

Ethical Standards Commissioner

Examination into the methods and
practices used by the Scottish Ministers in
making appointments to the Scottish
Local Authority Remuneration Committee

REPORT TO PARLIAMENT

November 2023

Laid before the Scottish Parliament by the Commissioner for Ethical Standards in Public Life in Scotland pursuant to Section 2(8)a of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. Laying reference CES/2023/02.

TITLE: EXAMINATION INTO THE METHODS AND PRACTICES USED BY THE SCOTTISH MINISTERS IN MAKING APPOINTMENTS TO THE SCOTTISH LOCAL AUTHORITY REMUNERATION COMMITTEE

MINISTER: JOE FITZPATRICK MSP, MINISTER FOR LOCAL GOVERNMENT, EMPOWERMENT AND PLANNING¹

DIRECTORATE: LOCAL GOVERNMENT AND HOUSING

PUBLIC BODY: SCOTTISH LOCAL AUTHORITY REMUNERATION COMMITTEE

SUMMARY

1. My representative, a Public Appointments Adviser (PAA), alerted me 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. As required by the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the 2003 Act), I undertook an examination of the methods and practices used by the appointing minister in making appointments to the Scottish Local Authority Remuneration Committee (SLARC). 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. 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.

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. It is my 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. I concluded

¹ See point 46 in Appendix 2. Ben MacPherson, Minister for Social Security and Local Government was the appointing minister up until the final stage of making an announcement.

that the Code had not been complied with and that the non-compliance was material in nature.

2. The examination 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. In summary:

- 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.
- It is clear that enquiries for legal advice, as was suggested by the Commissioner in November, following conclusion of the assessment stages of the appointment round, resulted in the panel chair becoming aware of the advice which had been given to the two potential applicants earlier in the process that the conflict was not manageable.
- When an explanation of the situation was presented to the minister, the legal advice was positioned as more important than complying with the Code and the minister's decision follows that position. The legal advice has not been provided to the Commissioner.
- 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.
- To try to address the issue within the context of the conflict of interest, the applicant was asked to consider whether they might be prepared to resolve the conflict by resigning from the serving councillor position in order to take up the appointment.
- The timing of the efforts to deal with the conflict of interest issue meant that the one applicant who was a serving councillor and who ultimately was not appointed, expended time and effort in good faith to go through the full application and interview process. The effects of this on the applicant could have been reduced if the applicant had been advised prior to interview that they would have to resign as a councillor if they wished to take a position up on the SLARC.
- Another applicant had also expended time and effort in preparing an application, which may not have been the case if the disqualification been made clear in the pack.

- There has been non-compliance with the Code in regards 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.

3. As the non-compliance with the code was material, inasmuch as it had a clear impact on the outcome of the appointment process, I am obliged to report this case to the Scottish Parliament.

The more detailed reasons for my findings are given on the following pages. Appendix one sets out the Code principles, paragraphs and statutory guidance relevant to this case.



Ian Bruce

Ethical Standards Commissioner

8 November 2023

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BACKGROUND

The Commissioner for Ethical Standards in Public Life in Scotland, known as the Ethical Standards Commissioner, 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 Public Appointments and Public Bodies etc. (Scotland) Act 2003 and (in summary) are to:

- prepare, publish and, as necessary, revise a Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code)
- issue guidance on the Code and promote compliance with it
- examine the methods and practices employed by the Scottish Ministers when making appointments
- investigate complaints about how an appointment was made
- report to the Scottish Parliament instances of material non-compliance with the Code; the Commissioner may direct the Minister to delay making the appointment until Parliament has considered the report.

The Commissioner is to exercise these functions with a view to ensuring that appointments are made fairly and openly and allow everyone, where reasonably practicable, the opportunity to be considered for an appointment.

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.

Appointments are made through a process called an appointment round. Under the 2013 Code, the appointing minister will choose a selection panel to run the appointment round on their behalf with ministerial agreement being sought at the beginning, then at the end of the planning phase which includes the final appointment pack with the full details of what is sought and at the end of the process when the applicants are recommended to the minister for appointment. The panel chair selected is usually a senior civil servant who has a good understanding of the workings of the public body. The code also encourages the minister to consider including an independent panel member. The code expects that membership of the selection panel will remain the same throughout the appointment round, unless a change of membership is required through ill health or due to an official moving to other responsibilities.

The Commissioner oversees a selection of appointment rounds by assigning a Public Appointments Adviser (PAA). PAAs are appointed by the Commissioner and are answerable to him for their professional conduct and competence. They do not answer to Ministers or their directorates, nor to any of the public bodies. The Commissioner decides on the appropriate level of oversight for an appointment based on a range of factors, including the body's budget and its functions. Depending on the level assigned, the PAAs provide oversight during planning only or as a full selection panel member throughout the whole appointment round until the panel has reached its conclusions on which candidates to present to the minister as "most able".

