

## Case study 5: Enforcement in the United Kingdom

Transcript of the presentation by **Roger Creedon**, *CEO of the UK Election Commission*

I should start explaining that we are relatively newcomers to this. Traditionally in the United Kingdom there has been no control at all on what political parties as opposed to candidates spend on national elections.

A bit of background about the commission. We came into existence in 2000 and have approximately 150 staff. The majority of those are not engaged in regulating political parties. We have a budget of about £ 36 million. We have our main office in London, and have offices in Edinburgh, Belfast and Cardiff. In the United Kingdom we have a very much devolved legislature system.

We are an independent body. Rather uniquely we are not part of government; we are accountable to a committee of parliament chaired by the Speaker, we receive our funding directly from parliament, we do not go through any ministry and we are not accountable to any minister. Members of parliament put questions about the work of the electoral commission to the Speakers' Committee and a representative answers on our behalf.

There are six commissioners who were appointed through an open competition. The posts were advertised, there was an independent selection process, parliament had to vote on their appointment and they were appointed by the Queen. The commissioners effectively have the security of tenure of a high court judge; they cannot be removed other than by a vote of parliament. This means that they cannot be removed on the basis of ministerial displeasure. They are appointed for a fixed term ranging from four to six years, and the appointment can be renewed. Underpinning our independence is the fact that the commissioners cannot be appointed if they have been active members of a political party, holders of an elected office, for the previous ten years.. Similar limitations apply to the staff of the Commission. The staff can be members of political parties but not active members. The commissioners and the CEO cannot be members of political parties.

At the Commission, we carry out a range of functions other than regulation. We hold responsibility for reviewing electoral law and practice, we provide advice to those who run elections, and we have responsibility for seeing how those elections are run and for making proposals to government for improving the process. We have an educational role also, in that we have the task of raising awareness of electoral matters, telling people how to register to vote, when elections are etc. We have quite a large team for reviewing electoral boundaries. Finally we are responsible for running referendums. Although we don't run elections we do run referendums. We will have three to run in 2004.

In terms of our regulatory efforts, I have about 20 full-time staff looking at the way in which parties are regulated. This area of work is new to us and parties and we initially adopted a light touch in dealing with compliance failures. Political parties – as opposed to candidates – have operated outside any regulations when it comes to how much they spend on campaigning, their sources of funds and accounts. It was pretty much a ‘wild west’ scenario for political parties, and many party activists liked it that way. Some resented any attempt on the part of the state to involve itself in the way political parties are run. It was against that background that proposals were introduced.

In the late 1990s there was an increasing concern about corruption, about sleaze, following a number of cases of improper payments to MPs. What emerged was a real concern about propriety in the political process. The government asked a standing committee of parliament called ‘The Committee on Standards of Public Life’ to undertake a review of the finances of political parties. It published its report in 1998 and made recommendations in three areas. First it recommended setting limits for the amount that parties and third parties (organisations that don’t field candidates but become organisations of support for political parties, such as trade unions) should be limited in how much they could spend in elections. Secondly, there should be rules – there were no rules at all – in terms of what political parties should accept in the way of donations. Thirdly, there should be requirements on parties to produce accounts.

The thrust of all these changes was to promote transparency, rather than focusing on control. The idea was to bring out to the electorate the sources of funding that parties were receiving and how those funds were used and then leave the public to decide once they had this information, whether they wanted to vote for the party or not.

I should paint a bit of background. We do not have state funding in the United Kingdom, so the controls that we have heard about in the last two days don't work in the UK context. We therefore had to find another way of applying the new rules to parties. The commission has only existed since 2000 and the new rules started in February 2001.. We have the same problem we heard yesterday about how to define a political party. Our legislation does not attempt to define what a political party is, and because there is no state funding, that's not one of the tests one can apply. The solution we came up with was to say that if you wanted your party name on the ballot paper you had to register with the commission. If you didn't register with the commission and you put up a candidate, you could only describe them as independent. You could not ascribe a party to the candidate. Thus parties were required to register with us in order to put a party name on the ballot papers. By registering with the commission you come within the control framework, which I will describe briefly.

Campaign spending is now limited; there is a cap of how much parties can spend at elections. It varies according to how many seats you contest, but if you

contested all of the 659 constituencies in a general election, the cap would be £20 million.

