



Government Response to Parliamentary Representations on the Draft Strategy and Policy Statement for the Electoral Commission

Presented to Parliament pursuant to section 4C(7) of the Political
Parties, Elections and Referendums Act 2000

December 2023



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Introduction

This document is laid before Parliament pursuant to section 4C(7) of the Political Parties, Elections and Referendums Act 2000 (“PPERA”) (as inserted by section 16 of the Elections Act 2022). It contains the final draft Electoral Commission Strategy and Policy Statement (“Statement”) and a report detailing the Government’s response to representations on the Statement made by Parliamentarians.

The Statement sets out the strategic and policy priorities of the UK Government in relation to electoral matters and the roles and responsibilities of the Electoral Commission in enabling the UK Government to meet those priorities. Subject to parliamentary approval, the Electoral Commission will be required to have regard to the Statement in the exercise of its functions.

Background

Pursuant to section 4C of PERA, the Government must satisfy a set of statutory procedural requirements before it may designate the Statement. Between 22 August 2022 and 20 December 2022, in accordance with section 4C(2) of PERA, the Government undertook a statutory consultation on a draft Statement with the Electoral Commission, the Speaker’s Committee on the Electoral Commission (“Speaker’s Committee”), and the Levelling Up, Housing and Communities Committee (“Levelling Up Committee”). The Secretary of State was then required to consider the responses, and, if he decided to proceed with designating a Statement, make any changes to the Statement deemed necessary as a result of the consultation alongside compiling a report responding to the consultees’ views.

On 8 June 2023, in accordance with section 4C(4) of PERA, the Government laid before Parliament a document containing an explanation of the Secretary of State’s proposals, a revised draft Statement, and a report detailing the Government’s response to the statutory consultation. This document was laid for a sixty-day period which ended on 14 September 2023 (“the sixty-day period”). During that time, Parliamentarians were able to make representations regarding the revised draft Statement.

In accordance with sections 4C(6) and 4C(7), the Secretary of State has considered the representations received, and is now laying a final draft Statement for Parliamentary approval alongside a report detailing the Government’s response to those representations.

Pursuant to section 4C(8) PERA, before the Secretary of State may designate the Statement, this document must be approved by a resolution of each House of Parliament within a forty-day period of being laid. The forty-day period excludes any period during which Parliament is dissolved or prorogued, or during which both Houses are not sitting for more than four days.

The Secretary of State's report responding to the representations on the revised draft Electoral Commission Strategy and Policy Statement of June 2023

In accordance with section 4C(6) of PPERA, the Secretary of State must consider any representations made during the sixty-day period. After laying the revised draft Statement on 8 June 2023, the Government received two representations from Parliamentarians: one from the Speaker's Committee and one from the Levelling Up Committee.

The Speaker's Committee made a representation via a [report](#) entitled "Response to the draft Strategy and Policy Statement for the Electoral Commission", which was published on 6 September 2023.

The Levelling Up Committee made a representation via a [letter](#) from the Chair of the Levelling Up Committee, Clive Betts MP, to the Speaker, in his capacity as Chair of the Speaker's Committee which was sent on 26 June 2023 and published on 28 June 2023.

The Government has considered both representations in conjunction with their respective responses to the consultation on the earlier August 2022 draft Statement and is grateful for their contributions. The representations reiterated principled objections to the Statement which had earlier been articulated during the statutory consultation, particularly around concerns that the Statement undermines the operational independence of the Electoral Commission.

After careful consideration, the Government has decided that the draft Statement of June 2023 should remain unamended (save for a few minor stylistic changes).¹ This is because the Government had already made substantive revisions to the Statement after the statutory consultation to provide clarifications and reassurances relating to the operational independence of the Electoral Commission.

In response to previous views expressed by the consultees, the revised draft had also already clarified that the Statement articulated the Government's priorities and not the Commission's, and that Commissioners and the Commission's executive leadership will remain responsible for determining the Commission's priorities and resource allocations. We had also clarified that the Statement articulated the Government's view of factors the Commission should have regard to, but that Commissioners and the Commission's executive leadership remain responsible for determining how the Commission exercises its functions.

