

*Operation of Electoral Regulatory Bodies
in Selected Places*

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Executive Summary

1. This report studies the statutory electoral regulatory bodies in the United Kingdom (UK), Australia, New Zealand, the State of New Jersey (New Jersey) of the United States of America and the Hong Kong Special Administrative Region (HKSAR). They are examined in nine aspects: statutory status, functions, powers, membership, staffing arrangement, funding arrangement, mechanisms for conducting public consultation, types of activities regulated and performance-monitoring mechanisms.
2. The report first examines the operation of the Electoral Affairs Commission of Hong Kong. The commission has three members, including a serving Judge as Chairman, with all of them being appointed by the Government and being prohibited from having political affiliations. The commission supervises elections of the head of government, legislators and local representatives. The commission also makes recommendations concerning constituency boundaries, and issues guidelines on both financial and non-financial aspects of electoral activities. The commission can publicly reprimand or censure any person who violates the guidelines. The commission is accountable to the Chief Executive of HKSAR.
3. The Electoral Commission in the UK is appointed with the approval of the legislature. The commission members, including the Chairman, are not required to be a Judge and are prohibited from having political affiliations. Directly funded by the legislature and with its own staff of non-civil servants, the commission supervises parliamentary general elections, regional elections and local elections. Its main functions include reviewing electoral boundaries, monitoring party campaign expenditure and election donations, and maintaining registers of parties. It can initiate the imposition of civil fines for lesser offences on election-related activities. The commission is solely accountable to the legislature.
4. The Australian Electoral Commission has three members who are selected by the head of state on the advice of the government. The Chairman is a serving Judge who, like other members, can be a member of a political party. The commission supervises and administers federal elections through its staff members (mostly civil servants), and is funded with government appropriation approved by the legislature. Its regulatory functions include monitoring election funding and financial disclosure, and the registration of political parties. The performance of the commission is subject to the scrutiny of both the legislature and the government.

5. The Electoral Commission in New Zealand has six members, including the Chairman who is required to be a Judge and is selected by the head of state on the advice of the government, and two party representatives whose appointments are approved by the legislature. The commission is responsible for carrying out most regulatory functions essential to general election, namely supervising the registration of political parties and the disclosure of party donation and election expenses, and making election broadcast allocations. The commission is funded by the government according to the appropriation voted by the legislature, and has its own staff members of non-civil servants. Its performance is subject to the scrutiny of both the legislature and the government.
6. In New Jersey, the appointment of the Election Law Enforcement Commission requires the consent of the State legislature. Members of the commission, including the Chairman, can have party affiliations. The commission's main function is to enforce the electoral laws which mainly regulate election campaign financing in relation to state parliamentary and gubernatorial elections. In particular, it can impose penalties and initiate civil action to enforce compliance with those laws. Funded through an annual appropriation from the state budget, the commission has its own staff. Its performance is monitored by both the legislature and the executive.
7. Comparing the distinctive features of the five selected commissions, the focus is on six issues: (a) scope of functions and powers of these commissions; (b) whether knowledge of or experience in electoral affairs should be an eligibility requirement for the Chairman of the regulatory body; (c) whether the Chairman should be a Judge; (d) how the independence of the regulatory body should be maintained; (e) whether measures should be in place to prevent the organization from making electoral guidelines too strict or too loose; and (f) whether measures should be in place to prevent the regulatory body from exercising excessive power in regulating electoral activities.

Operation of Electoral Regulatory Bodies in Selected Places

Chapter 1 - Introduction

1.1 Background

1.1.1 At the meeting of the Bills Committee on Legislative Council (Amendment) Bill 2003 on 29 May 2003, in response to the concern expressed by some deputations over the power of the Electoral Affairs Commission (EAC) in regulating election-related activities, some Members suggested that the Research and Library Services Division (RLSD) should conduct a research to compare the functions and powers of EAC with those of similar bodies in overseas jurisdictions. At the meeting of the Panel on Constitutional Affairs on 17 November 2003, a Member also raised concerns on whether knowledge of or experience in electoral affairs should be an eligibility requirement for the Chairman of an overseas electoral regulatory body, and whether and why the Chairman was required to be a Judge.

1.2 Scope of research

1.2.1 This research covers the operation of the statutory bodies responsible for regulating election activities in the Hong Kong Special Administrative Region (HKSAR) and in the following places:

- (a) the United Kingdom (UK);
- (b) Australia;
- (c) New Zealand; and
- (d) the State of New Jersey (New Jersey) of the United States of America (US).

1.2.2 The UK is chosen because its regulatory body was newly established after the re-organization of the regulatory system on parliamentary elections in recent years. Australia is chosen because its regulatory body regulates not only national elections but also non-parliamentary elections, including industrial elections. New Zealand is chosen because its parliament is elected through the proportional representation system. New Jersey is chosen because its regulatory body, regarded as one of the most successful electoral regulatory agencies in the US, can be useful reference at the local government level.

1.2.3 The electoral regulatory bodies are examined in the following aspects:

- (a) statutory status, functions and power;
- (b) chairmanship and membership;
- (c) staffing arrangement and funding arrangement;
- (d) mechanisms for conducting public consultation on electoral affairs;
- (e) types of activities supervised; and
- (f) mechanisms for monitoring the performance of the regulatory bodies.

1.3 Methodology

1.3.1 This research adopts a desk research method, which involves Internet research, literature review, documentation analysis and correspondence with relevant authorities. Telephone interviews are also conducted with government officials in Hong Kong.

Chapter 2 - Hong Kong Special Administrative Region

2.1 Background

2.1.1 There are five major types of public elections in HKSAR:

- (a) the Chief Executive (CE) Election at which the head of HKSAR, who is also the head of the Government, is elected by an Election Committee (EC) of a maximum of 800 members;
- (b) the Election Committee Sub-sector (ECSS) Elections which produce EC.¹ There were about 179 000 registered voters² in the latest elections held in 2000;
- (c) the Legislative Council (LegCo) Elections at which 60 Members are returned from geographical constituencies (GCs), functional constituencies (FCs) or EC. There were about 3 million GC registered electors and 175 600 FC registered electors in the 2000 Election;
- (d) the District Council (DC) Elections at which 400 members from 18 districts are elected, and some of them can become EC members through the ECSS Elections. About 2.97 million electors were eligible to vote in the 2003 Election; and
- (e) the Village Representative (VR) Elections at which indigenous inhabitant representatives and resident representatives are elected in the New Territories. There were about 160 000 registered electors in the 2003 Election.

2.1.2 These five types of elections are all supervised by a non-governmental body called the Electoral Affairs Commission (EAC) and are governed by the following major legislation:

- (a) the Electoral Affairs Commission Ordinance (the EAC Ordinance), which empowers EAC to perform various functions in supervising the conduct of the elections;

¹ EC was also responsible for electing 10 and six LegCo Members in the 1998 and 2000 Elections respectively. The role of EC in the LegCo Elections will end, starting from the 2004 Election.

² According to the *Guidelines on Election-related Activities in respect of the 2000 Legislative Council Elections* issued by EAC, the word "voters" is used instead of "electors" to distinguish the voters of the subsectors in the ECSS Elections from the electorate of the LegCo Elections.

- (b) the Chief Executive Election Ordinance, which governs the CE Election and ECSS Elections;
- (c) the Legislative Council Ordinance, which governs the LegCo Elections;
- (d) the District Councils Ordinance, which governs the DC Elections; and
- (e) the Village Representative Election Ordinance, which governs the VR Elections.

2.2 Electoral Affairs Commission

Statutory status

2.2.1 EAC is a statutory body established in 1997 under the EAC Ordinance. The predecessor of EAC was the Boundary and Election Commission (BEC) established in 1993 under the BEC Ordinance. In August 1997, EAC took over the functions of BEC, when the BEC Ordinance was repealed in July 1997. The Ordinance states that EAC "*shall not be regarded as a servant or agent of the Government*".³ It also prescribes functions and powers directly to EAC which is therefore not subject to the direction of any government body. Internally, EAC can "*make standing orders to regulate the conduct of its business or procedures*".⁴

2.2.2 While EAC says that it is an "*independent*" body,⁵ the Ordinance does not have a specific provision which explicitly states that EAC can act independently in the performance of its statutory functions.

Functions

2.2.3 EAC's major statutory functions are to:⁶

- (a) consider and review the boundaries of geographical constituencies for the LegCo Elections and constituencies for the DC Elections, and make recommendations;
- (b) be responsible for the conduct and supervision of elections;

³ Section 15, the EAC Ordinance.

⁴ Section 5 (c), the EAC Ordinance.

⁵ The EAC Chairman said on EAC's website that "*EAC is an independent, apolitical and impartial body*". See <http://www.info.gov.hk/eac/en/about/chairman.htm>.

⁶ Section 4, the EAC Ordinance.

- (c) be responsible for the conduct and supervision of the process for the formation and filling vacancies of EC;
- (d) supervise the registration of electors; regulate the procedure at an election; and conduct or supervise promotional activities relating to the registration of electors;
- (e) keep under review the matters relating to elections and the formation of EC;
- (f) report to CE on any matter relating to elections; and
- (g) make appropriate arrangements to ensure that elections are conducted openly, honestly and fairly.

Powers

2.2.4 In performing its functions, apart from making standing orders to regulate the conduct of its business or procedures, EAC can exercise the following major powers:⁷

- (a) requiring information from any appropriate public authority or public officer to estimate the population of Hong Kong for the purpose of making recommendations for the delineation of constituencies;
- (b) issuing guidelines and making regulations in relation to the administration and supervision of procedures at an election;
- (c) bringing to the notice of the appropriate authority or person any complaint received by EAC and any irregular occurrence in respect of elections;
- (d) publishing any materials relating to elections and distributing or selling such materials;
- (e) exercising the powers conferred on it by any other ordinance; and
- (f) involving in other incidental activities or exercising powers as it considers necessary or expedient for the performance of its statutory functions.

⁷ Sections 5, 6 and 7, the EAC Ordinance.

Membership

2.2.5 EAC consists of three members, including the Chairman. This three-person membership is primarily modelled on that of BEC. At any EAC meeting, the quorum must be formed by the Chairman and one member.⁸ Any question is decided by the majority of the votes of those present and voting. In case of an equality of votes, the Chairman has a casting vote,⁹ but it has rarely been exercised because almost all decisions have been made by consensus.¹⁰

Chairman

Appointment method

2.2.6 The Chairman is appointed by CE on the advice of the Government's Constitutional Affairs Bureau (CAB) which, on behalf of CE, is responsible for consulting the Chief Justice of the Court of Final Appeal on the potential appointees.¹¹

Eligibility requirements

2.2.7 There are five major eligibility requirements¹² for the appointment of the Chairman. The eligible person must:

- (a) be a serving Judge of the High Court;¹³
- (b) not hold a judicial office (other than that of a Judge of the High Court);
- (c) not have any political affiliations either in Hong Kong or outside,¹⁴ as listed in the EAC Ordinance. In particular, the eligible person must not be a member of any political party or any organization that purports to be a political party, or a member of an organization whose principal function or main object is to promote or prepare a candidate for an election. Additionally, the person must not be a CE Election candidate, an EC member and a member of the Executive Council, LegCo or a DC;

⁸ Schedule 2, 2(3), the EAC Ordinance.

⁹ Schedule 2, 2 (4), the EAC Ordinance.

¹⁰ Reply from Mr Paul Young, Senior Electoral Officer (SEO) of the Registration and Electoral Office (REO), 19 December 2003.

¹¹ Section 3 (3), the EAC Ordinance, and reply from CAB, 17 January 2004.

¹² Sections 3 (3), (4) and (5), the EAC Ordinance.

¹³ The current Chairman is a Justice of Appeal of the Court of Appeal of the High Court.

¹⁴ Section 3 (5) of the EAC Ordinance states that the eligible person must not be a member of any national, regional or municipal congress, legislature, assembly or council of any place outside Hong Kong, or a member of the armed forces of any other country. The person also must not be a member of the National Committee of the Chinese People's Political Consultative Conference or a Local Committee of the Chinese People's Political Consultative Conference, or a member of the armed forces of the Central People's Government of the People's Republic of China.

- (d) not be regarded by CE as "*actively engaged in politics*";¹⁵ and
- (e) not have political affiliations or engage actively in politics within the four years immediately before the appointment.

Tenure

2.2.8 With possibility of re-appointment, the duration of each term for the Chairman is no more than five years or less than three years, while the exact duration is specified by CE.¹⁶ The rationale behind the determination of the length of each term cannot be identified, according to REO.

Other members

2.2.9 The appointment method, eligibility requirements and tenure for the other two EAC members are the same as those of the Chairman, except that they are not required to be a Judge.¹⁷

Staffing arrangement

2.2.10 EAC itself does not have any staff member. Its functions are performed through:¹⁸

- (a) the Chief Electoral Officer (CEO) who is appointed by CE and is the Head of the Registration and Electoral Office (REO) which provides administrative and secretariat support for EAC. REO's staff members are all civil servants¹⁹ and are therefore required to be politically neutral in performing their duties in accordance with civil service regulations; and
- (b) the head of the Home Affairs Department (HAD). HAD is responsible for the registration of electors for the VR Elections and making arrangements for the conduct of those elections. Its staff members are all civil servants, similar to REO.

¹⁵ There is no definition of this expression or any of its key terms in the Ordinance.

¹⁶ Section 3 (6) and Schedule 2 (1), the EAC Ordinance.

¹⁷ Of the two current EAC members, one is the executive deputy chairman of Television Broadcasts Limited, a private broadcasting enterprise, and the other is the director-general of the Hong Kong Management Association.

¹⁸ Sections 9 and 9 (A), the EAC Ordinance.

¹⁹ Section 10, the EAC Ordinance.

Funding arrangement

2.2.11 EAC and its executive arm, REO, obtain funds from the Government's general revenue according to the appropriation approved by LegCo. Its budget is drafted by CAB which, as a house-keeping bureau of REO, is responsible for making adequate funds available to allow EAC to carry out its statutory functions. The draft budget must be submitted to the Financial Services and the Treasury Bureau, which may alter the budget, to form part of the Government's Estimates for LegCo to approve. Normally, EAC's members are not involved in the funding arrangements and the allocation of resources.

Mechanisms for conducting public consultation

2.2.12 EAC has a statutory obligation to conduct public consultation in respect of the performance of two of its major functions (see paragraph 2.2.3.), namely making recommendations for the demarcation of constituencies and issuing electoral guidelines. Accordingly, EAC has to:

- (a) make its provisional boundary-drawing recommendations available for public inspection for a period of not less than 30 days, and hold public meetings to solicit public opinions on them;²⁰ and
- (b) consult the public in relation to its electoral guidelines in such manner as it may determine,²¹ *"unless it considers that such consultation is not practicable due to the existence of an urgent need to issue, revoke or amend a guideline."*²²

2.2.13 Apart from the statutory obligation of consulting members of the public, upon requests, CEO is authorized to represent EAC at relevant panel meetings of LegCo and invite comments from Members on issues relating to its performances of the above functions.