. The controls cover not just cash spending, but notional spending. If a party is given a benefit in kind, such as the loan of a helicopter to fly campaigners around the country, the cost of that has to be included in the accounts as spending.

Following the elections, parties are required to submit detailed accounts to the commission of their spending. Parties that spent less than £250,000 have to submit their accounts within three months; these are not required to be audited. Parties that spent in excess of £250,000 – and only four or five parties do – have six months to send their returns to us but they have to be accompanied by an auditors' report and the auditor cannot be a member of that party. Along with accounts, the parties are required to submit all invoices and receipts showing every item of expenditure. It is part of our job to examine those accounts and invoices, to check that they are true and accurate accounts of spending. We publish the accounts and make them available to public inspection, though I have to say no one has bothered to come and look at them for the 2001 election.

Also, for the first time third parties are required to register with the commission if they want to spend more than £10,000. Bodies such as trade unions have registered with us, as have pressure groups. They also have a spending limit, which is much lower than for parties. At the last national election it was just over £600,000.

The 2001 general election was the first time the laws were applied. I think it is fair to say that there was a good deal of confusion among political parties about how the rules operated. We offered detailed advice about what did and did not count as campaign expenditure and how to put expenses into different categories such as media, advertising, transportation and other costs, which all had to be broken down by particular definitions.

We have one advantage in the United Kingdom and that is that you are not allowed to have any advertising in the broadcast media. There is no television advertising paid for by political parties. They get free time given by the broadcasters, allocated to them on the basis of a formula that the broadcasters themselves determine in consultation with the Commission.

In terms of the 2001 general election, the most any party spent was just under £13 million, which was well below the limit. We were not presented with any problems in terms of anybody exceeding the limit. It also represented a significant fall in campaign spending. At the 1997 general level the two major parties spent each in the region of £26 or £27 million. For 2001 that spending was halved, as a result more I suspect because of the fact that there wasn't much money around in 'war chests' for parties to spend. I doubt very much that the controls that we exercised had any impact on limiting spending at all. But I

think that we were effective in providing transparency about how parties spent their money.

Since 2001 we have applied similar controls to the elections to the Scottish parliament to the national assembly for Wales and to the Northern Ireland elections, all last year. In all three cases spending by the parties was significantly less than the limit itself. The evidence from those returns show that parties are now more familiar with the controls and better at defining much more accurately what was spent.

The second area is on donations. Again this area was previously totally unregulated. There were no controls on donations and there were questions over some sources of funding for the parties, in the case of one party involving significant donations from millionaires based in Hong Kong and in the case of another involving equally large donations from a millionaire linked with Formula One racing.

A whole raft of new controls came in on donations. But donations are not capped. You can give as much as you want. Companies are free to donate but they are required to obtain shareholder agreement before donating more than £5,000 to any political party.

The donation controls require the parties to make a return to the commission every three months of donations worth more than £5,000 given to the central party or more than £1,000 given to any of its subsidiary units. We publish this information on our website, along with details of the donor and the amounts given, though not the addresses of individuals.

Parties are free to take donations other than those from impermissible donors, which essentially means overseas donors. You have to be on the UK electoral register or be a UK registered company in order to donate to political parties. You are not allowed to accept anonymous donations. These have to be returned to the financial institution, or if there's no way of returning them they have to be handed over to the commission. We don't get to keep the money; it has to be turned over to the treasury.

The parties themselves have complied surprisingly well with the rules. We have had no more than four cases in the last three years of donations being accepted that should not have been. It has been because of inadvertence rather than avoidance of the rules. We do have powers to refer the matter to criminal prosecution, but we took the decision that we would not do that, and that we would insist on the return of those impermissible funds to their source. Parties have been quite willing to give back the money because the greater fear that parties have is not the prosecution, but the potential impact of the publicity of the prosecution on their electoral success.

These controls apply not just to parties. They apply also to a range of individuals. MPs for example are subject to the same controls on donations. They cannot accept impermissible donations, and they are required to report donations to the electoral commission within 30 days of accepting that donation.

These controls on donations also apply to candidates standing for election. The controls that the commission operates are focussed mainly on political parties. There are separate arrangements for candidates, which have been in existence for well over a century. Candidates standing for election are limited in what they can spend for electoral purposes. The amount is related to the number of electors in the constituency. But it ranges from £8,000–£10,000 per candidate. The candidate is required after each election to submit a statement of his expenses to the returning officer who is the person who runs the election. They now also have to report any donations over £50 and provide the source of those donations.

