

This document relates to the Public Appointments (Parliamentary Approval) (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 3 September 2001

PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. The following documents are published to accompany the Public Appointments (Parliamentary Approval) (Scotland) Bill introduced in the Scottish Parliament on 3 September 2001:

- Explanatory Notes;
- a Financial Memorandum; and
- the Presiding Officer's Statement on Legislative Competence.

A Policy Memorandum is printed separately as SP Bill 32-PM. The Financial Memorandum and Presiding Officer's statement are required under Rule 9.3 of the Parliament's Standing Orders.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by Alex Neil, who is the member in charge of the Bill, with the assistance of the Parliament's Non-Executive Bills Unit, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE BILL

4. The Bill provides that appointments to certain public bodies be scrutinised and approved by the Scottish Parliament ("the Parliament"). The bodies that are covered by the Bill are listed in the schedule to the Bill. The appointments to be approved by the Parliament will be those in relation to the listed public bodies which are made by the Scottish Ministers, or those made on their recommendation. The Scottish Ministers will be prohibited from making any appointment or recommendation before the Parliament's approval process has been completed. The Parliament will have the power to veto appointment nominations if it is felt that the nomination does not meet the criteria set out in the Bill.

5. Until 1996 there was little guidance available to Ministers when considering making appointments to public bodies. The Office of the Commissioner for Public Appointments was established in 1995 by an Order in Council made on 23 November 1995, following a recommendation of the Nolan Committee, and it published guidance and a Code of Practice in 1996. A revised Code of Practice was published in July 2001.

6. The development of this Bill has been influenced by the United States Senate system where, under Article II, Section 2, of the United States constitution, certain appointments are "confirmed" by the Senate.

7. The list of bodies that this Bill applies to is contained in the schedule to the Bill. These bodies are Executive Agencies, Executive Non-Departmental Public Bodies, state-owned companies, public corporations and Advisory Non-Departmental Public Bodies, all of which have members appointed by the Scottish Ministers. Bodies which have appointments made on the recommendation of the Scottish Ministers are also included in the schedule. Almost all the bodies also fall within the remit of the Office of the Commissioner for Public Appointments, being listed in the 1995 Order in Council, as amended by a further Order in Council made on 21 July 1998.¹

8. Any nomination for convener of a listed public body will be subject to an automatic hearing by the Parliament. For nominations to other posts in listed public bodies the holding of a hearing is optional.

¹ Copies of both instruments are available from the Privy Council Office at 68 Whitehall, London, SW1A 2AT.

9. The Bill provides that procedures for considering and hearing the nomination and for granting an extension to the consideration period will be set out in standing orders. Standing orders regulate proceedings in the Parliament and are made under section 22 of the Scotland Act 1998.

10. The Scottish Ministers will notify the Parliament of their intention to nominate, or recommend, an individual for a specific appointment. The information that the Scottish Ministers must provide to the Parliament regarding the nomination is provided for in the Bill.

11. From the date the Scottish Ministers notify the Parliament, the Parliament will have 28 days to consider the appointment. How the appointment will be processed by the Parliament will be provided in standing orders. However the criteria used to consider the merits of the nomination are prescribed by the Bill.

12. If the Parliament during its consideration of a nomination wishes to extend the consideration period it can do so once by up to another 28 days.

13. After 28 days (and any extension) the Parliament can approve the nomination, reject the nomination or take no action. If the Parliament approves the nomination then the Scottish Ministers can make the appointment or recommendation. If the Parliament rejects the nomination then the Scottish Ministers cannot appoint the nominee. If the Parliament takes no action then the nomination will be automatically approved.

COMMENTARY ON SECTIONS

Section 1: Exercise of powers of appointment, etc.

14. Subsection (1) makes it clear that the Scottish Ministers cannot make or recommend the appointment of a nominated individual unless, following consideration of the nomination by the Parliament, the nomination has been approved or is deemed to have been approved.

15. Subsection (2) sets out that the nominations for appointment to a listed public body covered by the Bill are those made by the Scottish Ministers, whether acting jointly with another person or alone. No such joint appointments are made at present. There may however be bodies that are added to the schedule in the future where the appointment is made jointly by the Scottish Ministers acting with another person. Also covered are appointments made on the recommendation of the Scottish Ministers. At present, the only bodies that are listed in the schedule to the Bill that come into this category are bodies where the appointment is made by the Queen, following upon recommendation of the Scottish Ministers. There may however be bodies that are added to the schedule in the future where the appointment is made by a person other than the Queen, on the recommendation of the Scottish Ministers.

