PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Public Appointments (Parliamentary Approval) (Scotland) Bill introduced in the Scottish Parliament on 3 September 2001. It has been prepared by Alex Neil, the member in charge of the Bill, with the assistance of the Parliament’s Non-Executive Bills Unit, in accordance with Rule 9.3.3A of the Parliament’s Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 32–EN.

POLICY OBJECTIVES OF THE BILL

2. The objective of the Bill is to increase the accountability of certain specified agencies and non-departmental public bodies (NDPBs) to the Parliament. The Bill provides that nominations, or recommendations for appointments to specified agencies and NDPBs made by the Scottish Ministers, are subject to the approval of the Parliament.

3. The classification of an NDPB relates to “a body which has a role in the processes of national Government, but is not a Government department or part of one, and which accordingly operates to a greater or lesser extent at arm’s length from Ministers. More simply, this means a national or regional public body, operating independently of Ministers, but for which Ministers are ultimately responsible” (Cabinet Office (2000), NDPBs: A Guide for Departments).

4. In 1995 following expressions of concern about the level of public confidence in the way in which appointments to public bodies were made The Nolan Committee on Standards in Public Life made a series of recommendations. The main weakness in the system of public appointments that the Nolan Committee identified was a lack of external scrutiny. The principal recommendation was that an independent commissioner be appointed.

5. The Office of the Commissioner for Public Appointments (OCPA) was set up in 1995. The role of the OCPA is to ensure that all government departments have systems for public appointments which are visible, fair and open and that all appointments within their remit are made on merit and contribute to the development of strong and balanced boards and public
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bodies. Guidance on appointments was issued in April 1996 by the OCPA and included a code of practice. A revised code of practice was issued in July 2001.

6. An Order in Council was made on 23 November 1995 and amended on 21 July 1998 which lists the public bodies that are subject to the jurisdiction of the Commissioner.¹

7. All but three of the appointments covered by the Bill fall within the remit of the OCPA and are covered by their code of practice. The three exceptions are:

- Scottish Transport Group
- Scottish Advisory Committee on Distinction Awards
- Scottish Law Commission

There is no apparent reason why these bodies should not be under OCPA supervision – they are all public bodies sponsored by the Scottish Executive. It is understood that in practice the OCPA exercises control over these bodies notwithstanding they are not listed in the schedule to the relevant Order in Council.

8. The Bill does not include appointments made or recommended by the Scottish Ministers to bodies that exercise functions of a judicial nature. Those bodies are children’s panels, the Horse Racing Levy Appeal Tribunal for Scotland and the Rent Assessment Panel for Scotland. The Independent Judicial Appointments Committee would more appropriately cover each of these latter bodies.

9. Under the Bill, nominations as “convener” to a body require a compulsory hearing to be held. The requirement to have a hearing will only cover cases where the establishing Act expressly provides that the Scottish Ministers are required to nominate or recommend the convener. In some cases the establishing Act simply provides that the convener must be one of the members that is appointed or recommended by the Scottish Ministers – for example, the Board of Trustees for the National Library of Scotland, where the convener must be one of the five members appointed by the Queen on the recommendation of the Scottish Ministers. Other Acts do not set out the basis on which the convener is appointed. The Bill does not require a compulsory hearing for either of these types of case.

10. Other nominations as board members will require a hearing at the discretion of the Parliament. In most cases the nomination may be confirmed without a hearing being held.

11. In considering whether or not to approve or reject the nomination the Parliament under the Bill must only have regard to:

- the procedure that has been followed by the Scottish Ministers;
- any statutory requirements for the appointment (for example, the Parole Board for Scotland requires one person appointed to be a registered medical practitioner who is a psychiatrist);

¹ Copies of the Orders are available from the Privy Council Office at 68 Whitehall, London, SW1A 2AT.
• the suitability of the nominee for the post having regard to their abilities, qualifications and experience; and
• any guidance or code of practice that is applicable to the appointment (this is intended to cover the Commissioner’s Guidance and Code of Practice for Public Appointments and any replacements that there may be).

12. The Scottish Ministers will be required to provide information about these matters and a statement concerning the suitability of the nominee when submitting nominations for approval to the Parliament. The Bill enables the Parliament to request further information on these matters if the information submitted is insufficient to enable it to make a decision.

