

Response to the Review of the Office of the Commissioner for Public Appointments

October 2015

Committee on
Standards in
Public Life

Chair: Lord Paul Bew

Response by Committee on Standards in Public Life (CSPL) to the Review of the Office of the Commissioner for Public Appointments (OCPA)

The Committee has considered the following key questions: whether there is a continuing need for the role; whether the roles of OCPA and First Civil Service Commissioner should continue to be combined; the clarity of the scope of the role; Ministerial involvement in the public appointments process; and finally addressed points to do with improving the efficiency and efficacy of the public appointments process.

Post of the Commissioner for Public Appointments - the continuing need for the role?

The first CSPL report in 1995, under Lord Nolan, devised the principles and structures underpinning the current system of regulation of appointments to the boards of public bodies. At the time there was 'widespread perception of bias in appointments', although Nolan acknowledged that 'much of the evidence was circumstantial or inconclusive'. The Committee were unequivocal that the final selection of candidates must remain with Ministers to ensure a clear line of accountability to Parliament. However given the 'considerable powers of patronage', Nolan recommended new independent checks and balances to provide more robust safeguards than previously existed. Perceived or actual patronage has remained a topic of interest to the public and media in the intervening years

Nolan also restated the 'deeply ingrained' principle of appointment on merit and greater external scrutiny to increase public confidence in the system.

'...all public appointments should be governed by the overriding principle of appointment on merit and "selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit.'

To reduce the risk of personal or political patronage - real or perceived – Nolan recommended 'a significant independent element' on selection panels advising the Minister on the final shortlist of candidates. The Nolan report did not define 'independence' but said that 'this would normally mean they had no operational role in government or in the bodies concerned'.

The report recommended the establishment of an independent Commissioner for Public Appointments to undertake standard setting, audit Departmental performance and initiate investigations of Departments or individual appointments to command greater public confidence in the appointments process. A draft Code of Practice for public appointments processes was produced at the same time and Nolan recommended that "reasons for departure from the Code on grounds of 'proportionality' should be documented and capable of review."

The Committee looked again at this issue in its Tenth Report, *Getting the Balance Right, Implementing Standards of Conduct in Public Life*¹ under the Chairmanship of Sir Alastair Graham in January 2005 which, considered the strengths and weaknesses of OCPA after its first 10 years. The Committee made a number of recommendations to address weaknesses but found the regulatory system was working 'relatively well and had successfully developed a 'culture which recognised the importance of appointment on merit and the broad acceptance by appointing Departments and Agencies of the Commissioner for Public Appointments' authority as custodian of the Code of Practice on Public Appointments.

The current Committee notes that the principles and structures underpinning the current approach to public appointments are well regarded and have been replicated with appropriate amendments with regard to board and committee appointments in many regulatory bodies and professional institutions serving the public and private sectors, for example the Bar Standards Board, ICAEW, RICS, GMC etc.

Public confidence

The argument that greater ethical regulation has not produced a corresponding increase in public confidence has been explored by the Committee on a number of occasions in recent years.²

Judgements about how to interpret public confidence are not based only on an individual's experience. They are mediated by perceptions shaped by a number of factors. Analysis of our survey trends by the Committee's research advisory board indicates a close link between perceptions of standards of conduct by public office holders and broader attitudes about the way the current political system works in the UK - people who are dissatisfied with the way the political system works or the level of influence they have on the political process are more likely to have negative perceptions of current standards of conduct in public life.

As noted in the Committee's 2013 Report *Standards Matter*³, media reporting can be 'haphazard and disproportionate' on standards issues. On public appointments, media interest tends to focus on very high profile appointments and regularly alleges political bias. Like Lord Nolan, this Committee finds such stories hard to prove or disprove. However, the Commissioner for Public Appointments is in a position to investigate where appropriate and at least offer public assurance about the process.

The Committee's last biennial survey of public attitudes towards conduct in public life was published in 2013. The analysis of the final survey drew on data collected from surveys of the last 10 years and demonstrated the continuous and substantial decline in public perceptions of standards in public life.

