

# CONSTITUTIONAL LAW

## The Elections Bill: the arrival of voter ID (and a whole lot more)

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### Introduction

At the end of 2017 I began to research and write extensively on the Conservative Party proposals to introduce compulsory voter ID laws for several types of elections in the United Kingdom, including General Elections.<sup>1</sup> At the time of writing then, and still today, voters in Great Britain do *not* need to produce any formal identification when visiting a polling station to cast their vote in *any* type of election.<sup>2</sup> A series of pilot schemes in England were held in 2018,<sup>3</sup> and again in 2019, to test the water for this fundamental reform. The authorisation of one such pilot scheme in the 2019 local elections was subject to judicial review, with both the High Court and Court of Appeal considering the issue,<sup>4</sup> albeit with a narrow focus on the legality of the schemes rather than any consideration of the merits of voter ID. This prompted my most recent piece on the issue in the *Coventry Law Journal*.<sup>5</sup>

Since then momentum has gathered pace considerably with the formal introduction of the Elections Bill in July 2021 which is, at the time of writing, at the House of Commons Report stage.<sup>6</sup> Whilst the inclusion of voter ID in the Bill has received the most attention so far,<sup>7</sup> the Bill also includes several other significant proposals which will impact the conduct of elections, the rights of candidates, voters and campaigners, as well as matters of transparency, scrutiny and accountability. These include reforms to the functions of the Electoral Commission, the introduction of “votes for life” for UK nationals residing overseas, arrangements for making reciprocal agreements with European states for EU citizens’ voting rights, tagging of electronic campaigning material, changes to the voting system for some elections, conditions of so-called “third party” campaigning, as well as several other issues affecting candidate eligibility, political party registration and expenditure.

This article will focus in particular on arguably the two most significant reforms in the Bill, namely, the introduction of voter ID and reforms to the functions of the Electoral Commission. These two issues have undoubtedly attracted the most public attention and commentary thus far. Whilst they concern very different issues, they both strike at the heart of democracy and matters of accountability in the

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<sup>1</sup> Ben Stanford, ‘Compulsory voter identification, disenfranchisement and human rights: electoral reform in Great Britain’ (2018) 23(1) EHRLR 57-66; Ben Stanford, ‘Voter ID plans could disenfranchise millions’ *The Conversation* (18 Dec 2017) at <https://theconversation.com/voter-id-plans-could-disenfranchise-millions-89096>.

<sup>2</sup> Voters in Northern Ireland, however, have had to produce some form of ID since 1985 and photo identification since 2003.

<sup>3</sup> Ben Stanford, ‘The 2018 English local elections ID pilots and the right to vote: a vote of (no) confidence?’ (2018) 23(6) EHRLR 600-613; Ben Stanford, ‘The results of the 2018 voter ID pilots and why this is not the time for a national roll-out’ *LSE Politics and Policy Blog* (31 July 2018) at <https://blogs.lse.ac.uk/politicsandpolicy/the-results-of-the-2018-voter-id-pilots/>.

<sup>4</sup> *R (Coughlan) v Minister for the Cabinet Office* [2020] EWCA Civ 723; [2019] EWHC 641 (Admin).

<sup>5</sup> Ben Stanford, ‘Electoral reform and the authorisation of voter ID pilot schemes’ (Case Comment) (2019) 24(2) *Coventry Law Journal* 77-83.

<sup>6</sup> UK Parliament, Parliamentary Bills: Elections Bill (Session 2021-22) at <https://bills.parliament.uk/bills/3020#timeline>.

<sup>7</sup> See for example Elise Uberoi and Neil Johnston, ‘Voter ID’ *House of Commons Library Research Briefing* (3 September 2021); Aubrey Allegretti, ‘Millions in UK face disenfranchisement under voter ID laws’ *The Guardian*, 4 July 2021; Richard Wheeler, ‘MPs support voter ID plans despite claims they amount to “far right” tactics’ *Evening Standard*, 7 September 2021.

United Kingdom. Ultimately this article argues that these reforms follow an increasingly noticeable and troubling pattern of democratic backsliding in the UK.

