

Written evidence from Timothy Straker QC (TEC 05)

Public Administration and Constitutional Affairs Committee

The work of the Electoral Commission inquiry

I submit this document to assist with the work of the Committee considering electoral law and the Electoral Commission.

I shall be brief and make only four points. There is, of course, more I could say and other points that could be made. I understand that a decision still stands to be made as to whether a thorough going review should take place. These observations may assist in reaching that decision.

I am a barrister in independent practice having an acknowledged speciality in electoral law. I have acted in all or the vast majority of important election cases in the past thirty years. My first such case concerned the Liberal Democrat candidate in a European Parliamentary election. I have acted for returning officers, the Director of Public Prosecutions, police forces and the Electoral Commission. I have presented multiple election petitions in the Caribbean. I have lectured and written on electoral law and advise, in the course of any given year, scores of returning officers on the conduct of elections. I have also acted as an election commissioner.

I proceed on the footing the intention is to achieve full, participatory democracy in the United Kingdom. The word 'full' signifies that all should be able to participate. Accordingly, the use of 'participatory' signifies a universal ability to participate.

Certain principles are clear if that intention is to be fulfilled.

First, participation cannot depend on permission by an organisation, however well-meaning that organisation may be. In that regard please note that a fundamental error by the Electoral Commission was judicially exposed a little under a year ago. The error was that the Commission supposed that participation in the EU referendum depended on registration with it as to which it contended it had a discretion. However, as the judge made clear (E40CL216, HHJ Dight CBE) all that was required was notification.

Second, that any organisation charged with running an election should do so on the basis that it is operating a set of openly available rules with no scope for discretionary action, save in remarkably limited circumstances, on its part. This avoids any possibility of even the perception of bias, sub-conscious or otherwise. In this regard please note that the Electoral Commission does not run or regulate elections, they are run locally by independent returning officers. This has been the case for well over a hundred and fifty years. Local returning officers have the highest reputation and are able to deploy, which is important, local knowledge. The Commission does not have that knowledge and, moreover, generally proceeds on the footing that it has discretion as to how it acts.

Third, finance is undoubtedly best dealt with by being referenced to elections, which are local. Such remains the position even in the case of a general election. Further, finance is best dealt with by speedy, local reporting with it then being a question for any opposing candidate or the police as to whether any prosecution should be brought. This has been the position for well over 150 years. Such an approach avoids difficulties (and injustices) exposed in the last year in respect of the Commission and the EU referendum.

Thus, expedition is required so as to secure early resolution about the election, if in any way it is questioned. It is difficult to balance the Commission's approach, which even today is keeping alive cases under the EU referendum, with that desideratum (or with the legislative requirement that the EU referendum could only be challenged within 6 weeks after the result was announced). It is also difficult to balance the desirable approach with that followed by the Commission which was not to act as the person to whom a report was made but also to judge the character of that report, whether or not anybody else did so.

This led to a grave injustice exposed by HHJ Dight CBE but not rectified by the Commission. He records the Commission's approach that if a participant, whether for the avoidance of doubt or otherwise, in reporting his expenses reported something that on analysis was not an expense then even though he had accurately and fully set out all his expenses he was still to be penalised.

HHJ Dight CBE was able to remedy the matter in the case (Grimes) before him but the Commission have not rectified the matter elsewhere (and consequently have levied penalties on a legally insupportable basis). It has to be remembered that this would not have happened if the Commission did not have the functions of 'judge and jury' but merely recorded what was reported leaving it to others to assert (the defective proposition) that reciting all your expenses and one that was not was a failure to record your expenses.

Fourth, as stated above the Electoral Commission does not run elections. The only contribution the Commission makes to the running of elections is a list of political parties and a record of party finance. Indeed on analysis these are, given elections are (and have to be) run locally, the

only possible contributions the Commission could make. However, it should not be supposed the existence of the Commission is necessary for their fulfilment. The requirement to register names of political parties can be traced to the *Literal Democrat* case and the legislative requirement that followed for a register to be kept at Companies House. It was; no complaint was ever made about it. The record of party finance could also be recorded elsewhere, especially if it be accepted that the purpose of the record is exposure. Accuracy is ensured by the willingness of others to question a list if there be any doubt about it. (This has the great benefit of removing an otherwise invidious task in choosing to pursue party A rather than party B).

I trust the preceding points are of interest to the Committee. I should add that long experience has taught me that unobtrusive, non-discretionary conduct of elections by returning officers, whose independence is given by statute, is undoubtedly the best way to operate elections. There are other matters that contribute to their integrity such as the minimisation of absent voting but there is an ultimate dependence on the returning officer system, as refined, that has served the United Kingdom well for over 150 years.

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