²⁰ Section 19 (1), the EAC Ordinance.

²¹ LC paper No. (2)668/03-04(01) issued by REO, December 2003. According to REO, before every election, EAC revises the electoral guidelines through the following steps: (a) revising the guidelines on the basis of suggestions and complaints received from the public and other parties concerned; (b) launching a 30 day consultation inviting representations from the public and other parties concerned on the draft revisions of the guidelines; and (c) holding a public forum to receive oral representations from the public, if practicable.

²² Section 6 (2), the EAC Ordinance.

Types of activities supervised

2.2.14 As mentioned in paragraph 2.2.3, EAC can make guidelines and regulations to facilitate the conduct and supervision of an election. In the latest version of the suggested electoral guidelines for the LegCo Elections issued by EAC, it is stated that the aim of the guidelines is to provide a code of conduct based on the principle of fairness and equality and some directions on how to comply with the relevant electoral legislation so that the candidates can avoid breaching them due to inadvertence. The major activities supervised by EAC are presented in Table 1.²³

Table 1 - Types of activities supervised by EAC

Types of activities supervised	Major duties of EAC
(a) Reporting of election expenses	<ul style="list-style-type: none"> • advising each candidate not to incur any election expenses in excess of the maximum amount prescribed; • advising each candidate to provide the returning officer or REO with a copy of the authorization specifying the amount that the candidate's election expense agents are allowed to spend, within the prescribed maximum amount of expenses; and • advising each candidate to declare and return all election expenses incurred by him or her or on his or her behalf to REO after an election.
(b) Reporting of election donations	<ul style="list-style-type: none"> • advising each candidate to issue the donor a receipt which specifies the name and address of the donor, when receiving a donation of more than a certain amount of money; and • advising each candidate to submit to REO a return and declaration of all election donations received, whether in cash or in kind, after an election.
(c) Election meetings	<ul style="list-style-type: none"> • requiring any person who organizes an election meeting to be attended by more than 50 persons in a public place or 500 persons on private premises must notify the Police in advance.

²³ The information in Table 1 is compiled on the basis of the five sets of guidelines issued by EAC for the corresponding five public elections it supervises. While the five sets of guidelines do not serve the same election, they are compatible with each other.

Table 1 - Types of activities supervised by EAC (cont'd)

Types of activities supervised	Major duties of EAC
(d) Use of sound amplifying devices and broadcasting vans	<ul style="list-style-type: none"> • advising candidates not to use loudspeakers for electioneering activities between 9pm and 9am of the following day, and reminding them not to breach the requirements under the Noise Control Ordinance; and • advising all vehicles used for and in connection with canvassing activities to avoid breaching the provisions and regulations of the Road Traffic Ordinance.
(e) Election advertisement	<ul style="list-style-type: none"> • arranging for Returning Officers (ROs) to allocate spots on government land and property to candidates for display of election advertisements; • advising each candidate to deposit a copy of written permission or authorization of the owner or occupier of a private spot with the relevant RO before displaying election advertisements; • appealing to owners and occupiers of private premises to give all candidates competing in the same constituency fair and equal treatment in the display of election advertisements; and • disallowing election advertisements to be displayed within the boundaries of a polling station or within any "no canvassing zone" and "no staying zone".
(f) Election broadcasting	<ul style="list-style-type: none"> • Disallowing commercial broadcasters to accept advertisements of political nature.
(g) Media reporting	<ul style="list-style-type: none"> • appealing to members of the printed media to provide fair and equal treatment to all candidates in the same constituency regarding the reporting of the candidates and their electioneering activities; and • requiring television or radio programmes in which candidates may take part freely to be conducted on fair and equal treatment principles.
(h) Election forums	<ul style="list-style-type: none"> • appealing to election forum organizers to treat all candidates on fair and equal treatment principles.
(i) Electioneering activities conducted in schools or participated by school pupils	<ul style="list-style-type: none"> • strongly advising against any pre-primary or primary school pupil taking part in electioneering activities; and • advising that participation by a pupil in electioneering activities must be entirely voluntary, and the written consent of a parent or guardian must be obtained beforehand.

Table 1 - Types of activities supervised by EAC (cont'd)

Types of activities supervised	Major duties of EAC
(j) Electioneering at private premises	<ul style="list-style-type: none"> • appealing to owners or tenants of private premises to provide fair and equal treatment to candidates; and • requiring candidates to obtain prior approval from the management of the premises before conducting any electioneering activities thereon.
(k) Exit poll	<ul style="list-style-type: none"> • requiring persons or organizations intending to conduct exit polls to provide their relevant information to REO one week before the polling day.

2.2.15 All in all, EAC's guidelines cover a wide range of non-statutory and statutory requirements that are governed by ordinances or subsidiary legislation other than electoral laws. They do not cover election-related activities such as registration of political parties and disclosure of party donations, which some similar bodies in other jurisdictions regulate.

2.2.16 According to REO, items (a) to (d) listed in Table 1 are not enforced by EAC. It is the Independent Commission Against Corruption which is responsible for enforcing the compliance with requirements relating to reporting of election expenses and election donations under the Election (Corrupt and Illegal Conduct) Ordinance. The Police is responsible for enforcing the requirements regulating election meetings and use of amplifying devices and broadcasting vans under the Public Order Ordinance and the Noise Control Ordinance respectively.

Enforcement capability

2.2.17 While EAC is not responsible for enforcing certain statutory requirements regarding election-related activities, it can look into complaints relating to the violation of its guidelines, and decide whether any appropriate action should be taken in respect of such complaints. With regard to any candidate or person who is in breach of the guidelines, EAC can:²⁴

- (a) refer the cases to the relevant authorities for actions to be taken; or
- (b) if the cases are within its remit of responsibility, issue warnings, or make reprimands or public censures in which the names of the candidates or persons concerned and other relevant parties, if any, are mentioned. The warnings, reprimands and public censure are separated from and in addition to the criminal liability for any offence committed.

²⁴ Sections 6 (3) and (4), the EAC Ordinance.

Mechanisms for monitoring the performance of the Electoral Affairs Commission

2.2.18 Unlike the other commissions studied, EAC does not publish annual reports detailing the progress of its work, or conduct surveys to measure the level of satisfaction of the public or stakeholders from its performance before and after elections. Nonetheless, EAC is required to submit a report to CE within three months after each election. Subject to the approval of CE, the report may be made public.

Parliamentary scrutiny

2.2.19 Although CAB and CEO are obliged to respond to LegCo questions over electoral arrangements and performance of EAC, EAC is not legally required to submit a report to LegCo on its activities for each election.

Executive scrutiny

2.2.20 EAC is accountable to the Government in the following four aspects:

- (a) it has a statutory obligation to submit a report to CE after each election giving a detailed account of the arrangements at various stages of the election, reviewing the arrangements and suggesting improvement measures for future elections;
- (b) its recommendations for the delineation of constituency boundaries are subject to consideration by CE in Council. If necessary, CE can return those recommendations to EAC for further deliberation;²⁵
- (c) CE can remove the Chairman or other members of EAC from office if he considers that any of them is unable or unfit to discharge the statutory functions;²⁶ and
- (d) the performance of EAC's members is a major factor in CAB's consideration of their re-appointments, according to CAB.

²⁵ Section 22 (1), the EAC Ordinance.

²⁶ Schedule 2, clause 1 (3), the EAC Ordinance. Neither the Ordinance nor any government guideline provides the meaning of unfitting to discharge the statutory functions.

Chapter 3 - United Kingdom

3.1 Background

3.1.1 In the United Kingdom (UK), the most important type of elections is the parliamentary general election which is held when Parliament is dissolved by the Queen on the advice of the Prime Minister. Such a general election must be held at least every five years. Only the House of Commons is involved in the election while the House of Lords consists of archbishops and bishops, hereditary peers and life peers who either inherit their titles or are appointed by the Queen on the advice of the Prime Minister. The House of Commons currently has 659 Members, each of them representing an individual constituency whose boundary is under review every eight to 10 years. Other than one independent Member, all other Members are from registered parties or groups. The party which wins the most seats in the House of Commons forms the government. Both voter registration and voting are not compulsory. In the latest general election held in 2001, about 44.4 million people eligible to vote were enrolled.²⁷ By the end of March 2003, there were a total of 295 registered parties or groups.²⁸

3.1.2 Apart from parliamentary general elections, there are regular general elections for the European and Scottish Parliaments, the National Assembly for Wales, the Northern Ireland Assembly, the Greater London Assembly (and the directly elected Mayor of London) and local governments (such as county and district councils, unitary authorities, etc.)

3.1.3 While parliamentary general elections and regional and local elections are administered separately by various government agencies,²⁹ they are subject to the supervision of a non-governmental body, the Electoral Commission (EC), which operates mainly under an electoral law, the *Political Parties, Elections and Referendums Act 2000* (PPERA).

²⁷ EC, *Election 2001: The Official Results*, July 2001.

²⁸ *The Electoral Commission Annual Report 2002-03*, p. 21.

²⁹ A number of different agencies are involved in the administration of elections. The Department for Constitutional Affairs has overall responsibility for electoral laws and policies such as preparing the electoral legislation for Parliament to consider and co-ordinating the UK-wide election matters. The Office of the Deputy Prime Minister is responsible for the policy and conduct of local and mayoral elections in England and Wales and any future English Regional Assembly elections. The Secretary of State for Scotland is responsible for the conduct and funding of elections to the Scottish Parliament, while the Scottish Parliament and Executive are responsible for local government elections in Scotland, including electoral systems and the timing and administration of elections. The Secretary of State for Northern Ireland is responsible for electoral laws relating to the Northern Ireland Assembly, while the Northern Ireland Office is responsible for all local elections in Northern Ireland. The Secretary of State for Wales is responsible for electoral laws relating to the National Assembly for Wales, while local elections are run by chief executives of local authorities. See <http://www.electoralcommission.gov.uk/elections/policyandlaw.cfm>, and reply from the Chief Executive of EC, Mr Roger Creedon, 15 January 2004.

3.2 Electoral Commission

Statutory status

3.2.1 EC is a statutory body established by Parliament in 2001 under PPERA to administer a new electoral regulatory framework,³⁰ with the purpose of fostering “*public confidence and participation in the democratic process within the United Kingdom*”.³¹ In PPERA, EC’s statutory status is highlighted through several arrangements:³²

- (a) it is not “*the servant or agent of the Crown*”;
- (b) its property is not the property of the government;
- (c) it is accountable to Parliament through the Speaker’s Committee chaired by the Speaker of the House of Commons;³³ and
- (d) internally it can regulate its own procedures.

3.2.2 While EC says that it is an “*independent body*”,³⁴ PPERA does not have a provision which explicitly states that EC can act independently in the performance of its statutory functions.

³⁰ The proposal for an independent electoral commission was first made in both the Neil and Jenkins reports in 1998. It was in response to increasingly vocal criticisms against the then outdated electoral administration system which was relying upon the disparate local authorities following national guidance provided by the small and under-resourced Constitutional Unit in the Home Office. That system was widely perceived as not capable of managing the complexities of electoral affairs, particularly after the introduction of national election finance regulations and new electoral arrangements. See *The Funding of Political Parties in the UK* (the Neil Report), October 1998 and *Report of the Independent Commission on the Voting System* (the Jenkins Report), October 1998.

³¹ See EC, *Corporate Plan 2002/03 to 2006/07*, p. 7.

³² Schedule 1, PPERA.

³³ The Speaker’s Committee was established by the same act that created EC, Section 2, PPERA. In addition to the Speaker of the House, the Speaker’s Committee has three ex-officio members, namely the Chairman of the Lord Chancellor’s Department Select Committee of the House, the Lord Chancellor and a Member of the House who is appointed by the Prime Minister and is also a Minister with responsibilities relating to local governments. The remaining five members are non-minister Members of the House appointed by the Speaker, largely reflecting the party composition in the House. See EC, “Speaker’s Committee”, <http://www.electoralcommission.org.uk/about-us/speakerscommittee.cfm>.

³⁴ See EC’s webpage, <http://www.electoralcommission.org.uk>.

Functions

3.2.3 EC does not administer elections but can perform:³⁵

- (a) functions directly related to the supervision of elections such as:
 - (i) reviewing electoral boundaries through its four Boundary Committees, one for each of England, Scotland, Wales and Northern Ireland;³⁶
 - (ii) monitoring compliance with controls on election campaign spending;
 - (iii) reviewing electoral and political matters in relation to general elections and local government elections in England, Wales and Northern Ireland;³⁷
 - (iv) reporting on the administration of particular general elections to the UK, European and Scottish Parliaments and to the Welsh and Northern Ireland Assemblies;
 - (v) giving advice to the authority on making statutory instruments generally relating to the administration of general elections and local government elections in England and Wales;
 - (vi) involving in pilot schemes conducted by local authorities in England, Wales and Scotland to test new electoral procedures;
 - (vii) carrying out education programmes to promote the public awareness of electoral and democratic systems at local, national and European levels, and providing financial assistance to other persons or bodies carrying out such programmes;
 - (viii) providing advice and assistance, upon requests, to local authorities, national or regional parliaments or governments and similar electoral regulatory bodies in other countries and international organizations;³⁸ and

³⁵ Sections 5, 6, 7, 9, 10, 13 and 14, PPERA. Under PPERA, EC can also perform functions in relation to referendums, which include conducting national and regional referendums; registering participants; regulating spending; and reporting on the administration of particular referendums.

³⁶ The four Boundary Committees are statutory committees established by EC to take on the functions of the four Boundary Commissions for England, Scotland, Wales and Northern Ireland respectively. Each Committee is chaired by an Electoral Commissioner and includes at least two other members.

³⁷ Generally, such electoral and political matters include the redistribution of seats at parliamentary elections, the registration of political parties and the regulation of their income and expenditure and political broadcast.

³⁸ Such assistance includes the secondment of EC's staff members but does not include any form of financial assistance.

- (b) functions indirectly related to the supervision of elections such as:
 - (i) registering political parties and third parties;³⁹
 - (ii) regulating political donations;
 - (iii) regulating the annual accounts of political parties;
 - (iv) providing grants to eligible political parties to support their policy development work;⁴⁰ and
 - (v) providing non-prescriptive guidance on party political broadcasts.

Powers

3.2.4 EC does not have powers to change the law governing elections, but it “*may do anything (except borrow money) which is calculated to facilitate, or is incidental or conducive to, the carrying out of its supervisory functions*”.⁴¹ In particular, it has certain advisory powers with binding effects upon the government, which include:⁴²

- (a) the Secretary of State cannot exercise a number of instrument-making powers under existing electoral laws except after consultation with EC. These powers are generally concerned with the administration of elections such as designating returning officers for elections, specifying arrangements for the conduct of local government elections and general elections to the legislatures at the national level, and making instruments to limit expenses by candidates and parties at elections; and
- (b) the broadcasting authorities are required to have regard to EC’s views in drawing up their policies on political broadcasts by parties.

