

Classification: Unprotected

Commission Board: 23 March 2011

Agenda Item no.3 (b)

Minutes of the meeting of the Electoral Commission held on Wednesday 23 February 2011 at 9.30am

Present: Jenny Watson (JW) Chair
Baroness Browning (AB)
Max Caller (MC)
David Howarth (DH)
Ian Kelsall (IK)
John McCormick (JMcC)
Rt Hon George Reid (GR)
Tony Hobman (TH)
Lord Kennedy of Southwark (RK)

In attendance: Peter Wardle (PW)
Clare Ettinghausen (CE)
Lisa Klein (LK)
Andrew Scallan
Bob Posner (BP)
Kairen Zonena (KZ)
Joel Blackwell (JB)

Owen Williams (OW) – for items 4-6
Natalie Birtle (NB) – for item 6
Dan Adamson (DA) – for item 6
Elizabeth Morrow (EM) – for item 6
Rupert Grist (RG) – for item 6
Louisa Parry (LP) – for item 7

1 Apologies

Apologies for absence were received from Henrietta Campbell, Alex Robertson and Carolyn Hughes.

2 Declaration of Interests

- 2.1 JW declared to the Board that from 1996 to 1998 she was employed by Charter88, an organisation which no longer existed but which at the time campaigned for constitutional change, including electoral reform. She was initially employed as a Press Officer and towards the end of 1997 became the Campaign and Communications Manager. She was not the principal spokesperson for the organisation, but might on occasion have been quoted in a professional capacity on this issue. Since leaving the organisation she had had no personal involvement in any campaign for electoral reform. The Chair also declared that the Welsh arm of Charter88 was part of the 'yes' campaign during the last Welsh referendum in 1997.
- 2.2 GR declared that he had moved a motion in the House of Commons in 1970 to adopt the Alternative Vote (AV), had been Director of the 'Yes' campaigns for electoral reform, and had fought six elections on a platform which included support for electoral reform.
- 2.3 DH had spoken and voted in favour of AV in the House of Commons in April 2010 and had frequently spoken and voted against First Past The Post (FPTP). He had fought four general elections on platforms that opposed FPTP.
- 2.4 RK declared that he was a member of the political party which had called the referendum on Welsh devolution in 1997. He also declared that he sat in the House of Lords and took the Labour Whip.
- 2.5 IK declared that he had been Director for CBI Wales during the 1979 Wales Referendum and that CBI Wales had supported the 'no' campaign. CBI Wales had also supported Proportional Representation (PR) and, in his capacity as Director, IK had made public statements in favour of PR.
- 2.6 AB declared that she sat in the House of Lords and took the Conservative Whip. During public debates in the 1980s she had supported FPTP, and had fought five general elections on a platform which included support for FPTP, and from 1992 to 2010 as a Conservative Member of Parliament voted with the Conservative Party in supporting FPTP. In 2000, as Shadow Leader of the House of Commons, she was responsible for leading the Commons in the final stages of the debate on the Political Parties, Elections and Referendums Act 2000.
- 2.7 It was agreed that none of these declarations made withdrawal from discussion or decision necessary.

- 3a Minutes of the Commission Board meetings of 19 January, 25 January and 1 February 2011 (EC 13/11, EC 14/11, EC 15/11)
- 3.1 In relation to minute 2.4 of the 25 January meeting, AB asked for an amendment to note that it was the Secretary of State for Wales and not the Minister of Wales who was personally known to her.
- 3.2 It was agreed that minute 4.12 of the 25 January meeting be amended to reflect the fact that a discussion had taken place on the risks associated with placing party political material on the Commission's website and that although concerns had been raised, it was agreed that Option B should proceed and Option C be given further thought.
- 3.3 It was agreed that the Board's decision by email correspondence to the draft regulations for referendum fees and charges be recorded as a separate minute.

Agreed: That;

- (a) the minutes of the meetings of 19 January and 1 February 2011 be approved as a correct record and the Chair be authorised to sign them;
- (b) subject to the two amendments above, the minutes of the meeting on 25 January 2011 be approved as a correct record and the Chair be authorised to sign them; and
- (c) a separate minute be drafted to record the Board's agreement by email correspondence to the making of regulations for referendum fees and charges.