PAA's work to a service level agreement (SLA) with the Commissioner. This SLA requires the PAA to draw instances of potential non-compliance to the attention of the responsible person during an appointment round. This will usually be the chair of the selection panel and/or a senior civil servant. It is anticipated that the responsible person will take steps to ensure that the Code is complied with. Where the responsible person, for whatever reason, is unable or unwilling to address any instance of potential or actual non-compliance highlighted by the PAA, the PAA will:

- set out the relevant facts in writing
- provide this to the responsible person and
- copy the correspondence to the Commissioner.

Whether to take action in response to such a report and the form that any such action might take are matters for the Commissioner.

At the conclusion of their involvement in the appointment round, the PAA will also provide a written report to the Commissioner on what they have observed during each stage of the round that they have overseen.

In this appointment round, the PAA was a member of the selection panel through the whole process. The Commissioner was alerted to a potential instance of non-compliance when approached for advice by the PAA in November 2022. He was then provided with formal notification of non-compliance when the PAA wrote to the panel chair on 13 December outlining the concerns. Two discussions were offered and taken up between the Commissioner and Scottish Government officials (one in December 2022 and another in January 2023) with a view to finding a solution to allow the appointment round to be concluded whilst remaining compliant with the Code. The Commissioner had one option that he was able to offer as a solution to maintaining compliance with the Code and offered to discuss this directly with the appointing minister. This offer was declined and Scottish Government officials confirmed that the appointing minister wished to continue with the course of action which had been identified as being non-compliant with the Code.

At the second meeting with Scottish Government officials, the Commissioner confirmed that it was not his intention to direct the minister to delay making the appointments. The Commissioner took this decision in order to ensure that the body could fulfil its statutory functions. He advised that he would, however, require to examine the methods and practices used during the round, at its conclusion, in order to reach a view on the extent of the non-compliance.

EXAMINATION FINDINGS

The relevant principles and paragraphs of the Code of practice are outlined in appendix 1 and an overview and timeline of key events and decisions are outlined in appendix 2.

The public body to which the appointments were being made is the Scottish Local Authority Remuneration Committee (SLARC). SLARC was established under the provisions of the Local Governance (Scotland) Act 2004 to advise Scottish Ministers on the payment by Local Authorities of remuneration (including pensions), allowances and the reimbursement

of expenses incurred by local authority councillors in accordance with criteria specified by Scottish Ministers from time to time.

The Commissioner was notified in May 2022 that this Committee was to be reconvened, having previously been stood down in 2013, and that an appointment round was due to be commenced shortly. He allocated a PAA to join the panel as a full panel member, overseeing all stages of the appointment round.

The panel for the round comprised of:

- A senior civil servant from the Local Government and Analytical Services division
- A representative from COSLA (Convention of Scottish Local Authorities)
- The Commissioner's representative (PAA)

The Commissioner received a request from Scottish Government officials, which had the backing of the appointing minister, to vary the provisions of the Code in September 2022 such that the panel membership for the round could be changed and the senior civil servant who was originally assigned as panel chair be replaced by another civil servant from the same directorate. The reason given for this was (in summary) unexpected additional time pressures on the senior civil servant. The Commissioner allowed for this panel chair change to be made, subject to the provisions that the new panel chair be fully briefed on all arrangements and agreements made by the panel to date, and that the new panel chair would agree to be bound by all decisions made by the panel up to this point. This request was made after the panel had agreed on the contents of the final application pack, two days before the appointment opportunities were advertised.

The PAA'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.

As can be seen in Appendix 1, the appointing minister (as per paragraph B5 of the Code) is to define the requirements needed for the board. The panel (under section C of the Code) will then design an appointment plan to determine how best to meet these needs. This appointment plan will include disqualifications that are to apply (Annexe 2, paragraph 9v). Often, disqualifications will be those set out in the founding legislation of the body, but they can also apply to a policy position. In this case, a serving councillor of a local authority could be disqualified from being considered for an appointment at SLARC, due to an unmanageable conflict of interest: having the responsibility of determining the rates of remuneration for councillors of all local authorities (including their own) lies within their remit as a potential member on the SLARC.

No such disqualification was discussed during the planning for this appointment round or included in the appointment pack. Indeed, the panel identified a criterion which seemed to encourage applications from councillors, this being "Working knowledge and understanding of Scottish local government, and the role of councillors". This was approved by the panel and included in the published applicant pack.

There is also a note on one draft version of the applicant information pack which indicates that legal advice has been sought about disqualifications and that there are no disqualifications to holding the role.

The wording in the draft pack is

“Legislation provides that the following persons are not eligible for appointment:

*Please advise which, if any disqualifications apply – what does the founding legislation say?
Please also advise whether Scottish Parliament (Disqualification) Order 2020 applies.”*

The comment made by an official on this wording in the pack is “[Legal] Advice ... is that none of this applies and can be deleted”. Although this appears to be seeking advice about disqualifications in the founding legislation only, there was clearly an opportunity for the giver of the advice to also raise any other wider disqualifications which should apply such as an unmanageable conflict between sitting as a local councillor and serving on the SLARC.

