

Research Study

**COMPARATIVE ASSESSMENT OF
CENTRAL ELECTORAL AGENCIES**
A REPORT COMMISSIONED BY ELECTIONS CANADA

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Our assessment of the governance arrangements for Elections Canada took us to five other countries – unfortunately, not through travel but only through telephone interviews. Following up the letter of introduction from the Chief Electoral Officer at Elections Canada to the senior official of the EMBs in Australia, India, New Zealand, the United Kingdom and the United States, we managed to conduct confidential interviews with representatives of those offices in four of those countries. In the case of the US, the current difficulties being experienced in the two national election commissions meant that no official was available from either. Thus, as an alternative, we interviewed an electoral law specialist with four decades of front-line experience in the field. The names of the interviewees are listed in Appendix F. We offer a sincere thanks to all those individuals who so generously shared their time, expertise and candid insights into the little studied world of electoral governance. It is a cliché, but true, to say that this report could not have been completed without the benefit of the kind of distinctive, specialized knowledge that they contributed to the study.

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NOTE TO THE READER

This comparative assessment of selected electoral management bodies (EMBs) was commissioned by Elections Canada. The authors were engaged to look at the electoral commissions in Australia, India, New Zealand, the United Kingdom and the United States and to compare the strengths and weaknesses of these EMBs with those of the Canadian federal model as represented by the Office of the Chief Electoral Officer of Canada. The observations, comparative assessment and conclusions are those of the authors.

EXECUTIVE SUMMARY

This study was commissioned by and developed in collaboration with Elections Canada. The descriptions, analyses and conclusions presented in the study are those of the authors, not Elections Canada.

The purpose of the study was to provide an analysis of the governance arrangements for national elections in Canada compared to the arrangements in Australia, India, New Zealand, the United Kingdom and the United States.

The comparative assessment focuses on the following components of the electoral governance in each country:

- The national context
- The legal mandate and the principles and values of the electoral management body (EMB)
- The structure and composition of the EMB
- The scope of responsibilities of each EMB, how it is resourced and how it operates to achieve its mandate
- The nature of the accountability relationships of the EMB with other parts of government
- The organizational challenges faced by each EMB

The assessments of the six countries are guided by a set of criteria presented briefly in the body of the report and discussed at length in Appendix A. These criteria are:

- Clear legal authority
- Independence
- Impartiality and fairness
- Professionalism and expertise
- Stability, consistency and reliability
- Economy, efficiency and effectiveness
- Transparency, responsiveness and accountability

The methodology for the study consisted of a selective review of the secondary academic literature, an analysis of official documents and websites in the six countries and the conduct of a series of semi-structured, confidential interviews with officials in the six countries.

The main sections of the report consist of an overview of the findings from the six country case studies, more detailed analyses of the electoral arrangements in each of the countries and a brief conclusion that draws some possible lessons for Elections Canada.

The overview findings include the following observations:

- The national context – the geography, history, political traditions, constitutional order, the dynamics of power among different parts of the political system and the issues that have arisen around the electoral process – have all shaped the electoral arrangements in each country.
- All six EMBs operate along a boundary between the partisan political process and a professional electoral governance and administration process, but the exposure to undue political pressure varies among the countries.

- The distribution of authority, initiative and power within the political system is an important factor that shapes electoral governance arrangements, and, on this dimension, the political system of the US, which operates on a presidential-congressional model, has followed a fundamentally different approach than the Cabinet-parliamentary countries of Australia, Canada, New Zealand and the UK. Put simply, the US has built partisanship into the governance arrangements, whereas the other countries have sought to distance electoral management from partisanship.
- The balance between, on the one hand, independence and professionalism and, on the other, accountability and responsiveness to the political process depends on a number of factors in the governance arrangements: how the mandate of an electoral body is set and modified, how the members of each body are appointed and removed, how an electoral body obtains its budget and staffing, the requirements for reporting, the strictness of the scrutiny of its performance and the consequences that flow from that performance.
- Among the EMBs examined in this study, Elections Canada has the longest history of operation as an independent body led by a professional, impartial administrator. The other countries have all chosen to create multi-member commissions to oversee the electoral process, adopting a variety of different legal, structural and procedural arrangements to achieve what is seen in each country as the appropriate balance between independence and professionalism and accountability and responsiveness.
- The EMBs in the six countries face challenges distinctive to their own context, but there is also a significant commonality to the issues and challenges confronting them.

The brief conclusion to the study elaborates on the following three points:

1. Elections Canada operates on a sound governance framework and has a strong reputation both domestically and abroad as a model of independence, professionalism and integrity in the field of electoral administration.
2. The comparative assessment suggests that independence and other fundamental values of electoral democracy can be achieved under a number of different organizational formats, including a single-headed agency, a multi-member commission that is strictly non-partisan and a hybrid model that includes both independent and politically aligned commissioners. The dysfunctional status of the two bipartisan commissions in the US provides a warning against allowing partisan political considerations to become central to the structure and procedure of an electoral commission.
3. The six EMBs face many common challenges that arise from changing political conditions and practices in modern democracies. The ongoing revolution in information technology (IT) is both driving and enabling changes in the campaign and electoral processes. IT is pushing in the direction of greater integration and consolidation of various electoral administration activities rather than toward fragmentation and organizational separation.

INTRODUCTION

The objective of this study was to provide an analysis of the governance arrangements for national elections in Canada compared to the governance arrangements for national elections in Australia, India, New Zealand, the United Kingdom and the United States. In consultation with Elections Canada, it was agreed that the comparative assessment would focus on certain key components of the governance

arrangements in the six countries, without disregarding the contextual, organizational and procedural factors that would be relevant to drawing lessons for Canada.

The comparative assessment concentrates on the following components of electoral governance in each country:

- The national context, including whether the political system is Cabinet-parliamentary or presidential-congressional and whether the constitutional order is federal or unitary.
- The legal mandate as well as the principles and values that provide the foundation for the electoral management structures and processes.
- The structure and composition of the electoral management body (EMB), particularly the differences between multi-member commissions and single-headed agencies.
- The scope of the responsibilities of each EMB, how it is resourced and how it operates to implement its responsibilities.
- The nature of the accountability relationships between the EMB and other parts of government, particularly the political executive and the legislature.
- An assessment of the structural and decision-making independence of the EMB and threats to the scope of independence that may exist.
- The constraints, opportunities and organizational challenges faced by each EMB.

METHODOLOGY

Much of the information for this comparative assessment came from an online search of secondary academic literature on electoral system management, published reports, legal mandates and official websites of the EMBs considered in this study.

Since official documents may not provide complete and current information and may not provide frank evaluations of performance, interviews were sought with senior election officers in all six countries. Elections Canada identified contacts in each of the other EMBs and gained agreement for the interviews. Semi-structured interviews were conducted with officials from these EMBs on a confidential, not-for-attribution basis. (A list of interviewees is provided in Appendix F.)

CRITERIA FOR ASSESSMENT

This section sets out the criteria used to assess the roles, structures and operations of the EMBs in the five countries that are being compared to Canada. We start from the premise that free and fair elections, conducted in a non-partisan, professional and efficient manner, cannot take place without an independent, credible, transparent, trustworthy and legitimate electoral authority that inspires public confidence.

Sound electoral governance arrangements contribute to well-conducted elections, to public trust and confidence in the electoral process and to democratic legitimacy for the outcomes. However, providing

normative arguments and empirical evidence of the links between governance arrangements and such elusive, multi-dimensional concepts as quality, trust and legitimacy is inherently difficult because of the many factors that potentially affect elections and public perceptions of the electoral process.

Electoral authorities are not islands unto themselves within society. Located along the often blurred boundary between impartial administration and partisan politics, such authorities are highly exposed to influences from the environments that surround them. This means that electoral governance arrangements in any country reflect, to some not easily measured degree, the socio-economic and geographical circumstances of the country; its history, traditions, political culture and constitutional order; the interrelationships and dynamics of power among the different parts of the political system; the competitiveness of the party system; and the issues on the public agenda at a given point in time (Mozaffar and Schedler 2002, 13). As a consequence, isolating the separate contribution of electoral arrangements to a healthy democracy in a particular country is not straightforward and can be done only in a somewhat impressionistic manner.

Generalizing too easily from what appears to work well in other countries is risky because too little account may be taken of the distinctive context or environment in which each EMB operates as well as the scope of the responsibilities of those authorities and the resources they possess to fulfill their mandates. Transposing features from one electoral system to another must, therefore, be done very carefully in order to avoid unforeseen and perhaps unwanted consequences. This is not to say that we cannot draw both positive and negative lessons from the experiences of other countries.

In comparing the electoral governance arrangements in Canada to other countries, it is helpful to consider a number of foundational principles and values that should underlie the structures and processes of the electoral system. Such principles and values are typically rather general and even vague in nature. This means that countries can differ in how they interpret and apply such criteria in the initial design and any subsequent modification of their electoral governance arrangements as circumstances change within society and the political system. The generality of the criteria also means that there is always room for debate about whether existing structures and processes of electoral management in a given country adequately reflect and reinforce key criteria of democratic electoral management.

We used the following criteria for assessment to analyze the electoral governance arrangements in the six countries:

- Clear legal authority
- Independence
- Impartiality and fairness
- Professionalism and expertise
- Stability, consistency and reliability
- Economy, efficiency and effectiveness
- Transparency, responsiveness and accountability.

A detailed discussion of the meaning of these criteria as they have been used in the analysis to follow is provided in Appendix A.

Electoral governance involves more than the legal, logistical and mechanical dimensions of electoral administration. Those specialized activities are highly important in their own right, but they also reflect and reinforce important foundational principles and values of democracy.

The criteria for successful electoral governance are interdependent. They can both complement and contradict one another. Given that independence has become a compelling, internationally endorsed

norm, we have made that criterion the focal point of the analysis, while not ignoring how it intersects with other important criteria. There is no perfect electoral governance model that can maximize the achievement of all criteria simultaneously – balancing and trade-offs are inevitably required.

Of particular interest to the analysis are the relative merits of single-headed agencies compared to multi-member commissions in how they uphold independence and other important criteria.

The next section provides an overview of the findings from the six country case studies and how they reflect the integrating themes identified above. The six subsequent case studies present more detailed evidence for the observations and claims made in the comparative assessment, and they examine in some depth the electoral management arrangements in each of the countries under review.

COMPARATIVE ASSESSMENT OF ELECTORAL MANAGEMENT BODIES

This section draws comparative insights and lessons from the analyses of the EMBs in the six countries that are presented later in this report. The comparative assessment presented here is guided by the underlying premise that electoral management arrangements should contribute to free and fair elections, which are overseen by an independent body that has integrity, credibility and legitimacy in the view of the public and the political parties that participate in the electoral process. A number of criteria for assessment were described earlier in this report and were used to focus the analysis of the six countries.

Among the values identified, the condition of independence from the political executive, and to a lesser extent the legislature, has become a widely accepted international norm for the design and operation of EMBs, and this attribute received particular attention in the case studies. The relative advantages and disadvantages of a single-headed electoral agency compared to multi-member commissions was another focal point of the analysis.

Before turning to our findings, three caveats are in order. First, there is no such thing as a perfect model for EMBs, especially a model upon which all observers would agree. To the extent that a consensus exists among election professionals and academic commentators, a preferred model is limited to agreement on general principles and values that should serve as the foundation for the design of EMBs. There is far less agreement on how these foundational principles and values can best be translated into practice.

Second, in any country, the organizational and procedural arrangements for the management of the electoral process are never based solely on recognized principles of organizational design. Instead, those structures and processes reflect such factors as the size and diversity of a country, its history and political traditions, existing constitutional requirements, the formal and informal relationships among different parts of government, the nature of the party system and the dynamics of partisan competition, and the types of issues that have arisen related to elections. As the studies of the individual countries revealed, the EMBs became gradually more independent as each of the six democracies matured.

Third, our focus is mainly on the design of national EMBs, which sit in the middle of a three-tiered governance process for planning and conducting elections.

The top level of the governance structure involves the passage of primary legislation, which regulates the electoral process in a general way, including by establishing a supervisory agency. Governments and

legislatures are responsible for decision-making on this level. Ideally, electoral laws should be clear, consistent and up to date. However, our case studies revealed that the legal framework for elections involves multiple laws, often in need of reform and modernization. This legislative environment creates challenges for EMBs charged with translating legal provisions into regulatory policies and administrative practices.

The lower level of governance involves the actual delivery of elections “on the ground,” so to speak. Control over the planning and execution of elections may reside with an EMB, or it may be delegated to other orders of government and/or outsourced in whole or in part to private contractors. The pattern of devolution or decentralization can arise from the Constitution, as in the United States and the United Kingdom, or it may be the result of an administrative decision made by the EMB, as in Australia.

For electoral administration to be decentralized, a national EMB must develop regulations, policies, procedures, guidance, supports, standards and reporting requirements to ensure that local institutions comply with the legal rules and foundational principles of electoral democracy. The backgrounds and qualifications of local officials in charge of delivering electoral services can obviously have a significant impact on the quality of the voting experience.

EMBs are usually found in the middle of a hierarchical governance process. In some cases, they are required to take the multiple, often general aims and provisions of electoral laws and give them more precise operational meaning in order to guide their own administrative actions (as in the case of India) and the actions of local electoral authorities as well as to provide guidance to political parties and candidates.

The three levels of policy-making and administrative activities are interrelated, and all are important to ensuring integrity, access, participation, fairness and credibility in the electoral process. In the Canadian case, the *Canada Elections Act* is primarily a regulatory statute, and it is quite detailed and prescriptive in its content. There is no delegated subordinate law-making or regulatory authority vested in Elections Canada. This creates inflexibility in applying the law and requires amendments to the law to take account of changing conditions in the electoral environment. Similarly, the commissions in Australia, New Zealand and the United Kingdom operate without general subordinate or secondary law-making authority, and they face the challenge of adapting their interpretation and application of primary legislation to changing conditions within their electoral system. In the UK, Parliament granted the Electoral Commission authority to formulate regulations for the 2011 referendum, and this pilot project, together with an ongoing review of electoral laws by the Law Commission, suggested to a senior official of the Electoral Commission that Parliament might within the next five years agree to a generalized grant of rule-making authority.

The situation in the US is quite different from that in the Cabinet-parliamentary countries. There, the Federal Election Commission (FEC) regulates only in the area of campaign finance issues, but it has the legal authority to develop regulations. Its regulations are subject to approval by Congress and are often challenged in the courts, so the grant of subordinate law-making is subject to significant limits. The six commissioners on the bipartisan FEC are expected to approve regulations, advisory opinions, matters to be investigated and actions to be taken to achieve compliance with electoral law. However, as described in the US case study, partisan disagreements inside the FEC have often blocked decision-making.

The basic arrangement in the US of having politically connected individuals serving on a commission that makes decisions about the interpretation and enforcement of electoral law would be seen as unusual, if not inappropriate, by most knowledgeable observers in the other five countries. Even in the other four countries where a commission model exists, steps have been taken to provide distance from the

political and partisan processes of campaigning and governing. Details of those protections can be found in the case studies that follow.

There is a second way in which EMBs are caught in the middle. They operate along the often blurred boundary between politics and administration. As in other fields of public policy, the regulations and activities of EMBs create opportunities and constraints for, and confer benefits and costs on, political parties and politicians. However, those same partisan organizations and actors, when working in government and in the legislature, are able to decide the structure of an EMB, “the rules of the game” that it is required to implement and the “tools” that it is given to fulfill its legal mandate. For example, partisan politicians scrutinize an EMB and provide formal public and informal private advice to its leader. The parliamentary committees that review reports on the administration of recent elections or reviews of spending requirements often provide public criticism and advice. And elected politicians provide electoral bodies with a number of potential private channels of representation, often involving disagreements over the raising and spending of campaign money. On the basis of national election laws and informal pressures, partisan politicians set the parameters for the work of EMBs and also scrutinize their performance.

In the governance process, then, politicians play a dual role of both deciding electoral policies and being the primary targets of those policies. This duality creates the potential for conflicts of interest because politicians and political parties may draft laws that do not constrain them unduly and may even seek to create political advantages for themselves over other parties. If self-interested political calculation dominates the framing of laws and other instructions to EMBs, foundational principles and values of electoral democracy such as independence, impartiality and a level playing field will be compromised. The relationship between election officers and politicians must be mutually respectful but should not become too “cozy.”

It is impossible and inappropriate to completely remove issues of electoral governance and administration from the domain of political judgment and democratic accountability through the political process. The goal when designing a new or modifying an existing EMB should be to strike an appropriate balance between independence and professionalism on the one hand and responsiveness and accountability on the other.

Factors That Shape the Governance Process

The analysis of the six countries revealed four key factors that have shaped the governance process in the field of electoral management. The first dimension involves the distribution of authority, initiative and power within the political system generally and the electoral governance structure in particular. Authority can be divided in two ways: along horizontal lines at the national level and along vertical lines at the national, regional (in some countries) and local-authority levels. The constitutional differences between Cabinet-parliamentary and presidential-congressional political systems, and between federal versus unitary forms of government, has proved to be significant to the design of electoral arrangements.

The second key dimension involves the procedures and the basis for the appointment of election officers at all levels, but particularly at the national level, as well as the conditions that govern these appointments. An important related issue is whether the varied activities of an EMB are directed and controlled by a single agency head, a multi-member commission or some hybrid model.

The third component of the governance framework involves the scope of the responsibilities of an EMB and whether it is granted authority and resources commensurate with those responsibilities. An EMB may be granted control over the full range of electoral functions, or some of these functions may be

assigned to other bodies. Different decisions about consolidated or dispersed allocations of functions create different challenges for coordination, consistency, efficiency and effectiveness, and accountability for results.

The fourth component of the governance process involves the balance between independence and accountability involved in the relationship between an EMB and the government and legislature. The official rhetoric may describe a particular EMB as independent, but the balance that exists in the working relationship will reflect a combination of the processes by which the mandates of the EMB are adopted and modified, the manner in which its leaders are appointed and their backgrounds, the processes by which its budget and staffing are decided, the reporting and scrutiny requirements it faces and the consequences for it and its leadership that might accompany strong or weak performance. These characteristics are judged mainly by the political executive and, to a lesser extent, by legislators, especially those serving on committees that oversee the work of the EMB.

There is both a formal and an informal aspect to the accountability relationships that exist. EMBs must also be aware of and be responsive to the concerns of a range of stakeholders outside government. Each of these broad governance domains is discussed in the following subsections, with illustrative examples from the case studies used to support the conclusions.

It Starts, but Does Not End, with the Constitution

The case studies indicate that there is a connection between the distribution of authority and power within national political systems and the preferred model for an EMB. This connection can be discussed in terms of two constitutional distinctions: the Cabinet-parliamentary versus presidential-congressional political system and the federal versus unitary constitutional order.

Cabinet-Parliamentary Versus Presidential-Congressional Political System

Cabinet-parliamentary systems are characterized by a fusion of legislative and executive authority, and initiative is largely centralized with the prime minister and Cabinet.

Consistent with this constitutional centralization of authority, the historical preference within Cabinet-parliamentary systems was to rely on a department of government to oversee the full range of electoral management functions. This was in part because the principles of collective and individual ministerial responsibility required ministers of the Crown to answer before Parliament for all actions within government.

A second reason for a consolidated approach was that well into the 20th century, political involvement in electoral functions was more widely accepted. Gradually, however, the public in different countries came to insist that if democracy was to work properly, certain areas of the electoral process needed to be free of partisanship. The events leading up to such demands were often precipitated by scandals.

Finally, in earlier decades, elections were much simpler events than they became by the end of the century. Over time, the electoral process became professionalized, relied on ever-changing technologies and political practices, and involved raising large sums of money. The number of election laws and their specialized content increased in response to these trends, especially in the field of campaign finance regulation. In short, electoral management became a more technical and complicated process that called upon more in-depth knowledge and skills that would normally not be found in a regular department of government.

Canada was the first of the four Cabinet-parliamentary systems to establish an independent EMB. This took place in 1920 with the appointment of a chief electoral officer as an agent of Parliament who

would not come under the authority of a minister and who would be located outside the departmental framework of government. The other three Westminster-style systems were slower to abandon the government model in favour of a more independent body. Australia operated its elections out of a separate branch of government from 1902 to 1984, when it transferred responsibility to an independent commission. New Zealand had a chief electoral officer, who had responsibility for elections and candidates, but the position was located in the Ministry of Justice. Separate agencies responsible for the regulation of parties and the education of voters and for voter registration also existed. In 2010, these functions were consolidated in an independent commission. In the UK, responsibility for elections resided in the Home Office, a department of government, until 2000, when an independent commission was created.

In summary, outside Canada, reliance upon arm's-length, independent EMBs in Cabinet-parliamentary systems is a relatively recent development. As discussed below, the mechanisms for insulating each EMB from undue political pressures are somewhat different in each country, and the requirement for ultimate democratic accountability through the political process has placed some limits on each EMB's freedom and autonomy. The exposure to political pressures varies among the EMBs, and, over time, individual agencies have been more or less free of political controversy.

