



The Scottish Parliament  
Pàrlamaid na h-Alba

## STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

### AGENDA

2nd Meeting, 2011 (Session 3)

Tuesday 8 February 2011

The Committee will meet at 2.15 pm in Committee Room 5.

1. **Declaration of interests:** Jim Hume will be invited to declare any relevant interests.
2. **Commissioner for Public Appointments in Scotland:** The Committee will consider a report from the Commissioner for Public Appointments in Scotland.
3. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 9 May 2010 to 22 March 2011.
4. **Scottish Parliamentary Standards Commissioner (in private):** The Committee will consider draft directions to the Scottish Parliamentary Standards Commissioner.
5. **Legacy paper (in private):** The Committee will consider a draft legacy paper.

Gillian Baxendine / Alison Walker  
Clerks to the Standards, Procedures and Public Appointments Committee  
Room Room TG.01  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5239  
Email: [sppa.committee@scottish.parliament.uk](mailto:sppa.committee@scottish.parliament.uk)

The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk

SPPA/S3/11/2/1

**Agenda item 3**

PRIVATE PAPER

SPPA/S3/11/2/2  
(P)

**Agenda item 4**

PRIVATE PAPER

SPPA/S3/11/2/3  
(P)

**Agenda item 5**

PRIVATE PAPER

SPPA/S3/11/2/4  
(P)

**Standards, Procedures and Public Appointments Committee**

**2nd Meeting, 2011 (Session 3)**

**Tuesday 8 February 2011**

**Report from the Commissioner for Public Appointments in Scotland**

**Background**

1. On 24 January 2011 the Commissioner for Public Appointments in Scotland (“the Commissioner”), under the terms of section 2(8)(a) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003, laid a report before the Parliament on the subject of [Lord Commissioner of Justiciary Appointments to the parole Board for Scotland \(CPA/2011/01\)](#). Reports laid before the Parliament under section 2(8)(a) relate to cases where it appears to the Commissioner that the appointments do not comply in a material regard with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland.

2. Standing Orders Rule 3A.5.1 provides that where the Commissioner lays a report under section 2(8)(a), that notice of receipt of the report shall be published in the Business Bulletin and the report shall be referred to the Standards, Procedures and Public Appointments Committee.

3. It is for the Committee to decide what, if any, action to consider in the event of such a referral. There is no procedure to be followed by the Committee in considering reports under Rule 3A.5.1 set out either in Standing Orders or elsewhere in statute.

**Appointment of a Lord Commissioner of Justiciary to the Parole Board for Scotland**

4. The Commissioner’s report sets out detail of the history of appointments of a Lord Commissioner of Justiciary to the Parole Board for Scotland. In summary, this appointment has historically been made by Ministers after a suitable candidate has been nominated by the Lord President. A similar case of nominated appointments was considered by the Committee in January 2010.<sup>1</sup> In that instance the Committee was content with the approach taken by the Scottish Government to resolve the issue, specifically, to remove the appointments in question from the remit of the Commissioner.

5. The Committee may wish to note that the Scottish Government has taken the same approach in this instance and the Parliament recently approved a statutory instrument which will have the effect of removing the specific appointment to which the report relates from the remit of the Commissioner. This instrument came into effect on 18 January 2011.

6. Within the terms of the 2003 Act, the Commissioner is required to report to the Parliament in all cases where she considers appointments have been made that are

---

<sup>1</sup> Stakeholder Appointments to Health Boards, Report CPA/2010/01

not compliant with the Code of Practice. In relation to this report, the Committee may wish to note the Commissioner's statement that—

“Given the circumstances in which I discovered the past incidents of material non-compliance I am content that there appears to have been no intention on the part of the Scottish Ministers or Scottish Government officials to deliberately circumvent the 2003 Act or the Code.”

