

June 2004

The
Electoral
Commission

A photograph of a man and a woman in professional attire. The man is on the left, wearing a white shirt and a patterned tie, looking towards the right. The woman is on the right, wearing a dark jacket, looking towards the left. They appear to be in a meeting or discussion.

Political advertising

Report and recommendations

Translations and other formats

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The Electoral Commission

We are an independent body that was set up by the UK Parliament. We aim to gain public confidence and encourage people to take part in the democratic process within the UK by modernising the electoral process, promoting public awareness of electoral matters, and regulating political parties.

On 1 April 2002, The Boundary Committee for England (formerly the Local Government Commission for England) became a statutory committee of The Electoral Commission. Its duties include reviewing local electoral boundaries.

Political advertising

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Executive summary

Among The Electoral Commission's statutory functions is a duty to keep under review a range of electoral and political matters. In our report on the 2001 general election, we noted that no progress had been made towards a code on political advertising which the Committee on Standards in Public Life had urged political parties to adopt. We undertook to examine again the case for a code on political advertising and issued a consultation paper in October 2003 that invited comments on a range of issues relating to the principle and the practicability of a code.

Background

Political communications are a fundamental part of any democratic system. At elections, communications from parties obviously can inform voting intentions. In addition, communications from parties can have an impact on perceptions of the political process more generally. Given the widespread concern about increasing levels of distrust in and disconnection from formal political processes, it is appropriate that the impact of political communications on perceptions of politics is taken seriously.

The UK marketing industry has a well-established system of self-regulation for non-broadcast advertising. This system consists of a code written by the advertising industry through the Committee of Advertising Practice (CAP) which is interpreted and applied by the Advertising Standards Authority (ASA). The principles underpinning the Code are that all advertisements should be legal, decent, honest and truthful, and prepared with a sense of responsibility to consumers and to society.

Until 1999, political advertising was subject to the CAP Code, although it had always been exempt from certain requirements such as those relating to truthfulness. Following the 1997 general election there were concerns that the impartiality of the self-regulatory system could be damaged by rulings for or against political parties, and that the ASA could not be expected to respond with the speed necessary at an election. From October 1999, therefore, political advertising aimed at influencing voters in elections or referendums

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has been exempt from the CAP Code. The Committee on Standards in Public Life considered the issue of political advertising and in their 1998 report concluded that the best way forward would be for the parties to adopt a new code of practice.

Priorities

The priority for the Commission is to promote and protect the interests of the electorate. We are therefore concerned, above all, that political advertising should encourage participation and provide voters with information to support their voting decisions. We are also concerned that the electorate, and the wider general public, should not be exposed to advertising that causes gratuitous offence.

Conclusions

The argument for a statutory code on political advertising is in our view unsustainable, both because of the protection given to free political speech in the Human Rights Act and because it would be inconsistent with, and stricter than, the regulation of other non-broadcast advertising. Any regulation of political advertising would therefore need to be voluntary. Even with a voluntary code, it would seem inappropriate and impractical to seek to control misleading or untruthful advertising, given the often subjective nature of political claims.

With respect to political advertising that might offend against common standards of decency, a code could be in the public interest by protecting against gratuitously offensive material. However, for many forms of paid-for advertising, existing

editorial controls already provide a check on material that may be inappropriate.

The practical difficulties that would need to be addressed in order for any code to be workable are formidable. We doubt that a system of considering complaints would deliver sufficiently prompt adjudications to be of value, and we doubt that it would be acceptable to require pre-clearance of advertising copy. Even if a workable system could be established, very significant resources would be required to make such a system effective, particularly if the code extended to all political advertising from local to national level.

We are concerned that a code might be open to spurious claims. In addition, we consider that the only realistic sanction for breach of a code would be adverse publicity and we are not convinced that this would be a sufficient deterrent.

Were there to be a code with an adjudicatory body, that body would need to have sufficient independence and authority to carry out its role effectively. We do not consider that it would be appropriate for the Commission to undertake such a role, because of the risk that our independence might be perceived to be compromised.

In order for any code to be workable there would need to be a minimum level of acceptance among political advertisers. Although the Liberal Democrats and Plaid Cymru have indicated their support for a code, the Conservative Party have said that they would not adhere to a code and the Labour Party and the SNP, together with most

other parties that might be expected to undertake substantial advertising, have failed to respond.

It is clear that the difficulties of implementing any code on political advertising mean it would be impractical. The Electoral Commission therefore concludes that no further progress in this direction is likely to be achieved.

We do, however, acknowledge the evident desire among many political advertisers, including those that oppose a code, to uphold high standards of advertising and to foster public confidence in the political process. While we agree that political advertising should remain exempt from the CAP Code and do not consider that there should be a separate code, we recommend that political advertisers be guided by the principle in the CAP Code that ‘all marketing communications should be prepared with a sense of responsibility to consumers and society.’



1 Introduction

The Electoral Commission is a public body established on 30 November 2000 under the Political Parties, Elections and Referendums Act 2000 (PPERA). The Commission is independent of Government and political parties, and is directly accountable to Parliament. Among the Commission's general statutory functions is a duty to keep under review a range of electoral and political matters.¹

1.1 Political communications are fundamental to any democratic system, and effective direct communication between political parties and the electorate is a vital part of any election. Communications from parties obviously provide information to electors which may inform their voting intentions. In addition, communications from parties can have an impact on perceptions of the political process more generally. Given the widespread concern about increasing levels of distrust in and disconnection from formal political processes, it is appropriate that we, together with political parties and others involved in political communications and marketing, take seriously the impact of political communications on perceptions of politics.

1.2 The UK marketing industry has a well-established system of self-imposed controls for non-broadcast advertising. This system of self-regulation consists of a code written by the advertising industry through the CAP which is interpreted and applied by the ASA.² The principles underpinning the Code are that all advertisements should be legal, decent, honest and truthful, and prepared with a sense of responsibility to consumers and to society, and the ASA seeks to ensure that the public is not misled or offended by advertisements, through investigating complaints under the Code and publishing its adjudications.

