
	3. The Commission has to date fulfilled its duty to monitor and take steps to secure compliance with the controls through relatively small scale sampling of returns generally, and checks on returns with very high spending by candidates. The work has not been a priority (relative to party and other regulation, where we have clear statutory duties), and has been subject to the availability of resource.
	4. As a result of this, it has not always been possible to plan effectively, and the work has taken a significant period of time, 7 months in 2010 and 9 months (with fewer resources) in 2015.
	5. Our monitoring for the 2015 UKPGE comprised a sampling exercise of 200 returns (approximately 5% of the total received) to identify general compliance failures with a view to understanding common issues with returns and identifying appropriate action; and consideration of what was a small number of returns where the reported spending exceeded 95% of the spending limit.
	6. There are three specific issues leading to recommendations.

Monitoring of compliance by candidates and agents with the regime

* 1. Many of the same issues have arisen with the returns for the 2015 UKPGE as did in 2010, including:
	+ Confusion between the long and short campaigns - reporting of only one campaign or no indication which campaign the reported spending relates to – only 78.5% of the sample had clearly reported spending for both campaigns
	+ Declarations – 8% of the sampled returns did not have correctly completed declarations
	+ Reporting donations – 3% of the sample had not properly reported donations, for example no breakdown was provided of a total figure, or the total figure did not match the breakdown
	+ Use of forms – some candidates used local government election forms; others used older forms that do not distinguish between long and short campaigns. In both cases the result is that not all information is provided, even if the form is fully completed. This was a relatively rare occurrence in the sample, only 1%, but of concern because of the basic nature of the error
	+ General lack of complete information – many returns had omissions, albeit minor in some cases, and there was a lack of clarity in the figures provided – overall, we considered that only 64% of the sample were fully completed returns
	+ delivery of returns directly to the Commission – approximately 30 agents and candidates delivered their returns directly to us rather than to the ARO
	+ Confusion over the correct spending limit – many candidates reported spending limits ranging from zero to greatly inflated figures, as much as four times the correct limit
	1. There are clear indications from the limited number of returns we have reviewed that there are continuing problems with compliance, and particularly understanding of how to correctly report spending separately for the long and short campaigns.
	2. We also note however the recent recommendations of the [Law Commissions’ interim report](http://www.lawcom.gov.uk/wp-content/uploads/2016/02/electoral_law_interim_report.pdf) (Chapter 12 in particular) in respect of simplifying the regime and specifically the reporting of expenditure by candidates.
	3. The options we have considered are:
	4. **We continue to fulfil our statutory duty to monitor compliance in future based on a small sample review of the returns we receive, but nothing more**
	5. **We develop and implement a detailed plan of improvements that can be made to guidance and forms, without proposing any legislative change, and increase the level of monitoring we conduct on returns (using a larger sample and, for example, including all successful candidates)**
	6. **We develop a detailed plan of improvements that can be made to guidance, increase our monitoring, and propose legislative change where those proposals will simplify the requirements and are likely to improve compliance**
	7. We do not consider that option 1 is an adequate response to the current position. It is clear that confusion still exists as to the exact requirements, and how to report properly. The position does not appear to have improved since 2010 with, for example, correct reporting of the long and short campaigns still inadequate. In addition, the apportionment of spending between national and candidate spending became an issue in 2015 and has raised the public profile of candidate spending. This in turn has led to more public awareness of the weaknesses in the legislative regime. The Commission is increasingly perceived as the regulator of all aspects of political finance, and there is no evidence to suggest any appetite to take on this work elsewhere. This is an opportunity for the Commission to show it is putting voters first.
	8. There is work the Commission can do to improve clarity for candidates and agents without primary legislation, including:
* simplifying the form we provide, either by regulations or not, to be clear as to what is required by law and what is for the purposes of transparency
* expanding guidance provided to candidates and agents to cover areas outside the legislation and not currently covered, such as apportionment and reporting unused material
* establishing and setting out clearly what constitutes a complete and lawful return
	1. We do not propose legislative change at the present time, other than to support the implementation of the Law Commission recommendations (many of which expand upon recommendations made in our 2013 regulatory review). If implemented, we believe those changes should lead to an improvement in compliance.
	2. We therefore recommend option 2. Increased monitoring and checking will not require an increase in permanent staffing levels but will require significant additional resource for a relatively short period of time, immediately after the relevant election.[[1]](#footnote-1)