Unbeknownst to the panel until after the conclusion of the interviews, during the advertising period, two serving councillors enquired whether they could apply for the role. Both were advised that it would be an unmanageable conflict of interest to hold the position of councillor and a position on SLARC at the same time. This advice had been provided by a senior official within the directorate when questioned by those administering the appointment process. It is apparent that this viewpoint was not shared with the selection panel either during the advertising period or at any point during their assessment of the applicants. The applicant whose application resulted in the report of non-compliance had made no such enquiry and had simply applied. Another serving councillor had similarly applied without enquiry. This latter applicant was not shortlisted for interview.

One email from the panel chair to other panel members in advance of the shortlisting meeting included the statement: “With regards to the conflict of interest, some of the applicants are sitting councillors which I feel is a conflict of interest to sit on the group. It would be good to talk this through with you both and agree a consensus and if these candidates are discounted.”

An official confirmed that “at the shortlisting meeting conflicts of interest were discussed and it was agreed that as part of the Code, these would be explored at interview.”

Any potential conflicts of interest that an applicant might have are also considered by the minister under the “fit and proper person test”. This test is explained in paragraph E6 of the Code. The minister is able to delegate this test to the panel, which was done on this occasion. The fit and proper person test is usually carried out to explore conflicts which are more individual in nature, rather than those which would apply to a whole group of applicants. For example, if an individual had a financial interest in an organisation which worked with the public body of the board that they were applying to. It is also usually used to discuss how any conflict of interest could be managed, whereas if there are very limited options as to how the conflict could be managed and therefore little discussion to be had, then this would tend to be a disqualification rather than a fit and proper person test exploration.

Shortly before the interviews, the PAA had had a discussion with the Commissioner about conducting the fit and proper person test and this had included discussion about the

candidate who was a serving councillor. The Commissioner followed up the discussion with some written advice which the PAA sought consent to share with the panel. On the 10th November, which was during the interviews, but in advance of the serving councillor's interview, the PAA shared the Commissioner's advice with the panel which was as follows:

“Current councillors as SLARC board members

I advised that current councillors had an interest in the outcome of SLARC decisions for the amount of remuneration paid to councillors generally as well as in specific areas. I indicated that the appointing minister would have to be content that this apparent interest should not preclude their appointment. I agreed that any decision to preclude appointment on this basis at this stage would be non-compliant with the Code. I indicated that the SG legal division might be approached to confirm whether SLARC is currently subject to the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 and/or whether there was an intention for it to be included within its ambit. If it is subject to the Act then this would have potential implications for the adoption of a Code of Conduct and the Registration and Declaration of financial interests. If the Act does not apply the panel will nevertheless have to be satisfied that paragraph E6 iii of the Code does not preclude the appointment of current councillors. I recommended that the panel obtain wording from the SG to ensure that this has been considered and that there are cogent reasons why what could be considered to be a conflict is not sufficiently “inappropriate or unmanageable”. “

In this appointment round, as there was no disqualification relating to serving councillors of local authorities described in the applicant information pack, and as the panel could clearly see that there was a conflict of interest inherent in holding the role and carrying out the work of the body, the panel questioned the applicant during the interview about how this conflict could be managed (as part of the fit and proper person test). They were content that this had been fully explored and that the conflict could be managed. This is confirmed by the COSLA representative in an email exchange where the following comment was made “being a serving councillor was discussed at the meeting and [they] provide [sic] an acceptable answer” (ref 27 in Appendix 2). It is particularly pertinent to note that this comment was made by the COSLA representative, given that their participation on the panel was designed to ensure the inclusion of a local authority viewpoint in the appointment process.

Following interviews, a set of candidate summaries were produced by officials and circulated to all panel members for comment. For the serving councillor in this case, the initial draft of this summary stated under the heading “conflict of interest” the phrase “no issues”. The PAA suggested including the following:

“After shortlisting, it became apparent that a serving councillor was amongst those who had been selected on merit for interview. The Panel were cognisant that the requirements and conditions for appointment that were set out in the advertisements and applicant information pack did not exclude any serving councillor from applying and being considered for appointment.

Therefore, after shortlisting but before the interviews, the Panel sought advice from the Ethical Standards Commissioner (ESC) on how best to proceed.

In written advice to the Panel on 10 November 2022, the ESC advised that current councillors had an interest in the outcome of SLARC decisions for the amount of remuneration paid to councillors generally as well as in specific areas. The ESC indicated

that the appointing minister would have to be content that this apparent interest should not preclude their appointment. The ESC agreed that any decision to preclude appointment on this basis at this stage would be **non-compliant** [emphasis added for the purposes of this report] with the Code of Practice on Public Appointments.

When the candidate was interviewed and questioned about conflicts of interest, he recognised that his status as a serving councillor was a conflict that required to be declared and managed. He gave his assurance of his commitment to the Principles of Public Life, and that he would not use SLARC to pursue personal benefit. When prompted he gave his further assurance that he would not use his role on SLARC to seek to favour ²{his Council area} or its category/banding of Councils. The candidate also undertook to submit himself to the requirements of SLARC's Code of Conduct.”

None of the panel disagreed with this wording and it remained in the final version of the candidate summaries.

When the fit and proper person test is delegated to the panel by the minister, if the panel have any concerns about whether someone meets this test, they are able to delegate the decision back to the minister. In this situation, the panel did not do so as they were content that the test had been met and the conflict was manageable.