Given that the representations reiterated views articulated during the statutory consultation, the Government is of the view that the remaining objections have either been addressed previously or cannot be satisfied by amending the Statement without compromising significantly its intended effect. The Statement is designed to enhance the parliamentary accountability of the Electoral Commission which will increase public confidence in its work. To ensure this, the Elections Act 2022 also provided for the expansion of the role of the Speaker's Committee with new powers to

¹ These changes include changing capital letters for lower case letters in bulleted lists, add the word 'the' before 'accessibility' in paragraph 6, replacing the word 'stamp out' for the word 'remove' in paragraph 7, correcting the reference to the Political Parties, Elections and Referendums Act 2000 in paragraph 7 from section 4B(3)(b) to section 4B(3), add the word 'the' before 'extension' in paragraph 8, remove the repetition of the word 'effective' in paragraph 12(a), change 'Information Commissioner' for 'Information Commissioner's Office' and change 'Public Prosecution Service NI' for 'Public Prosecution Service for Northern Ireland' in paragraph 19 and avoid repeating 'campaigners' twice in the first sentence of paragraph 22.

examine the Commission's performance of its duty to have regard to the Statement. This will allow that Committee to scrutinise what the Commission has done with regard to the Statement across a range of functions.

The Government is clear that the Statement must always be compatible with the foundational principle of respecting the Commission's operational independence. The Commission will only be required to have regard to the Statement in the exercise of its functions. This legal duty does not replace or undermine the Commission's other statutory duties or give the Government powers to direct the Commission's decision making. Therefore, the Government's view remains that the existing draft Statement will not undermine the Commission's operational independence.

Further, the Elections Act gave the Secretary of State broad powers to issue guidance on matters in respect of which the Commission has functions. The legislation also makes clear that the Secretary of State is prohibited from designating a Statement which contains provision relating to any specific enforcement or investigatory activity. In addition, the legislation places a duty on the Secretary of State, when preparing the Statement, to have regard to the Commission's duty to monitor and secure compliance with offences under PPERA. The Government is of the view that the draft Statement is already compliant with the provisions of the Act, as approved by Parliament.

Key Themes from Representations and Government Response

This section in the report outlines the key themes that were drawn from the representations and the Government's response to each of the individual points.

Distinction between Government priorities and Electoral Commission priorities

Representations

The representation from the Speaker's Committee welcomed the amendments included in the revised Statement of June 2023 which provided clarifications and reassurances that the Statement articulated the Government's priorities and not the Commission's.

The Levelling Up Committee also acknowledged that some clarity has been brought to the distinction between Government and Commission priorities.

Government Response

The Government proposes no further changes on this point.

Guidance on how the Commission exercises its functions

Representations

The Speaker's Committee welcomed a number of changes made to address criticisms regarding general guidance included in the Statement. The Speaker's Committee cites an example relating to Government guidance for the Commission to only sanction "deliberate" breaches of electoral law, which was replaced with a reference to the Commission's statutory Enforcement Policy.

Government Response

The Government notes the Speaker's Committee's view on these alterations and proposes no further changes on this point.

Operational independence

Representations

Despite substantive improvements, the Speaker's Committee and the Levelling Up Committee expressed views that the Statement remains incompatible with the fundamental principle of the Electoral Commission's operational independence.

The Speaker's Committee stated that the use of "should" statements in the draft Statement constituted operational interference in the Commission's priority-setting and resource allocation. The Speaker's Committee said that use of the word "should" suggested an obligation on the part of the Commission and served to elevate those Government priorities set out in the Statement above those determined independently by the Commission. The Speaker's Committee also stated that such guidance could create confusion and increase legal risks for the Commission which might be costly.

Further, the Speaker's Committee disagreed with the Government's characterisation of the Commission's "duty to have regard" to the Statement, contending that it does not simply mean that the Commission is only required to consider the Statement and weigh it up against other considerations. The Levelling Up Committee made similar points and argued that the Government appeared to assume that it can suggest what the Commission should prioritise.

Government Response

The provisions in the Act give the Secretary of State broad powers to set out the Government's strategic and policy priorities relating to elections and referendums (section 4A(2)(a) PPERA) and the role and responsibilities of the Commission in enabling the Government to meet those priorities (section 4A(2)(b) PPERA), as well as guidance relating to matters in respect of which the Commission has functions (section 4A(3)(a) PPERA).

The Government has been clear that the Statement must always be compatible with the foundational principle that the Commission remains operationally independent. Having previously made substantive revisions, the Government remains of the view that this Statement does not impinge on the Electoral Commission's operational independence.