**Recommendation**

**7. The Committee is invited to consider what, if any, action it wishes to take in relation to this report.**



## The Office of the Commissioner for Public Appointments in Scotland

### **REPORT TO PARLIAMENT**

*Laid before the Scottish Parliament by the Commissioner for Public Appointments in Scotland in pursuance of Section 2(8)a of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.*

**(Reference CPA/2011/01)**

**24 January 2011**

**TITLE:** LORD COMMISSIONER OF JUSTICIARY APPOINTMENTS TO THE PAROLE BOARD FOR SCOTLAND

**MINISTERS:** CATHY JAMIESON, MINISTER FOR JUSTICE and KENNY MACASKILL, CABINET SECRETARY FOR JUSTICE

**DIRECTORATE:** JUSTICE

**PUBLIC BODY:** THE PAROLE BOARD FOR SCOTLAND.

**NATURE OF APPOINTMENT:** LORD COMMISSIONER OF JUSTICIARY

### **SUMMARY**

- 1) Since 2003 appointments of a Lord Commissioner of Justiciary have been made to the Parole Board for Scotland on the basis of nominations made by the Lord President.
- 2) These appointments do not comply in a material regard with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) prepared and published under the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the 2003 Act).
- 3) I have intimated this fact to the Scottish Ministers. As the appointments are historic and have been made over a number of years, the Code cannot now be complied with.
- 4) The Scottish Ministers have taken action to address the situation going forward. They have laid before the Scottish Parliament a Scottish Statutory Instrument (SSI); the motion to approve the removal of this specific appointment from my regulatory remit was considered and approved by the Justice Committee of the Scottish Parliament on 21 December 2010 and the SSI came into force on 18 January 2011.
- 5) The SSI does not apply to the appointments that have already been made in material breach of the Code. Accordingly, I am required by Section 2(8)a of the 2003 Act to report the case to the Scottish Parliament together with any information in relation to the case that I consider it appropriate to include.

Karen Carlton  
Commissioner for Public Appointments in Scotland  
24 January 2011

## **BASIS OF REPORT**

In November 2010 I established that, since 2003, ministerial appointments have been made to a position on the board of the Parole Board of Scotland without reference to the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code). The Prisoners and Criminal Proceedings (Scotland) Act 1993 requires at least one member of the Parole Board to be a Lord Commissioner of Justiciary; this is the position that has been filled on two occasions without reference to the Code.

As Commissioner for Public Appointments in Scotland, I am required by Section 2(8) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the 2003 Act) to report to Parliament any cases where, in making appointments to regulated public bodies, Ministers do not comply in a material regard with the requirements of the Code.

The instances of non-compliance reported here date back to 2003 and two Codes apply:

1. the Code of Practice for Ministerial Appointments to Public Bodies introduced by the Commissioner for Public Appointments prior to the creation of a separate post of Commissioner for Public Appointments in Scotland
2. the current Scottish Code, introduced in April 2006.

## **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 noncompliance.

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 MATERIAL NON-COMPLIANCE**

The principles of both Codes referred to above require ministerial appointments to be made in a way that is open and transparent, is fair and is subject to independent scrutiny.

Openness, transparency and fairness are observed through

- publicising the details of an appointment opportunity

- ensuring that decisions and actions taken at each stage of an appointment are clear, open to scrutiny and based on the merit of applicants in relation to the post to be filled
- keeping accurate and timely records of those decisions and actions.

Independent scrutiny is observed through the involvement of an OCPAS Assessor during a round.

No OCPAS Assessor oversaw any aspect of the appointments reported on here, a clear breach of one for the principles of the Code. Due to the lack of independent scrutiny I am unable to confirm whether the appointment processes were open and transparent. My understanding that the Lord President selected an individual suggests they were not.