¹ Section 6 of the Political Parties, Elections and Referendums Act 2000

² The eleventh edition of the British Code of Advertising, Sales Promotion and Direct Marketing came into force on 4 March 2003. Previous versions of the Code were known as the British Codes of Advertising and Sales Promotion. In this paper, the term 'the CAP Code' is used to refer to the current British Code of Advertising, Sales Promotion and Direct Marketing, as well as previous versions.

1.3 Until 1999 political advertising was subject to the CAP Code, although it had always been exempt from the Code's requirements that advertisements are truthful, that advertisers hold documentary evidence to prove their claims, and from the rules requiring fair comparisons and prohibiting the denigration of competitors. Political advertisements were nevertheless expected to comply with all other rules in the Code, including those relating to the protection of privacy, taste and decency, and social responsibility.

1.4 Following the 1997 general election there were concerns that the impartiality and independence of the advertising industry's system of self-regulation could be damaged by rulings for or against political parties, and that the ASA could not be expected to respond with the speed necessary during an election campaign. From October 1999, therefore, political advertising aimed at influencing voters in elections or referendums has been exempt from the CAP Code.

1.5 The question of how best to deal with political advertising was put to the Neill Committee on Standards in Public Life in 1998 by the CAP. The Neill Committee rejected a suggestion that such responsibilities might fall to an Electoral Commission, were one to be established in the future. Instead, in their report *The Funding of Political Parties in the United Kingdom (1998)*, they concluded that the best way forward would be a new code of practice:

We would welcome any progress which could be made in this direction by the political parties working in association with the advertising industry and we would exhort them to endeavour to formulate an agreed code.

1.6 In the Commission's report on the 2001 general election, we noted that no progress had been made towards such a code. Although that election did not give rise to any significant problems in the area of political advertising, we suggested that it was appropriate to take that opportunity of the absence of controversy to review this issue, acknowledging that problems could arise in the future. We commenced the review with an open mind as to whether a code on political advertising was appropriate or practicable.

Review process

1.7 This report sets out the views and recommendations of The Electoral Commission. The review has been managed by Commission staff under the guidance of a Project Board chaired by Glyn Mathias (Electoral Commissioner) and also including Robin Esser (Executive Managing Editor, *Daily Mail*, and Chairman of the Parliamentary and Legal Committee of the Society of Editors) and Kenneth Newton (Professor of Politics, University of Southampton).

1.8 In October 2003 we published a consultation paper. The paper was sent directly to more than 3,000 stakeholders, including advertising and communications industry groups, political parties, politicians, media

representatives, leaders and chief executives of local authorities. In addition, the paper was, and remains, available for the public to download from our website: www.electoralcommission.org.uk.

1.9 The consultation paper examined issues of principle relating to political advertising. The paper also examined a range of practical issues that are important in the case for or against a code on political advertising. We provided 12 weeks (extended to 14 weeks) for responses to the issues raised in the consultation paper to be submitted to us, and received a total of 45 substantive responses, some of which were submitted by membership organisations on behalf of industry groups (the Institute for Practitioners in Advertising and the Newspaper Society). A list of respondents is included in the Appendix and responses are available to view at the Commission.

1.10 During the consultation period the All-Party Parliamentary Group on Advertising took the subject of our review as the topic for their regular meeting, with Commission representatives present. The All-Party Group is a forum for debate between Parliamentarians and advertising industry representatives. Commission staff also took part in an Advertising Standards Association consumer panel meeting in the North East of England.

Priorities

1.11 We were aware at the outset of the review that there were a range of distinct stakeholder groups and that the particular interests of these different groups would not necessarily coincide.

The responses to our consultation papers have confirmed this, although there was broad consensus on some issues. It has therefore been important to be clear about the priorities of the Commission and the basis of the conclusions we reach in this report.

1.12 The priority for the Commission is to promote and protect the interests of the electorate. One of the Commission's corporate aims is to encourage greater participation in and increased understanding of the democratic process. We are therefore concerned, above all, that political advertising should encourage participation and provide voters with information to support their voting decisions. We are also concerned that the electorate, and the wider general public, should not be exposed to advertising that causes gratuitous offence.

1.13 Although the Commission's role is not principally to protect the interests of political parties and other political advertisers, we are alert to the pressures that any form of increased regulation brings. Clearly, the Commission also attaches fundamental importance to the protection of essential freedoms, including the freedoms of expression and association. In addition, we are concerned that the integrity of advertising self-regulation in the UK should not be undermined.

Scope

1.14 This review is concerned with the content of political advertising which would be subject to the CAP Code if the exemption were not in place. This covers all forms of non-broadcast advertising, the principal function of which is to

influence voters in local, regional, national or international elections or referendums. It covers advertising in national, regional and local press, posters and billboards, leaflets, direct mail, email and the internet.

1.15 Because we are concerned with the implications of the exemption of political advertising from the CAP Code, we do not consider aspects of political advertising that would have been beyond the remit of the CAP Code, such as the general tone of advertising. We therefore do not consider the merits or demerits of negative or positive advertising. Although we recognise that the tone of advertising may have an impact on perceptions of the political process, and although parties may wish to have regard to research conducted by others on this issue, the tone of advertising is properly a matter for political advertisers alone.

1.16 We focus on those aspects of political advertising that are not subject to statutory controls. In particular, we do not consider issues such as libel, incitement and copyright. Nor do we consider aspects of political advertising that are subject to electoral law, such as campaign spending controls, the requirement for ‘imprints’ on published campaign materials containing publisher and printer details and the prohibition on making false statements about another candidate.

1.17 Our review does not consider marketing communications by central or local government, as distinct from those concerning party policy, as such communications remain subject to the CAP Code.

1.18 This report has been submitted to the Secretary of State for Constitutional Affairs, in accordance with section 6 of PPERA. It has also been distributed to stakeholders and published on the Commission’s website. While the Commission has a statutory duty to keep these matters under review, our role with respect to political advertising is wholly advisory.