3b Decision/Action tracker (EC 16/11)

Noted.

4 Update from Chief Executive for February (EC 17/11)

- 4.1 PW highlighted key aspects and added a number of other points which had arisen since the report had been produced, as follows:
- **Guidance for candidates and agents at May 2011 elections** (Para 1.2) – Following a useful Westminster Parliamentary Parties Panel meeting, a further discussion was scheduled for later in the year on the possibility of bringing forward the Commission's timetable for producing

guidance in the run up to future elections to align it with the parties' election preparations. For this set of elections, for example, the parties said they would have found it useful to have had guidance by the end of 2010, ie earlier than currently produced. It was noted, however, that some of the guidance was contingent on rules and administrative arrangements not usually clarified by Parliament until relatively late in the run-up to the polls. The views of the Scottish, Welsh and Northern Irish Political Parties Panels would also be sought. It was noted that a similar issue was likely to arise for guidance in relation to elections taking place as a result of the Police and Social Responsibility Bill, many of the practical consequences of which had yet to be tackled by the various government departments involved.

- **PEF Online** (Para 1.5) – The follow up to the Gateway 4 review had concluded that the status of the project was 'green' and, as a result, a system launch date of 10 March had been agreed. PW confirmed that a full review of the PEF Online project would take place once the system has been implemented and it was agreed that the next Chief Executive's update would include a note on how the review would unfold. Commissioners also asked that a note of the breakdown of the project costs over the life-time of the project be provided.
- **Wales referendum** (Para 2.1) – Staff and Commissioners would not be participating in an electoral observation exercise on 3 March as the Commission plays a different role in the running of referendums. No-one had applied yet to be an independent observer for the Wales referendum, although there might be some applications between now and 3 March, and it was noted that the issue would be logged in relation to the UK PVS referendum on 5 May.
- **National Audit Office (NAO) Value for money (vfm) report** (Para 3.1) - The latest draft of the vfm report had considered and incorporated a number of the issues highlighted by the Commission's Executive Team and would be considered by the Speaker's Committee on 16 March. The report would be published with the minutes of the Speaker's Committee meeting.
- **PEF cases** - LK provided an update on a current case involving a third party. The case highlighted the broader issues surrounding the regulation of third parties and had provided a robust test case for future cases of that nature. It was noted that we would monitor whether the legislation remained fit for purpose in the light of the growth in digital media. LK was asked to ensure that the principles and precedents established during decision-making in these cases were collected and accessible for reference and review.

4.2 GR brought to the Board's attention an issue regarding the use of the Scottish Parliament communication allowance during the 'long campaign' period. LK outlined how this had been dealt with by staff in Edinburgh and London. GR and JMc agreed that some follow-up

action with stakeholders may be necessary and this would be discussed with Andy O'Neil in due course.

Agreed: That:

- (a) the next Chief Executive's update include a note on how the full review of the PEF online project would unfold and a note outlining the costs of the project and how they had developed during the life of the project;
- (b) the issue of independent observers for the UK PVS referendum on 5 May be logged for further consideration by the planning group;
- (c) a system be devised for recording any principles and precedents established during PEF case decision-making;
- (d) the issue raised in relation to the Scottish Parliament and the regulated period be logged for 5 May, and further communications work be undertaken to ensure that stakeholders were clear about the Commission's position.

5 Chief Counting Officer decision-making: Wales referendum 3 March 2011 and proposed UK-wide referendum 5 May 2011 (EC 18/11)

- 5.1 It was noted that a decision had been made not to provide explanatory information in polling stations about the voting systems referred to in the UK PVS referendum question. However, polling station staff would be issued with 'Frequently Asked Questions' to assist them in answering questions on the day.
- 5.2 In relation to the instruction that there was to be a maximum of 2,500 electors per polling station, Commissioners were informed of the ways in which the Commission would ensure that the message reached Local Authorities. It was noted that Local Authorities could apply for an exception to the direction, although a sufficient explanation as to why an exception should be granted would be required.

