

REPORT OF COMMISSIONER'S FINDINGS – COMPLAINT

Report Reference OCPAS 940/08

29 August 2008



INTRODUCTION

NAME OF DIRECTORATE: CONSTITUTION LAW AND COURTS DIRECTORATE

NAME OF PUBLIC BODY: SCOTTISH LEGAL COMPLAINTS COMMISSION

NAME OF APPOINTING MINISTER: KENNY MACASKILL MSP, CABINET SECRETARY FOR JUSTICE

NATURE OF APPOINTMENT: COMMISSIONERS

NATURE OF EXAMINATION:

- 1) Were these appointments made in accordance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code), and
- 2) If not, and there was non-compliance with the Code, was it material?

RELEVANT POWERS OF THE COMMISSIONER IN PRODUCING THIS REPORT:

Section 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the Act) provides:

- (5) The Commissioner –
- (a) is to examine –
 - (i) the methods and practices employed by the Scottish Ministers in the making of appointments and recommendations for appointment, to the specified authorities; and
 - (ii) if the Commissioner considers it appropriate, the making by the Scottish Ministers of any appointment, or recommendation for appointment, to any of the specified authorities.
 - (b) is to investigate complaints arising from the making by the Scottish Ministers of any appointment, or recommendation for appointment, to any of the specified authorities.
- (6) The Commissioner may issue guidance to the Scottish Ministers (either generally or in a particular case) as to compliance with the code of practice.

SUMMARY OF REPORT

BACKGROUND

This investigation was conducted in response to a complaint from a member of the general public. The complaint relates to appointments made to the Scottish Legal Complaints Commission.

Specifically, the complainant alleged that:

1. the regulatory history of lawyer members appointed to the board of the body was not sought or obtained by the Scottish Government
2. two of the appointees to the body may not have declared issues in relation to their probity and any conflicts of interest that they may have that, if provided, may have been of concern to the Cabinet Secretary for Justice. One concern related to a newly appointed member's conduct in a previous role and the other to another member's involvement in the master insurance policy for the Law Society of Scotland.

THE COMMISSIONER'S FINDINGS

Focus for review

The investigation assessed compliance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) as it applies to:

- the use of references (paragraphs 11.1 to 11.4)
- questioning on probity and conflicts of interest (paragraph 22.7), and
- additional information about candidates (paragraphs 21.1 to 21.8).

The purpose of the investigation was to establish:

- the way in which the directorate sought the information required to assess the probity of the candidates for the role
- any declarations made by candidates in this regard
- the information provided to the Cabinet Secretary for Justice to allow him to make an informed decision as to the suitability of candidates for appointment and
- whether there was a record of the reasons set out by the Cabinet Secretary for the appointment decisions that he made.

1) Regulatory history of lawyer members

Conclusion

The regulatory history of the relevant appointed lawyer members was sought and obtained by the directorate. The response from the Law Society satisfied the directorate that the appointments were not inappropriate.

This element of the complaint is not upheld.

2) Probity and conflicts of interest

Conclusion

All candidates, including the two subject to this complaint, were questioned on probity and conflicts of interest. The selection panel was satisfied with their answers and the information was passed to the Cabinet Secretary for Justice in the relevant candidate summaries.

Since appropriate questions were asked of candidates regarding their probity and any conflicts of interest they may have, the requirements of the Code were met.

3) Additional information on candidates

Conclusion

As no investigation was carried out in relation to any of the candidates, other than the check on the regulatory history of lawyer members, the Code's requirements in this regard have not been breached.

4) Information on candidates provided to the Cabinet Secretary for Justice

Conclusion

The submission to the Cabinet Secretary included details of the suitability of candidates for appointment based on their completed application forms and their performance at interview in relation to the person specification/s for the roles. The submission also made it clear that all candidates were questioned on probity and conflicts of interest and provided a summary record of those discussions.

