Local Government Committee

20th Meeting, 2002

Tuesday 3 September 2002

The Committee will meet at 2.00 pm in Committee Room 2.

1. **Items in private:** The Committee will consider whether to take items 3 and 4 in private.

2. **Public Appointments and Public Bodies etc. (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—
   
   Office of the Commissioner for Public Appointments:
   Dame Rennie Fritchie, DBE, Commissioner for Public Appointments
   Alistair Howie, Policy Adviser
   
   Scottish Funding Councils for Further and Higher Education:
   Roger McClure, Chief Executive.

3. **Local Government in Scotland Bill:** The Committee will consider a draft Stage 1 report.

4. **Renewing Local Democracy - Phase 2 Inquiry:** The Committee will consider a paper from the Convener.

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The following papers are attached for this meeting:

**Agenda item 2**

Submission from Dame Rennie Fritchie

Submission from Scottish Funding Councils for Further and Higher Education

**Agenda item 3**

Local Government in Scotland Bill: Draft Stage 1 Report [PRIVATE]

**Agenda item 4**

Renewing Local Democracy - Phase 2 Inquiry: Paper from the Convener [PRIVATE]
1. I am grateful to the Local Government Committee for inviting me to present written evidence in respect of the Public Appointments and Public Bodies etc (Scotland) Bill.

2. I should like to begin by saying that I welcome the proposal for a separate Commissioner for Public Appointments for Scotland and I support much of what is in the current Bill.

3. I have been Commissioner for Public Appointments for Scotland, as well as for England and for Wales, since March 1999. Under a separate Order in Council, I am also Commissioner for Northern Ireland. My role is to regulate, monitor, advise and report on Ministerial appointments to public bodies within my remit. If this Bill is successful, I would relinquish my responsibility for Scottish appointments. A similar arrangement to establish a separate Commissioner for Public Appointments for Wales is also being considered.

4. With the consent of the Scottish Parliamentary Corporate Body, I am proposing to set up an OCPA office in Scotland at the beginning of October 2002, with the assistance of the Chief Executive of the Scottish Parliament and the help of the Scottish Executive. This will enable the Scottish Parliament to take over a going concern if the new Commissioner is established. I recognise, however, that the Commissioner will wish to give the appointments process a national identity. I am currently recruiting a member of staff to the new office in Scotland and will take a lead in their induction and development; help them through the audit process; and guide them on the drafting of the Annual Report.

5. There are many aspects of the Public Appointments and Public Bodies etc (Scotland) Bill which I welcome, particularly the proposal to give the new
Commissioner a role in promoting diversity in public appointments. This is an area where I have been taking positive action since becoming Commissioner for Public Appointments, by meeting groups and undertaking a number of speaking engagements targeted at attracting more women, people from the ethnic minorities and disabled people, as well as younger people and those from a wider geographical region, to apply for public appointments. The Public Appointments Order in Council 2002 now formalises my responsibility to promote “equality of opportunity”.

6. There are, however, some aspects of the Public Appointments and Public Bodies etc (Scotland) Bill which cause me concern.

7. Clause 2(4) of the Bill states that “In preparing the code of practice, and in making revisions to it, the Commissioner must consult the Parliament and Scottish Ministers”. When I was revising my Guidance last year, which was subsequently issued as my Code of Practice in July 2001, I gave the Scottish Executive, the National Assembly for Wales and Government departments the opportunity to comment on the draft Code and took their views into account as far as possible. There is currently no duty to consult Parliament or Ministers. As an independent regulator, I believe that it is appropriate for me to decide what should be included in my Code of Practice and to be able to make revisions, for example, as a result of my audits of departmental appointments procedures. I would, however, normally ask the Scottish Executive, the National Assembly for Wales and Government departments for their comments on any proposed revisions. I recognise the importance of the democratic role of the Scottish Parliament and the need for Parliament to have confidence in the process. However, I believe that the new Commissioner for Public Appointments for Scotland should also be able to prepare and revise their Code of Practice in the light of their work on public appointments without having to consult formally with the Scottish Parliament or Scottish Ministers whom they regulate. This would preserve the independence of the regulator and better meet the expectations and perceptions of the public.

8. As stated in paragraph 5 above, I am particularly pleased that the Bill proposes that the separate Commissioner should have responsibility for ensuring that, “as far as reasonably practicable, all categories of person are afforded an opportunity to be
considered for appointment to the specified authorities”. I fully support the need for inclusion. However, the draft Bill also proposes in clause 2(10) that the Commissioner should prepare and publish a strategy for ensuring that appointments are made in a manner which encourages equal opportunities; and that the Commissioner should also set targets. I seem to me that it would be more appropriate for Scottish Ministers to formulate the strategy on equal opportunities and to set targets; for the Scottish Executive to implement the policy; and for the Commissioner to ensure that, as part of this, the principles of equal opportunities and diversity are inherent in the public appointments process and that the Scottish Executive is taking positive action wherever possible to attract suitable candidates from all sections of society.