The approach to the governance of the electoral process in the US is fundamentally different from the Cabinet-parliamentary model. The US has a national political system based on separation of power and on checks and balances among the executive, legislative and judicial branches. These arrangements are meant to prevent possible abuses of power and to make it very difficult to undertake any government action that might be seen to threaten personal liberty.

Dispersed authority and divided government in the US has produced a fragmented approach to the legislative, regulatory, guidance and implementation roles in the processes for electing the president and vice-president as well as the two Houses of Congress. The US Congress – both the House of Representatives and especially the Senate – is far more powerful than parliaments typically are in Cabinet-parliamentary systems. As reported in the US case study, Congress has been very mindful of its constitutional prerogatives and aggressive in asserting them in the design and operation of EMBs.

There is a strong tendency in the US to codify the rules governing the political process, and this has meant considerable involvement of the courts in resolving disputes over what is constitutionally appropriate action by other branches of government. Compared to the other countries in this study, the courts, all the way up to the Supreme Court, have played a more influential role in determining the balance between freedom and regulation of many electoral matters. In general, the constitutional and legal environment surrounding elections in the US is more complicated, conflictive and intense than in Cabinet-parliamentary systems.

In the US, there are two national electoral bodies – the FEC, mentioned above, and the Election Assistance Commission (EAC) – both of which are regularly entangled in controversy. Created in 1974 in response to the Watergate scandal, the FEC regulates only campaign finance matters. The EAC was created in 2002 to administer funds and provide other supports to state and local governments to improve voter participation and the quality of elections.

Both commissions are constructed on a bipartisan basis, with appointees coming from a background of involvement in one of the two main political parties. The thinking behind this model is that placing partisans in equal numbers inside the commissions will lead them to monitor one another, and this will prevent partisan bias in decision-making. This is fundamentally different than the preferred model in Cabinet-parliamentary systems, where either a single, impartial professional is placed in charge of an independent agency or a commission is created of eminent citizens deemed to be above partisanship.

Federalism Versus Unitary Forms of Government

The second constitutional distinction among the six countries is federalism versus unitary forms of government. Australia, Canada, India and the US are federal systems, which cover vast territories and contain significant economic, social and political differences. (The UK was once thought of as unitary, but with the ongoing devolution, begun in 1998, to executives and legislatures in Northern Ireland, Scotland and Wales, the country is more accurately described as quasi-federal.) Achieving coordinated national policies and standards on elections while respecting regional differences and local preferences has been a challenge in all four federal systems, and increasingly in the UK. New Zealand is a relatively small, socially homogeneous society with a unitary political system, and these conditions make electoral governance more straightforward.

The impact of federalism on the US electoral process has been dramatic and controversial. The Constitution grants primary authority over national elections to state governments, who in turn have further delegated responsibility to county and local governments. Congress has the authority to override state and local electoral regulations and administrative practices, but the constitutional founders envisaged this power being used only in “extraordinary circumstances” (Samples 2001). There has been limited legislative action at the national level to restrict the freedom of state and local governments to run national elections, which are often held simultaneously with local elections. Even when serious problems have arisen (such as the controversial outcome in the presidential contest in Florida in 2000), calls for national standards have been successfully rebuffed by the argument that “nationalizing elections through federal mandates would be a constitutional and policy mistake” (Samples 2001, 1). In Congress, protection of states’ rights has been such a strong, perpetual theme in all policy fields that centralizing electoral management in one national body seems highly unlikely.

Whether operating in a federal or unitary state, in a geographically small or expansive country, EMBs must rely upon local returning officers to administer the actual voting processes for elections and referendums. As the case studies indicate, how these officials are chosen and to whom they are responsible affects the quality of those processes. In the US, for example, local government officials from approximately 8,000 different jurisdictions, many of whom hold elected positions, organize and conduct national elections with minimal supervision from state governments. The diversity of the selection processes in those communities has given rise to many problems. In the UK, there is a long-standing tradition of local government authorities being in charge of the operational aspects of voting. Even after a national electoral commission was created in 2000, the decentralized approach to electoral administration was retained. Returning officers in the UK continue to answer to local governments.

In contrast, returning officers in Canada are appointed and report to Elections Canada. (Australia and New Zealand also follow this model.) This relationship gives Elections Canada the opportunity to determine the qualifications and training requirements for returning officers, and their knowledge and professionalism can be advantageous. Operating within the administrative framework of an EMB may reduce the scope for errors, but it is not a guarantee that mistakes will not occur.

Scope of Responsibilities

The legal mandate and the powers granted to the EMB in each country are different. The most radical differences are in the US, where the impacts of divided government at the national level, federalism and self-interested actions by politicians have produced two commissions with narrow mandates and limited authority.

Despite its name, the FEC is not responsible for all matters affecting national elections, but only for campaign finance matters. Even in relation to the raising and spending of money, the FEC has been described by many critics (it has very few defenders) as a weak and dysfunctional watchdog over campaign finance issues. According to the experts, the original legislation establishing the FEC was flawed, and, over the years, Congress proceeded to further handcuff it by diluting its authority and denying it the resources needed to enforce the rules.

The second commission, the EAC, does not engage in direct regulation but instead seeks to improve voter participation and the quality of the voting experience by providing money and advice to states and local governments. Even though the EAC must rely on “carrots” rather than “sticks,” it has still been entangled in controversy. To believers in limited regulation and states’ rights, the EAC trespasses on constitutional territory assigned to state and local governments. To would-be reformers of the national electoral process, the flaws contained in the Act creating the EAC and the failures of implementation mean that little has been done to address the problems (e.g. voter registration issues, antiquated voting technology, long voting lines) in this process.

The fragmented and limited mandates of the US commissions contrast drastically to the more comprehensive and consolidated mandates found among the EMBs in the other countries. Elections Canada, for example, is responsible for a wide range of related functions: registering voters, parties, constituency associations and third parties who engage in election advertising; managing the location of polling stations; enforcing electoral laws and regulations; educating voters; and monitoring and reporting on party and candidate contributions and election spending. The positions of Commissioner of Canada Elections and Broadcasting Arbitrator are separate, but both individuals are appointed by the Chief Electoral Officer. Ten independent boundary commissions, one for each province, are responsible for the redistribution of seats in the House of Commons after each decennial census, but the work of these commissions is supported by Elections Canada. In summary, Elections Canada’s formal mandate is broadly inclusive of all electoral functions, and this allows activities to be integrated and coordinated within the framework of a single organization.

New Zealand once relied upon three separate agencies to manage different aspects of elections, but in 2010, it combined all of the functions into a three-person commission. A government briefing document justifying the change pointed out that three separate agencies led to disjointed decision-making on electoral matters, involved an unnecessary overlap of roles and duplication of administrative costs, and limited the opportunity for anticipatory planning, especially with respect to the use of information technology (IT) in future elections. A consolidation of functions would provide for “more consistent oversight and decision-making across electoral policy and operations” and provide for a “high level of service to the public, candidates and political parties” (New Zealand 2009b, 4).

Australia and India also entrust all of the most important electoral functions to their three-person commissions. In 2000, when the UK adopted the independent commission model, it recognized the opportunities to integrate and coordinate functions that had previously been the overall responsibility of the Home Affairs department, but that department had to rely on several other departments to implement electoral laws. At first, the UK Electoral Commission became the organizational “home” for the existing independent boundary commissions, but following devolution, three of these institutions became the responsibility of the devolved legislatures.

In summary, the trend identified in our cases has been toward integration rather than fragmentation. There are a number of reasons for this. Elections are complex events to manage, and grouping all electoral functions into the decision-making and administrative framework of a single organization is seen as the best way to avoid unnecessary overlap and duplication, improve coordination and avoid possible gaps and breakdowns in planning and conducting elections. The increasing reliance on IT in

delivering electoral services means that different functions (such as registration and polling systems) can be more easily integrated. Having several agencies involved runs the risk of reducing the effectiveness of delivering electoral services, but one body with an expert perspective on all electoral functions may be better equipped to provide advice to governments and legislatures.

The case against a more inclusive, consolidated model is that it places too much authority in the hands of either a single electoral administrator or a commission consisting of a small number of “enlightened amateurs,” who will rely too heavily on the advice of full-time professionals in the EMB. Because this model has a sweeping mandate, the balancing and trade-offs among different values and interests set out in different electoral statutes will take place in confidential debates within a small commission or even through the reasoning of a single unelected public official at the apex of the agency. As a result, separating certain politically sensitive functions (such as party registration and redistribution) into different bodies could insulate the main EMB from criticism.

These are not irrelevant concerns, but they can be addressed by structural separations inside an agency, as was done in the Canadian case by creating the ten independent boundaries commissions and appointing the Commissioner of Canada Elections to be responsible for enforcing electoral laws. Although the Commissioner is housed within the administrative framework of Elections Canada, he operates independently. He can accept complaints about violations of electoral law from any source. Many matters are referred to his Office as a result of reporting, monitoring and auditing work done within Elections Canada, but it is his decision, whether to investigate and what remedies should be applied to deal with violations of the law, including deciding whether to prosecute. As for the concern about an undue concentration of power, this risk can be addressed by having strong external requirements for transparency and accountability.

Our country studies suggest that there is a link between the laws, structures and regulatory processes of electoral management and the substantive issues that have appeared over time on the political and government agendas in each of the countries. In other words, the substantive issues that arise from changes in society, including new technologies and shifts in public opinion, as well as changes to the practices of political parties, have often resulted in changes to legislation, creation of new EMBs or modifications to existing EMBs as well as new secondary rules and procedures to deal with real and perceived problems in the electoral process. In turn, these changes to the governance processes for elections affect the behaviour of politicians, political parties and other actors in the political process, including creating incentives to search for ways to avoid the constraints of law and regulations.

This study focuses mainly on the governance process rather than the substantive issues of electoral management. To describe the two-way relationship between substantive issues and governance matters, it is useful to examine briefly how the rising importance of money in politics has created an impetus for changes and ongoing challenges for electoral authorities. In all six countries, the issue of money in political life has probably been the most sensitive and controversial area of electoral governance.

The scope and strictness of the laws and regulations affecting financial matters vary among the countries, and details can be found in the country studies. Briefly, therefore, among the countries, Elections Canada has the most extensive regulatory regime and the most effective enforcement apparatus for upholding the political financing provisions contained in its authorizing statute, the *Canada Elections Act*. The Act provides for ceilings on contributions and spending by parties and candidates; requires disclosure, reporting and auditing; and allows parties and candidates who obtain a certain percentage of the vote to be reimbursed a portion of their eligible election expenses. A division of Elections Canada is dedicated to auditing the financial reports of parties and candidates as well as to

giving advice and support to parties to achieve compliance and other actions intended to ensure compliance with the law.

In the UK, the regulatory regime for party and candidate financing relies mainly on reporting and transparency. There are no caps on contributions and relatively generous ceilings on spending. In the US, where money, particularly private money, plays a greater role than in any of the other six countries, the sole mandate of the FEC is to regulate financial matters; however, despite any laws that might exist, it is seen as a weak watchdog over the financial side of political life. Actions by Congress and the courts have tended to undermine its authority and have created a dysfunctional, dispirited body that is ineffective in disclosing and curbing potential violations of laws that might appear good on paper. In summary, the authority, capacity and commitment of an EMB to act effectively, impartially, consistently and transparently on financial issues contributes greatly to its overall reputation and credibility as well as to the public confidence it inspires.

Single-Headed Agency Versus Multi-Member Commission

A number of models exist for creating an independent EMB, although, most often, it comes down to choosing either a single-headed agency or a multi-member commission. There are a couple of approaches to determining the advantages and disadvantages of the two models. One approach is to list the costs and benefits in the abstract, and this exercise is carried out in Appendix D. The second approach, followed here, is to look at examples of each model in operation. The four countries that follow the Cabinet-parliamentary model have opted for arm's-length electoral authorities – whether a single official or a commission – who are appointed on the basis of merit and perform their duties in a professional, impartial manner. In the US, there is a greater insistence on being responsive to the concerns of politicians, and the members of the two national commissions are appointed on the basis of their partisan affiliations.

In the Cabinet-parliamentary systems, appointment is by the Crown on the recommendation of the government of the day. This method of appointment may create the impression of potential bias or partisanship, and so to avoid this, there is either a statutory requirement or a recognized practice to consult with other parties in Parliament. How meaningful that consultation is can be debated: if a majority government is determined to appoint someone with obvious partisan leanings, they would have to be prepared to pay the political price of criticism inside and outside Parliament.

In Australia, the law requires that the chairperson of the three-member commission be a judge, and a second commissioner is the full-time chief executive. In New Zealand, there is no statutory requirement to appoint a judge as chairperson of the three-member commission, but a retired judge has been chair since the commission was created in 2010 and was recently reappointed.

In the UK, the chairperson of a ten-member commission is appointed after consultation among parliamentary parties and after an all-party committee chaired by the Speaker of the House of Commons has conducted a recruitment and selection process. From 2000 to 2009, the membership of the commission was strictly non-partisan because the law disqualified individuals who had recent involvement with a political party. Amendments to the law in 2009 allowed for four additional commissioners, who were assigned the explicit role of contributing first-hand knowledge of the political process without acting on the basis of their partisan affiliation.

Before Canada's present Chief Electoral Officer was appointed in 2007, the government consulted opposition parties, the nominee for the position appeared before a parliamentary committee, and then a resolution endorsing an appointment was voted on by the full House.

The length of appointment for commissioners or agency heads can have an impact on their independence and their willingness “to speak truth to power.” If commissioners or CEOs lack long-term security, there may be a concern that their actions are motivated by calculations about reappointment. The approach followed in the four Cabinet-parliamentary models varies. For example, Australia and New Zealand use flexible terms of up to seven and up to five years, respectively, and reappointment is possible in both cases. The UK appoints commissioners for terms of varied lengths, and they can be reappointed. In Canada, the CEO is appointed until the age of 65, and this results in terms of varied duration. This is also the case with India’s commissioners.

Among experts in the field, there is a strong consensus that continuity is valuable because it fosters a long-term planning perspective; leaders of EMBs need to be around through at least two electoral cycles, which normally means eight to ten years in office. Removal from office is a drastic and rare event that can take place only for the most serious causes, such as incapacity or misconduct. Such dismissals usually require a resolution of both Houses of Parliament – a requirement that discourages governments from acting in a blatantly partisan manner. In Canada, removal can be only for cause, by the Governor General on a joint request following a majority vote in the House of Commons and Senate.

In the US, the commission model has partisanship built into the appointment process. In the case of both the FEC and the EAC, the law requires that appointees be affiliated with one of the two main parties, with an equal number of appointees from each. Both commissions have an even number of members, and decisions can be made only by a majority; this means that at least one commissioner must join with the other side. Even though the laws creating both commissions talk about the importance of impartiality and professionalism in decision-making, it is understandably difficult for commissioners to leave their partisan identities behind them when they join a commission.

Partisan appointments were meant to prevent bias by creating a decision-making dynamic of mutual monitoring and a search for accommodation. But instead, according to the numerous critics, the result has been deadlock, inaction, excessive concern for the interests of parties and Congress, and a woeful performance in upholding national electoral laws. Some analyses of FEC and EAC decisions make the case that principled policy disagreement more than partisanship has produced the standoffs. In a sense, this does not matter because, whatever the reason, the two commissions have been ineffective in pursuing their mandates and have been the target of widespread criticism by politicians, the media, academics, think tanks and advocacy groups. Poor performance and constant criticism rob the commissions of credibility and reduce voter confidence in the electoral process.

The process of appointing commissioners to the FEC and EAC is highly political. In principle, the president is authorized to appoint commissioners, but only with the consent of the Senate, so that in practice, there can be prolonged negotiations between the president and the party leaders in Congress over potential nominees. Achieving timely appointments has been a problem, and, even with the provision that existing members may stay on beyond the end of their terms, vacancies arise that make it harder to conduct commission business. Terms are for six years, and no reappointments are allowed. The position of chairperson rotates among members each year, and commissioners can serve only once as chair. The lack of continuity of both the membership and the leadership of the FEC makes it difficult for commissioners to develop collegiality and bonds of trust.

The three Cabinet-parliamentary systems with commissions have been more successful than the US in developing an appointment process that supports non-partisan, efficient and credible performance. The experience in the US may be the worst-case example of what can happen under the commission model if steps are not taken to insulate a commission from political pressures of various kinds. In Canada, on the other hand, the appointment of a single professional to lead an agency has worked well over many decades.

Leaders play a major role in shaping the internal cultures of EMBs, which are exposed to continuous influences from wider political and administrative processes and cultures. The FEC and EAC face great difficulty in creating a strong, shared culture of professionalism because of the partisan backgrounds of their commissioners and the pressures to please the president, congressional leaders and senior party officials. In the four parliamentary systems we studied, there was a somewhat greater distance between the EMBs and direct political pressure, with the result that there is a greater opportunity to embed professional values into the organizational cultures.

This takes us further into the fundamental issue of achieving an appropriate balance between independence and professionalism on the one hand and accountability and responsiveness on the other.

Budgetary and Staffing Independence

Some measure of autonomy in determining the budget and staffing of a commission or agency is often seen as a critical factor in achieving independence. Requiring an EMB to negotiate its budget with the political executive and/or central budgetary agencies in government creates the risk of underfunding and interference in internal decision-making. Electoral management involves specialized knowledge and skills, and, therefore, the freedom to recruit, appoint and classify personnel can be important to maintaining both the independence and the effectiveness of electoral authorities. On the other hand, EMBs cannot be completely exempt from the changing financial realities of government.

The case studies describe the budgeting and staffing procedures in detail, so only some brief general observations will be provided here. In Cabinet-parliamentary systems, the constitutional principles of ministerial responsibility and the dynamics of power mean that EMBs are basically dependent on government decisions, although some safeguards exist to avoid political interference. One such safeguard is to have two budgets: one is an annual appropriation for its staffing and operating expenses, and it is approved by government and voted by Parliament; and the second is statutory authority to spend the money needed to stage elections and referendums.

The practice in Australia, India and New Zealand is for the commissions to negotiate the amount of the annual appropriation with the Treasury or the finance department. In the UK, the Electoral Commission previews its budgetary requirements with the all-party Speaker's Committee before government, and then Parliament approves the budget. Elections Canada operates both annual and statutory budgets. From 2006 to 2013, an advisory Speaker's panel, which included representatives from all parties, reviewed requests for increases to the budgets of all officers of Parliament, and ministers on the Treasury Board (a Cabinet committee) agreed to give the advisory panel's funding recommendations significant weight. In 2013, however, the government indicated that the panel would no longer be used for this purpose.

Another concern is the tendency by governments to treat EMBs as just another part of the departmental apparatus of government by insisting that they comply with a wide range of rules concerning, for example, human resource management, classification and compensation, and audit and evaluation. This tendency can give rise to the appearance of, or actual, interference by central agencies that exist to serve the prime minister and Cabinet. It is difficult for outside observers to determine how constrained electoral authorities are by central administrative policies and rules.

In the US, both the FEC and the EAC are required to obtain annual funding through the budgetary process inside the executive branch. This means that the Office of Management and Budget must approve their budgetary requests. They also fall under government-wide administrative policies, such as requirements to produce strategic plans and report annually on performance measures related to such plans.

External Accountability to Legislatures and the Public

The accountability relationships between electoral authorities and legislatures reflect the wider constitutional and political differences between parliamentary and congressional systems. In the UK and its four former colonies, parliaments have influence, but no real power. They must approve legislation and budgets; they stage question periods and hold committee hearings to make ministers and public servants answerable for their use of authority and resources. An increasing amount of information on the performance of all public bodies is being made available to all parliamentarians, although they seem to rarely use most of the information as a basis for accountability based on results. Parliaments can propose action, but governments decide what actions will be taken. Interest among parliamentarians in electoral-machinery issues is sporadic, often triggered by controversy or perceived threats to re-election.

In contrast, the US Congress is a powerful political force with the capacity to initiate, block and modify legislation and spending. Money matters greatly in national politics, so the FEC is naturally a target of congressional interest. Over the years, Congress has taken steps to remove authority from the FEC to the point where a regulatory watchdog designed to operate on a short leash has, according to the harshest critics, lost its capacity to bark let alone bite when it comes to enforcing campaign finance laws. In the case of the EAC, there have been suggestions by Republican legislators that its function of assisting state and local governments should be terminated or merged with that of the FEC. For the leadership of both commissions, there are annual accountability sessions before several congressional committees. Like parliamentarians, members of Congress seem more interested in fuelling political “fires” over election controversies than in preventing the outbreaks.

In the parliamentary countries, all of the EMBs operate under the terms of freedom of information or access to information laws, which provide complaint-based remedies for citizens when they are denied access to government information. There is a clear trend among the authorities toward proactive disclosure of electoral information, particularly through comprehensive websites. In the US, the FEC and EAC also fall under freedom of information legislation and are expected to conform to the policies of “open government” brought forward by the Obama administration.