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336897/10thFullReport.pdf

² Standards in Public Life - does trust matter seminar, 26 March 2014

³ Standards Matter, A review of best practice in promoting good behaviour in public life, January 2013, para 6.18

Over the five surveys, public perceptions of whether a range of professions in the public domain can be trusted to tell the truth demonstrate consistent relative ratings: High Court judges and senior police officers score highly, while tabloid journalists, government ministers and MPs in general, score poorly. In 2012 MPs and government ministers were evaluated less favourably than all other categories (except tabloid journalists).

The Committee's questions in the 2015 Hansard Society Audit (www.auditofpoliticalengagement.org) found fewer people saying that overall standards of conduct of people in public life were high and more people saying that standards were low than recorded in any of the Committee's previous (2004-2012) surveys.

Given these continuing high levels of public scepticism, this Committee is firmly of the view that the Commissioner's role is still required. The Committee sees no case to depart from the model of a Commissioner for Public Appointments who is demonstrably independent of government and the civil service and can provide effective, external scrutiny. This model has gained broad acceptance and recognition and has stood the test of time. That does not mean that more cannot be done to improve the way in which these important appointments are made.

Re-structuring, breaking the link between OCPA and First Civil Service Commissioner

The arguments for and against the merging or converging of the Public Appointments Commissioner and the First Civil Service Commissioner are not new and were rehearsed in both the First and Tenth Reports from this Committee. Since 2010 the posts of First Civil Service Commissioner and the Commissioner for Public Appointments have been combined and held by Sir David Normington.

There are symmetries between the two appointments regimes but there are some clear differences and this can lead to confusion for civil servants and Ministers dealing with appointments under the different regulatory systems.

In the interests of transparency for stakeholders and the public alike, **the Committee believes there should be separation of postholders.**

The Committee understands from the evidence provided by the Chief Executive of the Civil Service Commission there would be budgetary and resource implications if the roles were to revert to the pre-2010 position (as convergence with the Civil Service Commission secretariat currently provides a cost saving.) To some degree this is an operational matter. However the Public Appointments Commissioner's functions of monitoring and evaluating Department's processes and investigating complaints require appropriate resource if he/she is to carry out this work effectively, proportionately and with appropriate independence from government.

The Committee would also welcome arrangements that continued to allow for additional time and resource for more proactive dissemination of best practice to share innovation among Departments and to ensure consistency in application of the

process. This is in line with the third thread of the need for ‘guidance and education’ in Nolan’s original report designed to ensure that the Principles are properly understood and followed.

Remit and clarity of the scope of the CPA’s role

The Commissioner’s remit and scope is set out and regularly amended by an Order in Council.

Currently the Public Appointments Order in Council (revised July 2015) lists only those public bodies and offices regulated by the Commissioner for Public Appointments but does not set out which bodies are unregulated nor the rationale for doing so. For example, non-executive directors - a welcome and important addition to the boards of government departments - are not currently OCPA regulated appointments. These individuals carry out an important role in best practice corporate governance.

In the interests of transparency, the Committee’s view is that the Order in Council should revert to the Nolan report’s original recommendation which was that the Commissioner should regulate all Ministerial appointments to all public bodies unless they are specifically listed as being excluded.

Ministerial involvement in the public appointments process

Like all public office holders, Ministers are bound by the seven principles of public life. Members of the public expect those in public office and especially those in senior public office:

- to be committed to public rather than private ends (selflessness and integrity);
- to be honest and open in decision-making;
- to make decisions in the light of the best evidence (objectivity)
- to be held accountable; and
- to in some respect lead exemplary lives (leadership).⁴

This Committee’s consistent position is that appointments to the boards of public bodies must be made by Ministers who in turn are accountable to Parliament. **The Committee believes early and proactive engagement with the Minister charged with making the final choice is critical in making a successful appointment.** This was noted in the First Report: “if Ministers were taken out of the final selection process, it might diminish their ability to persuade people in senior positions in other walks of life to take on a substantial and often not well remunerated commitment”..