9. Schedule 1, clause 1(3) of the Bill states that a person who has ceased to hold office as Commissioner is, during the period of 3 years from the date of leaving office, disqualified from a large number of public appointments. I would suggest that the proposed 3-year rule may be excessive, especially compared to guidelines on the acceptance of appointments or employment outside Government by former Ministers and Permanent Secretaries, where only a three-month waiting period from the date of leaving office is normally expected (unless the Advisory Committee on Business Appointments advise a longer waiting period).

10. Clause 4 of the Schedule raises issues in relation to age and the length and terms of the new Commissioner’s appointment. Firstly, it is proposed that the new Commissioner would be required to vacate office on 31 December in the year of service in which they attain the age of 65. My Code of Practice currently states that care must be taken not to discriminate on the grounds of age. There is no upper age limit on public appointments; and my Annual Report this year records that 10 per cent of those appointed or re-appointed to boards of public bodies in 2001-02 were aged 66 or over. If the new Commissioner chooses to adopt the same approach to public appointments and has no age barrier, then it may appear inconsistent if the Commissioner were expected to leave the post in the year in which they reach 65.

11. Additionally, clause 4 of Schedule 1 proposes that the new Commissioner for Scotland should serve no more than 3 periods of office; and that each period should not exceed 5 years. This would mean that the Commissioner could serve for a total of
15 years. In my Code of Practice, the maximum period in office for public appointments must not exceed 10 years on the same board (except in exceptional circumstances); and for upper tier posts, a first re-appointment may be made subject to a satisfactory performance assessment, but a second re-appointment (ie a third term in the same post) is rare and can only be made if the individual has been considered alongside other applicants in open competition and has proved to be the most suitable candidate. If the new Commissioner continues with the same policies as set out in my Code of Practice, it may appear to be inequitable if the Commissioner were allowed both to stay beyond 10 years in the same post and also be appointed for three terms without going through an open competition for a second re-appointment.

12. I suggest that it may be worth clarifying in the Bill that “appointment” means any appointment, including re-appointment or extension of an appointment made by Scottish Ministers. Although the Public Appointments Order in Council 1995, which set up the Office of the Commissioner for Public Appointments, was interpreted in this way, it is now been made explicit in the new Public Appointments Order in Council 2002 in order to avoid any possible ambiguity.

13. Similarly, the 1995 Order in Council was interpreted in a way that provisional appointments which were due to be made before a body existed in law or before it was specified as a public body should be subject to the requirements of the Order and fall within my remit, as if they were public appointments to a public body. This has now been specified in the 2002 Order in Council and may be useful to include in this Bill.

15. I would be pleased to provide further clarification on any of these points or information on other matters relating to the Bill when I give oral evidence to the Committee on 3 September.

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Public Appointments and Public Bodies (Scotland) Bill

Written submission to the Local Government Committee of the Scottish Parliament from The Scottish Funding Councils for Further and Higher Education

The Councils welcome the opportunity to provide evidence to the Committee on the proposals within the Bill for the creation of a Scottish Commissioner for Public Appointments.

Earlier this year we made a submission to the Scottish Executive consultation on the detailed provisions for the appointment, funding, remit and reporting arrangements for the Commissioner. We note that all 33 respondents who expressed a view stated that they welcomed the creation of a Commissioner.

In that submission we stated that we supported the measures being put in place to ensure that the Commissioner is, and is seen to be, genuinely independent. We note that the Bill proposes appointment of the Commissioner by Her Majesty on the nomination of Parliament. We welcome this proposal.

We welcome the specific remit in the Bill for the Commissioner to prepare and publish a strategy for ensuring that appointments to the specified authorities are made in a manner that encourages equality of opportunity. The Councils were pleased to participate in the Scottish Executive Non-Departmental Public Bodies Work Shadowing Initiative in 2001. We believe that this offered one useful model for encouraging applications for NDPB membership from currently under-represented groups. If the preparation and publication of an equal opportunities strategy for appointments to public bodies are included within the Commissioner’s role within the enacted legislation then we would look forward to participating in the implementation of that strategy. It will be important for the Commissioner to ensure that the procedures for appointment and the scrutiny process do not themselves discourage particular groups from seeking to participate in public life.

Sub-sections 7 and 8 of Section 2 of the Bill, taken together, appear to imply that appointments that are in breach of the code could still be made by Ministers and identified only after the event. In other cases, where the appointment is in process, considerable delay seems to be envisaged while the question of a possible breach of the code is addressed – delay which could be serious for the body concerned and for the individuals who have applied for the appointment. We wonder whether it would be possible to consider a system, particularly for the most significant appointments, in which the Commissioner could approve the process before the appointment is confirmed. This need not be burdensome nor time-consuming and would help to avoid subsequent challenge and possible embarrassment.
Finally, we note that the Bill contains provision for the post of Commissioner to have a renewable term determined by Parliament and not exceeding 5 years. In our response to the Scottish Executive’s consultation we suggested that a period of office of five years is too long. Instead, we suggested that consideration should be given to a three or four year appointment with one further term. Our view on this issue was informed primarily by the term of membership of our Councils and our experience that some able people would be deterred by a long fixed term. We welcome the recognition in the Bill that a shorter term, with potential renewal, may be more appropriate.

Scottish Funding Councils for Further and Higher Education
August 2002