16. This subsection also provides that only those vacancies that arise after the Act comes into force will be affected by the procedures contained within the Bill.

17. "Appointment" is defined as including the extension of an appointment of a person who is already in post and the re-appointment of a person to the same body. This means that when the term of office of an appointment expires, continuation in post by that individual, or re-

appointment of that individual – to the same or another post with that body – will be subject to the provisions of the Bill.

18. This section also introduces the schedule to the Bill, which lists the public bodies to which the Bill is applicable.

Section 2: Issues for consideration

19. This section prescribes the only four factors that the Parliament can take into account when considering a nomination.

20. Under paragraph (a), the Parliament during its consideration can review the procedure followed by the Scottish Ministers in making the nomination. This enables each step of the process to be scrutinised. For example, the Parliament should be told where and how the post was advertised so that the Parliament can determine whether enough people were informed about the availability of the vacancy. The Parliament can also consider whether any statutory procedural requirements have been followed, e.g. a requirement to consult with another body before making an appointment.

21. Paragraph (b) provides for the Parliament to consider whether a nominee fulfils any statutory requirements which exist regarding the appointment. For example, some appointments require the appointee to have specific qualifications or to be a member of a particular profession.

22. Paragraph (c) provides that the Parliament will have regard to the suitability of the nominee for the post. This relates only to the nominee's ability, experience and qualities and how well they match the criteria for the post. This paragraph will restrict the ambit of questioning to matters directly relevant to the nominee's qualifications for the post. The Scottish Ministers will be required to provide the Parliament with a statement to this effect (see paragraph 26).

23. Paragraph (d) ensures that the Parliament considers the nomination in conjunction with any guidance and codes of practice that apply to the appointment at the time of consideration. In particular this will include the Guidance and Code of Practice that has been issued by the Office of the Commissioner for Public Appointments.

Section 3: Duty to notify nominations

24. This section places a duty on the Scottish Ministers to notify the Parliament of any nomination, or recommendation made by them for an appointment to a body covered by the Bill. This notification is referred to as a "nomination notification".

Section 4: Nomination notifications

25. This sections details how nomination notifications are to be presented to the Parliament and the information which must be provided with any notification. A nomination will be duly given only when subsections (1) and (2) of this section have been complied with. This means that if a notification is lodged with only part of the required information, the Parliament's

consideration period for the nomination will not start to run until the missing information has been provided by the Scottish Ministers.

26. Subsection (1) details the form and method of lodging nomination notifications.

27. Subsection (2) details the information to be provided with a nomination notification. Paragraph (a) requires any nomination notification to be accompanied by information about the nominee and relating to the factors listed in section 2(a), (b) and (d) of the Bill. Paragraph (b) requires a supporting statement from the Scottish Ministers as to the suitability of the nominee.

28. Subsection (3) ensures that the nomination notification will not be deemed to have been given to the Parliament, and the consideration period will not begin, until the requirements of subsection (1) have been met (notification in writing and lodged with the Clerk) and all the information required by subsection (2) has been received.

29. Subsection (4) enables the Parliament to request further information from the Scottish Ministers that is relevant to the consideration of the nomination. This, while allowing the Parliament to seek additional information, ensures that the request can only be related to the list of issues in section 2.

Section 5: Parliamentary consideration of nominations

30. Subsection (1) makes clear that standing orders will provide the detailed procedure for the Parliament's consideration of nominations. The standing orders are made by the Parliament on a motion of the Procedures Committee. It would be possible for the standing orders to make provision for the nomination to be considered by the committee whose remit is relevant to the particular public body concerned. It would also be possible for the standing orders to make provision for certain appointments to be considered at a meeting of the Parliament. These could for example be those appointments that are thought to be more significant or of particular interest. Standing orders could also provide a mechanism for a committee to refer consideration of an appointment to a meeting of the whole Parliament. This could be useful in circumstances where the committee thought that the appointment gave rise to particularly significant issues that justified consideration by the whole Parliament. It will be for the Parliament following consideration by the Procedures Committee to decide whether the possible procedures outlined above or some other procedures are appropriate.