Delivery of candidate spending returns to the Commission by AROs

* 1. For the 2010 UKPGE, we received copies of returns for 4,028 candidates out of the 4,150 who stood at the election. This was a return rate of 97%, down slightly from 99% in 2005.
	2. As a result we took a number of steps to seek to improve the return rate, including setting out the duties of AROs in the Register prior to the election, and the introduction of a dedicated email inbox to which AROs could send scanned returns. Previously all returns had been sent to us in paper form.
	3. Despite every ARO who had not yet delivered the required information being reminded at least once by the end of December 2015, we received only 3436 returns (there were a total of 3971 candidates) by 31 January 2016. The return rate for the 2015 UKPGE (by 31 January 2016) was therefore 86.5%.
	4. 34 AROs (for 63 constituencies with a total of 404 candidates) did not deliver any returns to us, despite the reminders. We are continuing to try to obtain these. We recognise that local authorities are under increasing resource pressures, but the delivery of the returns is a statutory duty and our publication of all returns data in one place aids transparency and is a useful resource for voters. The number of entire constituencies which failed to deliver copies of returns to us is a concern, albeit that those returns are also required to be available to view at each authority.
	5. Of the 587 constituencies that did deliver returns to us, 131 returns were missing. In many cases the ARO confirmed that particular returns had not been provided to them, in other cases it was unclear whether the returns had been provided to the ARO and then not delivered to us, or not provided to the RO at all. None of those missing returns related to successful candidates, and two related to second place candidates.
	6. There were also issues with the ways in which some AROs who provided returns did so, leading to significant work for us, for example:
	+ AROs scanning all of the returns for a constituency as one document, with pages out of sequence, or providing multiple scanned documents for each candidate (up to 12 separate documents in the worst case)
	+ AROs requesting that we log in and download documents from their servers. In some cases passwords provided were incorrect, and in others the passwords had a limited lifespan and expired
	+ Incomplete returns (e.g. front pages only, missing declarations, only short campaign returns) being forwarded without any explanation as to whether the return had been incomplete when delivered to the RO
	+ One ARO, apparently misunderstanding the meaning of expenditure return, delivered to us a statement of expenses for the local authority, including staff payroll
	1. Some AROs responded to our reminders by delivering the returns, and various explanations were offered, including that the ARO was unaware of the requirement to send them to us; IT issues; lack of resources; and workload.
	2. The fall in numbers of AROs delivering returns to the Commission over the last three UKPGEs (and a significant fall most recently) means that our ability to effectively monitor compliance with the rules is diminished, both in terms of whether returns delivered are compliant, and in terms of whether returns have been delivered at all.
	3. Whilst improvements can and will be made in the electronic delivery method in future, the main cause of the significant fall in compliance appears to be that AROs are not making this a priority.
	4. We considered the following options:
	5. **Increase the priority we afford to candidate returns in our relationship with AROs in future, and particularly in our communications with AROs after UK Parliamentary General Elections; make improvements to the delivery process; begin chasing, logging and checking returns as soon as the 35 day deadline has passed**
	6. **Consider Introducing performance standards in this area alongside any improvements we can make in the delivery process**
	7. **Reconsider the option discussed in our 2010 spending report that the Commission should become the repository of these returns, rather than AROs**
	8. We have already identified improvements that can be made in the process by which AROs are asked to deliver the returns, and in the way we communicate with AROs throughout. For example, it is likely that we will achieve better communication through the regional office staff, who have good working relationships with AROs rather than through direct contact from PEF, the method used to date. Whilst electronic delivery remains the most effective way to receive the returns, we can also be more prescriptive about the format in which the returns should be sent.
	9. We do not consider that, at present, it is appropriate to consider underpinning the process through the performance standards framework. This would be a lengthy process, and these controls sit outside the framework of the existing standards. We recommend instead that in the first instance we engage with AROs on the issue and identify why compliance has fallen and how we can improve the process for delivering returns to us. We will then consider whether other action is required to ensure AROs take this duty, which is not onerous, seriously at a time when, we acknowledge, there are many other pressures on their resources.
	10. We remain at present of the view, expressed in our 2010 spending report, that, unless significant additional resourcing is in place, it would not be practical for the Commission to become the repository of returns. This would not, in practice, achieve anything in terms of our ability to regulate effectively that improved compliance by AROs would not achieve. It is possible however that we will revisit this issue should other changes in the regime occur.
	11. We therefore recommend option 1.

