**UCL Constitution Unit seminar**

**Public Appointments: should Ministers have more control?**

**By Sir David Normington, former Commissioner for Public Appointments**

## Introduction

Ministers make on average over 2,000 appointments each year to boards of about 300 public bodies and statutory offices. At least that is the number of appointments regulated by the Commissioner for Public Appointments. The bodies touch every aspect of our lives. They include regulators like the boards of Ofcom and Ofwat; inspectors, like the Chief Inspectors of Schools, Police, Probation and Prisons; funders like the Art Council and the Big Lottery Fund; advisory bodies like the Committee on Climate Change; plus a multitude of executive bodies, like NHS trusts, national parks, museums and galleries.

It matters who fills these roles. Board members need to be skilled and competent and to have excellent judgment. The boards themselves need to comprise well functioning teams of people from diverse backgrounds who can command public confidence and act in the public interest.

These are, however, Ministerial Appointments and in a democracy it is right that Ministers should have a substantial say in who is appointed. And it is essential that those appointed are willing to work within, and not against, the framework of the policy that the Government of the day has set down.

The question at the centre of today's seminar is where to strike the balance between Ministers' right to appoint and independent oversight and regulation. Think of it as a spectrum. At one end Ministers have almost complete freedom to make appointments as they think fit. At the other, appointments are handed over to an independent body and Ministers forego their powers to appoint altogether. Over nearly 30 years policy and practice has flowed to and fro across this spectrum; and so have the arguments about where to draw the line.

My aim today is to illuminate the ebb and flow of the debate over 25 years and to provide a context for considering the present Government's intention to shift the balance back towards Ministerial control. I should stress perhaps that My comments today are solely about appointments to arms length bodies and not to the Civil Service, which is the subject of separate regulatory arrangements.

## Before 1995

Before 1995 there was no formal system of regulation of public appointments, so Ministers could do pretty much as they wanted. There was Cabinet Office guidance on good practice; and a modicum of public scrutiny. However, as a civil servant in Whitehall at the time, my recollection is that important appointments were often made by informal processes; or no process at all. Some appointments were undoubtedly made on the basis of personal or political patronage. That does not

mean the people appointed were incompetent: but, whether they were the best people for the job in terms of their skills and experience, no one knew or, it seemed, cared. I have no recollection of Parliament expecting to scrutinise such appointments.

**The Nolan Committee**

The first report of the Committee on Standards in Public Life in 1995 changed all this. The early 1990s had seen increased media scrutiny of MPs and Ministers and an increasing number of alleged and actual financial and sexual improprieties. There was a popular narrative about declining standards in public life. The word " sleaze" was in common parlance.

In response the Prime Minister, John Major, set up the Committee on Standards in Public Life under Lord Nolan, a judge of impeccable credentials. He was asked to report within six months on how standards in public life could be improved. The Nolan Committee report is a landmark report in establishing the basic principles for conduct in public life.

The Committee chose to concentrate on the three issues, which it judged were causing most public disquiet. One of these was, what it called, "executive Quangos and NHS bodies". A substantial section was devoted to how the boards of these public bodies were appointed.

The Committee did not find conclusively that there was chronic cronyism in Ministerial appointments. But in a rather elegant swerve, perhaps to avoid direct criticism of the Government, it concluded, that, whatever the reality, the public believed that appointments were made on the basis of political and personal allegiance to the Government of the day. And, said the Committee, such was the informality and opaqueness of the public appointments process that it was impossible to allay public concerns.

So the Nolan Committee recommended

- first, that merit should be the overriding principle to be applied in all public appointments
- secondly, candidates applying for public appointments should be impartially assessed by a panel with an independent element in its membership; and
- thirdly, there should be an independent Commissioner for Public Appointments with the power to "regulate, monitor and report on" public appointments.

The Committee was clear that Ministers should have the final say over who was appointed. But it was the Commissioner's job to set down the required standards in a Code of Practice. Ministers, it said, should only appoint people assessed as suitable by a selection panel and would need to justify publicly any departures from the best practice set down by the Commissioner.

These recommendations were accepted in their entirety by the Government. They were enacted through an Order in Council and have formed the regulatory framework governing public appointments ever since.

Many things improved as a result: greater transparency; candidates properly assessed and improved quality in those appointed; low levels of appointees declaring that they were politically active; and improvements, but very slowly, in the diversity of candidates.