Ministers also play an important part in encouraging suitable applicants to apply. However, all those who have been encouraged to apply by the Minister must then be assessed by the panel along with all other candidates. This is consistent with Lord Nolan’s view “All candidates, regardless of how they are nominated, including those put forward by Ministers, should be scrutinised by a panel before being recommended for appointment.”

⁴ Survey of public attitudes towards conduct in public life 2012, September 2013

Ministers must be appropriately involved throughout the appointment process and make the final selection from appointable candidates who have been assessed by the panel as ‘above the line’. Under the current Code if a Minister is provided with a list marked ‘above the line’ by the panel but does not want to appoint any of these candidates the 2012 OCPA code of practice states the reasons for this decision must be recorded. In such cases the Minister may choose to re-run the competition”. Where only one candidate is judged appointable by the panel, only that name can go to the Minister. This may not feel like much of a ‘choice’ to the Minister. However, it would also be a matter of concern if individuals who fail to meet the role specification or lack the necessary skills or experience were appointed to the boards of public bodies. In order to help resolve this problem, **the Committee’s view is that Departments must put additional effort and creativity into encouraging the broadest possible field of credible candidates to apply.** In its Tenth Report⁵ this Committee said: “The requirement is for highly skilled staff using modern and professional selection methods which are proportionate to the responsibilities associated with posts, and which contribute to a widening of the base from which public officeholders are selected.” The Committee were concerned to read in Sir David Normington’s evidence to the Review about the variable quality of recruitment capacity in Departments.

Lord Nolan originally went further and recommended giving Ministers a power to override the advice of the independent selection panel so long as the Minister’s decision was made public:

“All candidates, regardless of how they are nominated, including those put forward by Ministers, should be scrutinised by a panel before being recommended for appointment. Ministers would not be obliged to accept the advisory committee’s recommendations, but if they intend to appoint someone not approved by the panel or committee as suitable for the post, they would be obliged to inform the Public Appointments Commissioner publicly”.

This recommendation was not implemented in 1995 when the then new system was set up.

Should this earlier recommendation be reinstated, cases where this override had been used would need to be made public. The Committee hope that this would only apply in exceptional circumstances and would be concerned if this was used repeatedly as such an approach could risk not only a diminution in the number of applications but also an increase in public cynicism about the nature of the process.

Public appointments process and procedures, efficacy and efficiency

Independent element

Lord Nolan did not define ‘independence’ in his report but said that ‘this would normally mean they had no operational role in government or in the bodies concerned’.

The Committee agrees that any independent element must be demonstrably independent of government and the public body concerned, but drawn ideally from a relevant sector or profession. A perceived lack of independence is an important aspect to

⁵ Getting the Balance Right, Implementing Standards of Conduct in Public Life, January 2005

be considered by departments. Critically, independent panel members must be well briefed by the department on the principles and process of the appointment.

It is important that the Commissioner is able to decide how best to regulate the operation of the process within the relevant Code.

In the interests of transparency, the Department should publish details of the independent members of departmental panels who are not OCPA appointed assessors.

Proportionate Regulation and Consistency

As noted above in the discussion about the remit of the CPA, not all public appointments are regulated. **In the interests of building public confidence, the Committee believes common standards should apply to all public appointments. There is a need for a consistent systematic independent infrastructure to apply to all appointments and re-appointments, with proportionate regulation.**

David Normington's revision of the Code of Practice in 2011 which was designed to reduce unnecessary process and limit prescription, has led to a much "lighter touch" level of regulation of Departments' appointment processes.

We believe that there is a strong case for additional guidance and effort to promote best practice to drive Departmental performance and professionalism. It is clear that there is currently a mixed picture in the approach and expertise in Departments. Sponsor teams must be encouraged to do more than simply follow previous practice for each appointment.

Re-appointments and transparency

In the interests of transparency, it is important that departments are open and clear about their processes for re-appointments. There should be no guarantee of any re-appointment and re-appointments should in any event be subject to a successful appraisal recorded by the department. The decision to re-appoint should be taken in a timely manner and departments should also take the opportunity to record and update political activity.

