

# **PUBLIC APPOINTMENTS AND PUBLIC BODIES ETC. (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Public Appointments and Public Bodies etc. (Scotland) Bill introduced in the Scottish Parliament on 17 June 2002. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 56–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The 4 objectives of the Bill are:

- to establish a Commissioner for Public Appointments in Scotland;
- to abolish 6 non-departmental public bodies, namely the Ancient Monuments Board for Scotland, the Historic Buildings Council for Scotland, the Scottish Hospital Trust, the Scottish Medical Practices Committee, the Scottish Conveyancing and Executry Services Board and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS);
- to grant limited notarial powers to conveyancing and executry practitioners; and,
- to create a new body – the National Survey of Archaeology and Buildings of Scotland – which would take on the functions as laid down in the Bill of the RCAHMS.

### **A Scottish Commissioner for Public Appointments**

3. The establishment of a Commissioner for Public Appointments in Scotland was first raised and considered in the consultation paper *Appointments to Public Bodies in Scotland: Modernising the System* issued in February 2000. Responses to that paper provided strong support for such a Commissioner and these were set out in *Public Bodies: Proposals for Change*. Key functions of the Commissioner will be to:

- regulate the appointments process, by prescribing and publishing a Code of Practice for Public Appointments made by the Scottish Ministers;
- oversee compliance by the Scottish Ministers with the Code of Practice, including power to inform the Parliament if the Code is breached;

- monitor the appointments process either directly or by appointing independent assessors;
- conduct ad hoc inquiries into appointment policies and practices;
- investigate complaints;
- promote diversity; and,
- report annually to the Parliament.

### **Review of public bodies in Scotland**

4. The Executive delivered a fundamental review of public bodies in Scotland in June 2001. The specific objectives of the review were:

- to secure a set of principles that should underpin the organisation and delivery of devolved central government services in Scotland. To explore the relationship between the Executive and the bodies it sponsors and between them and other interests – for example, local government, the Parliament and civic Scotland;
- to test all public bodies, and the single person Commissioners appointed by the Scottish Ministers, and any future proposals to establish public bodies, against these principles. To abolish those bodies whose existence is not justified by reference to them – either by ceasing the function if it is no longer needed, or by moving it to another organisation, or bringing the function into, or closer to, the Executive;
- to ensure that those public bodies that remain operate effectively and are appropriately accountable to the Scottish Ministers and the Parliament and have legitimacy in the eyes of the public, most particularly by further modernising the appointments process; and,
- to secure maximum value for money with a rolling review of the remaining public bodies in the context of wider scrutiny of the functions they carry out.

5. During the review every one of the public bodies sponsored by the Executive was tested against a new set of principles. Ministers agreed to retain only those bodies which showed that:

- they have a distinct role to play and functions to perform that cannot be carried out at least as effectively by any other organisation;
- they are clearly accountable to the Scottish Ministers and the people whom they serve for the functions they perform;
- they are able to work with other organisations and are able to draw new people into the process of government in its widest sense; and
- they are properly run, efficient and effective, and deliver value for money.

6. As a direct result of the review, recommendations were made for the abolition, reform or further review of 113 public bodies. The recommendations were published in the report of the review *Public Bodies: Proposals for Change* on 21 June 2001. Most of the changes detailed in the report could be, or are being, effected without the need for primary legislation. However, the public bodies cited for abolition in this Bill, and the proposals arising from the review of the Royal Commission on the Ancient and Historical Monuments of Scotland, were identified as

requiring primary legislation to effect the report's recommendations. It is for this reason that these bodies alone are included in this Bill.

### **Reasons for abolition of bodies specified in the Bill**

7. The Scottish Conveyancing and Executry Services Board (SCESB) was established to introduce competition with solicitors in relation to conveyancing and executry services. The decision to abolish the SCESB was reached because it has had very limited success. Of the 11 practitioners registered with the Board at the time of the review only 2 were practising independently of solicitors' firms. It is unlikely that income from registration fees payable by practitioners, and their contribution to insurance premiums, will fully fund the cost of the Board in the future. The Law Society of Scotland has in place a regulatory structure for solicitors and their employees. The regulation of these professions could be seen as a natural extension of the Law Society's activities.

8. Both the Ancient Monuments Board for Scotland (AMB) and the Historic Buildings Council for Scotland (HBC) were set up under statute when the range of expertise they provide was not available to the Scottish Ministers from their own officials. That is no longer the case, particularly through the advice available from Historic Scotland. External advice will remain of value, but this can be obtained in a more focussed and less formal way.