2 The principle of a code

The nature of political advertising and the priorities of political advertisers often differ from those of commercial and other advertising. It is important to take account of these differences when considering whether or not it is appropriate in principle to introduce a code on political advertising.

2.1 Among the issues discussed in our consultation paper were the special importance of freedom of expression with respect to political advertising, the inherently subjective nature of much of political advertising, the extent to which a code might be in the public interest, and the differing but legitimate priorities of commercial and political advertisers. Respondents to the paper were divided in their views as to whether a code on political advertising was desirable in principle. Of those who addressed this issue, 54% were in favour of a code in principle and 46% were against. While some argued that it would be in the public interest for political advertising to be subject to some form of self-regulation, others stated that a code would constitute an infringement on freedom of political expression and result in the curtailment of genuine political debate.

Freedom of expression

2.2 Of these issues of principle, it was freedom of expression that provoked by far the most discussion among respondents to our paper. The lack of legislative or self-regulatory control of the content of political advertising in other comparable countries, even though self-regulation of other advertising is common, is a clear reflection of the high importance attached to protecting free speech. In a survey in 2000, the European Advertising Standards Alliance (of which the ASA is a member) found that political advertising is outside the scope of advertising regulation in almost all European countries as well as in Australia, Canada, New Zealand, South Africa and the United States of America.³

³ European Advertising Standards Association (2000) *Coverage of political advertising by self-regulation in EASA member countries*.

2.3 Under the European Convention on Human Rights and the Human Rights Act, any restrictions on the right to freedom of expression can only apply in clearly defined and justifiable circumstances. Such restrictions must be prescribed in law and must be necessary in a democratic society – for example, to protect national security or public safety, or to protect the rights of others.

2.4 Because any restrictions must be explicitly justifiable as necessary in a democratic society, and because political expression is fundamental to our democratic society, freedom of political expression should be afforded special protection. Several respondents stressed this point.

I question the legality of an attempt to introduce a code, whether ‘voluntary’ or not, to attempt to control political advertising. Such a proposal appears to undermine, if not contradict, the fundamental principles and human rights of freedom of political expression and freedom of association.

**Solicitor to the Council,
North Somerset Council**

Additional regulation of non-broadcast political advertising is unnecessary and undesirable. Such a code would effectively infringe legitimate freedom of political expression and serve to hinder the necessary scrutiny of both governing political parties and those who hold public office.

The Conservative Party

2.5 The Commission fully agrees that freedom of political expression should be given special protection, and we accept that the principle of a code on political advertising is more difficult to sustain than a code on other advertising because of this special protection. All advertising is subject to some specific statutory controls, such as those on libel, incitement and copyright. We do not consider that any further statutory regulation of the content of political advertising could be justified given the importance of free political expression. In particular, it would not be acceptable for controls on political advertising to be stricter than controls on other forms of advertising. Increased statutory regulation of political advertising would clearly constitute a stricter control than the voluntary system that applies to other advertising.

2.6 However, we recognise that a voluntary code of practice, which does not have the force of law, would not necessarily constitute a restriction on the right to free political expression. While there is certainly no case for a statutory code, it is possible that a voluntary code might be in the public interest.

2.7 The Northern Ireland Human Rights Commission (NIHRC) shared this view. That Commission noted that to restrict the right to impart information necessarily also restricts the corollary right to receive information, and so there must be a very strong presumption in favour of allowing divergent political views to be expressed in order to maintain the vigour and depth of political discourse. However, the NIHRC expressed specific concern that the scope of current legislative measures prohibiting

the incitement of racial hatred have not been sufficient in blocking the dissemination of racist ideas within electoral campaign materials and suggested that the absence of regulation exacerbates this problem. They argued that a code which seeks to restrict the dissemination of racist and xenophobic information would be in the public interest and could be compatible with the European Convention on Human Rights and other international human rights instruments.

Hate speech

2.8 The Electoral Commission is also of the firm view that there should be no place for racism and xenophobia, or other forms of hate speech, within political campaigning. We note the view of the NIHRC that further regulation of political advertising in this respect may be compatible with human rights legislation. However, we do not consider that a voluntary code on political advertising is the most appropriate way in which to create any additional safeguards. Rather, we consider that it is necessary to rely on statutory controls in this regard.

2.9 We doubt that a voluntary code on political advertising would provide sufficient deterrence against racist material. We note that the CAP Code does not contain specific clauses on racial hatred but reminds advertisers that their advertising must be lawful. We also note that the Commission for Racial Equality's compact against using racist statements in political campaigning, which was signed by the major parties in 2001, was a very welcome initiative but nevertheless was clearly not able to extend to those parties that chose not to sign it.

2.10 Because there are existing statutory controls on hate speech, particularly the Public Order Act 1986, and because our review has examined the case for non-statutory controls, this is not an area that we have considered in detail. In addition to being outside the scope of this review, the Commission has no powers to review that legislation or the manner in which it is enforced.

Subjectivity

2.11 In our consultation paper we suggested that there is a much higher degree of subjectivity involved in political advertising than other advertising, with appeals very often based on opinion, conjecture and values. This high degree of subjectivity applies both to those devising and making the appeals and to consumers as they interpret and respond to those appeals. Because of this subjectivity, the CAP Code is difficult to apply. Clauses such as those relating to truthfulness, honesty, comparisons and denigration are problematic, and the obligation in respect of substantiation of claims has never applied to political advertising.

2.12 The Committee of Advertising Practice has argued that all advertising involves subjectivity and that political advertising is not a special case in this regard. However, we consider that the often complex nature of political claims, and the particular sensitivities involved in the adjudication of their substantiation, are significant.

2.13 The campaign group Britain in Europe argued that, in the context of a referendum campaign in which electors are to make a decision on a complex issue based on factual

arguments, there is a need for protection against advertising that misleads. However, the distinction between fact and conjecture is often blurred and it is difficult to see how any truthfulness requirement could be applied narrowly to factual claims. Most respondents accept, and the Commission agrees, that it would be inappropriate to apply these provisions of the CAP Code.