5) The record of the Cabinet Secretary's appointment decisions

Conclusion

The Code requires the appointing Minister to record their decision on which candidate(s) is (are) to be appointed and the reasons for this decision. This requirement of the Code was not complied with in respect of the lawyer members appointed. This was attributed by the Scottish Government to the fact that the Cabinet Secretary was not presented with a choice of candidates for the lawyer member roles. The Commissioner does not consider this to be material to the outcome of the appointments process.

The Cabinet Secretary recorded the names of those that he had decided to appoint to the chair and non lawyer member positions and provided reasons for these decisions. This was in accordance with this requirement of the Code.

Other concerns raised about appointments to this body

During the course of this investigation the Commissioner was referred to complaints made by other individuals in relation to these appointments and requested relevant documents relating to these complaints.

The additional complaints also related to the probity of appointees and to potential or actual conflicts of interest that appointees may have.

As with the original complaint, this investigation has found that the Code has been complied with in relation to questioning on probity and conflicts of interest, in relation to the use of references and in relation to seeking additional information on candidates.

Appointment decisions

A fundamental principle of the Code is that of ministerial responsibility. The ultimate responsibility for appointment rests with Scottish Ministers.

In this particular case the Cabinet Secretary made his appointment decisions on the basis of the information provided to him.

The Commissioner has no role or remit in investigating the individual histories of applicants, candidates or public appointees. The Code does allow selection panels to conduct such investigations into potential appointees on behalf of the Scottish Ministers during appointments rounds and no such investigation was undertaken during this round other than the check on the regulatory history of lawyer member appointees.

Conclusion

Given that the appointments have now been made, and that no material non compliance with the Code was identified, the Commissioner has no basis on which to take further action.

The Commissioner has provided guidance to the relevant directorate as to future compliance with the Code in respect of the area of non compliance identified during this investigation.

A handwritten signature in black ink that reads "Karen Carlton". The signature is written in a cursive, flowing style.

Karen Carlton
Commissioner for Public Appointments in Scotland
29 August 2008

DETAILED REPORT

BACKGROUND

This investigation was conducted in response to a complaint from a member of the general public. The complaint relates to appointments made to the Scottish Legal Complaints Commission.

Specifically, the complainant alleged that:

1. the regulatory history of lawyer members appointed to the board of the body was not sought or obtained by the Scottish Government
2. two of the appointees to the body may not have declared issues in relation to their probity and any conflicts of interest that they may have that, if provided, may have been of concern to the Cabinet Secretary for Justice. One concern related to a newly appointed member's conduct in a previous role and the other to another member's involvement in the master insurance policy for the Law Society of Scotland.

THE COMMISSIONER'S FINDINGS

Focus for review

The investigation assessed compliance with the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) as it applies to:

- the use of references (paragraphs 11.1 to 11.4)
- questioning on probity and conflicts of interest (paragraph 22.7), and
- additional information about candidates (paragraphs 21.1 to 21.8).

The purpose of the investigation was to establish:

- the way in which the directorate sought the information required to assess the probity of the candidates for the role
- any declarations made by candidates in this regard
- the information provided to the Cabinet Secretary for Justice to allow him to make an informed decision as to the suitability of candidates for appointment and
- whether there was a record of the reasons set out by the Cabinet Secretary for the appointment decisions that he made.

1) Regulatory history of lawyer members

The regulatory history of the relevant lawyer members appointed to the board of the body was sought and obtained by the Scottish Government.

The Scottish Government wrote to the Law Society requesting confirmation of:

- whether the candidates were enrolled with the society
- how long they have been enrolled
- was there any period for which they were not enrolled
- were there any complaints upheld on record (and if so to provide details).

This information was requested on three of the four candidates who were appointed. The Law Society's response in relation to each of these candidates provided the requested information. The

response confirmed that each was enrolled with the society and that there were no findings of professional misconduct against any of these candidates.

The regulatory history of the fourth lawyer member appointed was not checked. The Scottish Government confirmed in writing that this was because the individual concerned had not practised law.

Conclusion

The regulatory history of the relevant appointed lawyer members was sought and obtained by the directorate. The response from the Law Society satisfied the directorate that the appointments were not inappropriate.

This element of the complaint is not upheld.