9. The functions of the Scottish Hospital Trust (SHT) could be performed effectively from within the NHS and would not appear to require to be held at arm's length from the Scottish Ministers. NHS Trusts and Boards already operate endowment funds within the control of NHS Scotland. The abolition of the Scottish Hospital Trust would bring all endowment funds within the control of NHS Scotland.

10. The Scottish Medical Practices Committee (SMPC) was set up with a view to securing that "the number of medical practitioners undertaking to provide general medical services in the areas of different Health Boards, or in different parts of their areas, is adequate". The core function of the SMPC is to determine whether there is a need for an additional GP or GPs in any area or whether vacancies which arise for GPs should be filled. This role is contrary to the general premise that local health care systems should be responsible for all aspects of health care provision locally. On abolition, the functions of the SMPC will be transferred to local health care systems. It is proposed that a GP concerned at a decision by a primary care NHS trust (PCT) or Island NHS Board should be able to appeal through the new workforce development arrangements proposed in the discussion paper issued by the Scottish Executive Health Department in January in response to *Planning Together* – the report of the Scottish Integrated Workforce Planning Group. Currently, a GP whose application to fill a vacancy has not been selected by a Board to go forward to the SMPC or whose application is refused by the SMPC may appeal to Scottish Ministers on a point of law. The SMPC also carries out a range of other related functions, involving the inducement payment scheme for GPs in the most remote and rural areas, a limited range of statutory appeals by GPs and certification that sales of practices do not involve the sale of goodwill. Abolition is linked to separate plans to make PCTs and Island NHS Boards responsible for managing all the financial resources for primary health care.

## **Notarial powers for conveyancing and executry practitioners**

11. *Public Bodies: Proposals for Change* included the proposal to abolish the SCESB and transfer regulatory responsibility for qualified conveyancers and executry practitioners registered by the Board to the Law Society of Scotland. The Scottish Ministers have, however, agreed that both the professions of executry practitioner and qualified conveyancer should be retained, but that with effect from the date of transfer of responsibility no new independent qualified conveyancers (to be renamed independent conveyancing practitioners) should be registered. Ministers have agreed that independent conveyancing practitioners should be provided with limited notarial powers with direct relevance to their conveyancing duties. The proposed notarial powers will ensure a level playing field for solicitors and independent conveyancing practitioners when the latter are transferred to Law Society supervision. Conveyancing practitioners are also to be permitted to subscribe dispositions and standard securities and executry practitioners to subscribe testamentary documents, on behalf of people who are blind or unable to write.

## **Creation of the National Survey of Archaeology and Buildings of Scotland**

12. It was announced in *Public Bodies: Proposals for Change* that RCAHMS was one of the public bodies which Ministers believed continued to have an important role to play in recording the archaeological and historical man-made environment of Scotland and should be retained but that its status should be reviewed. The Executive explored alternative models to non-departmental public body (NDPB) status for the Commission. Following consideration of the matter Ministers have concluded that an alternative to NDPB status for RCAHMS would be unacceptably expensive and run counter to the intention of the review which was to enhance rather than reduce accountability. It is therefore proposed that a new body shall be created to be known as the National Survey of Archaeology and Buildings. The functions of RCAHMS will transfer to the new body and its duties set down in statute. This should result in the body having a clearer identity, and foster a greater understanding of its activities and of the facilities it provides.

## **ALTERNATIVE APPROACHES**

13. It is proposed that the Commissioner for Public Appointments in Scotland will be appointed by the Queen on the recommendation of the Parliament. The only way that this can be achieved is through primary legislation.

14. There is no alternative option available to achieve the purposes of the Bill in relation to the abolition of SCESB, AMB, HBC, SMPC and SHT. Primary legislation is required to abolish these public bodies.

15. A Joint Working Group comprising representatives of SCESB, the Law Society of Scotland and the Scottish Executive Justice Department was set up to consider a suitable basis for the implementation of the proposals referred to in *Public Bodies: Proposals for Change*. The Group recommended the establishment of notarial powers to ensure a level playing field for solicitors and independent conveyancing practitioners.

16. Alternative models to NDPB status for the RCAHMS were considered by the Executive in consultation with the present Commissioners. There was a view that the existing charitable

status enjoyed by the Commission offered a possible way forward. The Commission engaged a consultant to explore the possibility of RCAHMS converting to a trust. However, the consultant concluded that this option would be unacceptably expensive and run counter to the intention of the review which was to enhance rather than reduce accountability. The Commission Chair and Ministers agreed that this option should not be pursued.

