

Annexe One to Report Reference CPA/2007/02

Summary of Historical Background

January 2004 – in response to a request from the Scottish Executive that third terms of appointment be allowed for statutory nominees to the NPAs, the Office of the Commissioner for Public Appointments (OCPA), which was the predecessor body of the Office of the Commissioner for Public Appointments in Scotland (OCPAS), responded that it was too far in advance to consider such an exemption. The letter noted:

- *“Local authorities should be encouraged to look wider than elected members when putting forward nominations to the department*
- *It is good practice in any such vacancy that more than one nomination is put forward. This is in keeping with offering Ministers a choice of candidate.”*

June, July and August 2004 – there was ongoing correspondence between OCPAS and the Executive regarding statutory nominations to the NPAs. In accordance with guidance from the Commissioner (under the interim Code), the local authorities were asked in writing by the Scottish Executive to provide a choice of statutory nominees who met a publicised person specification. Most local authorities chose to provide the minimum number. Only Moray and Argyll and Bute provided a choice.

The Executive wrote to OCPAS (28 June 2004) seeking a Code exemption on the basis that local authorities had not provided a choice of nominees. The following extracts from that letter are relevant:

“You will also wish to note that:

- *Neither the 2000 Act nor the Designation Order appears to limit the local authorities to submitting only the number of nominees given in the Order;*
- *To comply with the Commissioner’s Code of Practice and enable Ministers to exercise choice, we therefore invited local authorities to nominate more than the basic number. However, due to the LAs interpretation of the legislation the local authorities other than Argyll and Bute provided nominations corresponding to the number of members specified in the Order;*
- *To ensure compliance with the Nolan rules, we decided that an Independent Assessor should be invited to conduct a paper audit of the local authority nominations before recommendations were made to Ministers; and*
- *It would be open to Ministers to reject any nominee they believe did not fit the basic criteria and invite further nominations”*

“Way forward

For the future, we propose that the Public Appointments Team and the Sponsor Team meet with the relevant local authorities well in advance of the next appointments round, which would take place in 2007, to clarify how the legislation can be interpreted to allow the requirements of the Commissioner’s Code to be followed. You would, of course, be welcome to attend any meeting that we arranged with the local authorities.

The Scottish Executive Public Appointments Team have cleared the content of this letter.”

Summary of Recent Developments

01 November 2006 – OCPAS and the Executive met to discuss statutory nominations to the NPAs. OCPAS took a note of the meeting and sent it to the Executive by e-mail asking the sponsor team to make any relevant changes and to confirm the factual accuracy of any version so revised.

03 November 2006 - The Executive agreed OCPAS's note of the above meeting with some minor revisions and additions. The following was agreed in writing:

- *“The Scottish Executive will seek legal advice to establish whether the provisions of the Order supersede the provisions of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and the Code that it refers to. That advice will be shared with OCPAS.*
- *Both the sponsor department and OCPAS will enter into dialogue with the relevant local authorities and discuss the new Code of Practice and its requirements as to ministerial choice and appointment on merit”.*

11 January 2007 - The Executive confirmed to OCPAS in writing that legal advice had been sought and that the Executive's view was that the Scottish Ministers and local authorities are required to comply with the law as set out in the Designation Orders. The legal advice obtained was not disclosed in any detail in this letter. The letter also confirmed that the Executive had no plans to *“compel local authorities to offer Ministers a choice”*. An exception to the requirements of the Code regarding statutory nominations was requested on this basis.

18 January 2007 - An interim e-mail response from OCPAS advised that the Commissioner was herself seeking legal advice on the issue before responding to the exception request. The e-mail indicated that, *“The Commissioner is therefore concerned that the advice that you obtained has not subjected this apparent incompatibility (between the 2000 Act, its Designation Orders and the 2003 Act) to the appropriate level of scrutiny. The Commissioner's particular concern is that to grant the exception requested would represent a failure on her part to comply with Part 1 section 2 (9) (a) and (b) of the Public Appointments and Public Bodies etc (Scotland) Act 2003”*. The e-mail also asked whether the Executive had entered into dialogue with the relevant local authorities regarding the nomination process.