31. Subsection (2) requires standing orders to provide that a nomination for an appointment as convener will automatically be the subject of a hearing by the Parliament and that for any other nomination a hearing may be held but is not to be mandatory.

32. Subsection (3) requires standing orders to set out the procedure to be followed when any hearing is conducted by the Parliament.

Section 6: Consideration period

33. Subsection (1) allows a consideration period, within which consideration of a nomination must be concluded, of 28 days beginning on the day after the nomination notification is lodged,

or is deemed to have been duly given in accordance with section 4(3), unless the period is extended.

34. Subsection (2) enables the 28-day consideration period to be extended only once for a maximum of a further 28 days. The grounds on which the period can be extended will be set out in standing orders. The standing orders could make provision for the circumstances in which there would be an automatic extension. The standing orders could also make provision for other circumstances in which an extension for a particular period (up to 28 days) could be obtained. It will be for the Parliament following consideration by the Procedures Committee to decide the circumstances in which the extensions may be obtained and whether any particular circumstances should be specified in standing orders as meriting an automatic extension.

35. Subsection (3) is concerned with the calculation of the consideration period. The first day of an extension is the day after the expiry of the initial 28 days. Both for the initial period and any extension, periods during which the Parliament is dissolved or in recess will not be counted as part of the consideration period if the recess is for more than four days. The Parliament is dissolved during the period in which the Scottish Parliament is not sitting pending an election. This is normally every four years. It may also be dissolved in other circumstances, for example if there was a vote of no confidence in the Scottish Executive. Recesses are other periods when the Parliament is not sitting. The exclusion of the recess from the calculation of the consideration period does not prevent the Parliament from considering and reaching a decision on the nomination during recess in the event of an emergency, e.g. as might have happened had the Bill been in force when the Chairman of the Scottish Qualifications Authority resigned.

Section 7: Outcome of Parliamentary consideration

36. This section outlines the options open to the Parliament following consideration of a nomination.

37. Subsection (1) gives the Parliament the power to approve or reject the nomination. Such a decision must be given before the consideration period expires.

38. Subsection (2) provides that the nomination will be deemed to be approved, if at the end of the consideration period, the Parliament has not indicated any decision to approve or reject the nomination. (The intention is that the Parliament will look at all nominations, although the degree of examination will vary depending upon the nature of the particular appointment.) This provision provides a safeguard for the Scottish Ministers if e.g. the Parliament accidentally omits to consider the nomination. In that event the Parliament is not given any further time to consider the nomination and the Scottish Ministers can proceed with the appointment or recommendation.

39. Subsection (3) provides that the Parliament must give reasons if a nomination is rejected. This ensures that the process is open and transparent and that anybody who is affected by the rejection is clear about the basis for the Parliament's decision.

Section 8: Consequences of the Parliament's decision

40. This section provides what may happen after the Parliament has made its decision on a nomination.

41. Subsection (1) enables the Scottish Ministers to make the appointment or recommendation when the Parliament approves a nomination.

42. Subsection (2) prevents the Scottish Ministers from appointing the nominee when the Parliament rejects the nomination. This prohibition applies to the particular appointment to which the nomination notification relates. It does not prevent the same person being nominated for the same post at a future date i.e. when the position next falls vacant, nor does it prevent the same person from being put forward for that particular appointment in the circumstances that are set out in subsection (3).

43. Subsection (3) provides for the circumstances in which the Scottish Ministers can put forward a nominee who has already been rejected. A rejected nominee can only be nominated again for that particular appointment, on that occasion, with the express permission of the Parliament. Such permission must be given by the Parliament at the time of rejection.

44. This provision could be used, for example, in a situation where the nomination was rejected because the appointment procedure had not been properly followed.

Section 9: Definitions

45. This section defines the terms used in the Bill.

46. “Convener”, in relation to a listed public body, is defined as being the person, however designated, who is appointed to undertake the specific function of chairing the meetings of that body. Since the Bill only applies to ministerial appointments and recommendations, the convener is only covered by the Bill when the appointment or recommendation of the convener requires to be made by the Scottish Ministers. In the case of some of the listed public bodies, the convener is chosen from among the members. In those cases, although the appointment of the members is covered by the Bill, the appointment of one of the members as convener is not. The definition also excludes any person, including a designated deputy, who as part of their duties chairs meetings in the convener’s absence.