## Why it matters

The introduction of voter ID and reforms to the functions of the Electoral Commission, as well as the other reforms contained in the Elections Bill, raise a number of fundamental issues which necessitate close scrutiny. First and most importantly, the proposals strike at the very heart of British democracy insofar as they concern the ability of the electorate and other interested parties to directly participate in the electoral process and have a stake in parliamentary democracy. Some of the measures also engage the rule of law given that they concern the power of the executive and matters of scrutiny and accountability.

An important preliminary observation concerns the context in which these reforms are being proposed. Much of the electoral law system that currently underpins elections in the United Kingdom is outdated and complex. In recent years a variety of stakeholders have expressed concern at the state of the UK's electoral framework. The Electoral Commission has said that there is an "urgent need for simplified and modernised electoral law" which is "increasingly complex and outdated".<sup>8</sup> Going further, the Commission stated that this presents "risks for voters, candidates and campaigners, electoral administrators, regulators and governments".<sup>9</sup> On this point critics often point to the sheer volume of legislation governing elections in the UK. Writing in 2016, the Electoral Commission noted 17 pieces of primary legislation and 27 pieces of secondary legislation governing UK elections.<sup>10</sup> However, if we also factor in other sources of lesser importance or significance, this framework can stretch to more than 50 Acts of Parliament and 220 pieces of other legislation.<sup>11</sup> Moreover, the last consolidation of electoral law occurred in 1983 with the Representation of the People Act,<sup>12</sup> and some aspects of modern electoral law such as the need for a secret ballot can actually be traced back to the Ballot Act 1872.

Emerging technological and digital challenges have also prompted much criticism of the current framework's relevance and suitability for the 21<sup>st</sup> century. In 2019 the House of Commons Digital, Culture, Media and Sport Committee described the current electoral legal framework as "not fit for purpose" in relation to advertising and political campaigning due to digitalisation and changing techniques.<sup>13</sup> Shortly after, the Electoral Reform Society went further and described the overall framework of UK electoral law as unfit for purpose, suggesting that "elements of our electoral law date back to Victorian times, with legislation failing to keep up with societal and cultural changes, and developments in digital technology".<sup>14</sup>

There is, therefore, a wholly legitimate need to update and modernise the UK's electoral legal framework. This was, to some extent, apparently recognised by the Government when the Bill was introduced. At the second reading in the House of Commons, the Minister for the Constitution, Chloe

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<sup>8</sup> Electoral Commission, 'Reforming electoral law' (October 2021) at <https://www.electoralcommission.org.uk/sites/default/files/2021-10/Reforming-electoral-law-PACAC-booklet.pdf> p. 2.

<sup>9</sup> *Ibid.*

<sup>10</sup> Law Commission, Scottish Law Commission and the Northern Ireland Law Commission, 'Electoral law: a joint interim report' (4 February 2016) p. 5.

<sup>11</sup> Michela Palese, 'We've told Parliament the case for updating our campaign rules – now it's time to act' *Electoral Reform Society* (28 June 2019) at <https://www.electoral-reform.org.uk/weve-told-parliament-the-case-for-updating-our-campaign-rules-now-its-time-to-act/>.

<sup>12</sup> *Ibid.*

<sup>13</sup> House of Commons Digital, Culture, Media and Sport Committee, 'Disinformation and "fake news": final report' (HC 1791, 2017-19) para. 211.

<sup>14</sup> Palese, n. 11.

Smith, claimed that the Bill would have the “overall effect of keeping our elections safe, modern, transparent, fair and inclusive”.<sup>15</sup>

The significant reforms envisaged in the Elections Bills should, however, be viewed in a wider context given the recent and sustained pressure on accountability and scrutiny mechanisms in the UK. We need only consider a few examples of recent and ongoing legislative reforms and reviews to see how the scope for challenging the actions and decisions of the state are arguably diminishing. Some have gone so far to label this sliding trend of unaccountability as a “disease within Government”.<sup>16</sup> For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 has imposed a statutory presumption against the prosecution of soldiers for alleged offences committed in the course of duty which occurred more than five years prior,<sup>17</sup> as well as additional hurdles and time limits for bringing a criminal or civil case.<sup>18</sup> On a similar note, the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 allows for a “Criminal Conduct Authorisation”,<sup>19</sup> essentially authorising conduct which would amount to a crime and thus guaranteeing immunity for undercover agents who break the law in the conduct of their role. Most recently, it has been claimed that the UK’s Border Force could be given legal immunity from prosecution for harm or death caused to migrants whilst conducting so-called “pushbacks” in the English Channel.<sup>20</sup>