Diversity and Recruitment Process

In order to attract a range of high quality candidates and provide the Minister with a real choice, there needs to be much greater consideration given to outlining the person and role specification. If a post is too narrowly defined, the field of candidates may be restricted. The best field of candidates is one diverse in gender, ethnic background, abilities, experience and background. **Appointments should be advertised publicly and as widely as possible to attract the best available candidates.**

Nolan said that whilst individual posts should always be made on merit, the overall field of selection should represent an appropriate mix of relevant skills and backgrounds. More needs to be done to address the lack of diversity amongst public appointments so that the boards of public bodies are more reflective of the communities they serve.

The annual statistics of OCPA published in July this year showed an increase in appointments and re-appointments made to female candidates (45.2% in 2014/15 compared with 39.1% in 2013/14) but only a slight increase in BAME appointments (7.9% compared with 7.7%);⁶ a fall in those registering a disability (4.6% of appointments went to candidates registering a disability in 2014/15 compared with 7.6% in 2013/14) and a decline in those declaring political activity (4.5% in 2014/15 and 5.0% in 2013/14).

Current budgetary pressures mean public appointments are largely only advertised online. Diversity amongst public appointments might be increased by thinking more creatively about the recruitment process and using greater variety of selection and assessment techniques. There may be opportunities for greater use of inexpensive social networks and social media to alert potential candidates ensuring openness and increasing diversity and these options should be explored more fully. Effective use of advertising or specialist search and recruitment firms should not be automatically ruled out.

The Committee believes that much more should be done by Departments to reduce the length of recruitment processes and to keep interested candidates informed of progress. Processes need to be prompt, proportionate and well communicated. Many of these appointments are not well paid relative to similar roles outwith the public sector and good candidates may be put off applying or withdraw over the uncertainty caused by lengthy recruitment processes.

Pre-Appointment Parliamentary Scrutiny

There is a list of appointments which are subject to a pre-appointment scrutiny hearing. The Committee was pleased to hear that one of the issues under consideration is this involvement of Select Committees in the final selection process. While it is important that preferred candidates are able to demonstrate their credentials, it would be helpful to examine fully the advantages and disadvantages of the current approach which leaves final approval after a full assessment and interview process subject to approval by a single hearing by a Select Committee. The Committee has recently heard from Dr Matthews who has conducted research in this area:

<http://www.sheffield.ac.uk/politics/people/publications/felicity-matthews>.

Dr Matthews' and Professor Flinders' research states that pre-appointment scrutiny rests on the principle that select committees should seek to test an appointee's competence and expertise rather than challenge a Minister's decision. However, since 2009, select committees have become increasingly willing to challenge publicly the choice of the government's preferred candidate. By the end of the 2014/15 parliamentary session, a total of 13 candidates had divided committees or been rejected outright which represents around 22% of all hearings held to that date. They also argue that this activism has been both partisan and institutional in nature with select committee members from all parties attempting to block appointments. This has resulted in the unintended consequence of select

⁶ *Commissioner for Public Appointments Official Statistics July 2015*

committees failing to focus solely on independence and professional competence and have instead engaged in political point-scoring.⁷

This leaves in question whether the final approval of an appointment being taken by the legislature, increases or decreases public confidence in the system.

Political Activity

Political activity is no bar to an appointment. It has always been possible for Ministers to appoint people with political backgrounds to the boards of public bodies. The annual statistics of OCPA published in July this year showed a further decline in those declaring political activity (4.5% in 2014/15 and 5.0% in 2013/14). **It is important the Commissioner continues to monitor statistics regarding candidates' declaration of political activity; that these statistics and trends continue to be made public and that political activity is considered alongside a candidate's ability to perform in the role.** Any declared significant political activity undertaken in the last five year by a successful candidate should continue to be made public on his/her appointment.

More generally in the interests of transparency the Committee expects that any potential or actual conflicts of interest to be declared by applicants and explored by the panel during the selection process. This is particularly the case for candidates who may have been acting as lobbyists and active campaigners

CSPL

October 2015

⁷ <https://cspl.blog.gov.uk/2015/10/16/the-two-way-regulation-of-public-appointments-and-its-effects-on-public-life/>