Electoral authorities in all of the countries studied have adopted, to varying degrees, the “customer service” philosophy, which has pervaded thinking inside governments over the past several decades. Actions to facilitate participation and make the voting experience more satisfying are being adopted in all six countries.

If we should not oversell the importance of structure and procedures, we should also not overlook the importance of leadership and organizational culture in ensuring integrity in the electoral process. Being the chair of a commission or the chief electoral officer of an electoral agency presents some distinctive leadership challenges based mainly on the need to balance independence and professionalism against accountability and responsiveness. Leaders need strong character, courage, contextual intelligence, balanced judgment and effective communication skills. EMB leaders need to gain a reputation for integrity and credibility.

Current and Future Challenges

As demonstrated below in the case studies of the individual countries, the geographical, social, constitutional and political contexts greatly affect how elections are organized and conducted. On the other hand, there are also important similarities among the countries, including the policy and administrative challenges facing the EMBs, both in the present and into the future.

In all countries, elections have changed from being relatively simple events taking place on a local level to more complicated, national events that demand striking a balance between consistency across an entire country and responsiveness to local circumstances.

There have always been local and national dimensions to party campaigns. However, in the earlier stages of democracy in each country, a greater emphasis was placed on local candidates and local campaigns. Today, full-time professionals working out of centralized party “war rooms” direct campaign planning, strategies and tactics. To varying degrees in each country, campaigning has become a continuous activity that rises in intensity as election dates approach. The tactics and technologies of campaigning are constantly evolving as parties seek to gain political advantage in a highly competitive environment where winning every day, not just on election day, has become a preoccupation. Raising and spending money, always important in political life, has become a key dimension of partisan competition. Hyper-partisanship in the US and, to a lesser extent, in Canada and the UK have entangled EMBs in political controversy and may detract from their reputations as professional entities operating above the political fray.

All six political systems examined in this study exhibit disillusionment among voters, as reflected in opinion survey findings of lack of trust and confidence in politicians and political parties as well as declining voter turnout in elections. These symptoms of political malaise are particularly pronounced among younger voters, and the worry is that future generations will learn habits of non-participation. The causes of mistrust and disengagement are many, both long-term and more immediate. The structures, roles and activities of EMBs may at times contribute to disenchantment among voters, but the impacts are probably marginal compared to developments in the wider political environment. This means that EMBs will encounter limits and risks if they attempt to solve the so-called democratic deficit on their own.

The ongoing IT revolution has brought both benefits and costs to the electoral process. This is far too big a topic to be addressed fully here; suffice it to say that for both political parties and EMBs, IT has become a driver and enabler of changing practices.

For political parties, Internet-based technologies offer opportunities for both the positive purpose of connecting with and engaging citizens as well as the negative purpose of manipulating public opinion and electors. EMBs face great challenges in finding an appropriate balance between principles of free political communication and some measure of control over the growing use of social media by political parties, including for the purpose of raising money. Part of the challenge arises from outdated legislative and regulatory frameworks, which generally do not provide electoral authorities with adequate tools to monitor and enforce responsible behaviour by parties and candidates. A related problem is the dynamic nature of IT, which allows parties to continuously invent more sophisticated communications strategies and tactics.

The use of automated telephone calls (*robocalls*) to transmit political messages is an example of the challenges posed by IT. Such calls are less expensive than other media, but they can be annoying and misleading. The use of robocalls takes place in all six countries, but their use is most advanced in the US, as are the attempts to adopt laws and regulations to control their use.¹ Canada experienced its first controversy over robocalls during the 2011 election, and Elections Canada has submitted proposals to

¹ For a summary of legal actions at the national and state levels, see Illinois Legislative Assembly Legislative Research Unit 2010. See also regular reports in the magazine *Campaigns & Elections* at www.campaignsandelections.com.

Parliament to avoid similar issues of alleged voter suppression in the next election, scheduled for October 2015.²

All electoral bodies have experimented with IT as a means to improve voter turnout, increase voter satisfaction with the electoral process and reduce the costs of electoral administration. For example, recent on-demand postal voting has been used more extensively in Australia and the UK, and, while shown to provide these benefits, it has also led to allegations of voter fraud. Pilot projects on telephone and online voting have been conducted in several of the countries, but usually on a constituency or local election level. Many issues, such as integrity of the voting process and ensuring the privacy of voter information, will need to be resolved before national online voting is adopted.

The pace, breadth and depth of the changes taking place in the political environments of all countries have tested the limits of the legal frameworks for elections. Many electoral laws are out date and in need of replacement or modernization. In a country like the UK, a flurry of new laws has been enacted in the past two decades, and the challenge has been to ensure consistency and coherence in the legal framework. In many cases, the authority and regulatory tools available to EMBs do not match the policy and administrative challenges they face. Adapting the functions and authority of national EMBs in an era of intense, continuous political competition is difficult because no parties favour changes that might work to their disadvantage.

² See Elections Canada 2013c.

Elections Canada

Introduction

The Canadian constitutional order and political system are based on the principles and conventions of Cabinet-parliamentary government, which, under modern political conditions, concentrate a great deal of authority, initiative and control in the hands of the prime minister and Cabinet. During periods of majority government, Parliament, in the form of the elected House of Commons and the appointed Senate, has influence but no real power. The House of Commons is elected on a simple plurality model, which tends to “over-reward” the political party with the largest share of the popular vote with the number of seats it obtains in the Commons. This pattern may be a source of voter discontent with the outcomes of the electoral process because they have meant that regions of the country lack strong representation in the caucus of the governing party and the Cabinet. At various times throughout Canadian history, there have been proposals calling for some type of proportional representation for House of Commons elections and for the creation of an elected Senate as ways to offset the majoritarian tendencies and centralization of power reflected in present electoral arrangements and other fundamental features of the political system.³

The second leading constitutional feature of Canada’s political system is federalism. The existence of two orders of government and divided legislative responsibilities reflects and reinforces regionally based economic, social and cultural differences in the country. Canada is thought by many to be the most decentralized federal system in the world, and the existence of strong provincial governments gives rise to complaints that regional concerns are being neglected in the national electoral and policy processes.

History

Centralized administration of elections in Canada began in 1920 under the *Dominion Elections Act*. The Act established the position of Chief Electoral Officer. The new position was given deputy minister status and, at the time, lifetime tenure. In 1927, the Act was amended so that the Chief Electoral Officer would be appointed by resolution of the House of Commons rather than by government. The Chief Electoral Officer was responsible for an independent, non-partisan Office charged with administering federal elections and by-elections – the first such agency in the world (Elections Canada 2007, ch. 3). According to John Courtney, the Office of the Chief Electoral Officer was established “in order ... to guarantee an electoral organization that would be distinguished by its managerial competence, administrative fairness and institutional non-partisanship” (Courtney 2007, 33).

The legislation governing the administration of elections was renamed the *Canada Elections Act* in 1951. The independence of the agency responsible for elections was established by provisions within the Act related to tenure and removal of the Chief Electoral Officer, various accountability mechanisms and its financial independence. Other significant improvements to Canada’s electoral legislation occurred over time – expanding the franchise for Canadian citizens and making the vote more accessible. The most influential change came about in 1982 with the adoption of the *Canadian Charter of Rights and Freedoms*. The Charter guarantees every citizen of Canada the democratic right to vote in an election of

³ For collections of articles that examine regionalism, representation, political parties and the electoral system, see Aucoin 1985 and Bakvis 1991. See also Law Commission of Canada 2004.

members of the House of Commons or of a legislative assembly of a province or territory as well as eligibility to hold public office.

Institutional Status

The Chief Electoral Officer is one of a number of so-called officers of Parliament who are appointed to promote and uphold values and practices considered important to Canadian democracy.⁴ Their offices carry out duties assigned to them by statute. They are accountable to Parliament and report to one or both of the House of Commons and the Senate, but they are also tasked with supporting individual Canadians by ensuring fairness and integrity in public life. In the case of Elections Canada, its role is to ensure free and fair elections. As discussed below, a number of mechanisms in its design and operation are meant to ensure that independence, especially from the government of the day, is balanced with accountability to Parliament.

The method of appointing the Chief Electoral Officer reflects the search for an appropriate balance. Following consultation with the opposition parties in Parliament, the government forwards to Parliament the name of a nominee for the position. Appointment takes place after a resolution of the House of Commons is passed, a method that differs from that of other officers of Parliament, who are appointed by the Cabinet. When the present Chief Electoral Officer was appointed in 2007, he appeared before the House of Commons Standing Committee on Procedure and House Affairs to answer questions from members of Parliament (MPs).

While the position of Chief Electoral Officer is no longer a lifetime appointment, it still has a long tenure – until age 65 or upon resignation. The Chief Electoral Officer can be removed from office only for cause by the Governor General on address of the Senate and House of Commons; this is the same as the procedure for removing a judge of the Supreme Court of Canada. There have been six Chief Electoral Officers since the position was created in 1920. Both the rank as a deputy department head and salary of a Federal Court judge are fixed in legislation. The current Chief Electoral Officer, Marc Mayrand, was appointed to the position in 2007; he was formerly a law professor and federal public servant. The past four Chief Electoral Officers have held the position for an average of 20 years, a duration that leads to a great deal of stability within the organization and consistency in the approach to electoral administration.

Mandate, Powers and Responsibilities

Elections Canada's primary mandate is to be prepared to conduct a federal general election or by-election at all times. Within the five-year legal mandate of Parliament, the call of an election is at the discretion of the Governor General on the advice of the prime minister. *An Act to amend the Canada Elections Act*, fixing the dates of national elections, was passed into law in May 2007. While this law may introduce some degree of predictability in planning for electoral events, it did not change the rules that allow the prime minister to dissolve Parliament, and neither the October 2008 nor the May 2011 national election was held on the scheduled date indicated by the law. In addition to its responsibility for administering the *Canada Elections Act*, Elections Canada also conducts referendums according to the *Referendum Act*.

⁴The other officers of Parliament (and the dates of their creation) include the Auditor General (1868), the Official Languages Commissioner (1970), the Information Commissioner (1983), the Privacy Commissioner (1983), the Conflict of Interest and Ethics Commissioner (2007), the Public Sector Integrity Commissioner (2007) and the Commissioner of Lobbying (2008).

Elections Canada's duties are both operational and regulatory. On the operational side, the agency exercises general direction and supervision over the conduct of federal elections, maintains a voters list called the National Register of Electors, instructs and oversees election officers to ensure their compliance with the Act, implements voter education and information programs, conducts voter and election-related research and provides support to the independent commissions responsible for the periodic readjustment of federal electoral boundaries (according to the *Electoral Boundaries Readjustment Act*).

Elections Canada also regulates political entities and administers an extensive set of political financing rules. This includes registering political parties and their district associations, leadership contestants, nomination contestants and third parties engaged in election advertising and administering the candidate nomination process. The agency examines the financial returns of all political entities for compliance with the *Canada Elections Act*, ensuring that these entities do not exceed their election expenses and contribution limits. Elections Canada publicly discloses the details of these financial filings on its website. It is also responsible for reimbursing eligible election expenses to candidates and political parties and administering quarterly payments to political parties.⁵

Elections Canada has responsibility for both gaining and enforcing compliance with the Act. In this regard, there is a clear separation of duties between its role in advising, educating and assisting political parties and candidates in their efforts to comply with the regulatory burden of the political financing provisions of the Act and its role in enforcement. A Commissioner of Canada Elections, who is appointed by the Chief Electoral Officer, handles enforcement of Canada's electoral laws but acts independently. The position was created in 1974. The Commissioner has a range of options at his or her disposal in order to bring anyone who has broken the law, or may break the law, into compliance with the Act. Caution letters and voluntary compliance agreements can be used for less serious or technical infractions. The Commissioner used to have prosecution powers, but this authority was removed in 2006; now he or she must refer prosecutions to the Director of Public Prosecutions. The Chief Electoral Officer has recommended to Parliament alternatives to traditional enforcement tools that make greater use of adapted civil and administrative sanctions.

The Chief Electoral Officer also appoints a Broadcasting Arbitrator to allocate paid and free broadcasting time to the political parties. The Broadcasting Arbitrator prepares guidelines to clarify the responsibilities of broadcasters in allocating time and resolves disputes about the purchase of advertising time during an election.

Operational Arrangements

Elections Canada is divided into six organizational units for the purposes of administering its statutory obligations: the Office of the Chief of Staff; Electoral Events; Integrated Services, Policy and Public Affairs; Legal Services, Compliance and Investigations; Political Financing; and Human Resources. These sectors, as they are called, handle all of the agency's various administrative, policy, technical, operational and human resource functions. Elections Canada, whose head office is located in Gatineau, Quebec, employs approximately 500 people. Employees are hired in accordance with the *Public Service Employment Act*, meaning that they must perform their duties in a non-partisan manner.

⁵ Public funding of political parties on a per vote basis was introduced in 2004 in conjunction with new restrictions on the source and amount of contributions – eliminating corporate and union donations and restricting contributions to individuals. Following a gradual reduction imposed in April 2012, the public subsidy will be completely eliminated in 2015.

To stage elections, Elections Canada must recruit more than 230,000 temporary election workers from across the country to staff over 15,200 polling sites. The law still allows for registered parties whose candidates finished first and second in the last election in an electoral district to provide lists of names for some categories of election workers. However, in an era when many citizens are disengaged from the political process, parties have enough difficulty finding their own campaign staff, let alone finding extra workers to refer to Elections Canada,⁶ and the number of names submitted by political parties dropped from 53,000 in the 2008 election to 33,000 in the 2011 election (Elections Canada 2013a, 14). Therefore, the vast majority of election officers are non-partisan appointees recruited by the returning officer, and all election officers must complete a pledge of non-partisanship. Election field management personnel, such as returning officers and field liaison officers, are appointed in an open, merit-based competitive process to work in what are now 338 electoral districts.

Elections Canada also works in collaboration with provincial and territorial electoral offices to address issues of common concern, and it has agreements in place to share elector data with agencies that maintain permanent voter registers.

The Office of the Chief Electoral Officer operates under two separate budget authorities. The first is an annual appropriation, which covers salaries of the agency's permanent staff and in 2013–2014 was for \$30.1 million. The second is statutory spending authority for all other expenditures, including the funding necessary for elections and referendums, which Elections Canada draws directly from the Consolidated Revenue Fund. This is an ongoing authority that is not subject to parliamentary approval. Statutory spending comprised 74 percent of the agency's total budget in 2013–2014, when Elections Canada projects drew \$85.8 million in statutory funds. This type of funding mechanism highlights Elections Canada's independence from government and is necessary to manage the unpredictability of electoral events.

The Chief Electoral Officer chairs the Advisory Committee of Political Parties, consisting of two representatives from each of Canada's 18 registered political parties, to discuss administrative and legislative issues of common concern. In 2013, he established the Elections Canada Advisory Board to provide non-partisan advice on matters related to Canada's electoral system.⁷

While Elections Canada does not have the mandate to fund international electoral assistance projects, it is widely recognized for the advice, professional support and technical assistance it provides to promote democratic development around the world. It also actively exchanges information with other EMBs and international electoral organizations for the purpose of identifying and contributing to best practices in the field of electoral administration. In response to increased pressure to contain its expenditures, Elections Canada has recently decreased its participation in regional and multilateral international organizations.

Accountability and Independence

Elections Canada has an international reputation as an independent and impartial EMB. The Chief Electoral Officer reports directly to Parliament rather than to a minister of the Crown and communicates with Cabinet through the Government House Leader. These reporting relationships are meant to emphasize that Elections Canada's primary accountability relationship is with Parliament, not with the

⁶ In 2010, the CEO recommended a change to the law that would allow returning officers to begin recruiting revision and other local election officers earlier than the 17th day into the election campaign. See www.elections.ca/content.aspx?section=res&dir=rep/off/r40&document=index&lang=e.

⁷ For more information, see www.elections.ca/content.aspx?section=med&document=oct1513&dir=pre&lang=e.

prime minister and Cabinet or with the central agencies that serve the political executive of government. Within 90 days of an election, the Chief Electoral Officer is required to report on electoral administration; he can also submit a separate report that includes recommendations for changes to the *Canada Elections Act*. He also reports to Parliament each year on his budget and expenditures, although he is the only officer that is not obligated by law to submit an annual report to Parliament.

As noted earlier, the government nominates the Chief Electoral Officer, but he or she is formally appointed through a resolution of the House of Commons and can be removed only by a joint resolution of the two Houses of Parliament. The Chief Electoral Officer is given relative security of tenure and does not have to seek reappointment. The mandate of the agency is set by Parliament, and, when changes are introduced to electoral laws, they are debated in both the House of Commons and the Senate. The Chief Electoral Officer is authorized to recommend changes to these laws, but still depends on government to amend them through legislation.

The Chief Electoral Officer does not have the power to make regulations but has the power, under subsection 17(1), to adapt any provision of the *Canada Elections Act* during an election period, or within 30 days after an election, if satisfied that it is necessary because of an emergency, an unusual or unforeseen circumstance or an error. Another provision of the Act (section 179) authorizes the Chief Electoral Officer to issue instructions to adapt special voting rules where he or she considers it necessary. These provisions were used, for example, following a Supreme Court decision that struck down a prohibition on inmate voting, allowing the Chief Electoral Officer to adapt the rules and issue instructions to ensure that inmates could exercise their right to vote.⁸

Any increases to Elections Canada's annual appropriation budget is subject to negotiation with the Treasury Board, a Cabinet committee and the Treasury Board Secretariat, which supports it. From 2005 to 2012, the ad hoc Parliamentary Advisory Panel on the Funding and Oversight of Officers of Parliament considered requests for new funding developed by officers of Parliament, including the Chief Electoral Officer, before the Treasury Board considered them. The panel was chaired by the Speaker of the House of Commons and functioned as an advisory body only.⁹ In 2012, however, the government discontinued the practice of seeking the advice of the panel concerning new funding requests.

That same year, under the government's expenditure review process, Elections Canada was invited, like the other agencies of Parliament, to reduce its appropriation budget, and Elections Canada did so, by 8 percent a year for the next five years. These reductions have had a considerable impact on its activities. The *Report on Plans and Priorities for 2012–2013* states, "In the current climate of fiscal restraint, Elections Canada plans to undertake limited improvements over the next three years," and "Fiscal restraint and current priorities mean that Elections Canada will not invest resources in referendum readiness and remains unprepared to conduct a referendum" (Elections Canada 2012, 9).

The annual appropriation budget is debated by and voted on by the House of Commons Standing Committee on Procedure and House Affairs. The statutory budget does not require a vote. The financial statements of the Office of the Chief Electoral Officer are subject to annual audits by the Office of the Auditor General, and the agency is subject to the reporting requirements of Public Accounts.

By and large, Canadians have a high degree of faith in their electoral agency. A recent survey of Canadians revealed that 77.6 percent had "a great deal" or "quite a lot" of confidence in Elections Canada, and 82.6 percent indicated they were either "very satisfied" or "fairly satisfied" with the way it runs federal elections (Canadian Election Study 2011). Following the May 2011 federal election, a

⁸ *Sauvé v. Canada (Attorney General)*, [2002] 3 S.C.R. 519.

⁹ For a discussion of the panel's work up to 2010, see Stilborn 2010.

further survey indicated that 85 percent of eligible electors thought that Elections Canada had run the election in a fair manner (Elections Canada 2013d).

Challenges

Despite its long history and the relative lack of political interference in its affairs compared with some other EMBs, Elections Canada still faces several organizational challenges.

- It is becoming increasingly difficult to attract and retain the approximately 230,000 election workers needed for federal elections in Canada. The turnover and replacement of workers from one election to the next makes skills and knowledge transfer more difficult and results in the need for continuous retraining and potential administrative errors at the polls.
- Elections Canada faces a major challenge in reversing the erosion of public trust stemming from a legal dispute that revealed serious procedural irregularities and exceedingly poor levels of procedural compliance on the part of election officers in the 2011 federal election.¹⁰ A report resulting from a major review on compliance, commissioned by the Chief Electoral Officer, found multiple, interlinked causes for the levels of error made by election officers working at the polls and concluded that “fully addressing the compliance problem requires a fundamental redesign of the voting process” (Neufeld 2013, 6). Elections Canada has committed to developing a new voting services model by 2019 providing that it receives support to do so from parliamentarians. It has also committed to overhauling administrative practices in time for the (scheduled) 2015 general election to improve procedural compliance levels in the short term.
- The 2011 federal general election revealed a voter suppression scheme, commonly referred to as robocalls. The scheme involved placing automated and personal telephone calls to electors on or near election day, falsely informing them that the locations of their polling stations had changed, and it was allegedly designed to discourage electors from casting their ballots. Such deceit can seriously undermine the otherwise high degree of trust that electors have in the electoral system and how it is administered. The laws regulating political party communications with electors are inadequate to deal with the situation, and Elections Canada has recommended changes to the *Canada Elections Act* to prevent this kind of fraudulent activity in the future. From personal privacy and security perspectives, there are also concerns about the volume of information that political parties are accumulating about voters and how it is being used and protected. In addition, there is the issue of enforcement, which needs to be bolstered if the Commissioner of Canada Elections is to have the necessary tools to effectively investigate future occurrences. In the wake of the robocalls issue, in March 2012, Parliament voted unanimously in support of a motion to introduce legislation within six months that would strengthen Elections Canada’s investigative powers.
- In terms of the regulatory framework that holds political parties and candidates to account, the rules are detailed, complex and burdensome. While Elections Canada does not set these rules, it is responsible for ensuring compliance with them, which contributes to public trust in the integrity of the regulatory regime. In June 2010, the CEO issued a report to Parliament (Elections Canada 2010) that included numerous recommendations to alleviate the regulatory burden on political participants and improve the integrity of the political financing regime. Thus far, there has been no indication from the government as to whether they are prepared to adopt any of these proposals.

