

Investigation of the Welsh Government Ministerial reappointment process for Public Body X.

Executive summary

1. This report sets out the findings of an investigation by the Commissioner for Public Appointments ('the Commissioner') into a complaint made regarding two reappointments made by the Welsh Government to the board of an Arm's Length Body (ALB). The basis of the Commissioner's investigative powers and methodology is set out in the Annex.
2. This complaint was brought to the Commissioner by the Chair of the board of Public Body X in February 2022 who is concerned about the Board reappointment decision making process. The investigation examined the ministerial decision making process for reappointments in relation to the government's Governance Code on Public Appointments (the Governance Code).¹
3. The Commissioner respects the right of complainants to maintain their anonymity and therefore has not named the body nor the complainant in this notice. From hereon, this Decision Notice will refer to 'Public Body X' as the body to which this complaint relates.
4. The Office for the Commissioner for Public Appointments (OCPA) informed the complainant in writing on 23 February 2022 that parts of the complaint were deemed to be within scope of the Commissioner's remit. These were:
 - a. the reappointments made were within the Governance Code's provisions for reappointment on the basis of merit and a performance appraisal;
 - b. the declarable political activity of the reappointees had not been published by the Welsh Government; and
 - c. the Welsh Government did not publish the reappointments.
5. The findings and conclusions of this investigation are based on the examination of official records, correspondence between Welsh Government officials and the complainant; and other relevant information held by both the complainant and the Welsh Government.
6. In summary, the Commissioner's investigation found:
 - a. the opinions of the Chair of the board of Public Body X and ministers diverged on the merit of members under consideration for reappointment. At the time the reappointments were processed, the body did not have an established performance appraisal process; an interim process was put in

¹ Cabinet Office (2016) *Governance Code on Public Appointments*.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf

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place which the Chair was invited to use to assess the members of the Board. This assessment and other material regarding the performance of Board members was provided to ministers who made the decision to reappoint on the basis of this evidence.

- b. there was a lack of transparency by the Welsh Government in regard to these reappointments, which were made by ministers but were not publicly announced. The reason given by the Welsh Government for not publishing is that there were resource constraints. The Welsh Government stated that having decided not to use its limited resources to send reappointment letters, the administrative procedures that normally follow to comply with the transparency provisions in the Code were not discharged.

7. The Commissioner has partly upheld an aspect of the complaint as set out below:

- a. the Governance Code places the responsibility on ministers to determine merit and decide on who to appoint (Paragraph 5.5 and Principle A: Ministerial Responsibility). The Commissioner finds there is no breach in this respect and does not uphold the part of this complaint to which this relates;
- b. there was a failure to publish details of the significant political activity for one of the reappointees. The Commissioner finds this was a breach of paragraph 9.2 of the Code and upholds this part of the complaint; and
- c. there was a failure to publicly announce the two reappointments. The Commissioner finds this is a breach of the Principle of Openness and Paragraph 8.1 of the Code and upholds this part of the complaint.

8. The Commissioner sets out the following remedial measures:

- a. the Welsh Government to apologise to the complainant in writing for not addressing their concerns regarding the breaches as set out above in paragraphs 7 (b) and (c); and
- b. the Welsh Government to share the key lessons learned from this case across its ALBs, including the importance of robust performance appraisals for Board members and the requirement to ensure a robust ALB governance model.

Findings and consideration

Appointment on merit

9. Paragraph 5.4 of the Governance Code places the responsibility on ministers to consider each reappointment case 'on its own merits'. There is 'no automatic presumption of reappointment' and ministers must consider 'a number of factors including, but not restricted to, the diversity of the current board and its balance of skills and experience'.

