

Report to:	STANDARDS COMMITTEE
Date:	6 November 2018
Report of:	Sandra Stewart - Director (Governance and Pensions)
Subject Matter:	PROTECTING THE DEBATE: INTIMIDATION, INFLUENCE AND INFORMATION - CONSULTATION DOCUMENT
Report:	<p>To inform Members of the Cabinet Office consultation seeking views of proposed changes to electoral law aimed at improving political debate. The consultation document covers:</p> <ul style="list-style-type: none"> • A new electoral offence of intimidation of candidates and campaigners; • Intimidation of voters – undue influence; • Digital Campaigning – use of imprint.
Recommendations:	That Members note and comment on the consultation questions set out in Appendix 1 to the report.
Financial Implications: (Authorised by the Section 151 Officer)	There are no financial implications for the local authority as a result of the consultation.
Legal Implications: (Authorised by Borough Solicitor)	The consultation document is proposing changes to electoral law concerning intimidation of candidates and their campaigners; intimidation of voters and changes concerning the use of imprints on digital campaigning material.
Risk Management:	A separate risk assessment is undertaken as part of the preparations for each election. An assessment of the most recent election informs future planning and assessment of risk.
Links to Community Strategy:	Indirectly the running of elections helps support most elements of the Community Plan.
Access to Information	<p>The background papers relating to this report can be inspected by contacting the Report Writer Robert Landon, Head of Democratic Services by:</p>



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1. INTRODUCTION

- 1.1 Earlier this year the Committee on Standards in Public Life (CSPL) published a review of the impact of intimidation in public life, with a focus on the role of social media. The Committee made recommendations for social media, political parties, police and local government and suggested the government consult on ways in which electoral law could be changed to protect candidates and their supporters. The attached Cabinet Office consultation takes this forward.
- 1.2 The consultation document reviews the following recommendations and issues from the CPSL's review:
- Section 1: the Government should consult on the introduction of a new offence in electoral law of intimidating Parliamentary candidates and party campaigners;
 - Section 2: consolidation and clarification of the electoral offence of undue influence;
 - Section 3: the Government should extend electoral law requirements for an imprint on campaigning materials to electronic communications.
- 1.3 In its response the Government has taken a wider view than the CPSL (which was entirely concerned with parliamentary elections). The scope of the Government's consultation covers candidates and campaigners at all polls, not just General Elections, and will cover local elections and be extended to campaigners in referendum campaigns.
- 1.4 The significance of this consultation is that by introducing a new electoral offence, conviction for an offence with criminal sanctions can also involve sanctions under electoral law. These include being barred from holding office, barred from voting for a certain period, or removal from the electoral register.

2. A NEW ELECTORAL OFFENCE OF INTIMIDATION

- 2.1 The CSPL recommended consultation on a new offence that applied specific electoral sanctions in cases of intimidation of candidates and their campaigners during a parliamentary election period.
- 2.2 The consultation document sets out how this recommendation can be implemented, by:
- creating a new electoral offence which would apply appropriate electoral sanctions to existing criminal offences of intimidation where committed against a candidate or relevant campaigner during an election period;
 - and which would be classified as a corrupt practice for the purposes of electoral law (and so carry specific additional sanctions).
- 2.3 The aim is that the additional electoral sanctions would work to deter intimidatory behaviour during the election period, allowing those engaging in the electoral process to participate peacefully.
- Electoral sanctions for corrupt practices**
- 2.4 Penalties for those convicted of a corrupt or illegal practices under the Representation of the People Act 1983 range from a fine to a maximum of two years in prison in the criminal courts. In addition, anyone found guilty of corrupt or illegal practices under the Act could be prohibited from standing or holding any elected office for a period of three or five years respectively.
- 2.5 A reason for classifying the new offence as a corrupt practice is its similarity to the existing offence of undue influence – intimidation of voters – which is already classified as a corrupt practice. The effect would be, if found guilty of committing the new offence in a criminal

court the individual would be prohibited from standing or holding any elected office for a period of five years.