³⁹ A third party is an organization or individual who is not fielding candidates at an election but who nonetheless intends to campaign in support of a candidate, party or group of candidates. See EC, Glossary, <http://www.electoralcommission.gov.uk/toolkit/glossary.cfm>.

⁴⁰ Section 12 of PPERA states that with the approval by the Secretary of State, EC can administer a scheme for the payment of policy development grants to registered political parties which are represented by at least two sitting Members of the House of Commons.

⁴¹ Schedule 1 (2), PPERA.

⁴² Sections 7, 8 and 11, PPERA.

Membership

3.2.5 Not less than five and not more than nine full-time members of EC, including the Chairman, are Electoral Commissioners who are responsible for the high-level EC business. In PPERA, there is no requirement that the number of members must be odd or even; nor does the number have implications for the making of decisions in EC meetings.⁴³ It is the government's decision that the number of members should be kept small, as their main role is to set the strategic direction of the organization and oversee its activities. The number can increase to nine, because in due course, EC will have extra workload after eventually taking over responsibilities for the four Boundary Commissions that review parliamentary boundaries in England, Scotland, Wales and Northern Ireland.⁴⁴

Chairman

Appointment method

3.2.6 The appointment of the Chairman is first recommended by a selection panel through open competition. The panel includes the Permanent Secretary of the Home Office, the Commissioner for Parliamentary Standards of the House of Commons, and an independent member selected by the Commissioner for Public Appointments.⁴⁵ There is no ministerial involvement or pre-appointment hearing in Parliament. Nevertheless, before the Chairman is appointed by the Queen, the panel's recommendation is subject to the approval of the House of Commons. The procedure involves the House's vote on a motion presented by the Prime Minister recommending the appointment to the Queen, acting with the agreement of the Chairman of the Speaker's Committee.⁴⁶ Before moving such a motion, the Prime Minister is also required by law to consult the leaders of each registered political party with two or more sitting Members of the House.⁴⁷

⁴³ Schedule 1, 10 of PPERA provides that EC can regulate their own procedure, including the quorum for meetings. The Chief Executive of EC also points out that in arriving at the number of Commissioners, no account is taken of the decision making process.

⁴⁴ As the first move, EC took over the functions of the Local Government Commission for England on 1 April 2002 by establishing a new Boundary Committee for England.

⁴⁵ It should be noted that since there has so far been only one recruitment exercise for Commissioners and EC is currently reviewing such matter, the recruitment process may be subject to changes in the future. For example, after transferring its electoral functions to the Department for Constitutional Affairs, the Home Office no longer has any role in electoral matters. Additionally, as the first recruitment exercise took place before EC and the Speaker's Committee came into existence, it was of necessity a relevant government department (the Home Office at that time) took the lead in finding the Chairman and other Commissioners. Nevertheless, EC is considering whether the involvement of a government department in the recruitment of Commissioners is compatible with its statutory independence, according to the Chief Executive of EC.

⁴⁶ Section 3 (2), Part 1, PPERA.

⁴⁷ Ibid.

Eligibility requirements

3.2.7 PPERA does not require the Chairman to be a serving or retired Judge.⁴⁸ According to EC, this arrangement can enable the selection panel to opt for a broad range of skills and experiences. The Chairman is also not required to have knowledge of or experience in electoral or political affairs, because other Commissioners or the Commission staff can provide such an input.⁴⁹

3.2.8 On the other hand, to ensure EC's independence from political parties, PPERA requires explicitly that the Chairman must not:⁵⁰

- (a) be a member of a registered party;
- (b) be an officer or employee of a registered party or of any accounting unit of such a party, or have been such an officer or employee within the last 10 years;
- (c) hold a "relevant elective office" such as being a member of the House of Commons, a member of the European Parliament elected in the UK,⁵¹ or have held such an office in the last 10 years; or
- (d) be named as a donor in the register of donations within the last 10 years.

Tenure

3.2.9 To further buttress EC's independence, the Chairman is provided with a substantial security of tenure in that he or she:⁵²

- (a) is appointed for up to 10 years;
- (b) can be re-appointed or further re-appointed, although the expectation is, in line with the Commissioner for Public Appointments' guidance on appointments to public bodies, that no one should serve for longer than 10 years; and

⁴⁸ The first and current Chairman of EC was formerly the Chief Executive of the British Red Cross from 1999 to 2001 and the Managing Director of the BBC World Service from 1994 to 1998. See <http://www.electoralcommission.gov.hk>.

⁴⁹ EC has Commissioners with substantial experiences in law, politics, journalism, election or local government service. See <http://www.electoralcommission.gov.hk>.

⁵⁰ Section 3 (4), Part I, PPERA.

⁵¹ "Relevant elective office" also refers to being the Mayor of London and a member of the following organizations, namely the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly, the Greater London Assembly and other local authorities in the UK. See Schedule 7, Part I, Section 1 (8), PPERA.

⁵² Section 3 (3) and (5) and Schedule 1, PPERA.

- (c) can only be removed from office by the Queen on the presentation of an Address from the House of Commons to that effect, and such an Address can only be moved if the Speaker's Committee has presented a report stating that EC is satisfied that one or more of the grounds for removal are valid. For example, the Chairman is unfit to hold the office or unable to carry out EC's functions.

Other commissioners

3.2.10 The appointment method, eligibility requirements and tenure arrangement for other Commissioners are the same as those for the Chairman.

Staffing arrangement

3.2.11 EC currently has 125 staff members. Under PPERA,⁵³ EC is fully responsible for the recruitments of its staff, including the Chief Executive who is selected by the Commissioners. EC can also determine the terms and conditions of its staff, as long as they are broadly in line with those of the civil service.

3.2.12 To reinforce its independence from the government, the staff members are not civil servants.⁵⁴ Moreover, the Chief Executive is required by law to be politically neutral and independent, as are the Commissioners. Other staff members are subject to the same political restrictions. In addition, EC has a code of conduct which disallows staff members to engage in any activity that may call into question their political impartiality.

3.2.13 The arrangement of the Chief Executive not being simultaneously a Commissioner is to follow best practice in corporate governance for both commercial and public bodies that the roles of the Chairman or Board members and the Chief Executive should be separated.⁵⁵ In addition, EC has an in-house legal team instead of relying upon legal officials from the government, and it retains its own counsel in any legal action.

⁵³ Schedule 1, clause 11, PPERA.

⁵⁴ Schedule 1, clause 11 (8), PPERA, and reply from the Chief Executive of EC, 9 December 2003.

⁵⁵ Reply from the Chief Executive of EC, 21 January 2004.

Funding arrangement

3.2.14 EC obtains funding directly through Parliament instead of the government. Such arrangement is regarded as an "*essential ingredient*" of EC's independence.⁵⁶ Indeed, its budget is not examined by a Department Minister but by the Speaker's Committee which lays the budget, with modifications the Committee thinks fit, before the House of Commons. The Committee also examines a five-year corporate plan drawn up by EC. While EC can be challenged on their spending, it has not been handicapped by inadequate funding, according to EC.

Mechanisms for conducting public consultation

3.2.15 While EC has a statutory duty to keep a range of electoral and political issues under review and can set its own agenda in deciding which issues should be subject to review, it is not subject to any statutory rule on public consultation. Nevertheless, it normally follows best practice in inviting comments from members of the public by launching consultation papers on its policy reviews and recommendations.⁵⁷ In particular, various stakeholders, such as political parties, electoral administrators and senior managers of the local authorities, are invited by EC to send submissions.

Types of activities supervised

3.2.16 As mentioned in paragraph 3.2.3, EC has certain supervisory functions in respect of political parties and election expenses. In particular, it is responsible for ensuring that organizations and individuals comply with the registration and financial regulatory requirements of PPERA, and the statutory financial reporting requirements of both PPERA and the *Representation of People Act 1983* (RPA 1983). The major activities supervised by EC are presented in Table 2.⁵⁸

⁵⁶ Reply from the Chief Executive of EC, 5 January 2004.

⁵⁷ Up to October 2003, EC had published 14 policy reports on issues, including party political broadcasting, funding electoral services, online election campaign, ballot paper design and the electoral registration process. See <http://www.electoralcommission.org.uk/about-us/policypubs.cfm>.

⁵⁸ EC (2003).

Table 2 - Types of activities supervised

Types of activities supervised	Major duties of EC
Disclosure of party campaign expenditure	<ul style="list-style-type: none"> • requiring political parties to report to EC detailing all the campaign expenditure incurred by them following an election;⁵⁹ and • reviewing the expenditure returns submitted by parties and using the findings to produce more useful guidance for parties.
Disclosure of election donations to political parties	<ul style="list-style-type: none"> • requiring political parties fielding candidates in a general election to report weekly to EC giving details of any donations over certain amounts during the election period; • requiring candidates to include the details of donations received in their election expenses returns; and • requiring organizations that register with EC as recognized third parties for the purpose of campaigning at elections to report any accepted donations, or any donations from impermissible or unidentified sources, to EC following the election.
Party election broadcasts	<ul style="list-style-type: none"> • keeping matters relating to party election broadcasts under review, but having no direct responsibility for the broadcasting arrangements⁶⁰ and no powers to ensure that its recommendations must be implemented.
Registration of political parties	<ul style="list-style-type: none"> • maintaining two registers of parties, one for Great Britain and one for Northern Ireland.
Disclosure of donations to political parties	<ul style="list-style-type: none"> • requiring political parties which have received certain donations to report to EC at quarterly intervals; • requiring donors who have made party donations over certain amounts to report yearly to EC; and • updating and publishing the register of political donations received by a party.

⁵⁹ It should be noted that EC only regulates campaign expenditure at elections to the UK and European Parliaments, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.

⁶⁰ Under the *Broadcasting Act 1990*, the broadcast of paid political advertising is prohibited.

3.2.17 From Table 2, it is noteworthy that EC only has a limited range of electoral activities under its supervision. In addition, its power of inflicting penalties for violations is restricted as well. Unlike EAC in Hong Kong, it cannot issue public reprimands or censures to persons who violate its guidelines. As its Chief Executive points out, EC's role is to provide "*best-practice advice*"⁶¹ based on its interpretation and previous experience of the legislation. Its guidelines are "*not intended to substitute for the actual effect of the statute*".⁶² Election officials of the government are "*free to accept or reject our advice, as they are only accountable to the courts for the conduct of elections*".⁶³

3.2.18 Unlike EAC of Hong Kong, EC does not provide any guidance on electoral activities other than election expenses and donations, which do not fall within its responsibility. Indeed, there is no central regulation of non-financial electoral activities in the UK. Although some of these non-financial activities, such as electoral advertisements, election meetings and exit polling, are regulated under RPA 1983, they are enforced by the police instead of EC.⁶⁴

Enforcement capability

3.2.19 As EC has supervisory powers over matters relating to election expenses and donations, it can undertake investigations by:⁶⁵

- (a) requiring relevant parties to furnish documents relating to the income and expenditure of the supervised organizations and individuals; and
- (b) demanding access to premises occupied by relevant parties to inspect or make copies of related documents.

3.2.20 EC can also initiate the imposition of civil fines for lesser offences against the electoral acts, such as failure of or delay in delivering required documents. For criminal matters, it would refer the case to the prosecuting authorities.⁶⁶

Mechanisms for monitoring the performance of the Electoral Commission

3.2.21 As mentioned in paragraph 3.2.1, EC is responsible to Parliament. Its performance is therefore scrutinized by Parliament where two mechanisms are in place: one is the Speaker's Committee and the other is the Parliamentary Parties Panel.

⁶¹ EC (2003:1)

⁶² Ibid.

⁶³ Reply from the Chief Executive of EC, 9 December 2003.

⁶⁴ Reply from the Practice Team Manager of EC, Ms Karen Quaintmere, 6 January 2004.

⁶⁵ Sections 145 and 146, PPERA.

⁶⁶ Section 147, PPERA.

The Speaker's Committee

3.2.22 The Speaker's Committee has general oversight of the performance of EC's functions. As such, a Committee member is assigned by the Speaker to answer questions from the House of the Commons on the work of EC.⁶⁷ It should be noted that neither the Chairman of EC nor any other representative of EC is a member of the Speaker's Committee, although the Chairman and the Chief Executive are expected to attend the Committee's meetings which are usually held twice a year.⁶⁸

3.2.23 Under PPERA, the Speaker's Committee monitors the performance of EC mainly through the following means:⁶⁹

- (a) only the Committee can initiate a vote in the House of Commons on whether a Commissioner is unfit to hold office, which can cover the lack of political neutrality;
- (b) the Committee is particularly responsible for monitoring EC's financial accountability to Parliament. For each financial year, EC is required to produce both an annual estimate of its income and expenditure and a five-year plan covering its aims, objectives and resource requirements over that period. The annual estimate and plan are subject to the preliminary approval of the Committee which decides whether they are "*consistent with the economical, efficient and effective discharge by the Commission of its functions*".⁷⁰ The Committee is required both to consult and to have regard to the advice of the Treasury and also to have regard to the most recent annual report on the examination of EC made by the Comptroller and the Auditor General.⁷¹ The Committee can make modifications to the estimate or plan insofar as they are considered appropriate in achieving the stated objectives. Both the estimate and the five-year plan are laid before the House of Commons for its final approval; and
- (c) the Committee is under obligation to report at least annually to the House of Commons on the exercise of EC's functions, including stating the reasons for making any modifications to the annual estimate or five-year plan submitted by EC.

⁶⁷ See *Select Committee on Speaker's Committee on the Electoral Commission - First Report*. See <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmspeak/56/5601.htm>.

⁶⁸ EC, "Speaker's Committee", <http://www.electoralcommission.org.uk/about-us/speakerscommittee.cfm>.

⁶⁹ Schedules 1 and 2, PPERA.

⁷⁰ Schedule 1, Section 14, PPERA.

⁷¹ See "Report to the Speaker's Committee by the Comptroller and Auditor General" in *Select Committee on Speaker's Committee on the Electoral Commission - First Report*.

Parliamentary Parties Panel

3.2.24 The Parliamentary Parties Panel consists of representatives from each registered party which has at least two sitting Members of the House of the Commons.⁷² Its function is to submit representations or information to EC about matters affecting political parties. EC is obliged to consider the representations or information and decides whether or to what extent it should act on them.⁷³

⁷² Section 4, PPERA.

⁷³ Ibid.

Chapter 4 - Australia

4.1 Background

4.1.1 Australia is a constitutional monarchy with a federal parliamentary democracy. It has a bicameral legislature, the Parliament of the Commonwealth, which is constituted by two houses with different elections:

- (a) the general election is held at least once every three years under the *Commonwealth Electoral Act 1918*. Through the election, the 150 Members of the House of Representatives are directly elected from single-member constituencies. The leader of the majority party or coalition in the House usually becomes the Prime Minister; and
- (b) the Senate election is an election, under the *Representation Act 1983*, for all 76 Senators, who are elected by proportional representation from the states for a six-year term and the territories for a three-year term.