Once a minister has been provided with a list of recommended applicants by a panel, it is for the minister to decide whether to appoint or not (paragraph E4 of the Code). If new information comes to light during the minister's deliberations, it would be open to the minister to re-run the fit and proper person test.

In this appointment round, once the panel had concluded its' deliberations and had a list of recommended applicants to present to the minister, including one who was a serving councillor, the panel chair sought legal advice which concluded that the conflict of interest of being a serving councillor was unmanageable. The legal advice was not made available to the Commissioner with the reason given being “the Scottish Ministerial Code providing, at paragraph 2.38, that Ministers may acknowledge publicly that they have received legal advice on a particular topic, but must not divulge either who provided the advice or its contents”. It is clear from the action taken following this advice that it must have outlined that there was an unmanageable conflict between being a serving Councillor and sitting on SLARC.

It is clear from the advice given to two potential applicants who were also serving councillors and who made enquiries at application stage that a senior official considered that being a serving councillor and sitting on the board of SLARC was an unmanageable conflict of interest. The panel only became aware that this had been conveyed to two potential applicants once the panel chair had made enquiries for legal advice, following the panel deliberations and decisions on who to recommend to the minister as most able, including one recommendation of a serving councillor.

Once the legal advice was received, a number of events all happened within a few of days of each other (13th – 16th December 2022, ref 23-29 in Appendix 2):

- the panel chair notified the panel of the legal advice discussion and advice that being a serving councillor and member of SLARC was an unmanageable conflict of interest

² The council area has been removed to retain confidentiality

and that, as such, the candidate who the panel had recommended for appointment would not now be put forward to the minister;

- the PAA formally notified the panel chair of non-compliance with the Code;
- a meeting between civil servants and the Commissioner was arranged to discuss the non-compliance and any options which might be available for keeping the round compliant;
- the panel were made aware that two other potential applicants had been advised that they would not be able to hold both the positions of serving councillor and SLARC member;
- the panel chair re-convened the panel to identify which of the applicants initially not recommended to the minister might now be included.

The reason given by the panel chair for reconvening the panel was to consider the list of applicants to be recommended to the minister, following the revelation that two potential applicants had been told that being on the SLARC would be an unmanageable conflict of interest with the role of serving councillor. It was the panel chair's view that if the panel were now to put forward the serving councillor, there would be inherent unfairness. The email contained the following content: "The concern we have with recruiting a standing member is that during the application stage a number of standing councillors enquired about applying and PAT informed them that they were not eligible. This had been agreed with others in the team and with the change in panel chair this piece of information had not been relayed the panel. Therefore, we shifted [sifted]³ on the assumption that serving councillors could apply." This wording confirmed to the Commissioner that there was awareness among officials that there was a policy position that holding both positions was an unmanageable conflict of interest, but that the panel had not been informed about this.

When the panel did meet, no agreement was sought or reached about changing the previously agreed list of recommended applicants. The panel did however, decide on who was the most meritorious of the applicants who had not previously been recommended for appointment.

At the meeting in December between civil servants and the Commissioner, the Commissioner sought to understand what had happened and to explore if there was any course of action that the panel might take which would keep the round compliant with the Code. There were two issues to consider. Firstly, whether the minister was able to accept that being a serving councillor was a manageable conflict of interest and secondly, whether anything could be done to address the unfairness which had arisen when two potential applicants who were serving councillors were told that holding both positions at the same time would be an unmanageable conflict of interest.

For the first issue, the Commissioner provided his view that it was a manageable conflict of interest and provided an equivalent example of the setting of council tax levels by those who also have to pay council tax⁴. However, he recognised that the minister was responsible for deciding on the extent to which the conflict was manageable.

³ The fact that this was a spelling error ("shifted" was meant to be "sifted") was explained to the Commissioner during the course of the examination. The Commissioner accepted this explanation.

⁴ The Commissioner had regard to section 5.4 of the Code of Conduct for Councillors, which concerns declaration of interests.

If the minister decided that the conflict was unmanageable, then the Commissioner would be unable to conclude that the round had been run in a Code-compliant way.

For the second issue, if the minister did agree that the conflict of interest was manageable, then the panel could offer the two applicants who had enquired about the role the opportunity to apply, the panel could consider their applications and include them in the list of recommended applicants to the minister, if they were found to be among the most meritorious. This would allow the round to remain fair, as no other potential serving councillor applicants had enquired, and therefore there were no others who had been disadvantaged.

This meeting took place mid-December. Shortly thereafter, all applicants were informed that there would be a delay in notifying them of the outcome of their applications. A submission was prepared for the minister to explain the situation and outline the options.

In short, the three options proposed to the minister were:

If the conflict of interest was considered unmanageable:

1. Halt the appointment round and start again
2. Refuse to appoint the serving councillor on the basis of the conflict being unmanageable

If the conflict of interest was considered manageable:

3. Offer the two potential applicants who were serving councillors and who had enquired about the appointment, the opportunity to apply.