## **CONSULTATION**

17. The proposal to establish a Commissioner for Public Appointments in Scotland has been subject to a full and widespread consultation. The creation of such a post was first raised and considered in the consultation paper *Appointments to Public Bodies in Scotland: Modernising the System* issued in February 2000. Responses to that paper provided strong support for the establishment of a Scottish Commissioner and these were set out in *Public Bodies: Proposals for Change*. A second consultation on the detailed provisions of the appointment, funding, remit and reporting arrangements for the Commissioner for Public Appointments in Scotland was issued in February 2002 and reported in May 2002. The proposals set out in the consultation paper were developed taking full account of the responses to the consultation paper *Appointments to Public Bodies in Scotland: Modernising the System*.

18. Following responses to the January 2001 Discussion Paper on the Review of Public Bodies, the proposals to abolish a number of bodies, including the specified bodies, were outlined in *Public Bodies: Proposals for Change*. It was determined that these bodies should be abolished. Subsequent consultations concerned with the mechanisms of abolition and possible transfer of functions were undertaken individually at a scale and of a distribution appropriate to the bodies concerned. This avoided unnecessary and excessive consultation, on the grounds that a consultee's interests for one of the named bodies was unlikely to transfer to the other bodies specified in the Bill.

### **Commissioner for Public Appointments in Scotland**

19. The question of whether there should be a Scottish Commissioner was raised in the Executive's consultation paper *Appointments to Public Bodies in Scotland: Modernising the System* issued in February 2000. During a Parliamentary debate later that year there was all party support for this proposal. The vast majority of responses received to the consultation paper favoured the creation of a Scottish Commissioner and these were set out in *Public Bodies: Proposals for Change*.

20. A second consultation on the detailed provisions for the appointment, funding, remit and reporting arrangements for the Commissioner for Public Appointments in Scotland was issued to over 1,000 organisations and individuals including public bodies, local authorities, business, ethnic minority, disabled and women's groups, professional and trade organisations across Scotland on 14 February 2002. The closing date for responses was 11 April.

21. The second consultation included proposals for ensuring independence from Ministers along similar lines to that proposed for the Scottish Information Commissioner and the Scottish Public Services Ombudsman. The paper also makes it clear that the detailed procedures relating to the appointment of the Commissioner and the reporting arrangements with the Parliament will be a matter for the Parliament and will be provided for in standing orders.

22. All 33 respondents who expressed a view stated that they welcomed the creation of a separate Commissioner for Public Appointments in Scotland and supported (to a greater or lesser degree) the proposals outlined in the consultation document.

### **Scottish Conveyancing and Executry Services Board**

23. In addition to the general consultation process initiated by the publication of *Public Bodies: Proposals for Change*, the Deputy First Minister wrote to the Board Chair on 21 June 2001 eliciting his views, and on the same day the Justice Department wrote to Board members, practitioners registered with the Board, the Scottish Consumer Council and the universities providing courses relevant to practitioners.

24. The Deputy First Minister met the Board Chair on 2 occasions to hear the views of the Board. Executive officials met the Scottish Consumer Council in September 2001 to discuss the proposals. Officials also met an independent qualified conveyancer in January 2002 to discuss concerns she had raised about the proposals.

### **Ancient Monuments Board for Scotland**

25. A consultation letter was issued in August 2001 by Historic Scotland inviting comments on the proposal to abolish the AMB and on the further proposal that advice would continue to be sought from external sources as and when policy issues arose which would benefit from such advice. It was suggested that specific working groups might be convened and charged with specific tasks. The Chair was given the opportunity to comment on the consultation letter before it issued and the list of people consulted took account of his comments. The consultation letter was issued to around 200 organisations and individuals with an interest in Scotland's built heritage. The consultation period closed on 31 October but was extended slightly to allow AMB to make representations to the then Deputy Minister.

26. 35 responses (representing an 18% return) were received. The consultation exercise did not produce any new or significant arguments for its long-term retention. Ministers remain of the view that the Board should be abolished.

### **Historic Buildings Council for Scotland**

27. The consultation process for abolition of the HBC and on the further proposal that advice would continue to be sought from external sources as and when policy issues arose which would benefit from such advice mirrored that detailed above for the AMB exactly.

28. 57 responses (representing a 29% return) were received. Again, the consultation exercise did not produce any new or significant arguments for its long-term retention. Ministers remain of the view that the Council should be abolished.