13. Thus the Bill does not allow open-ended and intrusive questioning of nominees into matters that are not related to their ability or qualification for the post in question.

14. Standing orders of the Parliament will be able to make provision for the procedure that is to be followed by the Parliament when considering the nomination. Standing orders may allocate the consideration of applications to the relevant committee: that is a matter for the Parliament to decide. For non-convener appointments the Parliament may decide to hold a hearing on the nomination. The procedure at a hearing is of course a matter for the Parliament, although it is envisaged that where a hearing is held the nominee would be interviewed and the Parliament might also interview other persons, e.g. the relevant Minister, as it deems necessary.

15. An area of possible concern which emerged during preparation of the Bill arising from research into the experience of other jurisdictions, particularly the United States Senate, was that of delays in appointments being approved. The Parliament is to have a period of 28 days to consider nominations. If the Parliament has not approved or rejected the nominations within that period subject to the following exception the nomination will be regarded as approved.

16. The Bill enables there to be one extension to the initial 28-day period (up to a maximum of a further 28 days). Standing orders will make provision for the circumstances in which extensions are to be sought.

17. The Bill makes it clear that no further extensions are permitted.

18. It is not anticipated that the Parliament or a committee would require to extend the 28-day limit frequently.

19. In calculating either period of 28 days, no account will be taken of any time during which the Parliament is in recess for more than four days. The extension of the 28-day period during recess will not prevent the Parliament or a committee from considering a nomination during recess if, for example, a committee happened to be meeting on other business. A committee could also be called to sit should any emergency situation arise requiring appointment to be made quickly e.g. as may have happened during the problems at the Scottish Qualifications Authority when the Chairman resigned.
20. If the Parliament approves the nomination or recommendation the Scottish Ministers may proceed to make the appointment or recommendation.

21. If the Parliament rejects the nomination or recommendation the Scottish Ministers will not be able to proceed. They will require to submit a fresh nomination or recommendation for the particular post for consideration by the Parliament. For the purposes of the fresh nomination or recommendation, the Scottish Ministers will not be able to nominate or recommend the candidate that has been rejected unless the Parliament gives permission at the rejection stage. The Parliament might for example be content to accept the same nominee if its concerns about the appointment were based around procedural considerations rather than concerns about the nominee’s suitability for the job. The Parliament will require to give reasons when it rejects a nomination.

IMPLEMENTATION

22. The Bill specifies a commencement date as the date six months after Royal Assent. This period is such as to allow for both the Scottish Executive and the Parliament to put into place the required structures, staff and resources. In the case of the Parliament there will be a need for standing orders to be prepared and agreed specifying details of how nominations will be handled.

ALTERNATIVE APPROACHES

23. In the majority of European member states the legislature has no power to approve nominations, for example France, Belgium, Denmark, the Netherlands and Portugal. In Greece the legislature has the power to express an opinion on an appointment but not to approve it. In Germany the Bundestag does have the power to approve the budget for public appointments but it has no right of veto on appointments.

24. The European Parliament has seen its role in public appointments develop over the years. It now has the power to approve and conduct confirmation hearings for nominations to the Commission. It also has the right to be consulted over nominations to certain EU institutions such as the European Central Bank.

25. In Australia there is no role for the legislature in public appointments and it does not have the power to veto an appointment. Concerns regarding public appointments can however be raised during Question Time. In New Zealand the legislature does not have a role in the process as such. However, the State Services Commission forms part of a panel that recommends the appointment of chief executives to public services departments. The recommendation made by the panel is referred to the Cabinet who can approve or reject the recommendation.

26. In Nova Scotia the Human Resources Committee approves nominated candidates to agencies, boards and commissions where the nomination is made by the Governor General. It holds confirmation hearings for nominees when it thinks it is necessary. The Committee’s power is restricted to approving or not naming the candidate; it cannot nominate alternatives.
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27. At Westminster the House of Commons Select Committee on Liaison’s First Report 1999-2000, *Shifting the Balance: Select Committees and the Executive* (HC 300, March 2000) endorses the practice adopted by some select committees of holding confirmation hearings. The committee indicates it will be seeking statutory acknowledgement of this process (paragraph 24).