In the submission, there was an exploration of compliance issues in respect of the three options. The submission also contains the following text:

“Officials were invited to meet with the Commissioner and the ESC adviser on 16 December. The Commissioner was concerned about the difference of treatment as between the two potential applicants who were told at the advertising stage that there would be conflict of interest and the applicant who was not so told (but did not ask). The Commissioner also outlined that he believed that because the application pack did not contain any specific disqualification to serving Councillors, the candidate who is the serving Councillor should not be subject to what the Commissioner considers to be a change of policy - that this would constitute an unmanageable conflict – part way through the process. The Commissioner appears to take the view that, having not indicated in the application pack that serving councillors would be excluded on the basis of a conflict of interest, it is not open to the panel to reach that conclusion at a subsequent stage of the recruitment process.

It is not clear if the panel could have determined that this is an unmanageable conflict of interest at the review stage if the two prospective candidates had not enquired about this matter during the advertising stage. It would seem unusual that the panel would be precluded – as a matter of procedure – from determining, following discussion with the individual during the interview, that the conflict is too great.

Further, the Commissioner is also questioning if in fact there is an unmanageable conflict of interest with a serving Councillor sitting on SLARC. In his view it is not uncommon for people to be appointed to roles in which they have some financial interest, citing the

example of the setting of council tax levels by those who also have to pay council tax. The Commissioner's focus appears to be on the fairness of the appointment process, rather than any propriety concerns about a serving Councillor sitting on a board which makes recommendations as to the remuneration of Councillors."

The Commissioner has concluded that the submission to the minister represented some misunderstanding of the situation and his position. The panel had considered the matter as a conflict of interest and explored it with the applicant. It was always open to the panel to consider that it was unmanageable. But the panel did not consider it to be unmanageable when they explored the issue with the applicant during the interview. The panel chair (separately from the panel) undertook to seek legal advice following the panel's final assessment on the applicants to be recommended to the minister for appointment and on receiving the advice confirmed that being a serving councillor was an unmanageable conflict. This decision was not based on the circumstances of this one applicant, but on all applicants (or potential applicants who were serving councillors). The decision precluded options for exploration or discussion about whether a potential conflict was manageable. It was effectively a blanket ban. As such it should have been included as a disqualification in the applicant pack so as to provide full clarity to all who sought to apply for the position. Bringing in the blanket ban at this stage in the process had an adverse effect on the applicant who was a serving councillor and who had applied, gone through the interview process and would otherwise have been appointed.

The panel chair met with the minister on 10 January to have a short discussion about the submission sent up on 22 December. No decisions were made at that meeting except agreement that the panel chair should meet with the Commissioner again. Following the second meeting with the Commissioner on 19th January, at which the same options were discussed, further advice was provided to the minister. This continued to provide the same 3 options but clarified that option 3 would allow the appointment round to be compliant with the Code (on this issue) and included the Commissioner's offer to speak with the minister if this would aid in decision making.

On the 27th January 2023 the minister confirmed the decision to not appoint the applicant who is a serving councillor (option 2) and this information was relayed to the Commissioner. On the same day the panel were asked to confirm their agreement to put forward for recommendation to the minister a list of applicants which did not include the applicant who was the serving councillor and included the next most meritorious applicant, as agreed by the panel in mid-December. The panel were not provided with the candidate summaries which had been updated by the panel chair and now contained the following wording in the assessment of the serving councillor:

"During the assessment of candidates further assessment was sought regarding {applicant name} currently being a serving Councillor. The Minister concluded that a candidate serving as a Councillor would be an unmanageable conflict of interest due to SLARCs remit to make recommendations as to the remuneration of Councillors, therefore, {applicant name} was not recommended to the Minister for appointment".

In the view of the Commissioner, this statement is inaccurate as the candidates had been assessed, the assessment was concluded, and the conflict of interest had been explored by the panel and found to be manageable. Further assessment was not conducted, but legal advice was, instead, sought and obtained.

A submission was sent to the minister on 2 February with a list of recommended applicants to consider. This submission included the list of names as detailed in the email to the panel on 27th January.

On 10th February, civil servants requested some advice from the Commissioner about the fit and proper person test in relation to a different applicant in the same appointment round. This advice provided guidance that if the minister wished to re-run the fit and proper person test, then the Code paragraphs of A16 & 17 would apply. These paragraphs allow for the applicant to be informed as to why they have not been found to be fit and proper and provided with an opportunity to respond. On receipt of this guidance, civil servants asked if the same should apply for the serving councillor. The Commissioner confirmed that, based on his understanding from discussions with officials, the only possible response that the serving councillor could provide, which would allow the appointment to be made, would be to resign from the councillor position. Therefore, if officials wished to comply with the Code at paragraphs A16 and A17, they would be required to be honest with the applicant and explain that the policy position had changed such that being a serving councillor was no longer seen as a manageable conflict. The applicant's only choice in the circumstances would be to resign as a councillor in order to be considered suitable for the appointment opportunity.

On 22nd February, a further submission was sent to the minister with a list of recommended applicants, which included the serving councillor. The candidate summaries were updated again to remove the additional wording previously added by the panel chair and a separate advice note was also provided to explain that the serving councillor would be sent a letter which would offer them the opportunity to remove the conflict of interest by resigning as a councillor if they wished to take up the appointment.