Criminal sanctions

2.7 The criminal sanctions available on conviction of the wide range of intimidatory offences – from a fine to imprisonment for up to ten years – will apply. It will also be possible for the courts to take aggravating factors into account on sentencing, which may result in a higher sentence.

2.8 Aggravating factors within existing sentencing guidelines include where an “offence is committed against those working in the public sector or providing a service to the public”, so that when sentencing, the courts may consider interference with the democratic process to be an aggravating factor.

Which elections will be covered?

2.9 The government has taken a wider view than the CSPL (which was entirely concerned with parliamentary elections). The new offence would protect candidates and campaigners at all polls, not just those at General Elections, and so will cover local elections and be extended to campaigners in referendum campaigns.

2.10 **A candidate** is already defined under the RPA 1983:

A person who has previously expressed an interest in standing for an election becomes a candidate when an election is ‘officially declared’ (either by dissolution of Parliament, issue of Writ for a Parliamentary by-election, or in other elections, on the last day for publishing the notice of election.) Subsequently, any individual who is declared or nominated as a candidate, is a candidate from that point on.

2.11 There is no current definition of **a campaigner**, or party campaigner. The definition could include an employee of a registered party or independent candidate, or a member of a registered political party, but this could exclude those campaigners who work on independent campaigns, referendum campaigns, and those that volunteer. The term ‘campaigner’ could cover individuals who undertake varying degrees of actions, responsibilities and frequency in participation. It will be important to consider all those looking to promote or procure a particular outcome at an election, but to be aware there is a risk that by casting the net widely, there is less certainty about who is and is not a campaigner, which may make the offence more difficult to prosecute. The Cabinet Office will work with the CPS to try to establish a satisfactory and precise definition, but responses to the consultation questions will be taken in to account.

Time period covered

2.12 The starting point for protection – for both candidates and campaigners – will run at least from the period of notice of elections as the most consistent deadline, which is 25 days before polling day. It will be the responsibility of political parties to set clear standards and expectations outside that time period. A defined end date is equally important, and the protection should be at least until the close of poll. As there is a risk of intimidation immediately after poll, before candidates have accepted their seat or role, the period of protection will end seven days after the close of poll. In referendums, the relevant time period would be the referendum period itself, as set out in the relevant referendum legislation.

Appropriate cases: when to prosecute

2.13 The new electoral offence must be effective in targeting intimidation of candidates and campaigners during an election period. So it will not be sufficient to know that an individual is a candidate or campaigner – the electoral sanctions can only be applied where an individual is *intimidated because they are a candidate or campaigner*. This is a more

practical solution than linking the offence to an intention to affect the outcome of the election.

Balance with Article 10 of the European Convention on Human Rights

- 2.14 A communication must be 'more than simply offensive, shocking or disturbing' for conviction for a criminal offence. A demanding evidential standard is required to comply with Article 10, which protects freedom of expression. The new electoral offence will apply appropriate electoral sanctions to existing offences of intimidation, so that existing evidential standards and thresholds will be retained.

3. INTIMIDATION OF VOTERS – UNDUE INFLUENCE

The problem

- 3.1 The issue of intimidation of voters was not considered by the CSPL, but was already raised for possible reform as a result of recommendations made by Sir Eric Pickles in his report on [voter fraud](#) and having been considered in depth by the [Law Commissions](#) in a major Report on electoral law (February 2016). The consultation focuses on

- Clarifying the offence
- Intimidation at polling stations.

The law – Representation of the People Act 1983 section 115 – has not been essentially reformed since introduced in the early 19th Century. Few cases have ever been brought. The current offence is complex, with three main elements. To summarise, a person is guilty of corrupt practice (and so subject to penalties) if he or she:

- directly or indirectly uses or threatens force, violence or restraint;
- inflicts any temporal or spiritual injury, damage, harm or loss.