Looking to the future, Part 2 of the Police, Crime, Sentencing and Courts Bill, currently at the House of Lords Report stage,<sup>21</sup> will allow the police to impose significant restrictions upon static protests, for example with start and finish times as well as maximum noise limits. The Judicial Review and Courts Bill, currently at the House of Commons Report stage,<sup>22</sup> will reform quashing orders to allow public authorities an opportunity to address an issue before further court intervention i.e. a suspended quashing order, and the Bill will also eliminate the possibility of subjecting Upper Tribunal refusals to allow an appeal from the First Tier in certain cases (known as *Cart* judicial reviews) to judicial review by the High Court. Lastly, the Independent Review of the Human Rights Act is soon expected to report its findings and recommendations, amidst concerns from Government that the UK courts are deferring too much to the European Court of Human Rights when applying certain provisions of the Human Rights Act 1998.<sup>23</sup> These reforms should also be viewed in the context of the appointment of the new Justice Secretary, Dominic Raab, who has previously voiced criticism of the Act as well as economic and social rights.<sup>24</sup>

Whilst each of these matters address a particular and specific issue, the mechanisms being subject to review and reform are all essential as they contribute to the safeguarding of democracy. Most

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<sup>15</sup> HC Deb vol 700 col 208 (7 September 2021) per Chloe Smith.

<sup>16</sup> Ronan Cormacain, ‘Unaccountability – the disease within government’ *UK Constitutional Law Association* (17 May 2021) at <https://ukconstitutionallaw.org/2021/05/17/ronan-cormacain-unaccountability-the-disease-within-government/>.

<sup>17</sup> Overseas Operations (Service Personnel and Veterans) Act 2021 s.2. This presumption does not, however, apply to genocide, crimes against humanity, and war crimes (Schedule 1 to the Act).

<sup>18</sup> *Ibid*, Parts 1 and 2.

<sup>19</sup> Covert Human Intelligence Sources (Criminal Conduct) Act 2021 s.1. The conduct must be necessary for the purposes of either national security, preventing or detecting crime or preventing disorder, or for the economic well-being of the UK, and it should be considered whether the objective could be reasonably achieved by other lawful conduct.

<sup>20</sup> Rajeev Syal, ‘UK Border Force could be given immunity over refugee deaths’ *The Guardian* (13 October 2021).

<sup>21</sup> UK Parliament, Parliamentary Bills: Police, Crime, Sentencing and Courts Bill (Sessions 2019-21; 2021-22) <https://bills.parliament.uk/bills/2839#timeline>.

<sup>22</sup> UK Parliament, Parliamentary Bills: Judicial Review and Courts Bill (Session 2021-22) <https://bills.parliament.uk/bills/3035>.

<sup>23</sup> Ministry of Justice, Independent Human Rights Act Review (last updated 31 August 2021) at <https://www.gov.uk/guidance/independent-human-rights-act-review>.

<sup>24</sup> Rajeev Syal and Haroon Siddique, ‘Labour fears Dominic Raab will target rights act in new justice post’ *The Guardian*, 16 September 2021.

importantly they all engage the rule of law – a fundamental constitutional principle of even greater importance in the absence of a codified constitution – in the sense that they all in some way help to ensure transparency, accountable government and some means of scrutiny.

Returning to the Elections Bill and the introduction of voter ID, this reform arguably engages the greatest power that individuals have over government, namely, the power to remove officials from office in parliamentary and local elections. At the same time, the functional independence of the Electoral Commission is under threat, bringing into question whether it will be able to provide genuine and effective oversight of elections in future.

