

ESTABLISHING AN ELECTORAL COMMISSION

Although elections in the United Kingdom are free and fairly conducted, the rules governing their administration and conduct are dated and inefficient. Labour and the Liberal Democrats have proposed establishing an electoral commission as a key element in the reform of our electoral framework. This briefing examines the role and functions, and the process of establishing an electoral commission.

Attitudes to the Existing Framework

Concern about the current electoral framework is shared by all three main parties. The previous Home Secretary confirmed his intention towards the end of the last Parliament to conduct a review of the rules under which the Boundary Commissions work (House of Commons Debate, 23 January 1997); and in evidence to the Hansard Society Commission, the Conservative Party supported changes to the rules on local expenditure limits. In the report of their Joint Consultative Committee on Constitutional Reform, the Labour Party and Liberal Democrats expressed concern at the lack of progress which has been made in respect of reforms and improvements to the processes of electoral registration and voting procedures and agreed to examine what independent machinery may be desirable.

The Labour Party's Working Party on Electoral Systems, chaired by Lord Plant, considered wide-ranging reform of current electoral arrangements in its 1993 report, including a rolling register, improved provision for absent voting and the need for national limits on election expenditure; and a commitment to establish an electoral commission was included in the Party's 1993 document, *A New Agenda for Democracy*. This commitment was referred to in Labour's proposals for determining boundaries for regional government (*A New Voice for England's Regions*, October 1996). The Liberal Democrats have focused their attention on a fundamental change in the voting system for the House of Commons, but have also expressed support for the establishment of an electoral commission, a rolling register and fixed term Parliaments (*Here We Stand: Proposals for Modernising Britain's Democracy*, September 1993).

The Hansard Society Commission on Electoral Campaigns covered much of this ground in its report in 1991 and since then several academic studies have explored these issues in more detail and there have been a number of

Parliamentary debates on the subject. The key recommendation to emerge has been the establishment of an electoral commission. An electoral commission would not in itself resolve the concerns expressed about the current electoral framework, but its advocates believe it would strengthen the framework and provide a vehicle for the development of more detailed reforms.

Role and Functions

A permanent electoral commission exists in most other Westminster-style democracies. Such a commission typically has responsibility for the administration and conduct of elections and referendums. Proponents of an electoral commission have argued that it should take on all aspects of electoral administration currently the responsibility of the Home Office, Scottish Office, Northern Ireland Office and the four Boundary Commissions. It has also been suggested that an electoral commission should have a 'watchdog' role, providing a first point of access for any individual or party wishing to raise concerns about any aspect of electoral administration, including allegations of illegal practices. Less clear is how much responsibility an Electoral Commission should take for the staff involved in electoral registration (currently local authority officers) and the practical administration of elections and/or provide ring-fenced funding for these activities.

Co-ordination, Supervision and Administration

Under current arrangements, the Home Secretary, Scottish Secretary and Northern Ireland Secretary have a supervisory role in respect of elections and are responsible for reviewing electoral machinery and recommending any changes in legislation. Advocates of an electoral commission argue that it would provide a mechanism for ongoing review of electoral practice which is not pursued with sufficient vigour at the moment. As an independent body it could be openly critical of any existing failings in electoral administration and more active in promoting improved standards, putting forward proposals for improvements to current practice on the basis of past experience and international best practice.

The role of an independent electoral commission may be particularly important in the context of significant changes to the voting system. These include the possible introduction of proportional representation for elections to the House of Commons, for elections for the European Parliament, and for the new Scottish Parliament and a Welsh assembly. It could also play a central role in the conduct of referendums themselves, which all parties include amongst their current policy proposals. The need for an independent statutory commission with responsibility for the administration and conduct of referendums was a key recommendation of the recent report of the independent Commission on the Conduct of Referendums. Similarly, if moves are made to limit national expenditure by political parties and/or to monitor party funding more closely (or even to provide state funds for political parties), a body independent from the Government would be necessary to take responsibility for monitoring compliance.