10. The Governance Code sets out the basis of reappointment on merit at Paragraphs 3.1 and 3.5:
- (a) Para 3.1, bullet 1: 'Ministers must be consulted before a competition opens to agree the job description for the role, the length of tenure and remuneration. Advice to Ministers must include information on the make-up and diversity of the current board. Any requests to Ministers for reappointments must also include this information and must be submitted early into planning processes. Reappointments should only be made on merit.'
 - (b) Para 3.5: 'Ministers may reappoint or extend the terms of public appointees or statutory office holders subject to:
 - any such reappointment or extension being made in accordance with the law relating to the particular public body or statutory office; and
 - no reappointment or extension being made without a satisfactory performance appraisal, evidence of which must be made available to the Commissioner on request.'
11. Principle A alongside Paragraph 5.5 of the Governance Code firmly establishes that ministers are responsible for the final decision on appointments and that they base the determination on merit:
- Principle A: Ministerial responsibility: 'The ultimate responsibility for appointments and thus the selection of those appointed rests with Ministers who are accountable to Parliament for their decisions and actions. Welsh Ministers are accountable to the National Assembly for Wales.'
- Para 5.5: '...It is then for Ministers to determine merit and make the final appointment.'
12. The evidence provided to OCPA shows that the first terms for two Board members lapsed 31 August 2021 and was formally raised within the Welsh Government in May 2021. The terms lapsed prior to the formal reappointment process commencing, leaving the status of the members unclear.
13. Subsequently, the Chair and Welsh Government officials corresponded at length regarding appraisals for both of these Board members. At the time, a formal appraisal process was not established for Board members of Public Body X. The Governance Code does not state who should appraise the performance of a member of a public body, only that an appraisal must be carried out before a reappointment is made. The

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Code of Conduct for Board Members² published by the Cabinet Office also does not specify who should carry out appraisals.

14. The Chair's view is that contracts for board members specified that performance is assessed by the Chair. Welsh Government Officials agreed that the Chair conducts performance appraisals but that ministers would be provided with additional information to inform a final assessment to reappoint, and would also consider data for attendance at board meetings and views from stakeholders. Officials described this process as providing a 'more rounded consideration of members' performance'. The Chair disagreed, noting it potentially undermined his/her responsibility for the body's conduct and functions.
15. In the absence of an agreed process, the Chair and officials worked together to design an interim process to appraise performance. All members of the board were informed about this appraisal process in an email sent jointly from the Chair and the Welsh Government.
16. The Chair subsequently undertook an assessment of the performance of the Board members. This was incorporated into advice submitted to ministers in relation to the reappointments.
17. The advice noted that before the current Chair was appointed, the board had operated for 18 months without a chair. Under the previous chair, 'the Board has not had a formal performance assessment process in place, with the previous Chair conducting ad hoc conversations instead.' Further, there were no agreed objectives for Board members. The advice also stated that as the pandemic prevented in person board meetings taking place, 'the Chair was not able to meet the other Board members face to face and [sic], with all meetings and interactions taking place virtually. The Chair was afforded only very limited opportunity to get to know members and observe their performance'.
18. Officials supplemented the material from the Chair's appraisal with information about attendance and Board member contributions at meetings, the members' self-assessments and the fulfilment of contractual obligations in their respective roles. Advice from officials to ministers stressed that 'in the absence of agreed objectives against which to measure performance, or of consistent, documented performance discussions between Chair and Board members, it is difficult to arrive at an assessment which could be termed objective.' In later evidence supplied to the Commissioner, the Welsh Government noted that 'as Board Members did not have agreed performance objectives, [the assessment by the Chair] could not be considered to constitute a formal

² Welsh Government have confirmed the Code of Conduct applies to board members in Welsh Government ALBs. Cabinet Office (2019). *Code of conduct for board members of public bodies*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809093/Code-of-Conduct-for-Board-Members-of-Public-Bodies-2019-WEB.PDF

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assessment of performance, but it did offer an opportunity for members and the Chair to reflect on successes, as well as areas for development.’