- 3.3 In order to induce or compel a person to vote or refrain from voting, or on account of having voted or having refrained from voting, or

- “by ‘*abduction, duress or any fraudulent device or contrivance*’, impedes or prevents the free exercise of the franchise of an elector or their proxy, or imposes pressure either to vote or refrain from voting.

- 3.4 This third element of the offence is complex too, and incorporates trickery, such as pretending to represent one political party while standing for another, and the use of unlawful coercion within communities and religious groups.

- 3.5 The challenge is to simplify the law so that it is clearer but no narrower than the existing offence. The aim is to capture all the behaviour that currently falls within the scope of the existing legislation. This means:

- clarifying the terminology
- clearly establishing the components of undue influence

- 3.6 It means taking account of situations where a person can abuse a position of power over another, either to make them vote in a certain way, or as punishment for failing to do so. For example, an employer could terminate or threaten to terminate employment, or a landlord to terminate a tenancy with the intention of influencing a person's vote, actions not unlawful in themselves.

The proposals

- 3.7 In outline, the consultation proposes:

- the element of the offence in relation to physical acts of violence or threat of violence will not be materially changed;

- any act that inflicts or threatens to inflict damage, harm or loss, whether done lawfully or not, should be prohibited when carried out in order to make a person vote, or vote in a particular way, or deter them from voting;
- that the scope of the offences continue to protect voters from victimisation by including actions which are carried out both before and after elections

3.8 It is also intended to cover:

- wider circumstances, where the franchise is impeded as a result of duress: actions which may not cause an individual specific harm or loss, but coerce someone to vote in a particular way, or refrain from voting, against their will. The example given is of an individual pressured to vote in a certain way by a family member as a failure to do so would bring shame on the family
- undue influence, or trickery. This is where a voter is tricked into voting a particular way and so prevented from exercising their vote freely.

3.9 The offence will be fully drafted only after the consultation, but will present some challenges. The question of influence will be particularly difficult to make clear, and it may be difficult to capture more subtle forms of pressure.

3.10 The Law Commissions – whose drafting suggestions ought to be taken into account – come down in favour of retaining a specific element of ‘improper pressure’. While uncertain about how easy it would be to enforce a redefined offence there are reservations about leaving the protection of vulnerable voters, such as older voters, those with mental impairment or with dementia, to offences of trickery or duress. [11.36 onwards in LC Report].

Intimidation at Polling Stations

3.11 This element of the consultation arises as a result of the Tower Hamlets case and the subsequent review by Sir Eric Pickles.

3.12 In that case, the Election Commissioner found that there was little doubt that the intention of the activists outside the polling stations was to induce or prevail upon electors to vote in a particular way. The behaviour would ‘undeniably have amounted to the [criminal] offence of intimidation’, although not such that it involved the use of sufficient ‘force, violence or restraint’ or sufficient ‘duress’ to amount to undue influence [under electoral law].

3.13 Sir Eric Pickles recommended a lower test of ‘intimidation’ than that currently enforced in electoral law, in order to capture this type of behaviour at polling stations. **The government has accepted this recommendation.** The proposal is to amend the offence of undue influence:

- to include behaviour intended to intimidate voters into voting in a particular way, or prevent them from voting, which takes place either inside or outside polling stations
- the behaviour would not need to amount to physical force, violence or restraint, but would include behaviour which could reasonably be classed as intimidating.

3.14 The Law Commissions express strong reservations about lowering the bar to include intimidation, on the grounds that:

- Undue influence currently covers the direct or indirect infliction or threat of force, violence, restraint, damage or harm to induce or compel a vote or non-vote. Impeding or preventing the free exercise of the franchise by duress is also prohibited.
- A new, unprecedented, and difficult to define prohibition would have to be enacted in order to criminalise some of the behaviour found by the Commissioner to have taken place in Tower Hamlets.
- It would crucially have to avoid penalising mere political fervour and the desirable promotion of participation and canvassing of voters.