In England, Wales and Scotland, electoral registration and the actual conduct of elections are the responsibility of local authority electoral registration officers and returning officers. In evidence to the Hansard Society Commission, the Association of Electoral Administrators argued that local authority responsibility for electoral registration makes differences in standards inevitable. Responsibility for a national electoral registration service is therefore one of the functions which has been proposed for an electoral commission. It is, however, unlikely that this would entail the transfer of current electoral registration staff to a national agency. A more practical approach would be for an electoral commission to have a closer supervisory role than currently undertaken by government departments: key roles of an electoral commission could be public education relating to elections and electoral registration and the provision of improved training and support for registration and returning officers. In addition, the funding provided to local authorities for electoral registration could be clearly ring-fenced. Returning officers are also likely to continue to be drawn from local authority staff. Again greater consistency and improved standards could be achieved through a closer supervisory and support role by an electoral commission.

In Northern Ireland the roles of both electoral registration officer and returning officer are carried out by a chief electoral officer, who is an independent Crown official. These arrangements work well. Although it may be impractical to transfer this approach to the rest of the UK, there seems to be little point in bringing Northern Ireland into line with the rest of the UK purely for the sake of consistency.

Even if all of the current Home Office electoral responsibilities were transferred to an electoral commission, the commission would need to retain some link with a government department which had a residual responsibility for elections. Any changes to electoral law proposed by an electoral commission would still need a Minister to support and introduce the legislation: to secure a legislative slot and to steer the legislation through Parliament. Some technical changes might be achieved through secondary legislation and could be non-controversial; or, if they require primary legislation, they might sometimes follow the streamlined practice adopted for Law Commission bills. Measures which will have any impact on Parliamentary constituencies will, however, continue to be controversial, as will any provisions relating to election campaigns and expenses.

Any controversy surrounding changes to the electoral system may be reduced if proposals originate from an independent body rather than from the Government, but they will still need strong backing from the Government to get through Parliament. It would be unrealistic to force the Government to support legislation proposed by an electoral commission, but procedures could be put in place to ensure that Parliament is made aware of recommendations by the commission. The Home Secretary is currently required to place the recommendations of the Boundary Commissions before Parliament and it would be possible to require similar treatment for advice given by an electoral commission.

There may be a case for the residual responsibility for electoral matters to be moved from the Home Office to the Cabinet Office, particularly if other constitutional functions are gathered there. These might include responsibility for referendums generally, including the referendum on reform of the electoral system. The Ministerial lead could shift to the Leader of the House, whose role is less partisan than other members of the Government because of the need to work across the party divide in managing the business of the House.

Boundary Reviews

The revision of constituency boundaries for Parliamentary and European elections is currently the responsibility of four Boundary Commissions, covering England, Northern Ireland, Scotland and Wales. Each Commission is nominally chaired by the Speaker of the House of Commons, although the Speaker does not play an active part in their deliberations. In addition, each commission has three part-time members: the deputy chairman must be a High Court judge (or a Court of Session judge in Scotland) and for the English and Welsh Commissions is appointed by the Lord Chancellor, for the Scottish Commission is appointed by the Lord President and for Northern Ireland is appointed by the Lord Chief Justice; the other members are appointed by the Government in consultation with the opposition parties.

The Commissions are staffed by a small number of civil service secondees, with public inquiries being led by Assistant Commissioners who are appointed by the relevant Secretary of State. The Commissions conduct a general review of all boundaries every eight to twelve years, but can also recommend interim changes to be put into effect at the next general election. The Commissions submit their recommendations to the relevant Secretary of State, who must put them before Parliament for approval. There is *ad hoc* co-ordination between the Commissions, but the Scottish Commission works to different statutory guidelines.

There is concern across the political spectrum about the way in which the Boundary Commissions currently work. Particular points of concern have been the seemingly inevitable increase in MPs as a result of each review and the relative over-representation of Scotland, Wales and London. Furthermore, in comparison with similar exercises overseas, the Commissions' work has tended to be enormously time consuming (the Boundary Commission for England's Fourth Review started in February 1991 and was not completed until April 1995). This has resulted in two key proposals for change:

- The rules governing the Boundary Commissions' reviews should be revised.
- The four existing Commissions should be merged into a single UK electoral commission.