22 January 2007 - OCPAS met with the sponsor team and the Scottish Executive Public Appointments Team (PAT). The Executive confirmed at the meeting that the local authorities had not yet been approached. The Executive referred OCPAS to an extract from the Commissioner's summary of consultation responses on the Code which confirmed that the Code cannot require that Ministers be provided with a choice of statutory nominees. OCPAS advised that a further response from the Commissioner would be sent to the Executive.

26 January 2007 - E-mail correspondence regarding the above meeting between OCPAS and the Scottish Executive Public Appointments Team (PAT). With reference to the extract from the Commissioner's summary of consultation responses on the Code, discussed at the meeting, OCPAS explained that the extract had been taken out of context, that it has no statutory force and that the Commissioner's views regarding statutory nominees are made quite clear in the Code and in the consultation response summary from which the extract was taken. The extract on its own did not represent the Commissioner's view on the matter.

30 January – An e-mail was sent from OCPAS to the Executive, further to the e-mail of 18 January, confirming that the Commissioner had now taken legal advice on the issue and it was possible to interpret the Designation Orders and Acts in a manner that was not inconsistent and that would enable the Code and the 2003 Act to be complied with. The e-mail confirmed that the requested exemption was refused on the basis of the information provided. The e-mail further confirmed that:

“Taking the above into account, the Commissioner’s concerns remain about granting the exception as it stands. If the Scottish Ministers are asked to endorse such an exception request they are effectively being asked to undermine the principles of the Code. Such an exception, if granted at this stage, would also mean that the Commissioner was not only herself undermining these principles but also failing to comply with Part 1 section 2 (9) (a) and (b) of the Act.

...OCPAS is, as per our original discussions, willing to take a pragmatic approach to these appointments. If the department can provide evidence to OCPAS that the local authorities are employing a process to select statutory nominees that complies with the principles of the Code, but are unable to provide a choice of nominees to the Minister as a result of this process, this evidence should be provided to the Commissioner who will consider the department’s request for an exception.”

No response to this e-mail was received from the Executive.

26 June 2007 – An e-mail from OCPAS to the sponsor team – in response to one from the sponsor team concerning a related exception to the Code granted by the Commissioner – noted that the Executive planned to appoint statutory nominees to the NPAs from 1 September 07 and asked when the department intended to invite one or more OCPAS Assessors to participate in the appointments rounds.

28 June 07 – A letter from the sponsor team to OCPAS referred back to the Executive’s letter of 11 January but made no reference to OCPAS’s responses of 18 and 30 January. The letter indicated that, *“it would be premature to engage assessors”*.

13 July 07 – A letter from the Commissioner to the Director-General Environment (DGE) restated her position and sought to clarify whether the directorate was in the process of making appointments to the statutory nominee positions with no OCPAS oversight and, if so, what progress it had made to date.

17 July 07 – A letter to the Commissioner from an Executive representative suggested a joint meeting between OCPAS and the Executive, with each accompanied by legal advisers, to see if there was a way through the divergent interpretations.

03 August 07 – The Commissioner responded on her return from annual leave:

“My understanding of the legal position is quite clear and was communicated to the Landscapes and Habitats Division in January. If it appeared that my understanding differed from the legal advice received from the Executive, the time to address this was when the Division received my advice”.

The Commissioner indicated that she was awaiting a response to the letter sent to the DGE on 13 July.

08 August 07 – The Commissioner conducted a telephone call with the DGE regarding her letter of 13 July during which the DGE intimated that the process to make appointments had commenced without OCPAS involvement. The Commissioner requested a full copy of the legal advice obtained by the DGE and answers to the questions set out in her letter.