- 3.15 A more clearly defined offence of undue influence would be sufficient to deter the use of voter intimidation as a campaign tactic. Effective policing and the general criminal law is available to deal with disorder outside polling stations, and in more extreme situations will have recourse to the restated electoral offence of undue influence to make sure the public can vote unimpeded and unthreatened.

4. DIGITAL CAMPAIGNING

- 4.1 The third element of the consultation focuses on the expansion of social media and the information available during elections and referendums. It is important that voters are aware of who is targeting them online to preserve the integrity of the electoral system.

- 4.2 The consultation does not cover the content of digital material, nor intimidation and abusive material. After considering the current state of knowledge and practice, it concludes with practical and technical questions about how imprints can be included in the wide range of online communications.

Imprint requirement

- 4.3 Election material is already defined in UK law, as any material which can reasonably be regarded as intended to promote or procure electoral success at any relevant election for a registered party or candidate (section 143A Political Parties, Elections and Referendums Act 2000 (PPERA)). It extends to political parties, third party campaigners and referendum campaigners.

- 4.4 The basic requirement is for printed election material to contain certain details (referred to as an “imprint”) to show who is responsible for its production. Printed material such as leaflets and posters must include the name and address of the printer, the promoter (the person who has authorised the material to be printed) and any person on behalf of whom the material is being published.

Consultation and jurisdiction

- 4.5 The consultation is restricted to the imprints regime for parliamentary elections in the United Kingdom, local government elections in England and Northern Ireland and police and crime commissioner elections in England and Wales.

- 4.6 The Cabinet Office is also seeking views on whether a new system for digital imprints should apply for national referendums and local referendums in England.

- 4.7 There is already provision in PERA to extend the rules for printed electoral material to digital communications and to design a new system which puts the confidence of the voter first.

Purpose in introducing an imprint requirement

- 4.8 Transparency in who has placed and paid for online material is relevant as it will:
- allow voters to see who is behind digital material
 - allow the Electoral Commission to see how and where money is being spent, whether on employing people to post messages or acquiring software to boost content where content can otherwise be posted without cost
 - allow the Commission to see who is behind larger campaigns, and what should count towards a campaigner’s spending limit
 - further assist the Electoral Commission by defining who needs to register and make a return.

- 4.9 There is no spending threshold before being required to include an imprint on printed electoral material and this should apply to online material too, to avoid uncertainty about when an imprint should be included.

When should an imprint be required

- 4.10 The law requires an imprint on which can ‘reasonably be regarded’ as intending to influence voters. Following the Scottish Referendum, the Electoral Commission and Law Commission support extension on these lines, subject to striking a balance between regulation and reasonable practicality.
- 4.11 On time period, there is also a question as to whether the requirement should be for an election period, or all year round as for printed material at present. Material designed to influence voters is distributed all year round, and it is proposed that the same requirement would apply to digital publication too.

Forms and responsibility for digital publication

- 4.12 A wide variety of mechanisms and platforms exist and are expanding. Should there be a limit of any kind? Incorporation of the imprint will present different challenges, though experience of the Scottish referendum does show that it is manageable. This is an area in which the government needs practical assistance. Social media companies will need to be involved, but campaigners and candidates will be able to comment on how visible an imprint should be. Whether those who subsequently share digital electoral material can be required to include an imprint if they forward it will depend on what technical solutions are available.

