

Standards, Procedures and Public Appointments Committee

1st Meeting 2024 (Session 6), Thursday 18 January 2024

Ethical Standards Commissioner's Report on Public Appointments

Introduction

1. On 10 November 2023 the Commissioner for Ethical Standards in Public Life in Scotland ("the Commissioner") under the terms of section 2(8)(a) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 ("the Act"), laid a report before the Parliament on the examination into the methods and practices used by the Scottish Ministers in making appointments to the Scottish Local Authority Remuneration Committee.
2. This paper summarises the terms of the examination and the Commissioner's findings in respect of the examination.

Background

3. The Commissioner for Ethical Standards in Public Life in Scotland independently regulates how Scottish Ministers make appointments to the boards of public bodies that are within his remit. The Commissioner's statutory functions in relation to public appointments are laid out in the Act and the key functions include:
 - 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.

4. Reports laid before the Parliament under section 2(8)(a) of the Act relate to cases where it appears to the Commissioner there has been non-compliance in a material regard with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (“the Code of Practice”).
5. The [most recent Code of Practice](#) was introduced in March 2022 and took effect from October 2022. Appointments made before this were done so under the [2013 Code of Practice](#). The appointment practices being reported on in this document were conducted under the 2013 Code of Practice.
6. Standing Orders Rule 3A.3 provides that this report is laid before the Parliament and referred to the SPPA Committee for consideration. If the Commissioner has issued a direction under section 2(8)(b) of the Act, the SPPA Committee is required to report to the Parliament and the Parliament is then required to consider the case in light of that report. No such direction has been issued in this case and it is therefore a matter for the Committee to consider how it wishes to approach the Commissioner’s report and whether to publish a report on its conclusions.

Details of the Commissioner’s Report

7. The full details of the Commissioner’s investigation are set out in the report provided in the Annexe. The overview and timeline of key events and decisions is included in Appendix 2 of the Commissioner’s report.
8. The key stages of the appointment process were as follows:
 - Stage 1 – May to September 2022: planning of the SLARC appointment process
 - Stage 2 – 23 September to 14 October 2022: appointment advertised, and applications accepted
 - Stage 3 – October to November 2022: shortlisting and discussions of potential conflict of interests for serving councillors
 - Stage 4 – November 2022: interviews
 - Stage 5 – December 2022: panel deliberations and legal advice sought regarding the recommended candidate who was a serving councillor; first submission sent to the minister explaining the situation and offering options
 - Stage 6 – December 2022 – January 2023: meetings between the Scottish Government officials and the Commissioner and the Public Appointments Adviser
 - Stage 7 – January 2023: minister decides that serving councillor cannot be appointed due to an unmanageable conflict of interest
 - Stage 8 – February 2023: further considerations by Scottish Government officials and the minister; the applicant serving as a councillor given an option to resolve the conflict of interest by resigning as a serving councillor to take up the role on
 - Stage 9 – April 2023: appointments announced publicly.

9. The Commissioner's report covers his examination of the methods and practices used by the appointing minister in making appointments to the Scottish Local Authority Remuneration Committee (SLARC), particularly in relation to the matter of a potential conflict of interest in relation to serving councillors being eligible for appointment. The examination sought to determine whether there had been a change of policy during the course of the appointment process which precluded serving councillors from sitting on the SLARC due to their having an unmanageable conflict of interest.
10. The examination established that:
 - there was no explicit disqualification listed in the applicant information pack that serving councillors could not also be on the SLARC,
 - a senior civil servant had advised officials to tell potential applicants during the advertising stage of the round that being a serving councillor and being on SLARC was an unmanageable conflict but had not relayed this to the panel
 - the selection panel concluded assessment of the applicants and found the conflict to be manageable
 - after the panel's conclusion of assessment, legal advice was sought on the issue and the appointing minister determined that the conflict was not manageable.
11. As a consequence, a serving councillor who applied in good faith and who was found to be suitable for appointment by the selection panel was not appointed by the appointing minister.
12. It is the Commissioner's view that although there was no direct intention to treat this applicant unfavourably, the actions that were taken amounted to a change in policy position which did adversely change the outcome of the appointment round for this applicant. The Commissioner concluded that the Code had not been complied with and that the non-compliance was material in nature.
13. The Public Appointments Adviser's formal report of non-compliance was made on 13 December 2022, which was after the panel had concluded interviews and deliberations about which applicants to recommend to the minister as suitable for appointment. The non-compliance related to a subsequent decision not to recommend one of the applicants to the minister for appointment due to the fact that they were a serving councillor on a local authority. This effectively overturned the panel's conclusions about the suitability of this applicant.
14. In his examination, the Commissioner found that the Scottish Ministers did not comply with the Merit and Integrity principles of the Code, nor with code paragraphs C4, Annex 2 paragraph 9v or E6iii. Appendix 1 of the Commissioner's report set out the relevant principles and paragraphs of the 2013 Code of Practice.
15. The examination of the Commissioner's findings can be found on pages 7 to 15 of the Commissioner's report. In summary, during the appointment process