## **The Elections Bill**

Before the voter ID pilots were held in 2018 and 2019, the first indication of the proposal to introduce compulsory voter identification laws for elections came in 2017 in the build up to the June 2017 General Election. The Conservative Party Manifesto for that election pledged to “legislate to ensure that a form of identification must be presented before voting”.<sup>25</sup> As discussed earlier, a series of pilot schemes were then held in the May 2018 and May 2019 local elections with mixed results and receiving much critique in the aftermath. These pilot schemes are authorised by section 10 of the Representation of the People Act 2000. In essence, s.10(2)(a) permits voter ID pilots that allow modifications to electoral rules in respect of “when, where and how voting at the elections is to take place”. The legal challenge to the Cabinet Office’s authorisation of a pilot scheme in 2019, pursuant to this provision, was rejected.<sup>26</sup>

Then, shortly prior to the December 2019 General Election, the Queen’s Speech in October pledged to address “Electoral Integrity” with the purported objectives to “tackle electoral fraud and protect our democracy, whether people are casting their votes at the polling station or elsewhere” and to “make it easier for disabled voters to vote at polling stations”.<sup>27</sup> The proposals could loosely be grouped into three categories: first on voting methods such as the introduction of voter ID as well as reforms to postal and proxy voting; second on providing greater assistance for blind and other disabled voters; and lastly a series of responses to emerging challenges such as online campaign material.

Little progress was made with the proposals until the Queen’s Speech in 2021 where a specific “Electoral Integrity Bill” was outlined with the purpose “to tackle electoral fraud, prevent foreign interference and to make it easier for British expats to participate in elections”.<sup>28</sup> Finally, the Bill was renamed simply to the “Elections Bill” and given its first reading in the House of Commons on 5 July 2021.

The Bill in its current form has seven Parts which address the following issues: the integrity of the electoral process including the introduction of voter ID, reforms to postal and proxy voting, and several other issues concerning the administration and conduct of elections (Part 1); the registration process and voting rights for British electors overseas, as well as voting and candidacy eligibility of EU citizens post-Brexit (Part 2); the issuing of strategic direction for the Electoral Commission as well as removing its power to initiate prosecutions for breaches of electoral law (Part 3); political finance and expenditure in elections with a particular focus on third-party spending and campaigning (Part 4); disqualification rules if a person is convicted of an intimidatory criminal offence towards a candidate, campaigner or

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<sup>25</sup> Conservative Party Manifesto 2017, ‘Forward together: our plan for a stronger Britain and a prosperous future’ p. 43.

<sup>26</sup> n 4 above.

<sup>27</sup> The Queen’s Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Monday 14 October 2019 (14 October 2019) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/839370/Queen\\_s\\_Speech\\_Lobby\\_Pack\\_2019\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839370/Queen_s_Speech_Lobby_Pack_2019_.pdf).

<sup>28</sup> The Queen’s Speech 2021 (11 May 2021) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/986770/Queen\\_s\\_Speech\\_2021\\_-\\_Background\\_Briefing\\_Notes..pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986770/Queen_s_Speech_2021_-_Background_Briefing_Notes..pdf).

office-holder (Part 5); imprints for digital campaigning material (Part 6); and lastly other miscellaneous and general provisions (Part 7).<sup>29</sup> The Bill is further supplemented by 11 Schedules of considerable length and complexity to implement these changes.

Whilst all of these proposals will have a significant impact upon electoral law in the UK to some extent, some raise particular concerns about the future conduct of elections, rights of voters and campaigners, as well as matters of transparency, scrutiny and accountability. Such is the potential impact of these reforms, David Howarth, a former Electoral Commissioner, has warned that the “bill will benefit the Conservative Party at the expense of British democracy”.<sup>30</sup> Attention will now turn to two particular reforms which have attracted the most interest so far.

### *Voter ID*

With the exception of Northern Ireland, voters in the rest of the UK have historically been able to cast votes in person in polling stations simply by confirming their name and address. Section 1 of the Elections Bill proposes to introduce the requirement for voters to produce identification at polling stations, which will apply to UK General Elections as well as Local Elections in England, and Police and Crime Commissioner Elections in both England and Wales. Schedule 1 to the Bill sets out the technicalities of the reforms in considerable detail, reflecting the complexity of the UK’s electoral framework alluded to earlier.

