



Office of the Commissioner for Public Appointments in Scotland

1. Thank you for the opportunity to comment on the Scottish Government's proposals for a Local Healthcare Bill. Our comments will be restricted to those matters which are directly relevant to the work of the Commissioner for Public Appointments in Scotland ('the Commissioner') and her Office.

Background to our response

2. The Office of the Commissioner for Public Appointments in Scotland (OCPAS) was established under the Public Appointments and Public Bodies etc (Scotland) Act 2003 to regulate the process used for appointing people to the boards of many of Scotland's public bodies, including territorial NHS boards.
3. Appointments to these bodies are made by Scottish Ministers, who rely on a selection panel to identify and recommend to them suitable candidates for appointment. The process followed by the selection panel is open and transparent. It ensures that only people with appropriate skills, knowledge and experience are recommended to Ministers. All vacancies are publicised and people who wish to be considered must submit an application and be assessed against the skills, knowledge and personal qualities required for the role in question. Every application is handled in the same way, to ensure equality of opportunity for all. Thus, the people of Scotland can be reassured that the individuals selected to run our public bodies, including our NHS boards, are people with relevant experience and expertise who have been appointed on merit.
4. The Commissioner's vision for the public appointments process is to contribute to the delivery of effective public services by ensuring that Ministers are provided with a choice of quality candidates for each board appointment. In November 2007, under the terms of the Public Appointments and Public Bodies etc (Scotland) Act 2003, the Commissioner published for consultation the first equal opportunities strategy for public appointments in Scotland. A summary of the recommendations in the strategy is attached as Annex A. The consultation document containing the full strategy can be found at www.publicappointments.org/consultations/documents/DiversityDeliverablesConsultationNov2007FINAL.PDF.

During the recent consultation, the proposed strategy received strong support from the Scottish Parliament and Scottish Government, as well as a very positive response from a wider public consultation which closed in March 2008. The final strategy is now being prepared by the Commissioner and will be launched later this year.

5. As outlined in the strategy, the Commissioner is committed to encouraging greater and more diverse participation in the governance of our public bodies and in ensuring the highest standards of governance on these boards. **The Commissioner therefore welcomes the Scottish Government's commitment in the Local Healthcare Bill consultation paper to promoting effective governance in public bodies - including the NHS - through greater public and community participation.**

Consultation questions

As stated above, our comments will be restricted to the questions that are directly relevant to the work of OCPAS.

Section 1 – Making things better

Question 3 – Would the appointment of more lay members to NHS boards – perhaps to directly represent patients or other groups – help achieve the aim [of better engaging and involving local communities] How might this be achieved?

Should this option be pursued, the public appointments process could be used to find suitable candidates for these additional 'representative posts'. The person specifications for these posts could be tailored to reflect the particular skills, knowledge and personal qualities required, for example, first-hand knowledge of local health services from a patient's perspective. Care would need to be taken to avoid narrowing the field of potential applicants unnecessarily, for example, by also requiring a patient's representative to have prior experience of corporate governance or complex financial management where these skills were already adequately represented on the board.

At the moment, the vast majority of people are not aware of public bodies, their work and the role of their boards, so it is not surprising that few people currently apply for positions on these boards. Our research has shown that the advertisements currently used for these positions have very limited appeal. The appointments process focuses on experience in a similar role and there are no obvious routes to develop future board members. However, as the recommendations in our equal opportunities strategy begin to be implemented, these problems will be addressed and should lead to

- increased awareness of, and interest in, public bodies and the work of their boards

- increased awareness of, and confidence in, the appointments process
- better support and development for both current board members and the board members of the future.

These improvements should in turn lead to an increase in the number and diversity of people applying for appointments to NHS boards and other public bodies. Hence, over the coming years, we hope that the existing public appointments process will become a much more inclusive and well-known route for sourcing potential board members for our public bodies.

Section 2 – A new approach

Question 9 – What eligibility criteria should candidates meet? (e.g. Should they be resident in the board area? Should there be any other qualifications?)

In terms of residence in the area, whether this should be included as a criterion for eligibility will depend on what the elected members are required to bring to the board.

Research has shown that certain core skills are essential for all non-executive board members. The Higgs Report¹ identified the following four personal attributes as being required of an effective non-executive director in the private sector:

- integrity and high ethical standards
- sound judgment
- the ability and willingness to challenge and probe
- strong interpersonal skills.

As outlined in the Commissioner's equal opportunities strategy, these attributes are equally important for a non-executive on the board of a public body. They are attributes that could have been developed and demonstrated in any number of ways by people from a wide variety of backgrounds, but they encapsulate the qualities required to fulfil the non-executive role effectively.

Additional criteria may be important for specific roles, for example, if the board needed input from a service users' perspective, or knowledge of the health needs of a particular community. When assessing the essential attributes for each particular role it would be important to look at the balance of skills and knowledge across the board as a whole, in order to identify any areas which needed strengthening. In this way, the public, and Scottish Ministers could be assured that at any time the board would have the full breadth of skills and

¹ Higgs, Derek (2003) The Role and Effectiveness of Non-Executive Directors

knowledge it needed to fulfil all its functions, without being over-represented in certain skills areas and under-represented in others.

In order to have the necessary control over the skills balance of the board, the Commissioner believes it is necessary to continue using the public appointments process to appoint a number of the non-executive members of each board. In this way, applicants could be sought who had the particular skills needed by the board at a given time, an act which may not be achieved through a normal election process. Alternatively, a modified election process could be used - at least for some posts - where candidates were required to demonstrate certain essential skills in order to be shortlisted, with the shortlisted candidates then standing for election by the public.