2.14 While we consider that it is inappropriate to apply certain provisions of the CAP Code, it does not necessarily follow that no provisions are applicable. Other sections of the CAP Code make provisions regarding decency, fear and distress, safety, violence and anti-social behaviour, protection of privacy, exploitation of goodwill and imitation. A consideration of the case for a code on political advertising has to have regard to the extent to which it is appropriate to apply these principles of the CAP Code to political advertising.

Public interest

2.15 The CAP Code, from which political advertising is exempt, specifies that advertising should be prepared with a sense of responsibility to consumers and to society. It is therefore principally intended to protect the public interest. As we have stated, the Commission is keen, above all, to encourage political advertising that promotes participation and we are also concerned that the public should not be exposed to advertising that causes gratuitous offence. The public interest therefore lies at the heart of the Commission's consideration.

2.16 As the CAP Code is intended to protect the public interest, several respondents suggested that for political advertisers to have no equivalent requirement to have regard to the public interest is anomalous. There is concern about what is considered to be a double standard for political and all other types of advertising, particularly among the advertising industry but also within some political parties.

We find it more than a little hypocritical that politicians can support further regulation and constraints of commercial freedom of speech but refuse to countenance any self-regulatory code for their own communication. It is this sort of double standard that fuels voter disengagement.

The Liberal Democrats

Our research into voters' perceptions of political advertising suggests that there is a strong desire (amongst the increasingly less loyal sectors of the electorate) for a less aggressive, less personalised, less attack oriented approach to political communications. The potential harm then might be the legitimacy of the entire system, rather than to individuals feeling personally upset by a particular ad.

**Richard Scullion,
Bournemouth University**

The effect of misleading and offensive political advertising leads to disaffection with politics generally and to low electoral turn-outs.

**Labour Group,
Manchester City Council**

2.17 The difficulty with applying a code covering truthfulness, honesty, comparisons and denigration to political advertising has already been noted and it is difficult to see how any code could protect against aggressive or attack-orientated advertising, even if this was desirable. However, all political advertisers should take seriously the challenge to ensure that their communications serve to encourage and not to deter the wider electorate from engagement with the political process.

2.18 It has also been noted that most consumers assume that advertisements are regulated and conform to common standards and so would assume that political communications comply with these same standards. Consumers would therefore expect protection against, for example, advertising that offends or that stigmatises certain groups in society. While we accept that it might be a legitimate aim of political advertising to shock or to disturb, it is difficult to see justification for political advertising to use images or language that would not be permitted in any other sphere of advertising on the grounds of decency, fear and distress, safety, violence, or anti-social behaviour. This argument has particular force given the high visibility of many forms of political advertising, including exposure to children.

The public is right to expect parties to adhere to certain standards and we feel that the creation of a broadly supported code would meet the popular expectation.

Birmingham City Council

Freedom of political expression should not be restricted without very strong reasons. However, this Council's experience is that certain political parties have no scruples about abusing that freedom and 'political expression' is often used as a justification for circulating offensive material. The Council would therefore support the principle of a code on the content of political advertising.

Gateshead Council

Editorial control

2.19 Although there is no code regulating political advertising, that is not to say that there are no controls within certain media on advertising that may be inappropriate for the audiences of those media. The principle of editorial control remains a crucial one. For newspapers and periodicals this control rests with the appropriate editor and will be clearly set out in the conditions for advertising.

Even if any advertisement complies with the law and any political advertising code, any newspaper must always be able to make an independent decision as to whether or not it was prepared to publish or distribute the material offered.

The Newspaper Society

2.20 There is a similar control for the outdoor media. The Outdoor Advertising Association's general terms and conditions of contract provide a basis for the relationship between advertisers and those companies that control billboard and other outdoor sites. Those terms and conditions specify that 'the contractor shall

have the right to see details of advertising copy prior to commitment of display and of refusing to display or continuing to display any advertising copy'. Although political advertising is not subject to the CAP Code, therefore, any advertisements placed in print and outdoor media are subject to editorial controls, and these controls are likely to prevent material being displayed that offends against decency.

2.21 There is obviously no such editorial control for materials distributed directly by political advertisers. It is this type of advertising – for example, leaflets produced and distributed by a local party – which seems to generate the most concern regarding standards of decency. It is also the case that this type of advertising would be the most difficult to control through any code on political advertising. We consider the practicability of introducing a code in the next section, but should note here that even those who propose that there should be a code acknowledge that it may not be practicable to apply such a code beyond national political advertising.

Priorities and incentives

2.22 The differences in the priorities of political and other advertisers contributed to the decision by the CAP and ASA to exempt political advertising from the CAP Code. As occasional advertisers only, political parties and other campaign groups do not have the same incentive as regular commercial advertisers to work with the self-regulatory system in the interests of the integrity of commercial communications.

2.23 To shock or to disturb is not often an objective of a commercial advertiser, but might be for a political advertiser. And although much commercial advertising is also highly competitive, there is usually a greater intensity of competition in political campaigns conducted over a limited period of time. The premium on media coverage at election time might provide an additional incentive to err on the side of controversy in political advertising campaigns.

2.24 The intense scrutiny of election campaigns by the media, and especially the opportunity for consumers to deliver their own verdict on polling day, already provide incentive for political parties and campaign groups to steer clear of advertising that may be perceived by some to mislead or offend. Political advertisers overstepping the mark would run the risk of punishment through media criticism, through rival parties capitalising on any 'mistake' and ultimately through rejection at the polls. A further tempering influence will be the longer-term reputational consideration for many parties, although it has been put to us that the risk of damage to reputation may not be a consideration for some short-term campaign groups, particularly participants at referendums.

If electors are unhappy with the tone of political advertising they are well placed to voice that disapproval and withdraw their support for any political party engaging in such behaviour. In this context, self regulation already exists.

The Conservative Party

The restraints which operate upon political parties (e.g. the possible reputational risk if they are involved in controversial advertising) will not apply in a referendum campaign, as many of the participant organisations will be disbanded after the poll; they will not be concerned about possible censure or public disapproval after the votes are counted.