The potential and likely issues to arise with the introduction of voter ID laws in Great Britain have been commented on extensively elsewhere and so will not be repeated in detail here.<sup>31</sup> In essence, the Government’s rationale for the introduction of compulsory voter identification has been questioned given the minimal evidence that impersonation takes place at polling stations. Moreover, concerns have been raised about the possible negative impact on voter turnout and the risk of disenfranchisement, in particular, the disproportionate impact that voter ID requirements may have on ethnic minorities, the elderly, the young, women and the poorest in society who are statistically less likely to possess acceptable forms of photographic identification. Some political stakeholders have gone so far as to call the proposals a form of voter suppression similar to the phenomenon in the United States of America.<sup>32</sup>

These proposals directly impact the ability of members of the electorate to exercise the right to vote to determine the elected representatives and law-makers of the United Kingdom. In that respect, the right to vote in national elections is guaranteed by Article 3 of the First Protocol to the European Convention on Human Rights (ECHR).<sup>33</sup> Whilst some conditions upon this right can of course be applied, such as age, nationality or residence requirements, any conditions must not curtail the right in question in a way that impairs its very essence and effectiveness, and such conditions must be proportionate and pursue a legitimate aim.<sup>34</sup>

In light of these concerns, the Elections Bill is already encountering difficulties in Scotland and Wales where, pursuant to the Sewel Convention, legislative consent is required when a UK Parliamentary Bill contains provisions which will impact devolved matters or the legislative or governmental powers of

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<sup>29</sup> See the Explanatory Notes to the Elections Bill at <https://publications.parliament.uk/pa/bills/cbill/58-02/0138/en/210138en.pdf>.

<sup>30</sup> David Howarth, ‘Government’s poisonous Elections bill is designed to cement Tory rule’ *OpenDemocracy* (6 September 2021) at <https://www.opendemocracy.net/en/opendemocracyuk/governments-poisonous-elections-bill-is-designed-to-cement-tory-rule/>.

<sup>31</sup> See above notes 1, 3 and 5 and Heather Green, ‘The voter ID pilots: an unlawful electoral experiment’ (2019) *Public Law* 242-250.

<sup>32</sup> Aubrey Allegretti, ‘Millions in UK face disenfranchisement under voter ID plans’ *The Guardian*, 4 July 2021.

<sup>33</sup> Article 3 of the First Protocol to the ECHR states: ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’.

<sup>34</sup> *Mathieu-Mohin v Belgium* (1988) 10 E.H.R.R. 1 at [52]; *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos v Greece* (2013) 56 E.H.R.R. 9 at [64].

the nations. In quick succession, the governments of both nations refused to give consent to Westminster, exposing what might already be considered a tense relationship between the governments of the nations of the the UK and the British Government. Consent was refused first by the Welsh Government on 9 September 2021,<sup>35</sup> followed by the Scottish Government on 21 September 2021.<sup>36</sup> This is significant given the infrequency of refusals for legislative consent in Scotland, Wales and Northern Ireland, with the Institute for Government suggesting that, since 1999, “out of more than 350 legislative consent motions, on just 13 occasions has consent been denied, in part or in full”.<sup>37</sup>

To alleviate some of the initial concerns about the proposals, the Bill will allow a wide range of acceptable forms of identification and the creation of a free electoral identity document, similar to that already offered in Northern Ireland, but many questions remain about the necessity, contents and consequences of the reforms. First, the need for this significant reform remains unconvincing given the clear infrequency of allegations and prosecutions of voter fraud by means of impersonation.<sup>38</sup> Second, it has been estimated that the reform could cost up to £180 million over the next 10 years,<sup>39</sup> or up to £20 million per General Election,<sup>40</sup> which at a time of economic stagnation and recovery following the COVID-19 pandemic is not to be ignored. Third, the range of acceptable identification outlined in Schedule 1 of the Bill has also drawn criticism due to the exclusion of student identification and concessionary travel cards, whilst certain forms of concessionary travel passes for people over the age of 60 will be permitted.<sup>41</sup> These issues have not helped to allay the most fundamental concern that the reforms will effectively disenfranchise large portions of the electorate to the advantage of the Conservative Party.