Public scepticism about the fairness and integrity of the process has, however, remained. The Nolan Committee did not take Ministers out of the process altogether and deliberately sought to strike a balance between their freedom to appoint and independent oversight. When, as Commissioner for Public Appointments, I came to revise the Code of Practice in 2011 the substantial powers of Ministers were well established and accepted. Ministers were able to agree the job description and person specification for each role, to approve the panel composition and to comment on the long and short listed candidates. Selection panels were required, if possible, to give Ministers two or more appointable candidates from which they were free to make their choice. The Code emphasised that it was acceptable to appoint someone who was politically active, as long as they had first passed a panel's test of merit and suitability.

This balanced settlement is still in place today and it is working well. It reflects the reality that Ministers are accountable for these bodies and must be confident in who is appointed to lead them. I have never supported shutting Ministers out of the process.

Not everyone agrees. There were many submissions to the Nolan Committee arguing for appointments to be handed over to an independent appointing body. At least one previous Commissioner argued this to the Committee on Standards in Public Life in 2004. We also have one example of Ministers being taken out of the process altogether. This was under the Blair Government which, after it was accused of packing NHS trust boards with its political supporters, set up an NHS appointments commission to make NHS trust appointments with no Ministerial involvement at all.

This was reversed by the Coalition Government and never caught on. For the rest of appointments the Nolan argument that the democratic Government should retain substantial influence and have the final say has always won out. While I believe that to be right, it comes at a price in terms of continuing public scepticism about the integrity of the process. It only takes one high profile controversial appointment of a Government supporter to undermine public confidence in the system.

**The Cameron Government**

Of course, all regulatory systems depend on a degree of restraint and self-regulation by those it regulates. There have always been occasions over 20 years when individual ministers have pushed at the boundaries of the system in order to get their favoured candidates appointed. All Commissioners have from time to time

pushed back, warned and drawn lines. But overall the Nolan system has worked in striking a successful balance.

In 2012 something changed. The Prime Minister, David Cameron, with the support of some Cabinet colleagues and the then Minister for the Cabinet Office, Francis Maude, decided to take a much more activist approach to public appointments. An adviser on public appointments with a Conservative background was appointed to No. 10. New guidance was issued encouraging Secretaries of State to be much more involved at every stage of competitions, including scrutinising shortlists. The Minister for the Cabinet Office held regular meetings to scrutinise progress and intervene if he considered shortlists unsuitable. There was anecdotal evidence that candidates' political allegiances were being researched.

It is important to say that the vast majority of appointments are uncontroversial and were unaffected by this new activism. Many Ministers also continued to focus on getting the best people irrespective of political allegiance. But over the following three years there was an upsurge in Ministerial activism. It took several forms: objecting to the composition of panels; putting pressure on civil servants on panels to support the Minister's candidates; insisting that Conservative supporters should sit on panels, even sometimes as the independent member; demanding that panels put their favoured candidates on shortlists or even on the final list of appointable candidates; and refusing to appoint for weeks, even months, when the panel had not recommended their favoured candidate.

One of the changes I had made in 2011 was to require that in all appointments of board chairs and of significant statutory office holders, the panel chairman should be appointed by the Public Appointments Commissioner from a list of independent public appointments assessors. This was specifically designed to strengthen the independent scrutiny of high profile appointments. The assessors were generally of high quality and continue to do an excellent job. It was perhaps inevitable, therefore, that they became a particular focus of criticism, when Ministers could not get their way. There were increasing attacks on their judgements and regular demands from the Minister for the Cabinet Office and his advisers that I should change my Code to allow Ministers much more control.

I think this new activism had two sources. First, the Conservative part of the Coalition Government believed that the Labour Government had used its 13 years in power to fill public bodies with supporters and sympathisers and that it was time to reverse this trend. There is very little hard evidence of this but it was a deeply held view.

Secondly, there was also a strong view from the Prime Minister and his closest allies that an elected Government must be free to decide who to appoint. It was said to me by Ministers that it was not for an unelected office holder to stand in the way of the democratically elected Government. This, of course, conveniently ignores the fact that an elected Government had set up the regulatory system in the first place in response to public disquiet; and appointed me to provide independent oversight of the Government's actions and to speak out when I saw abuses. I never challenged the

Government for the sake of it. I did it in private, whenever I could. But I did think it important to do the job I was charged to do by the Government's Order in Council.