4.1.2 Both voter registration and voting are compulsory for general elections. By the end of 2003, there were about 12.8 million citizens enrolled, representing 95% of the eligible population.⁷⁴

4.1.3 Apart from federal elections, the six states and two federal territories which constitute Australia also have their own legislatures formed by local elections.

4.1.4 While general elections and Senate elections are under different electoral laws, they are administered and supervised by a single statutory body - the Australian Electoral Commission (AEC). Local elections can be administered by AEC, but are supervised by local authorities.

⁷⁴ AEC, *Enrolment Statistics*, http://www.aec.gov.au/_content/what/enrolment/stats.htm.

4.2 Australian Electoral Commission

Statutory status

4.2.1 AEC was created as a statutory authority in 1984 under the *Commonwealth Electoral Act 1918*.⁷⁵ It is expected by the Parliament to “*operate independent of political influence*”.⁷⁶ The statutory status of AEC is established through several arrangements in that the Act:⁷⁷

- (a) directly gives functions and powers to AEC rather than to the relevant Minister (or to the Governor-General acting on the advice of Ministers); and
- (b) states that AEC may do all things necessary or convenient to be done for or in connection with the performance of its functions.

4.2.2 As such, AEC is able to exercise its functions and powers with resources allocated by the Parliament, and does not require the day-to-day approval of the relevant Minister.

4.2.3 Nevertheless, the *Commonwealth Electoral Act 1918* does not have a specific provision which explicitly states that AEC can act independently in the performance of its statutory functions.

⁷⁵ AEC was previously known as the Australian Electoral Office (AEO) which was first established as a branch of the Department of Home Affairs in 1902. During the next 70 years, the branch functioned as a unit of various Commonwealth departments. From 1973 to 1984, AEO was established under the *Australian Electoral Office Act 1973* as a statutory authority responsible to the Minister for Services and Property. The creation of AEC was regarded as the most recent round of reforms in the Australian history of federal elections. It was part of the major reforms to electoral administration initiated by a 1983 inquiry by the Joint Select Committee on Electoral Reform (currently known as the Joint Standing Committee on Electoral Matters) of the Parliament of the Commonwealth of Australia. See Joint Standing Committee on Electoral Matters, *The 2001 Federal Election: Report of the Inquiry into the conduct of the 2001 Federal Election, and Matters related thereto*, June 2003, and AEC, "A Short History of Federal Electoral Reform in Australia", http://www.aec.gov.au/_content/when/history/short_history.htm.

⁷⁶ Reply from Mr Shawn O'Brien, Project Officer, Parliamentary and Ministerial Section of AEC, 14 January 2004.

⁷⁷ Section 7, the *Commonwealth Electoral Act 1918*.

Powers and functions

- 4.2.4 AEC can perform a variety of electoral powers and functions, including:⁷⁸
- (a) conducting federal elections and by-elections;
 - (b) maintaining the Commonwealth Electoral Roll in accordance with the Joint Roll Arrangements with the States and Territories;
 - (c) enforcing compulsory enrolment and voting;
 - (d) determining State and Territory representations in the House of Representatives in accordance with the latest population statistics;
 - (e) administering the conduct of re-distributions of electoral boundaries for the House of Representatives;
 - (f) administering election funding and financial disclosure;
 - (g) reporting to the Minister on electoral matters relating to parliamentary elections, and elections and ballots under the *Workplace Relations Act 1996*;
 - (h) conducting electoral information and education programmes to promote public awareness of electoral and relevant parliamentary matters;
 - (i) providing information and advice on electoral matters to the Parliament, the federal government and its departments and agencies;
 - (j) conducting and promoting research into electoral matters;
 - (k) publishing materials on matters relating to its functions;
 - (l) assisting in the conduct of foreign elections as approved by the Minister for Foreign Affairs and Trade;⁷⁹ and

⁷⁸ Section 7, the *Commonwealth Electoral Act 1918*. Apart from regulating and conducting elections, AEC conducts national referendums to amend the Australian Constitution in accordance with the *Referendum (Machinery Provisions) Act 1984*; assists in the conduct of referendums as approved by the Minister for Foreign Affairs and Trade; and reports to the Minister on matters relating to referendums.

⁷⁹ The provision of international electoral services is a salient feature of AEC, which started in 1989 when the United Nations (UN) requested Australia to send an electoral expert to Africa to contribute to the Namibian peacekeeping operation. In 1992, the *Commonwealth Electoral Act 1918* was amended to formalize the provision of such services as one of AEC's functions. Such services are undertaken in close co-operation with the Department of Foreign Affairs and Trade, the Australian Agency for International Development, the Australian Defense Force and the Australian Federal Police. Most funding for such services does not come from AEC but from the UN and international electoral bodies. See http://www.aec.gov.au/_content/how/international/international.htm.

- (m) conducting non-parliamentary elections, including those for registered industrial organizations under the *Workplace Relations Act 1996*⁸⁰ and those for Aboriginal and Torres Strait Islander Commission (ATSIC) under the *ATSIC Act 1989*.⁸¹

4.2.5 It should be noted that AEC can also perform the function of conducting and supervising State and local government elections, but this function is not statutory. Whether it is able to do so depends on several factors, including the extent to which State legislation enables the involvement of AEC in those elections, and the extent to which AEC successfully tenders for them.⁸²

Membership

4.2.6 The membership of AEC consists of three Commissioners, namely the Chair who serves part-time, the Electoral Commissioner who is designated as AEC's full-time Chief Executive Officer and has the powers of a secretary of a government department⁸³, and a non-judicial member who serves part-time. The person (normally the Chair) presiding at an AEC meeting has a deliberative vote and, in the event of a tied vote, a casting vote.⁸⁴

Chairman

Appointment method

4.2.7 The Chair is appointed by the Governor-General in Council, on the advice of the Department of the Prime Minister and Cabinet of the government, among three eligible Judges nominated by the Chief Justice of the Federal Court of Australia. There is no formal selection process for a Chair to be nominated to the Governor-General, and ACE is not involved in the selection.⁸⁵

⁸⁰ In order to preserve the integrity of industrial elections and hence best serve the public interest, AEC has a statutory monopoly in the conduct of these elections whose cost is fully borne by the federal government. It conducts up to 700 industrial elections every year for registered trade unions and employer organizations.

⁸¹ AEC has conducted elections for ATSIC since 1990. Elections are held every three years for Regional Councils, Zone Representatives and Regional Council Office holders. Only indigenous people can vote at these elections, and the enrolment and voting are not compulsory.

⁸² *Australian Electoral Commission Annual Report 2002-03*, p. 65.

⁸³ *Ibid.*, p. 9.

⁸⁴ Section 15, the *Commonwealth Electoral Act 1918*.

⁸⁵ Reply from the Parliamentary and Ministerial Section of AEC, 15 January 2004. The selection procedure of a Chair is not laid down in either the *Commonwealth Electoral Act 1918* or the *Cabinet Handbook* (2002), with the latter detailing the principles and conventions of significant statutory and non-statutory appointments.

Eligibility requirements

4.2.8 There are two eligibility restrictions for the appointment of the Chair in that the potential appointee:

- (a) must be a serving Judge, other than the Chief Justice, of the Federal Court of Australia or a retired Judge of that Court; and
- (b) has been or was such a Judge for a period of at least three years.

4.2.9 The potential appointee is not required to have any experience in or knowledge of electoral affairs. More importantly, there is no restriction on the Chair in his or her private political views or party membership.⁸⁶ Restrictions such as the disclosure of interest will only be imposed on the public activity of the Chair after the appointment. According to AEC, there can be media suggestions or parliamentary debates regarding the appointment of a Chair and other Commissioners and whether they are appointed because of their sharing the same view with the government on some matters. However, these suggestions and debates have been rare, and they indicate "*more about the robust and forthright exchanges of political views in Australia than they do about the appointments themselves*".⁸⁷

4.2.10 In addition, the *Commonwealth Electoral Act 1918* does not specify that the Chair as a serving Judge is required to stay out of the bench in electoral cases. In most electoral cases relating to the Parliament, AEC is either an active participant or involved in the cases as an interested party. In those circumstances, the Chair is required to declare interests and step down from the cases as a member of one of the parties appearing before the court.⁸⁸

Tenure

4.2.11 The Chair can serve a term for up to seven years and is eligible for re-appointment. There is "*no formal mechanism for the termination of the appointment of the Chair*".⁸⁹ The conditions of employment for the Chair contain a political neutrality clause similar to those applying to the employees of AEC, as well as standard of conduct and conflict of interest clauses.

⁸⁶ According to the Parliamentary and Ministerial Section of AEC, there have been no appointments made to AEC from staff, candidates or members from political parties.

⁸⁷ Reply from the Parliamentary and Ministerial Section of AEC, 19 January 2004.

⁸⁸ Ibid.

⁸⁹ Ibid.

Other members

Appointment method

4.2.12 The appointment procedure for the other two members of AEC is the same as that for the Chair.

Eligibility requirements

4.2.13 Like the Chair, there is no restriction on the other two members in their political views or memberships. They are also not required to have any experience in or knowledge of electoral affairs. Nevertheless, there are certain distinctive features relating to their eligibility requirements:

- (a) both are not required to have judicial background; and
- (b) each of them is expected to have certain know-how in electoral administration. Accordingly, the Electoral Commissioner takes up the role of the Chief Australian Electoral Officer (i.e. the Chief Executive of the Australian Electoral Office, the predecessor to AEC). The non-judicial member must also be an office holder of agency head or equivalent, who is usually the Australian Statistician, the permanent head of the Australian Bureau of Statistics.⁹⁰

Tenure

4.2.14 The tenure for the two members are the same as the Chair's, except that they are subject to the conditions for the termination of appointment (e.g. when they do not comply with the disclosure of interests requirements) stipulated in the *Commonwealth Electoral Act 1918*.⁹¹

Staffing arrangement

4.2.15 By mid-2003, AEC had an establishment of 811 employees.⁹² Other than Commissioners and Electoral Officers (in charge of the State and Territory elections) who are appointed by the Governor-General in Council on the advice of the government, all permanent staff members are civil servants employed under the *Public Service Act 1999*.

⁹⁰ *Australian Electoral Commission Annual Report 2002-03*, p. 7.

⁹¹ Sections 8, 11, 12 and 25, the *Commonwealth Electoral Act 1918*. In particular, section 11 of the Act states that if a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered by AEC, he or she not only must disclose the interest at an AEC meeting, but also is not allowed to be involved in any deliberation or decision of AEC with respect to that matter, unless the Minister otherwise permits.

⁹² *Australian Electoral Commission Annual Report 2002-03*, p. 19.

4.2.16 AEC can retain its own legal staff independent of the government. Additionally, AEC has set up a number of senior management committees, such as National Executive, Strategic Advisory Committee, Business Assurance Committee and Budget Performance Management Committee to assist the Chief Executive Officer to improve the performance and accountability structures within AEC, and to consolidate the strategic direction.

Funding arrangement

4.2.17 AEC is funded through the Commonwealth Budget. However, it is the Parliament which decides, in responding the government's budget, what proportion of the available funding is allocated to electoral administration. It is possible for the Parliament to appropriate funds for certain programmes in non-budget legislation so that the expenditure on those programmes is less in the budget. For example, the *Commonwealth Electoral Act 1918* contains provisions which can specifically consolidate revenue funding for electoral roll reviews.

4.2.18 It should be noted that AEC can earn revenue from fees for service activities such as tendering for local government elections and maintaining the Joint Roll Arrangements with the States and Territories (see paragraphs 4.2.4 and 4.2.5). Both AEC and the government take expected revenue into account in determining funding for AEC. When AEC earns revenue, that revenue is split into two equal shares. AEC keeps and allocates its share towards its programmed expenditure in any way it chooses, while the government puts its share into the consolidated revenue.

Mechanisms for conducting public consultation

4.2.19 AEC is not subject to any statutory requirement to conduct public consultation on its policies, although it usually invites stakeholders to submit representations.

4.2.20 It is the Parliament which plays a key role in soliciting public opinions and support with respect to electoral matters. The Joint Standing Committee on Electoral Matters (JSCEM)⁹³ of the Parliament routinely conducts a public inquiry into the conduct of each federal election. Submissions are made by AEC, political parties, candidates and other people and organizations interested in electoral matters. Significant changes to electoral procedures or legislation are usually the result of inquiry and report by JSCEM.

⁹³ The membership of JSCEM largely reflects the party composition of the House. It consists of 10 members: three Members of the House of Representatives nominated by the Government Party Whip or Whips; two Members of the House of Representatives nominated by the Opposition Whip or Whips or by any independent Member; two Senators nominated by the Leader of the Government Party in the Senate; one Senator nominated by the Leader of the Opposition in the Senate; and two Senators nominated by any minority group or groups, or independent Senator or independent Senators, <http://www.aph.gov.au/house/committee/em/emmemb.htm>.

Types of activities supervised

4.2.21 As mentioned in paragraph 4.2.4, AEC has the function of administering election funding and financial disclosure. Accordingly, it publishes various handbooks which set out the law as interpreted by the courts on particular electoral matters, but its opinions have no force in law.⁹⁴ Henceforth, it usually advises political parties and candidates to seek their own legal advice. Table 3 presents the types of activities supervised by AEC.⁹⁵

Table 3 - Types of activities supervised

Types of activities supervised	Major duties of AEC
Funding and disclosure for candidates and Senate groups ⁹⁶	<ul style="list-style-type: none"> • responsible for the payment to candidates and Senate groups eligible for election funding; • requiring candidates and Senate groups to lodge returns of election donations and electoral expenditure; and • requiring persons or organizations who donate a certain amount of money or more to the same candidate or Senate group to lodge returns.
Disclosure for broadcasters and publishers	<ul style="list-style-type: none"> • requiring broadcasters to lodge returns listing details of electoral advertisements broadcast during the election period with AEC following a federal election or by-election; • requiring publishers to lodge returns listing details of electoral advertisements published during the election period with AEC following a federal election or by-election; • seeking notifications from broadcasters and publishers who do not broadcast or publish electoral advertisements; and • requiring broadcasters and publishers to retain relevant records and documentation for at least three years.
Funding and disclosure for third parties	<ul style="list-style-type: none"> • requiring third parties to lodge annual returns setting out donations made, directly or indirectly, to registered political parties.
Registration of political parties	<ul style="list-style-type: none"> • maintaining a register of political parties; • refusing to register a party if the name or abbreviation of the party is obscene or causes confusion; and • de-registering a party.

⁹⁴ Reply from the Parliamentary and Ministerial Section of AEC, 14 January 2004.

⁹⁵ The information of Table 3 is mainly based on a series of guidelines issued by AEC.

⁹⁶ According to Section 168 of the *Commonwealth Electoral Act 1918*, two or more candidates for election to the Senate can form a group making a joint request that their names be grouped in the ballot papers or grouped in the ballot papers in a specified order.