¹⁰ See *Opitz v. Wrzesnewskyj* [2012] 3 S.C.R. 76 at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/12635/1/document.do> and *Wrzesnewskyj v. Canada (Attorney General)*, 2012 ONSC 2873 (CanLII) at www.ijcan.org/en/on/onpsc/doc/2012/2012onpsc2873/2012onpsc2873.html.

- In Canada, participation at the polls has been waning steadily for the past 25 years. Elections Canada recognizes that it has a leadership role to play in addressing this issue by researching the factors involved in electoral participation; ensuring voter accessibility; educating the public; collaborating with other groups that can engage and support civic education with pre-voters, new voters and non-voters; reducing the barriers to equitable access to the electoral process; and leveraging new technologies to make voting easier (Elections Canada 2013a, 23–25).

Australian Electoral Commission

Introduction

Australia's constitutional order and political system is similar in many respects to Canada's. Both countries have federal systems of government that are based on the principles and practices of Cabinet-parliamentary government. The Commonwealth (federal), state and territorial parliaments are all directly elected by the people in accordance with the constitutional and legislative requirements that apply to each. Each jurisdiction also has its own administrative body, which is responsible for conducting elections. However, the Australian Senate comprises an equal number of elected members from each state, unlike the Canadian upper house, which is appointed on a regional basis. Furthermore, both Houses of the Australian Parliament are elected on a form of proportional representation rather than a simple plurality model. These electoral features result in a stronger role for Parliament, especially for the Senate, where government majorities are rare.

History

The electoral authority in Australia was first formed administratively in 1902 as a branch of the Department of Home Affairs. It consisted of a Chief Electoral Officer for the Commonwealth, a Commonwealth Electoral Officer for each state and a divisional returning officer for each electoral division. All appointees were public servants, and electoral administration was distributed across various federal government departments. In 1973, a statutory body called the Australian Electoral Office was established, with senior staff appointed for fixed terms by the Governor General. While the status of the Chief Electoral Officer was elevated to the equivalent of a department head under this structure, the Office of the Chief Electoral Officer was still located within a government department and subject to ministerial direction and executive control. In 1984, major amendments to the *Commonwealth Electoral Act 1918* established the Australian Electoral Commission (AEC).

Membership

The AEC consists of three persons appointed by the Governor General, on the recommendation of the government, for a term of office not to exceed seven years unless the incumbent is reappointed. The chairperson of the AEC must be an active or retired judge of the Federal Court of Australia, and he or she is selected from a list of three names put forward by the Chief Justice of the Federal Court. The current chairperson, Hon. Peter Heerey, was appointed for a five-year term in 2009. This is a part-time position.

A second position is the Electoral Commissioner, who is the full-time chief executive of the AEC, responsible for the day-to-day direction and management of the agency. This position is currently

vacant.¹¹ The third member of the commission, Brian Pink, is a part-time, non-judicial appointee. This appointee must be the head of a public service agency or hold an equivalent position. Since 1984, the Australian Statistician has occupied this position, an arrangement that is thought to be advantageous considering the AEC's responsibility for boundary redistribution.

Electoral commissioners can be removed from office for misbehaviour, mental or physical incapacity, bankruptcy, absence without leave, engagement in paid employment without approval, failure to disclose a conflict of interest or failing to comply with his or her statutory obligations without reasonable excuse. An independent remuneration tribunal determines the salaries of AEC members.

There is no set frequency with which the AEC must meet; it is at the discretion of the chairperson to convene meetings as he or she deems necessary for the efficient performance of AEC functions. Meetings are not open to the public, but minutes are taken, and decisions are usually made public. If there is no consensus on matters arising at a meeting, decisions are made by a majority vote by members present. If only two members are present, the determination of questions is postponed to a full meeting.

Mandate, Powers and Responsibilities

The AEC has one primary outcome for which it is funded – namely, to maintain an impartial and independent electoral system for eligible electors through active management of the electoral roll, efficient delivery of polling services and targeted education and public awareness programs (AEC 2012) – a mandate derived from the *Commonwealth Electoral Act 1918*. The AEC is organized into three service areas: electoral roll management, electoral management and support services, and education and communication. Its core business functions include:

- Managing the Commonwealth electoral roll
- Conducting elections and referendums, including industrial and fee-for-service elections and protected-action ballots¹²
- Educating and informing the community about electoral rights and responsibilities
- Providing research, advice and assistance on electoral matters to Parliament, other government agencies and recognized bodies
- Providing assistance in overseas elections and referendums in support of wider government initiatives
- Administering election funding, financial reporting, disclosure and party registration requirements
- Supporting electoral redistributions
- Providing international electoral capacity-building and technical support

¹¹ The former commissioner, Ed Killesteyn, was a career public servant with a background in accounting. He was appointed in 2009 and reappointed for another five-year term, to begin in January 2014. He resigned from the position in February 2014 following a controversy involving lost ballots in a close Senate race in Western Australia.

¹² The AEC is mandated to conduct all elections for office in registered organizations, such as trade unions and employer organizations, unless the Industrial Registrar grants an exemption. An industrial action, such as a strike, work stoppage or lockout, is generally unlawful and prohibited unless it is a protected industrial action, which is industrial action taken by employees or an employer for the purpose of supporting or advancing claims in relation to an agreement under the *Fair Work Act 2009*. A protected-action ballot is a process by which employees can choose, by means of a fair and democratic secret ballot, whether to engage in a particular protected industrial action.

The AEC has the power to investigate suspected contraventions of the Act, but no authority to lay charges, prosecute offences or impose penalties, except for an infraction of the country's compulsory voting laws. For example, the AEC may examine the annual and election-related financial disclosure statements required to be filed by registered political parties and candidates and can compel documents and other oral or written evidence to be produced when it suspects non-compliance. However, alleged offences must be referred to the Australian Federal Police for further action.

Operational Arrangements

As noted above, the Electoral Commissioner is the Chief Electoral Officer of the AEC. Reporting to this position is a deputy electoral commissioner and eight electoral officers. The electoral officers for each of the six states and the Northern Territory are appointed by the Governor General for a term of office not exceeding seven years, and they are eligible for reappointment. The Electoral Commissioner appoints an electoral officer for the Australian Capital Territory, an appointment that ends following the election for which the electoral officer was appointed. The commissioner may also appoint assistant electoral officers, divisional returning officers and assistant divisional returning officers. Electoral officers for all states and both territories have delegated authority to manage election and referendum activities within their respective jurisdictions. At the electoral division level, these tasks are the responsibility of returning officers.

As the statutory head of the AEC, the Electoral Commissioner has the authority to decide the agency's staffing level within its approved budget and to determine the remuneration of the senior executive staff, consultants and such temporary staff as he or she thinks necessary to conduct an election and carry out mandated education and information programs. The vast majority of the AEC's roughly 900 personnel are permanent public servants selected through a merit-based hiring process and paid according to public sector position classifications. These and other staff are expected to refrain from engaging in political activities and to be politically neutral in performing their duties. All AEC staff are bound by the Australian Public Service code of conduct.

In 2013–2014, a non-election year, the AEC's total revenue was A\$134.4 million. The majority of this amount (A\$116.7 million) is appropriation funding for ongoing operations. The remainder is revenue from Australian state and territorial electoral commissions, which contribute to the maintenance of the electoral roll; funds received from the Department of Foreign Affairs and Trade for electoral support work conducted in the Asia-Pacific region; and income generated from various industrial, commercial and fee-for-service elections.

Accountability and Independence

The AEC reports to Parliament through the Joint Standing Committee on Electoral Matters, a multi-party body with members from both chambers of Parliament. Committee meetings and inquiries are open to the public. Over the years, the committee has conducted a wide range of studies of election bills and inquiries into aspects of the electoral process.¹³ It is an advisory body only so that, while the AEC must give due consideration to its views and recommendations, it cannot issue binding directives to the AEC on how to perform its duties. The government is required to respond to the committee's reports, and government-supported recommendations form the basis of the electoral reform agenda during any parliamentary term.

¹³ For a list of reports prepared from 1996 to the present day, see the committee's website at www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=em/reports.htm.

The AEC reports to the government through the Special Minister of State. It is not subject to ministerial direction in how it conducts electoral events; it is, however, required to report to the minister on electoral matters and such other matters as it sees appropriate. It must also report to the minister each year on its operations and following any general and Senate elections in relation to election funding and financial disclosure of the political participants. In addition, it must provide information and advice on electoral matters to Parliament, the government, departments and other Commonwealth authorities. All reports are tabled in Parliament. The AEC is expected to undertake regular research and analysis to build a strong evidence base for improving electoral participation, support the delivery of electoral services and contribute to electoral policy reform.

The AEC's annual operating budget is submitted as part of the Department of Finance budgetary portfolio and is subject to the same routine Treasury Board scrutiny as government departments. Once its budget is appropriated, the AEC has discretion to spend it as it sees fit, within the limits approved by Parliament. Additional funding is available through separate submissions for preparing the electoral roll and conducting elections as well as for the payment of per vote reimbursement to political parties. These funds are usually provided without significant alteration provided the AEC's budget has conformed to restraint targets established by central government. All accounts are subject to annual audit by the Australian National Audit Office, and audits are published in the annual report.

The entire process of selecting and appointing commissioners to the AEC remains within the government's oversight and control (Kelly 2012, 35). There is no requirement for a multi-party committee recommendation, a supporting resolution from Parliament or consultation with party leaders before an appointment can be made. However, having none of these interposing mechanisms in place can leave appointees open to claims of partisanship. Thus, Australia made the conscious decision to have the AEC chaired by a judge or former judge to bolster the perception of non-partisanship. The other two members are also known for their integrity and impartiality, and this reinforces public confidence in the integrity of the AEC. In the Australian model, there are no legislative restrictions on partisan appointments, but political parties are not directly represented within the AEC or electoral administration.¹⁴

Under the law, the AEC is authorized to do "all things necessary or convenient" for the performance of its functions. However, it does not have the power to independently develop the electoral regulatory framework, nor does it have statutory authority to make recommendations to government and Parliament, although this happens informally. The AEC's main opportunity to influence the electoral reform process is through the Joint Standing Committee on Electoral Matters. The AEC is able to make independent submissions and is one of the main sources of evidence throughout the public hearing process. The AEC may also make recommendations to the minister, who would then need to seek government approval to initiate any legislative change. Although this does not appear to be a major issue, it has the potential to give the political party in government the advantage of having earlier access to critical information before it is made available to the other political parties, and this can lead to the criticism that the AEC has a closer relationship to government.

The lack of authority to recommend legislative changes and issue binding regulations may be intended to preserve the policy-setting roles of government and Parliament and may serve to protect the AEC from claims of partiality. While more limited administrative rule-making authority would give the AEC greater autonomy and enforcement capacity, Norm Kelly (2012) points out that granting it such

¹⁴ The reason for this may stem from the fact that the AEC was formed before a strong party system developed in Australia. Political parties were largely ignored under federal legislation until 1984, when amendments permitted a candidate's party affiliation to be printed on the ballot (Maley 2001).

authority could lead to administrative actions that have “significant partisan impacts and the Australian experience has generally been that the governing political parties keep tight controls over this area of electoral regulation.”

In recent years, the neutrality and independence of the AEC have come under attack by the previous opposition Liberal Party. Numerous references can be found in *Hansard* of committee meetings in which the AEC’s submissions have been accused of being partisan, biased, tainted and supporting policy decisions of the then governing Labor Party. It is a troubling situation at any time for an EMB to have its integrity questioned by a major political party, but it is particularly distressing after a Liberal-National Coalition government was formed following the 2013 general election. From comments made in committee meetings, it would appear that the current government’s view is that the AEC should focus its efforts on administering elections and not on recommending reforms to Parliament. Fuelled by the early reappointment of the Electoral Commissioner for a further five-year term before the Labor Party left office, the Coalition government recently indicated that it would initiate a “hard” review of the AEC, focusing on its structure and paying close attention to the recommendations (Kelly 2012).

As noted above, budgetary allocations for the AEC are appropriated through the regular governmental budget process. With regard to financial independence, Dundas (1994, 40) points out that the need for an electoral authority to negotiate its budget can subvert the authority from its primary role as an independent agency. Wall et al. (2006) also suggest that it would be ideal for an EMB to be free from day-to-day interference in how it spends its budget within the parameters of the vote approved by Parliament. In this regard, while the AEC remains reliant on the government budgetary process for its funding, there is little recent evidence that the government restricts the flow of funds to constrain the AEC or gain political advantage. The AEC is, however, expected to fully participate and co-operate in the overall budgetary reduction exercises affecting all government departments, and it has had to defer investments to replace outdated IT.

Challenges

The following is a list of the challenges that the AEC currently faces:

- Securing the legislative change necessary to improve and modernize electoral processes has often been contentious. For example, there has been considerable debate about a recent legislative amendment that would allow the AEC to update details for enrolled electors and add persons to the electoral roll from “trusted” government data sources. The current government (then in Opposition) opposed the legislation on the grounds that the veracity of the data could not be relied upon and that its use could threaten the integrity of the electoral roll. It remains to be seen whether the government will repeal this legislation. Parliament has also been quite reluctant to amend electoral legislation to permit electronic voting to be expanded beyond its use with visually impaired voters, despite increasing public demand for this option.
- Australia’s political parties disagree on the role of the AEC in providing advice on electoral policy matters. Certain members of the current government, while in Opposition, voiced the opinion that the AEC’s role should be restricted to providing advice on specific technical and administrative matters and not on electoral policy or advocating for electoral reform. The AEC recognizes that it is within the government’s purview to determine electoral policy and the extent to which it seeks the agency’s input and advice. However, there are occasions when the lines blur between technical and policy issues.
- Parliamentary expectations for more convenient early-voting opportunities have been welcomed by voters because they try to avoid voting on polling day. Early voting has increased in every election, and it is difficult to accurately predict early-voting service volumes at election time. It is also difficult

to make resource adjustments to compensate for the early-voting uptake on polling day. Early voters must declare their eligibility for this option, and the process of scrutinizing some of the ballots, which must be placed in envelopes, is more resource-intensive at the vote count. Despite the increased volume of early voting during each election and the time-consuming process for counting these ballots, political parties still expect the AEC to provide final election results within the same time frames.

- Despite having compulsory voting, there is concern that the turnout for national elections in Australia is only about 93 percent, and it has been slowly declining. There is concern as well that the number of eligible electors missing from the electoral roll has been increasing. The legislative mandate of the AEC, “to promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programs and by other means,” and its responsibility to administer the compulsory voting provisions of the *Commonwealth Electoral Act 1918*, justify a role for the AEC in trying to increase democratic participation. There is no shortage of ideas as to how to go about this challenging task, but no easy solutions.
- Maintaining a complete and current electoral roll is becoming more of a challenge as traditional updating methods, such as door-to-door and mailed-out enumeration, are becoming less effective. Online enrolment, which was introduced before the last election, now accounts for approximately 80 percent of enrolment transactions. Despite the fact that coverage of the roll is estimated to be at 89 to 93 percent (due to compulsory enrolment), there is constant political pressure to improve the coverage and maintain it between national elections for use in state and territorial government elections.
- Securing sufficient funding to prepare for and run elections is not a major problem for the AEC. However, in each budgetary cycle, it (along with all other government departments and agencies) is expected to return an efficiency dividend, and this has made it more difficult to acquire sufficient funding for ongoing programs, services and infrastructure. Recent budget increases resulting from a government review of the AEC were almost completely recouped by an increase in the efficiency dividend expected from the AEC. Also, government policy requires proposals for any new expenditure to be funded from the anticipated efficiencies or offset savings that it will achieve. To address the issue of aging IT systems, the AEC is now looking at having to collaborate more widely with other agencies to leverage their systems and infrastructure.
- The AEC’s ability to attract election workers has become more difficult in recent elections because people appear less inclined to work for 14 hours or longer on election day for the low wages it is able to offer. As a result, the AEC is contemplating dividing election day work into shifts, but it is not certain that this will resolve the issue. It could be that the higher amounts that state and territorial governments can pay for election work will continue to make it difficult for the AEC to recruit and retain election staff.

Election Commission of India

Introduction

India is a constitutional democracy with a parliamentary system of government. The Election Commission of India (ECI) was established under India’s Constitution in 1950. The ECI’s constitutional authority includes preparing electoral rolls and exercising control over elections to the national Parliament, to the offices of the president and vice-president and to state legislatures. The Constitution also provides for the appointment of commissioners, the conditions of their tenure and removal from office and the availability of staff for the ECI to carry out its functions. The Constitution establishes the

primacy of the Chief Election Commissioner and provides the ECI with the authority needed to carry out its mandate. The Constitution also establishes voter entitlement on the basis of citizenship and age and bars the courts from interfering in electoral matters.

Membership

According to the Constitution of India, the ECI can have one or more commissioners. The president¹⁵ must appoint a Chief Election Commissioner and may also determine the number of, and appoint additional, commissioners with relevant expert knowledge. There is no legal requirement to consult with other parties on presidential selections, and, thus far, the advice of opposition parties has not been sought before appointing a new commissioner. Only the prime minister and the government's Council of Ministers provide input into the selection process. Commissioners are typically selected from senior-ranking public servants with good reputations for neutrality and fairness. The president may also appoint regional commissioners before each election to assist the ECI in performing its functions, but only after consulting with the Chief Election Commissioner. The first ECI in 1950 had only a single member – the Chief Election Commissioner. In what was seen at the time to be an attempt to limit the power of the position, two additional commissioners were added in 1989 and again in 1993. Since 1993, the ECI has consisted of three members.

The law allows commissioners to be appointed for up to six years or until age 65, whichever is earlier. Within this range, the president can specify a shorter term of office as well as commissioners' conditions of service. However, the law stipulates that the Chief Election Commissioner must be granted the salary and benefits available to a Supreme Court judge, and these entitlements cannot be reduced after appointment. The Chief Election Commissioner can be removed from office only through impeachment by Parliament on the grounds of misbehaviour or incapacity. Regional commissioners can be removed from office only on the recommendation of the Chief Election Commissioner. The current Chief Election Commissioner, Mr. V.S. Sampath, was previously employed in the administrative civil service of India and will conclude his term in 2015, after six years on the ECI, when he reaches age 65. The other two commissioners, Harishankar Brahma and Syed Nasim Ahmad Zaidi, also former civil servants, will have served six years and four or five years, respectively, before they retire at age 65.

The ECI has the power to decide when it meets, how often it meets and whether its meetings will be held in public or private. It will typically convene two days each week during non-election times and hold daily meetings during election periods. It frequently entertains submissions and delegations from members of the public, civil society organizations and political entities, and it has a policy of keeping all meetings open to the public. Election commissioners have equal say, and decisions are made by majority vote.

The ECI Secretariat's budget is not a charge on the Consolidated Fund of India, but is a voted allotment approved in Parliament. According to an agreement between the central government and state governments, the Secretariat's administrative expenditures are wholly met through budget grants of the central government's Ministry of Law and Justice. This budget is used for commissioner and staff salaries and the Secretariat's operating expenses, including the cost of some centrally supplied equipment, such

¹⁵ The president is formal head of the executive, legislature and judiciary of India. The president is elected by members of Parliament and the state legislatures, and he or she appoints the prime minister. According to the Constitution, the prime minister is the chief of government, the chief advisor to the president, the head of the Council of Ministers and the leader of the majority party in Parliament. The prime minister leads the executive branch of government and is the chairperson of the Cabinet. The prime minister allocates posts to members of the government and is responsible for bringing forward proposals for legislation.

as electronic voting machines. In 2013–2014, the ECI’s budget was 656,200,000 rupees. The ECI has not had any major problems securing the funding necessary to fulfill its mandate because politicians are loath to interfere with its funding requests.

Mandate, Powers and Responsibilities

Many of the powers and functions of the ECI are referred to in the *Representation of the People Act, 1950*. This legislation describes its authority to oversee the preparation of electoral rolls and appoint chief electoral officers, district election officers and electoral registration officers for each state. The responsibility for delimiting electoral boundaries is vested with a separate Delimitation Commission. The ECI is represented on, and provides support to, this body.