**Dealing with potential offences**

* 1. We have reviewed returns where candidates were within 95% of the spending limit in 2015, and have noted a number of issues (some of which were also noted in 2010) which could potentially indicate spending in excess of the limit:
	+ Apportionment of spending - spending between national and local campaigns; between neighbouring candidates in the same election; and between current and past (or future) elections
	+ Deductions from spending reported for unused material, or spending prior to the long campaign
	+ Invoices provided but not declared in return
	+ Reporting less than the amount on an included invoice, without explanation
	+ Basic arithmetical errors
	+ Inaccurate spending limit stated – in some cases with spending below that limit but above the correct limit
	1. We have identified a small number of returns where we will be making further inquiries. We may consider referrals to the police if we find evidence of an offence and it is in the public interest to do so. Any such cases will be brought before the Board for consideration.
	2. As the Board knows, allegations have been made in relation to candidate spending at the 2015 UKPGE, and about how parties and candidates attribute expenditure. There have been suggestions that spending that should have been properly attributed to candidates has been attributed to parties in order to enable spending in a constituency in excess of the candidate spending limit. There have also been issues raised in Northern Ireland as to incomplete returns delivered by some candidates, specifically in relation to the reporting of donations.
	3. There appears to be some understanding amongst voters, parties, and the media that the Commission does not have powers to investigate or sanction potential candidate offences. This is due not least to our clear statements on the matter. Nonetheless, there also appears to be concern about the situation, specifically in relation to the limited extent to which returns are checked; the lack of clear responsibility for chasing missing returns; and dealing with potential offences.
	4. We considered the following options:
	5. **We continue to deal with potential offences by working with the police and prosecutors, accepting the current position**
	6. **We accept the current position but take a more active role in identifying potential offences in relation to candidate spending whilst developing a closer working relationship with the police and prosecutors to pursue issues we consider warrant action**
	7. **We seek to persuade Parliament to implement our regulatory review recommendation that we should be given investigatory powers and civil sanctions for RPA offences and become the overall regulator of political finance by taking on responsibility for financial offences in RPA (through civil sanctions, and potentially through prosecutions)**
	8. We do not consider that the current position is tenable in the long term; particularly should the Law Commissions’ recommendations on modernisation of other aspects of the regime be adopted. It is right that the most serious offences should be subject to criminal prosecution, but it is important in that context that there is clarity as to who has primacy in deciding which cases those are. It is equally important that voters know the appropriate authority to approach where there are potential offences, and can have confidence that the authority will be able to deal with the matter.
	9. We agree with the Law Commissions that replacing criminal offences with a civil sanctions regime is not desirable, removing as it would some strong deterrents to non-compliance, particularly for successful candidates. The Law Commissions have not however opposed a dual system as currently exists for PPERA. With such a system we would continue to consider whether cases merited criminal prosecution, and members of the public could still bring matters to the attention of the police, but we would be able to deal with matters that did not merit that action, to ensure improvements in compliance. This would enable the Commission to have a full range of options available to it in order to deal with all types of non-compliance across both candidate and party regimes.
	10. Option 2 would involve developing a closer relationship with law enforcement agencies, and most likely the passing of cases from the Commission to those agencies. It would not however provide any assurance that those cases would reach the courts. Nor would it provide the clarity for the public of a single regulator for all political finance. Recent instances of spending allegedly being reported as national (and captured by the PPERA regime) which should have been reported as candidate (under the RPA regime) illustrate effectively the need for a single regulator.
	11. We therefore recommend option 3.
1. Wider implications
	1. All of our recommendations carry financial implications, principally in terms of additional staffing resource. Those implications are most significant in relation to any substantial increase in monitoring and checking of returns. Nonetheless, we do not consider those implications to be substantial in the context of the overall Commission budget, and would be relatively short term for the relevant period of each UKPGE or for other relevant elections.
	2. There are equality implications in the sense that both monitoring and potential action regarding offences would need to ensure that all candidates and agents were treated fairly.
2. Risk
	1. There are greater risks in the current position than arising from the recommendations. Without increasing our focus on candidates, our reputation as an effective regulator may be undermined.
	2. There are risks associated with the Commission voluntarily taking on a greater role in candidate regulation, principally in accepting responsibility for dealing with matters where our legal powers are limited, and in potentially creating a significant rise in workload. Both can be mitigated to a great extent by setting out clearly the extent to which we intend to regulate, and clear criteria as to where we will consider looking into a matter and taking action.
3. Key audiences/stakeholders, and their views
	1. The key audiences and stakeholders are candidates and their agents (including political parties), as well as voters. Our key message to all is that we consider compliance with the rules for candidates to be a priority, and we intend to assist candidates and agents to comply, but also to take a more robust approach where significant non-compliance occurs.
4. Attachments
	1. The following are attached as appendices:
5. Overview of the candidate regime
6. Previous action and comment by the Commission in relation to the regime

