

Good Governance Project

# Reforming the Administrative State

Why Quangos fail and what to do about it

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Hundreds of different public bodies oversee public administration, policy making, and delivery across many different areas of government activity. These public bodies are a critically important part of the machinery of government.

How best might one ensure that the priorities of those that preside over public bodies are aligned to those of the elected government, and that the “quangos” respond to democracy through accountability and transparency?

Previous administrations have tended to take an *ad hoc* approach, hoping that ministers and their departmental officials appoint the “right” people – those who share the government’s outlook and approach – as and when vacancies arise.

This paper proposes a strategic approach to ensure those who preside over public bodies share the priorities that the government was elected to deliver. It suggests ways to ensure:

- **Strategic appointments process.**

For democracy to function properly, government needs to be better at appointing those who share the aims that government was elected to deliver. This paper outlines a way of ensuring that this happens.

- **Enhanced accountability.**

If public bodies are more accountable they will better serve the public. This paper outlines ways to ensure that the administrative state responds to what the public wants, rather than to the preferences of those who run it.

## 1. Different types of agency

The administrative state consists of a range of different types of “quangos” or agencies:

- **Non-departmental public bodies (NDPBs)** constitute most agencies, operating at arm’s length from Ministers, but not within departments. Staffed by public servants, producing accounts but consolidated with departments’, their four types are:
  - **Executive NDPBs**, which have executive, administrative, regulatory and/or commercial functions (e.g. the Environment Agency);
  - **Advisory NDPBs**, staffed by independent specialists supported by civil servants, give Ministers independent policy advice. They do not produce their own accounts (simply part of departments’) (e.g. the Low Pay Commission);
  - **Tribunal NDPBs** have jurisdiction in a specialised legal field, often deciding private citizens’ rights regarding departments or authorities. Typically staffed and funded by departments<sup>1</sup> (e.g. Valuation Tribunals);
  - **Independent Monitoring Boards** of prisons and immigration centres.
- **Executive Agencies** within departments and **Department offices and taskforces** are staffed by civil servants, with accounts consolidated with departments (e.g. Jobcentre Plus, Better Regulation Executive).<sup>2</sup>
- **Non-Ministerial Departments** produce their own accounts (e.g. Ofgem);
- **Department-specific public bodies** in Health, Justice, and Defence;
- **NHS bodies** not listed as NDPBs (e.g. NHS Trusts, Strategic Health Authorities);
- **Local bodies** are local-level equivalents (several thousand);
- **Statutory office holders** (e.g. the Commissioner for Public Appointments, below).

The reforms this paper discusses take in all types of agency, except NHS and local bodies.

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<sup>1</sup> Under the Constitutional Reform Act 2005, tribunal appointments, previously the responsibility of the Lord Chancellor, fell under the Judicial Appointments Commission.

<sup>2</sup> This does not include departments’ working groups or expert committees, with funding approved by standard Parliamentary approval of departmental estimates.

## 2. The current process of appointment and oversight

The current appointment process is complex and often convoluted. This makes a strategic approach to appointments difficult – and makes it easier for departmental officials to ensure appointments are made in favour of default outlooks and assumptions.

### 2.1. Current appointment process

The **Office of the Commissioner for Public Appointments (OCPA)** plays a central role in the appointments system,<sup>3</sup> regulating the way ministers make appointments to the boards of many public bodies. The Commissioner does this in accordance with a series of codes, such as the:

- **Governance Code for Public Appointments.** The Commissioner ensures recruitment follows the Code,<sup>4</sup> which takes appointments largely out of ministerial hands. It states that [our italics]: ministers must consult the Commissioner if appointments to public bodies are to be made without competitions (only in “exceptional cases”), and that Advisory Assessment Panels, who oversee most competitions, “decide... *who meets published selection criteria for the role*”.
- **Code of Practice for Ministerial Appointments to Public Bodies**, also published by the Commissioner, gives Ministers “ultimate responsibility”, however:
  - Selection criteria are typically guided by civil servants (due partly to a lack of ministerial resource). Applicants who do not meet criteria *cannot go to Ministers*;
  - Ministers may only be “kept informed” and vaguely “involved” in sifting (before a final decision) and may not join selection panels;
  - The Commissioner appoints Independent Public Appointments Assessors for higher-tier bodies, who agree criteria, becoming panel members;
  - Reappointment requires opaque “satisfactory performance”.
- **Public Appointments: Guidance to departments** (published by the CO Centre for Public Appointments) states that panels to appoint Chairs of departmental agencies are led by a Public Appointments Assessor. Ministers’ views are represented by a senior civil servant. While re-appointments need ministerial consent, the Centre for Public Appointments must be consulted, as for appointment campaigns.