19. There was a tension between the Chair and officials as they differed in their expectations about their respective roles vis a vis reappointment decisions. What followed was an interim system designed to inform the impending reappointment decisions. The complainant disagreed with the ‘more rounded’ approach and maintains that the reappointments were not made on merit.
20. The Commissioner recognises the challenges faced by the Chair and the board as a consequence of ways of working during the pandemic. However, the absence of a formal robust performance appraisal system exacerbated the challenges. It is not acceptable for public body boards to operate without setting objectives for its Board members and without a formal performance appraisal system. The Commissioner acknowledges that officials, once this gap was identified, designed an interim appraisal process and used supplementary evidence alongside the Chair’s assessment to advise ministers, thereby fulfilling the requirements of the Governance Code.
21. The Governance Code sets out at Principle A and Paragraph 5.5 that ministers base the decision to reappoint on merit. Further, in Paragraph 5.4 of the Governance Code, ministers must consider ‘a number of factors including, but not restricted to, the diversity of the current board and its balance of skills and experience’. It does not stipulate that the Chair’s assessment of performance is the *only* information considered for a reappointment decision made by ministers. **The Commissioner therefore does not uphold this part of the complaint in relation to reappointment on merit.**

Publication of the significant political activity of the reappointed members

22. The complainant raised concerns with OCPA that the political activities of the reappointed members have not been published. The Commissioner considered Paragraph 9.2 of the Code which sets out the requirements to publish any significant political activity by appointees:

Para 9.2 ‘Political activity should not affect any judgement of merit nor be a bar to appointment or being a member of an Advisory Assessment Panel, with the exception of Senior Independent Panel Members. It should be publicly disclosed however if a panel member, or a successful candidate, has, in the last five years, been employed by a political party, held a significant office in a party, has stood as a candidate for a party in an election, has publicly spoken on behalf of a political party, or has made significant donations or loans to a party.’
23. The Commissioner has not been provided with evidence that any public announcement of these reappointments has been made. The Commissioner notes that one of the reappointed members has undertaken significant political activity within the last five years which meets the definition in Paragraph 9.2 of the Code, but this was not publicly

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disclosed at the point of reappointment. At the time of this investigation, the listing for Public Body X board members includes the names of the reappointees only.³

24. This same Board member declared political activity when appointed for their first term in 2018, which was published at the time the appointment was announced in accordance with Paragraph 9.2. At the time of writing, no further announcements since 2018 have been made about Board members. The Commissioner considers making a public announcement for all appointees to public bodies to be a basic administrative requirement. For an appointment to a second term, there must be a 'fresh' public disclosure of the member's significant political activity.
25. **The Commissioner finds a failure to publish the significant political activity of the reappointee is a breach of Paragraph 9.2 of the Governance Code and upholds this part of the complaint.**

Publication and openness

26. The Governance Code's Principle E: Openness, states that 'processes for making public appointments should be open and transparent'.
27. Para 8.1 states:
- 'Transparency is an important part of public appointments which departments should factor into the design and planning of their systems and processes. Publically [sic] available information on public appointments processes helps to provide assurance that Ministers and departments have complied with the Public Appointments Principles and this Governance Code.'
28. The complainant maintained that there was no public announcement of the reappointments. The reasons subsequently given to the Commissioner by the Welsh Government during the course of this investigation, to explain why the announcements were not made, were not communicated to the complainant in the initial response to the complaint. This element of his/her complaint was not addressed by the Welsh Government in its response to the complaint.
29. It was not clear to the Commissioner as he began this investigation as to what decision ministers had made regarding the two members. The Welsh Government provided further information about the ministerial decision making process to the Commissioner during his investigation to establish the status of the reappointments.
30. The Welsh Government confirmed that ministers decided to make the two reappointments in November 2021. At the time, officials were asked to draft a Decision Report ready for publication in due course.⁴ The Chair was informed of this decision

³ As of August 2022.

⁴ Decision reports are short summaries of Welsh Government ministers' decisions published online.

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shortly afterwards. At the time of writing this notice, no Decision Report on this matter had been published⁵ and no announcement has been made.