An interesting question is: what use is made of the return? The answer is not a lot. The returns are made to the town hall, they are available for inspection by candidates and others, but they are very rarely inspected. The returning officer has no legal duty to check that the returns are complete and accurate. In fact no one has that responsibility at all. The sanction essentially is that the losing candidate can take action if he thinks the winning candidate has spent more than he should. An election petition can be brought to the court within 35 days of the election to get the result overturned. This is in fact very rarely done. The costs would have to be covered by the person challenging the election. Other than that, returns have to be copied to the electoral commission for national elections, though not for local elections. We carry out an analysis to ensure that there is transparency. At the last general election we discovered that a small number of winning candidates had spent more than their permitted allowance, including the case of a leading opposition politician. But by the time we came to examine the cases, the time limit for taking action had expired. This left no possible course of action under electoral law, although there are still sanctions in criminal law. The police could take action for making a false declaration for 12 months after the election under the penal code (and by referring the matter to the police, the challenger avoids the cost involved in challenging the election). Penal action does not have any electoral consequences.

In answer to the question of party versus candidate spending, the line we take is whether the name of the candidate appears in the advertisement. If it has just 'vote Yellow Party', for example then it is party campaign spending; if it says 'vote John Smith', then it is candidate spending. It is an odd control in that for marginal seats in elections the political parties will produce adverts saying vote for the party and not mention the candidate. You have to ask what value the candidate's name is in those circumstances. Parties can use all of their permitted spending in one constituency if they want to.

Turning to the issue of accounts, parties now have to produce accounts, which are party, rather than campaign, spending accounts. The commission has considerable powers to make parties adopt common accounting standards. Previously the parties' accounting standards varied. We have powers to insist on what goes in the accounts although we have not used those powers to date. We rely largely on persuasion and consensus with the parties. But the accounts have to be audited and published.

## **Case study 5: Enforcement in the United Kingdom**

Transcript of the presentation by *Keith Ewing*, *Professor of Public Law at the King's College, University of London*

Let me start by saying that in terms of enforcing party funding or electoral law it is important to focus on the important agencies, but also there are other considerations that need to be addressed.

The first of these considerations is really quite important in determining whether the law is going to work and whether it will be applied and enforced. The first of these considerations is what I would refer to as the political culture within any particular society or country.

This, I think raises questions such as: is it the practice for the law to be followed and enforced? Do people feel a sense of obligation to comply with the law? Do people feel that they are bound by the rules that are being used to regulate their activities? Also relevant here is whether there exists what might be referred to now as a strong rights culture operating within a particular country. Often we find there is a clash between the aspirations of election law and the fundamental rights that are protected in particular society. This has clearly been a problem in the United States and has been a problem in Canada as well where only last May the Canadian Supreme Court upheld what we would call third-party spending limits from constitutional challenge on the grounds that they violated freedom of expression. Whenever there is doubt about the constitutionality of these provisions and whether they violate fundamental rights provisions, there is always a temptation of cautiousness on the part of the enforcer or regulator. This has to be kept in the background: fundamental rights may be the enemy of election law, curious though that may seem.

The second issue that is relevant is whether there is a political consensus about the law in question. This raises questions about whether the legislation or the rules governing political parties are fair between the parties. Secondly, whether they are perceived to apply in an even handed way between the parties, as opposed to being introduced simply to give one party an advantage over another. Another point that arises here is whether the legislation is relevant to the circumstances of the country in question and whether it gives the party a fair opportunity to conduct its relevant activities. Of note is the spending limit of £20 million for parties at UK elections. In the evidence that was submitted to the committee that came up with this figure as a proposed limit, one of the parties recommended £15 million. The commission, the independent body that made recommendations, argued that it is fantasy to think that parties that were spending £26 or £27 million in 1997 would be able to reduce their expenditure to £15 million in 2001 or whenever the next election were held. In a sense what they were highlighting was the importance that the legislation be realistic, that is, that the targets can be met by the parties.