The Commissions currently follow rules set out in the Parliamentary Constituencies Act 1986, which specify that they should as far as possible create constituencies of approximately equal electorates. The rules set out a number of other considerations to be taken into account, such as local government boundaries, local ties and

geographical factors. It is impossible to avoid some contradiction between these considerations, and part of the Commissions' task is to try to reconcile these often conflicting aims.

Population distribution and geography ensure that there will always be a need for some degree of compromise, but despite a rule which states that the number of constituencies in Great Britain shall not be substantially greater or less than 613, there has been an inexorable increase in the number of MPs after each review. In 1950 there were 625 MPs; in 1955, 630; in 1974, 635; in 1983, 650; and, in 1997, there are 659 MPs.

The relative over-representation of Scotland and Wales results as much from historical anomaly as from any conscious policy decision, although it is exacerbated by the way in which the Boundary Commissions' rules are interpreted. The Redistribution Act 1944 fixed the minimum number of Scottish seats at 71 and Welsh seats at 35. In the new Parliament there are 72 Scottish seats and 40 Welsh ones. This produces an average of 55,043 electors per Scottish seat, 54,047 electors per Welsh seat and 69,238 electors per English seat. Any review of the redistribution of Parliamentary seats, or a merger of the Boundary Commissions, will produce calls for the distribution of seats to be re-examined. With devolution back on the political agenda, the number of Scottish and Welsh MPs will, in any case, become a matter of sharper political controversy.

The work of the Boundary Commissions is further complicated by the need to take into account the work of the Local Government Commissions which review local authority boundaries and wards. The Boundary Commissions' Fourth Reviews were based on existing local authority structures, even though changes to local government boundaries were being reviewed at the same time. This made it inevitable that there would be a poor fit between the new local authority and constituency boundaries. The final recommendations of the Local Government Commissions were not available in time for the Boundary Commissions to take them into account, and the Local Government Commissions were under no obligation to consider the use of wards in defining Parliamentary constituencies when producing their recommendations. Unless some steps are taken to co-ordinate the two processes (as was undertaken in Northern Ireland prior to the Fourth Review and is now the practice in Scotland) mis-matches will be difficult to avoid.

The merger of the four existing Boundary Commissions into a UK-wide electoral commission, operating under a single set of rules, should help to ensure a consistent interpretation of the rules across the UK and improve co-ordination. There is also a case for incorporating the Local Government Commissions' responsibilities into those of an electoral commission to ensure co-ordination of boundaries at all levels. Placing responsibility for all boundary reviews in a single body with shared resources and a proactive remit may also speed up reviews.

It would be possible to introduce a single set of rules, a more consistent approach between the different Commissions and changes to the rules to prevent a continuing increase in the number of MPs, without establishing an electoral commission; but revising the rules would itself require primary legislation. Similarly, any

reduction in the number of constituencies in Scotland and Wales requires a review of the statutory framework within which the Boundary Commissions work and, although it does not in itself point to a change in the institutional framework of the Commissions, there may be a cumulative case for an electoral commission which would support including these changes in legislation establishing an electoral commission.

Territorial Structure

Any merger of the existing Boundary Commissions needs to retain a territorial structure: because reviews are best conducted by experts with an understanding of the local political geography; and because Scotland, Wales and Northern Ireland may have devolved assemblies with different electoral systems. The Constitution Unit's reports on a Scottish parliament and Welsh assembly suggested that responsibility for those electoral systems should remain with Westminster. Even if this recommendation is not accepted, there is a strong case for having a single UK electoral commission to ensure uniformity in the elections for Westminster and the European Parliament, and to ensure that the building blocks for elections at every level so far as possible coincide, strengthening and not dividing political communities.

Both of these criteria could be met by making boundary reviews primarily the responsibility of national electoral commissioners, with final approval being made at a UK level by commissioners from all four constituent nations of the UK and chaired by a UK electoral commissioner. Each commissioner should have the power to appoint a national panel; and to appoint assistant commissioners to conduct boundary inquiries, as the Boundary commissioners currently can. In addition to primary responsibility for boundary reviews, the national commissioners should be responsible for sub-national referendums, for elections to the devolved assemblies and for local elections. Under the additional member system of elections proposed for both the Scottish parliament and Welsh assembly, regional returning officers will be required to distribute the additional seats allocated proportionally: their work could be supported and supervised by the Scottish and Welsh electoral commissioners.

