

## **Written evidence from ACoBA (ACB 08)**

### **Public Administration and Constitutional Affairs Committee**

#### **The role and effectiveness of ACoBA and the Independent Adviser on Minister's interests inquiry**

1. ACOBA's remit, given to it by Government, is to provide advice. In formulating this advice it is required to strike a balance between the right of people to earn a living after leaving government and any justified public concern, criticism or misinterpretation surrounding the circumstances of an outside appointment.
2. ACOBA is aware that restrictions placed upon an individual's ability to work are sometimes challenged in an employment context on the basis that they amount to an unlawful restraint of trade. This is the principle that an individual's ability to follow their trade and use their skills should not be interfered with unless any restrictions placed upon them are designed to protect a legitimate interest; are no wider than necessary; are reasonable between the parties; and reasonable in the interests of the public.
3. Therefore, while mindful of the need to take a consistent approach when dealing with applications, the Committee considers each one on its merits in light of the facts of each case. This ensures that its advice is fair, reasonable and proportionate to the legitimate interests that the Committee has been set up to protect and enables it to properly address any assertions of unfairness or restraint of trade.
4. Given the Government's rejection of the previous PASC proposals for a statutory scheme, ACOBA recommends that a cost-benefit analysis should be undertaken of a statutory scheme with a prohibited period at the end of public service/ministerial office. This should involve an assessment of the pros and cons, in public policy terms, of a statutory scheme, and should include consideration of: applicants seeking employment in paid and unpaid work; applicants seeking employment in sectors they have previously regulated or had policy responsibility for while in public office; people returning to work they had previously been employed in; and those occupations where continued practice is required e.g. doctors.
5. Other specific factors likely to require consideration would include: how should such statutory restrictions be framed; what specific activities (such as lobbying) might be prohibited; what sanctions would apply to breaches, how would they be investigated and enforced, and by whom; what exemptions to statutory restrictions might be appropriate; whether a discretion would be required to dis-apply restrictions in some cases - e.g. where there was a clear public interest, and in whom might such a discretion be vested; and what time periods might be appropriate.

6. This exercise should consider the impact of adopting such a policy in financial, legal and public policy terms (e.g. would it impact on the Government's ability to draw on expertise from outside the public sector). ACOBA's experience in recent years has been that compared, for example, with 20 years ago people do not stay in post for long periods and many cases that come before the Committee involve younger age groups rather than those nearing retirement age. Therefore, analysis should also consider the impact on civil servants' career planning.
7. Until such an analysis has been carried out it is difficult to judge the merits of a move from an advisory committee to a statutory one. The resources available to ACOBA preclude such an analysis and we believe that it would fall to PACAC or Government to undertake or commission this work. ACOBA would be very willing to contribute to such an exercise but is not resourced to initiate it.
8. Alternatively, a more flexible system for proposing and considering enhancements to the Rules could maximise the effectiveness of ACOBA as an advisory committee. ACOBA is well placed to identify trends and to recommend improvements to the Rules, and these could be implemented on a regular basis. However, this would require flexibility in the way the Rules are currently reviewed by the Cabinet Office.
9. The Chair of ACOBA regularly meets Permanent Secretaries to discuss departmental procedures in respect of the Rules. In addition, the Committee would welcome the appointment of a non-executive director on each departmental board with responsibility for oversight of the Business Appointment Rules. Senior, independent, board-level oversight would help to facilitate good governance of departments' business appointment processes. This would both ensure the appropriate collation and retention of data needed when considering applications, and counter the possible perception of applicants being given preferential treatment by their former Civil Service colleagues in departments, whose advice the Committee currently draws upon.
10. By way of further background, the body of the Committee's 2015/16 Annual Report is enclosed with this note.