Britain in Europe

2.25 The arguments for and against the principle of a code are strongly disputed – the right to free expression versus what some perceive to be the public interest. However, the principle of a code cannot be viewed in isolation from a consideration of how such a code would be implemented, and that is what we turn to now.

Appendix

Financial Statements for the Year
ended 31 December 2014

2014

MEMORANDUM

Independent Director's Report for 2014

1

Independent Director's Report for 2014

The Independent Director's Report for 2014 is set out in the following table:

At least a part of all the data for each of the years the report covers, the names of the

independently of the Company, or members of the company, concerned in the following manner, namely the names of the

Details and recommendations

1. The Director's Report for 2014 is set out in the following table:
2. For the purpose of providing performance information for 2014, the Director's Report for 2014 is set out in the following table:

The Director's Report for 2014 is set out in the following table:

3 The practicability of a code

The decision to exempt political advertising from the CAP Code was made in large part because of practical difficulties. In our consultation paper we noted that a range of practical issues would need to be addressed if a meaningful code on political advertising were to be feasible.

3.1 In making political advertising exempt from the CAP Code, the CAP and the ASA were concerned that it was inappropriate for the ASA to consider complaints about political advertising. They were also concerned that it was difficult to make adjudications with appropriate timeliness given the relative brevity of a political campaign, and given that the incentives which underpin the CAP system and which ensure a high level of industry buy-in are less potent for political advertisers.

3.2 A clear majority of respondents to our consultation considered that it would not be practicable to implement a code. Although a small majority had been in favour of a code in principle, 67% considered that a code would be unworkable in practice. Others expressed a view that practical difficulties should not preclude work towards a code, if a code was considered appropriate in principle.

Adjudication system

Timeliness

3.3 The system implemented by the ASA in overseeing the CAP Code is an effective one for most forms of advertising. The ASA acts on complaints received only after publication of an advertisement – unlike broadcast advertising, there is no requirement on advertisers to obtain clearance of materials in advance of publication (although the CAP does offer a free and confidential copy advice service to advertisers). Any written complaint about published material that can be dealt with under the Code is investigated by the ASA. The advertiser is provided with an opportunity to

respond to the allegations and the ASA Council considers both the complaint and the advertiser's response. If a complaint is upheld, the advertiser is usually asked to withdraw or amend the advertisement, the media are warned against carrying the material that has breached the Code, and all the ASA adjudications are published.

3.4 We noted in our consultation paper that a system such as that used by the ASA is problematic if applied to political advertising. Because of the short nature and high intensity of an election campaign period, it is likely that adjudications would not be completed before election day. Such adjudications would effectively be rendered meaningless. In addition, because much political advertising is intended to have immediate impact and might be replaced within a short period by the next phase of a campaign, any order to withdraw an advertisement is likely to have little impact. The damage will already have been done, and attendant media publicity is likely to have drawn even greater attention to the offending advertisement which may be to the benefit rather than the detriment of the offending advertiser.

3.5 Respondents to our paper agreed that, if there were to be a code on political advertising, an adjudication system similar to that implemented by the ASA would not be workable.

The practical difficulties in regulating political advertising present serious problems, such as dealing with complaints during the heat of a political campaign or assessing whether a political claim could be substantiated. These are clearly

apparent if the advertisements were to be regulated under the existing code, but our view is that these problems would remain even if a new political advertising code were to be introduced.

Institute of Practitioners in Advertising

Even if it were thought desirable to have a code, it would be well nigh impossible to implement. For a code to have teeth it needs to be enforceable. How could this be so when by the time complaints have been investigated and upheld, the political campaign is over and votes cast?

**Conservative Group,
Arun District Council**

Pre-clearance

3.6 Some have suggested that, because it would be difficult to make timely adjudications once advertising has been published, a pre-clearance requirement would be necessary. Some political parties are concerned that any pre-clearance would compromise the confidentiality of their advertising copy. We do not agree that the confidentiality consideration is a major obstacle to a pre-clearance system. The CAP ensures the confidentiality of copy submitted as part of its copy-advice service, and we note that this service enjoys widespread trust among commercial advertisers for whom confidentiality is also an important concern.

3.7 However, we do not think that a pre-clearance system would be workable. A pre-clearance requirement for political advertising would be a stricter form of regulation than applies to other forms of non-broadcast advertising. The voluntary

nature of any code would mean that it would be difficult to require pre-clearance, and any such requirement might constitute an unacceptable infringement of political expression. In any case, pre-clearance would present very significant practical difficulties given the timeframes that typically apply within an election campaign. Any system of pre-clearance would need to be sensitive to the tight schedules that political parties work to during a campaign and to the copy deadlines applying to the print media. We doubt that it would be practicable to provide clearance within the time period necessary within the context of a political campaign.

Scope

3.8 The greater the scope of any code in terms of the range of materials that were covered, the more the difficulties outlined above would be accentuated. The CAP Code applies to advertisements in printed and electronic materials, including newspapers, magazines, brochures, leaflets, circulars, mailings, fax transmissions, and catalogues. It applies to posters and other promotional media in public places, to cinema and video commercials, and to sales promotions. It also applies to advertising on the internet (for example, pop-up and banner ads) but not to the content of websites except where these contain promotions. Political advertisers use most of these media or materials.

It would seem appropriate to include all forms of advertising.

Birmingham City Council

It does appear that the existing Code primarily intended for commercial advertising cannot be easily applied to political advertising as it is much too broad in scope.

Northern Ireland Human Rights Commission

3.9 The practical implications of attempting to apply a voluntary code on political advertising to the range of media and materials covered by the CAP Code are huge. If a code were to cover as comprehensive a range of media as the CAP Code, including materials used by local canvassers, any compliance monitoring and enforcement mechanisms would require very large levels of resource given the concentration of political advertising activity at the time of an election. We do not think that it would be practicable for any code to apply to this range of materials.