Noted

6 Regulatory decision-making for PEF casework (EC 19/11)

- 6.1 JW set out some of the background that led to the decision to review regulatory decision-making at the Electoral Commission, and advised that she had suggested to staff the paper's approach and starting point.
- 6.2 LK then gave a brief outline of the history of regulatory decision-making since 2007.

- 6.3 A discussion took place on the Board's future role in regulatory decision-making. Commissioners considered the various decision-making models used by other regulatory bodies and their relative merits within the context of the Commission's new set of powers and sanctions. (A copy of 'The Electoral Commission's approach to enforcement' was tabled.) During discussion points raised included:
- Transparency of decision-making was essential (being clear where and by whom decisions were taken)
 - How could the Board gain the knowledge and experience necessary to continue refining principles and culture if all regulatory decision-making was delegated?
 - The 'approach to enforcement' set out high-level policies (including education and proportionality) but mid-level principles could be established, with tools (systems for recording precedent) and clear delegations and escalation processes
 - Regulation was affected by the context and culture of who was regulated
 - scrutiny and oversight could be as important in shaping regulatory culture as decision making itself
- 6.4 JW read an email from HC setting out her views on the issue (that cases should be decided by staff on the basis of principles laid down by the Board). Commissioners with previous experience in a regulatory environment contributed examples from their own backgrounds. Thought was given to inviting Board members from other regulators to share their experiences at a future date.
- 6.5 It was noted in response to a question that the new enforcement powers included a right for the other side to be heard, and a right of appeal to the County Court, which would be a re-hearing of the case.
- 6.6 Other points made included the need for consistency; handling and presentation might always be a matter for the Board; the need to know the views of the regulated community in relation to the principles, practice and delegation; and, any system would need to be developed through discussion and external input.

Agreed: That, in preparation for the Board's next consideration of regulatory decision-making in July:-

- (a) all models be kept open
- (b) external input be sought by inviting other regulators (directors, Chairs, Board members and non-executive directors) to participate in a workshop on their experiences of regulation;
- (c) The principles of advice and guidance, consistency, proportionality, and transparency and clarity to the regulated community, within a

- culture of applying the law in a practical and common-sense way, be the subject of a separate session on principles; and
- (d) Further work be done on developing a more rigorous and systematic process for deciding what comes to Board in terms of monitoring, scrutiny and audit of how regulation in this area takes place.

7 Performance, risk and finance report – quarter three (EC 20/11)

- 7.1 LP introduced the report and drew the Board's attention to changes made to the risk summary following the last review. Commissioners welcomed the report and the progress which had been made.
- 7.2 Commissioners were informed of the factors that contributed to the year-end forecast underspend and noted that the non-recurring nature of some aspects of the underspend meant that it was unlikely to have an effect on future budget proposals.
- 7.3 TH commented on the table of control measures in place for strategic risk (ST/A/01) and noted that there was no reference to stakeholder engagement within the list of assurances. PW confirmed that the planned June Board away day would include some consideration of where the Commission was doing well, and where less well, supported by some evidence, such as that contained in the 2009 stakeholder survey. This had been included in Commissioners' induction packs, but would be re-circulated if Commissioners requested it.

Agreed: That further discussion was needed by Executive Team and others to help inform the development of an appropriate control measure for strategic risk ST/A/01.

8 Chair's report (EC 21/11)

- 8.1 It was noted that JW continued to meet with key broadcast journalists in order to discuss with them their expectations for both the Wales and UK PVS referendums.

Noted

9 Draft minutes of Audit Committee on 1 February 2011 (EC 22/11)

- 9.1 It was noted that the risk referred to in minute 6.1.2 had been identified by the NAO as a potential risk to be considered by the Commission and not a risk that had actually occurred, but there might be potential complexities around referendum fees and charges that could pose a risk, and work was being done to identify and mitigate the risks.

Agreed: That a note of progress with issues around fees and charges be included in the next Chief Executive's Update.

10 Meeting wash-up (Commissioners only)

The meeting ended at 1.30 pm.

Chair