Election Watchdog

Under current legislation any disputes arising from general election campaigns are decided by an Election Court made up of two judges of the Queen's Bench Division of the High Court. The judgement of the Election Court takes the form of a report to the Speaker which the House of Commons is bound to act upon (Representation of the People Act 1983). This process has been used very rarely since the 1930s and has been criticised as being both complex and costly. It has been suggested that while an electoral commission would not replace the role of an Election Court, it could provide a means by which political parties and the electorate could register their complaints and concerns, and that it could have responsibility for investigating complaints as appropriate, and at no charge to the complainant. This could lead to a significant increase in the number of complaints. The

commission would need power to screen out frivolous or vexatious complaints, and to refer to an Election Court difficult points of election law, or serious cases where it appears the result should be annulled and a fresh election ordered.

Further work needs to be done on the respective roles of returning officers, the electoral commission and the court in investigating petitions and complaints (in particular on whether the commission should have enforcement powers); but the ombudsman-type role of investigating complaints is one performed by electoral commissions overseas, and with suitable adaptation should be capable of introduction in the UK.

Setting up an Electoral Commission

The independence of an electoral commission will be crucial to its successful operation. Its independence must therefore be clearly signalled and protected in its structure and organization. A commission must also be accountable for its performance and ensure that its activities are transparent and open to scrutiny. The general principles informing the governance framework of an electoral commission are considered in the briefing on *Constitutional Watchdogs*. Key factors such as the mechanisms by which it is held to account, the nature of its membership and the means by which it is funded are considered below.

Accountability and Independence

An electoral commission should be independent of any government department and accountable to Parliament to ensure that it is as far as possible protected from political influence. The Boundary Commissions are currently chaired by the Speaker. However, the Speaker plays no part in the proceedings of the Boundary Commissions and the Speaker's nominal role as chair makes it difficult for MPs to criticise the work or methods of the Commissions. It would be better to achieve accountability to Parliament through a select committee. This could be done through a committee created specifically to oversee the electoral commission. This would, however, break with the current departmental structure of committees and could be seen as leading to a proliferation of new committees in the House of Commons.

The development of other 'constitutional commissions' may make it appropriate for a new committee to be created to provide them with a framework for Parliamentary accountability. Given current arrangements, an existing departmental committee may be the most realistic option: if responsibility for electoral law was retained by the Home Office, it would be sensible for the electoral commission to report to the Home Affairs Select Committee; if responsibility were to be moved to the Cabinet Office, it should report to the Public Service Committee.

In addition to this formal line of accountability, an electoral commission should give a wider account to other stakeholders and to the public. This would include ensuring transparency in its actions—by, for example, publishing annual reports and accounts—and engaging in consultation both in relation to boundary reviews and on the wider issues covered by its remit.

Membership

The independence of the electoral commission will be judged by a number of factors, including the method of appointment and the background of the members. The requirement that the deputy chairman of the Boundary Commissions should be a High Court judge has meant that their independence has not been brought into question. If membership were to be extended in order to bring a wider range of expertise into an electoral commission, political bias could become an issue. The involvement of Parliament and the opposition parties could provide a safeguard. Members should be appointed through a motion of the Prime Minister in the House of Commons following consultation with the Opposition—as is the case with the Comptroller and Auditor General. Security of tenure could also help to safeguard the commissioners' independence. Commissioners should be appointed on a fixed-term basis with provision for renewal. Provision would also be necessary to cover dismissal on grounds of misconduct, or inability to perform duties; with protection similar to that applying to the judiciary.

Funding and Costs

The Boundary Commissions are currently funded out of the relevant departmental vote, but are not cash limited. Such an arrangement is increasingly anomalous and cannot endure. To underline an electoral commission's independence its budget should come from the Consolidated Fund, as does the budget of the National Audit Office. An electoral commission should as far as possible have to live within a set budget, but the budget will fluctuate depending on the cycle of boundary reviews and the volume of local inquiries. If the latter continue to be unpredictable it may prove impossible to introduce a cash limited budget. The electoral commission should submit annual budget plans and report on previous expenditure to a Parliamentary committee.