3.10 Furthermore, we doubt that it would be reasonable to place an expectation of compliance with a code on, for example, political campaigners at a grass roots level. Those who produce promotional material and engage in canvassing activity at a local level play a crucial role in a healthy democracy. To expect grass roots campaigners to be familiar with and to adhere to a code on political advertising would be onerous. We are concerned that such an expectation might risk deterring or stifling vital campaign activity and we do not consider that this risk would be outweighed by increased protection to the public, particularly given the difficulties in monitoring compliance with and in enforcing any code.

3.11 If it would be impracticable and inappropriate to extend the scope of any code on political advertising to the full range of media covered by the CAP Code, there might nevertheless be a case for establishing a code that applied to advertising in a limited range of media, or to advertising placed by a limited range of advertisers. For example, a code could be restricted to outdoor media (billboards) and national and regional press advertisements. Alternatively, a code could be restricted to national advertising by a registered party or permitted participant and not apply to advertising undertaken by or on behalf of individual candidates – a distinction already made with respect to spending limits and financial reporting requirements.

3.12 If a code were to apply only to a narrow range of advertising forms that could more easily be monitored, it is likely that those forms of advertising would be those for which greater controls already exist. We have noted above the importance of editorial controls in providing a safeguard against the publication of materials, for example, in print and outdoor media, that might not be in the public interest. Clearly, the value of any code on political advertising would be diminished if it applied only to those forms of advertising.

3.13 In addition, we consider that it would be confusing, particularly for consumers but also for political advertisers, to have different rules applying to different forms of non-broadcast political advertising. In particular, we consider that to apply a code only to certain categories of political advertiser, such as national parties as distinct from local party

branches or individual candidates, would not be helpful for consumers. It is unlikely that the majority of consumers would readily make the distinction between such categories.

Potential for abuse

3.14 Although it might be argued that a code on political advertising would assist in curbing offensive advertising, it is also argued by some that by creating a basis for complaint, a code would increase the potential for controversy. Parties might take advantage of a code by seeking every possible opportunity to appeal against the advertising of opponents. This, of course, is a feature of any code of this nature.

Vindictive complaints by competitors are... an inevitable feature of an effective, free and transparent system. The key test for the adjudicatory body is not the motive of the complainant but the validity of the complaint.

Committee of Advertising Practice

3.15 The Commission is concerned that a regulatory system for political advertising might be more susceptible to spurious claims and allegations than the system for commercial advertising. However, it is difficult to predict the extent to which any code on political advertising might encourage spurious claims. Some have suggested that it is instructive to consider the Code of Conduct intended to promote the ethical behaviour of members of local authorities, parish and town councils, and some other authorities, overseen by the Standards Board for England. The Standards Board receives and investigates allegations of breaches of the Code. In the financial year 2003-4, only 34% of allegations

received by the Standards Board were referred on for investigation, with the majority of allegations – including any considered by the Standards Board to be spurious, politically-motivated allegations – being filtered out. While the Standards Board points out that more than half of all complaints come from the general public, and that their own research has shown no surge in complaints during a period of heightened political tension, there remains a perception, among some political parties in particular, that the small proportion of allegations investigated implies that the system encourages claims that are politically motivated. There is a concern that any code on political advertising would encourage similar claims.

We believe that the likely abuse of the regulation of political advertising would create a constant stream of negative publicity for the whole political process. Such controversy would generate more cynicism amongst the public than would exist without additional regulation.

The Conservative Party

Sanctions

3.16 In order to be effective, any code on political advertising would need to be accompanied by meaningful and proportionate sanctions. Because any such code would be non-statutory, any associated sanctions would also have to be non-statutory. In practice, sanctions would most likely be restricted to those currently applying under the CAP Code, with adverse publicity perhaps being the most significant in a political campaign. There would be no possibility of levying fines, reducing spending limits or

applying any form of electoral sanction, even if such action were considered appropriate or proportionate.

3.17 In addition to adverse publicity that can result from the publication of the ASA adjudications, advertisers who offend against the CAP Code are usually asked to withdraw or amend the advertisement and the media are warned against carrying the offending material. In addition, the ASA can require that a pre-clearance requirement apply to a certain advertiser for a specified period of time. We have already noted that political campaigns are short and advertising themes are typically fast-changing. In this context, it is unlikely to be an effective sanction to require an advertisement to be withdrawn or amended, or to warn media against carrying a certain advertisement. We have also noted that to require pre-clearance of political advertising would not be workable.

3.18 Even the sanction of adverse media publicity may not be a strong deterrent against breach of any code on political advertising. Although negative media publicity might be damaging for most regular commercial advertisers, political advertisers might welcome the higher profile that their campaign would be given through even negative media coverage. Most parties and campaign groups, having considerable financial constraints, will seek to maximise the impact of their advertising through attracting media coverage. A code that relied on media publicity as its principal sanction might therefore in fact provide an incentive, rather than a disincentive, for breaches of that code.

Media publicity is an added bonus to political parties launching a political advertising campaign and in an increasingly competitive market the ability to ‘shock’ will increase.

Plaid Cymru

3.19 As we have noted in section 2.24, the ultimate sanction against political advertising that offends against common standards of decency is provided by the electoral process itself. The intense scrutiny of election campaigns by the media, and especially the opportunity for electors to deliver their own verdict through the ballot, already provide incentives for political parties and campaign groups to steer clear of advertising that is offensive. Political advertisers overstepping the mark would run the risk of punishment through media criticism, through rival parties capitalising on any ‘mistake’ and ultimately through rejection at the polls.

Are the existing disincentives of negative publicity and rejection at the polls sufficient? Yes.

**Cllr Mrs Pat Quinton,
Lancaster City Council**

Independent adjudication

3.20 The ASA is a non-statutory and non-representative body. It was concerned that, because of its status, any rulings on political advertisements within an election period could be construed as inappropriate interference in the electoral process. It was also concerned that perceptions of interference could bring advertising self-regulation into disrepute. The

Commission agrees that it is not appropriate for the ASA to have the role of regulating political advertising. However, were there to be a code with an adjudicatory body, that body would need to be fully independent and have sufficient authority if it were to be able to carry out its role effectively.