*October 2016*

## Annex A - body of the Committee's 2015/16 Annual Report

### Part 1 - The Committee

#### The Committee's role

1. The Advisory Committee on Business Appointments (the Committee) was established by the Prime Minister in 1975. It is an independent, advisory, non-departmental public body, whose sponsoring Department is the Cabinet Office.
2. The Committee advises on the application of the Government's Business Appointments Rules on outside appointments<sup>1</sup> (the Rules), which apply to both Crown servants and Ministers after they leave office.
3. The Committee provides independent advice<sup>2</sup> on the application of the Rules in relation to the most senior Crown servants (civil servants at Director General-level and above, and their equivalents); and to all former Ministers of the UK, Scottish and Welsh Governments.<sup>3</sup>
4. During the reporting period the Committee advised on 110 appointments of former Crown servants and on 123 appointments of former Ministers.
5. Further information about how the Committee approaches its work are set out in Parts 2 to 5 of this report.

#### Membership

6. The Committee has eight members, appointed by the Prime Minister. All members are appointed for a single non-renewable term of five years. Three members are political appointees; nominated by the Conservative, Labour and Liberal Democrat parties; and a further five are independent members, appointed following fair and open competition, in accordance with the Commissioner for Public Appointments' Code of Practice. The appointment of Baroness Browning as Chair of the

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<sup>1</sup> Equivalent versions of the Rules are in place for the Diplomatic Service, armed forces and intelligence agencies.

<sup>2</sup> Advice is provided to the Foreign Secretary if the applicant is from the diplomatic service, GCHQ or SIS; to the Defence Secretary for most Ministry of Defence staff, both civilian and military; to the First Ministers of Scotland and Wales in the case of staff working in those Devolved Administrations; to the relevant Permanent Secretary if the applicant is a special adviser; and to the Prime Minister for all other Crown servants.

<sup>3</sup> Advice is provided direct to former Ministers.

Committee was also conducted in line with the Commissioner's Code, following her earlier nomination by the Conservative Party as that party's member.

7. The membership of the Committee, which has remained the same throughout the reporting period, is:
  - Mark Addison, independent member
  - Sir Alex Allan, independent member
  - Baroness (Angela) Browning, Conservative member and Chair
  - Lord (Michael) German, Liberal Democrat member
  - Mary Jo Jacobi, independent member
  - Terence Jagger, independent member
  - Baroness (Helen) Liddell of Coatdyke, Labour member
  - John Wood, independent member

## Expenditure

8. The Committee's expenditure figures are published annually in the Civil Service Commission's audited Accounts, reflecting the fact that the Civil Service Commission provides secretariat support for the Committee.<sup>4</sup> The figures in the audited accounts include the cost of accommodation and other service charges paid to the Cabinet Office, the Committee's share of which was approximately £84,000 in 2015-16.
9. Excluding the service charges mentioned above, the Committee's total expenditure for 2015-16 was £218,000. This compares with £164,000 in 2014-15.
10. The increase can largely be attributed to the secretariat taking on additional staff for a six-month period in order to process the anticipated rise in applications from former Ministers and special advisers following the 2015 General Election (see Parts 4 and 5 for more detail about the increase in application numbers). Staff costs remained the largest element of the Committee's expenditure at £177,000 in 2015-16 (compared with £124,000 in 2014-15).
11. The Committee members' honoraria of £8,000 per annum for the Chair and £3,000 for each of the other members remained unchanged from last year and totalled £29,000.
12. Other costs included the cost of legal advice and the press officer contract.

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<sup>4</sup> <http://civilservicecommission.independent.gov.uk/publications/annual-reports/>

## Governance

13. The Committee has a [Code of Practice](#), which is published on gov.uk<sup>5</sup>.
14. In March this year the Cabinet Office announced its new strategy for reviewing public bodies to ensure that they are efficient, effective and accountable<sup>6</sup>. A review of each body will be undertaken at least once in the lifetime of a Parliament. The Committee stands ready to cooperate with and contribute to its own review in due course.

## Parliamentary scrutiny

15. On 16 April 2016 Baroness Browning appeared before the Public Administration and Constitutional Affairs Committee (PACAC) to give evidence on the work of the Committee during the last year.
16. The full [transcript](#) of her evidence can be found on the PACAC pages on the UK Parliament's website<sup>7</sup>.