2) Probity and conflicts of interest

The investigation assessed whether candidates named in the complaint were questioned appropriately on probity and conflicts of interest. It also reviewed what their responses to that questioning were and what information was passed to the Cabinet Secretary as a result of that questioning.

The investigation found that all candidates interviewed were questioned on probity and conflicts of interest. In the context of this complaint the most relevant of these questions were as follows:

Probity:

“Can you tell us about a time when your integrity was tested?”

Conflicts of Interest:

Is there anything about this post that might appear to divide your loyalties in some way?

Is there anything about your home or work life that might be seen as incompatible with this appointment, or which might raise questions if you were appointed?

Do you have any other obligations or commitments that might influence you, or appear to influence you, if you were appointed?

The results of this questioning was recorded on individual panel member’s notes and summarised in the candidate summaries provided to the Cabinet Secretary. For those individuals about whom the complainant raised specific concerns the following was established at interview by the selection panel and passed to the Cabinet Secretary as part of the candidate submission:

Candidate X

“His answers on probity and conflicts of interest were good, ranging from the issues arising from the need to align personal and professional values to direct personal experience of adverse media coverage. He came across as resilient and thoughtful. He had thought through possible conflicts of interest but had not identified any as likely to arise.”

The summary also made it clear that the candidate had served as a police officer and had been a committee member for the Law Society of Scotland.

Candidate Y

“His answers on probity and conflict of interest were satisfactory, giving evidence of deeply-ingrained professional values and personal integrity. He was at his most animated in discussing the importance of probity, conveying some anxiety or regret that his own high standards are less widely or rigorously held by others. He had given thought to possible or apparent conflicts of interest arising from his professional contacts and other relationships. He came across as someone committed to public service as a way of returning something to the profession at this stage in his career.”

The candidate summary also advised that the candidate had been a partner with his law firm for 33 years and that he proposed to retire from that firm in April 2008.

Conclusion

All candidates, including the two subject to this complaint, were questioned on probity and conflicts of interest. The selection panel was satisfied with their answers and the information was passed to the Cabinet Secretary for Justice in the relevant candidate summaries.

Since appropriate questions were asked of candidates regarding their probity and any conflicts of interest they may have, the requirements of the Code were met.

3) Additional information on candidates

The investigation examined whether any additional information on candidates, other than the regulatory history of lawyer members, was assessed by the panel and, if so, what conclusion/s the panel drew as to the suitability of these candidates for appointment.

The Code advises that specific information may come to the attention of a member or members of the selection panel which calls into question a candidate's suitability for appointment or which may affect the credibility of the appointment process or the credibility of the public body concerned.

Where information of this nature is known to a member or members of the panel they have a responsibility to share this with their colleagues on the selection panel. If the panel believes it necessary to investigate this information then such an investigation must be carried out by the selection panel chair to attempt to verify the accuracy of the information. The process followed, and the outcome, must be recorded as part of the audit trail for the appointment round.

We saw no evidence that individual panel members were party to or provided with such information during this appointments process. As no such information was raised with or by members of the selection panel no such investigation into the suitability of candidates for appointment was conducted.

Conclusion

As no investigation was carried out in relation to any of the candidates, other than the check on the regulatory history of the lawyer members, the Code's requirements in this regard have not been breached.

4) Information on candidates provided to the Cabinet Secretary for Justice

The investigation included a review of the information provided to the Cabinet Secretary for Justice to allow him to make an informed decision as to the suitability of candidates for appointment.

Conclusion

The submission to the Cabinet Secretary included details on the suitability of candidates for appointment based on their completed application forms and their performance at interview in relation to the person specification/s for the roles. The submission also made it clear that all candidates were questioned on probity and conflicts of interest and provided a summary record of those discussions.

5) The record of the Cabinet Secretary's appointment decisions

The Cabinet Secretary recorded the names of those that he had decided to appoint to the chair and non lawyer member positions and provided reasons for these decisions.

The Cabinet Secretary provided the following reasons for his decision to appoint Candidate X:

“Wide knowledge of the field. Commitment to public service. Experience with social work and Law Society.”