### *The Electoral Commission*

The Electoral Commission was established by the Political Parties, Elections and Referendums Act 2000 following a recommendation from the Committee on Standards in Public Life and several other non-governmental bodies.<sup>42</sup> The functions of the Commission are extensive and include reporting on the conduct of elections, regulating political finance and the registration of political parties in the UK. With the exception of four Commissioners who are nominated by the largest political parties, eligibility requirements for the appointment of the majority of Commissioners are designed to ensure that the Commission remains impartial.<sup>43</sup> According to its website, the Electoral Commission is an independent body which works “to promote public confidence in the democratic process and ensure its integrity”.<sup>44</sup> Thus, its independence from Government and role in safeguarding British democracy is immediately apparent. Part 3 of the Elections Bill, however, proposes three major reforms that will undoubtedly reduce the independence of the Electoral Commission.

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<sup>35</sup> Legislative consent memorandum: Elections Bill at <https://senedd.wales/media/se2pxiww/lcm-ld14517-e.pdf>.

<sup>36</sup> Legislative consent memorandum: Elections Bill at <https://www.parliament.scot/-/media/files/legislation/bills/lcms/elections-bill/splcms068.pdf>.

<sup>37</sup> Akash Paun, Jess Sargeant and Elspeth Nicholson, “Sewel Convention” *Institute for Government* (8 December 2020) at <https://www.instituteforgovernment.org.uk/explainers/sewel-convention>.

<sup>38</sup> Michela Palese and Chris Terry, ‘A sledgehammer to crack a nut: the 2018 voter ID trials’ *Electoral Reform Society* (September 2018).

<sup>39</sup> Cabinet Office, Elections Bill Impact Assessment (1 July 2021) at <https://publications.parliament.uk/pa/bills/cbill/58-02/0138/2021-05-07ImpactAssessmentREV.pdf> para. 62.

<sup>40</sup> Electoral Reform Society, ‘Voter ID: an expensive distraction’ at <https://www.electoral-reform.org.uk/campaigns/upgrading-our-democracy/voter-id/>.

<sup>41</sup> Fair Vote, Analysis: July 5<sup>th</sup> Elections Bill (6 July 2021) at <https://fairvote.uk/analysis-july-5th-elections-bill/>.

<sup>42</sup> Committee on Standards in Public Life, ‘The funding of political parties in the United Kingdom (Fifth Report, Cm 4057-I, 1998).

<sup>43</sup> Political Parties, Elections and Referendums Act 2000, Part 1.

<sup>44</sup> Electoral Commission, ‘Who we are’ at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/who-we-are>.

First, the Bill proposes to introduce a “Strategy and Policy Statement” which will be drafted by a Secretary of State and subject to the approval of Parliament and the Speaker’s Committee. This Statement will determine the “strategic and policy priorities” of the Government relating to elections and, crucially, the “role and responsibilities” of the Commission in enabling the Government to meet these priorities. The Statement may also set out guidance relating to particular matters. Moreover, the Bill will impose an obligation upon the Commission to have regard to this statement when carrying out its duties. Second, the Bill will allow the Speaker’s Committee – a House of Commons committee chaired by the Speaker – to “examine the performance” of the Commission with respect to its fulfilment of the proposed Strategy and Policy Statement. The Speaker’s Committee is a statutory body, established by the Political Parties, Elections and Referendums Act 2000, which currently has nine members. Whilst the political composition of the Committee has historically been balanced,<sup>45</sup> five out of nine members of the present Committee are Conservative Party MPs, thus giving a clear controlling stake to the party of Government.<sup>46</sup> Third, the Bill will strip the Electoral Commission of its powers to initiate criminal proceedings in England and Wales, leaving the Crown Prosecution Service alone with the task. This comes in the wake of several high-profile examples where the Commission has investigated the Prime Minister, Boris Johnson, for the refurbishment of his private flat at 11 Downing Street, as well as the imposition of fines against the “Vote Leave” organisation for breaking spending limits during the EU Referendum campaign.<sup>47</sup>

Given the significant impact of the proposals in the Bill to its operational independence, the Electoral Commission has unsurprisingly commented publicly. On the first issue – the Strategy and Policy Statement – the Commission has stated:

Within the context of this measure, and the statements which result from it under the current and future governments, it is important that we can continue to work independently and deliver all the duties we have been given. There should be no actual or perceived involvement from government in our operational functions or decision-making. Our independence must be clear for people to see, as this underpins fairness and trust in the electoral system.<sup>48</sup>

On the second issue – the removal of the Commissions’ powers of prosecution – the Commission responded:

Effective enforcement when the rules are broken gives voters confidence in the electoral system. The UK Government does not consider this to be an area of work we should undertake. In the public interest, in order to fill any regulatory gap, the Police and Crown Prosecution Service will need to work with us to take forward appropriate prosecutions. This means prosecuting the full range of offences, from the lower order criminal offences often brought to light through our investigatory work, right through to the more significant offences. We would welcome the government making it clear in the passage of the Bill that this will be the case. Voters have the right to expect that any political party or campaigner which deliberately or recklessly breaks electoral law will face prosecution.<sup>49</sup>

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<sup>45</sup> Alan Renwick and Charlotte Kincaid, ‘Why we need an independent Electoral Commission’ *The Constitution Unit* (7 October 2020) at <https://constitution-unit.com/2020/10/07/why-we-need-an-independent-electoral-commission/>.

<sup>46</sup> See UK Parliament, Speaker’s Committee on the Electoral Commission at <https://committees.parliament.uk/committee/144/speakers-committee-on-the-electoral-commission/>.

<sup>47</sup> Rob Merrick, ‘Electoral Commission to be stripped of power to prosecute after probe into Boris Johnson’s flat makeover’ *The Independent*, 18 June 2021.

<sup>48</sup> Electoral Commission, A strategy and policy statement for the Electoral Commission (5 July 2021) at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/a-strategy-and-policy-statement-electoral-commission>.

<sup>49</sup> Electoral Commission, The Electoral Commission’s ability to bring prosecutions (5 July 2021) at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/electoral-commissions-ability-bring-prosecutions>.

Thus, whilst the Electoral Commission has not expressly criticised the proposals, it has voiced clear concerns about the impact of the reforms to its operational independence and how maintaining this is essential for public trust in the electoral process.

Other bodies have similarly stressed the importance of *independent* election monitoring bodies and the need for them to be protected from Government control or pressure. For example, the influential Committee on Standards in Public Life in its recent report on regulating election finance has expressed similar sentiments, noting their belief in “the value of an independent regulator, insulated from political pressures and at arm’s length from the government”.<sup>50</sup> Beyond the UK’s particular framework, the Office of the United Nations High Commissioner for Human Rights has expressed similar views, stressing the importance of “independent electoral management bodies and procedures to deal with electoral disputes”,<sup>51</sup> and the need for “an impartial and independent election management body exempt from provisions leading to discriminatory treatment, political bias or government pressure”.<sup>52</sup>

Given recent revelations about conflicts of interest in politics, this move to subject the Electoral Commission to greater Government oversight and control should be firmly resisted. Any political interference with the functions and activities of the Electoral Commission would clearly risk undermining its independence and purpose, and thus risk undermining the integrity of UK elections and democracy more generally.

## **Conclusions – Democratic backsliding**

Whilst the inclusion of the long-anticipated voter ID proposals in the Elections Bill has attracted most commentary, it is clear that other provisions in the Bill equally warrant closer scrutiny and careful deliberation. The proposed reforms concern very different issues but are united by the fact that they all strike at the heart of democracy and engage issues of scrutiny and accountability. Changing the process of voting in polling stations in such a significant way engages arguably the most fundamental principle of democracy of all, namely, the ability of the electorate to determine the legislature. At the same time, reducing the independence of the UK’s election watchdog risks making the oversight of elections subject to political manipulation and pressure. Moreover, when considering other recent and ongoing reforms, a clear and troubling pattern of democratic backsliding and undermining of accountability mechanisms is clear.<sup>53</sup> Reminding the Government of the importance of the rule of law – and the necessity of independent scrutiny bodies and accountability mechanisms for that purpose – remains essential.

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<sup>50</sup> Committee on Standards in Public Life, ‘Regulating election finance: a review by the Committee on Standards in Public Life’ (July 2021) p. 6.

<sup>51</sup> Office of the United Nations High Commissioner for Human Rights, Manual on human rights monitoring, chapter 23: monitoring human rights in the context of elections (United Nations 2011) p. 11.

<sup>52</sup> *Ibid*, p. 12.

<sup>53</sup> See The Constitution Unit, ‘Is this what democratic backsliding feels like?’ Monitor 79 (November 2021) at [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/monitor\\_79.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/monitor_79.pdf).