The two separate submissions confirm that the policy position had been applied (in December following the legal advice). If there had been any options open to the applicant to discuss and explore with the minister, it would have been appropriate for the minister to consider re-running the fit and proper person test. The first submission did not include this applicant as being recommended to the minister for appointment, as the decision had already been made and would apply to anyone in the serving councillor category. The second submission appears to have been an attempt to rectify this and fairly apply A16 and A17 of the Code to the situation with the serving councillor, as had been discussed with the Commissioner.

The letter was sent to the serving councillor on the 27th February with a response from the applicant on the 28th confirming deep disappointment and frustration with the outcome.

In conclusion, the findings of the examination are:

- 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.
- It is clear that enquiries for legal advice, as was suggested by the Commissioner in November, following conclusion of the assessment stages of the appointment round, resulted in the panel chair becoming aware of the advice which had been given to the two potential applicants earlier in the process that the conflict was not manageable.
- When an explanation of the situation was presented to the minister, the legal advice was positioned as more important than complying with the Code and the minister's decision follows that position. The legal advice has not been provided to the Commissioner.
- 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.
- To try to address the issue within the context of the conflict of interest, the applicant was asked to consider whether they might be prepared to resolve the conflict by resigning from the serving councillor position in order to take up the appointment.
- The timing of the efforts to deal with the conflict of interest issue meant that the one applicant who was a serving councillor and who ultimately was not appointed, expended time and effort in good faith to go through the full application and interview process. The effects of this on the applicant could have been reduced if the applicant had been advised prior to interview that they would have to resign as a councillor if they wished to take a position up on the SLARC.
- Another applicant had also expended time and effort in preparing an application, which may not have been the case if the disqualification been made clear in the pack.
- There has been non-compliance with the Code in regards 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.

DEFINITION OF MATERIAL NON-COMPLIANCE WITH THE CODE

The 2003 Act does not provide a definition of material non-compliance. It is therefore for the Commissioner to determine whether the actions of the Scottish Ministers represent material non-compliance. In doing so, the Commissioner considers the following questions.

- Were the principles of the code breached?

- Was any non-compliance with the code not simply of a trivial or minor nature but something more serious or substantive?
- Did the non-compliance affect, or have the potential to affect, the outcome of the process?

NATURE OF NON-COMPLIANCE WITH THE CODE

In this case, the principles of the Code in question are merit and integrity. Both have been breached. The serving councillor was found to be one of the most meritorious and would have been appointed, other than the fact of being a serving councillor and that being deemed to be an unmanageable conflict of interest *after* the second assessment stage was concluded by the panel. This is fundamentally unfair. The fact that the serving councillor who went through the appointment process and the two other serving councillors who enquired about the position and told that it was an unmanageable conflict of interest were treated differently, albeit inadvertently, is also fundamentally unfair. A change in the publicly available policy position, as understood by the panel and applicants, during the appointment round, which had the effect of introducing a new disqualification, meant that the appointment process was not transparent. All of these matters have the capacity to undermine the public's trust and confidence in the regulated appointments process.

The non-compliance resulting from the non-appointment of the serving Councillor clearly affected the outcome of the process as, had the resulting change in policy position not occurred, this applicant would have been appointed to the SLARC. The applicant expressed their frustration and discontent at the decision in their reply to the ministerial letter confirming the outcome. If they had felt compelled to make a complaint, it is apparent that the Commissioner would find in their favour.

RECOMMENDATIONS

Prior to submitting this report to the Committee, the Scottish Government was provided with an opportunity to suggest recommendations intended to avoid any recurrence of non-compliance of this nature in the future. The following recommendations are based on their suggestions as well as the views of the Commissioner:

1. 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.
2. 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.
3. 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.
4. 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.

The Commissioner agrees that these recommendations will be helpful to panels when considering conflicts of interest and disqualifications in the future. He intends to issue guidance to provide further clarity on these issues as soon as practicable.

RELEVANT PRINCIPLES AND PARAGRAPHS OF THE 2013 CODE

Principles

Merit - All public appointments must be made on merit. Only persons judged best able to meet the requirements of the post will be appointed.

Integrity - The appointments process must be open, fair and impartial. The integrity of the process must earn the trust and have the confidence of the public.

Code Paragraphs relating to disqualification

B5 The Scottish Ministers will communicate to the selection panel

- i. the role to be performed
- ii. the skills, knowledge and experience required to meet the needs of the board.

C An appropriate plan guides appointment activity

C1 Based on the above, selection panel members will agree

- i. a clear and accurate description of the role to be performed (the role description)
- ii. a clear and accurate description of the skills, knowledge and experience envisaged to be effective in the role (the person specification). The skills, knowledge and experience will be described in a way that is readily understandable, is capable of assessment and reflects the requirements of the role. They will not be unnecessarily restrictive.