28. In the United States the Senate, by means of Article II, section 2 of the United States Constitution, is required to scrutinise and confirm nominations made by the President for federal judicial posts, Public Health Services posts and appointments to the Executive Branch. There are two methods of Senate consideration depending upon the type of appointment.

29. In the first, for example in relation to judicial appointments and appointments to independent agencies, the process sees the nomination with relevant background papers being referred to a Senate committee. The committee scrutinises the nominee by looking at background, suitability for the post, financial situation and likely influence. A hearing takes place at which the nominee testifies under oath in open session. The committee reports in relation to the nominee and the Senate thereafter considers and confirms in appropriate cases.

30. The second method is used in relation to large numbers of routine nominations, for example military posts. In these cases the Senate approves lists of nominees without investigation.

31. Criticisms have been directed at the Senate system. It takes lengthy periods to confirm appointments, the average being 99.5 days. There is no time limit imposed on the committee to action the nomination. The other controversial aspect of the Senate system is the inquisitorial nature of the hearings and intrusive type of investigations held into the nominees. This is said to deter people from putting their names forward for nomination.

32. This Bill adopts the best features of the US system while including safeguards against the areas subject to most criticism. The Bill further brings the system for making public appointments more in line with the European Parliament and adopts the thrust of the Liaison Committee report in advance of any consideration by the UK Parliament. The Bill increases the accountability of NDPBs to the Parliament in line with the publication *NDPBs: A Guide for Departments* (pages 5-6) produced by the Cabinet Office.

**CONSULTATION**

33. The consultation paper prepared by the Scottish Executive, *Appointments to Public Bodies in Scotland: Modernising the System*, issued in February 2000, sought to initiate “wide-ranging public debate” while looking for comment on a number of possible changes to the procedures for making appointments to public bodies in Scotland. Copies of the consultation document were sent to all NDPBs and other public bodies as well as being publicly available. 120 replies were received, including 50 from NDPBs and other public bodies or individual members of the boards of such bodies.

34. Chapter 7 of the paper concentrated on the role of the Scottish Parliament. That chapter sought responses to four questions:
• How do you think the Parliament should monitor and review public appointments made by the Scottish Ministers?
• Do you think that Parliament’s role should vary according to the type of NDPB, the functions it carries out, or the size of the budget to which the appointment is made?
• What role, if any, do you think the Parliament should play in the appointment process before the Executive makes the final decision?
• Do you believe that there would be merit in the Executive and Parliament developing proposals for post-appointment hearings along the line described in the Chapter?

35. Of these questions the third is directly relevant to the subject matter of the Bill.

36. The discussion and subsequent consultation in Chapter 7 seeks views based upon a preferred approach, one which highlights perceived drawbacks of involving the Parliament in pre-appointment procedure. That chapter presents only a single viewpoint and doesn’t include any factual or other material to support the approach. In particular the Executive states that it:

“does not believe that it would be appropriate to import anything resembling the highly confrontational Parliamentary confirmation hearings that operate in some countries. They believe that the introduction of a confirmation system could deter many able candidates from applying for high profile public service (para 7.4).”

37. In summing up the chapter it is stated:

“In forming your views on the extent, if any, to which the Parliament should be involved you may wish to consider the impact which any proposals might have on securing sufficient numbers of suitable candidates for some posts. As indicated above, it is possible that excessive Parliamentary scrutiny might have a deterrent effect on the number of candidates coming forward. It might also be perceived as extending politicisation of the appointments process. The Executive believe that every effort should continue to be made to ensure that the appointments process remains politically neutral.”

38. Reference is made in the consultation paper to ongoing research. This was issued as a supplementary research paper and was made available to consultees towards the end of the consultation period. The paper highlights that there are “two significant examples of Parliamentary involvement” in other jurisdictions; however one of them, the US Senate, is not subsequently covered within the research paper. There is no evidence put forward in the research report to support the drawbacks highlighted in Chapter 7.

39. In reply to question 3, forty-five respondents agree with the Executive’s approach. A number of those repeat verbatim text from the Chapter; none produces or points to any evidence that supports their propositions. The member has noted that 22 respondents suggest that the Parliament should have a role in the pre-appointment process.