**The Grimstone review**

The Government became convinced that the whole balance needed to change. So just before the 2015 election the Minister for the Cabinet Office announced the Government's intention to set up an independent review of the public appointments system and the role of the Commissioner. Sir Gerry Grimstone, the chairman of Standard Life and now also deputy chair of Barclays, was appointed to carry it out.

Sir Gerry reported before Christmas 2015; and after a three month silence the Government finally published his report in March 2015, two weeks before the end of my statutory term of office. It was to say the least disappointing from my perspective. On the basis of little analysis and even less argument, it proposed a dismantling of the Nolan system of regulation that had been in place since 1995 and a decisive shift back along that spectrum to Ministerial control over public appointments. The Government accepted the report and committed itself to implement the recommendations.

Sir Gerry's report was, of course, not all bad. In particular he proposed for new levels of transparency to enable everyone to see and scrutinise the progress of a competition in real time. On the central issue of Ministerial control, he argued that he had retained a robust regulatory framework. But it is hard to square that with the actual contents of the report. To take five examples.

First, he proposed that the power to draw up the Code of Practice and, therefore, to set the rules should be transferred from the Commissioner to the Government. A clear and, in my view, a disastrous reversal of what Nolan recommended.

Secondly, the selection panels, now to be called advisory panels, are to lose any semblance of independence. They are to be chaired by Government nominees. The Commissioner's Public Appointments Assessors who currently act as independent chairs of panels for significant appointments are abolished. The report puts a lot of stress on new senior independent panel members, who are to sit on panels for every significant appointment. The problem is that these are to be appointed, not by the Commissioner, but by the Minister.

Thirdly, Ministers are to be allowed to appoint candidates who have been assessed as not appointable by the selection panel, although they will have to explain their decision publicly.

Fourthly, Ministers may decide to dispense with a competition altogether and just make an appointment. The present requirement that in such cases they should seek the explicit approval of the Commissioner for an exemption is abolished.

Finally, almost all the current powers of the Commissioner are to be removed. He continues to have the power to monitor and report annually, although the report

casts doubt on his ability to have independent monitoring capacity. He has the right to be notified, but not consulted, about panel composition. He will be told, but again not consulted, when Ministers decide to appoint an unappointable candidate or to appoint without a competition. This can only mean that he is consigned to speaking up after the event, rather than before it has taken place.

Both Sir Gerry and the former Cabinet Office Minister have both claimed that the report builds on the "valuable" work I did as Commissioner during my term of office. So let me be clear, on the record, that it does no such thing. It undermines and dismantles almost everything that I and my three predecessors as Commissioner have sought to do in the public interest.

I don't expect you just to take my word for it. This is what the Public Administration and Constitutional Committee (with its Conservative majority) concluded in its own report on the Grimstone Review:

**" We have received evidence of widespread disquiet about Sir Gerry's proposals. Although the Government has adopted them, it should think again**."

"**We do not question the merits of holding a review of the public appointments process, but this review should have aimed to reinforce the changes made by Sir David Normington. Instead, the Grimstone review threatens to undermine the entire basis of independent appointments…. it effectively demolishes the safeguards built up by Lord Nolan. The Government's adoption of the Grimstone proposals is very worrying. The Government must make significant changes to the proposals in order to robustly deliver a public appointments process in which the public can have confidence.**"

We wait to see how the Government will respond. Despite the Committee's finding that the review "**threatens to undermine the entire basis of independent appointments and … demolishes the safeguards built up by Lord Nolan",** the Order in Council, which does not require Parliamentary approval, has already been changed to give the Government the power to draw up a code of practice and to remove most of the current powers of the Commissioner. We still await the Code itself.

## Conclusion

Before I finish I want to draw four broader conclusions from what is a dispiriting saga about how Government can operate.

First, it is a frustrating that there have been 21 months from the announcement of the Grimstone review to today; and we still do not have a finalised Code. In my last two years as Commissioner and in the nine months since, a lot of time and resource has been wasted on issues and arguments that did not need this degree of attention. Nothing will be improved as a result unless you are one of those who believes Ministers should have more freedom to do as they wish. Meanwhile the real problems of the public appointments system – long drawn out, badly run

competitions, lack of ethnic minority diversity in shortlists, an overall shortage of really good candidates – go unaddressed.

