

Written evidence from Dr Jacob Eisler¹ (TEC 14)

Public Administration and Constitutional Affairs Committee The Work of the Electoral Commission

Executive Summary

This paper addresses three topics queried by the Committee:

- *The governance of the Electoral Commission.*
- *Public and political confidence in the impartiality and ability of the Electoral Commission.*
- *The international reputation of and comparators for the UK Electoral Commission.*

In light of the importance of fair and unbiased oversight and enforcement of electoral regulation, this brief emphasises the desirability of ensuring that the leadership and operation of the Electoral Commission (EC) is non-partisan and insulated from political pressures in both reality and perception. Accordingly, the following points are made:

- In order to protect the neutrality of the EC, its leadership must be selected in a manner that is impartial with regards to political party affiliation, and this leadership must be ensured a degree of stable tenure.
- There are two ways of selecting neutral leadership: ‘partisan representation’, in which each major party is given the opportunity to select a Commissioner; and ‘non-partisan selection’, in which the selection of Commissioners itself is politically neutral and prioritises competence and lack of political bias in the selection process.
- The EC relies in part upon procedures of partisan representation. However, the challenges of polarised politics suggest that non-partisan selection may be a preferable method. This is based on an evaluation of the current selection processes of the EC, including through a comparison with the US Federal Election Commission (USFEC).

1. Importance of impartiality in administration of electoral procedure

1.1 Elections act as an intermediary between popular will and the expression of this will through governance by representatives. The rules that shape elections change the behaviour of citizens who wish to see their preferences realized through policies, and of representatives who wish to gain and retain office.² Where electoral rules create reliable linkages between citizens and representatives, it allows for effective and efficient governance. However, where

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² Pippa Norris, *Electoral Engineering: Voting Rules and Political Behavior* 8, 264 (Cambridge University Press, 2012).

the electoral rules become biased towards certain factions and interest groups, it can alienate voters, undermine civic unity, and permanently damage the integrity of democracy.

1.2. Integrity and fairness in the design, monitoring, and implementation of electoral rules – the functions performed by the EC³ – are thus of the highest importance. Political impartiality is especially critical, because manipulation of electoral rules by interested political groups (particularly those who currently hold power) comprises a convenient way to retain power.⁴ Such exploitation of electoral rules by current powerholders erodes the basic accountability of government to the citizenry. Given the capacity of the EC to recommend changes to the electoral structure, monitor elections, and advise political actors, it is essential that the EC epitomize neutrality and absence of partisan interest in its decision-making. In this regard, the EC should seek to avoid, in the discharge of its duties, intersection with political interests, reflecting a neutrality similar to that of the judiciary.⁵

2. Alternatives for ensuring impartiality: neutrality through non-partisan selection; or balance through partisan representation

2.1 To ensure a given institution discharges its duties with appropriate impartiality, there are two main alternatives. The first is to ensure that the process by which the relevant personnel – in the case of the EC, most critically, the Commissioners – are selected by a process that is itself insulated from political pressures. This is the strategy adopted for the selection of judges in England and Wales in the Constitutional Reform Act,⁶ which specifically ascribes power to judicial appointments to a Judicial Appointments Commission comprised of lay persons.⁷ As the personnel have been selected only on the basis of merit and suitability for the role, they presumably do not have any particular partisan interests. If effectively implemented, non-partisan selection identifies personnel whose only goal is the effective discharge of their civic-minded duties, and produces an institutional culture that justifies public confidence in their decisions.

2.2 An alternative means of pursuing impartiality is to balance political factions in selecting personnel. This approach presumes that since each group affected by the institution is represented, this power balance and internal oversight within the institution will yield impartial outcomes. The current composition of the EC incorporates such balancing in the selection of commissioners by including four ‘nominated’ commissioners (selected from the three largest parties and one from all other parties).⁸ The presence of these nominated commissioners is meant to ensure that each ‘stakeholder’ in electoral matters – each prominent political party – has some influence within the EC. These nominated commissioners are accountable to their nominating parties, as reflected in the relevant statutory provisions that exempt them from the requirement of neutrality.⁹ Subsequently,

³ Political Parties, Elections and Referendums Act 2000 ss 5-13.

⁴ John Hart Ely, *Democracy and Distrust* 120 (Harvard University Press, 1981) (‘we cannot trust the ins to decide who stays out’); Samuel Issacharoff and Richard H. Pildes, ‘Politics as Markets: Partisan Lockups of the Democratic Process’, 50 *Stanford Law Review* No. 3, 643-717, 648.