40. Overall only slightly more than one third of respondents (45 out of 120) support the Executive’s preferred approach while almost half of the respondents (58) agree with question 1 that the Parliament should have a role in monitoring and reviewing public appointments.
41. In relation to the content of consultations issued by government the Cabinet Office issued a code of practice on written consultation that applies to government consultation documents issued after 1 January 2001. At Criterion 3, paragraph 5 it states

“Documents should however set out the main information and competing arguments relevant to a decision, or say where they can be found. Significant sources of information and opinion outside government should be quoted if relevant, whether they support the Government's views or not. Accounts of EU and overseas law and practice, and other background materials such as legal texts proposed for amendment, might be included or put on an associated website, if they help illuminate the questions.”

42. For all of the foregoing reasons the member does not consider that the results of the consultation undertaken by the Executive support a view contrary to the policy which the Bill seeks to implement.

EXECUTIVE REVIEW OF PUBLIC BODIES

43. In June 2001 the Executive published the results of their review into public bodies. That review potentially affects the Bill in the following three ways:

- Abolition or altering of some bodies
- Creation of a Scottish Commissioner for Public Appointments
- Revised reporting arrangements to the Scottish Parliament

Abolition or altering of some bodies

44. The report proposes to declassify a number of bodies, to abolish some others and to alter the status of others to Executive Agencies. Many of the proposals for abolition had been earlier announced to come into effect at future dates; some require primary legislation. In a number of cases the change does not affect the power of the Scottish Ministers to appoint the convener or members. Where the abolition is to be a total one this Bill provides a mechanism for the body to be removed from the schedule by subordinate legislation.

Creation of a Scottish Commissioner for Public Appointments

45. The creation of a Scottish Commissioner for Public Appointments follows from the February 2000 consultation Modernising Public Appointments where there was “overwhelming support” for the creation of such a post. The Scottish Commissioner will replace the UK Commissioner for Public Appointments at some time in the future when legislative time permits. Paragraph 34 of the June 2001 report sets out in broad terms the role of the Scottish Commissioner. That role only differs slightly from that of the UK Commissioner which is summarised at paragraph 5 above. The main addition is that of an annual report to the Scottish Parliament on public appointments.
46. It is noteworthy that the Executive’s estimate of the cost of creating this new position is given as £200,000. That cost exceeds the cost of the proposals under this Bill.

**Revised reporting arrangements to the Scottish Parliament**

47. Paragraphs 23 to 26 of the June 2001 report detail how the Executive is responding to the earlier consultation questions regarding the role of the Scottish Parliament in relation to public bodies. The results of the consultation are interpreted differently by the Scottish Executive to the interpretation given above with the Executive concluding there is no need for a role in pre-appointment scrutiny for the Scottish Parliament. The only proposal in the June 2001 report affecting the Parliament is the submission of an annual report by the new Scottish Commissioner for Public Appointments.

48. Overall it is clear that the proposals outlined by the Scottish Executive in its June 2001 report, while welcome, do not affect the basic policy underlying this Bill that the Scottish Parliament should play an active role in monitoring appointments to public bodies before they are made.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

49. The main ECHR issue which appears to arise in the Bill is whether in the approval procedure the Parliament is determining the “civil rights and obligations” of that person. If so, then Article 6.1 of the Convention applies and the person would be “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The Bill procedures do not always envisage a hearing to consider the nomination. However, it is considered that the approval procedures will not involve the determination of “civil rights and obligations”. Recruitment to a public post is not a “civil right” for the purpose of that article (see for example *Pellegrin v. France*, 8 December 1999). The Parliamentary procedure and decision would however be subject to judicial review.

50. Other articles of the Convention apply to the Parliament when exercising its powers under the Bill e.g. Article 8 (the right to respect for private and family life), Article 9 (Freedom of thought, conscience and religion) and Article 10 (freedom of expression). There is nothing unique or special about this Bill which would place the Parliament in contravention of any of these Articles.

51. It is noted that other Parliaments within the European Union whose countries are signatories to the Convention, including in particular the European Parliament itself, operate similar procedures without challenge. The position in other Parliaments is discussed in the Executive’s subsequent consultation paper *The Role of Legislatures in the Public Appointments Process*.

52. The Bill will have no adverse impact on equal opportunities, which Government Departments and Ministers are required to take account of in the selection process. The
availability of a role for the Parliament could enhance equal opportunity consideration during the selection process.

53. In a similar way the Bill will have no adverse effect on island communities, local government or sustainable development.
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