47. “Nomination” is defined as being the proposal from the Scottish Ministers to appoint or recommend an individual for appointment to the listed public body within the terms of the Bill, after completion of all procedures (other than those in the Bill) to which the appointment is subject. This would include e.g. consultation with other parties and the initial Scottish Executive procedures.

48. “The Parliament” is defined so as to ensure that the references in the Bill to the Parliament are deemed to include committees or sub-committees of the Parliament.

Section 10: Amendment of this Act

49. Subsection (1) provides that the schedule of listed public bodies may be amended by order, but only for the purpose of updating it. An order could include new bodies, delete any that no longer exist and modify those on the list to reflect a change of name or constitution. The Scottish Ministers cannot remove a body from the list unless it no longer exists.

50. Subsection (2) provides that the consideration period, initially of 28 days, or the extension of up to 28 days, in section 6 may be amended by order. In the light of experience a more suitable consideration period may be required and this section allows for the alteration of both time periods, separately or together by the Scottish Ministers.

51. Subsection (5) explains that an order under subsection (1) amending the schedule, will come into force unless the Parliament passes a resolution to annul it. (This is commonly known as negative resolution procedure.) The procedure (which is commonly adopted where proposals are uncontroversial, administrative and may be frequent) does not require the Parliament to take any action unless members want to object to the making of the Order. Bodies are established, dissolved and merged on an ongoing basis and negative resolution procedure allows this to be achieved relatively easily.

52. Subsection (6) provides that in the case of subsection (2) any order that alters either the initial 28 day consideration period or the extension of that period of up to 28 days or both cannot be made unless the Parliament has approved a draft of the order by resolution. (This procedure is commonly known as the affirmative procedure.) Adopting the affirmative procedure in this case will require the Parliament to positively agree to any changes to the length of the consideration period.

Section 11: Modification of enactments, etc.

53. The section enables the Scottish Ministers by order to make modifications to existing statutory provisions governing appointments of individuals to devolved bodies where this appears to be necessary or expedient in order to make those provisions consistent with the provisions of the Bill. This section allows for the amendment of both primary and secondary legislation. This provision provides a safeguard in case there are any appointment procedures in any enactments or instruments that require amendment.

54. Subsections (2) and (3) provide that an order under subsection (1) is to be made by statutory instrument and will be subject to affirmative procedure.

Section 11: Short title and commencement

55. This section gives the Bill its short title and also provides for the Act to come into force automatically six months after the granting of Royal Assent. The period of six months is required so as to enable the Scottish Executive and the Parliament to put in place the required structures, procedures, staffing and resources. The Parliament will have to introduce procedures by way of standing orders and the period of six months allows the necessary time for this to be achieved.

Schedule: Listed public bodies

56. The schedule lists the public bodies to which the Bill applies. The schedule lists 73 organisations of which two are generic, covering multiple individual bodies to each of which Ministers appoint members. The entry relating to a National Health Service Trust includes all 28 Trusts and the reference to a Health Board includes all 15 Health Boards. In total the Bill applies to 114 bodies covering a total of 974 appointments.

FINANCIAL MEMORANDUM

INTRODUCTION

57. The main costs from the provisions of this Bill relate to the extra burdens placed on Scottish Ministers, Scottish Executive staff and the staff of the Scottish Parliament. In the case of the Executive this will arise from the additional work involved in putting a nomination before the Parliament. There could also be additional costs in the event of the Parliament rejecting a nominee where re-advertisement and re-nomination would occur. The Parliament will face new costs in processing “nominations” from Ministers and also in respect of any consideration hearings which are held.

COSTS ON THE SCOTTISH EXECUTIVE

58. The Scottish Executive in its February 2000 Consultation Paper *Appointments to Public Bodies In Scotland: Modernising the System* estimated that there were 1,246 appointments within the gift of the Scottish Ministers to public bodies which were included within the schedule to the Consultation Paper. In the year to 30 September 1999 a total of 431 appointments (or re-appointments) were made. It is estimated therefore that approximately one-third of the total number will arise annually.

59. The schedule to the Bill lists 114 public bodies encompassing a total of 974 appointments. Based on the one-third estimate in paragraph 58, there will be 38 appointments as “convener” annually and 286 other annual appointments.