⁵ Jacob Eisler, ‘Partisan Gerrymandering and the Constitutionalization of Statistics’, 68 *Emory Law Journal* No. 6, 979-1035, 1007-1008.

⁶ Constitutional Reform Act 2005, ss 61-94B.

⁷ Constitution Committee, *Twenty-Fifth Report: Judicial Appointments*, Ch. 1, pp. 1-2; Ch. 2, pp. 57 (2012).

⁸ Political Parties, Elections and Referendums Act 2000 s1(3); The Speaker’s Committee, Second Report 2020, Re-appointment of an Electoral Commissioner (21 July 2020).

⁹ Political Parties, Elections and Referendums Act 2000 s1(4A). (‘Paragraphs (a) [requiring a commissioner not

decision-making by the EC incorporates the interests of each major political actor. Given that the remaining EC Commissioners are selected by the politically accountable Speaker's Committee, the composition of the EC leadership is directly determined by those who hold power in government. Such a politically determined body may run the risk of losing public confidence where it should serve only objective public interest, as the leadership of such an institution will inevitably be responsive to the powerholders who selected it.

3. A comparison with the US Federal Election Commission (USFEC)

3.1 In appointing EC commissioners through a process guided by political accountability and giving partisan stakeholders influence in decision-making, the EC operates through institutional balance and accountability, rather than the personal impartiality of commissioners. In this regard it parallels the approach taken by the USFEC, which performs similar functions in the oversight and enforcement of US federal election law. The USFEC likewise is guided by a principle of partisan balance, with a leadership of six commissioners, no more than three of whom may come from any one political party.¹⁰ In practice, this means that three commissioners represent Democrats and three commissioners represent Republicans. The USFEC thus relies on a pure balancing approach, with partisan representation the dominant factor ensuring fairness in federal electoral administration.

3.2 The difficulties that the USFEC has encountered, and the criticisms it has endured, indicate the weaknesses of a balancing approach. The difficulty of finding appointees acceptable to both major parties, combined with the requirement that no party have a majority of USFEC commissioners, often leaves appointments unfilled. At the time of this filing, as well as at times in the past, the USFEC often has three or more of its seats left empty, and is thus incapable of making decisions as a quorate body.¹¹ Many critics have furthermore observed that beyond the problem of filling appointments, because its politicized nature leaves it inclined to deadlock, the USFEC is frequently incapable of effective oversight of elections.¹² Some have gone so far as to suggest electoral regulation would benefit from its abolition.¹³ Much of the USFEC's inefficacy can be traced to its attempt to guarantee political neutrality through partisan balancing.

3.3 The challenges faced by the USFEC suggest that seeking the critical feature of impartiality in electoral administration may be better achieved through non-partisan selection processes, rather than seeking an institution internally balanced among partisan interests. This would suggest that the selection of EC commissioners should be insulated from the political process as much as possible. Currently, in addition to the four commissioners selected explicitly by party affiliation, the remaining commissioners are selected by the politically accountable Speaker's Committee of the House of Commons. Thus the selection of EC

be a member of a registered party] and (d) [requiring no material political affiliation with a registered party] of subsection (4) do not apply to the appointment of a person as a nominated Commissioner".)

¹⁰ Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, Section 310.

¹¹ Melissa M. Smith, 'With the departure of another commissioner, the FEC's main job now is shuffling paper', LSE US Centre Blog, 9 September 2019, available at <https://blogs.lse.ac.uk/usappblog/2019/09/09/with-the-departure-of-another-commissioner-the-fecs-main-job-now-is-shuffling-paper/>; 'Leadership and structure', Federal Election Commission, available at <https://www.fec.gov/about/leadership-and-structure/>.

¹² Trevor Potter, 'A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done', 27 George Mason Law Review No. 2, 483-502 (2020).

¹³ Note, 'Eliminating the FEC: The Best Hope for Campaign Finance Regulation?' 131 Harvard Law Review No. 5, 1421-1442 (2018).

commissioners is guided by a principle of political accountability, rather than institutional independence.

3.4 A variety of alternative means of selecting EC commissioners could rely on political independence to ensure impartiality, with meaningful tenure protections for EC commissioners so independently selected. The critical feature is ensuring that commissioners obtain and hold their positions with meaningful procedural insulation from direct political accountability. The selection process itself should be run by persons who are not explicitly partisan (rather than MPs or their direct affiliates), and should prioritize competence and integrity over political alignment. As suggested above, one possible model for selecting EC commissioners in an impartial manner is the means for selecting judges under the Constitutional Reform Act 2005.

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