Also as a result of the lack of independent scrutiny I am unable to quantify how many of the requirements of the Code were and were not met. However, it is apparent that certain practices have not been complied with and I list those here:

- paragraphs 8.1 and 8.2 – an OCPAS Assessor will be involved in planning for every appointment round and no vacancy may be publicised until he or she has confirmed that the appointment plan complies with the Code
- paragraph 9.3 – selection panels will always include an OCPAS Assessor
- paragraphs 25.1 and 25.2 – the OCPAS Assessor will complete a validation statement confirming that the appointment round conformed with the Code and this will be passed to the Minister
- paragraph 32.2 - sponsor departments will obtain written agreement from the Commissioner in advance of any act or omission which will deviate in any way from the written procedures contained in the Code
- paragraph 36.2 – no appointment round may proceed without the involvement of an OCPAS Assessor

## **THE HISTORY**

Schedule 2 (2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the 1993 Act) sets out provisions relating to the membership of the Parole Board for Scotland as follows:

*“The Parole Board shall include among its members—*

- (a) a Lord Commissioner of Justiciary;*
- (b) a registered medical practitioner who is a psychiatrist;*
- (c) a person appearing to the Secretary of State to have knowledge and experience of the supervision or aftercare of discharged prisoners; and*
- (d) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders.”*

In November 2010, a Scottish Government official contacted my office to discuss a forthcoming appointment to the Parole Board. The official indicated that the Lord Commissioner of Justiciary member had advised of his intention to stand down by the end of the year and that a successor for him had already been nominated by the

Lord President. The official explained that my office had never been approached before when this particular type of appointment, described as a nominated appointment, had been made. The official wished to ensure that I was content with the approach to be taken and that had been taken historically to fill this position. The official also referred my office to the body's founding legislation and to schedule 2 to the 1993 Act. A member of my team undertook to review the provisions of the 1993 Act and the 2003 Act and to provide a view on the legitimacy of the proposed course of action. Following a review of the legislation, my office advised the official that an appointment made on the basis of a nomination by the Lord President would not comply with the requirements of either the 2003 Act or the Code.

Further, my office explained that there appears to be no statutory right in the 1993 Act for the Lord President to nominate an individual to fulfill this role. My office also explained that, even if this were the case, the Code would require a process to be followed to make the appointment. The official was referred to paragraphs 14.1 to 14.8 of the Code that concern the making of public appointments by way of statutory nomination.

My office indicated that, if the Minister were to proceed to appoint on the basis of a nomination by the Lord President, our view was that this would represent material non-compliance with the Code and that I would be statutorily obliged to report the case to the Scottish Parliament (by reference to section 2 (7) & (8) of the 2003 Act).

My office provided the directorate with options for consideration. These were as follows:

1. run a Code compliant appointment round to identify a replacement for the Lord Commissioner of Justiciary
2. remove this position from my regulatory remit.

My office provided guidance to the directorate on a case that I had previously considered in respect of a Code compliant process for the appointment of a Lord Commissioner of Justiciary, should the Scottish Ministers choose to pursue the first option.

My office also provided guidance on a case in which the Scottish Ministers had chosen to pursue option 2 and to remove the position from my regulatory remit. The background to that case was laid before the Scottish Parliament in report CPA/2010/01.

In response, the official advised that the directorate intended to delay making the appointment pending consultation with the appointing Minister and the incumbent Lord Commissioner of Justiciary

The directorate's intention was to make the necessary amendment required to the Parole Board entry in Schedule 2 to the 2003 Act to remove this board position from my regulatory remit. Given the likely time it would take, the directorate would ask the incumbent to remain as a board member until the affirmative order came into force and the Minister was in a position to appoint a successor.



The directorate laid an affirmative Scottish Statutory Instrument (SSI) intended to remove the board position from my regulatory remit before the Scottish Parliament and this was considered and approved by the Justice Committee at its meeting of 21 December 2010.

The SSI came into force on 18 January 2011.

## **THE FUTURE**

Given the circumstances in which I discovered the past incidents of material non-compliance I am content that there appears to have been no intention on the part of the Scottish Ministers or Scottish Government officials to deliberately circumvent the 2003 Act or the Code. Whether ignorance of the law is a reasonable defence in this case is not a matter for me to consider.

I am content, therefore, that no future reports of this nature on this particular board member position will require to be laid and leave this case to the further consideration of the Scottish Parliament.