## Part 2 – The Rules

### Purpose

17. The Business Appointments Rules are set by the Government. It has been the view of successive Governments that it is in the public interest for people with experience of public administration to be able to move into business or other bodies outside central government, and to be able to start a new career or resume a former one. However, it is important that when a former public servant takes up an appointment there should be no cause for public concern about the propriety of that appointment.
18. The aim of the Rules is to avoid any reasonable concerns that:
- a. an individual might be influenced in carrying out his or her official duties by the hope or expectation of future employment with a particular firm or organisation, or

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<sup>5</sup> <https://www.gov.uk/government/publications/acoba-code-of-practice-for-committee-members>

<sup>6</sup> <https://www.gov.uk/government/publications/tailored-reviews-of-public-bodies-guidance>

<sup>7</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/inquiries/parliament-2015/advisory-committee-on-business-appointments-15-16/>

in a specific sector; or

b. on leaving Crown service, an individual might improperly exploit privileged access to contacts in Government or sensitive information; or

c. a particular firm or organisation might gain an improper advantage by employing someone who, in the course of their official duties, has had access to:

i. information relating to unannounced or proposed developments in Government policy, knowledge of which may affect the prospective employer or any competitors; or

ii. commercially valuable or sensitive information about any competitors.

## Scope

19. The [Rules for civil servants](#) – which apply equally to civil servants serving the UK Government, the Scottish Government and the Welsh Government – can be found on the Committee’s pages on gov.uk and on Departmental intranets. They are designed to uphold the core values in the Civil Service Code, of integrity, honesty, objectivity and impartiality<sup>8</sup>.

20. Equivalent versions of the Rules are in place for Ministers, the diplomatic service, intelligence agencies, and armed forces (members of which, along with civil servants, are referred to as Crown servants for the purposes of this report).

## Part 3 – The Committee’s Approach

### The decision-making process

21. The Committee’s remit is to provide advice. In formulating this advice it is required to strike a balance between the right of people to earn a living after leaving government and any justified public concern, criticism or misinterpretation surrounding the circumstances of an outside appointment. While mindful of the need to take a consistent approach when dealing with applications, the Committee considers each one on its merits in light of the facts of each case. This ensures that its advice is fair, reasonable and proportionate to the legitimate interests that the Committee has been set up to protect.

22. It is sometimes necessary to seek additional information from applicants, or their former Departments, to assist the Committee in forming its advice. Occasionally

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<sup>8</sup> As temporary, political appointees, special advisers are exempt from the requirements to behave with objectivity and impartiality, but are bound by the values of integrity and honesty.

the Committee will meet an applicant, where an applicant or the Committee need to discuss its provisional advice further.

23. The Rules allow, in exceptional circumstances, for the Committee to advise that an appointment is unsuitable. However, past experience has shown that, in those rare cases when the Committee indicates informally to an applicant that it is likely to consider a particular appointment to be unsuitable or to recommend a substantial waiting period, it is often the case that the application is withdrawn or amended to such an extent that the Committee's provisional advice can be revised. As only appointments that are taken up are published, the Committee's website and reports do not show any unsuitable appointments. Nor do they show how the nature of initially potentially unsuitable appointments may have subsequently been modified at the Committee's prompting.

### **The lobbying ban**

24. As a general principle, former Ministers and Crown servants are required to observe a two-year ban on lobbying the particular administration within the UK that the applicant served while in Government. However, the Committee retains the flexibility to extend the lobbying ban to cover other administrations if the circumstances of an applicant warrant this. The two-year lobbying ban may also be waived or shortened by the Committee if it considers this to be justified by the particular circumstances of an individual application and if questions of propriety and public concern arising from the appointment or employment have been adequately addressed.

25. The Rules permit the Committee to qualify the lobbying condition to make clear that this restriction need not prevent individuals communicating with Government on matters that are an integral part of the normal course of business for their new employers. The Committee will only sparingly waive, shorten or qualify the lobbying ban as it considers it to be an important condition in guarding against the risk, either real or perceived, that a former Crown servant or Minister might influence a Government decision or policy to serve their own interests.

