

Appendix 8 Electoral Commission decision-making - Managing legal and reputational risks | Electoral Commission Search Appendix 8 Electoral Commission decision-making - Managing legal and reputational risks You are in the Code of Conduct for Electoral Commissioners section Home Commissioners Code of Conduct for Electoral Commissioners On this page Introduction Approach to managing legal and reputational risk Annex to Appendix 8 Fairness in Commission decision-making First published: 18 June 2023 Last updated: 23 June 2023 Introduction The Electoral Commission was established to be an independent and authoritative public body, with Commissioners who bring senior leadership experience and political expertise. In order to maintain public confidence in the electoral system and democratic process, Commissioners must observe the highest standards of propriety and maintain the Commission's reputation for independence and impartiality. This includes controls on the previous and current political activities of Commissioners, including nominated Commissioners once appointed. High profile and politically sensitive matters occasionally come before the Board for decisions. Some such decisions will give rise to an increased likelihood of allegations of conflict and bias in the decision-making and bear serious legal and reputational impacts for the Commission. It is important that the Board's decision-making process is as robust as possible to ensure that confidence in such decisions can withstand external scrutiny. The annex to this note provides information on the common law duty of fairness in decision-making and the circumstances that increase the likelihood of claims of bias and / or conflict which are relevant to the Commission. Approach to managing legal and reputational risk In order to manage the risk of challenge based on allegations that a decision has been tainted by a conflict of interest or bias, the following approach is to be adopted: Early consideration must be given to whether the decision gives rise to significant risk of claims of conflict and bias and legal and / or reputational risk. If any Commissioner or staff member considers there is a likelihood of allegations of conflict of interest or bias, the matter must be raised with the Chair, Chief Executive, Board Secretary, and General Counsel (if not the same person) for advice and recommendations. Based on advice and recommendations, the Board will then be in a position to consider its risk appetite in relation to the specific matter in-hand. The level of legal and reputational risk the Board is willing to accept from potential allegations of conflict and bias will depend on the circumstances, nature, and particular risks associated with each decision. If, following consideration of any advice and recommendations, the Board is of the view that a decision before it gives rise to a significant risk of claims of conflict and bias and legal and / or reputational risk, then the Board must consider what mitigations could be put in place to address or reduce the risk. As an overriding principle, the Board's default position is that all Commissioners should be able to be involved in all decision-making. The Board will, therefore, always consider in the first instance whether the risks can be effectively mitigated to enable all, or as many as possible of, the Commissioners to be involved in all aspects of the decision-making. While the potential mitigations that may apply to a particular decision will vary depending on the circumstances of that decision, the mitigations the Board will need to consider include: Making declarations of interest and obtaining waivers from those affected by the decision. Managing discussions so that a Commissioner may contribute to the overall strategy or provide expertise, but is excluded from the decision-making part of the deliberation. Recusals by some Commissioners from participation in discussions and decision-making. Delegating the decision or aspects of the decision-making to the Executive. If the Board conclude that the risk of

claims of conflict and bias and legal and / or reputational risk cannot be effectively managed, then the Board must recuse affected Commissioners from the deliberations and decision if that recusal would reduce such risk. Annex to Appendix 8 Fairness in Commission decision-making

There is a common law duty on public bodies to make decisions in a manner which is 'fair'. This includes duties on decision makers to approach decisions with an open mind and not to be a judge in their own cause (whether pecuniary or not). The test for establishing a conflict of interest or bias is set out in *Porter v Magill* [2001], whether a "fair minded and informed observer", having considered the facts, would conclude that there was a "real possibility" of bias." Applied to the Commission, the test is not whether Commissioners think they are conflicted or biased, but whether an external "fair minded and informed" member of the public would draw that conclusion. If so, the legitimacy of the decision will be drawn into question. The fair-minded and informed observer test in *Porter v Magill* has also been adopted by the courts to determine whether there is a possibility of bias arising from 'predetermination' or having a 'closed mind'. For local government decision-making, s.25 Localism Act 2011 provides clarity by making it clear that prior indications of a view on a matter do not in themselves amount to 'predetermination' for certain local government decisions. It does not, however, remove the requirement for decision-makers to be open-minded. There is no such statutory protection in PPERA and so the Commission will need to demonstrate that decision-makers had been open-minded and that a fair-minded and informed observer would not consider that there was a real possibility of bias. If the Commission were to make a decision 'unfairly' there would be a serious risk of successful legal challenge. Fairness is more than a legal requirement, it also ensures wider trust in the decision-maker(s), the process, as well as the decision itself. Circumstances that increase the likelihood of claims of bias and / or conflict

While decisions that could give rise to claims of conflict and bias come up relatively rarely, the implications of legal challenge and the reputational risk associated with such claims would have serious impact, not just for the Commission, but for the affected electoral event, individuals, political parties and campaigners, and the democratic process as a whole. There are no detailed statutory rules on the participation or exclusion of Commissioners from deliberations and / or decisions. Once appointed, and irrespective of any subject lead or political nomination, all Commissioners are jointly responsible for Commission decisions and bound by collective responsibility. Equally, there is no requirement for all Commissioners to be involved in all decisions, the quorum is a minimum of six (although non-nominated Commissioners must equal or outnumber nominated Commissioners). The Board has also delegated certain decisions and responsibilities to the Executive to perform (see the scheme of delegation in Part 4 of the Corporate Governance Framework). The Commission has the power to regulate its own procedures to manage the legal and reputational risks arising from its decisions. In doing so, it is important that both the Commission and individual Commissioners consider carefully whether there are any organisational or personal circumstances that increase the likelihood of complaints of conflict and bias and legal and / or reputational risk in respect of particular decisions. Whilst everything will depend on the facts, case law highlights the following: membership of professional, political or other organisations would not give grounds for an allegation of bias, without something more. Similarly, a court is unlikely to object to a person's participation in decision-making on the grounds of their religion, ethnic or national origin, gender, age, class, financial means or sexual orientation. In order to manage the legal and reputational risks,

Commissioners should be aware of the factors that have led to successful claims against individuals or organisations. These factors may not always lead to a successful claim as it will depend on the surrounding circumstances and degree. The following are non-exhaustive illustrative examples of factors, drawn from case law, which may increase the likelihood of claims of conflict and / or bias in Commission decision-making: A pecuniary or proprietary (and in certain circumstances, non-pecuniary) interest in the outcome. Promotion of the same cause as those affected by the decision, for example a long-standing association with one side of a debate, issue, or cause. Critical or supportive comments taking a position on an issue which may indicate predetermined conclusions. Involvement in decisions that could be seen as promoting a political policy or furthering a manifesto commitment of a political party which a Commissioner is a member. Personal acquaintance with, or antagonism against, a person or organisation involved. Financial transactions or relationships with organisations or individuals involved. Where Commissioners are aware of such circumstances, they must seek advice from the Chair, Chief Executive, Board Secretary or General Counsel.