The Government's view is that the use of the word "should" in relation to priorities and guidance does not impose or suggest an obligation on the part of the Commission. It does not indicate a mandatory obligation and does not amount to operational instruction, nor does it change the effect of the duty to have regard. The Commission is only required have regard to the Statement when carrying out its functions regardless of the use of the word 'should' or any alternative phrase.

As stated previously, the "duty to have regard" to the Statement does not replace or undermine the Commission's other statutory duties or give the Government powers to direct the Commission's

decision making. As stated clearly in the existing draft, the Statement does not place an obligation or a direction on the Commission for how to concentrate its resources, rather it places a duty for the Commission to consider the Statement and weigh it up against any other relevant considerations when discharging its functions.

With respect to guidance contained in the Statement, the Government maintains that it is vital that the Commission remain operationally independent, especially in its enforcement functions. This is why section 4A(4) of PPERA has placed a duty on the Secretary of State when preparing the Statement to have regard to the Commission's statutory duties to monitor and secure compliance with electoral law. Section 4A(5) also prohibits the Statement from containing provision relating to any specific enforcement or investigatory activity. The Statement does not contradict the Commission's "Enforcement Policy".

With regards to the risk of legal challenges, the Commission is, like any public body, already subject to the potential for legal challenges by way of judicial review in respect of its functions.

The Statement sets out Government priorities and guidance in relation to elections, the merits of which are for the Commission to determine independently. The Commission are accountable to Parliament through the Speaker's Committee in how they have regard to those priorities and what actions they take as a result. The Commission will remain operationally independent, with Electoral Commissioners and the Commission's executive leadership remaining responsible for determining the Commission's strategy, priorities and how the Commission should discharge its duties, including its day-to-day operations.

Rationale for the Statement

Representations

The representations argued that the Government has not articulated a clear and convincing rationale for designating the Statement, and that it is redundant. The Speaker's Committee stated that the Government's priorities outlined in the Statement reflected work that the Commission would be doing anyway. Both the Speaker's Committee and Levelling Up Committee also said that there was a lack of rigorous evidence in support of the need for a Statement.

Government Response

The Government's view is that it has set out a consistent and clear rationale for the Statement. The Statement sets out the Government's strategic and policy priorities and the roles and responsibilities of the Commission in enabling the Government to meet those priorities, such as the Government's determination to tackle issues such as voter fraud, to improve the accessibility of elections and to improve participation.

The fact that these may already be priorities for the Commission does not mean that the Government cannot use the Statement to state the view that the Commission should continue to have regard to how it can support the Government in meeting those priorities for the foreseeable future. It also means that the Statement will enable Parliament (via the Speaker's Committee) to hold the Commission to account for how the regulator has regard to these priorities which improves the parliamentary accountability of the Commission.

The Government is confident in the evidence base underpinning the rationale for the Statement. Lord Pickles' report 'Securing the Ballot: Review into Electoral Fraud' was clear that the existing system of oversight by the Speaker's Committee did not provide an effective third-party check on the Commission's performance. While some may already have a high level of confidence in how the Commission already exercises some of its functions, others may disagree. For example, the [PACAC Report](#) into "The Work of the Electoral Commission" in 2022 identified several areas for improvement, including the support the Commission provides to parties and campaigners and the way the Commission secures compliance with and enforces political finance laws.²

Effective parliamentary scrutiny and accountability

Representations

The representations stated that the Statement does not facilitate more effective parliamentary scrutiny of the Electoral Commission's performance, nor strengthen the accountability of the Commission. The Speaker's Committee expressed the view that the Government's priorities outlined in the Statement conflict with those established in the Commission's Five Year corporate plan which has already been approved by the Committee. They said that it was not clear how the Commission should reconcile the Statement's priorities with those already approved by the Committee. They argued that the Committee would be placed in a position where it would be required to arbitrate as to whether the Commission has struck the right balance between pursuing the Government's priorities and those already approved in its corporate plan, which – in the Committee's view - there is no objective way of assessing.

The Speaker's Committee stated that it is not for the Government to set performance benchmarks for the Commission. They also contended that the Statement only allows the Committee to examine the performance of the Commission in relation to Government priorities, but that this has very little bearing on an assessment of the Commission's wider performance relating to its existing statutory duties.

The Speaker's Committee also once more noted that their new power to examine the performance of the Commission in relation to its duty to have regard to the Statement is optional, and one they would have to carefully consider whether to exercise if they considered that the Statement designated was not fit for purpose.