60. Hearings are mandatory for all appointments as convener. The additional cost involved for the Scottish Executive in relation to a hearing is estimated at £1,000 per case, giving a total cost of approximately £38,000 per annum.

61. The additional cost incurred in putting the nomination to the Scottish Parliament, which does not involve a hearing, is estimated at £100 per nomination, giving a total cost of approximately £28,600 per annum.

62. The experience of the US Senate is that less than 0.01% of appointments as ordinary board members will lead to “hearings” being called by the Senate. This figure is not directly comparable as it includes many routine nominations such as those in the armed services and the

Foreign Service. What the figure does suggest is that the number of ordinary board members called for a hearing is unlikely to be significant. For the purpose of this Memorandum a figure of 5% has been used. The additional costs involved in such a hearing falling on the Scottish Executive is estimated in paragraph 60 as £1,000 per case. Taking 5% of the annual figure of 286 (paragraph 59) ordinary members appointed gives a total of 14 additional hearings. The cost of such hearings to the Scottish Executive is estimated at approximately £14,000 per annum.

63. The experience of the US Senate shows that between 1981 and 1992 90% of nominations were confirmed (many of the others were withdrawn); this leaves approximately 5% of “hearings” which rejected the nominee, resulting in the need to re-advertise etc. The estimated total number of hearings per annum is 38 (paragraph 59), plus 14 (paragraph 62), giving a total of 52. The estimated total number of rejected candidates is thus three. The additional costs involved in re-advertising etc. is estimated at £6,500 per case (paragraph 60) giving a total cost of approximately £19,500 per annum.

64. The total additional costs falling on the Scottish Executive from the above is approximately £100,000 per annum. This figure is dependent upon the estimates made above and the actual figure could be either higher or lower in any given year. The main uncertainties in this figure are the number of ordinary appointments that are called to a hearing and the number of appointments rejected. In each case generous estimates have been used compared to the only comparable source of information available. If the margin of error in both of these estimates is taken as +/- 100% the total cost to the Scottish Executive could vary upwards or downwards by up to £33,500 per annum.

65. The above estimates also assume a consistent pattern of requests by the Parliament for hearings in relation to non-convener appointments. It is possible this pattern may take a while to become consistent. Two opposing factors may influence events in the early years:

- The Parliament may wish to examine closely the Executive nomination process and request additional hearings in order to be satisfied. As the Parliament becomes familiar with the processes used and the rigours of the Executive approach confidence could grow and the numbers of additional hearings diminish.
- The Executive may undertake closer scrutiny of procedures and nominations being submitted to ensure conformity with accepted principles. This could have the effect of increasing the Parliament’s confidence in the Executive’s nominations, leading to an earlier settling down of the number of hearings requested in respect of non-convener appointments.

66. There is the potential for some savings to the Executive as a result of possible lower turnover in relation to some public appointments. This could arise from there being an enhanced public acceptability through the involvement of the Parliament in the appointment process. It can be anticipated that additional scrutiny, or the knowledge that such scrutiny will be given by the Parliament will increase the quality of appointees, leading to increases in the periods of time they serve.

COSTS ON LOCAL AUTHORITIES

67. It is not anticipated that the provisions should impose any direct costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

68. The Scottish Parliament will incur additional costs in processing the estimated 324 (paragraphs 58 and 59) annual appointment decisions. The processing is expected to occupy half of one member of staff at a cost estimated at approximately £13,000 per annum. In addition there may be additional costs involved in those decisions which result in hearings. It is anticipated that most hearings will be accommodated within the normal sittings of the committees and that no additional costs will be incurred, with one possible exception. The exception relates to expenses payable to witnesses. However, it is not possible to estimate the amount that will be incurred under this category.

69. The total additional costs falling on the Parliament from the above is approximately £13,000 per annum.

70. It is not anticipated that the provisions should impose any direct costs on other bodies, individuals and businesses. It is possible that individuals required to attend and answer questions from the Parliament will incur some costs. Most of these costs would have been incurred in any case as it could be anticipated that in those few cases where a “hearing” is held the nominee would have been required to attend shortly after appointment to provide information to a Committee of the Parliament. In the circumstances no cost is assessed under this category.

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

71. On 31 August 2001, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Public Appointments (Parliamentary Approval) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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