3.21 It has been suggested that The Electoral Commission would be the most appropriate body to undertake any adjudicatory role. The Commission is an independent statutory body and already regulates political parties, ‘third party’ campaign groups and permitted participants at referendums. This existing regulatory role is principally with respect to the statutory financial controls.

It is hard to see who other than the Electoral Commission itself would be in a position to adjudicate on breaches of any code for election advertising.

Advertising Standards Authority

We believe the appropriate self-regulatory body is the Electoral Commission. We may need to outsource the expertise but they must hold the ultimate responsibility.

The Liberal Democrats

3.22 We do not consider that it would be appropriate for the Commission to be the arbiter for disputes relating to political advertising. This is principally because of the risk that the Commission’s independence might be compromised or be perceived to be compromised by such a role. To have to adjudicate on controversial advertising within the

heat of an electoral campaign, probably within a very short timeframe, has inherent dangers which it could not accept given the fundamental importance for the Commission of maintaining strict impartiality in all of its areas of work.

3.23 In addition, as a statutory body, the Commission's remit is set out in legislation. We have acknowledged that any code on political advertising could not be a statutory code. We doubt whether to take on an additional, non-statutory function of this nature would be acceptable to Parliament, to whom the Commission is accountable and on whom we are dependent for budget approvals. The adjudicatory role would be likely to be highly resource intensive at election times, requiring significant financial resources that we doubt Parliament would approve.

3.24 The concerns about the threat to the Commission's independence and about the misfit with the Commission's statutory remit extend to any consideration of the Commission establishing a separate committee or panel to undertake an adjudicatory role. It would not in our view be appropriate for the Commission to have a formal role in establishing or convening a panel to oversee a code on political advertising.

3.25 If there were to be a code, we are clear that the content would have to be agreed by political parties and so be a self-regulatory code, in the same way that the advertising industry writes the CAP Code. If it were possible for parties to agree a code, it might also be possible for them to agree a system for monitoring compliance with the code – for example, by inviting individuals

with suitable expertise and standing, to sit on a panel for that purpose.

[There] needs to be a body independent of political parties and the advertising industry – but informed by both. It should include a panel of experts on advertising regulation, political advertising and electoral engagement, drawn from a range of professions.

**Dr Janine Dermody,
University of Gloucestershire**

3.26 However, it remains the case that the potentially resource-intensive nature of the role would present practical difficulties, particularly if such a body were to be able to maintain an effective compliance-monitoring role. The system of financing for the ASA, which oversees the CAP Code, involves a small levy on all expenditure on advertising that is subject to the Code – we doubt whether it is realistic to expect an equivalent system to be acceptable to political advertisers. Any such body could only realistically be financed from public funds.

Level of acceptance

3.27 An important feature of the self-regulatory system for commercial advertising is the wide acceptance of the Code by the advertising and media industries. The system is effective because of this high level of industry buy-in. Indeed, without a high level of acceptance, any self-regulatory system is meaningless to a large extent.

3.28 It is not realistic to expect all political advertisers to agree to adhere to a strictly voluntary code on political advertising, particularly if such a code were to apply to all advertising that is exempt from the CAP Code. There are, at present, more than 300 registered political parties and it is likely that a significant number of additional campaign groups would register with the Commission as permitted participants for any referendum. The exemption also extends to other organisations that might seek through their advertising to influence the outcome of an election or referendum.

3.29 Given that we cannot expect all potential political advertisers to sign up to a code, we have considered the extent of agreement that would be necessary for any code on political advertising to be meaningful. We acknowledged in our consultation paper that only a small proportion of political parties undertake high-profile publicity campaigns, although most would develop some publicity materials that would potentially be subject to any code. We have suggested above that it would not be practicable to monitor compliance with a voluntary code that extended to all forms of advertising, including leaflets produced at a local level. If, in order to be practicable, a code would only apply to higher profile forms of advertising, it would seem reasonable to expect those parties which typically undertake higher profile campaigning to agree to adhere to it in order for the code to be meaningful.

3.30 Only a very small number of political parties commit significant spend to advertising. At the 2001 general election, the first at which

registered parties were required to report on detailed national campaign expenditure, only four parties reported expenditure on advertising of more than £100,000, and only 11 parties reported spending of more than £10,000. It is likely that some campaign groups at regional or national referendums would also commit significant spend to advertising although these groups are not necessarily known at this stage. Overall, however, it is clear that only a small number of political advertisers are likely to run high profile campaigns. We consider that, at a minimum, those political parties that run major advertising campaigns would need to sign up to a code for it to be meaningful.

If the main parties do not sign up, a code is unlikely to prove effective... 'Buy-in' is essential for a code to operate effectively.

Committee of Advertising Practice

It would be vital for at least the major political parties, across the ideological spectrum, at national and regional level to agree such a code for it to be effective not only in terms of regulation but equally in terms of the message sent out to the electorate about what is and is not acceptable in the political arena.

Northern Ireland Human Rights Commission

3.31 From the response to our consultation from political parties, it is clear that there is not this minimum level of support. Although the Liberal Democrats and Plaid Cymru have indicated that they would welcome a code in

principle, there has been silence or resistance from other major parties. In particular, the Labour Party, despite promptings, did not respond to our consultation and the Conservative Party has stated that it would not be willing to commit to adhering to a code. In addition, the SNP and most other parties that might be expected to undertake significant advertising campaigns failed to respond.

The Conservative Party would not support in Parliament any legislative attempt to introduce additional regulation of non-broadcast political advertising. Since we oppose the principle of additional regulation, the Conservative Party would also be unwilling to sign up to and be bound by a voluntary code.

In the context of the Conservative Party being the largest party of local government in Britain and the Official Opposition in Parliament, it would not be viable for a voluntary code to exist without our participation and cross-party consent. As a result, we respectfully submit to the Commission that any proposals for a voluntary code are not workable.