Government Response

In order to provide for a more effective third-party check on the performance of the Electoral Commission, section 17 of the Elections Act 2022 gave the Speaker's Committee an expanded role to examine the performance of the Electoral Commission in relation to their duty to have regard to the Statement.

The Speaker's Committee acknowledged in their representation that the Statement does not seek to set out Electoral Commission priorities. It is for the Commission to decide independently how it reconciles recommendations stemming from Government priorities with those outlined in its Corporate Plan as part of its duty to have regard to the Statement.

² Public Administration and Constitutional Affairs Committee, 'The Work of the Electoral Commission', published on 20 Oct 2022, available at: <https://committees.parliament.uk/publications/30380/documents/175485/default/> (accessed on 4 December 2023).

Similarly, it is for the Speaker's Committee to decide how to hold the Commission to account on its performance of its duty to have regard to the Statement. The Statement does not set performance benchmarks, and nor does the legislation ask the Speaker's Committee to adjudicate objectively as to whether the Commission has struck the right balance between Government and Commission priorities. The Government has also been clear that the Statement does not override the Commission's other statutory duties (and this is already stated clearly in the draft Statement). The Elections Act rather provides the Committee with a power, if it wishes to exercise it, to consider the Commission's actions in relation to the Statement.

The Government acknowledges that the Speaker's Committee has a power, not a duty, to hold the Commission accountable for its duty to have regard to the Statement. Were the Speaker's Committee minded not to exercise this power, the Commission would still be required to have regard to the Statement.

Confidence in the impartiality of the Commission

Representations

The Levelling Up Committee argued that the Statement would undermine confidence in the impartiality of the Commission. The Committee said that the Statement reads as if the Commission is part of Government, which could have implications for perceptions of the Commission's political impartiality. The Speaker's Committee expressed similar views.

Government Response

The Electoral Commission has an important role to play in maintaining the integrity of elections and public confidence in that integrity.

The Government does not agree with the view that the Statement risks undermining confidence in the impartiality of the Commission. The Statement sets out Government policy and strategic priorities on electoral matters. It is not uncommon for governments of the day to set broad policy frameworks, as approved by the UK Parliament, which independent regulators should consider. The powers to designate the Statement were borne out of primary legislation that was passed by Parliament and the Statement will require parliamentary approval in order to be designated by the Secretary of State.

Furthermore, the Government's view is that the Statement does not seek to interfere with the governance of the Commission and the Commission remains operationally independent. Section 4B(2) of PPERA states that the Commission is required to have regard to the Statement. This legal duty does not replace or undermine the Commission's other statutory duties or give the Government powers to direct the Commission's decision making.

By improving the accountability of the Commission to the UK Parliament, it is the Government's view that the Statement will increase public confidence in its work.

The Government's remit to provide guidance to the Electoral Commission

Representations

The Speaker's Committee and Levelling Up Committee questioned whether it was appropriate for the Government to use the Statement to provide guidance to the Electoral Commission. In particular, the Levelling Up Committee argued that the Government should not provide guidance on factors the Commission should consider when carrying out its enforcement functions, as this constituted government interference in matters which are for the Commission to determine independently.

The Speaker's Committee contended that the Government should not provide instructions under the guise of guidance. It also stated that Government guidance should be limited to matters on which the Government has knowledge and expertise but the Commission may be lacking. The Speaker's Committee further argued that it is not appropriate for the Government to give guidance via the Statement in areas where primary legislation is not explicit and the Commission is exercising discretion.

Government Response

Section 4A(3)(a) of PPERA gives the Secretary of State broad powers to use the Statement to set out guidance relating to particular matters in respect of which the Commission has functions. The only restrictions on this are stipulations that the Secretary of State must have regard to the statutory duties of the Commission to monitor and secure compliance with electoral law (section 4A(4)) and that the Statement must not contain provision regarding the Commission's enforcement functions in relation to a particular person (section 4A(5)). It does not specify any restrictions relating to knowledge and expertise. Guidance relating to enforcement in the Statement does not contradict the Commission's current enforcement policy and satisfies both stipulations set out in legislation.

The Government's view is that the Statement does not provide operational instruction to the Commission. The Government is also of the opinion that it is appropriate and useful to give guidance via the Statement for the Commission to consider, particularly in areas where primary legislation is not explicit and the Commission is exercising a significant amount of discretion.