

## 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*



*13 September 2007*

**MINISTER:** MICHAEL RUSSELL MSP, MINISTER FOR ENVIRONMENT

**DIRECTORATE:** RURAL AFFAIRS AND THE ENVIRONMENT

**PUBLIC BODIES:** CAIRNGORMS NATIONAL PARK AUTHORITY (CNPA) and LOCH LOMOND AND THE TROSSACHS NATIONAL PARK AUTHORITY (LLTNPA)

### **SUMMARY**

- 1) Appointments have been made by the Minister for Environment, Michael Russell MSP, on the basis of statutory nominations made by local authorities, to the CNPA and the LLTNPA;
- 2) The Commissioner considers that 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) The Commissioner has intimated this fact to the Scottish Ministers and considers that after a reasonable time from that intimation, the Code remains to be complied with;
- 4) Accordingly, in this case, the Commissioner is 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 the Commissioner considers appropriate to include).

Karen Carlton  
Commissioner for Public Appointments in Scotland  
13 September 2007

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[All documents referred to in this report and its annexes are held by the Commissioner's office and may be requested in accordance with the Freedom of Information (Scotland) Act 2002, the Data Protection Act 1998, and the OCPAS Freedom of Information Publication Scheme.]

## **BASIS OF REPORT**

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

The Code, which sets out the criteria required to ensure ministerial appointments are made fairly and openly – as required by the 2003 Act – was debated and accepted by the Scottish Parliament in September 2005 and came into force in April 2006.

The Code includes guidelines as to the methods and practices to be employed in the making of all ministerial appointments which fall under the 2003 Act. It also specifies a particular procedure in respect of statutory nominations.

The relevant appointments are statutory nominations. The framework for the National Park Authorities (NPAs) and their constitutions is set out in the National Parks (Scotland) Act 2000 (the 2000 Act). The 2000 Act and its subsequent supplementary Designation Orders specify several methods for appointing an NPA member. Twenty of the 25 authority members for each NPA are designated as ministerial appointments. Of these ministerial appointments, ten are to be made on the nomination of the relevant local authorities. This report concerns only those appointments, referred to as statutory nominations.

I and my officials have been communicating with the directorate regarding these appointments since 2004. During this time, I have endeavoured to work with the directorate to ensure these appointments could be made in a manner that complies with the principles and requirements of the Code. The legislative framework which applies to these statutory nominations may not sit at ease with their inclusion in the public appointments regime. My Code does make general provision for statutory nominations in a manner that provides flexibility whilst preserving the fundamental principles of both the Code and 2003 Act. My view has been that, in practice, it is possible to reconcile both the letter and spirit of the NPA legislation with the Code and 2003 Act. The directorate and Minister have indicated that in their view this is not possible.

It remains clear to me as Commissioner, that notwithstanding any potential difficulties in reconciling these pieces of legislation, these appointments, as statutory nominations, explicitly and unambiguously fall within the public appointments regime as determined by Parliament in 2003.

The Minister confirmed to me in writing on 29 August 2007 that he had made five new appointments to each National Park Authority. For reasons set out in this report, I consider that the Minister has failed to comply with the Code in a material regard in making these appointments.

There has been extensive dialogue between my office and the directorate and, latterly, the Minister on this matter. A summary of events and dialogue between the Scottish Executive and my Office is attached as background information at annexe one.

## **NATURE OF MATERIAL NON-COMPLIANCE**

A fundamental principle of the Code is that an OCPAS Assessor be involved at each stage of an appointment round to provide independent scrutiny and to ensure that the Code has been followed. A second is that the practices employed at every stage in an appointment round must be open and transparent.

No OCPAS Assessor oversaw any aspect of the appointments reported on here. It is my view that the lack of independent scrutiny, openness and transparency are themselves sufficient to qualify this breach of the Code's principles as material. Due to the lack of independent scrutiny I am unable to confirm whether many of the practices required by the Code have been complied with. 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
- paragraph 14.2 – nominating bodies will be asked to put forward more than one nomination for each post
- 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 complete text of these provisions and of the principles of the Code is set out in annexe two to this report.

## **RELEVANT POWERS OF THE COMMISSIONER IN PRODUCING THIS REPORT**

Section 2 of the 2003 Act states:

"(1) The Commissioner is to prepare and publish a code of practice in respect of the making by the Scottish Ministers of any appointment or, as the case may be, the making by them of any recommendation for any appointment-

- (a) of a person to an office specified in schedule 2."

Schedule 2 lists "any National Park authority".

Section 2 of the 2003 Act provides:

(7) In any case where –

- (a) it appears to the Commissioner that the code of practice has not been complied with in a material regard;
- (b) the Commissioner has intimated that fact to the Scottish Ministers; and
- (c) the Commissioner considers that –
  - (i) the code of practice is unlikely to be complied with within a reasonable time of that intimation; or
  - (ii) after a reasonable time from that intimation, the code remains to be complied with, subsection (8) applies.

(8) Where this subsection applies, the Commissioner –

- (a) must report the case to the Parliament (together with any information in relation to the case the Commissioner considers appropriate to include);
- (9) The Commissioner is to exercise the Commissioner's functions with a view to ensuring that -
- (a) appointments, and recommendations for appointment, to the specified authorities are made fairly and openly; and
  - (b) so far as reasonably practicable, all categories of person are afforded an opportunity to be considered for appointment, to the specified authorities.