Enforcement

- 4.13 Existing civil and criminal enforcement provisions for print materials would apply to digital publication. The Electoral Commission would exercise its investigation and enforcement powers, and can impose fines of up to £20,000.
- 4.14 It is a criminal offence not to comply with the requirement for an imprint, and an illegal practice under electoral law, so that electoral sanctions would also apply. The promoter of the material, any other person on behalf of whom the material is published, or the printer, commits an offence. Fines range from an upper limit of £5000 in Scotland to an unlimited amount in England and Wales.
- 4.15 The Law Commissions considered liability for digital publication. The publisher’s name is not required as part of the imprint (only the promoter who caused it to be published, who is usually the candidate or election agent), and there would continue to be a due diligence defence for printers, publishers and promoters of the material. A “reasonably practicable” defence, of the kind that was available in the Scottish independence referendum campaign, would protect the online publisher who had taken all reasonable means to verify the information given to them. Details of enforcement provisions can be found at 10.49, page 49 of the consultation document.
- 4.16 Reporting mechanisms would mean that users – members of the public – can report content and behaviours which contravene the platforms’ terms and conditions, even if content is based outside the UK. The government’s draft social media code of practice includes guidance to social media companies on adequate reporting mechanisms and moderation processes for abusive content, which it is proposed could provide the framework.

5. CONCLUSIONS

- 5.1 The offence of intimidation of candidates and campaigners should to be seen as part of the wider imperative to address intimidation and abuse on social media, and the consultation questions need to be read in this context. The new offence would add significance to the penalties on conviction of any of the criminal offences which it is now clear apply to both off and online behaviour, and could act as a deterrent. It makes sense that any new offence should apply to local elections as well as general elections. The existing definition of being a candidate would continue to apply, but reaching a clear definition of a campaigner will be more difficult, should that be the right approach. Councillors with regular election experience are in a strong position to provide useful information and to influence the final definition. The definition could be important in justifying the extension to referendums in England. It is suggested that protection start with the announcement of the poll and end seven days after the poll. Intimidation and abuse outside that time would be dealt with by the criminal law. There is also the expectation that political parties will do more to rein in excesses on the part of their campaigners. Is this sufficient? The offence is concerned with protecting the electoral process, and this sounds right: any case for the time frame to be wider would need to be well argued.
- 5.2 It seems obvious that the law of undue influence needs clarification. The issues arise in how this can be achieved. The Law Commission have raised some important points about vulnerable voters, which do not seem to have been taken into account in the redrafting. Any experience of vulnerable voters, or insights into how this issue can be addressed, will make valuable contributions to the consultation. Whether the scope of the offence should be extended to include a specific reference to intimidation at polling stations is difficult to answer. There are risks either of increasing unnecessary prosecutions, or of failing to prosecute, due to the difficulty of making a case. The experience of officers and elected members will be relevant
- 5.3 The value of including an imprint in online materials is self-evident and already being implemented. The key questions are as to whether this should be determined by spending limits, whether certain forms of digital communication should be prioritised, how visible the imprint can be, and whether the imprint should be passed on when shared. Much of this appears to be determined by what is technically possible and the conviction that if particular requirements are made, then solutions will be found. It will be valuable to consider whether the responsible bodies have sufficient enforcement powers. The limit of £20,000 on the fines that can be imposed by the Electoral Commission could well be reviewed.

6. RECOMMENDATIONS

- 6.1 As set out on the front of the report.

APPENDIX 1

Question: In what capacity are you giving the information? Eg: as a voter, an elected representative, an organisation.