### **Moving to a job in the same sector**

26. During the period of this report, the Committee has taken steps to increase the information available to it to ensure that it can best tailor the restrictions it recommends to each case.

27. The Committee has revised the business appointments application form to seek information explicitly about any dealings a former Minister or Crown servant may have had, while in office, with a particular commercial sector more broadly – not just the company or organisation to which they are seeking to move.
28. The Committee has also expanded its [Guidance for former Ministers](#)<sup>9</sup> to make clear that significant involvement with a sector will increase the likelihood of the Committee recommending an additional waiting period.

### Taking into account a current public role

29. Former Ministers may continue to represent Government in some capacity, for example, as a Trade Envoy or special representative. Such roles may involve privileged access to information and could create potential conflicts of interest between their current role representing Government and their proposed outside employment. (The Committee notes that there is no formalised code of conduct relating to this type of role, akin to the Ministerial Code(s), and believes it would be helpful if Government produced one.)
30. During this reporting period the Committee expanded its [Guidance for former Ministers](#) to give further information about the Committee's approach to dealing with applications of this type. The Committee will consider whether to extend the restrictions it would normally impose to take account of any continuing government role, for example by extending any condition around drawing on privileged information to information deriving from that role. It is also likely to recommend that the individual makes clear in any activities he or she undertakes on behalf of new employers that he or she is acting as the employers' representative and not on behalf of, or representing, Government. It may recommend an additional waiting period where there is a relationship between the post-Ministerial role and the outside appointment.

### Retrospective applications

31. The Government amended the Rules in 2014 to make clear that retrospective applications will not normally be accepted. The Committee needs to be free to offer the most appropriate advice in any situation without it appearing to be constrained by an appointment already having been announced, or an individual already having signed a contract or taken up a post.

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<sup>9</sup> The Cabinet Office is responsible for guidance for civil servants.



32. The Committee will make its concerns public when applications are received retrospectively by publishing the letter it writes to the individual (in the case of former Ministers) or the Department (in the case of former Crown servants) concerned. The Committee takes this approach in the expectation that drawing attention to a failure to submit an application will encourage others to follow the correct process. It also means that any improper appointment does not pass without comment. The Committee has also decided to express its concerns publically where it comes to the Committee's attention that individuals have failed to submit applications before accepting jobs.

33. There were five such cases during the reporting period.

### 'Gardening leave'

34. The Committee notes that the Rules allow for a Department to continue to pay former civil servants or special advisers who are required to observe a waiting period before taking up an outside appointment. However, the Committee has agreed that whether or not such a payment has been, or is likely to be, approved will not form part of the Committee's consideration when offering its advice.

### Transparency

35. The Committee publishes its advice on all appointments it has considered that are subsequently taken up or announced<sup>10</sup>. It makes public as much detail as it is able to, after taking into account its responsibilities under data protection and freedom of information legislation.

36. It is through this transparency, as recommended by the Committee on Standards in Public Life, that all those involved in the business appointments process (including applicants, government Departments, outside employers and the Committee itself) are accountable to the public. Equally, if approached about an individual who has not submitted an application to the Committee when he or she should have done under the Rules, the Committee will also make clear that no application has been received.

37. The Committee's advice and the other material it publishes about how it operates are available on its website<sup>11</sup>. As transparency is crucial to the Committee's work,

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<sup>10</sup> With the exception of the appointments of a small number of individuals from the intelligence agencies, where information may be withheld for security reasons.

<sup>11</sup> <https://www.gov.uk/government/organisations/advisory-committee-on-business-appointments>

the Committee keeps the effectiveness of its website under review. For the period 2015-16 the website had just over 40,000 'hits'.