The third background issue is what might be referred to as the legislation itself. Very pertinent questions need to be asked about how the legislation is drafted. Is it clear? Is it effective? Are there loopholes that have been deliberately tailored into the legislation to minimise its impact? Are the sanctions realistic or are they too tough? If the sanctions are too tough, then what is likely to happen, particularly with the growing influence of human rights ideas, is that courts will be very defensive – they will be fair to the defendant in particular in criminal proceedings because the costs of getting it wrong will be very high.

| In a sense there are a number of background issues that weigh in the balance before we can determine whether these laws are likely to be effective and implemented or not. The role of a regulatory agency is one factor that is relevant but is not the only factor that is relevant. The regulatory body works in a legal and constitutional environment and has to do so in a very comfortable way.

If we move on to the United Kingdom and to the three questions that have been presented for our discussion, as we have heard, the main regulatory body is the electoral commission. But we have other regulators, too, that touch upon the funding of political parties. One is in the field of labour law. Trade union donations are highly regulated and the state regulatory body administers or supervises the administration of that particular form of regulation. Similarly there is a formal supervision of political parties by the House of Commons and the House of Lords, which actually give money to political parties to help them with their parliamentary activities. There has to be some independent auditing and supervision of this money to ensure that it is not misused.

Subject to that footnote the main source of control is the electoral commission.

The first question we have been asked to look at, relates to the independence and resources of the regulator. I think there are three fundamental preconditions of independence.

The first relates to appointments. Who actually makes the appointments? Clearly, if the appointment is by government, then questions are raised about the independence of the body in question.

Secondly, there is the question of security of tenure of the people who are appointed to the regulatory body. If people who are appointed can be removed at will, then questions again arise about the effectiveness of their independence.

The third question relates to funding in the sense that if the government controls the purse strings it can effectively render any supervisory body ineffective or redundant.

I would have to say that on these three grounds if we were competing in the Eurovision song contest we would score 10 points on each. We do have a strong

and robust system in terms of appointment, security of tenure and funding of the commission, as discussed by Roger.

Briefly to supplement in terms of appointment, we heard that there are tight rules in terms of eligibility to ensure that people with a history or current practise of party activity are ineligible to serve. But also, in order to ensure that there is no abuse of the appointment process by the Prime Minister a number of safeguards have been built into the system. The problem for us in the parliamentary system is that when we say the Queen makes an appointment that means in practice that the Prime Minister makes that appointment. So how do we safeguard against abuse of that power by the Prime Minister? There are three ways – and it is very unusual in our system to have this actually specified. For one, the Prime Minister must consult with all the other parliamentary parties, of which there are presently about seven or eight that have to be consulted. If they have strong objections in the case of one individual, he or she will be ruled out. Secondly, the nominees, as members of the electoral commission, must have the agreement or the approval of the Speaker of the House, who is probably the most independent public servant that the UK system has been able to create. Thirdly, the person appointed must have the approval of the Houses of Commons by resolution. This is as far as we have ever gone to ensure that there is no abuse of the power of patronage that the Queen may have.

In terms of security of tenure, as Roger pointed out, electoral commissioners effectively have the same security of tenure as a high court judge. It is unusual for people other than the judiciary to have such security. The effect of this is that you can be removed from office only on grounds that relate to your conduct or capability *and* only if there has been a resolution passed by the House of Commons. Judges are subject to the same security. The last time a judge in England was removed from office under these rules was in 1883, so it is a very robust safeguard for the commission.

In terms of financing, the financing is determined by the House of Commons with the advice of the treasury. But that advice can be rejected by a committee of parliament that has been established to oversee this matter. The budget estimates are presented by the commission to a committee of parliament, called the Speaker's Committee, which has eight members, five of whom are selected by the speaker himself.

In terms of functions and powers, the commission has three different kinds of activity. Its regulations, which are extraordinary, state that:

“The commission may do anything except borrow money, which is calculated to facilitate or is incidental or conducive to the carrying out of any of its functions.” So it can do anything that it thinks it needs to do to carry out its functions. But then there are also two specific powers in section 1.46 which I think would alarm the rights enthusiasts. One of these powers is that the commission may require a

relevant person in the case of any organisation that the commission supervises to produce any documents, any books or any other records related to the income or expenditure of the organisation in question. So it has a right to demand this information without any prior judicial authorisation or warrant, even though it may incriminate a person. Not only does the Commission have a right to demand that this information be provided, but also the individual may be required to furnish the commission with an explanation relating to the information in question.