Our current electoral arrangements are run relatively cheaply and the establishment of a more effective electoral commission may lead to some increase in cost. Precisely how much is difficult to quantify because it will depend on the commission's range of functions and on the division of expenditure between the commission and local authorities. The greatest area of potentially open-ended expenditure, more intensive voter registration, is a local authority function and likely to remain so.

Other functions will be transferred from the Boundary Commissions and from the Home Office with their existing budgets. The budget of the Boundary Commissions for England and Wales in 1997-98 is around £1.6M, and the five staff in the Elections Section of the Home Office £184,000. The Boundary Commissions have a small permanent staff seconded from the Office for National Statistics, and take on extra staff according to the fluctuating workload involved in boundary reviews. The electoral commission would need a core permanent staff but would need to recruit temporary staff to meet the demands of periodic reviews. The cost and duration of these reviews depends heavily on local inquiries, which have been criticised for providing cumbersome and artificial opportunities for special pleading by the parties, who will already have submitted evidence to the review. Consideration should be given to ending local inquiries, or at least streamlining their procedures (for example by requiring that all evidence be submitted prior to an inquiry); if achievable this could greatly speed up boundary reviews as well as reducing their cost.

Timescale

Establishing an electoral commission would require legislation. A purely advisory body could be established without legislation, but its functions would be limited. For an electoral commission to supervise the administration of elections, to increase voter registration, to conduct boundary reviews or investigate complaints requires legislation. The legislation need not confer all these functions on an electoral commission at once. It may make sense to establish the electoral commission initially as a slimline body and to build up its functions gradually.

Under a Labour Government, referendums may provide the key. It is unlikely that a full electoral commission will be established in time to supervise the proposed referendums in Scotland and Wales. But electoral commissioners could be appointed in Scotland and Wales, initially to supervise the referendum; and then to supervise the first elections to the Scottish parliament and the Welsh assembly. These commissioners could in due course become members of an electoral commission.

When might legislation be needed to establish an electoral commission? The case for an electoral commission is particularly strong in relation to the proposed referendum on electoral reform. This will require a considerable educational role about the effects of the alternative electoral systems, and could result in the need for a fundamental reorganization of Parliamentary constituencies. If any change resulting from a referendum is to be implemented prior to the next general election, the referendum will need to be held, at the latest, in 1999. If an electoral commission is to take the lead in overseeing the referendum and implementing any consequent boundary changes, legislation will need to be introduced at the latest in the 1998-99 Session (see the Constitution Unit's companion briefing, *Changing the Electoral System*).

It would thus be possible to build up the functions of an electoral commission gradually: starting with electoral commissioners responsible for the devolution referendums (appointed in the Scotland and Wales referendums legislation) and then with supervising the elections to the devolved assemblies (authorised in the devolution legislation). If necessary, commissioners could also be appointed to supervise early referendums on a single currency and a strategic authority for London. Legislation establishing a full electoral commission would then be passed in time for the referendum on electoral reform.

If the electoral commission is to be robust and independent it will in any case need a solid statutory basis. Bringing together all of the functions proposed for an electoral commission in a single piece of legislation need not represent as great an upheaval as appears at first glance: for example the transfer of responsibility for boundary reviews to an electoral commission would have little immediate effect. The next full review of Parliamentary constituencies is not due to start for another five to ten years. The degree of change involved in legislating for an electoral commission will also depend on whether it is used as an opportunity for more detailed reform of electoral law, for example the introduction of restrictions on election expenditure, or a rolling register. Some of these changes may benefit by preparatory work being done by an electoral commission as part of its general remit to review and update electoral law. Parliament may feel more confident about such changes if they have been carefully scrutinized by an independent body which has engaged in the necessary consultation and thought through the practical implications.

One solution might be to confer a power on the electoral commission to review electoral law and recommend changes, and empower the Government to make changes through secondary legislation subject to the affirmative resolution procedure. Changes to provisions for absent voting would, for example, be suitable for secondary legislation. Other reforms, such as national restrictions on election expenditure, will clearly need to be in primary legislation. There is a case for including any such major reforms in the legislation for an electoral commission: as our 19th-century arrangements show, the opportunities for primary legislation on electoral law will continue to be relatively rare.