38. The Committee welcomes the Government's commitment, in the 2014 iteration of the Rules, to greater transparency in relation to the outside appointments of more junior Crown servants, which are considered internally by Departments and do not come before the Committee for consideration. Details of these applications are now published on the relevant Departmental pages of gov.uk.
39. Since March 2010 the minutes of all Committee meetings have been published. In 2015-16 the Committee met four times to discuss a range of issues. The Committee will continue to publish minutes of future meetings once it has approved them.
40. As a public authority, the Committee is required to respond to requests for information in accordance with the Freedom of Information Act 2000 (FOIA). During the reporting period 9 requests were received and responded to.
41. In February 2016 the Committee's approach to dealing with FOIA requests was supported by the Information Commissioner's Office's (ICO) ruling in favour of the Committee following a complaint about the Committee's handling of a FOIA request. The ICO's [decision notice](#) is available on its website. The complainant is currently appealing the ICO's decision to the Tribunal; we will report on the outcome in our next annual report.
42. The Committee maintains a register of its members' interests which is available on its website. Committee members follow a strict policy of declaring any individual interests related to a case and, if necessary, recusing themselves. The Committee publishes such details alongside its advice on the relevant case.

## **Part 4 - Ministers**

### **The Ministerial Codes**

43. The Ministerial Codes for the UK Government, Scottish Government and Welsh Government all require former Ministers to seek the Committee's advice before taking up appointments in the two-year period after they leave Ministerial office.
44. All three Codes are based on the premise which also underpins the Business Appointment Rules, that it is in the public interest for former Ministers with

experience in Government to be able to move into business or into other areas of public life, and be able to start a new career or resume a former one. It is, however, equally important that when a former Minister takes up a particular appointment or employment, there should be no cause for any suspicion of impropriety.

## Applications

45. In the reporting period, the Committee advised 33 former Ministers in relation to 123 appointments, including 18 commissions under the terms of independent consultancies agreed by the Committee.
46. Both the number of Ministers seeking advice and the number of applications rose significantly since the last reporting period (for 2014-15 they were 19 and 49 respectively). This can largely be attributed to the changes in Government and Parliament following the 2015 UK General Election.
47. Of the 123 appointments, 26 had not been taken up as of 31 May 2016. This may have been for a variety of reasons, including: the applicant had decided not to take up the appointment; the applicant had applied speculatively and the role never materialised or the role had not *yet* been taken up (possibly because the applicant was subject to a waiting period). The Committee's advice in relation to appointments that have been taken up or announced is published on its website. If and when others are taken up, the Committee's advice will be published.

## The process

48. Former Ministers are asked to complete an application form, which is available on the Committee's website. We ask applicants to provide us with as full a picture of the proposed appointment as possible so that we can provide fully informed advice. We will seek a view on the application from the Minister's former Department(s). We may also seek further confidential evidence from other sources, for example the Minister's proposed employer or their competitors. All applications are treated in strict confidence and remain confidential until appointments are taken up or publicly announced.
49. The Committee provides its advice direct to the former Minister. It aims to provide its advice within 15 working days of receipt of an application. However, the complexity of some cases, and the need to seek information and guidance from the Minister's former Department(s), means it is not possible for all cases to be fully considered within this timeframe. During the reporting period, the Committee

provided its advice to former Ministers within 15 working days in 64% of cases (84% received advice within 20 working days). This compares with 51% in 2014-15, and 72% in 2013-14, and was despite the Committee receiving significantly more applications than in each of the previous two years (123 appointments in 2015-16, compared to 49 in 2014-15 and 58 in 2013-14).

50. The advice to former Ministers will typically include a ban on making use of privileged information available to them while in post and a two-year lobbying ban. Other conditions may be added, tailored to address the risks around individual appointments. Former Cabinet members of the UK Government are routinely subject to a minimum three-month waiting period after leaving office, although this can be waived by the Committee if justified by the circumstances of the case. The Committee can recommend a waiting period of up to two years. In exceptional circumstances, the Committee can recommend that a particular appointment is unsuitable (although the caveat set out in Part 3, explaining why the Committee's website and reports do not show any unsuitable appointments, should be noted here).

51. The Committee's advice is normally published as soon as the former Minister has advised the Committee that he or she has taken up or announced an appointment. We do not publish our advice where an appointment is subsequently not taken up.