Table 3 - Types of activities supervised (cont'd)

Types of activities supervised	Major duties of AEC
Funding and disclosure of registered parties	<ul style="list-style-type: none"> • requiring all registered political parties and each of their State or Territory branches to appoint an agent to receive election funding and for disclosure purposes; • offering direct payment to each registered party eligible for election funding based on the number of first preference votes its candidates receive in each electorate contested at an election; • requiring registered parties to lodge annual returns setting out the totals of all receipts, payments and debts; and • conducting regular audits of registered political parties to verify disclosure returns.
Funding and disclosure for associated entities	<ul style="list-style-type: none"> • requiring associated entities, including companies which hold assets for a political party, trust funds or fundraising organizations, to lodge annual returns setting out the totals of all their receipts, payments and debts; and • conducting regular audits of associated entities to verify disclosure returns.

4.2.22 Similar to EC of the UK, AEC does not issue any guidelines on electoral activities other than election financing, as almost all of them are out of its remit.⁹⁷

Enforcement capability

4.2.23 AEC has limited power in enforcing the electoral law, such as not being able to issue public reprimands or censures. Where apparent breaches of the electoral law occur, AEC can approach the courts for issuing injunctions to prevent continued breaches. It can also refer probable breaches of the electoral law to the prosecuting authority which advises on the appropriateness of further investigation, prosecution or other actions such as issuing official warnings. The courts remain the final arbiters of issues regarding electoral breaches.

⁹⁷ Reply from the Parliamentary and Ministerial Section of AEC, 14 January 2004. For example, AEC has no responsibility beyond six meters of a polling station. The campaigning in schools, though very rare in Australia, is supervised by the schools' authorities. See also AEC, Electoral Offences, July 2002, http://www.aec.gov.au/_content/How/procedures/offences.htm.

Mechanisms for monitoring the performance of the Australian Electoral Commission

4.2.24 Like most government organizations, AEC manages its resources against predefined and agreed performance measures and targets with respect to cost, quantity and quality. It also conducts various reviews of its administration of the election, such as:⁹⁸

- (a) conducting national telephone surveys, after each phase of an advertising campaign, to measure the awareness of the voting public and impact of the advertising campaign on them; and
- (b) conducting post-election surveys to measure the levels of satisfaction with the election process and AEC services.

Other than this internal monitoring, AEC is subject to parliamentary and executive scrutiny.

Parliamentary scrutiny

4.2.25 Neither AEC nor JSCEM of the Parliament has any formal role in taking actions against the Chair of AEC for any perceived violation of the principle of political neutrality.⁹⁹ Nevertheless, the Parliament has kept a regular and almost ongoing monitoring of the performance of AEC through the inquiries by JSCEM. In particular, after each federal election, JSCEM will inquire into the conduct of the election, and AEC can make submissions and may be invited to appear as witnesses.

4.2.26 Moreover, as AEC is funded through the normal government budget, its senior officers are required to attend regular hearings of the Senate Estimate Committees to be questioned on its performance.

Executive scrutiny

4.2.27 There are only a few executive mechanisms which monitor AEC's work. For example, the integrity of the Electoral Roll is audited by the Australian National Audit Office (ANAO). The audit report is tabled in the Parliament where JSCEM subsequently conducts a review of the report, and provides additional recommendations that largely complement or expand on the ANAO recommendations.

⁹⁸ Australian Electoral Commission Annual Report 2002-03, p. 54.

⁹⁹ Reply from the Parliamentary and Ministerial Section of AEC, 15 January 2004.

Chapter 5 - New Zealand

5.1 Background

5.1.1 New Zealand is a constitutional monarchy with a single chamber of Parliament known as the House of Representatives.¹⁰⁰ A general election is held at least once every three years to choose Members using the mixed member proportional system of representation (MMP).¹⁰¹ The House consists of 120 Members who, as a whole, determine the appointment of the Prime Minister. In New Zealand, voter registration and voting are compulsory. As at August 2003, there were about 2.5 million eligible voters, and by the end of June 2003, there were 19 registered political parties.¹⁰²

¹⁰⁰ Apart from parliamentary general elections, there are local council elections and District Health Board (DHB) elections. Local councils mainly consist of three types of publicly elected bodies - regional councils, city and district councils, and community boards. Their elections are run by electoral officers in each local council. DHBs are responsible for the delivery of publicly funded health and disability services for an area, and their elections are run by council electoral officers in conjunction with local council elections. Both local council elections and DHB elections are overseen by the government's Department of Internal Affairs. See http://www.elections.org.nz/elections/esyst/la_index.html and replies from the Chief Executive of the Electoral Commission, Dr Paul Harris, on 17 December 2003 and from the Senior Project Leader of the Chief Electoral Office of the Ministry of Justice, Mr Philippa Cooper, on 15 January 2004.

¹⁰¹ Under MMP which was adopted by referendum in 1993, each voter has two votes: (a) the Party Vote for the political party (that has nominated a priority list of candidates for the election) the voter wants to be represented in the Parliament; and (2) the Electorate Vote for the candidate the voter wants to be represented as the electorate Member of Parliament (MP). Of the 120 MPs, 51 are elected from party lists of candidates, 62 represent 62 independent General Electorates, and seven represent seven independent Maori Electorates. For details, see www.elections.org.nz.

¹⁰² EC, "Comparison of Eligible Voting Population to Enrolled Electors by Parliamentary Electorate", <http://www.elections.org.nz>, and *Electoral Commission Annual Report 2002/03*, <http://www.elections.org.nz>.

5.1.2 The administration and supervision of general elections is not handled by a single body but divided among three agencies, namely the Chief Electoral Office (CEO), the Representation Commission (RC)¹⁰³ and the Electoral Commission (EC), with the first one being a government agency and the latter two being independent statutory bodies.¹⁰⁴ While CEO, a division of the Ministry of Justice, administers elections and the independent RC decides electorate boundaries, it is EC which is responsible for carrying out most of the regulatory functions essential to general elections.

5.2 Electoral Commission

Statutory status

5.2.1 EC is an independent Crown entity established in 1992 under the *Electoral Act 1993*.¹⁰⁵ Its independence is stipulated in the Act which states that "*in the performance of its statutory functions*", EC can "*act independently*",¹⁰⁶ i.e. it is not responsible to any Minister of the government. Internally, EC can also "*regulate its procedure in such manner as it thinks fit*".¹⁰⁷

¹⁰³ Established under the *Electoral Act 1993* which also created the Electoral Commission, RC is an independent body that determines the boundaries of general electorates and Maori electorates after each five-yearly population census and the Maori Electoral Option. When the boundaries of the general electorates are to be drawn, RC comprises seven members: four ex officio, namely the Government Statistician, the Surveyor-General, the Chief Electoral Officer and the Chairperson of the Local Government Commission (LGC); two appointed by the Governor-General, with one representing the Government Party(ies) and the other representing the Opposition Party(ies); and the chairperson (normally a District Court Judge) nominated by the other members (except the Chairperson of LGC) of RC and appointed by the Governor-General. When the boundaries of the Maori electorates are to be drawn, RC is joined by three more members: one being the Chief Executive of the Ministry of Maori Development (an ex officio member); and two appointed by the Governor-General, each of whom must be Maori (one from the Government Party(ies) and the other from the Opposition Party(ies)). The commission is legally required to go through a public consultation process on its proposal of electoral boundaries. See Section 28, the *Electoral Act 1993* and http://www.elections.org.nz/elections/esyst/boundaries_drawn.html.

¹⁰⁴ Apart from the three agencies, there is a state-owned enterprise called the Electoral Enrolment Centre which is a business unit of the New Zealand Post Limited responsible for enrolling voters, conducting the Maori electoral option and verifying signatures on a citizen-initiated referendum petition. See http://www.nzpost.com/nzpost/control/about_us/whoweare/resource/know.

¹⁰⁵ The establishment of EC was derived from the 1986 recommendations put forward by the Royal Commission on the Electoral System that there should be a single independent entity modelled on the Australian Electoral Commission with responsibility for all matters relating to parliamentary elections. Reply from the Chief Executive of EC, 2 December 2003.

¹⁰⁶ Section 7, the *Electoral Act 1993*.

¹⁰⁷ Section 13, the *Electoral Act 1993*.

Functions

5.2.2 The principal statutory functions of EC include:¹⁰⁸

- (a) carrying out duties in relation to the registration of political parties and political party logos;
- (b) supervising political parties' compliance with the statutory requirements of financial disclosure;
- (c) carrying out duties in relation to the allocation of parliamentary election broadcast;
- (d) supervising political parties' compliance with the statutory requirements relating to the filing of returns of election expenses;
- (e) promoting public awareness of electoral matters through education and information programmes; and
- (f) considering electoral matters referred to it by and reporting to the Minister of Justice and the House of Representatives.

5.2.3 It should be noted that EC has no role in boundary-drawing for electorates. There is a practical and political difficulty for EC to be responsible for such matters in that the membership of RC which is responsible for deciding electorate boundaries is "entrenched". In other words, The membership of RC cannot be changed except by a vote of 75% of all Members of Parliament or by a majority of those voting in a referendum.¹⁰⁹

¹⁰⁸ Section 5, the *Electoral Act 1993*. The Act has two major functions: (1) to introduce the mixed member proportional system of representation in relation to the House of Representatives; and (2) to establish an electoral commission.

¹⁰⁹ Reply from the Chief Executive of EC, 8 December 2003.

Powers

- 5.2.4 To carry out its functions, EC can exercise the following powers:¹¹⁰
- (a) initiating, sponsoring and carrying out studies and research;
 - (b) making inquiries;
 - (c) publicizing its work and consulting with any persons or classes of persons; and
 - (d) requesting advice, assistance and information from any government departments or state enterprises.¹¹¹

Membership

5.2.5 The membership of EC consists of six Commissioners, including the President. The even-number membership has no implication for the making of decision by voting.¹¹² The quorum necessary for the transaction of business relating to election broadcast allocations at any formal meeting is three members; other than that, the quorum is two. The President has a casting vote but EC decisions are normally made by consensus instead of formal votes.¹¹³

President

Appointment method

5.2.6 The President is appointed by the Governor-General¹¹⁴ from a list of three persons nominated by the Chief Justice who is the head of the New Zealand Judiciary. There is no requirement for the government to consult the Parliament or other parties about the appointment, although it can choose to do so. Nor is there any pre-appointment parliamentary hearing or debate.

¹¹⁰ Section 6 (2), the *Electoral Act 1993*.

¹¹¹ For example, EC can seek assistance from the New Zealand Post Limited which is a state enterprise, see Schedule 1 of the *State-Owned Enterprises Act 1986*.

¹¹² Reply from the Chief Executive of EC, 15 December 2003.

¹¹³ Ibid.

¹¹⁴ Under New Zealand's constitutional monarchy, the Governor-General is the personal representative of the Head of State, Queen Elizabeth II of the UK. The Governor-General is non-partisan and does not take an active or initiating role in the executive functions of the government. See <http://www.gg.govt.nz/role/index.htm>.

Eligibility requirements

5.2.7 As for eligibility requirements, there is only one restriction for the appointment of the President, i.e. the position must be filled by a serving or retired Judge of the District Court, the High Court or the Court of Appeal¹¹⁵. This restriction is regarded as having two advantages:¹¹⁶ first, enhancing EC's independence; and second, adding judicial experience to the various procedural and evidential matters that come before EC from time to time. It is also worth pointing out that it is possible though unusual that if a serving Judge were to be appointed as the President, the Judge could continue to handle cases in relation to elections.¹¹⁷

5.2.8 On the other hand, the Judge eligible to be the President is not legally required to have knowledge of or experience in elections (or even experience in casting votes at elections, as some New Zealand Judges choose not to vote).¹¹⁸

5.2.9 There is also no provision in the *Electoral Act 1993* which explicitly requires the President to be politically neutral. Nevertheless, the Act states that "*Judge's services as a member [of EC] shall be taken to be service as a Judge*"¹¹⁹, and, by convention, Judges as public servants are non-partisan, as stated in the *New Zealand Public Service Code of Conduct*.¹²⁰

Tenure

5.2.10 The President is appointed for a term of up to five years, and can be re-appointed. In the event that the President is a serving Judge, the only ground that can remove the President from office is that he or she is removed or suspended from the judicial office.¹²¹ For a retired Judge to be the President, the President can also be removed from office on the grounds of misbehaviour or incapacity to discharge his or her functions.¹²²

¹¹⁵ Section 8(1)(d) and (2), the *Electoral Act 1993*.

¹¹⁶ Reply from the Chief Executive of EC, 8 December 2003.

¹¹⁷ Reply from Mr Philippa Cooper, the Senior Project Leader of CEO of the Ministry of Justice, 23 January 2004.

¹¹⁸ Ibid. According to the Chief Executive of EC, while EC is sometimes criticized for lacking political experience, having commissioners with political experience could create perceptions of possible partisanship in the exercise of powers.

¹¹⁹ Section 9, the *Electoral Act 1993*, and reply from the Chief Executive of EC, 8 December 2003.

¹²⁰ According to the Code issued by the State Services Commission, "*public servants need to ensure that their participation in political matters does not bring them into conflict, or the appearance of conflict, with their duty as public servants to act in a politically neutral manner*". See <http://www.ssc.govt.nz/display/document.asp>.

¹²¹ Section 11, the *Electoral Act 1993*.

¹²² Ibid.

*Other commissioners**Appointment method*

5.2.11 The other five members can be divided into three different types in accordance with the appointment arrangements:¹²³

- (a) two members are ex officio, namely the Chief Judge of the Maori Land Court and the Secretary for Justice;
- (b) one member, i.e. the Chief Executive of EC, is appointed by the Governor-General on formal advice from the Minister of Justice. The Chief Executive is recruited by the Ministry of Justice through open competition. While the President of EC is consulted throughout the recruitment process, EC is not responsible for the recruitment, because it is the normal practice for the recruitment of members of independent statutory bodies to be handled by the relevant departmental ministers only.¹²⁴ Like the President, the Chief Executive does not need to face any pre-appointment parliamentary hearings or debates; and
- (c) two party representatives are appointed by the Governor-General on the nomination of the House of Representatives after a motion debate, with one representing the government party and the other representing the opposition parties. They are appointed solely for the purpose of election broadcast allocations. Only the appointment of these two Commissioners requires a debate in the Parliament.

5.2.12 Except for the Chief Executive, all other Commissioners (including the President) are not full-time because of their limited workload given EC's responsibilities. EC's workload varies according to the electoral cycle and peaks mainly in the 12 months before an election and for a few months afterwards.¹²⁵

5.2.13 The President of EC and other Commissioners, who act, including interpreting the guidelines, in an overtly partisan way, may come under considerable public and political pressure to resign, and in very rare and extreme cases may even be dismissed through the procedure provided in the *Electoral Act 1993*.¹²⁶

¹²³ Section 8, the *Electoral Act 1993*.

¹²⁴ In his reply dated 19 December 2003, the Chief Executive of EC pointed out that if the Chief Executive were not a Commissioner, the appointment process would be handled in-house by EC.