In the case of Candidate X, the Cabinet Secretary was made aware of Candidate X's work with the Law Society and it was listed as a reason for his selection decision. The Cabinet Secretary made no direct reference to the essential criteria for the role in each of his reasons for this appointment decision. The Code is not prescriptive regarding the basis of the Scottish Ministers' appointment decisions.

The Cabinet Secretary did not set out the names of the lawyer members to be appointed or his reasons for these appointment decisions. The Cabinet Secretary was not provided with a choice of candidates for the lawyer member positions. The Cabinet Secretary took an in principle decision that he was content to proceed with this appointments round without a choice of appointable lawyer members. In response to a request from the directorate, the Commissioner granted a Code exception to allow the round to proceed on this basis.

Conclusion

The Code requires the appointing Minister to record their decision on which candidate(s) is (are) to be appointed and the reasons for this decision. This requirement of the Code was not complied with in respect of the lawyer members appointed. This was attributed by the Scottish Government to the fact that the Cabinet Secretary was not presented with a choice of candidates for the lawyer member roles. The Commissioner does not consider this to be material to the outcome of the appointments process.

The Cabinet Secretary recorded the names of those that he had decided to appoint to the chair and non lawyer member positions and provided reasons for these decisions. This was in accordance with this requirement of the Code.

Other concerns raised about appointments to this body

During the course of this investigation the Commissioner was referred to complaints made by other individuals in relation to these appointments. The Commissioner requested from Scottish Government and was provided with complaints correspondence relating to appointments to this body as part of this investigation.

These complaints also related to the probity of appointees and to potential or actual conflicts of interest that appointees may have.

As with the original complaint, this investigation has found that the Code has been complied with in relation to questioning on probity and conflicts of interest, in relation to the use of references and in relation to seeking additional information on candidates.

Appointment decisions

The Cabinet Secretary's appointment decisions depended on an appointment process which identified individuals who met the publicised criteria for the roles on the board.

A fundamental principle of the Code is that of ministerial responsibility. The ultimate responsibility for appointment rests with Scottish Ministers. The Scottish Ministers determine during the planning stage for the process the role description and the person specification for individuals to be appointed. The person specification may include reference to the personal qualities expected of potential appointees. On the basis of these documents, completed application forms and interviews, the selection panel identifies those individuals who most closely match the person specification/s and who are therefore considered appointable. The process is designed to offer the Scottish Ministers a choice of candidates considered appointable for each vacancy.

In this particular case the Cabinet Secretary made his appointment decisions on the basis of the information provided to him. Some of the concerns raised by complainants suggest that these decisions were not fully informed because the individuals appointed may not have fully disclosed information that the complainants believe to be pertinent to these individuals' suitability to serve on the board of this body.

The investigation has found that no material non-compliance with the Code has occurred during this appointments exercise. Candidates identified as appointable at the end of the appointments process were so identified as they most closely matched the publicised person specification/s. As indicated above, decisions to appoint or remove individuals to and from the board of the body ultimately rest with the Cabinet Secretary. It is open to any individual with a concern about a public appointee to raise it with the Scottish Ministers. If the Scottish Ministers are made aware of such concerns and that information is of concern to them it is their prerogative to decide whether and how to act on it.

The Commissioner has no role or remit in investigating the individual histories of applicants, candidates or public appointees. The Code does allow selection panels to conduct such investigations into potential appointees on behalf of the Scottish Ministers during appointments rounds and no such investigation was undertaken during this round other than the check on the regulatory history of lawyer member appointees.

Conclusion

Given that the appointments have now been made, and that no material non compliance with the Code was identified, the Commissioner has no basis on which to take further action.

The Commissioner has provided guidance to the relevant directorate as to future compliance with the Code in respect of the area of non compliance identified during this investigation.

Details of the processes used and information gathered during this examination (chronology, methodology, a full list of evidence) are held by the Commissioner's office and may be requested in accordance with the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998, and the OCPAS Freedom of Information Publication Scheme.