the Commissioner was alerted by the Public Appointments Adviser to an instance of potential non-compliance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) during the course of an appointment round. During the examination, the Commissioner established that the Code had not been complied with and that the principles of merit and integrity had been breached. As a result, the appointment process wasn't fair and transparent.

16. The Commissioner concluded among other things that:

- If the requirement not to be a serving councillor had been included as a disqualification in the pack, the round would have been compliant with the Code
- It is understood that when two applicants who were serving councillors made enquiries during the application stage of the process, advice was provided by a senior civil servant in the directorate that an unmanageable conflict of interest existed but that this advice was not shared with the panel. If the advice had been shared with the panel and a discussion taken place and legal advice sought at this stage, measures could have been taken to seek guidance from the Commissioner and communicate with all potential applicants so that they would understand the position. The Commissioner considers that any non-compliance resulting would then have been considerably less likely to be material in nature
- As part of the panel's role in determining which applicants to recommend to the minister, they had concluded the fit and proper person test and found that the serving councillor's conflict of interest could be managed
- The Commissioner held two conversations with Scottish Government officials where options to try and identify a way to resolve the situation in a Code compliant way were discussed. One option was identified where the two potential applicants who were serving Councillors could be offered the opportunity to apply. This would rely on the appointing minister agreeing that the conflict could be manageable. As the appointing minister did not consider the conflict to be manageable, this option was not taken up.
- There has been non-compliance with the Code in regard to the applicant who was a serving councillor and identified as most meritorious by the panel not being appointed. This decision was solely on the basis of the fact that the conflict of interest, when highlighted to the appointing minister, was considered unmanageable. This was considered to be more important than the conclusion of the panel's second stage (interview) assessment that the serving councillor was one of the most able candidates and suitable for appointment.

17. Before the submission of this report to the Committee, the Scottish Government was asked to suggest recommendations to prevent any recurrence of the non-compliance in the future. The following recommendations are based on the Scottish Government's suggestions as well as the views of the Commissioner:

- Guidance to be provided by the Commissioner on the difference between a conflict of interest, which may be manageable depending on the circumstances, and a conflict of interest that effectively amounts to a disqualification for a whole class of persons.
- Scottish Government officials to include a standard agenda item in planning meetings so that panels consider any disqualifications that may be needed, including conflicts which amount to disqualifications.
- Guidance to be provided by the Commissioner on when and how conflicts of interest can be considered. Clarity to be provided on when it is open to an appointing minister to reconsider a conflict of interest decision which has already been made by the panel.
- Where a directorate makes a decision about a conflict of interest being unmanageable which would affect a class of people who might apply, after a post has been advertised, advice should be sought from the Commissioner as soon as practicable.

18. Following the publication of the report, the Commissioner has published [statutory](#) and [non-statutory](#) guidance incorporating the recommendations from his examination. It is understood that the Scottish Government have acknowledged and accepted the findings and recommendations set out in the Commissioner's report.

Recommendation

19. The Committee is invited to agree what, if any, action it wishes to take in relation to the Commissioner's report. The Committee may wish to consider writing to the Scottish Government to confirm its response on the points raised in the Commissioner's report and to enquire to what extent the recommendations listed in the Commissioner's report have been addressed.