¹²⁵ Reply from the Chief Executive of EC, 15 December 2003.

¹²⁶ Section 11 of the *Electoral Act 1993* states that the President and other Commissioners can be removed from their offices on the ground of their misbehaviour or incapacity to discharge their functions.

Eligibility requirements

5.2.14 Similar to the President, other Commissioners are not legally required to be politically neutral or to have knowledge of or experience in electoral affairs. As the only full-time Commissioner who is responsible for the daily operation of EC, the Chief Executive is expected to have expertise in electoral management. As the Chief Executive is usually delegated by EC to exercise certain powers and functions of the President, he or she is expected to act in a non-partisan manner.¹²⁷

5.2.15 There is a perception that the political representation of the party representatives inevitably introduces an element of partisan influence into EC's exercise of its responsibilities relating to election broadcasts. This is especially because they are regarded as primarily representing the major parties rather than all the parties in the Parliament, not to mention the non-parliamentary parties.¹²⁸ In practice, EC's decisions are normally made by consensus instead of politicized formal votes. According to the Chief Executive of EC, the principal role of the two party representatives has been the same as other Commissioners, i.e. to exercise their best judgement within the remit of the legislation in making decisions on election broadcast allocations.

Tenure

5.2.16 Like the President, the Chief Executive of EC is appointed for a term of up to five years, and is eligible for re-appointment. On the other hand, the two party representatives are appointed for a term of up to 12 months only. The duration of their term is much shorter than other Commissioners', as they are solely responsible for the election broadcast allocations, which mostly occur during the 12-month period before a Parliament is due to expire.

¹²⁷ Section 12 (1) of the *Electoral Act 1993* states that EC may from time to time, either generally or particularly, by writing signed by all its members, delegate to any one Commissioner any of its powers and functions.

¹²⁸ According to the Chief Executive of EC, the arrangement appears to be particularly unfair to smaller parties, despite any consultation that may have occurred about the nominees before the motion of the appointment of party representatives is debated in the House. The Chief Executive points out that the representatives themselves also acknowledge that they have faced difficulty in representing parties with different interests. In addition, individual party representatives occasionally assist the parliamentary parties they represent to meet with legal and procedural requirements of election broadcasts. The Chief Executive also states that EC did oppose to have two party representatives when the function of allocating election broadcasts was transferred from the Broadcasting Standards Authority to the Commission in 1996, since it did not wish to have any perceptions of partisanship over any of its functions.

Staffing arrangement

5.2.17 EC only has five staff employees. The Chief Executive is responsible for employing staff, but the size of staff establishment is determined by the Minister of Justice.¹²⁹ To demonstrate EC's independence, all staff employees are not civil servants.

5.2.18 The arrangement of the Chief Executive as a Commissioner is modelled on AEC of Australia where the Electoral Commissioner is also the Chief Executive Officer. Although EC normally employs the legal services provided by the Crown Law Office, it can retain its own legal adviser or seek specialist legal advice from the private sector.

Funding arrangement

5.2.19 The funding for EC is provided by the Ministry of Justice according to the appropriation voted by the Parliament. As EC must carry out its statutory functions, some funding is non-discretionary. The level of funding for some other activities is discretionary and is subject to the priorities which the government brings to all its funding decisions. Indeed, according to EC, its public education role since the 1996 general election has been hampered by the lack of funding.

Mechanisms for conducting public consultation

5.2.20 There is no statutory requirement for EC to go through a public consultation process on electoral regulatory matters. Nevertheless, EC can decide to circulate drafts of its regulatory guidelines to stakeholders such as leaders of registered parties, or to consult parties about proposed decisions.

5.2.21 Meanwhile, all electoral bills are normally sent to a select committee for public submissions, and EC is able to make submissions. The select committee may also appoint EC as an adviser and ask for reports on various aspects of electoral laws.

Types of activities supervised

5.2.22 As mentioned in paragraphs 5.2.2 and 5.2.4, EC can issue guidelines on activities it supervises and these activities are listed in Table 4.¹³⁰

¹²⁹ Schedule 1, 3, the *Electoral Act 1993*.

¹³⁰ The information in Table 4 is derived mainly from a series of guidelines issued by EC. See EC (2002a), (2002b), (2002c) and (2002d).

5.2.23 According to EC, the electoral guidelines are only reflective of its interpretation of the law and how it intends to apply the law, and are "*not intended to be, and should not be regarded as, a final statement of the law*" on the activities monitored by EC.¹³¹ Parties and candidates are advised to seek their own legal advice concerning their electoral activities.

Table 4 - Types of activities supervised

Types of activities supervised	Major duties of EC
Disclosure of parties' election expenses	<ul style="list-style-type: none"> • requiring each registered party to comply with the statutory obligations in relation to the preparation, audit and submission of a return of election expenses (including a nil return) to EC.
Disclosure of party donations	<ul style="list-style-type: none"> • requiring each registered party to comply with the statutory obligations concerning the preparation, audit and submission of the annual return of donations made to the party (including a nil return) and the auditor's report on that return to EC.
Election broadcast	<ul style="list-style-type: none"> • responsible for allocating time and money to enable political parties to broadcast election programmes during an election period for general elections and by-elections; and • asking Television New Zealand (TVNZ) and Radio New Zealand (RNZ) to state how much time each provides for political parties to broadcast their opening and closing addresses for the general election, and asking other broadcasters to state how much time they individually provide free or at discounted rates to broadcast election programmes by political parties.

5.2.24 It is noteworthy that EC only supervises the disclosure of parties' election expenses and donations. It is CEO under the Ministry of Justice which is responsible for administering the regulations of the disclosure of general electorate candidates' election expenses and the disclosure of the donations they have received.

5.2.25 Under the *Electoral Act 1993*, all non-financial electoral activities other than election broadcast allocation fall within the responsibility of CEO instead of EC. Accordingly, CEO is responsible for making guidelines on most of those activities.¹³²

¹³¹ See the electoral guidelines published by EC.

¹³² See CEO's electoral guideline, *Information for Parliamentary Candidates – 2002 General Election*. For example, exit polls, canvassing activities, display of printed election advertisements, and radio, television and website election advertising are all prohibited on the polling day. Complaints about election advertising in print and in other media are dealt with by the Advertising Standards Complaints Board which was established by the Advertising Standards Authority.

Enforcement capability

5.2.26 EC can hold hearings, investigate matters and respond to complaints in relation to general elections, but it cannot issue public reprimands or censures to the offenders.

Mechanisms for monitoring the performance of the Electoral Commission*Parliamentary scrutiny*

5.2.27 In broad terms, EC is responsible to the Parliament through the Ministry of Justice in that it:

- (a) is required by both the *Electoral Act 1993*¹³³ and the *Public Finance Act 1989*¹³⁴ to prepare an annual report which contains: (a) a review of its work performance in the previous year; (b) its financial condition in the previous year; and (c) a statement of objectives for the following year. In particular, a report of service performance is incorporated in the annual report, stating the quantitative targets agreed in the Memorandum of Understanding for the previous year for which funding was provided to EC, the performance measures for each of the agreed objectives in that Memorandum of Understanding, and the performance of EC in that year for each objective;
- (b) is required to prepare annual financial statements for each financial year, and to establish and maintain a system of internal control designed to provide reasonable assurance as to the integrity and reliability of its financial reporting. It may be required to appear before a select committee for a financial review, although this has so far not happened; and
- (c) must prepare a written report for a select committee on its activities for each general election, present the report to the committee orally, and answer Members' questions.

5.2.28 In addition, from time to time, EC distributes questionnaires to seek party leaders' assessments of the performance of EC in relation to the disclosure of donations, and to seek broadcasters' and parties' assessments of the performance of EC in carrying out its responsibilities relating to election broadcasting after each general election. The performance is assessed in terms of six aspects: (a) independence and non-partisanship; (b) transparency and equitability; (c) availability; (d) clarity; (e) promptness and courtesy; and (f) accuracy and helpfulness.¹³⁵

¹³³ Section 15 of the *Electoral Act 1993*.

¹³⁴ Section 41 (1) of the *Public Finance Act 1989*.

¹³⁵ *The Electoral Commission Annual Report 2002-03*.

Chapter 6 - State of New Jersey

6.1 Background

6.1.1 As a state of the US, New Jersey has two major types of elections:

- (a) the general election at which the State legislature is chosen. The legislature consists of two Houses: a 40-member Senate and an 80-member General Assembly. All legislators are directly elected by voters from 40 legislative districts of substantially equal population.¹³⁶ In the latest election held in 2003, about 4.54 million registered voters were eligible to vote; and
- (b) the gubernatorial election at which the Governor is directly elected by the registered voters of the State.¹³⁷

6.1.2 The administration and supervision of the two elections are not handled by a single body but divided among three agencies. The Division of Election under the New Jersey Office of the Attorney General is responsible for administering these elections. The boundaries of the 40 legislative districts are redrawn every ten years by a constitutional body known as the Apportionment Commission, which is bipartisan and has members appointed by the State chairs of the two major political parties.¹³⁸ It is the Election Law Enforcement Commission (ELEC) which is responsible for enforcing most of the electoral regulatory laws, particularly about election campaign financing.

¹³⁶ General elections are held in November of each odd-numbered year. Members of the Assembly serve a two-year term, while Senators normally serve a four-year term. See <http://www.njleg.state.nj.us/legislativepub/our.asp>.

¹³⁷ See the State Constitution of New Jersey. See http://www.state.nj.us/hangout_nj/government_executive.html.

¹³⁸ The boundaries of legislative districts are redrawn after the Federal census to maintain an equal population in each district. See Article IV, Section III (1), New Jersey State Constitution 1947, <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>

6.2 Election Law Enforcement Commission

Statutory status

6.2.1 ELEC was established in 1973 under *The New Jersey Campaign Contributions and Expenditures Reporting Act* (the Act).¹³⁹ It is located within the Department of Law and Public Safety of the State government,¹⁴⁰ but is legally guaranteed to be “*independent of any supervision or control by the department or by any board or officer thereof*”.¹⁴¹

Functions

6.2.2 In general, ELEC is responsible for enforcing the provisions of the following laws:

- (a) the *New Jersey Campaign Contributions and Expenditures Reporting Act*;
- (b) the *Gubernatorial, Legislative Disclosure Statement Act*;
- (c) various portions of the *Legislative Activities Disclosure Act*; and
- (d) various portions of the *Uniform Recall Election Law*.

6.2.3 Specifically, it can perform the following major functions:¹⁴²

- (a) preparing and publishing a manual for all candidates, political committees and continuing political committees;¹⁴³ prescribing the requirements of the law, including uniform methods of bookkeeping and reporting, and the length of time for any relevant parties to keep records and documents;

¹³⁹ Like the Federal Electoral Commission and many other state electoral regulatory agencies, the establishment of ELEC was a response to the Watergate scandal. See Herrmann (1997).

¹⁴⁰ The Executive Director of ELEC, Dr Federick Herrmann, points out that ELEC cannot be separated from the Department of Law and Public Safety because the State Constitution allows the State government to form up to 20 departments only, in such a manner as to group the same departments according to major purposes so far as practicable. See also Article V, Section IV (1), *New Jersey State Constitution 1947*, <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>.

¹⁴¹ 19:44A-5, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

¹⁴² Ibid.

¹⁴³ A political committee refers to a group of two or more persons acting jointly which raises or expends US\$1,500 or more in an election to promote the nomination, election, or defeat of a candidate, or which raises or expends US\$1,500 or more to aid or promote the passage or defeat of a public question. Different from a political committee which is limited to one or two elections, a continuing political committee is ongoing in nature, and operates in two or more successive elections.

- (b) ascertaining whether candidates, committees and organizations have failed to file financial reports or filed defective reports; extending the dates upon which reports are required to be filed; giving notice to delinquents to correct or explain defects; and making available for public inspection a list of such delinquents;
- (c) ascertaining the total expenditures for candidates and determining whether they have exceeded the limits, and notifying candidates and committees if they have exceeded or are about to exceed the limits;
- (d) forwarding to the Attorney General or to the appropriate county prosecutor information concerning any violations of the Act which may become the subject of criminal prosecution or other legal proceedings;
- (e) preparing and making available for public inspection summaries of all reports relating to candidates' and committees' campaign financing; and
- (f) preparing and publishing annual reports of ELEC to the State legislature.

Powers

6.2.4 When enforcing various electoral laws, ELEC is empowered to:¹⁴⁴

- (a) conduct hearings with regard to possible violations;
- (b) issue subpoenas for the production of documents and the attendance of witnesses;
- (c) impose penalties;
- (d) initiate civil action to enforce compliance with the relevant acts specified in paragraph 6.2.2; and
- (e) promulgate regulations and official forms.

¹⁴⁴ 19:44A-6, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

Membership

6.2.5 In carrying out its functions and exercising its power, ELEC is led by a membership of four Commissioners, including a chairman. As the Act which created ELEC was enacted in 1973, information on the number of Commissioners being set to be an even number of four is not available.¹⁴⁵ While all ELEC decisions are reached by a formal vote, they are usually consensual.¹⁴⁶

Appointment method

6.2.6 Commissioners are nominated and appointed by the Governor by and with the advice and consent of the Senate of the State legislature.¹⁴⁷ The Senate is free to reject the Governor's nomination. If necessary, the Senate Judiciary Committee may interview the nominees before the Senate makes the decision. The General Assembly of the State legislature does not have any role in the appointment process.

Eligibility requirements

6.2.7 Commissioners are not legally required to be politically neutral or to have experience in or knowledge of electoral affairs. They can be members of political parties and their party affiliations are made public.¹⁴⁸ Nevertheless, their appointments are subject to two restrictions:¹⁴⁹

- (a) no more than two Commissioners belong to the same political party; and
- (b) no Commissioner can hold a public office or an office in any political party.

¹⁴⁵ According to the Executive Director of ELEC, such arrangement "*may be viewed as a means for preserving nonpartisan decision making*" because normally the four members are equally divided in terms of party affiliation.

¹⁴⁶ Reply from the Executive Director of ELEC, 7 January 2004.

¹⁴⁷ 19:44A-5, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

¹⁴⁸ According to the Executive Director of ELEC, of the current four Commissioners, two (including the Chairman) are Republicans and two are Democrats.

¹⁴⁹ 19:44A-5, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

6.2.8 While Commissioners are allowed to have party affiliations, there is a code of ethics¹⁵⁰ adopted by ELEC under which Commissioners are required to be free from partisan influence. In particular, they cannot have any interest, direct or indirect, in any political activity subject to review by ELEC, including publicly endorsing a candidate for public office, attending political functions and allowing the use of the home for campaign activities by the spouses of the Commissioners.¹⁵¹

Tenure

6.2.9 All Commissioners serve for a term of three years.¹⁵² It should be noted that all Commissioners are part-time, and usually conduct ELEC business once a month. They are not required to stay at the State capital, and can work in their respective communities. Currently, two of them are private attorneys and two are academics in universities.