The *Representation of the People Act, 1951* further defined the ECI’s powers by laying out somewhat more detailed provisions for conducting elections. These changes gave the ECI some important tools for administering elections, including the authority to select election dates, appoint additional election officers (such as returning officers and observers),¹⁶ use voting machines and publish election results. It was also given the responsibility for allocating broadcast time on the state-owned cable television network and other electronic media and the powers of a civil court to investigate complaints and enforce the election rules.

In 1989, the Act was amended to give the ECI additional responsibility for registering political parties and candidate nominations and monitoring political contributions and election expenses. The ECI imposed a strict framework around party registration to prevent “in name only” parties from contesting elections. In an effort to enforce campaign-financing rules, the ECI appoints financial observers to monitor the expenses of the participants during an election and requires parties and candidates to file financial reports. The use of financial observers is thought to have reduced the level of illegal spending during campaigns, but, as discussed below, it has not brought the problem under control.

The ECI has no regulatory powers. Electoral law-making powers rest with both Houses of Parliament and the state legislatures, but any new or amended laws they make are to be used only to fill in voids left by the principal laws. Laws passed by the states must be consistent with, and cannot override, constitutional provisions or ascendant Acts of Parliament. However, before governments at the national or state levels can make or change any of the rules for conducting elections, they must consult the ECI.

The ECI has developed supplemental rules, which are set out in the *Registration of Electors Rules 1960* and the *Conduct of Elections Rules 1961*, as well as a “Model Code of Conduct,” which it has also developed, through consensus with political participants, to provide guidance on acceptable behaviour by parties and candidates. The Code also deals with the misuse of government resources by the party in power during elections; this is an example of one of the ECI’s “soft laws,” which does not have legal force but rather relies on the threat of negative publicity to achieve compliance. This quasi-legal approach to codifying the rules has been found to be very effective in controlling the behaviour of candidates, parties and a government willing to misuse state resources to gain political advantage during elections. The ECI prefers this approach over having legal infractions handled by the courts because they can sometimes take years to resolve. The ECI’s orders are widely publicized by a largely free media and receive very swift attention and reparation from wrongdoers.

¹⁶ The ECI appoints observers to monitor elections, and they are required by law to be officers of the federal or state governments. They have the power to require a returning officer to stop the vote count or refrain from declaring the election results if they deem that a poll has been conducted improperly, and they are required to report the matter immediately to the ECI. (See India 1951, s. 20B.)

The ECI's wide-ranging constitutional authority is somewhat unusual for an EMB, but it provides a high degree of protection against reductions in authority and, therefore, more stability in electoral governance. On the other hand, there is a noticeable lack of detail in India's electoral legislation, and that has prompted the ECI to fill in the gaps. According to McMillan, "The lack of specificity regarding the scope of the Election Commission's role has resulted in a widening of its range of functions and control of executive authority during election campaigns" (2012, 189).

Operational Arrangements

The ECI performs its functions through a Secretariat located at its head office in New Delhi. The ECI usually makes tenured appointments of four deputy election commissioners and three directors general from the civil service to lead and direct its activities. The Secretariat employs approximately 350 full-time personnel, with 40 to 50 additional temporary staff brought on during an election. At the state level, a full-time chief electoral officer, nominated by the state government and appointed by the ECI, manages elections. Senior civil servants occupy these positions. State chief electoral officers cannot be dismissed without the approval of the ECI.

The job of conducting general elections in India is a massive and complex undertaking that extends over a period of almost two months. It involves nearly 5 million election officers and 500,000 police force members; the armed forces are not involved in India's elections. While the ECI exercises control over these officials, including their appointment, supervision, discipline and suspension, they are not its employees. For the most part, election officers are seconded from the ranks of the neutral¹⁷ civil service of state governments. According to the Constitution, the ECI has access to this ready pool of experienced and impartial workers without having to absorb training costs or salaries.

In each election, thousands of candidates are affiliated with national and state parties and as many independent candidates. India has a population of 1.27 billion people (as of September 2013), and there are over 670 million electors on the electoral rolls, of whom almost 390 million turn out to vote. Voting takes place at 900,000 polling stations throughout 28 states, five union territories and their roughly 500 districts. Each level of government funds the costs of its own elections or shares the costs when both parliamentary and state legislature elections are held together. The cost of India's last parliamentary election in 2009 was approximately 8.466 million rupees.

As noted above, the ECI has considerable input into the timing of elections. Within the last six months of the five-year terms for Parliament and state legislatures, it determines the date on which the next election will be held. It does not need to consult with the government or the prime minister in setting the date – it is the exclusive domain of the ECI. It also establishes the number and location of polling stations, counting centres and most other operational arrangements.

Accountability and Independence

In terms of accountability, there are no legal obligations for the ECI to report to Parliament each year or following an election. Nevertheless, it frequently prepares papers and reports on electoral matters, which it makes available to the public and to Parliament. There is also no formal mechanism for it to recommend changes to electoral law. However, it plays a major role in electoral reform by submitting

¹⁷ Despite India's tradition of having a politically neutral civil service, there are frequent newspaper reports of corruption allegations, accusations of electoral fraud and charges laid against government election officers. This is, of course, not to say that the public officials seconded to work for the ECI do not, by and large, perform their duties in an impartial manner. With an election workforce as large as that in India, it would be surprising, and perhaps suspicious, not to find such reports.

legislative proposals to the government and making public its views on the changes it believes are necessary, attempting to gain consensus on issues from the major political parties (e.g. “Model Code of Conduct”) and encouraging public debate. Many of the changes to India’s electoral laws have also come from court challenges brought by civil society groups and non-governmental organizations. Despite the relative lack of formal accountability mechanisms, the ECI’s financial records are subject to audit by both the Comptroller and the Auditor General, and any resulting reports are tabled in Parliament.

According to Patidar and Jha (2006, 192), the ECI is widely recognized by experts as a model of independence. The Indian Constitution established it to be autonomous, well resourced and beyond the reach of government. McMillan also notes, “Although highly political in terms of its actions, the Election Commission has developed and maintained a public reputation as an independent institution which has given it the authority to intervene and regulate the conduct of elections” (2012, 187). McMillan asserts that the ECI’s reputation has been acquired, in part, from the frequent need to interpret the broad provisions of the Constitution and the antiquated legislative prescription governing electoral matters.

The Supreme Court of India has provided express authority for the ECI’s approach to interpreting and augmenting India’s electoral law. In the case of *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner*, the Court commented, “the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours.” And, further, “Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of elections – of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation.”¹⁸

Many of the ECI’s interpretations, decisions and rules are popular with the public but resisted by the political entities they are intended to control. At times, however, its administrative rules have been challenged and struck down by the courts as beyond the scope of its authority.

The ECI is not free from accusations of partisanship, but it puts electoral integrity first and is reluctant to bow to government authority (McMillan 2012, 189). McMillan notes that its success is based on its administrative competence and the openness and accessibility it provides to the electoral process. However, he qualifies an otherwise strong endorsement of the ECI by observing that the expansionist role it has played to fill the vacuum of legislative authority and its attempts to fix the political system are distractions from its fundamental mission and will eventually weaken it. For now, its image as a fierce advocate of democratic principles and values has earned it public endorsement. In the 2009 National Election Study, almost 60 percent of respondents indicated that they had either a great deal or some trust in the ECI, compared to just over 45 percent for political parties. In addition, 72 percent thought that elections in India were conducted fairly, compared to less than 10 percent who thought they were unfair. No doubt the public esteem for the ECI has been earned by the convictions and decisions taken by the individuals who have been appointed as its members.

¹⁸ *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner*, December 2, 1977.

Challenges

The following are challenges that the ECI recognizes it needs to continue to address. Its major challenges have been dubbed the “three M’s” – muscle power, misuse of government resources and “black” money.

- Muscle power has to do largely with a practice known as “booth capturing,” a type of electoral fraud in which party supporters “capture” a polling booth by intimidating election officers, filling the polling station with party loyalists, preventing legitimate electors from entering and illegally voting in their place, thus ensuring victory for the party they support. Legal sanctions for this offence, coupled with the introduction of electronic voting machines with features introduced by the ECI, such as a time delay between entering each vote and a deactivation device, have helped to curb this serious voter suppression tactic.
- Misuse of government resources, in the form of personnel, funds, program advertising, vehicles and aircraft, was once rampant in India’s elections. The ECI’s response to this abuse of incumbency has been to include prohibitions in its “Model Code of Conduct” against the use of the government’s official machinery during election campaigns. While the prospect of detection, sanction by the ECI and the resulting negative publicity has not ended this abuse, the ECI thinks that the practice has now been severely curtailed.
- “Black money” usually refers to funds earned on the black market, on which taxes have not been paid. In the context of Indian elections, it refers more generally to funds that are difficult to trace and that enter election campaigns in the form of prohibited donations and illegal spending. The funds are used to circumvent the contribution and spending limits imposed on candidates and political parties. The ECI has been trying to come to grips with the problem by imposing more stringent accounting and reporting requirements on parties and candidates, ordering the co-operation of banks and deploying more financial observers. Unfortunately, these measures do not seem to have brought the problem under control, and legislative changes and stiffer punishments may be needed to deter this type of electoral corruption.
- Finally, there is the ongoing challenge of trying to keep India’s electoral rolls up to date. With such a vast electorate, encompassing nearly 825 million people, and greater internal movement within the country in recent years, the ECI has been unable to keep its electoral rolls current. It estimates that there is at least a 10 percent error rate in the rolls, although critics have estimated it to be much higher. Part of the problem is the incomplete coverage in the distribution of national identity cards, which were introduced to control fraudulent voting and which are required for voter registration. The ECI is now scrutinizing its electoral rolls to improve their integrity by using electronic data-matching tools to identify missing and duplicate electors.

Electoral Commission of New Zealand

Introduction

New Zealand is a unitary state that operates on a Cabinet-parliamentary model of government. It is a relatively small and socially homogeneous political community, with the exception of the minority Māori population. Before 1996, elections to the House of Representatives (commonly called Parliament) were based on the simple plurality system. Since then, elections have been conducted on the mixed member proportional (MMP) system, in which electors cast two ballots: one for a political party and one for a local candidate. There are also certain constituencies designated for Māori representatives.

In all seven elections held under MMP since 1996, no party has achieved a majority of the 120 seats¹⁹ in Parliament; as a result, coalition governments have been elected that involve two or more parliamentary parties represented in Cabinet and occasionally also Māori MPs. The scale of the political system and the nature of the representation system probably contribute to a greater sense of confidence in the electoral process than might exist in larger political systems.

History

From 1993 to 2012, four national agencies were responsible for electoral matters in New Zealand: the Electoral Commission (EC), the Chief Electoral Officer (housed in the Ministry of Justice), the Electoral Enrolment Centre and the Representation Commission, established intermittently to determine constituency boundaries. The EC was responsible for public education and administering rules related to political parties, the Chief Electoral Officer was accountable for administering elections and laws relating to candidates, while the Electoral Enrolment Centre of New Zealand Post Ltd. handled voter registration and maintained the electoral rolls. Following its 2008 general election, several reviews of New Zealand's electoral structures were carried out, and the existing institutional arrangements were found to be flawed because they duplicated functions, created confusion, increased costs and increased complexity for political parties, candidates and the general public.

Three options were considered: the status quo; a departmental model, with a new electoral commissioner located within the Ministry of Justice; and a Crown-entity model, with a new electoral commissioner designated as a statutory officer and a new commission created as an independent Crown entity. The options were evaluated against the key variables of independence, accountability, effective discharge of electoral administration functions, organizational capacity, cost-effectiveness and the timing of implementation. The status quo option was seen to perpetuate the overlap of roles, disjointed decision-making and duplication of administrative costs. The departmental option was deemed to be a highly effective and accountable model, but was rejected because it risked the perception, domestically and internationally, that New Zealand's electoral administration lacked the independence found in other jurisdictions. Despite offering a somewhat reduced level of accountability for delivering services and spending funds, the Crown-entity model was selected, with the EC placed at arm's length from executive government. It was also thought that designating the EC as an independent officer of the Crown would create an institutional separation from the executive branch of government and ensure greater structural, as well as perceived, independence.

The creation of a single statutory authority with overarching responsibility for all aspects of parliamentary elections and referendums was introduced in 2010. In introducing the Bill establishing the new commission, the Minister of Justice stated, "The adoption of an independent Crown entity for electoral administration will provide the best balance of a high level of independence with good accountability and the ability to administer the electoral functions to a high standard" (New Zealand 2009). The amendments establishing a new Electoral Commission of New Zealand and amalgamating former electoral agencies were phased in so as to minimize disruption in delivering electoral services and administering the 2011 general election and referendum (Electoral Commission n.d.). The new commission assumed its statutory functions under the *Electoral Act 1993* in October 2010, and the complete package of legislative changes was fully implemented by 2012.

¹⁹ Sometimes the number of seats can be slightly higher as a result of what are called "overhang seats." For an explanation, see www.mmpreview.org.nz/sites/all/themes/referendum/resources/Overhang.pdf.

Membership

The current New Zealand Electoral Commission has three members – a chairperson, a deputy chairperson and a Chief Electoral Officer – all of whom were appointed for terms of five years or less by the Governor General on the recommendation of the House of Representatives. Their appointments followed an open, merit-based, competitive process, conducted by the Ministry of Justice, calling for persons of integrity and independence with the necessary skills and experience to apply. The interviewing panel consisted of the Deputy Secretary of Justice, a High Court judge and the Ombudsman. The Minister of Justice circulated the names of recommended candidates to the leaders of the political parties represented in the House, and names that received unanimous approval went forward as a government resolution for debate and received unanimous support in Parliament.

The current chairperson of the EC, Hon. Sir Hugh Williams, is a retired judge of the High Court. He was appointed to the former EC in 2009 and to the new EC in August 2010 for a term of three years; in December 2013, he was appointed for a further three-year term. There is no legal requirement to appoint a judge to the new commission, but this was the case with the former commission, and the legislation anticipates that this may be the case by including provisions that preserve the rights and privileges of a judge so appointed. The deputy chairperson, Jane Huria, was a director and shareholder with a private consulting firm and was appointed to the EC for a three-year term in July 2011. The Chief Electoral Officer, Robert Peden, is the chief executive of the organization and a member of the independent Representation Commission, which determines the number of electorates and their boundaries every five years. Mr. Peden was originally appointed in 2005 as Chief Electoral Officer when the office was located in the Ministry of Justice. Before that, he worked as a policy and legal advisor for the Ministry of Justice. He was appointed for a five-year term to the new commission in August 2010. A remuneration authority is responsible for setting fair compensation levels for the commissioners' salaries.

Members of the EC can be reappointed or continue in office until a successor is appointed. The tenure of current appointees has been staggered so that appointments do not all expire at the same time or expire in an election year. Any member who is not a judge may be removed for just cause by the Governor General, acting upon an address from the House of Representatives. *Just cause* is defined to include misconduct, inability to perform the functions of office, neglect of duty and breach of any of the collective duties of the board or the individual duties of members. A judge serving as an EC member may be removed from office for a breach of the board's collective duties, but only if all of the other members are being removed for the same breach at the same time. The changes to the appointment and removal processes came about through legislative amendments in 2010 (New Zealand 2010).

Mandate, Powers and Responsibilities

The EC is defined as an independent Crown entity under the *Crown Entities Act 2004*. According to the *Electoral Act 1993*, its objective is to administer the electoral system impartially, efficiently, effectively and in a way that facilitates participation in parliamentary democracy, promotes understanding of the electoral system and associated matters, and maintains confidence in the administration of the electoral system. The EC's primary mandate is to administer parliamentary elections. There are no set dates for general elections; they are usually held in the third year of the parliamentary cycle at the call of the prime minister. The EC is also responsible for conducting by-elections and referendums.

The EC compiles and maintains an electoral enrolment for both parliamentary and local elections. The electoral rolls are updated daily since they must be available for "on demand" events. It was estimated that in the 2011 general election, the electoral roll coverage was 93.7 percent and currency

96.4 percent. The new commission assumed responsibility for managing the electoral rolls in 2012, and it delegates this function to New Zealand Post Ltd. Voting in New Zealand is voluntary, but all electors are required to register on the parliamentary electoral roll, and if they fail to do so and are convicted, they face a NZ\$100 fine.

According to the *Broadcasting Act 1989*, the EC also administers the public broadcasting rules for allocating approximately NZ\$3 million to political parties for radio and television broadcasts. This is the only money that can be spent on broadcasts to promote parties from the time the writ is issued until election day. Candidates, on the other hand, can use their own funds for advertising to garner voter support, within their spending limit.

Another major responsibility of the EC is promoting public awareness of electoral matters through education and information programs. It also conducts the Māori electoral option²⁰ every five years; provides support, funding and administrative services for the work of the Representation Commission; and provides advice to the Minister of Justice on electoral matters. Additional EC responsibilities include registering political parties; assisting parties, candidates and others with their compliance obligations; and reviewing and publicly disclosing financial returns from political parties, candidates and registered promoters.²¹

Operational Arrangements

At its national office in Wellington, the EC has a full-time staff of approximately 30 permanent and fixed-term positions. Six managers oversee the following organizational units: electoral events, electoral policy, communication and education, IT, corporate services and statutory relationships. The statutory relationships unit focuses on procurement, external service providers and contractors, including New Zealand Post Ltd., which has delegated responsibility for elector enrolment. There is no permanent field structure to deliver elections; instead, the necessary resource capacity, training, systems and infrastructure to support elections and referendums are put in place in the short lead-up to each event. In 2011–2012, five regional managers, 64 returning officers and 6,300 field headquarters staff were hired on fixed-term contracts to run the election and referendum. Approximately 18,000 to 20,000 additional field workers are employed on election day.

Despite its wide-ranging scope of authority over electoral matters, the EC has no powers to investigate or prosecute suspected offences under either the *Electoral Act 1993* or the *Broadcasting Act 1989*. It follows up on complaints to gather information and determine whether a matter warrants referral to the New Zealand Police, but it has very little authority to enforce compliance with its legislation. Even financial compliance matters, such as failure of parties or candidates to file the required financial returns and broadcasting infractions, must be referred to the police for further action. It is the returning officer's responsibility to report other kinds of offences to the police.

²⁰ The Māori electoral option gives New Zealanders of Māori descent the opportunity to choose whether they want to be on the general electoral roll or the Māori electoral roll. The existence of designated Māori seats remains controversial in New Zealand; for a range of perspectives, see Bargh 2010.

²¹ A registered promoter is an individual or group, other than a candidate or party, or person involved in the affairs of a candidate or party, on whose initiative an election advertisement is published for a parliamentary election. Promoters need to obtain authorization from the candidate or party before publishing the ad, identify themselves in the ad and register with the EC if they spend or intend to spend over NZ\$12,300.

As a result of a change to the *Election Act 1993*, since January 2011, the EC now provides advisory opinions on whether any particular advertisement referred to it is an “election advertisement” for the purposes of the Act. Any person can ask for an advisory opinion, and the EC’s opinion simply reflects its interpretation of the law and is not a binding ruling or legal advice (Electoral Commission 2012a).

Accountability and Independence

The EC is not subject to ministerial direction in discharging its electoral functions, and, according to the law, it must act independently. It has the same accountability and reporting obligations as other Crown entities under the *Crown Entities Act 2004*. Accordingly, it must prepare a statement of intent at the outset of each fiscal year – something akin to a business plan – including background information on its operating environment; its scope of functions and intended operations; the specific objectives, outcomes and impacts it intends to achieve and how it intends to achieve them; financial and non-financial performance forecasts, standards and measures; matters on which it will consult with or notify the Minister of Justice before making a decision; and the frequency of reporting. The Minister can also participate in determining the content of the statement of intent by identifying additional information, making comments and ordering amendments. Despite the Minister’s legislative authority to alter the contents of the statement of intent, however, it would be considered highly unusual and controversial for him or her to do so. Following each fiscal year, the EC must prepare an annual report that gives a clear assessment of its operations and performance for the reporting period. The Minister of Justice tables both the statement of intent and the annual report with the House of Representatives.

Since the EC was separated from the Ministry of Justice, its view is that it must continue to keep the Minister informed of its progress on preparations for an election and general event readiness, but, as for conducting elections, the *Electoral Act 1993* provides all of the necessary mechanisms for public oversight, accountability and reporting. Nevertheless, following a general election, the EC must report to the Minister on the services it provided to electors, enrolment and voting statistics, any substantive issues that arose, any necessary or desirable changes to administrative processes or practices, legislative amendments, matters that the Minister asks it to address and any other matter it considers relevant. Under the Act, it is also required to consider and report on electoral matters referred to it by the Minister or the House of Representatives.

The EC makes funding requests on the order of NZ\$6 million each year to Parliament through the Minister of Justice to provide a core-level service and staffing at its national office. Depending on where the year falls in the electoral cycle, a request may also include funds for elector enrolment, general and local authority elections, the Māori electoral option and the work of the Representation Commission. Over a three-year electoral cycle, the EC requests approximately NZ\$100 million to administer elections, of which roughly 50 percent is used for elector enrolment and 50 percent for conducting the elections. Separate funding requests are made for “on demand” events such as citizen- and government-initiated referendums and by-elections. The EC’s annual budgets are reviewed regularly to ensure that they meet the government’s expectations for efficiency and effectiveness, and business cases must accompany funding requests.

