



The Office of the Commissioner for Public Appointments in Scotland

Report on the views gathered during the pre-consultation phase on proposed revisions to the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code).

PART TWO – SENIOR CIVIL SERVANTS

We consulted a group of senior civil servants on our proposals for revisions to the Code at an event hosted by the Scottish Government 17 November 2009. Prior to the consultation on the proposals for the new Code, we gave a presentation on some of the apparent myths that have grown up around the Code and the public appointments process. Each myth was accompanied by a case study from a previous appointment round which made it clear that misunderstandings about the requirements of the Code were having a negative impact on public appointments.

Stella Manzie, Director General Finance and Corporate Services, chaired the event and commented, as required, on the Scottish Government's position on some of the matters that arose during the discussions.

Summary of views on the proposals

The following pages summarise the views expressed by attendees on the Code and more generally about the appointment process. The remainder of this document provides detail on the responses to the questions that the Commissioner asked about her proposals.

- Some civil servants believe that the appointment process and level of regulatory oversight, whilst bureaucratic, make it easier to defend appointments and protect Ministers. This was in spite of the fact that the process is viewed as cumbersome to work with.
- There appeared to be consensus that the Code might benefit from a reduction in size and complexity, perhaps in the direction of a more principles-based Code. If the Code is revised in this way, there is a need to ensure (either by OCPAS alone or by working with Scottish Government) that there is sufficient guidance on application of the Code to continue to both guide and provide reassurance for civil servants.
- The Code could be clearer about the need to focus on the outcome of appointment rounds.
- Many civil servants are risk averse and may therefore think that the most risk-free way of running a round is to follow the Code to the letter. This may account for non-application of the principle of proportionality. The term "exception" should be removed from the Code and replaced with something like "option". Setting out a range of potential Code-compliant options would be helpful.

- Not all civil servants prioritise a successful outcome during appointment rounds and will sometimes cut corners in order to generate any outcome that complies with the Code even if the round could have been more successful.
- The OCPAS Assessor (OA) appears to be considered the “professional” panel member. This is not just in relation to their knowledge of the Code but also applies to their knowledge of recruitment and selection and diversity. Other panel members, including both Chairs and senior civil servants, were not always trained in these areas prior to participating as selection panel members.
- There was one concern expressed about OA consistency but it wasn’t followed up at the time of the incident(s) by the civil servant concerned. Not all civil servants are aware of the key role that they can play in further developing OA contribution. The Commissioner made it absolutely clear that she expects the Scottish Government to give OCPAS specific examples when concerns arise over an OA’s contribution so that these may be investigated and addressed.
- The Director General Finance and Corporate Services stated that she recognises the need for more central Scottish Government support to be provided to civil servants in respect of making public appointments.
- The Code should contain the principles to be followed and the outcomes to be achieved, with suggested practices for sponsor teams to measure their work against.
- OCPAS should shorten and simplify the Code where possible and provide a supporting framework on its application. Process charts and illustrations would be helpful. It isn’t clear whether the guidance and illustrations should be produced by OCPAS or the Scottish Government or by both parties.
- The level of understanding of why there is an anonymity requirement in the Code varies across the civil service. Some recognise why it is a Code requirement and what value it brings, others do not. One civil servant noted that the requirement sometimes fails to make sense to people and gave a practical example of this. If an aspect of the Code doesn’t make sense to those who have to work with it, it was posited that this may have an impact on the credibility of not just this but other Code requirements.
- It was agreed that removing anonymity would have some very serious risks attached. If the Commissioner were to leave the decision to selection panels, she should only provide them with that discretion if she explains what the value of anonymity is and also provides advice on the very serious risks implied by dispensing with it during a round.
- Interview should not be stipulated in the Code as necessarily being the last stage of assessment. There was little or no support for an appointment process that doesn’t use an interview at some point.
- Interview is only one of a wide range of methods of assessment that might potentially be used for the public appointments process. Some are covered by the OCPAS guidance but many are not. More options should be considered by panels.