31. **The Commissioner therefore finds the Welsh Government to have breached Paragraph 8.1 and the Principle of Openness, and upholds this part of the complaint.** He notes the Welsh Government gave a confusing account of the status of the reappointments during the course of his investigation. Welsh Government confirmed that the administrative processes in relation to the reappointments and the requirements of the Code were well understood, but an active decision was taken not to follow them.
32. The Commissioner understands that the Welsh Government's decision not to publish details for the reappointments was a known and predictable consequence of deciding not to issue appointment letters. The Welsh Government informed him that publication of the appointments and any political activity in relation to individual Board members would be 'triggered' by the receipt of signed reappointment letters and associated documentation from the successful reappointees. This decision not to issue reappointment letters to the Board members was due to resource constraints and plans to review Public Body X. Further, a separate decision was made to not undertake the usual conflicts of interest or due diligence checks in advance of the reappointments, due again to resource constraints. Further, it was assumed that a risk-based approach to determine conflicts would continue to be considered by the Board of Public Body X through its business as usual processes.
33. The Welsh Government considered this was a 'low risk' approach. The Commissioner disagrees, as the decision to not issue reappointment letters prevented the publication of the reappointments, and the publication of the significant political activity declared by one of the members. The failure to undertake these subsequent administrative steps are, in his view, clear breaches of the Governance Code. The Commissioner is concerned that the transparency aspects of the Governance Code were wilfully disregarded by the Welsh Government, with no action taken to avoid breaching the Code. This indicates a significant governance oversight issue within the Welsh Government's understanding of its obligations and its approach to risk and appropriate mitigations in a regulated environment.
34. Further, the Commissioner considers the opacity around these reappointments contributed to the Welsh Government failing to address the complainant's concerns in relation to transparency when responding to the original complaint in February 2022. In all likelihood, this is what led to the confusing information about the status of the reappointments and what happened during the process to reappoint being provided to the Commissioner during the course of this investigation. The Commissioner is particularly disappointed that the Welsh Government knew that not taking certain administrative steps would lead to breaching the Code, but failed to address this when responding to the complaint about its failure to publish the reappointments. If standard

⁵ Welsh Government (2021). *Decision Reports 2021- 6th Government*. <https://gov.wales/decision-reports-2021-6th-government>. Accessed 25 August 2022.

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governance processes had been followed - a established appraisal system in place, advice to ministers on the usual matters to inform their decision, reappointment letters sent and a public announcement issued - the status of the reappointments would more than likely have met the transparency requirements as set out in the Governance Code and a complaint may have been avoided.

35. Since 2017, the Code has required transparency by appointing departments in relation to the public appointments and reappointments process. This complaint has highlighted the need for the Welsh Government to ensure appointments from competitions, those from reappointments and exceptional provisions in the Code are publicised promptly. There are various options currently being used for public bodies of the Welsh Government which are proving to be effective - whether via ministerial Decision Reports, news releases or the information pages for each public body. The Commissioner welcomes the Welsh Government's new approach, as of 28 November 2022, to publish all appointment decisions on an announcements page⁶ as a minimum standard. Standardising publication processes will help the Welsh Government support the culture of openness.⁷

Recommendations

36. The Welsh Government must apologise in writing within ten working days of publication of this Decision Notice to the complainant for the lack of transparency in relation to the decision to reappoint two Board members to Public Body X and for its poor handling of this complaint.
37. The Commissioner recommends that the Welsh Government consider the lessons learned as set out (but not limited to) in this Decision Notice. There are lessons in this case that all Arm's Length Bodies (ALBs) will benefit including ensuring robust formal appraisal systems are in place for all appointees to Welsh Government ALB Boards. He urges all parties to consider how to build robust governance and constructive working relationships with each other and mitigate the risk of this case reoccurring.