The requirement for the EC to act independently is embodied in the *Electoral Act 1993*. The Act stipulates that it must act independently in performing its statutory functions and duties and exercising its statutory powers. On the other hand, its functions and duties under the *Crown Entities Act 2004* are expressly exempted from this requirement for independence.

The EC works with policy advisors from the Ministry of Justice and provides advice and assistance to the Minister on proposed legislation and recommended changes to the *Electoral Act 1993*. There are, however, no powers for it to make regulations or advance rulings; all regulations under the Act are made by Order-in-Council.

One unique and very interesting feature of New Zealand's electoral law is the inclusion of what are called "reserved provisions." The *Electoral Act 1993* identifies six fundamental features of the electoral law – the minimum age for voting, the MMP method of voting, the term of Parliament, the establishment of a Representation Commission, the periodic adjustment of electoral division boundaries and the adjustment of the quota for the redistribution of these boundaries – which cannot be repealed or amended unless they are passed by a majority vote of 75 percent of all MPs or carried by a majority vote at a poll of electors. These provisions set a higher standard for changing or eliminating important features of New Zealand's democratic system and would block any government from acting without a broad consensus. A similar provision exists with regard to displaying election advertising along public roadways. The Minister may not recommend any changes without agreement from at least half of the leaders of the political parties represented in Parliament and unless at least 75 percent of their MPs agree.

Along with the establishment of the new commission in 2010, an important change was signalled in the *Electoral (Administration) Amendment Act 2010*. The EC was granted the power to provide information and advice to the Minister of Justice at any time and of its own volition. This means that it is free to express its views on how elections should be administered and any need for changes in the administrative framework.

Challenges

The following organizational challenges are impeding the EC's ability to fully achieve its mandate:

- In New Zealand, there is no set date for elections. Elections are usually announced about seven to eight weeks before election day. It is a challenge for the EC to recruit field staff, procure voting places and organize a quality election²² in such a short period of time.
- It has been problematic for the EC to obtain amendments to legislation early enough to be in a position to implement them before an election.
- There has been a steep decline in voter participation – from 89 percent in 1981 to 69 percent in 2011. The EC believes that it does not control the key drivers of electoral participation but, nevertheless, recognizes that it has a role to play in reversing the trend by encouraging participation and supporting others who promote voting.
- The EC tries to make the voting process easy for electors, but the system is complicated to administer because of the number of temporary workers involved. The EC would like to reduce the number of temporary workers and streamline voting processes – for example, by acquiring a system that electronically scrutinizes the electoral rolls and a postal-referendum management system to permit in-house scanning of postal voting returns.
- The amount of overseas voting declined 35 percent in 2011. The only statutory alternative to postal voting is for ballot papers to be submitted by fax machines, which are becoming increasingly harder to access. The EC is looking at improving access for overseas electors by enabling them to electronically upload ballot papers to a secure system.

²² For a definition of this term, see Appendix A, page 79.

- The EC's obsolete computer platform needs to be replaced, and security issues with the electoral management system need to be addressed. Funding must in place for this initiative by June 2014 in order to be ready for the 2017 general election.

The Electoral Commission in the United Kingdom

Introduction

The Constitution of the United Kingdom involves a blend of law and politics. Historically, a limited number of written constitutional documents and fundamental laws have set parameters on the exercise of executive authority. Most of the limits placed on the actions of the prime minister and Cabinet ministers have existed in the form of informal, unwritten constitutional conventions and the parameters of politically acceptable action.

Traditionally, conditions of majority government and disciplined parliamentary parties meant that there was normally the potential for predictable, unified policy leadership. Early in the 21st century, however, voters have denied any single party a majority, and coalition governments involving Cabinet-sharing between two parties has become the pattern for government at Westminster in London. In Scotland, Northern Ireland and Wales, as well at the level of local governments, minority and coalition governments have been more common.

The UK is a unitary rather than a federal state. This once meant that Parliament had complete authority over all public policy-making in the country; now, however, certain authority is shared with the European Union (EU). The first constitutional compromise with the principle of a sovereign national Parliament came when the UK entered the EU in 1973. After the first elections to the European Parliament took place in 1979 and the UK gained accession to the EU Council of Ministers, it became subject to certain laws and policies of the EU.

The second major change involved constitutional devolution to the constituent parts of the UK. Before 1998, Northern Ireland, Scotland and Wales were subject to laws and policies decided in London, and only a limited amount of administration was delegated to local authorities. However, following referendums in those jurisdictions, the Parliament at Westminster passed a series of three Acts that devolved legislative and executive authority to the three non-English parts of the UK. The devolution process created subordinate legislatures in Northern Ireland, Scotland and Wales, but there were significant differences in the authority they were granted. According to Bogdanor (2009, 89), "Devolution transformed Britain from a unitary to a quasi-federal state."

Since 2009, there are no fewer than five electoral systems in operation: i) for elections to the House of Commons, the method is simple plurality; ii) for the Northern Ireland Assembly, the method is single transferable vote; iii) for the Scottish Parliament and the National Assembly of Wales, the method is the "additional member" system, in which electors vote twice – once for the local candidate and once for the party; iv) for elections to the European Parliament, there is a regional list method; and v) for all directly elected mayors, the supplementary vote method is used. There are also directly elected police and crime commissions in England and Wales, and, in these elections, the supplementary vote system is used.

History

Until 2001, all elections in the UK were overseen and coordinated by a central government department in London called the Home Office, which was led by a minister of the Crown. However, electoral

registration and the running of elections was the responsibility of local authorities (see discussion below). The tradition of local control allowed the diverse circumstances across communities to be recognized, but it also gave rise to inconsistencies in the procedures and standards of electoral administration. Even after the national Electoral Commission (EC) was created in 2000, local electoral registration officers, acting returning officers and counting officers remained in charge of national parliamentary elections (Gay 2010). These local officials are not employees of, or under the direct control of, the EC.

During the late 1990s, several bodies recommended that an independent commission be created to oversee elections, with the aim of achieving both greater independence from the government and promoting a more uniform approach to how elections are conducted. However, the main impetus for the creation of the EC came from the work of a non-departmental public body called the Committee on Standards in Public Life (CSPL), which had been created in 1994 in response to a scandal involving undue influence by lobbyists in the parliamentary process (Ewing 2001). After issuing four reports on the ethical standards of public life, the CSPL focused on issues of party funding and campaign spending. Its fifth report, issued in 1999, recommended a “totally independent and authoritative election commission with widespread executive and investigative powers and the right to bring cases before an election court for judgment” (Committee on Standards in Public Life 1998, 4). It also envisioned that the EC would register political parties and supervise election finance rules.

The proposal for an electoral commission was implemented by the *Political Parties, Elections and Referendums Act 2000* (PPERA), and the EC was established in November 2000. In April 2002, the Boundary Committee for England (formerly the Local Government Commission for England) became a statutory committee of the EC. Its duties include reviewing boundaries for local government elections (see further discussion below).

Membership

Based on the PERA, the EC consists of six members, including a chairperson. The commissioners are appointed by the Queen based on an address from the House of Commons. They are recruited and nominated by the Speaker’s Committee on the Electoral Commission (henceforth referred to simply as the Speaker’s Committee), which consists of members of the House of Commons (see discussion in “Accountability and Independence” below).

The PERA originally set out strict limits on eligibility to serve on the EC; these were intended to prevent even a hint of partisan bias in appointments. Individuals were prohibited from serving on the EC if they were members of a political party, had held political office in the previous ten years or had donated to a political party. Employees of the EC were also subject to restrictions on their political involvement (Ghaleigh 2010, 9), and it remains the case today that the executive director cannot be a member of a political party. The executive director in turn has designated 12 staff, mainly in the campaign finance area, who also cannot be involved in partisan activities.

The principle of a strictly non-partisan commission was changed somewhat by an amendment to the PERA in 2009, which provided for three of the ten commissioners to be nominees of the largest political parties (Conservative, Labour and Liberal Democrats) and one to be a nominee of the minor parties represented in the House of Commons.

The EC did not oppose the changes to its membership structure, acknowledging that they were matters legitimately to be decided by Parliament, but it did point out the risks involved in moving to a mixed member commission. The bulk of academic opinion opposed the change.

However, the CSPL, the Speaker's Committee and all political parties supported the change on the grounds that the EC had not demonstrated sufficient knowledge of or attentiveness to the practicalities of the political process. In defence of the change, the government declared that party appointees "should bring their political experience to bear in a non-partisan manner and not act as representatives or delegates of their parties" (Committee on Standards in Public Life 2007, 17).

The result of the 2009 amendments was to create two categories of EC members. The six "selected" members are recruited and recommended for appointment by the Speaker's Committee. The selection process is conducted on the basis of established principles and practices for all such public appointments, which are overseen by a Commissioner of Public Appointments. The process for appointment of selected commissioners includes public advertising, the opportunity for anyone to apply and a review of applications with the support of specialists on appointment processes. In other words, appointments are not made simply because the government has identified candidates and brought their names forward to the Speaker's Committee.

Ineligibility based on partisan political involvement continues to apply to this first group of selected commissioners. However, because the four "nominated" commissioners are expected to contribute expertise based on their first-hand knowledge of the political process, the restrictions that prevent party activists from being appointed to the EC do not apply to them. Nominated commissioners are, however, not allowed to donate to political parties. Both groups of appointees are still subject to the further restriction that they cannot be elected members of any parliamentary body in the UK, of the European Parliament or of any elected local government body.

The 2009 legislation also increased the minimum and maximum number of commissioners who may be appointed. The minimum number was increased from five to nine, and the maximum number was increased from nine to ten. The increase in the minimum was intended to ensure that "nominated" commissioners would always be in the minority on the EC. It has become the practice, but is not a statutory requirement, to have a "selected" commissioner from each of the devolved jurisdictions and to have that person play a lead role on electoral matters in that part of the country.

Even in the case of the nominated commissioners, there is an informal process of the Speaker approaching the political parties to provide three names (rather than one) and then convening a panel (usually consisting of the Speaker, two other MPs from the committee and the chairperson of the EC, with the support of an appointments specialist) to provide names to be approved by the full committee.

The chairperson of the EC is appointed by the Crown on the recommendation of the House of Commons for a term of up to ten years. The chair cannot be one of the commissioners nominated by the parties.

The Speaker's Committee identifies and selects nominees with the assistance of an outside panel of eminent citizens and recruitment consultants. Before the name of a nominee is presented to the Commons, the Speaker is required under PPERA (section 3.2) to consult the leaders of the registered parties with MPs in the House of Commons. Chairpersons can be reappointed on the recommendation of the committee, but by law, they cannot be one of the nominated commissioners. To date, there have only been two chairs of the EC. In 2009, Jenny Watson replaced Sam Younger as chair for a three-year term, and in 2012, she was reappointed. Because of problems of long queues in the 2010 general election and postal ballot fraud in several by-elections, there was controversy over her reappointment (Wright and Taylor 2012). This incident reveals a more general tendency, when problems arise in the electoral process, for critics in Parliament and the media to blame the most visible, responsible official and pay little attention to the reliance of that official on the many other actors involved in staging sound elections.

The chairperson has a number of key roles: to provide leadership in developing collegiality; chair monthly meetings; represent the EC in dealings with government, Parliament, devolved legislatures, political parties and other stakeholders; select (with the other commissioners) the executive director and other senior managers; take (with the other commissioners) decisions about exercising statutory powers; and serve as the chief counting officer for any nation-wide or regional referendum.²³

Based on the review of the EC conducted by the CSPL, the PPERA was amended in 2009 to make the position of chairperson part time rather than full time.²⁴ The justification was that a part-time role would make it easier to attract “high-quality talent” and ensure that the role remained “non-executive and high level,” not operational (United Kingdom, Parliament, House of Commons 2008, 6). EC members are seen to be equivalent to “non-executive” directors on corporate boards in the sense that their role is to set policy directions, allocate resources and oversee management, not to be involved in deciding matters of compliance or enforcement.

Mandate, Powers and Responsibilities

The EC is an independent statutory body. Its mandate is broader than what was proposed by the CSPL and includes:

- Registering political parties
- Monitoring and publishing contributions to parties
- Regulating parties’ campaign spending
- Preparing reports on elections and referendums
- Reviewing electoral laws and providing advice to government
- Providing advice to authorities responsible for the administration of elections and referendums
- Appointing a chief counting officer (usually the chair of the EC) to manage UK-wide and regional referendums
- Promoting public awareness of electoral systems
- Setting and monitoring performance standards for local returning officers and electoral registration officers

The PPERA originally provided that a pre-existing committee on electoral boundaries would operate within the framework of the EC. However, based on a recommendation in the 11th report of the CSPL (published in January 2007), the government decided that in the spirit of devolution, independent committees established in each of the three devolved jurisdictions would conduct future boundary reviews (Committee on Standards in Public Life 2007). It was also decided, however, that the EC would retain an oversight role over the boundary review processes for all parts of the UK, including for local governments, and would be authorized to provide recommendations for improvements to those processes.

²³ When the EC was established in 2000, the resolution passed by the House of Commons provided for a full-time chair whose salary would be increased each year by the same percentage increase granted to High Court judges.

²⁴ Despite the shift to part time, there would be no reduction in the annual remuneration (£150,000) paid to then chair Sam Younger (Committee on Standards in Public Life 2007, 16). The justification was that the transition to a new governance structure, the ongoing process of modernization of election laws and the changing practices of electoral competition would present him and his colleagues with serious challenges for the foreseeable future.

The EC declares that its fundamental purpose is “to support a healthy democracy where elections and referendums are based on our principles of trust, participation and no undue influence” (Electoral Commission 2013b). The tools available to it to implement its mandate are discussed below.

Changes to PPERA in 2009

As noted above, the EC’s mandate has evolved to become quite extensive. The CSPL’s original proposal called for a narrow focus on campaign finance matters, but the subsequent government Bill added roles to supervise referendums and expenditures by third parties, promote elector participation and provide policy advice on electoral law reform.

The original PPERA declared that the EC was to “monitor” the raising and spending of money, and this wording created ambiguity as to whether the EC had a relatively passive role in receiving and disclosing information or a more active role in investigating complaints and imposing sanctions for violations of the law. The EC had no power to require witnesses to attend for an interview and could pursue fines only for a limited number of contraventions. For other potential breaches, the only option was to refer for criminal prosecution – action that was often not proportionate to the breach.

The amendments made to the PPERA in 2009 were intended to strengthen the EC’s regulatory role by making available to it a wider range of investigatory powers and sanctions. The EC had recommended these changes, including in its submissions to the CSPL over the years. This is not the place to describe those powers in detail; suffice it to say that Part 1 of the law clarified that the EC was not only to monitor, but also to regulate for the purposes of ensuring compliance (section 1), added new powers to investigate and obtain information (section 2) and gave the EC a wide range of sanctions to deal with contraventions and offences (section 3).

In December 2010, the EC released a document called “Enforcement Policy,” and in July 2012, it published a follow-up document entitled “Use of New Investigatory Powers and Civil Sanctions.” Both documents outline its approach to exercising its new authority, making clear its intention to rely mainly on advice and guidance and to use its authority to impose fines in a selective and proportionate manner when voluntary compliance is not possible. Under the law, the EC is required to report on its experience with the use of its new powers, and, to date, it has issued three such reports. In summary, according to the EC, the new regime has been successful. Overall levels of voluntary compliance have improved, and it has not imposed a vast number of sanctions under its new authority.

Under the PPERA 2009, the EC has the power to give advance notice of disclosure requirements and suspected offences and to identify the potential consequences (including criminal sanctions) that may result from a failure to comply with a notice.

Steering Local Electoral Administration by Remote Control

While the EC now has a clear regulatory role in election finance matters, other dimensions of the electoral process are not subject to its direct control. For example, elections are administered locally. An electoral registration officer (ERO) compiles and maintains the list of eligible voters. Returning officers are treated as honorary positions and are held by local mayors or sheriffs, and it is the acting returning officer (ARO) who organizes an election. In turn, AROs delegate the operation of the election to deputy returning officers. In most cases, the ERO is also the ARO. Traditionally, AROs had considerable autonomy in their work so that the creation of the EC in 2000 to provide advice and scrutiny was not universally welcomed by local electoral authorities. These officials are appointed by local government authorities.

Since 2000, the EC has sought to balance national support and guidance with local flexibility in several ways. It publishes its guidance to EROs and AROs on its website. Based on amendments to the *Electoral Administration Act 2006*, the EC was given authority to set performance standards for EROs, AROs and referendum counting officers. It published the first set of seven standards in July 2008 and its first assessment of performance in April 2009. It developed these performance standards in consultation with local electoral authorities and provided support for those officials to engage in self-assessment and public reporting related to electoral processes; it measured the extent to which local officials had adopted these standards and then published its findings online (James 2013; Electoral Commission 2010a). Rather than just focusing on performance after elections, the EC works with local authorities in advance to catch any problems that might affect electors.

After problems occurred during the 2010 general election (long queues, missing ballots, etc.), the EC went further in connection with two referendums held in 2011 by publishing detailed instructions to local electoral officers. This gave the EC greater input, but at a cost, according to one commentator, of overlooking local knowledge, entailing greater expense and losing a sense of ownership by local authorities (James 2013).

In 2012, the UK Electoral Advisory Board was established, composed of returning officers for elections in all parts of the UK and for EU elections, representatives of the Association of Electoral Administrators and representatives from government. The board is chaired by the executive director of the EC, and it aims to ensure that well-run, quality elections take place and to provide advice to governments for this purpose.

Operational Arrangements

The EC is headquartered in London, with regional offices located in the three devolved jurisdictions. The executive director provides day-to-day leadership of its operations, including staffing and financial matters. He or she directs the executive team, which is composed of directors for Party and Election Finance, Electoral Administration, Finance and Corporate Services and Communications. He or she reports to the EC, which does not have direct involvement in operational matters, particularly related to the enforcement of electoral law.

The EC is directly funded by a vote of Parliament. Its budget is divided into three categories: core funding, event-related costs and policy development grants, which are paid to political parties. In 2011–2012, Parliament voted £20.79 million for regular EC activities, and in 2012–2013, funding for referendums was provided in the amount of £66 million.

The EC's core funding is affected by government-wide budgetary policy. As a result of an ongoing government spending review process, the EC committed to delivering savings of 32 percent from the core budget over the years 2010–2011 to 2014–2015 (Electoral Commission 2013, 23).²⁵

EC employees are not members of the civil service; in fact, the current executive director had to resign from the civil service to assume his position. However, in determining the classification and remuneration of its employees, the EC must by law take into account comparable positions in the civil service.

²⁵ As part of the government-wide austerity program, the EC reduced its staff levels from 131 full-time equivalents in March 2012 to approximately 125 in March 2013 (Electoral Commission 2013, 25).

Accountability and Independence

The EC's primary accountability is to Parliament and, more specifically, the Speaker's Committee. The Speaker's Committee was created under the PPERA (section 2). The Speaker acts as chair and is responsible for establishing the membership, which must reflect the balance of party representation in the House of Commons. Membership typically includes the Speaker, two ministers of the Crown, the Chairman of the Home Affairs Committee of the House of Commons and five backbench members of the Commons.

The committee performs a number of functions.

- Identifying possible new members and reporting to the House of Commons any grounds for removal of a commissioner.
- Recommending the appointment of the chairperson from within the EC and reviewing his or her performance for the purposes of renewal, as described earlier.
- Examining the EC's annual estimates to determine whether they represent an economical, efficient and effective operation and modifying them before presenting them to the House of Commons for approval.
- Examining the five-year corporate plan and modifying it before placing it before the House of Commons for approval.
- Consulting with the Treasury Department before reaching decisions on the EC's estimates and plans.
- Designating the EC's accounting officer (the executive director is designated), who answers for the financial propriety of its finances.
- Receiving reports from the Comptroller and Auditor General on the economy, efficiency and effectiveness of the EC.
- Reporting each year to the House of Commons.

The Speaker's Committee is the parliamentary "home base" for the EC and the main forum where it is held accountable. On the important matter of setting the EC's budget, it is legally required to consult the Treasury Department. It is not required to obtain Treasury approval, but, if in approving the EC budget it goes against a clear Treasury recommendation, this fact must be reported by law to the House of Commons.

From time to time, the EC's affairs can be the subject of debates (for example, on election-related bills) and scrutiny in Question Period and before parliamentary committees. For example, on policy issues, such as possible reforms to electoral laws, the EC appears before the Commons Political and Constitutional Reform Committee. There is no generalized requirement that governments consult the EC before introducing changes to electoral law, although a number of legislative matters require advance consultation. However, consultation does not mean that governments must accept the EC's advice.