- One potential layout for the part of the Code that discusses the appointment process could be to split it into three main stages: Publicity, Application and Assessment.
- There is not widespread understanding of the reason that ranking is prohibited by the Code. Senior civil servants do not understand what the Code means by appointable in the context of providing a candidate summary to the appointing Minister. This lack of understanding may explain why some body chairs have felt concerned about decisions made by Ministers. The Code must be revised to make it clear that it is for selection panels to set the bar in relation to appointable candidates and that the bar can be set anywhere on the spectrum from “exact match for the criteria for the role” to “just meets the criteria for the role”.
- The Director General Finance and Corporate Services was clear that ranking of candidates would not be a recommendation that she would make to the Scottish Ministers as it had the capacity to place constraints on the power of Ministers to choose their preferred candidates. There appeared to be no strong views from other civil servants on whether giving Ministers the choice at the start of a round to receive a ranked list at the end of the round would be an appropriate revision to make to the Code.
- There could be more centrally provided support for sponsor directorates in future. Relaxation of OCPAS regulation would have to be based on the extent and nature of that support. Even where that extra support is provided, and OCPAS regulation is scaled back, Scottish Ministers may remain to be convinced that lesser OCPAS involvement offers them sufficient protection.
- Accreditation for teams and/or individuals is not a bad idea per se but the process to introduce and implement such a scheme should not use up more resources than are used by the current system, nor should it introduce another bureaucratic and complex system on top of one that is already considered cumbersome.
- The appointments process currently relies on the expertise, skills and knowledge provided by OCPAS through the OA. The expertise, skills and knowledge are not restricted to knowledge of the Code and its application. The OA’s current role is not necessarily appropriate but it is clearly meeting a need. Scottish Government could put more resource into the appointments process in future such that the OA is not relied upon so heavily.
- The role of the OA may have to change, whether desired by Scottish Government and/or the Commissioner or not, depending on the view of the Committee on Standards in Public Life.
- If the Commissioner considers scaling back on regulatory oversight by removing the OA from membership of the selection panel, some panels and potentially some Ministers will want to try to include an independent element on the panel in another way.

Knowledge of the Code

It was clear from comments made during the pre-consultation events that the Code and legislation governing public appointments is not universally understood. Misconceptions included:

1. Anonymity in the process doesn't make sense and has no intrinsic value.
2. There is no flexibility in the Code. This view may be due to an unwillingness to be flexible about application of the Code on the part of senior civil servants. The Commissioner had pointed out that exceptions to the Code were granted frequently.
3. Selection panels are unable to give Ministers clear information on which of the candidates most closely meet the person specification.
4. Selection panels are required to list as appointable all candidates who meet the criteria for the role even where such candidates are borderline and do not meet the criteria very closely. Some attendees were concerned that Ministers were able to appoint candidates that did not meet the criteria for a role most closely, even to the extent that borderline candidates could be appointed ahead of candidates who met the criteria very closely.

These misconceptions were not necessarily commonly held but were expressed.

Specific questions about the proposals

All senior civil servants were provided in advance with a list of questions about the Code. Their views on most of these questions were discussed at the event.

Many of the comments made in response to the questions related more to the public appointments process than to the content of the Code. It appeared that the Code and the process could not be divorced from each other in the minds of those who had been involved in making appointments. Custom and practice has built up in the appointments process. This has led to a situation in which participants believe, often wrongly, that the Code has dictated that custom and practice. We have included comments made about the appointments process as well as about the Code in this document. These comments have to be taken into account as revisions to the Code are considered as such revisions should have the practical effect of changing the appointments process.

The following pages give detail on some of the comments that senior civil servants had about the Commissioner's specific questions.

Question one: Which parts of the current Code:

- **support successful appointment**
- **inhibit successful appointment**
- **would benefit from clarification?**

One attendee commented that he had overseen two appointments processes and found it a positive experience. He understood that that there was a lot involved in the process and that it could be considered to be bureaucratic. He felt that his colleagues may, however, take some comfort from the bureaucratic nature of the process. He described the regulated appointment process as a “comfort blanket”. He asked what “comfort blanket” the Commissioner would put in place for civil servants if a new Code was introduced.

Another commented that following the Code and the appointments process provided a shield for the appointing Minister. It was good to be able to defend appointments, particularly if there was contention regarding the appointment, by reference to the neutrality that the Code and process represented.

A couple of comments suggested that the Code would benefit from being shortened and simplified.

A question arose in relation to the Commissioner’s proposals for potentially greater proportionality of regulation. OCPAS was asked if this related to the economic climate. In response, the Commissioner advised that the current risks of non-compliance were very low due to the high level of regulatory oversight during each round and referred to the importance of risk-based regulation. The Commissioner also suggested the idea of a phased or tiered approach to oversight.