C2 Selection panel members will agree an appointment plan containing

- i. the publicity, application and assessment methods to be used. The agreed methods will be those the panel considers most likely to attract a diverse range of able applicants, taking account of relevant information held by or available to the Scottish Government.
- ii. a timetable specifying key prospective dates within the round.

C3 Publicity or advertisements about posts, details about posts, the assessment criteria to be applied, and the application forms (or equivalent) should be clearly and plainly drafted using simple, easy to understand, language. The objective should be to encourage the optimum number of people to apply for positions and for people to find it a comparatively easy exercise to submit applications.

C4 Publicity content, appropriate, resource-efficient publicity methods and information to be made available to potential applicants will be agreed by the selection panel. Matters relating to publicity and information which should be considered by selection panels are listed in Annex Two.

Annex Two - Information

8. The information and material to be provided or available to the candidates should be readily accessible, informative, encouraging, brief, plainly expressed and compliant with relevant statutory obligations.

9. The following material should normally be provided:

v. specific documentation relevant to the role and/or the public body including details of any disqualifications from membership and signposting the Code of Conduct, including the Principles of Public Life in Scotland, that the board members are bound by.

Code Paragraphs relating to the fit and proper person test

E4 When Ministers have made the decision whom to appoint and whom not to appoint, the reasons for these decisions will be recorded. This information will form the basis of additional feedback provided on request to applicants who are recommended to Ministers.

E5 Whilst the Scottish Ministers' decision will be based on an applicant's merit in relation to the requirements of the role it may also be based on information considered when determining whether the applicant is a fit and proper person for the appointment.

E6 The appointing minister will take steps to confirm that the applicant is a fit and proper person for the position to which they are to be appointed. This will require:

iii. confirmation that the applicant has no inappropriate or unmanageable conflicts of interest incompatible with their appointment

A16 If at any point from the beginning of a round information about an applicant becomes known to a member or members of the selection panel that

- i. calls into question an applicant's suitability for appointment
- ii. may affect the credibility of the appointment process
- iii. may affect the credibility of the public body concerned

they have a responsibility to share this with their colleagues on the selection panel. The panel will consider the potential impact of the information if the applicant were to be appointed.

A17 The consideration of such matters will take place openly and involve transparent investigation to establish the facts. The applicant will be given an opportunity to respond before any final decision as to their suitability for appointment is made.

OVERVIEW AND TIMELINE OF KEY EVENTS AND DECISIONS

Ref no.	Date	Event
1	11/5/22	The Commissioner is notified that SLARC is being reconvened
2	17/5/22	The Commissioner allocated a PAA as a full panel member to oversee all aspects of the appointment process
3	24/5/22	Panel membership is notified to the Commissioner
4	29/6/22	Submission provided to the minister to commence the round
5	5/7/22	Confirmation from the minister that the round can commence and content for the fit and proper person test to be delegated to the panel
6	11/7/22	The planning meeting takes place
7	18/7/22 – 1/8/22	Panel members exchange comments on the paperwork. This includes a comment from the sponsor team confirming that legal advice had been taken about disqualifications (the query was in relation to disqualifications which may have been included in the body’s founding legislation)
8	8/8/22	The PAA is notified that the round is being put temporarily on hold
9	7/9/22	Round recommences with revised dates sought
10	21/9/22	The Commissioner receives and agrees to a request to vary the Code’s provisions so that the panel chair can be changed.
11	23/9/22	Appointment opportunity publicised
12	4/10/22	By reference to Ref no 25, a potential applicant who is also a serving councillor is told that if they wanted to submit an application, they wouldn’t be able to hold both positions. On an unspecified date during the window open for applications, a further applicant who is also a serving councillor is also told that they wouldn’t be able to hold both positions and should raise it as a conflict of interest in the application form.
13	14/10/22	Closing date for applications
14	24/10/22	Panel chair emails panel with a few items to discuss at shortlisting, including whether serving councillors should be discounted
15	24/10/22	Shortlisting meeting takes place where it is agreed that being a serving councillor will be discussed with applicants at interview as part of the fit and proper person test.
16	25/10/22	Outcome of shortlisting relayed to applicants
17	3/11/22	PAA seeks advice from the Commissioner about disclosures resulting from media checks – meeting arranged for 4/11/22
18	4/11/22	PAA and Commissioner discuss round. During discussion the Commissioner and PAA discuss the potential conflict involved in being a serving Councillor
19	10/11/22	On receipt of Commissioner’s agreement, the PAA forwards the Commissioner’s advice (including that related to potential conflict of being a serving councillor and suggestion that officials may wish to seek legal advice) to the panel chair. The Commissioner’s advice