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Appendix 1 – overview of the candidate regime

**Monitoring of compliance by candidates and agents with the regime**

* 1. In Great Britain candidates must report expenditure to their local (Acting) Returning Officer (ARO) within 35 days of the result being declared. In Northern Ireland candidate returns are submitted to the Chief Electoral Officer. There are however no specific duties placed on ROs or the Commission in relation to chasing returns that are not delivered.
	2. The regime places responsibilities on both the candidate and their agent. There is a requirement to deliver a return of expenditure for the campaign. In 2007 we prescribed, under powers in RPA, a form for that return.
	3. Since 2009 the campaign has been divided into two parts: the ‘long’ campaign leading up to the dissolution of Parliament, and the ‘short’ campaign from dissolution to polling day. In 2009 we produced a new form which enables candidates and agents to report their expenditure separately for the long and the short campaign, in order to aid transparency. That form was not prescribed however, and there is no specific provision within the RPA requiring that the expenditure for long and short campaigns be reported separately.
	4. The return must include ‘a statement of all election expenses incurred by or on behalf of the candidate’ and ‘a statement of all payments made by the election agent together with all bills or receipts relating to the payments’.
	5. It must also include (this list is not exhaustive) a statement of donations made to the candidate or his election agent; and a statement of the amount, if any, of money provided by the candidate from his own resources for the purpose of meeting election expenses incurred by him or on his behalf.
	6. Both the candidate and agent must also provide separate signed declarations that the return is, to the best of their knowledge, complete and accurate.

**Delivery of candidate spending returns to the Commission by AROs**

* 1. The ARO (and the Chief Electoral Officer in Northern Ireland) must make the returns available for public inspection. In general, this involves the returns being available to view at the local authority premises.
	2. The ARO must also provide copies of the returns to the Commission as soon as reasonably practicable. The ARO is not however required to provide supporting documents such as invoices and receipts, and we do not obtain or publish these due to the considerable resources required. We collate and publish the returns in order to monitor compliance with the regime, and to provide a single accessible source of all candidate spending data for voters.
	3. The ARO is not under any duty by law to chase candidates and agents for missing returns, to examine or otherwise check the returns, or to take any action if a return is incomplete or appears inaccurate. The regime envisages that, once the returns are made public, any member of the public (including other candidates) can then pursue the matter if concerned about a return.