Stella Manzie expressed the view that the Scottish Government could do more centrally to reduce the risks if oversight was scaled back. She made specific reference to process charts that could be followed.

Another attendee felt that the process was both over-regulated and over-engineered. He also commented that the language was unhelpful in respect of exceptions to the Code. He felt that the term “exception” would be likely to be off putting to civil servants as, in applying for an exception, there was a tacit feeling that you were departing from safe territory – following the Code to the letter – and this was unlikely to be appealing due to the risk-averse nature of civil servants.

The Commissioner suggested that rather than the word, “exceptions” being used, “options” might be used to make it clear that there was flexibility in the system.

One attendee commented that there should be more focus on the outcome of the appointment exercise. In response, the Commissioner referred to the early planning meeting and its intent.

Another attendee commented that the process and the Code were considered very cumbersome and that she would be supportive of a principles-based approach to regulation. This basic framework could be supported by a number of examples of what type of process might be used to appoint board members to different types of public body.

The Commissioner agreed that this approach - using illustrations of what might be possible - was appealing whilst noting that a wholly principles based Code could be difficult to follow and that it would be difficult to assess compliance against such a Code. The Commissioner also referred to the risks involved for a regulator of endorsing such an approach by reference to the Financial Services Authority's work in this area.

One of the attendees felt that the problem with the process was the amount of time that he, as a senior civil servant, had to spend on it. He also noted that, in his experience, the only "professional" on the selection panel was the OCPAS Assessor as neither of the other selection panel members had in depth knowledge or training on recruitment and selection.

He gave an example of having to fill two positions at one time and, whilst accepting that a different person specification for each position was probably what was needed, he'd used a single specification to save time.

The same attendee advised that he had had two different answers to the same question from two different OCPAS Assessors.

Stella Manzie advised that it was wholly appropriate for senior civil servants to expend time and effort on appointments due to their importance.

The Commissioner advised that OCPAS Assessor responses should be based on the particular circumstances in a given case. The principle of proportionality dictated that this would mean that a different answer might be given to the same question if the circumstances required it. The Commissioner also made reference to the OA review form and the importance of senior civil servants completing it honestly, so that any concern about OA advice could be followed up.

Question two: What comments do you have on the proposed new Code principles?

One attendee suggested that under the outcome focussed principle the Code could be more specific about the outcome for the public body.

Another suggested that the Scottish Government should seek feedback from applicants on their experience of the process. At this point, the Commissioner made reference to the possible introduction in the Code of a requirement to operate a customer service charter.

The Commissioner also made reference to a proposal in the draft Code that decisions made about rounds should be based on past experience of what went well and what went less well in previous rounds. There was no apparent dissent over this proposal.

Question three: What is the value of anonymity during the early stages of an appointment round?

One attendee referred to two rounds in which he had participated and noted that during one the Chair had recognised 17 of the 19 applicants from their applications. In this context he felt that anonymity sometimes failed to make sense to people. This is particularly the case when people with specialist skills or knowledge are sought and there is a limited pool of individuals who might apply and who are likely to be known to the selection panel.

Stella Manzie was clear that unconscious bias had an impact on the selection of candidates and that the use of anonymity in the process could ameliorate its effects.

The Commissioner gave background information on the reason for the introduction of anonymity. Applicants from some sections of society had advised that they were discouraged from applying if the process was not anonymised.

Another attendee felt that the risk of removing the anonymity requirement was too high. The risks implied by seeing names outweighed the benefit to the panel given that the only benefit he could think of was the “comfort factor” that some panel members gained from seeing names.

Another noted the value of anonymity. He had been assessing applications and ruled one out as it did not meet the specification. After the shortlisting he discovered that he knew the applicant. He saw the value of anonymity at that point as his decision to rule the application out was clearly based only on the information in their form as opposed to what he might know about the applicant on a personal basis. He felt that anonymity clearly made decisions more defensible.

The Commissioner noted that the decision on whether or not to use an anonymised process could be for the selection panel to make. For example if only a limited number of specialists could apply for a role then it may not make sense to use an anonymised process.

An attendee advised that the OCPA regulated process was looser on anonymity and also allowed ranking, noting that this was applicable to cross-border bodies.

Stella Manzie advised that, if the Commissioner was considering allowing panels to decide in respect of anonymity, there should be a strong “health warning” in the Code setting out what risks were involved for panels choosing to pursue this option.

Question four: Are there any methods you would like to use to replace the interview as the final stage of assessment?