The Conservative Party



4 Conclusions and recommendations

From the outset of our review, we have been clear that the case for a code on political advertising depends both on issues of principle and on practicability. Our conclusions are informed by our consideration of these two areas.

4.1 There is no case for a statutory code on political advertising, especially because of the protection given to free political speech in the European Convention on Human Rights and the Human Rights Act. Such an approach would also be inconsistent with, and would be stricter than, the regulation of other non-broadcast advertising. Any regulation of political advertising would therefore be voluntary.

4.2 Political advertisers have priorities that differ from those of many other advertisers. Even with a voluntary code, it would seem inappropriate and impractical to seek to control misleading or untruthful advertising, given the often complex and subjective nature of political claims. Any requirement that political advertising be truthful, or capable of substantiation, would not be compatible with the nature of much of that advertising and we anticipate that it would be difficult for any enforcement body to adjudicate complaints made on substantiation grounds.

4.3 With respect to political advertising that might offend against common standards of decency, there is a stronger argument that the public interest might be served by a code. The most significant sanction against inappropriate advertising in any electoral contest will be the verdict of the electorate. However, this sanction is only available to members of the electorate and not to others among the public, such as children, who may be equally exposed to political advertising. A code could protect the public against gratuitously offensive or indecent advertising. However, we accept that for many forms of paid-for advertising, existing editorial controls already provide an important check on

material that may be inappropriate for the particular audience in question.

4.4 We recognise that there are competing arguments with respect to the principle of a code. However, there is much greater consensus on the extent of the practical difficulties that would need to be addressed in order for any code on political advertising to be workable. In the view of the Commission, these difficulties are formidable.

4.5 It is not clear how an adjudication system could work in practice, given the particular constraints and sensitivities within the context of a political campaign. We doubt that the ASA system of receiving and considering complaints would deliver sufficiently prompt adjudications and we doubt that it would be acceptable to require pre-clearance of advertising copy. Even if a workable adjudication system could be established, very significant resources would be required to make such a system effective, particularly if the code extended to all forms of political advertising from local to national level.

4.6 We are concerned that a code on political advertising involving adjudication of complaints might be open to frivolous or spurious claims. If there were a significant volume of such claims, the impact could be to delay adjudication of substantive complaints and so to undermine the system. In addition, the only realistic sanction for breach of a code would seem to be adverse publicity and we are not convinced that this would be a sufficient deterrent against breaching the code.

4.7 It is not clear who would act as the arbiter of any code. Were there to be a code with an adjudicatory body, that body would need to be fully independent and have sufficient authority if it were to be able to carry out its role effectively. However, it is not a role that The Electoral Commission would be prepared to assume.

4.8 Given the difficulties that we foresee in establishing a workable adjudication system, we have to conclude that any code on political advertising would have to be entirely self-regulating with no attempts to enforce the code. Any political advertiser that saw merit in undertaking voluntarily to adhere to such a code could do so. To the extent that those undertaking to adhere to the code did so, and to the extent that the electorate and other consumers were made aware of the code and those who had signed up to it, such a code could provide a degree of protection against offensive advertising and could enhance consumer confidence in political advertising. However, the degree of protection and confidence would be dependent on the level of buy-in by political advertisers.

4.9 We have suggested above that for any code to be workable there would need to be a minimum level of acceptance among political advertisers, and that this minimum should constitute agreement among all major political parties which are likely to undertake substantial advertising campaigns. From the response to this review, it is clear that this level of support is not achieved.

4.10 The Neill Committee on Standards in Public Life urged the political parties, in association with the advertising industry, to formulate an agreed code on political advertising. Having considered again the case for a code, it is clear that the difficulties of implementing any such code mean that, to all intents and purposes, it would be impractical. The Electoral Commission therefore concludes that no further progress in this direction is likely to be achieved.

4.11 We do, however, acknowledge the evident desire among many political advertisers, including those which oppose a code on political advertising, to uphold high standards of advertising and to foster public confidence in the political process. While we do not consider that there should be a separate code on political advertising, and although we agree that political advertising should remain exempt from the CAP Code, we recommend that political advertisers undertake to be guided by the CAP Code, and particularly those sections of the code relating to legality, decency, fear and distress, safety, violence and anti-social behaviour. Above all, we urge political advertisers to be guided by the principle in the CAP Code that ‘all marketing communications should be prepared with a sense of responsibility to consumers and society.’

Appendix

Respondents to the consultation paper

Adur District Council
Advertising Standards Authority
The Alliance Party
Anti-Maastricht Alliance
Conservative Group, Arun District Council
Lord Avebury
Ballymena Borough Council
Birmingham City Council
Britain In Europe
Campaign for an Independent Britain
Mr Christopher Chope OBE MP
Committee of Advertising Practice
The Conservative Party
Denbighshire County Council
Dr Jane Dermody, University of Gloucestershire
Dorset County Council
Chief Executive, Dundee City Council
Enfield Council
Baroness Falkender
Gateshead Council
Gloucestershire County Council
Institute of Practitioners in Advertising
Mr Ray Jackson
Mr Andrew Lansley CBE MP
Liberal Democrats
The Liberal Institute
Mr Khalid Mahmood MP
Labour Group, Manchester City Council
The Newspaper Society
Solicitor, North Somerset Council
Northern Ireland Human Rights Commission
Mr Sydney Peen
Lord Phillips of Sudbury
Plaid Cymru
Cllr Pat Quinton
Mr Richard Scullion, Bournemouth University
Sevenoaks District Council
Solace Electoral Matters Panel
South Ribble Borough Council
Stroud District Council
Torfaen County Borough Council
Cllr Peter Webb
West Sussex County Council
Wigan Metropolitan Borough Council
Mr Derek Wyatt MP

The Electoral Commission

We are an independent body that was set up by the UK Parliament. We aim to gain public confidence and encourage people to take part in the democratic process within the UK by modernising the electoral process, promoting public awareness of electoral matters, and regulating political parties.

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