14 August 07 – The Commissioner sent an e-mail to the DGE reiterating the request (see above). The e-mail confirmed that the directorate was in breach of the Code regardless of the differences in interpretation of statute and advised that no appointments to the board could be made until the situation had been resolved.

14 August 07 – Further to their telephone conversation of 08 August, the DGE wrote to the Commissioner. The letter confirmed that five new statutory nominee appointments were planned for each NPA. It further confirmed and built on the Executive's legal position, advising that there was "no way" that the Executive could enforce the requirement of the Code that local authorities be asked to put forward more than one nomination for each post. The Executive's legal advice was that the Minister had little choice but to appoint the persons nominated by the local authorities and that, once nominations were made, the Minister had very little discretion. The DGE stated that the application of the Code processes to these appointments would bring very little added value.

17 August 07 – The DGE sent an e-mail providing the detailed legal advice obtained by the Executive on the issue.

24 August 07 – The Commissioner provided a full response to the DGE. It addressed each of the legal points set out as justifications by the Executive for not complying with the 2003 Act and the Code. The directorate had taken the view that it is not possible to reconcile the statutory framework set out by the NPA legislation and the 2003 Act and Code. The Commissioner set out her view that the provisions of the 2000 Act, the 2003 Act and the Code are not incompatible. Her response emphasised that the requirements of the Code apply to statutory nominations to the boards of the NPAs. These ministerial appointments were explicitly included in schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. The Commissioner advised that application of the Code to these appointments was therefore mandatory, not discretionary. The Commissioner indicated that the intention of the Scottish Parliament, as expressed in the 2003 Act, was clear in that regard. She stated:

"This failure to date to comply with the Code appears to be material and has the potential to result in a report by me to Parliament as required under Section 2 (7) of the 2003 Act. If the Executive continues with the current appointments rounds notwithstanding the material concerns I have raised and asked it to address, then these ministerial appointments will, in my opinion, not comply with the Code in a material regard. In particular, the principal failings appear to be:

(i) the refusal to approach local authorities to agree an approach which respects the provisions of the Code. and

(ii) the failure to involve any OCPAS assessor to provide the independent scrutiny required by the Code."

The Commissioner suggested a way forward for the Executive that would ensure that new appointments were Code compliant and which would allow each NPA to retain a local authority presence on their boards and to continue with the full complement of 25 members, until the new appointments were made.

The Commissioner further confirmed that a previous appointment term extension granted for local authority nominees should afford the Executive sufficient time to run an appointments process that did comply with the Code. The Commissioner closed by asking the Executive to confirm its intended course of action without delay.

29 August 07 – The Environment Minister responded to advise that the appointments had now been made as any delay would not be in the interests of good governance.

The Minister indicated that the difference of view about the approach to be adopted in making these appointments stemmed from the difficulty of reconciling the Code with the intentions of the Parliament as set out in the National Parks legislation. He further advised that it would be open to the Commissioner to draft or operate the Code in a way that recognised the distinctive nature of the appointments in question; that they should not be subject to the same tests as apply to the generality of ministerial appointments and that they should not be subject to ministerial choice.

31 August 07 – The Commissioner's response confirmed that the intentions of the Parliament in the 2003 Act were quite clear inasmuch as these statutory nominations are ministerial appointments and they had been explicitly brought within the remit of the Commissioner's regulation three years later than the 2000 Act referred to by the Minister. The letter confirmed that the Executive and Parliament were consulted on the draft Code, including specific provision regarding statutory nominations, and that Parliament gave it its unambiguous support in September 2005. Equally, the Executive had not identified any issue regarding inconsistency between those two regimes at that time. It also confirmed that the Code cannot now be altered without the Commissioner formally engaging in further consultation with the Scottish Parliament and the Scottish Ministers. The letter enclosed the correspondence with the DGE of 24 August to ensure that the Minister was provided with all relevant information. The Commissioner confirmed that she intended to report this instance of material non-compliance with the Code to the Scottish Parliament.

To date, no response to that letter has been received by OCPAS.