More than one attendee, including Stella Manzie, questioned whether interviews should be set out as the definitive last stage of assessment in the Code.

There appeared to be little or no support for an appointment process that didn't always include some sort of interview.

Stella Manzie set out a range of different assessment methods that she had used in previous roles, particularly to senior positions. These included role plays, stakeholder panel interviews and assessment centres. She noted that for some positions, politicians had assessed candidates as a panel. Stella Manzie noted that people involved in selection in other organisations she had worked with, including elected officials, did not participate in such work without having first been trained to do so. This was not necessarily true of participants in the public appointments process in Scotland.

The Commissioner suggested that the Code could be split to reflect first and second stages of assessment. Stella Manzie suggested instead that the Code might simply refer to assessment and perhaps make reference to a range of options which could be used in any order.

The Commissioner suggested three key stages that could be reflected by the Code:

Publicity
Application
Assessment

This seemed to meet with the approval of attendees.

Question five: Should the summary of the people considered by a selection panel to be appointable be presented to the Minister in a ranked order?

The consensus appeared to be that the current Code is appropriate in respect of ranking. Stella Manzie in particular felt that ranking could represent a constraint on the Minister's ability to choose.

The Commissioner suggested that, at the planning stage of a round, Ministers might be given the option to request a ranked list at the end of a round. There appeared to be no strong views about this as a possible option.

There appeared to be misunderstanding from civil servants as to what it meant for a candidate to be appointable. The Commissioner explained that it was for the selection panel to, "set the bar". This meant that the panel could decide that only candidates who met the specification very closely, as opposed to just meeting it, were appointable. It appeared that many civil servants did not understand that selection panels had this leeway.

Question six: Do you believe you are adequately supported when participating in an appointment round? Do you receive the training you believe necessary? Is there sufficient written guidance? Does the OCPAS Assessor provide useful information on the process and the requirements of the Code? What else could the Scottish Government or OCPAS do to support you?

This question wasn't specifically covered during the discussion due to time constraints. Stella Manzie confirmed that she did believe more central support could be provided by the Scottish Government in future although what form that might take was still to be decided.

Question seven: Would you prefer the OCPAS Assessor to take a more “hands off” approach?

The Commissioner suggested that she was considering a more flexible role for the OA. The Commissioner advised that any change to the role, such that there was a lesser degree of monitoring, would have to be based on the potential risk of non-compliance by directorates whose appointment activity was not overseen to the extent that it currently is by OAs.

One comment from the floor suggested that the Scottish Ministers would be unlikely to support such a change as it would represent the removal of their assurance that the process complied with the Code. This was described as the Ministers’ “bullet-proof vest”.

Stella Manzie suggested that a relaxation in the role could be considered if there were key people from Scottish Government in place in each round who had the skills and knowledge required to make appointments in a Code-compliant way such that the risk of non-compliance was reduced. This led to a brief discussion on accreditation. The Commissioner made reference in this context to the public appointments hallmark that she had considered introducing and its relation to Investors in People accreditation. The consensus seemed to be that, although accreditation per se is not a bad option to consider, OCPAS should not put in place a resource intensive system or one that replaces one overly bureaucratic system with another one.

Question eight: What, in your view, would be the most valuable role for the OCPAS Assessor to take during an appointment round?

One attendee questioned the dual role of the OA. The Commissioner explained that the OAs were recruited and trained to enable during rounds and to facilitate a successful and Code compliant outcome. The Commissioner advised that if the OA had only a regulatory role and did not provide that level of support then the expertise needed to run an effective and Code compliant process would rarely otherwise be represented on the selection panel. Several attendees confirmed that value that the OA added to the appointments process in terms of the knowledge and expertise.

Stella Manzie confirmed that she felt that expertise should be made available during each round from within the Scottish Government rather than relying on the OCPAS Assessor for this input.

One final comment came from the floor. The attendee wished to reiterate how important it was to have an “independent” member of the selection panel. He felt that if OCPAS withdrew the OA from parts of an appointments process, that independent element would be missing and would have to be covered somehow. There may even be an argument that the Scottish Government should itself provide an independent for selection panels in cases where an OA would not be provided.

The Commissioner referred to the original Nolan recommendations and the way in which the OA role had developed in Scotland. The Commissioner also advised that the Committee on Standards in Public Life had been asked to consider the perceived dual aspect of the role of the independent assessor/OA.