**Dealing with potential offences**

* 1. Under section 145 PPERA we have a duty to monitor compliance with the candidate spending controls, but no power either to determine whether the provision was breached or to impose a sanction. Nor are we able to require information from anyone other than the agent or candidate and could not use court orders to compel disclosure for RPA offences.
	2. There is no specific regulatory regime for candidate returns, with the only assurance of compliance being based on the returns being published, and anyone with an issue then being able to raise the matter with the police.
	3. Our general position to date has been that where issues are raised regarding candidate returns, we advise that this is a police matter. We do not invite complainants to bring these matters to us, with a view to our then passing them to the police.
	4. We are able to pass matters to the police where we identify significant non-compliance, and so is anyone else who believes an offence may have been committed. Before making a decision to pass a matter to the police we would need to satisfy ourselves of a potential offence and that it was in the public interest to do so.
	5. Given that both the Commission and the criminal authorities have statutory scope to investigate RPA candidate expenditure offences; this is an area that requires coordination with the relevant prosecutorial authorities. Responsibility for candidate returns regulation

Appendix 2 - Previous action and comment by the Commission in relation to the regime

* 1. In the wake of the 2010 UKPGE we held discussions with both the Crown Prosecution Service and the Procurator Fiscal in Scotland and the Board approved a framework by which we would decide whether we should bring specific cases to the attention of the police[[2]](#footnote-2).
	2. That approach was, broadly, that only evidence that a candidate had exceeded the spending limit would warrant police involvement, and decisions would be based on the extent to which that appeared to have occurred. No cases arose in Northern Ireland and we did not hold discussions with the Public Prosecution Service of Northern Ireland.
	3. Following the 2010 UKPGE, we conducted investigations into two successful candidates’ returns, and published our findings. We identified a number of ways in which spending had been calculated and reported that were not non-compliant, because the legislation was unclear or silent on those matters, but did suggest uncertainty as to whether all spending had been reported.
	4. Our [spending report for the 2010 UKPGE](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/109388/2010-UKPGE-Campaign-expenditure-report.pdf) (paragraphs 3.20 to 3.24) noted a number of problems with some returns, both in relation to the long regulated period and more generally.
	5. We suggested that these problems could be addressed for future UK general elections through a combination of administrative measures and changes to the rules.
	6. We considered what changes could or should be made to our guidance and template forms for candidates and agents but did not at that time identify any significant changes required. We also revised our guidance for administrators.
	7. Paragraph 3.25 of the spending report suggested that an alternative to the existing arrangements would be to centralise this function to a body such as the Electoral Commission, though it did not make a recommendation to this effect. The report noted that this would require considerable resources to review, redact and publish a significant volume of information.
	8. In our [Regulatory Review](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/157499/PEF-Regulatory-Review-2013.pdf) of June 2013, we said:

*We think that extending our investigative and sanctioning powers at major elections for offences relating to candidate spending and donations would help ensure compliance with the rules at national elections and strengthen voters’ trust in the regulatory system. However, we recognise that there would be an ongoing cost to setting up and maintaining the appropriate structures, including within the Commission, to make an enhanced regime work effectively.*

* 1. We recommended (recommendation 43):

*The Commission should be provided with investigative powers and sanctions for offences relating to candidate spending and donations at specified elections. Given the lead-in time that would be required to prepare for these changes, we recommend that changes should apply to the 2020 UK general election at the earliest.*

* 1. The Law Commission Review has stated that it civil sanctions should not replace possible criminal prosecution as the means by which RPA offences are dealt with, but has not opposed a dual system, as currently exists with PPERA:

*‘We consider that the primary legal deterrent should be through the criminal law. Where a failure to provide expenses returns, or a false statement on an expenses return, is attributable to a candidate, he or she will face the consequences of having committed an illegal practice, including losing his or her seat and being disqualified for a period of three years from holding public office. Civil sanctions do not provide this effect, and cannot replace corrupt and illegal practices.’*

1. This work will be owned by the Monitoring and Analysis team under the Head of Regulatory Compliance and Casework. [↑](#footnote-ref-1)
2. <http://ecsccmshpt/PEF%20Guidance%20and%20Policy/CAS-19708-B5K0V3-Public/EC%2077%2010%20UKPGE%20Candidate%20Campaign%20Expenditure%20Cases.doc> [↑](#footnote-ref-2)