While not a formal accountability relationship, the EC strives to be responsive to a range of stakeholders who are affected by its policies and practices. The Parliamentary Parties Panel and similar panels for the three devolved legislatures give the EC advice and information. In addition, the EC regularly engages in consultation exercises, maintains an extensive website and Facebook presence and deliberately seeks out advocacy groups promoting electoral reform. It also conducts research and posts it online for free download. Generally, the EC operates in a manner that conforms to the Freedom of Information law.

Challenges

The following is a list of the challenges that the EC currently faces:

- Issues related to declining voter turnout and the factors influencing the propensity to vote have led to a strategy for modernizing the electoral process that focuses on two main lines of reform.
 - Simplifying the complex legal environment that governs elections, a process that involves working with the Law Commission on a multi-year project.
 - Using IT for such purposes as online registration, voter authentication and interactions with political parties; electronic counting of votes; and ensuring the security of the voting system to protect privacy and reduce the potential for intrusions.
- The shift from registration by household (anyone in a home can register an elector) to registration of individuals and the introduction of a requirement for voter identification at polling stations are upcoming changes.
- On the issues related to campaign financing, possible challenges will depend on parliamentary action to change a regulatory system that relies mainly on reporting and transparency and operates with no caps on donations and relatively high ceilings on total spending.

The Federal Election Commission and the Election Assistance Commission in the United States

Introduction

The national government in the United States operates on a presidential-congressional model, which involves the separation of power among the three branches of government: the president, the Congress and the courts. There is an elaborate system of checks and balances among the three branches, which is meant to avoid any undue concentration of authority in a single branch. Major policy changes in the US require the agreement of at least two, and often all three, branches of government.

The US is also a federal system of government, in which authority is divided between the national and state governments. The Constitution of 1787, which sets out the responsibilities of the two orders of government, divided authority over national elections between Congress and the state legislatures. Article I, Section 4, the “Elections Clause,” grants state legislatures the authority to regulate the “times, places, and manner of holding Elections” for Congress. At the same time, it grants Congress the authority to “make or alter” these state rules. The Supreme Court has ruled that these provisions apply to presidential elections (Benson 2008, 347). Article II of the Constitution allows Congress to set the date for presidential elections. The Constitution also provides for the establishment of an Electoral College to serve as an intermediary between voters and the final selection of the president and vice president.

Congress has enacted only a limited number of laws related to elections. Most of them deal with the right and the opportunity to vote and with political finance.²⁶

²⁶ For example, in 1965, Congress passed the *Voting Rights Act*, which sought to prohibit racial discrimination in all elections. This was followed in 1993 by the *National Voter Registration Act*. Because these Acts were meant to apply to a large, diverse country, they were broadly worded to allow flexibility in how they were applied.

History

After the high-profile Watergate scandal in the 1972 presidential election, Congress established the Federal Election Commission (FEC) through a 1974 amendment to the *Federal Election Campaign Act* (FECA), originally passed in 1971. As a national agency, the FEC regulates how money is raised and spent in national elections. Under the *Revenue Act*, the *Presidential Primary Matching Payment Account Act* (1975) and the *Presidential Election Campaign Fund Act* (1975), the FEC administers public funding for presidential elections. Its authority, however, does not extend beyond these financial matters to include other aspects of national electoral administration. The role, structure and operations of the FEC are discussed below.

Congress has also used the Constitution's Spending Clause to further the aims of these Acts by attaching certain conditions to the transfer of federal money to state governments. In 2002, Congress passed the *Help America Vote Act* (HAVA), whose main goal was to increase access to the polls while reducing the risk of fraud (Tokaji, 2009). The new law provided for the creation of the Election Assistance Commission (EAC), which serves as a clearing house for resources on electoral administration and as a mechanism for grants to states to cover such expenses as the purchase of modern voting machines (Benson 2008, 349–350).

Despite federal transfers to state and local jurisdictions, issues concerning the right and opportunity to vote continue to beset the electoral system. After numerous complaints were lodged during the 2012 elections about elector eligibility and long lineups, on March 28, 2013, President Obama appointed a Presidential Commission on Election Administration. The nine members were to be individuals with knowledge of the administration of elections. The commission was instructed to hold public hearings across the country and, within six months of its first public hearing, make “best practice” recommendations. In carrying out its mandate, it was instructed to avoid duplicating the efforts of other entities.²⁷ In January 2014, the commission delivered its report.

Even with these intermittent national actions, the state legislatures are the predominant source of laws regulating the electoral process. The state legislative process with respect to electoral matters has been described as often “piecemeal, sporadic and dominated or driven by partisan concerns” (Benson 2008, 357). The electoral codes passed by state legislatures tend to be general and grant widely varying powers to local governments to conduct elections. This further delegation of responsibility from the state to the local level means, in effect, that elections for the four national offices – president and vice president along with representatives and senators – are mainly planned, organized and executed by local authorities in approximately 13,000 counties and municipalities across the country. (See Appendix B for a brief discussion of the roles of state and local governments in the national electoral process.) Some local election officers are appointed and others are elected, but almost all are selected on a partisan basis. The 2014 report of the Presidential Commission on Election Administration concluded that these arrangements did not promote professionalism in electoral administration and in fact undermined public confidence in the electoral process (Presidential Commission on Election Administration 2014, 18).

It should also be noted briefly that both national and state courts play a role in overseeing the electoral process. In numerous, and at times contradictory, rulings, the Supreme Court has sought to balance free speech with fair electoral processes and has imposed limits on the authority of the FEC, most notably in *Citizens United vs. the Federal Election Commission*.²⁸ State courts are charged with resolving disputes

²⁷ *Federal Register*, Executive Order 13639 of March 28, 2013.

²⁸ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

and punishing offenders of electoral laws, but it is rare for a state court to overturn an election outcome (Benson 2008, 351–54, 357–59).

In summary, the US national electoral system is highly complicated, involving several institutions and actors that interact to shape, administer and enforce laws, policies and practices. There is no national body that has strong legal and regulatory authority over all dimensions and stages of the electoral process. According to the critics, the fragmented electoral system lacks national standards, creates opportunities for electoral irregularities and leads to more contested elections (Issacharoff, Karlan and Pildes 2002, 223).

Membership of the FEC

The composition and appointment process for the FEC has always been controversial. The original design provided that the president, the Speaker of the House of Representatives and the president *pro tempore* of the Senate would each appoint two members to a six-member commission. Officially, this appointment process reflected the separation-of-powers principle enshrined in the Constitution; unofficially, it reflected a political concern: to ensure that the new regulatory body would not intrude too heavily into the sensitive domain of politics and money.

In 1975, a lawsuit was launched, challenging the constitutionality of the appointment process. The appellants used the separation of powers doctrine to argue that because the FEC's powers were executive, rather than legislative, in nature they fell under the appointments clause (Article II, Section 2, Clause 2) of the Constitution, which authorized only the president, with the advice and consent of the Senate, to make executive appointments.

A year later, the Supreme Court in *Buckley v. Valeo*²⁹ sided with the appellants. The court ruled that the FEC, as then constituted, could no longer exercise its authority to enforce the law, determine eligibility for public funding, conduct civil litigation or issue advisory opinions because those functions were executive rather than legislative. The FEC's informational and auditing functions, however, were found to be legislative and, therefore, constitutional (Kershner 2010).

In response, in May 1976, Congress passed and the president signed FECA 1976, which reconstituted the FEC to its present structure of six full-time members, appointed by the president and confirmed by the Senate. The revised law still provided for close congressional scrutiny by making the Secretary of the Senate and the Clerk of the House of Representatives *ex officio* members of the FEC without voting rights. This meant that these top congressional officials would be privy to the most sensitive FEC discussions about enforcement matters concerning the re-election campaigns of their fellow lawmakers (Mann 1997, 277).

According to FECA, six voting members of the FEC shall be chosen “on the basis of their experience, integrity, impartiality and good judgment.” However, the anticipation is that members will have partisan identities because the law provides that no more than three members can be affiliated with the same political party; on a six-member commission, this implies that three will be Democrats and three will be Republicans.

The theory behind the bipartisan commission model is that the two parties will “check” each other so that neither party can take political advantage of the other in enforcing campaign finance laws. It is also argued that appointing commissioners with partisan affiliations will ensure greater awareness of the realities of the political process and greater responsiveness to the concerns of elected representatives.

²⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

Critics of the FEC membership structure claim that it undervalues impartiality, professionalism and expertise in overseeing election finance matters and places a premium on partisan political connections. They also suggest that the bipartisan model regularly produces deadlocks based on tie votes. However, other commentators argue that principle rather than partisanship typically guides decision-making and that deadlocks are relatively rare. The evidence for these conflicting claims is examined in Appendix C.

Political Bargaining on Appointments

To ensure a favourable outcome to the confirmation process, the president's office floats the names of prospective nominees with key members of Congress, including the party leadership in both Houses (Ostrander 2013, 8). The names of nominees who make it through this initial screening are placed before the Senate, and the nominations are referred immediately to the Senate Rules Committee, where they may be the subject of public hearings. Delays in reviewing nominations can occur because other business takes precedence and because, occasionally, this becomes a tactical means of gaining leverage in other political disputes. Once reviewed, nominations are reported back to the Senate with a recommendation from the committee – usually to confirm the nominee – and a vote is held. If a nomination has not been approved before a congressional session ends, these nominees are returned to the president and must be reintroduced at the start of the next session. Presidential nominations rarely fail, but achieving timely appointments to ensure a full membership on the FEC has proven to be difficult, especially over the past several decades, when hyper-partisanship has dominated the political process in Washington.

Commissioners were originally appointed for a six-year term and were eligible for renewal, but in 1998, Congress changed the law to allow for only one term. The one-term limit was justified as a way of insulating commissioners from political pressures that might arise if they had to look to the president and the leadership in Congress for renewal (Mann 1997, 277). However, it has produced considerable turnover at the FEC.³⁰ Terms are staggered; this means that every two years, two new appointments must be made, and this results in a lack of continuity in membership.

When vacancies occur, they are filled in the manner described above. Commissioners may serve past the expiration of their terms until a successor is appointed. When Barak Obama became president in January 2009, there were four vacancies, and his first appointments were not confirmed until September 2013 (Levinthal 2013). The two appointments restored the FEC to full strength, but the other four commissioners are all serving on expired terms.

Commissioners are full-time appointees and are not allowed to have any outside employment. The chair and vice chair are elected each year from among the FEC members, and they must come from different parties. No commissioner is allowed to serve as chair more than once during his or her term. The chairperson does not have decision-making authority, nor does he or she have sufficient status to act as an honest broker when substantive disagreements arise.

Mandate, Powers and Responsibilities of the FEC

The name of the FEC is somewhat misleading because it deals not with a broad range of electoral matters, but only with campaign finance issues. As mentioned earlier, the FEC was created by a 1974 amendment to FECA, a statute that limits the sources and amount of contributions used to finance

³⁰ For some numbers, see Franz 2009, 172.

federal elections and requires public disclosure of campaign finance information.³¹ According to Thomas E. Mann, a leading scholar on campaign finance issues, Congress designed the “watchdog” agency “to operate on a tight leash strictly held by its master” (1997, 277). Many other informed commentators agree that the structure of the FEC and its legal authority make it very difficult for it to provide effective and expeditious enforcement of campaign finance laws.

In 1976, only two years after the FEC was created, Congress took the first of a series of steps to curtail its authority. First, by amendments to FECA, Congress granted itself the authority to disapprove regulations proposed by the FEC and immediately used this authority to veto the first two such regulations. Second, advisory opinions (see below) that the FEC issued in lieu of regulations could apply only to specific cases and could not have general applicability. Third, the FEC was prohibited from investigating anonymous complaints or violations reported in the media. Finally, FECA 1976 pushed the FEC to minimize reliance on regulation and litigation and instead promoted reliance on informal methods of consultation, conciliation and persuasion. Further amendments to FECA in 1979 reduced the administrative “burdens” on candidates and parties by requiring fewer reports during electoral cycles. They also removed the FEC’s authority to conduct random audits, which members of Congress from all parties likened to “fishing trips.”

It is not possible in the space available here to describe fully the responsibilities and activities of the FEC,³² but we will discuss four broad sets of procedures that the FEC has established to implement FECA: rule-making, advisory opinions, auditing and analysis, and adjudication.

Rule-making involves the FEC interpreting and refining the law as passed by Congress. New regulations may be required as a result of changes to FECA passed by Congress, or the FEC can act independently when existing regulations are regarded as unclear or inadequate (for example, when the Internet changes political practices). Proposed rules are published in the daily *Federal Register*, and individuals and organizations are invited to submit arguments for or against them. Individuals may also petition the FEC to introduce a new rule or modify or remove an existing rule, and Congress can veto any rule that is proposed. The convoluted history of campaign finance regulation involves good intentions, constitutional setbacks and retrenchments of former rules.³³

Another way to clarify points of the law when individuals or organizations request a formal interpretation is by issuing advisory opinions. They must deal with specific circumstances and cannot be of general application, and drafts are discussed at the FEC’s public meetings. The advisory opinion process has been harshly criticized for allowing so-called super political action committees (super PACs) to escape the election spending limits imposed on parties and candidates. As a 2012 book written by two veteran election commentators concluded, the FEC’s advisory opinions “gave the green light for mendacity that makes laughable the candidates’ claims that they have no connections with the super PACs created in their names” (Mann and Ornstein 2012, 153).

In terms of public reporting, candidates for the Senate, the House of Representatives and the presidency are required to file public reports on revenues and expenditures as well as report donations over US\$200. In 1979, the FEC lost the authority to conduct random audits; since then, audits can be conducted only as part of a complaint investigation or if FEC staff detect potential violations based on public filings by candidates for national office.

³¹ FECA operates in tandem with the *Revenue Act*, the *Presidential Primary Matching Payment Act* and the *Campaign Act*, all of which provide public funding for national elections.

³² For more information on the FEC, go to www.fec.gov/.

³³ For a brief history up to 2006, see Sheppard 2007, 38–45.

Individual citizens and organizations can file complaints with the FEC regarding possible violations of the law, and the FEC must decide whether to investigate. It will not investigate anonymous complaints. The time-consuming nature of the investigation process means that few complaints are resolved in the electoral cycle in which they arise, and in some instances, successful candidates can be installed in office before they may face a small fine for violation.

By law, the FEC has exclusive civil jurisdiction over all campaign finance violations. This statutory authority seemingly strengthens its enforcement capacity, but for reasons too technical and lengthy to be described here, the monopoly over civil actions can actually hamper both agency enforcement and private actions by citizens in response to alleged violations.³⁴

When violations are blatant and/or persistent, the FEC can impose punitive sanctions, and knowing and wilful violations can result in imprisonment. Most minor violations, such as late filings of reports, are dealt with through a conciliation process (the Alternative Dispute Resolution process, introduced in 2000), which can result in civil penalties in the form of fines. Since 2008, the FEC has operated an Administrative Fines Program. For actions involving alleged criminal wrongdoing, the FEC must work with the Justice Department to obtain convictions.

In general, the FEC prefers to rely on voluntary compliance by signalling in advance its intentions to enforce different requirements under the law.

Operational Arrangements

The FEC receives an annual appropriation, which in 2012 was US\$66.4 million, up from US\$54 million in 2006. Despite an explosion of political spending hastened by a series of Supreme Court decisions that reduced restrictions on spending by corporations, associations, labour unions and political action committees, the agency's funding levels have remained flat for five years, and staffing levels have fallen to a 15-year low. Key executives have also left in the last few years (Center for Public Integrity 2013).

The FEC has 375 full-time employees, and personnel costs account for 6 percent of its budget. The largest portion (69 percent) of these personnel costs are spent in the General Counsel division, which is responsible for developing policy and litigation as well as handling complaints. The remaining (31 percent) is spent on infrastructure, including IT and contracts with IT consultants. The FEC is headquartered in Washington and has no regional offices.

A recent report from a campaign reform organization concluded that the FEC was chronically underfunded and understaffed (Wertheimer and Simon 2013, 20–21). It also recommended that the agency be provided with multi-year funding to allow for planning over the electoral cycle.

All of the FEC's core regulatory functions – rule-making, advisory opinions, investigations, administering fines and launching court cases – require four votes from the six members. This brings us back to the widespread criticism of deadlocks in the FEC, which allegedly render it ineffective as a regulatory body. But the popular image of a dysfunctional agency divided along party lines has been largely based on anecdotal evidence in the media. Empirical analyses of the FEC's actual decision-making have been relatively rare. A valid examination of the extent of partisan deadlock would have to include the different types of decisions made by the FEC over time rather than relying on a few high-profile controversies or a snapshot of agency decision-making in a short time period. Appendix C gives an overview of several empirical analyses using different kinds of evidence and covering different time

³⁴ For a detailed legal analysis, see Seifried 2012, 10–11.

periods. The findings are mixed, but generally not positive about how well the FEC fulfills its mandate in an effective manner.

Accountability and Independence

The FEC can most accurately be described as a semi-independent regulatory agency. It is subject to a number of formal constraints on its authority and to multiple accountability requirements. There are a large number of so-called stakeholders who are affected by FEC actions and/or who can affect its performance. Meeting the expectations and demands of different institutions and actors involves a difficult balancing act that is inherently political and risky.

The president plays a major role in determining the direction and effectiveness of the FEC because he or she can propose legislation amending its formal mandate. Under conditions of divided government, however, there is often no guarantee that amendments will be approved by Congress, and, even more often, approval requires compromises. The president appoints members to the FEC, subject to Senate approval, and can recruit nominees who share his or her philosophy on campaign finance regulation. The president submits an annual government budget to Congress for review and approval by both Houses. The Office of Management and Budget (OMB) within the federal bureaucracy supports the president in developing budget proposals. The FEC is part of this budgetary process and must negotiate with the OMB on its budgetary requirements each year.

Finally, by providing administrative policy leadership for the national public sector, the president can insist that certain management approaches be followed across the entire range of government, including the FEC. For example, following President Obama's management agenda, the FEC must produce a five-year strategic plan along with an annual performance and accountability report, both of which are public documents.

Compared to legislatures in most Cabinet-parliamentary systems, Congress, especially the Senate, can be a powerful political force. Congress sets the FEC's mandate and can amend the law at any time. The Senate is also involved in the appointment of members. The FEC budget must be reviewed by both House and Senate committees and then approved by a vote in both chambers, and several committees in both Houses of Congress provide additional general oversight of FEC operations. Primary responsibility for such scrutiny resides with the Senate Committee on Rules and Administration and the House of Representatives' Committee on House Administration. These committees can roam widely over election finance matters.

In addition to being accountable to political actors and central bureaucratic rules and procedures, the FEC is also answerable before the courts. In the highly politicized environment of recent decades, it has spent a great deal of time defending itself against lawsuits of various kinds. On its website, it devotes several pages to ongoing litigation and selected campaign finance cases, and it provides an alphabetical listing of all court cases in which it has been involved.³⁵

Transparency is a means of promoting accountability to other parts of government, stakeholders and the public at large. The FEC has taken a number of steps to operate in an open manner. It holds regular open public meetings, usually on Thursday mornings, during which it considers new regulations, advisory opinions, audit reports and other actions to implement campaign finance laws. It uses closed executive sessions to discuss pending enforcement actions, litigation and other matters that by law must remain confidential. In addition, it provides proactive disclosure on its website of information on

³⁵ See <http://www.fec.gov/law/litigationrecent.shtml>.

proposed regulations, investigations underway and completed, advisory opinions and litigation, both ongoing and completed.

The Election Assistance Commission

When the Election Assistance Commission (EAC) was created in 2002, Congress chose to replicate the bipartisan composition of the FEC. The EAC is not a regulatory body; it exists to promote national electoral standards, provide information to electors and candidates, and transfer federal money to state and local governments to upgrade election processes.

The four members of the EAC are nominated by the president based on recommendations from the majority and minority party leadership in the House of Representatives and the Senate. Appointments are for a term of four years, and commissioners can be reappointed for a second term. No more than two commissioners can belong to the same party. The chair and vice chair are selected from among the members for a one-year term and must come from different parties. Members may serve in these positions only once during their terms.

Normally, any action of the EAC requires the votes of three of the four commissioners, and, in the past, this has created deadlocks along partisan lines. However, since December 2011, all four seats on the EAC have been vacant. Without a quorum of commissioners, the EAC cannot adopt policy, issue advisory opinions to the states on the use of HAVA funds or conduct audit appeals (Election Assistance Commission 2013, 2). Its functions are, therefore, being directed by an executive director, who is herself serving in an acting capacity. Agency staff are authorized to conduct some routine operations, such as certification of voting systems and dispersing grants.

The EAC had a budget of US\$11.5 million for 2012 and employed 24 full-time staff. The budget must first be approved within the executive branch before it goes to Congress to be passed. The EAC uses a Board of Advisers, a Standards Board and a Technical Guidelines Development Committee to provide outside advice on the performance of its duties.³⁶ Each year, the EAC must submit a report to Congress on its activities as well as a performance report. It must also submit a five-year strategic plan to Congress; the next plan is due in 2014.