These are fantastic powers. In practice they have never been used but it is extraordinary that the commission may require someone to produce evidence that can incriminate the individual in question, and it is a criminal offence to fail to provide the information in question. And not only that, but also under s. 146 the commission has the right in order to carry out its activities to enter at any reasonable time the premises occupied by a supervised organisation – including third-party organisations – and to inspect the books and make copies of any parts of books that are found there. All of this can be done without a warrant. There is no need for a judicial warrant before this right of entry, search and seizure is exercised. Even the police in a murder enquiry don't have these powers under English law; the police must always have a warrant.

A lot of power has been entrusted to the commission, and this is an example, but as far as I am aware neither of these powers has ever been used. In a sense, therefore, to focus on the power may misrepresent the way in which the commission actually operates. I think if you look at the corporate plan of the commission it is made clear that the plan is to operate on the basis of consensus between the parties and to operate on a more voluntary way than the legislation would perhaps indicate. But behind the intention to operate in a consensual way are these great powers; on paper at least the commission has extreme power, though it is inconceivable that they could be used except in the most egregious case, because of the potential political backlash.

The third question is sanctions. There have been cases where the parties have failed to submit appropriate donation reports. The commission's view so far has been to issue yellow cards to the parties. There is at least one party that is on notice that its standards have to go to improve. I saw in the newspaper advertisements from said party for a compliance officer to help it to comply more effectively with these obligations under the act. It appears from newspaper reports that appeared in May 2004 that standards are not quite there yet, but are moving in the correct direction.

In terms of sanctions, these vary according to the nature of the offence. There are three types. The first are civil penalties, which can be applied by the commission exercising what might be said to be a quasi-judicial function. These civil penalties are basically applied where there has been a failure in relation to reporting obligations. Secondly there are criminal penalties, so that if, for example, a political party receives an impermissible donation and does not return

it, then that is a criminal offence and both the party and the treasurer of the party commit the offence. The party can be fined and the treasurer can be imprisoned.

It is also an offence to exceed the spending limits both for a political party and for a third party. If either exceeds the permissible spending limits, then they too can be fined. There is again a strong liability both for the party and for the treasurer or the responsible person of the party or organisation. I think it is very smart to attach liability not just to the organisation but also to an individual officer within the organisation who has to take responsibility, because it does have an impact if people think they might be defendants in criminal proceedings and may be found guilty with consequences over which they have no control. This is a very sobering restraint on the activity of people who have had no experience in the past of the justice process and who suddenly realise that this might be a reality for them.

The third possible sanction is political disabilities. These disabilities arise not under the political party law but under the election law relating to candidates and their agents. Every candidate must have an election agent with some responsibilities. Under the election law there is a spending limit and there is a duty on the part of the agent and the candidate to report expenses after the elections. To exceed the limit or to submit a false report may be a corrupt or illegal practice. If there is a corrupt or illegal practice the election may be challenged, as Roger pointed out, but it may also be an offence. The offence may lead, if found guilty to imprisonment or a fine. If anyone is found guilty of a corrupt practice, they are subject to criminal sanctions but also their seat falls vacant and there then has to be a fresh election. The guilty party is struck off the electoral register and banned for being a candidate for between three and five years depending on the nature of the offence in question.

We had an example of this in 1997 when a candidate called Fiona Jones was prosecuted for submitting a false election return. She was found guilty at first instance and suffered criminal and electoral penalties. She appealed, and the higher court (of criminal appeal) actually reversed the conviction. Again this shows that where the sanctions seem to be tough and the law is unclear, the law will tend to give the benefit of the doubt to the candidate or the agent. We are operating on the basis of rules in 1997 that had been introduced in 1883 and that were last applied, before 1997, in 1923. People thought the rules were very unclear and the candidate was given the benefit of the doubt although she had not reported all of her election expenditure.

So, to supplement Roger, this is very new territory for us, though we were pioneers in the 1880s. The rules were never kept up to date and political practice long overtook our legal rules. But the legal rules have been updated since the structure created in Victorian times, and I think the structure of rules and the commission that we now have are just about right. There are clearly people who would like to reform them and take them further, reforming political parties to

death, but I think the commission needs strong powers even though it may never use them.