Ref no.	Date	Event
		<p>includes the observation that a change in policy position at this stage would represent non-compliance with the Code: <u>“Current councillors as SLARC board members</u></p> <p>I advised that current councillors had an interest in the outcome of SLARC decisions for the amount of remuneration paid to councillors generally as well as in specific areas. I indicated that the appointing minister would have to be content that this apparent interest should not preclude their appointment. I agreed that any decision to preclude appointment on this basis at this stage would be non-compliant with the Code. I indicated that the SG legal division might be approached to confirm whether SLARC is currently subject to the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 and/or whether there was an intention for it to be included within its ambit. If it is subject to the Act then this would have potential implications for the adoption of a Code of Conduct and the Registration and Declaration of financial interests. If the Act does not apply the panel will nevertheless have to be satisfied that paragraph E6 iii of the Code does not preclude the appointment of current councillors. I recommended that the panel obtain wording from the SG to ensure that this has been considered and that there are cogent reasons why what could be considered to be a conflict is not sufficiently “inappropriate or unmanageable”. “</p>
20	8/11/22, 10/11/22, 14/11/22, 17/11/22	Interview dates
21	6/12/22	Candidate summaries for the panel’s recommended candidates sent out to check for accuracy.
22	7/12/22	<p>Email from panel chair confirms that panel concluded deliberations and agreed candidate summaries and provides a list of panel’s recommended candidates.</p> <p>Panel chair asks in the same email what the position is if the minister chooses to reject any of the recommended applicants and whether the panel can have a “reserve list”,</p> <p>The email states that legal advice is being sought about the recommended candidate who is a serving councillor.</p>
23	13/12/22	Panel chair emails the panel to confirm that, following receipt of legal advice, serving councillors cannot be appointed and that therefore one of the panel’s recommended candidates will not be put forward to the minister
24	13/12/22	By reference to the advice previously provided by the Commissioner, the PAA formally notifies the panel chair that the proposed action is non-compliant (see Ref 19.) and asks to be informed what steps the panel chair intends to take to bring the round into compliance. The PAA copies the Commissioner into the correspondence.
25	14/12/22	The panel (including the PAA) and Commissioner become aware that 2 other serving councillors enquired about applying and were told that it would be an unmanageable conflict of interest to hold roles on both the SLARC and as a serving councillor (see ref no 12)

Ref no.	Date	Event
26	14/12/22	Commissioner discusses with the head of the Public Appointments Team (PAT) the compliance concerns and options which might be available to try and bring the round back into compliance
27	14/12/22	Email exchange between the panel seeking a meeting to discuss the candidate summaries. Email chain confirms panel view that conflicts of interest related to being a standing councillor had been confirmed as manageable by the panel during the interview and suggests that the reason this view has changed is due to the unfairness for the other two potential applicants who were told that holding both positions would be an unmanageable conflict of interest.
28	15/12/22	Panel meet to discuss candidate summaries. They identify who is the best selection out of the applicants not already on the list to recommend to the minister (the best of the rest)
29	16/12/22	Officials meet with Commissioner and PAA to discuss options which might allow the round to remain compliant
30	19/12/22	Applicants informed that there will be a delay in decision making
31	22/12/22	Submission sent to minister explaining the situation and offering options. Submissions states that all options could potentially lead to grounds for non-compliance and suggests that the legal advice is more important than remaining Code compliant
32	10/1/23	Panel chair has a discussion with the minister about the submission and agrees to speak with the Commissioner again
33	11/01/23	Applicants informed of further delay in decision making
34	19/01/23	Officials meet with Commissioner and PAA again to further discuss options which might bring the round into compliance
35	19/01/23	Commissioner follows up discussion with an offer to meet with the minister to discuss the only option available to avoid potentially material non-compliance in respect of the serving councillor who had been included in the panel's list of 8
36	20/01/23	Follow up advice sent to minister explaining situation and options following discussion between the panel chair and the Commissioner
37	27/01/23	Panel chair confirms to Commissioner that minister decision is that serving councillor cannot be appointed due to there being an unmanageable conflict of interest.
38	27/01/23	Panel are asked to agree the recommendations for the applicants to put forward to the minister, excluding the serving councillor and including the candidate who was the "best of the rest" as identified in ref no 28.
39	30/1/23	Panel chair amends the candidate summary to include wording confirming that the serving councillor is not being recommended
40	02/02/23	Submission to minister with recommendations for appointment which does not include the serving Councillor.

Ref no.	Date	Event
41	10/02/23	A request for advice on the Fit and Proper person test in relation to another applicant is made by SG officials. In the course of interaction about this, advice is also provided to officials clarifying aspects of the fit and proper person test in respect of the serving councillor
42	17/02/23	On the basis of that advice, SG officials confirm to Commissioner that serving councillor will be put forward to minister as a recommended applicant noting the conflict is unmanageable. Applicant will be given the opportunity to respond, with the option to resolve the conflict by resigning from the councillor position.
43	22/02/23	2 submissions sent to the minister. One outlines the names of the recommended candidates following the panel deliberations and the other provides some additional information for the minister to consider in relation to 2 applicants
44	22/02/23	Formal letter sent to applicant who is the serving councillor giving the option to resolve the conflict by resigning as a serving councillor in order to take up the role and that will not be able to be appointed otherwise.
45	28/02/23	Response from applicant who is serving councillor outlining disappointment with the decision
46	March 2023	Appointing minister changed from Ben MacPherson MSP, Minister for Social Security and Local Government to Joe Fitzpatrick MSP, Minister for Local Government Empowerment and Planning
47	31/03/23	Commissioner confidentially notified of appointments to be made
48	05/04/23	Appointments announced publicly