This is not the place to attempt to assess the HAVA legislation or the role of the EAC in achieving the dual goals of promoting access to the polls while reducing the risk of voter fraud. HAVA requires states to have computerized voter registration lists. But as the distinguished legal scholar Daniel Tokaji wrote, “Like so much federal law governing election administration, the rules governing states’ registration databases are murky and subject to reasonable disagreement” (2009, 10). He went on to conclude that HAVA “did little or nothing to change the hyper-decentralization of American electoral administration” (12). A somewhat more positive assessment was offered by the principal researchers of the AEI-Brookings Election Reform Project, who concluded in 2010 that HAVA, even with all its limitations, was the high-water mark for electoral reform in Congress. They did not see much immediate prospect for a new version of HAVA. The EAC has sent billions of dollars to state governments to adopt new voting technologies, and improvements have definitely been implemented, but for the future, funding for improvements in electoral administration will depend on state appropriations (Fortier, Mann and Ornstein 2010).

The EAC has been in political and administrative trouble for a number of years. Several bills have been brought before Congress to eliminate it and transfer some of its functions to the FEC. Critics assert that the EAC is no longer necessary because it has fulfilled its primary purpose of disbursing HAVA funds after

³⁶ Detailed information on these bodies can be found on the EAC website at www.eac.gov/.

the debacle of the 2000 election. However, its defenders claim that given the budget strains on local governments, there is an even greater need for the EAC's resources and support (Martinez 2013).

Challenges

The governance structure for national elections in the United States entails divided authority on a vertical basis among national, state and local governments as well as on a horizontal basis at the national level among Congress, the president and the courts. Most electoral administration matters are actually decided by local government authorities, subject to state oversight and only limited statutory direction from Congress. This highly decentralized approach may increase responsiveness to local circumstances, but this comes at the cost of a lack of consistency and national standards.

Congress has chosen to create two EMBs based on bipartisan membership. Both have been rendered dysfunctional by partisan and ideological infighting among EAC members, and they are unable to take decisions on key issues. The bipartisan commission model involves the risk that commissioners will understand that their role is to act as partisan representatives, especially when contentious issues arise. Even when commissioners have background education and experience relevant to positions in the two agencies, there is the risk that parties, advocacy organizations, the media and the public will perceive them as neither independent nor objective in their interpretation and enforcement of campaign finance laws.

But the internal divisions and stalled decision-making that have impaired the effectiveness of the two national commissions reflect the wider divisions in American political life and should not be attributed to the commission model per se. As other case studies make clear, commissions can be designed and operate in an independent and impartial manner if they are sufficiently insulated against political pressures.

In the current condition of deadlock and stalled activities, the commissions are focused on the short term. However, there are some obvious medium- and longer-term issues that they must eventually confront. In the case of the FEC:

- Dealing with the consequences of a series of court cases, particularly the *Citizens United v. FEC* decision by the Supreme Court in 2010, that significantly changed the regulatory environment by removing restrictions on political spending by corporations, associations and labour unions.
- The need to improve public access to information about how campaign funds are raised and spent.
- Encouraging voluntary compliance with FECA requirements by carrying out educational outreach and distributing information.
- Recruiting and retaining top executive talent and a committed workforce.

In the case of the EAC, it is facing a fight for its ongoing existence and must make the case that federal subsidies and support to state and local governments is legitimate and represents an ongoing need. Its most recent strategic plan emphasizes the need to communicate its activities and accomplishments to a wide range of stakeholders. Two other objectives are monitoring and reporting on the use of federal subsidies as well as building public confidence in its integrity by testing and certifying voting systems to improve accessibility and security.

Our case studies show that there is no simple institutional solution to the challenges inherent in ensuring independent, professional electoral management while also preserving accountability and responsiveness. In practice, there are no perfect EMBs and no perfect elections. Therefore, when assessing the effectiveness of electoral governance arrangements and administration practices, it is more realistic to examine performance and outcomes across multiple dimensions and over time.

Another integrating theme of this study is that modifications to election machinery will not work if so-called reforms neglect the wider configuration of power within the political system and the incentives and disincentives that shape the behaviours of various institutions and actors, especially political parties and politicians.

Independence has become, in the opinion of the experts and the public alike, the single most important attribute of a credible electoral authority. However, independence can never be absolute, and the condition of being independent matters more for some electoral management functions than others. Also, independence cannot be allowed to trump other important values such as transparency, responsiveness and accountability.

This study demonstrates that independence, balanced by other important values, can be achieved under a number of different organizational formats. It is now widely accepted by election professionals and scholars that locating electoral management functions in a government department does not provide sufficient distance from the partisan political process to inspire public confidence in the independence and integrity of the electoral process. Single-headed agencies and multi-member commissions can, under appropriate structural and procedural arrangements, achieve independence, effectiveness and credibility. Knowledgeable, capable professional leadership committed to electoral integrity can make an important difference to the performance and reputation of a national EMB.

At the outset, we sounded the cautionary note that generalizing from what appears to work in another national setting to the Canadian situation should be done very carefully. While mindful of the risks of drawing lessons from other countries, we will conclude by offering some brief comparative observations on the Canadian electoral management arrangements.

First, we note that the Canadian electoral governance arrangements are well established and mature compared to the other countries in this study. In 1920, Canada was the first country in the world to move the electoral management function into the hands of an independent agent or officer of Parliament. This reliance on a single, impartial, professional administrator has not been followed in any of the other countries examined in this study, but it does not negate Elections Canada's strong reputation for integrity, consistency, stability and independence among informed observers in Canada and in other countries.

As a mature organization, Elections Canada represents decades of experience and evolution in response to changing circumstances. Because of its stability and the continuity of its top leadership, the organization has become a repository of distinctive competencies. It has a clear professional identity and a shared professional culture of impartiality and professionalism. In short, Elections Canada operates on a strong foundation that both promotes and preserves the fundamental values of electoral management in a democracy that were set out at the beginning of this study. Any proposed modifications to Elections Canada should not jeopardize these organizational strengths. All of these observations, however, should not be read to imply that Elections Canada could not perform better or that modifications to its structures and processes should never be contemplated.

Independent electoral commissions are a relatively recent invention, and, elsewhere in the world, the preferred electoral management model has become the multi-member commission, with members appointed in a number of different ways. As the discussion of the two bipartisan commissions in the US makes clear, the commission model is not a panacea for ensuring independent, effective or credible performance. However, forming a generally negative conclusion about commissions based on the US case would be wrong. The problems involved with the operation of the two commissions reflect more the realities and constraints of the US political system than the organizational model itself. As the examples of the other four countries with commissions reveal, if an appropriate structure, membership composition and procedures for balancing independence and professionalism with accountability and responsiveness are put in place, these EMBs can achieve a strong performance and inspire public confidence.

The important consideration is to ensure that a commission is not open to undue political pressure. As the UK example indicates, a hybrid model can be created with a mixed membership of independent and politically aligned individuals and still be effectively insulated from political pressures, especially from the governing party. Some of the institutional features of the UK governance model, such as the transparent public appointment process for commissioners and the existence of a parliamentary body (the Speaker's Committee) that serves as a buffer between the commission and the government, as well as an accountability forum, could usefully be considered for Canada should a government and Parliament decide to adopt a commission model.

Elections and referendums are complex countrywide events that are compressed into short time frames. More numerous laws, changing technologies, evolving political practices and rising expectations of citizens are adding to the complexity of these processes. In particular, technological change is both driving and enabling greater integration of the various functions performed by EMBs, including such activities as registering voters, authenticating voter identity, counting votes and interacting with political parties. There is room for debate, but generally, there seems to be a persuasive case for consolidating functions within single organizations, with some internal divisions to avoid conflicts, rather than a more dispersed approach of creating separate specialized bodies.

Finally, in all countries, there are challenges in keeping the legislative, regulatory and administrative frameworks up to date and adequate to deal with changing conditions in the political system. Elections Canada and the commissions in the other parliamentary countries have limited or no subordinate law-making authority, and, in some cases, the sanctions they can apply to deal with violations are limited to criminal actions before the courts. Laws developed over time can be inconsistent and become outdated. The UK is undertaking a review and modernization of its electoral laws, something that all countries would be advised to do periodically. To face the challenges ahead, electoral authorities will need a wider range of tools to deal with these changing conditions.

APPENDIX A – DEFINING THE CRITERIA FOR ASSESSMENT

The criteria that we used to conduct the comparative assessment of the six electoral governance arrangements are defined as follows:

- **Clear legal authority** means authority is commensurate with the responsibilities assigned to an EMB. The legal mandate of an EMB is both enabling and constraining: it provides legitimacy for the EMB's actions as well as the legal means for it to carry out its work. At the same time, an EMB is obliged to respect the law, work within its parameters and enforce its provisions to the best of its ability.
- **Independence** refers to the insulation of electoral management, especially certain highly sensitive activities, from interference or undue influence by other institutions and actors. Most election officers and scholars regard independence as the single most crucial test of the soundness of electoral governance arrangements. We agree. It is necessary to recognize, however, that EMBs cannot be completely independent and autonomous because they must also be accountable and responsive to the body that establishes them.

The capacity to act independently matters more in relation to some functions of an EMB than others. Independence is crucial, for example, with respect to such legal and quasi-legal functions as regulation, investigation, adjudication and enforcement, all functions for which both actual and perceived impartiality and fairness must exist. Independence is also important when the mandate of the EMB requires it to provide independent policy advice that is informed by expert knowledge and devoid of political considerations. Many EMBs are also expected to engage in communication and educational outreach activities, and these activities should ideally be conducted in an independent, non-partisan manner. Independence is usually less complete with respect to such administrative matters as budgeting and staffing, where an EMB is required to negotiate with other parts of the governmental system.

An EMB cannot claim autonomy just because it is administratively convenient or even because a certain degree of independence has been long-standing. Rather, independence must be justified by upholding the essential values and properties of the institution, which are seen to be necessary for promoting a healthy democracy.

- **Impartiality and fairness** are two essential values to be protected by the condition of independence. An EMB needs some measure of insulation from outside pressures from various sources to perform in a professional and objective manner. For example, EMBs must have the authority and freedom to conduct a thorough investigation and reach an unbiased decision concerning a political party, a candidate, a voter or members of the media.

There are both procedural and substantive aspects to the notion of an impartial and fair election process. Regarding procedure, the law must be applied with diligence and due process, and there must be no hint of bias or favouritism. In terms of substance, decisions must be based on the provisions of the law, an accurate and valid interpretation of the facts and the application of sound professional judgments.

- **Professionalism and expertise** are meant to be hallmarks of sound electoral governance. In an established democracy like Canada, citizens see elections as routine events and give little thought to the complications of planning and executing a countrywide election on a single day, with the voting process taking place at the local level and with election officers called returning officers in charge. Ensuring that citizens know where and how to vote, making it convenient for them to do so, preventing possible abuses of the laws and arranging for the accurate and timely reporting of election outcomes – all pose significant operational challenges in a large and socially diverse country

like Canada. The specialized knowledge and skills required to stage well-run elections comes from the background education, the experience and the ongoing training of EMB employees. In the EMB itself, there needs to be a culture of professionalism, accuracy, integrity, learning and improvement.

- **Stability, consistency and reliability** should be attributes of an EMB. These qualities enable the public to better understand and have confidence in the organization that oversees the electoral process. Stakeholders, including the institutions and actors most directly affected by the EMB's actions and those who have authority and/or influence over its role, need to develop mutual understanding and respect for their different roles in the electoral process. Respect and trust in the reliability, consistency, impartiality and fairness of an EMB takes time to develop and can be quickly lost when allegations of bias or incompetence are made. Relative continuity in the structures and procedures of an EMB also allows cumulative knowledge and skills to develop and enables a strong, shared culture of professionalism, precision and integrity to emerge.

Over time, there will be changes in the political system, IT, public opinion and so on, and these changes may require modifications to the electoral governance arrangements. Given the central importance of such arrangements to achieving a healthy democracy, any such institutional modifications should preserve the underlying foundational principles and the distinctive competencies that an EMB will have developed over time.

- **Economy, efficiency and effectiveness** are three closely related criteria. In the narrowest sense, EMBs exist to support well-run elections in which national votes are held in as economical and efficient a manner as possible while having regard for the quality of the voting process. Effectiveness refers, in part, to the accuracy and timeliness of reporting results, the limitation on the number of controversies over the process and the results, and the satisfaction of voters, parties and candidates with the process.

A broader measure of the effectiveness of EMBs is achieving *quality elections*, a term that is subjective and therefore potentially controversial. For our purposes, a quality election takes place when there is strong and informed elector participation, when there are no or few instances of illegalities or attempts at undue influence and when the results are seen to be accurate and legitimate. Very few attempts have been made to develop an assessment framework identifying empirical measures of quality that could be used to compare different countries or compare improvement over time in a single country (Elkit and Reynolds 2005).

- **Transparency, responsiveness and accountability** – Transparency is a highly prized value in a democracy because it supports the public's right to know. Transparency is also a means of supporting both effectiveness and accountability in electoral management. It can help to prevent, detect and correct election irregularities. It provides one basis for informing and educating the public; it also provides a basis for holding EMBs accountable for their performance (Mozaffar and Schedler 2002, 10).

Responsiveness refers to the openness of an EMB to changing conditions in the external environment and its willingness to adjust its policies and practices to meet emerging challenges. It involves consulting with citizens, parliamentarians and party officials to obtain feedback and advice on how the electoral process can be improved. The relationship between an EMB and political parties involves an inherent tension: they are the primary targets of the rules governing elections, but at the same time, parties in government and the legislature assign the EMB its mandate and grant it the authority and resources needed to perform its functions. The ideal relationship between an EMB and party officials might be described as "cordial, but not cozy." Both the actuality and the appearance of undue responsiveness to partisan and political concerns must be avoided.

In general, accountability means being required to answer for the exercise of authority and the use of public money based on providing valid information about performance. Electoral administration involves exercising discretionary authority and professional judgment within the framework of both the “hard law” of legislation and regulations and the “soft law” of administrative policies and codes of conduct. Formal rules set the boundaries for behaviour, but controversial situations will arise that require judgment about the facts, the interpretation of the rules and how they should be applied. When an EMB exercises discretion, its neutrality or competence can be challenged – hence, the insistence on accountability.

APPENDIX B – STATE AND LOCAL GOVERNMENT ADMINISTRATION OF US NATIONAL ELECTIONS: RADICAL DECENTRALIZATION?

Virtually every aspect of the national voting process – eligibility to vote, registration, the location of polling places, design of the ballot, voting technology, methods of counting, rules for recounts and methods of resolving complaints – are handled locally and vary widely from one state to another and even among local jurisdictions within states. The local officials who oversee the elections are chosen in a variety of ways, including being elected. Variation in the size and organizational capacity of local jurisdictions means that the professionalism of election officers is uneven (Kimball and Baybeck 2013; Burden et al. 2010). Contracting out the actual conduct of elections to consulting firms is a widespread practice.

There is state supervision of the local electoral process in the form of a state secretary or an electoral board or commission.³⁷ In 33 states, the state secretary, who serves as the chief electoral officer, is elected, and he or she becomes part of the political executive working with the governor. For states that rely on electoral boards or commissions, the members are usually appointed by the governor on a bipartisan basis, and this gives a political advantage to the majority party.

The authority of these election officers varies significantly state by state.³⁸ The mandate of state election officers is generally to promote integrity and public confidence in the election process, but because they are elected or politically appointed, when controversies arise, their neutrality can be challenged.

³⁷ See Hasen 2005, 975–76 for a table showing the arrangements for all states.

³⁸ For a detailed review, see Benson 2008, 361–81.

APPENDIX C – DYNAMICS OF DECISION-MAKING IN THE FEDERAL ELECTION COMMISSION

Michael M. Franz's article (2009) is one example of careful empirical analysis of decision-making in the FEC from 1996 to 2006. His analysis focuses on how the FEC processes complaints and imposes fines. His principal interest is whether the FEC has exhibited a "respondent bias," which refers to being unduly influenced by the interests of incumbents in the presidency, Congress and leadership of the national parties who select the members of the FEC and control its fate. He codes the data on a variety of dimensions, including the focus of the complaint, the backgrounds of the complainant and the respondent, the final penalty levied by the FEC and a breakdown of the votes by partisan background of each commissioner. A couple of his conclusions will be presented here – those relevant to the issue of partisan deadlock.

Over this decade, which included a period when the FEC was short one commissioner, there were 1,500 votes on Matters Under Review (MURs, also known as enforcement matters); 55 percent of the time, the six commissioners were unanimous, and 54 percent of the time, there was unanimity among the five commissioners. Deadlocks were relatively rare – in only 2.4 percent of the cases when the FEC was at its full complement of six commissioners. However, the 3–3 deadlocks occurred on the high-profile complaints raised by national party committees, alleged wrongdoing by federal candidates and violations by presidential campaigns. It is also noted that the severity of fines levied against violators rose during the decade (Franz 2009, 177).

A second study of FEC deadlocks was conducted by the Congressional Research Service for the years 2008–2009 (Garrett 2009). It examined deadlock votes in rule-makings, MURs and advisory opinions (AOs). It found that deadlocked votes occurred in about 13 percent of the MURs and in about 17 percent of the AOs. No deadlocks occurred on rule-makings. When there were deadlocks, issues involved staunch policy disagreements, and votes were strictly along party lines (Garrett 2009, 8).

These earlier studies would not convince critics like journalist Christopher Rowland (2013), who claims that since 2008, the FEC has become nearly impotent. In that year, the new Republican appointees were allegedly united in the belief that the FEC had been guilty of exceeding its mandate by intruding too much into the political process. The Republican contingent has allegedly moved consistently to block new rules and soften enforcement. Rowland reports, "The commission is taking up fewer enforcement cases – down to 135 in 2012 from 612 in 2007. And the cases it does consider often go nowhere. The cases of deadlocked votes have shot up to nineteen percent from less than one percent." The Democratic chairwoman is quoted as saying that the FEC is "dysfunctional" because it is "mired" in deep partisan disagreements. This is happening at a time when the Supreme Court's Citizens United ruling of 2010 opened elections to unlimited third party fundraising and spending.

APPENDIX D – THEORETICAL ADVANTAGES AND DISADVANTAGES OF A SINGLE-HEADED AGENCY VERSUS A MULTI-MEMBER COMMISSION

In the abstract, a single-headed agency might involve the following potential advantages:

- Clearly focused responsibility and accountability
- Unified leadership and direction
- Greater efficiency in decision-making
- Lower costs

The disadvantages might include:

- Too much reliance on the character and judgment of a single individual
- Less opportunity for debate and collective deliberation
- Less potential for specialized knowledge and mastery of different functions
- Susceptibility to “political capture” because only one individual, rather than several, will be exposed to political pressures

The advantages and disadvantages of a multi-member commission are in most respects the reverse of a single-headed agency. The advantages include:

- A commission would allow different background expertise and different perspectives to be represented.
- There would be a requirement for debate, particularly in relation to controversial issues.
- A process of mutual constraint among members would discourage them from adopting extreme positions.
- Members could specialize in different electoral functions.

The potential disadvantages include:

- Members might be appointed on grounds other than knowledge of and experience with the election rules.
- Frequent turnover in membership could result in a lack of stability and continuity.
- Decision-making could be slower because of the need to reach a consensus or secure enough votes to act.
- The authority and leadership skills of the chair could be crucial for creative, collegial and timely decision-making.
- There might be confusion about whether the professional staff served the chair or the entire commission.
- The cost of operating a commission might be higher than those of a single-headed agency.

These may be the theoretical possibilities, but what happens in practice will depend greatly on a range of factors, such as the backgrounds of the leaders, how they are appointed, the security of their tenure, the EMB’s budgetary and staffing procedures and how it is held accountable by other parts of the political system.

APPENDIX E – ELECTION MACHINERY AND VOTER CONFIDENCE IN THE ELECTION PROCESS

There are a growing number of empirical studies, using opinion surveys, that seek to measure how the nature of different electoral authorities and the public's perception of them affects voter turnout, public confidence and satisfaction with the electoral process (Birch 2005). For example, one study in the US found that local election officers who were themselves elected inspired less voter confidence than appointed officials (Burden et al. 2010). In a study of 19 Latin American democracies, Kervel (2009) found that there was greater confidence in EMBs that were perceived to be independent, non-partisan and professional, although the relationship was not very strong.

APPENDIX F – LIST OF INTERVIEWEES

Mark Lawson, Deputy Commissioner, Electoral Commission of New Zealand

Surinder Kumar Mendiratta, Legal Advisor, Election Commission of India

Gabrielle Paten, Assistant Commissioner, Australian Electoral Commission

Robert Peden, Electoral Commissioner, Electoral Commission of New Zealand

Stéphane Perrault, Deputy Chief Electoral Officer, Legal Services, Compliance and Investigations, Elections Canada

Donald J. Simon, former Executive Vice President and General Counsel of Common Cause in Washington, DC

Peter Wardle, Executive Director, Electoral Commission in the United Kingdom

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