Section 1: A New Electoral Offence

- Question 1:** Do you agree that the new electoral offence should apply electoral sanctions to existing offences of intimidatory behaviour, such as those identified by the CSPL, listed in Annex A, and equivalent offences in Scotland and Northern Ireland?
- Question 2:** We propose that the new electoral offence will attract the sanction of being barred from standing for elected office for 5 years. Do you agree?
- Question 3:** We do not propose that the new electoral offence should remove an offender's right to vote. Do you agree?
- Question 4:** We think that offences committed against candidates and campaigners during all types of polls should attract the additional electoral sanctions. Do you agree? If not, please explain.
- Question 5:** We propose that offences against campaigners during a referendum campaign should attract the additional electoral sanctions. Do you agree? If not, please explain.
- Question 6:** We propose that the existing definition of when someone becomes a 'candidate', with reference to any election campaign, would be clear and workable for the new electoral offence. Do you agree? If not, please explain.
- Question 7a:** Do you think the new electoral offence should extend to campaigners? If so, please explain which campaigners you think should fall within the scope of the new electoral offence, given the above considerations. If not, please explain.
- Question 7b:** If you think that campaigners should be included, do you have a suggestion as to how this could be done for use in the relevant legislation?
- Question 8:** Do you agree that protection should start from the period of notice of elections? If not, please explain.
- Question 9:** Should there be a period before notice of election for a scheduled poll during which this offence applies? If so, what would be a suitable time period of protection? If not, please explain.
- Question 10a:** Do you agree that protection, under the new electoral offence, should end seven calendar days after the close of poll?
- Question 10b:** If not, when do you think protection under the new electoral offence should end?
- Question 11:** Do you agree that protection, under the new electoral offence, should apply during the referendum period, as determined by the relevant referendum legislation? If not, please explain.
- Question 12:** Do you agree that a new electoral offence should only be applicable in cases where a candidate or campaigner is intimidated because they are a candidate or campaigner?

Section 2: Intimidation of Voters – Undue Influence

- Question 13:** Do you agree that the law of undue influence requires greater clarity in its application? If not, please explain.
- Question 14:** If it is decided to simplify the existing offence of undue influence, we do not propose to materially change the element of the offence relating to physical acts of violence or threat of violence. Do you agree? If not, please explain.
- Question 15:** Any act, whether lawful or unlawful, which is intended to cause harm to the individual and is carried out with the intention to make a person vote, vote in a particular way, or deter them from voting and should be captured within this offence. Do you agree? If not, please explain.
- Question 16:** We propose to retain reference to 'direct and indirect' acts which cause the elector harm. Do you agree? If not, please explain.

- Question 17:** We propose that the redefined offence retains reference to offences committed by or on behalf of a perpetrator in relation to acts that cause the elector harm. Do you agree? If not, please explain.
- Question 18:** We propose that the scope of section 115(2)(a) continues to include those acts which are carried out before and after the election. Do you agree? If not, please explain.
- Question 19:** Do you agree that the offence should continue to cover actions of duress? If not please explain
- Question 20:** Any redefined offence would still look to cover actions of trickery. Do you agree? If not, please explain.
- Question 21:** Do you agree that the scope of the offence should remain the same, subject to including a specific reference to intimidation at polling stations? If not, please explain.
- Question 22a:** Do you agree that the offence should specifically capture intimidatory behaviour carried out inside or outside of the polling station? If not, please explain.
- Question 22b:** If so, do you agree that the definition should include behaviour which falls below the current requirement of physical force, violence or restraint?

Section 3: Increasing Transparency in Digital Election Campaigning

- Question 23:** Do you as a voter believe that the current system as applied to printed election material promotes transparency and gives confidence in our systems?
- Question 24:** Should the imprint rules in PPERA be commenced for Northern Ireland?
- Question 25:** Should the imprint rules for Northern Ireland elections be the same as for the rest of the United Kingdom?
- Question 26:** What are your views on whether imprints should be required on all digital electoral material or only where spending on such material has been over a certain threshold?
- Question 27:** Should any new rules on digital material only apply to what we would already consider to be “electoral material” or should broader categories be considered?
- Question 28:** Do you agree that the requirement for imprints on election material can arise all year round, not just during election periods?
- Question 29:** Should we prioritise regulating certain forms of digital communications over others? If so, please give reasons.
- Question 30:** What sort of mechanisms for including an imprint should be acceptable? Are there any technical difficulties that would need to be overcome to include text which is not accessible without a further step?
- Question 31:** Would you find an imprint in an overarching space such as a ‘bio’ on Twitter sufficiently visible?
- Question 32:** How can these mechanisms be future-proofed in expectation of developments in media and technology?
- Question 33:** Should those who subsequently share digital electoral material also be required to include an imprint and, if so, whose details should be on it – theirs or the original publisher?
- Question 34:** Do you think the responsible bodies have sufficient enforcement powers?