Question 10 – How could equality and diversity of candidates be promoted?

Research for the Commissioner's equal opportunities strategy identified a strong relationship between diversity at board level and the effectiveness of the board.²

As outlined above, once it is launched later this year the strategy should start to address many of the barriers to equality and diversity that exist in the system currently used for appointing NHS (and other) board members. The Commissioner does not envisage any conflict or tension between direct elections to health boards and the public appointments process, however, she recognises that the introduction of elected members will have an effect on the diversity of the board as a whole.

The Commissioner broadly welcomes the concept of encouraging a broader cross-section of the public to participate on the boards of public bodies, through elections for territorial NHS boards. She is concerned, however, that in practice candidates from some minority groups may find it more difficult to gain the widespread support they need to be elected by a majority. This view is borne out by the Scottish Government's own research into the attitudes of the Scottish people to various minority groups, which shows that a significant minority in Scotland holds discriminatory attitudes to certain groups in our society.³

While measures could be taken to encourage candidates from a variety of backgrounds to stand for election, in reality, the election process is likely to favour those who have the time, money (for example, because of loss of earnings), confidence, physical stamina and administrative support to mount an election campaign, in addition to the commitment needed to take up the role once elected. The Commissioner is concerned that this may discourage

² See Diversity Delivers – The proposed strategy for enhancing equal opportunities in public appointments in Scotland, Section Three – Does Diversity Deliver?
www.publicappointments.org/consultations/documents/DiversityDeliversConsultationNov2007_FINAL_PDF_000.pdf

³ Attitudes to Discrimination in Scotland 2006, published December 2007
<http://www.scotland.gov.uk/Publications/2007/12/04093619/0>

many people from standing for election, including, for example, people with certain disabilities, people with caring responsibilities or people with less flexible working patterns. She therefore considers that relying too heavily on elected members may not bring the desired diversity of board membership. It would be preferable to maintain a balance between elected members and members appointed through the public appointments process, where it may be easier to achieve equality of opportunity and treatment through the recommendations in the Commissioner's strategy.

Question 11 – Should candidates have to submit profile statements and declare any interests and/or any relevant qualifications/ skills/ experience, for example membership of a political party or a pressure group?

A requirement to demonstrate the core attributes of an effective board member would be a potential way of assuring the public and the Scottish Ministers that candidates had the necessary skills to perform the role of a board member effectively. The public could then be offered a choice of candidates from which to elect a member, with full confidence that they had the skills, knowledge and qualities required to fulfil all aspects of the role effectively. It is important to note that board members will be required to make and challenge decisions on the breadth of issues dealt with by the board, over a period of several years. This will be true even if the board member was originally elected on the strength of their campaign on a single issue. By using a combination of a selection process (similar to the public appointments process) and an election process, the public could choose which of the candidates to elect, whilst being confident of each candidate's ability to perform their role effectively.

Question 12 - Is there a case for excluding candidates standing as a representative of a political party?

The Commissioner's Code of Practice for Ministerial Appointments makes it clear that political activity or political affiliation *per se* play no part in the public appointments process. However, currently serving MPs, MSPs and MEPs are usually excluded from sitting on the boards of public bodies, as there would be a conflict of interest between their two roles. Once a candidate becomes a board member, whether by appointment or election, their duty is to the board. While this will not necessarily create any difficulty for someone who has particular political views or affiliations, it may create a conflict of interest for someone who is on the board to *represent* a political party. For example, the board may be required to implement ministerial policy that goes against the policy of the political party that the member is representing. It therefore seems incompatible with the nature of the board to have *representatives* of political parties as members, however, political affiliation or activity should not automatically disqualify a candidate from standing for election. They should, however, be aware that their role as a board member involves a duty to act in

the best interests of the board, under the ultimate control of whichever government is in office at the time.

Question 13 – In what circumstances might someone be disqualified from seeking election?

There are currently certain criteria that disqualify people from being considered for appointment to a NHS board, for example, where a person has unspent convictions of a certain nature. You may wish to consider whether these criteria would also be relevant for elected members to NHS boards.

Question 16 – Should directly elected members form a majority of the elected members of the board?

Please see our response to question 10 above regarding the balance of board membership.

Question 20 – Would the emergence of groups or individuals with particular views be a difficulty or a potential threat to good governance and direction of the NHS in Scotland?

Please see our response to question 9 above.

Question 24 - Should directly elected Board members be remunerated? If so, at what rate - the same as appointed members currently receive?

Evidence gathered in our work on the equal opportunities strategy suggests that remuneration for board positions is important for a significant proportion of people. In one focus group, there was unanimous agreement that remuneration, and the capacity to claim expenses in advance, are crucial in encouraging more people to apply for board positions. Expenses will be a particular issue for those who have to travel some distance to attend meetings. Even small expenses that cannot be claimed in advance can be a barrier to people on benefits or low incomes. Anecdotal evidence suggests that only people who have a good income can afford to do unremunerated work on a board, especially where the time commitment is fairly high.

Among those people already applying for public appointments (as opposed to the wider public), we found that relatively few (12%) cited remuneration as a motivating factor. A range of the qualitative comments we received indicated that the remuneration, when on offer, was too low for the role and associated time commitment.

Equally, the impact of remuneration on benefits is a major issue for some sectors of the community, particularly people on disability benefits. At present, if someone (for example a disabled person) on benefits accepts a remunerated board position they may lose their entitlement to benefits, even if the remuneration does not adequately compensate them for this loss. Clearly, this may discourage disabled people on benefits from applying. The same principle could apply to elected positions on the board.