52. The Committee will consider requests for continuing confidentiality once an appointment has been taken up, but a compelling case must be made to the Committee for doing so. The Committee will give no undertaking longer than three months, at the end of which the situation is reviewed.

53. All former Ministers are written to when they leave office to remind them of the need to ask the Committee for advice on all applications for two years after leaving office.

## **Part 5 – Crown Servants**

### **Applications**

54. The Rules apply to all Crown servants<sup>12</sup>, including special advisers. The Committee is responsible for providing independent advice on their applications in

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<sup>12</sup> In this context, the Civil Service, Diplomatic Service, armed forces and intelligence agencies.

relation to the most senior Crown servants who wish to take up appointments within two years of leaving Crown service.

55. The Rules specify that applications from special advisers “of equivalent standing” to civil servants at Director General (Senior Civil Service pay band 3) level and above need to be considered by the Committee. As civil service and special adviser pay bands do not mirror each other exactly, Departments may need to exercise judgement, in consultation with the Cabinet Office and Committee secretariat where necessary, as to whether special advisers’ applications should be referred to the Committee.
56. Departments deal with more junior applications under their own arrangements, and publish details of the appointments as part of their own transparency data. Permanent Secretaries are responsible for the operation of the Rules in their Departments.
57. In the reporting period, the Committee advised 36 Crown servants in relation to 110 appointments. This compares with 41 Crown servants and 89 appointments in 2014-15, and 57 and 158 respectively in 2013-14.

### The process

58. The Committee aims to provide its advice within 20 working days of receiving a fully completed application form. As each case is considered on its merits and some are complex, it is not possible to achieve this target in all cases. During this reporting period, 86% of cases were dealt with within the 20-day target. This compares with 67% in 2014-15 and 79% in 2013-14. As with Ministerial applications, our turnaround times have improved since the last reporting period despite an increase in the volume of applications.
59. Of the 110 appointments, 27 had not been taken up as of 31 May 2016. Possible reasons for this are explained at paragraph 48 above.
60. Applicants must complete a standard application form which is available on the Committee’s website. The form requests details of their current and previous posts as well as information on the proposed appointment, including whether or not it was advertised and if it will involve dealings with their former Department or government more generally. Applicants must also state if they have had any contractual or official dealings with their prospective employer, competitors of their prospective employer or the sector in which the employer operates over the previous two years; and if they have been involved in policy development or the

award of grants that could affect either the prospective employer or its competitors.

61. Applicants must submit the application to both their countersigning officer and the Department's HR division for them to provide their assessments. The Department then sends the completed application to the Committee's secretariat. The Committee relies on the information provided by the Department and countersigning officer to inform its consideration of the application. The Committee considers each case individually against the Rules. It collects wider evidence where necessary, for example it might seek the views of other Departments, including the Cabinet Office, as "owner" of the Rules. In some instances the Committee will meet applicants to discuss the proposed appointment further.
62. The Committee will then reach a view on whether there should be any restrictions on the applicant taking up the proposed appointment. As a general principle, former Crown servants at Director General level and above, and their equivalents, will have to observe a two-year lobbying ban.
63. Former Crown servants at the equivalent of Permanent Secretary-level or above will be required to observe a minimum three-month waiting period after their last day of paid service, although this can be waived or reduced by the Committee if justified by the circumstances of the case. As with Ministers, the Committee can recommend a waiting period of up to two years.
64. Once the Committee has agreed its advice it writes to the relevant final decision-maker (whether Minister or Permanent Secretary), who then considers the application and the Committee's recommendation. Once he or she has made the decision the Committee is informed, as are the Department and applicant.
65. The applicant is responsible for informing the Committee when he or she has taken up the appointment, or it has been announced. The Department is responsible for informing prospective employers of any conditions that have been attached to the approval of the appointment. Once the Committee has been informed it will publish the details of the appointment and its advice on its website.
66. Until an appointment is taken up or announced, the Committee undertakes to treat all applications confidentially. It does not publish its advice on appointments not taken up.