Secondly, elected Governments are entitled, of course, to set the framework of oversight and regulation for public appointments or, indeed, to decide not to have regulation at all. The problem at the moment is that they can do so by executive action through an Order in Council. There is no requirement for Parliamentary approval and therefore no effective check on what the Government wants to do. It also makes for a very weak regulator because, as Commissioner, you are only too aware that if you cross the Government too often, it can amend the rules by a stroke of the royal pen. This is obviously not going to change any time soon. But it is not acceptable.

Thirdly, if the Grimstone review is implemented, then the case for extending Select Committee scrutiny of individual appointments becomes unanswerable. At present such pre appointment scrutiny, as it is known, is limited to a list of appointments agreed with the Government, which contains mainly regulators, inspectors and others where independence from the executive is a requirement of the job. If the Commissioner's scrutiny is to be weakened, pre appointment scrutiny may need to be extended to all significant appointments.

Having said that, experience of such scrutiny is mixed. Select Committee hearings are not well suited to a rounded assessment of the candidate; and public hearings can favour those who already have experience of such occasions. In future Select Committees may need to spend more time scrutinising the processes by which a particular candidate was chosen and reinforcing the powers of the Commissioner to speak out, when he believes there is an abuse of the Code. The more they go in for high profile grilling of candidates, the more good candidates may be put off from applying.

Finally, my greatest disappointment about the last few years is that the original reason for independent oversight of public appointments has been lost sight of. The Nolan Committee's proposals were, as I described, designed to rebuild public confidence in the integrity of public appointments. That was the explicit purpose of establishing an independent Commissioner. Every time a Government takes a step back from the Nolan settlement; every time a Minister seeks to subvert a process by packing a selection panel or ignoring the outcome of an independent assessment; every time someone is appointed for reasons of political allegiance rather than merit: then public cynicism that personal and political allegiance is the determining factor in public appointments grows. That puts off people from applying: we know, it has a disproportionate effect on minorities, who assume public appointments are not for them. There is a carelessness with public attitudes which undermines public confidence in the political process. The latest IPSOS Mori veracity index shows public trust at 15 % for politicians and 20% for Government Ministers, figures which have certainly not improved since Nolan made his recommendations. PACAC in its report clearly understood the public confidence issue. Sadly, the Grimstone report and those who support it do not.

There are some grounds for optimism. Unless the Government is remarkably cloth eared, it is, I think, likely that, given the universal criticism it has faced, it will move at least a little bit back down that spectrum away from the full Grimstone proposals.

It has appointed as the new Public Appointments Commissioner, Peter Riddell, a person of great integrity and independence. He assured the Select Committee that he would stand up for independent scrutiny. We know from his October annual report that he has been arguing with the Government for an increase in the powers of the Commissioner. This includes the right to be consulted, not simply notified, on the appointment of senior independent members and on exemptions from the Code.

These concessions would still be within a framework in which Ministers are free to ignore their own rules and to overrule the recommendations of appointments panels. But if these changes can be achieved, they will be important steps in the right direction. If, in addition, the Commissioner, using improved transparency arrangements, is prepared to speak out and report to the relevant Select Committee when he sees abuses, we may begin to see the first steps in rebuilding an effective system of oversight. In a strange way the Government may made it more likely that it will be challenged publicly by the Commissioner because public reporting is one of the few powers left to him. We will see how the Government responds, when it is next challenged.

A lot will depend, as Peter Riddell acknowledges in his annual report, not on the exact wording of the Code, but on the spirit in which it is interpreted by Ministers and Departments. “A fair and open system will work”, he says “if everyone involved wants it to work that way.” Recent history, I am afraid, is not very encouraging on this score. But there have been many changes in Ministerial responsibilities since the Grimstone report and we now have a Prime Minister who, as Home Secretary, was generally a respecter of the rules on public appointments and on the whole wanted public appointments to be made on merit on the advice of independently chaired panels. She may, of course be rather too busy to spend time on this subject but let us hope that in her new role she continues to set the example.

Whatever happens, this is likely to be my last public comment on this subject. It is time to let Peter Riddell fight the good fight. I am grateful to the Constitution Unit for providing me this opportunity to put my views on the record.

Sir David Normington
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