Chairman

6.2.10 The Chairman is designated at the "*sole discretion*" of the Governor from among the Commissioners after their appointment. The designation has nothing to do with the appointment procedure of Commissioners, and hence does not need the advice and consent of the Senate.

6.2.11 Other than the eligibility restrictions for Commissioners, there are no provisions in the law or official guidelines which lay down any criteria specifically for the selection of a Chairman.¹⁵³ In particular, the law does not require that the Chairman should be a serving or retired Judge, although in the past seven years, ELEC has been chaired by a retired Judge, and in the past 30 years, three out of the six Chairmen were Judges.¹⁵⁴ Nor does the law specify qualifications relating to electoral or political experience, other than the restrictions on political party affiliation specified in paragraph 6.2.7.

¹⁵⁰ "Code of Ethics for Commissioners and Employees of the New Jersey Election Law Enforcement Commission".

¹⁵¹ Ibid. Other political activities in which Commissioners are not permitted to participate include making contributions to candidates for public offices (except federal offices) and making speeches for political organizations or candidates. The code allows Commissioners' spouses to make political contributions provided that their contributions are wholly derived from private and separate assets of the spouses.

¹⁵² 19:44A-5, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

¹⁵³ According to the Executive Director of ELEC, ELEC has recommended over the years that the Chairman should not serve at the pleasure of the Governor in order to strengthen ELEC's independence.

¹⁵⁴ ELEC, *2002 Annual Report*, May 2003, p. 11.

6.2.12 In terms of tenure, the Chairman serves at the pleasure of the Governor and can be replaced by the Governor at any time.¹⁵⁵

6.2.13 By convention, it is ELEC's counsel, not the Chairman, who represents ELEC in a court case relating to elections. When the position of the Chairman is held by a lawyer or Judge, he or she could in theory represent ELEC in court, but in the 30-year history of ELEC, such situation has never happened.¹⁵⁶

Staffing arrangement

6.2.14 ELEC currently has 45 staff members. By law, it can fully determine the recruitment, assignment, direction, discipline and supervision of its staff.¹⁵⁷ In particular, it can appoint a full-time Executive Director who normally represents Commissioners to liaise with the legislature, including testifying before legislative committees about various bills that affect ELEC, and offering technical advice from time to time to legislative staff in drafting such bills. The Executive Director is chosen by the Commissioners through open competition, and serves at the pleasure of ELEC. The Executive Director is not required to attend any pre-appointment hearing in the legislature.

6.2.15 Most division heads under the Executive Director are not civil servants but are directly recruited by the Executive Director. However, to protect their independence, employees other than division heads are all civil servants and can only be hired or removed through civil service procedures. To reinforce ELEC's non-partisanship, all staff members are subject to the regulation of its code of ethics which details the standards of behaviour required of them, as are all Commissioners.

6.2.16 ELEC has the authority to retain its own legal staff and hearing officers rather than relying upon government legal officials.

6.2.17 The arrangement of the Executive Director not being a Commissioner may be that a Commissioner who is also the head of the staff would have too much authority and influence over the actions and decisions of ELEC.¹⁵⁸

¹⁵⁵ Reply from the Executive Director of ELEC, 7 January 2004.

¹⁵⁶ Reply from the Executive Director of ELEC, 17 January 2004.

¹⁵⁷ 19:44A-6, *The New Jersey Campaign Contributions and Expenditures Reporting Act*.

¹⁵⁸ *Ibid.*

Funding arrangement

6.2.18 ELEC is funded through an annual appropriation from the State budget. It does not have a guaranteed base budget for its work, and has to submit its funding request to the Governor, who determines the amount allocated to ELEC before the entire budget goes to the State legislature.¹⁵⁹ This arrangement, which is adopted by almost every state in the US, is not seen as the best way to fund an "autonomous" regulatory agency because the transparency of how the State government determines ELEC's funding requests may not be sufficient. According to the Executive Director of ELEC, obtaining funding approval directly from the Parliament may render ELEC's autonomy to regulate parliamentary elections to be compromised by the Parliament's "power of the purse", but at the very least, the assessment of the funding needs of ELEC can be openly disclosed to the public.

Mechanisms for conducting public consultation

6.2.19 ELEC has no statutory obligation to conduct public consultation in preparing its regulatory policies or guidelines. In a bid to avoid its implementation of electoral regulations to be considered too stringent or too loose, ELEC acts with the following mechanisms:

- (a) while Commissioners are allowed to have party memberships, they are required to act in a politically neutral manner. There are numerous checks and balances built into ELEC's decision-making process to ensure that ELEC does not work to either simply please or oppose perceived political desires;¹⁶⁰ and
- (b) after each general or gubernatorial election, ELEC holds hearings to seek comments from candidates, their treasurers, debate sponsors, other interested individuals and the public on the operation of the electoral financing regulations. These hearings help ELEC to formulate recommendations for legislative actions, revise ELEC regulations and improve internal programme operations and procedures.

Types of activities supervised

6.2.20 As mentioned in paragraph 6.2.3, ELEC is responsible for enforcing the regulations of electoral campaign financing by publishing manuals for stakeholders in elections. Table 5 presents its major regulatory duties.¹⁶¹

¹⁵⁹ According to the Executive Director of ELEC, it is common in the US that electoral regulatory commissions do not have their executive directors as commission members.

¹⁶⁰ Reply from the Executive Director of ELEC, 19 December 2003.

¹⁶¹ The information in Table 5 mainly comes from *the Compliance Manual for Campaign Reporting* issued by ELEC in 2002.

Table 5 - Types of activities supervised

Types of activities supervised	Major duties of ELEC
Disclosure of expenditures	<ul style="list-style-type: none"> • requiring an individual who has received funds or other benefits or has made payments (including his or her funds) solely for the purpose of determining whether or not he or she should become a candidate to file disclosure reports; • requiring all expenditures to be made through the campaign treasurer or deputy campaign treasurer of the candidate or joint candidates committee¹⁶² from the campaign depository;¹⁶³ • requiring each candidate or joint candidates committee which raises or spends no money, and each candidate or joint candidates committee which spends less than a certain amount of money, for an election to file disclosure reports; • requiring the treasurer or deputy treasurer of a candidate or joint candidates committee to make and maintain a written record of all expenditures, regardless of amount; and • requiring each political committee treasurer to file the report of contributions and expenditures in both the pre-election and post-election settings.
Disclosure of contributions	<ul style="list-style-type: none"> • requiring the treasurer of each candidate, candidate committee, joint candidates committee or political committee to deposit all funds received in the campaign depository; • requiring each candidate, candidate committee, joint candidates committee or political committee to make and maintain a written record of all contributions, including non-monetary contributions, regardless of amount; • disallowing contributors to make anonymous contributions and disallowing candidates or treasurers to accept anonymous contributions; • requiring a contributor who makes more than a certain amount of contribution to file a report by disclosing the contributor's name, address, etc.; and • requiring all candidates and committees to observe the contribution limits and return the excessive contribution.

¹⁶² By law, a candidate must establish a candidate committee, a joint candidates committee, or both, for an office sought in an election.

¹⁶³ A "campaign depository" means a bank account established by a candidate, a joint candidates committee or a political committee, to receive contributions and make expenditures to aid or promote the nomination, election, defeat of a candidate(s), or to support or oppose a public question.

6.2.21 It is noteworthy that neither ELEC nor the Division of Elections of the State government is responsible for monitoring, or making any guideline on, non-financial electoral activities. In particular, according to the New Jersey Office of Legislative Services,¹⁶⁴ activities such as exit polls, the use of sound amplifying devices, electioneering at private premises and election meetings are not addressed by the current State laws and are therefore permitted. There are State laws addressing canvassing activities outside polling stations but the enforcement of these laws lies with local jurisdictions, i.e. the counties and municipalities.

Mechanisms for monitoring the performance of the election law enforcement commission

6.2.22 In the Act, there is no formal mechanism for monitoring ELEC,¹⁶⁵ but in practice, the legislature and the executive can scrutinize the performance of ELEC to a certain extent.

Parliamentary scrutiny

6.2.23 The performance of ELEC is monitored mainly through the legislature which can:

- (a) review ELEC's budget annually at public hearings and ask any questions pertaining to it; and
- (b) exercise a veto of ELEC's regulations whereby the legislature can strike down a regulation, it believes, exceed ELEC's statutory authority.

¹⁶⁴ Replies from Mr Frank J. Parisi, Principal Research Analyst, State Government Section of the New Jersey Office of Legislative Services, 29 December and 30 December 2003.

¹⁶⁵ Reply from Principal Research Analyst of the State Government Section of the New Jersey Office of Legislative Services, 24 November 2003.

Executive scrutiny

6.2.24 As ELEC is “*in but not of*” the Department of Law and Public Safety, the Department has no responsibility for monitoring the performance of ELEC (see paragraph 6.2.1). ELEC, however, is subject to two major executive scrutiny mechanisms:

- (a) the Governor reviews ELEC’s budget request, as part of the annual budget bill, and can make changes to it if he or she thinks fit; and
- (b) if an ELEC member (including the Chairman) violates the principle of political neutrality, he or she would be punishable by the Executive Commission on Ethical Standards (ECES) in New Jersey. ECES regulates the ethical conduct of all governmental agencies in the executive branch. All agencies are governed by the *New Jersey Conflict of Interest Law* which requires the creation of codes of ethics within each agency.¹⁶⁶ All violations are subject to ECES review, and if a violation is found, the penalties include fines and even removal from office.

¹⁶⁶ Section 52:13D-23, the *New Jersey Conflicts of Interest Law*.

Chapter 7 - Analysis

7.1 Introduction

7.1.1 The subject of the operation of electoral regulatory bodies has been discussed at various meetings of the Panel on Constitutional Affairs and other meetings of LegCo. Members are particularly concerned with the following issues:

- (a) scope of functions and powers of EAC;
- (b) whether knowledge of or experience in electoral affairs should be an eligibility requirement for the Chairman of EAC;
- (c) whether the Chairman of EAC should be a Judge;
- (d) how to maintain the independence of EAC;
- (e) whether measures should be in place to prevent EAC from making electoral guidelines too strict or too loose; and
- (f) whether measures should be in place to prevent EAC from exercising excessive power in regulating election-related activities.

7.1.2 Based on the findings in this study, the following paragraphs highlight the issues which Members may wish to consider when deliberating upon the operation of EAC in Hong Kong. To facilitate Members' discussion, a comparison table of the findings of the selected places studied is presented in Appendix.

7.2 Scope of functions and powers

Supervising elections

7.2.1 All the commissions under study have a common function of supervising the elections of the corresponding legislatures. Only AEC of Australia and EC of New Zealand do not have a statutory function of supervising local elections. However, AEC can perform that function if it is empowered by the legislation of a state or if it succeeds in tendering for such elections.

7.2.2 Three of the five selected commissions can extend their supervisory functions to elections barely related to the political structure of their respective jurisdictions. In Hong Kong, EAC can supervise village representative elections. In Australia, AEC can supervise elections for registered industrial organizations. In New Jersey, ELEC can supervise a wide range of elections, including those of school boards and fire commissions.

Drawing constituency boundaries

7.2.3 The commissions in the UK, Australia and Hong Kong have a statutory function of making recommendations regarding constituency boundaries. In both New Zealand and New Jersey, this function is performed by another commission.

Supervising election expenses and donations

7.2.4 All five commissions can monitor compliance with controls on election expenses and donations, issue related guidelines and handle complaints in respect of elections, although their supervisory powers and the functions and scope of their guidelines vary.

Supervising party registration and donations

7.2.5 The commissions in the UK, Australia and New Zealand are responsible for administering political parties registration and regulations on party donations. In New Jersey, such matters are dealt with at the federal level. In Hong Kong, there is no electoral law specifically regulating the operation of political parties and their financing.

7.3 Electoral knowledge or experience of the Chairman

Statutory requirement

7.3.1 The eligibility requirements for the appointment of the Chairman and members of all of the electoral regulatory commissions studied are an essential part of the laws that created these commissions. Nevertheless, none of the laws has a provision which requires the potential appointee of the Chairman to have knowledge of or experience in electoral affairs. Nor is this attribute considered a non-statutory requirement.

Political affiliation

7.3.2 The extent to which the commission Chairman should be insulated from political party affiliations is different among the places studied.

7.3.3 Some places have no restrictions on the Chairman's party membership. In Australia, while the law does not explicitly allow the Chair of AEC to be a party member, the Chair has as much right to join a political party as any other Australian, as long as he or she upholds the principle of political neutrality and avoids the conflict of interest in public activities. In New Jersey, although the law disallows the Chairman of ELEC to hold a public office or an office in any political party, it does allow the Chairman to join a party as a member, provided that the Chairman abides by the code of ethics and in particular does not have any interest in any political activity under review by ELEC.

7.3.4 Other places tend to view that the Chairman's independence of party influence is important. In the UK, to be a Chairman of EC, the eligible person must not be a member or employee of a registered party, a member of an elective office or a donor in the register of donations within the last 10 years. In New Zealand, the President of EC is selected from among Judges who by convention must be non-partisan. In Hong Kong, the person who holds elective offices or has political affiliations is unqualified to be the Chairman of EAC. All in all, only the law in Hong Kong explicitly requires that the Chairman must not be regarded by the Government as actively engaged in politics.

Support to the Chairman

7.3.5 In the selected overseas commissions, even if the Chairman do not have electoral knowledge or experience, he or she can seek assistance from other commission members or staff members who are familiar with electoral regulation. Among the places studied, only New Zealand has party representatives serving on the commission, who are involved in the making of decisions on election broadcast allocation, which is the sole means for political parties to directly access the broadcast media.

7.4 Judicial background of the Chairman

Importance of judicial background

7.4.1 Three out of the five selected commissions treat judicial background as a statutory requirement for the appointment of the Chairman. In Australia, the Chair must be a senior and experienced Judge. New Zealand also requires the Chairman to be a Judge who is not required to be senior and experienced. Similar to AEC of Australia, the Chairman of EAC in Hong Kong is required to be a senior Judge.

7.4.2 The other two commissions, however, do not stipulate this background as a necessary requirement. Both the UK and New Jersey do not require the Chairman of the commission to be Judges, although in New Jersey, ELEC has been chaired by a retired Judge over the past seven years.

7.4.3 For those commissions which must have a Judge as the Chairman, the effectiveness in handling procedural and evidential matters can be strengthened by the leadership's judicial experience. Having a Judge as the leader is also perceived by the respective commissions as a means of enhancing the image of independence and impartiality of the commissions. On the other hand, for those commissions which are not required to choose the Chairman from Judges, they have more freedom to select the right person who fits their strategic direction and development.

7.5 Maintaining the independence of the commission

7.5.1 According to the selected commissions, they are all independent. Nonetheless, to maintain independence, they have adopted different arrangements. Certain arrangements that are regarded by some commissions as crucial components of their system of safeguarding independence are not necessarily adopted by others.