### **Scottish Hospital Trust**

29. SHT was consulted as part of the review of public bodies process and recognised themselves that the Trust may be abolished. Since the review, the Trust has contributed to the considerations of how it may be replaced. The favoured option by both the Trust and the Executive is for the division of endowment funds among the NHS Boards on a proportionate

basis. This will bring endowments closer to local control and would entail the SHT endowments being dispersed no more than 15 ways thereby minimising the transaction costs in distributing the investments. The intention is that NHS Boards will determine whether to hold the endowments at Board level or distribute them to NHS Trusts.

### **Scottish Medical Practices Committee**

30. Following initial discussions with interested parties, a consultation paper was issued in February 2002 to a wide range of interested bodies. Over 60 responses were received. Generally PCTs and Island NHS Boards supported the transfer of the SMPC functions on workforce planning and distribution to local health care systems. The response from other consultees was mixed, some supporting the change and others arguing that the SMPC was necessary to ensure consistency and adequacy of services across the country. The SMPC argued that it had been successful in maintaining an adequate and fair distribution of GPs nationally and expressed concerns about the ability of primary care to carry out the Committee's functions.

31. Respondents raised other more specific points. These included concerns about the capacity of local systems, about costs and about appeal procedures. Concerns were expressed that primary care could be adversely affected by pressure from secondary care for additional resources through the linked plans to make PCTs and Island NHS Boards responsible for managing all the financial resources for primary health care. Responses from Grampian were particularly concerned about the financial plans, reflecting concern that resources might be distributed by the formula developed for general medical services as part of the National Review of Resource Allocation for the NHS in Scotland (the Arbuthnott Review).

### **Royal Commission on the Ancient and Historical Monuments of Scotland**

32. There has been no formal consultation exercise following the announcement contained in *Public Bodies: Proposals for Change* that the Scottish Ministers believed that the Commission had an important role to play and should be retained. The Executive in consultation with the Commission reached the conclusion that the functions of RCAHMS should be retained but transferred to a new statutory national body.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

33. The Bill will have a positive impact on equal opportunities because the proposed Commissioner for Public Appointments in Scotland will be given specific responsibility to promote diversity to ensure that a wider cross-section of the Scottish people come forward and are appointed to public bodies. It is a commonly expressed concern that disproportionately few women, disabled people, people from ethnic minorities and different socio-economic groups and from outwith the central belt apply for appointment. The Bill is intended to ensure that the full potential of Scottish society can be tapped.

34. To promote diversity in public appointments, the Executive envisages that the Commissioner for Public Appointments in Scotland will:

- draw up a diversity strategy for public appointments in collaboration with the Executive and other statutory equality agencies (e.g. the Equal Opportunities Commission and the Disability Rights Commission) and others;
- contribute to public appointments training for Scottish Executive staff;
- participate in public events and speaking engagements aimed at increasing awareness of public appointments; and
- review targets for under-represented groups in collaboration with the Scottish Executive and statutory voluntary agencies and others.

### **Human rights**

35. The Executive considers that the Bill is compatible with the European Convention on Human Rights and that not many issues in connection with the Convention arise under the Bill.

36. None of the bodies about which provision is made in Part 2 (and the property rights of which are being affected by the Bill) are considered by the Executive to be “non-governmental organisations” (as that term is used in Article 34 of the Convention). The view is accordingly taken that none of these bodies are entitled to complain of any contravention of rights under the Convention.

37. The provisions in section 13 under which conveyancing and executry practitioners are placed under the supervision of the Scottish Solicitors’ Discipline Tribunal may give rise to issues under Article 6 of the Convention. Where the Tribunal is considering whether or not to take a step referred to in section 20(2B) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (as inserted by paragraph 14(6) of schedule 4 to the Bill), it is likely that this would constitute a determination of that person’s civil rights and obligations for the purposes of Article 6. Compliance with that Article is, however, ensured by way of the full right of appeal to the Court of Session under section 20(11A) of the 1990 Act (inserted by the same provision of that schedule). Applicants for registration as a conveyancing or executry practitioner whose applications are refused, or granted subject to conditions, will have the right to apply to the Council of the Law Society of Scotland to review their decision; and on being informed of the outcome of such review, to apply to the Court of Session for an order.

### **Island communities**

38. The Bill will have no particular impact on island communities.

### **Local government**

39. There are no implications for local authorities.

### **Sustainable development**

40. The Bill will have no negative effects on sustainable development. Its effects will be positive as it will promote social inclusion by increasing awareness of public appointments and promoting public appointment to currently under-represented groups across Scottish society.



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