ANNEX

1. The Public Appointments Order in Council (OIC) November 2019 states that the Commissioner for Public Appointments 'may conduct an enquiry into the procedures and practices followed by an appointing authority in relation to any public appointment whether in response to a complaint or otherwise'.⁷
2. Under the Governance Code,⁸ complaints should be raised with the appointing department in the first instance. Departments are responsible for having effective

⁶ See *Welsh Government Announcements*, www.gov.wales/announcements.

⁷ Order in Council (6 November 2019). <https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2019/11/Public-Appointments-No.-2-Order-in-Council-2019.pdf>

⁸ Cabinet Office (December 2016). *Governance Code on Public Appointments*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578

complaints handling procedures, for making applicants aware of their right to complain and for referring them to the Commissioner's complaints procedures. If, after investigation by the department, the complainant remains dissatisfied, they may bring their complaint to the independent Commissioner for Public Appointments.⁹

3. The Chair first brought his/her complaint to the Welsh Government in December 2021 and the Welsh Government responded in February 2022. The response stated, in regards to two reappointments made to the board of Public Body X that Welsh ministers 'had made a reasonable decision... based on all the evidence', and it was not in breach of the provisions set out in the Governance Code.
4. The Chair remained dissatisfied. In line with the complaints process outlined in the Governance Code, he/she subsequently approached the Commissioner to make a complaint on 14 February 2022. The complainant brought several additional and related matters to the Commissioner's attention when making this complaint. Some of these, related to the Equality Act 2010 and standards in public life were not within the Commissioner's remit and therefore not investigated.
5. The Commissioner agreed to investigate elements of the complaint relating to reappointment on merit, publication of political activity and transparency. The Commissioner informed the complainant of his decision to investigate these matters only, on 23 February 2022 and invited the submission of evidence. The Commissioner and the complainant agreed that the findings from the Commissioner's investigation would be published but the complainant's anonymity would be protected by not naming the public body in the Decision Notice.
6. The complainant submitted evidence to OCPA on 24 February 2022 which included emails between him/her and Welsh Government officials, and the members in question. The complainant also shared a copy of the performance appraisals for the Board members.
7. The Commissioner informed the Welsh Government of his investigation on 23 February 2022 and requested information in line with his Regulatory Framework including:¹⁰
 - a. submissions to Ministers at every stage of the reappointment process and documentation of all relevant internal discussions including transcripts of phone calls and copies of emails;
 - b. declarations of political activity or conflicts of interests (for those considered for reappointment);
 - c. due diligence checks (for those considered for reappointment);

[498/governance_code_on_public_appointments_16_12_2016.pdf](#)

⁹ Ibid.

¹⁰ Office of the Commissioner for Public Appointments (2016). *Regulatory Framework: Regulating Public Appointments with the Governance Code 2016*.
<https://publicappointmentscommissioner.independent.gov.uk/publications/accessible-formats/office-of-the-commissioner-for-public-appointments-regulatory-framework/>

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- d. a copy of the responses given to the complainant;
 - e. the minutes of a meeting attended by the complainant and the minister on 17 November 2021 at which reappointments were discussed; and
 - f. links to the public announcement of the two reappointed Board members.
8. The Welsh government provided the evidence in response on 9 March 2022.
 9. Upon investigation of this evidence, the Commissioner requested additional information from the Welsh Government which was received on 6 April and 14 July 2022. This included one email omitted in the 6 April evidence bundle and answers to specific questions from the Commissioner on the status of the review of Public Body X, the reappointments and the reappointment process.
 10. On receipt of the information requested from the Welsh Government and the complainant, the Commissioner investigated the ministerial decision making process for reappointments to the board of Public Body X. The Commissioner also considered the handling of this complaint and the overall reappointments process in Public Body X. The Commissioner considered each of these matters to be relevant to his investigation, as the overall purpose of OCPA investigations is to improve the quality of the process of public appointments.¹¹
 11. The Commissioner would like to thank the complainant and the Welsh Government for their cooperation with this investigation.

¹¹ Order in Council (6 November 2019).
<https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2019/11/Public-Appointments-No.-2-Order-in-Council-2019.pdf>