Statutory guarantee

7.5.2 Only the commissions in New Zealand and New Jersey have specific legal provisions which explicitly state that they can perform their statutory functions independent of the government. Meanwhile, the commissions in both the UK and Hong Kong are guaranteed by legal provisions that they are not servants or agents of the government. In Australia, since the commission's functions and powers are explicitly prescribed in law, it is not subject to the direction of any government body.

Appointment of members

7.5.3 The commissions in the UK and New Jersey consider the final approval of the appointment of their members (including the Chairman) by the legislature as a key measure of guaranteeing their independence from the government. In Australia, New Zealand and Hong Kong, the appointment of their commission members is approved by the respective governments.

Staffing arrangement

7.5.4 The selected overseas commissions are fully responsible for the recruitment of all their staff members, including the chief executive, whereas EAC of Hong Kong does not bear this responsibility, as its executive arm is part of the Government. In addition, instead of relying upon legal officials from the government, the overseas commissions have in-house legal officers, and can retain their own counsel in legal actions. EAC of Hong Kong does not have such an arrangement.

Funding arrangement

7.5.5 For EC of the UK, its direct funding through the legislature instead of the government is considered by the Commission as an essential ingredient of its independence. This kind of funding arrangement is not adopted by the other selected commissions, each of which is funded by the government according to the appropriation voted by the legislature. In New Jersey, ELEC recognizes that obtaining funding approval directly from the legislature can increase the transparency of the assessment of the funding needs of ELEC, despite the possibility of compromising its autonomy to regulate parliamentary elections.

Accountability arrangement

7.5.6 Another characteristic of EC of the UK is its sole accountability to the legislature. Such an arrangement is not shared by the other commissions, which are under the scrutiny of both the legislature and the executive.

7.6 Setting and enforcing electoral guidelines

7.6.1 The selected commissions all have the function of issuing electoral guidelines to facilitate compliance with electoral laws. Nevertheless, in the overseas places studied, the question of how not to make electoral guidelines too strict or too loose is not as topical as in Hong Kong.

Function of guidelines

7.6.2 The electoral guidelines issued by the selected overseas commissions do not have binding effects. In particular, the commissions in the UK, New Zealand and New Jersey state in their guidelines that the information provided is advisory in nature, and is not intended to substitute for the effect of the relevant acts. In Hong Kong, EAC's guidelines do not contain this kind of statement, because EAC can denounce any non-compliance with the guidelines. In the latest version of the suggested electoral guidelines for the LegCo Elections issued by EAC, it is stated that the aim of the guidelines is to provide a code of conduct based on the principle of fairness and equality.

Sanction against non-compliance with guidelines

7.6.3 All selected overseas commissions may consider complaints relating to the violation of the electoral guidelines they issued. However, the non-compliance with guidelines is not subject to any sanction, unless it is eventually ruled by the court as constituting an offence against the relevant acts. Compared with other selected commissions, EAC of Hong Kong can consider complaints and issue public reprimands or censures against any non-compliance with its guidelines.

Public consultation

7.6.4 Unlike EAC of Hong Kong, the selected overseas commissions are not statutorily required to conduct public consultation in respect of the drafting of electoral guidelines. In order to make the guidelines practical and reasonable, they normally seek comments from stakeholders on the draft guidelines.

7.7 Monitoring the performance of the commission

7.7.1 The commissions in the overseas places studied are subject to certain monitoring arrangements which are expected to help prevent the commissions from exercising excessive powers in regulating election activities.

Types of activities supervised

7.7.2 The scope of the selected overseas commissions' supervisory functions is mostly confined to the financial aspects of elections, the regulations of which are rather prescriptive. Unlike EAC of Hong Kong, none of the overseas commissions studied is responsible for supervising activities on election advertisements, election meetings, electioneering activities in private places or schools, exit poll, and corrupt and illegal practices, although some of these activities are prohibited by electoral laws in the first place. Therefore, it seems that the overseas commissions have fewer opportunities to over-exercise their powers.

Internal codes of conduct

7.7.3 In the UK, Australia and New Jersey, the commissions have internal codes of conduct which detail the standards of behaviour required of the commission members and staff. In particular, they are required to avoid conflicts of interest and act in a non-partisan or apolitical manner. The commissions in both Hong Kong and New Zealand do not have similar codes of conduct.

Submission of annual reports

7.7.4 All the overseas commissions studied are required to submit annual reports to either the legislatures or heads of governments or related government departments. Such reports mainly detail the exercise of their functions, the review of the work performance in the previous year or work progress against predefined targets for cost, quantity and quality. In Hong Kong, EAC is not required to submit such a report to the legislature or the executive, although it is required to submit a report to the Chief Executive after each election, which is made available to the public.

Parliamentary scrutiny

7.7.5 In all the overseas places studied, there is a distinctive parliamentary monitoring arrangement for the commission's operation. The UK has a statutory committee, the Speaker's Committee, to oversee the performance of EC. In Australia, the parliamentary committee, JSCEM, has a regular duty to proceed with inquiries into the conduct of election, including the performance of AEC after each federal election. In New Zealand, EC is required to submit a report to a select committee of the Parliament on its activities for each general election and to answer Members' questions. In New Jersey, the legislature can review ELEC's budget annually at public hearings and raise any questions about it. In Hong Kong, representatives of EAC and officials from the Constitutional Affairs Bureau may discuss issues relating to EAC at meetings of the Constitutional Affairs Panel.

7.7.6 It should be noted that in all the overseas places studied, the major concern of the parliamentary monitoring is usually about the commission's financial accountability. The performance of the commissions has rarely been in the limelight.

Appendix

A Summary of the Operation of Electoral Regulatory Bodies of Selected Places

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Types of elections supervised	<ul style="list-style-type: none"> Chief Executive election. Election Committee Sub-sector elections. Legislative Council elections. District Council elections. Village Representative elections. 	<ul style="list-style-type: none"> Parliamentary general elections. Regional elections. Local government elections. 	<ul style="list-style-type: none"> General elections. Senate elections. Non-parliamentary elections, such as industrial elections and Aboriginal and Torres Strait Islander Commission elections. 	<ul style="list-style-type: none"> General elections. 	<ul style="list-style-type: none"> General elections. Gubernatorial elections. County, municipalities and school board elections.
Appointment method for chairman	<ul style="list-style-type: none"> Appointed by the Chief Executive in consultation with the Chief Justice of the Court of Final Appeal. The appointment does not require the approval or consent of the legislature. 	<ul style="list-style-type: none"> Recruited by open competition and appointed by the Queen. The appointment requires the approval or consent of the legislature. 	<ul style="list-style-type: none"> Appointed by the Governor-General in Council on the advice of the government. The appointment does not require the approval or consent of the legislature. 	<ul style="list-style-type: none"> Appointed by the Governor-General The appointment does not require the approval or consent of the legislature. 	<ul style="list-style-type: none"> Appointed by the Governor. The appointment requires the approval or consent of the legislature.
Eligibility requirements for chairman	<ul style="list-style-type: none"> Must be a serving Judge. Must not have a party membership. Not required to have electoral knowledge or experience. 	<ul style="list-style-type: none"> Not required to be a Judge. Must not have a party membership. Not required to have electoral knowledge or experience. 	<ul style="list-style-type: none"> Must be a serving or retired Judge. Can have a party membership. Not required to have electoral knowledge or experience. 	<ul style="list-style-type: none"> Must be a serving or retired Judge. Must not have a party membership. Not required to have electoral knowledge or experience. 	<ul style="list-style-type: none"> Not required to be a Judge. Can have a party membership. Not required to have electoral knowledge or experience.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Appointment method for other members	<ul style="list-style-type: none"> They are appointed solely at the Chief Executive's discretion. 	<ul style="list-style-type: none"> Same as the Chairman. 	<ul style="list-style-type: none"> Same as the Chair. 	<ul style="list-style-type: none"> Two judicial members are ex officio. One member, the Commission's Chief Executive, is appointed by the Governor-General on formal advice from the Ministry of Justice. Two party representatives are appointed by the Governor-General on the nomination of the House of Representatives after a motion debate. 	<ul style="list-style-type: none"> Their appointment must have the consent of the Senate of the State legislature.
Eligibility requirements for other members	<ul style="list-style-type: none"> Same as the Chairman, except that they are not required to be Judges. 	<ul style="list-style-type: none"> Same as the Chairman. 	<ul style="list-style-type: none"> Same as the Chair, except that they are not required to be Judges. 	<ul style="list-style-type: none"> Same as the President, except that they are not required to be Judges. 	<ul style="list-style-type: none"> Same as the Chairman.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Staffing arrangement	<ul style="list-style-type: none"> It is not responsible for the recruitment of its staff. It delegates most of its functions to the Registration and Electoral Office whose staff members are civil servants. It does not have an internal code of conduct on political neutrality, but the Registration and Electoral Office follows the Civil Service regulations which are committed to political neutrality. It does not have in-house legal staff independent of the government. 	<ul style="list-style-type: none"> It is fully responsible for the recruitment of its staff who are not civil servants. It has an internal code of conduct on political neutrality for its staff members. It has in-house legal staff independent of the government. 	<ul style="list-style-type: none"> It is fully responsible for the recruitment of its staff, and most permanent staff are civil servants. It has an internal code of conduct on political neutrality for its staff members. It has in-house legal staff independent of the government. 	<ul style="list-style-type: none"> It is fully responsible for the recruitment of its staff who are not civil servants. It does not have an internal code of conduct on political neutrality for its staff members. It has in-house legal staff independent of the government. 	<ul style="list-style-type: none"> It is fully responsible for the recruitment of its staff who are civil servants. It has an internal code of conduct on political neutrality for its staff members. It has in-house legal staff independent of the government.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Public consultation on the drafting of electoral guidelines	<ul style="list-style-type: none"> It has a statutory duty to conduct public consultation. 	<ul style="list-style-type: none"> It does not have a statutory duty to conduct public consultation, but consults various stakeholders. 	<ul style="list-style-type: none"> It does not have a statutory duty to conduct public consultation, but consults various stakeholders. 	<ul style="list-style-type: none"> It does not have a statutory duty to conduct public consultation, but consults various stakeholders. 	<ul style="list-style-type: none"> It does not have a statutory duty to conduct public consultation, but consults various stakeholders.
Scope of responsibility for electoral activities related to financial disclosure	<ul style="list-style-type: none"> It can supervise candidates' election expenses and election donations. 	<ul style="list-style-type: none"> It can supervise candidates' and parties' election expenses and election donations. 	<ul style="list-style-type: none"> It can supervise candidates' and parties' election expenses and election donations. 	<ul style="list-style-type: none"> It only supervises parties' election expenses and election donations. Candidates' election expenses and election donations are supervised by the Chief Electoral Office under the Ministry of Justice. 	<ul style="list-style-type: none"> It can supervise candidates' and parties' election expenses and election donations.
Scope of responsibility for electoral activities unrelated to financial disclosure	<ul style="list-style-type: none"> The activities unrelated to financial disclosure under its supervision include display of election advertisements, electioneering at public and private places, and exit polls.. 	<ul style="list-style-type: none"> It does not supervise electoral activities unrelated to financial disclosure, though some of them are regulated by electoral laws. 	<ul style="list-style-type: none"> It does not supervise electoral activities unrelated to financial disclosure, though some of them are regulated by electoral laws. 	<ul style="list-style-type: none"> It does not supervise electoral activities unrelated to financial disclosure, though some of them are regulated by electoral laws. 	<ul style="list-style-type: none"> It does not supervise electoral activities unrelated to financial disclosure, though some of them are regulated by electoral laws.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Power of supervision on electoral activities	<ul style="list-style-type: none"> • It can issue electoral guidelines. • It can handle complaints in respect of elections, but cannot issue subpoena for the production of documents and the attendance of witnesses. • It cannot impose civil fines for offences, but can issue public reprimands and censures. 	<ul style="list-style-type: none"> • It can issue electoral guidelines. • It can handle complaints in respect of elections, and can require relevant parties to furnish documents and demand access to premises occupied by relevant parties to inspect or make copies of related documents. • It can initiate the imposition of civil fines for lesser offences, but cannot issue public reprimands and censures. 	<ul style="list-style-type: none"> • It can issue electoral guidelines. • It can handle complaints in respect of elections, but cannot issue subpoena for the production of documents and the attendance of witnesses. • It cannot impose civil fines for offences, nor can it issue public reprimands and censures. 	<ul style="list-style-type: none"> • It can issue electoral guidelines. • It can handle complaints in respect of elections, but cannot issue subpoena for the production of documents and the attendance of witnesses. • It cannot impose civil fines for offences, nor can it issue public reprimands and censures. 	<ul style="list-style-type: none"> • It can issue electoral guidelines. • It can handle complaints in respect of elections, and can issue subpoena for the production of documents and the attendance of witnesses. • It can impose civil fines for offences, but cannot issue public reprimands and censures.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Parliamentary scrutiny	<ul style="list-style-type: none"> It is not required to submit a report to the legislature after each election. It may face questions from the relevant panels of the Legislative Council on its performance, recommendations or policies. 	<ul style="list-style-type: none"> It is not required to submit a report to the legislature after each election. It is mainly monitored by the Speaker's Committee of the House of Commons. 	<ul style="list-style-type: none"> It is not required to submit a report to the legislature after each election. After each federal election, the Joint Standing Committee on Electoral Matters holds an inquiry into the conduct of the election, in which the Commission can make submissions. It is required to attend regular hearings of the Senate Estimate Committees. 	<ul style="list-style-type: none"> It is required to submit a report to the legislature after each election. It must prepare annual financial statements and may be required to appear before a select committee. Its annual financial statements may be reviewed by the Parliament, if necessary. 	<ul style="list-style-type: none"> It is not required to submit a report to the legislature after each election. The legislature can review the Commission's budget annually at public hearings.

Appendix (cont'd)

	Electoral Affairs Commission in Hong Kong	Electoral Commission in the United Kingdom	Australian Electoral Commission in Australia	Electoral Commission in New Zealand	Electoral Law Enforcement Commission in New Jersey
Executive scrutiny	<ul style="list-style-type: none"> • It must submit a report to the Chief Executive after each election. • The Chief Executive may, after the Chief Executive in Council has considered a report on constituency boundaries, "return" the report for further consideration by the Commission of any recommendations contained in it. • The Chief Executive may "remove" the Commission's Chairman or other members from office if he considers any of them unable or unfit to discharge their functions. 	<ul style="list-style-type: none"> • It is not required to submit a report to the government after each election. 	<ul style="list-style-type: none"> • It is not required to submit a report to the government after each election. • Its electoral roll is audited by the Australian National Audit Office. 	<ul style="list-style-type: none"> • It is not required to submit a report to the government after each election. • It must prepare and submit annual financial statements to the Ministry of Justice. 	<ul style="list-style-type: none"> • It is not required to submit a report to the government after each election. • The Governor can review the Commission's budget request. • It is monitored by the Executive Commission on Ethical Standards, including whether it acts in a politically neutral manner.

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