While the **Prime Minister** and other **Ministers** have an important role, their role in overseeing appointments has been diminished. According to Matthew Flinders, “the relationship between ministers and senior civil servants [has changed] to the advantage of

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<sup>3</sup> There are separate Commissioners for Public Appointments for Scotland and Northern Ireland.

<sup>4</sup> Following the Nolan Committee on Standards in Public Life, 1995.

the latter”<sup>5</sup>, from one intended to give ministers independent advice (but giving them the final say), to one in which the democratically elected have less influence (Flinders also notes that this has led to significant working-class under-representation: “the main losers in the contest for public appointments”).

Within the **Cabinet Office (CO)** responsibility is divided between:

- Appointments Section (which oversees governance of public bodies and makes and manages public appointments);
- Propriety and Ethics Team (responsible for public appointments policy<sup>6</sup> and ministerial conflicts of interest);
- The Centre for Public Appointments (supporting departments’ procedures).

Within **Departments**, Departmental Appointments Units are joined by “Independent appointments assessors” from a central OCPA list, who sit on interview panels for important appointments (other assessors, chosen *ad hoc*, join others).

**Specialist appointments bodies** include the Judicial Appointments Commission devised to reduce the role of the Minister of Justice (Lord Chancellor).

The upshot of this is that a typical appointment process minimises the role of ministers in:

- Sifting and interviewing. Ministers may not take part in decisions on who to invite for interview or shortlist.
- Ministerial selection from the shortlist. Where ministers are involved, interview panels normally present more than one name for final ministerial choice. However:
  - In a 2011-2012 study of one Ministry, for 53 appointments, only 55 of 1,053 applicants were deemed “appointable”, giving panels almost total control;
  - Four other selections were determined completely or almost completely by interview panels, in one case with only two officials and a solicitor as independent member: with just one name deemed “appointable”, the minister had to accept the choice or order a new competition;
  - Cabinet Office generally *de facto* appoints management boards (ministers usually only appoint non-executive Chairs);
- Reappointment, which often does not include appraisal.

## 2.2. Current oversight

Many public bodies are not publicly accountable in any practical sense. Accountability to Parliament is limited. Accountability to departments and ministers often exists more in theory than in practice. Many public bodies are not even properly accountable to the public,

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<sup>5</sup> Matthew Flinders, *op. cit.* Policy Exchange (2013) *Reforming public appointments*, Michael Pinto-Duschinsky and Lynne Middleton. Following a period within Cabinet Office as a Whitehall Fellow during Gordon Brown’s government, Flinders concluded that “the pendulum had swung too far... from the previous practice of political party and ministerial influence over appointments” (i.e. democratic influence).

<sup>6</sup> Including through the document *Making and Managing Public Appointments*.

given that many do not publish annual reports. Few of those that run public bodies are ever required to publicly explain the priorities and strategic objectives of their organisations.

- **Accountability to Parliament and role of Parliamentary Committees.** Only 58 of thousands of agency posts are subject to Committee scrutiny.<sup>7</sup> Civil servants appear before Select Committees, but are not directly responsible to Parliament, appearing only as representatives of Ministers (apart from Permanent Secretaries in their capacity as Principal Accounting Officers (PAOs)).<sup>8</sup>

A large minority of agencies publish no annual reports.<sup>9</sup> Some departments still lack centralised accounts, preventing compilation of a complete record of agency spending. Most do not make board meeting minutes public (75 percent have closed meetings). Large agencies are reviewed triennially: outcomes of bad reviews are vague.

- **Cabinet Office and HM Treasury role.** CO must approve new agencies (consulting HMT). Its approval is usually needed for merger, restructure, or closure.
- **In Departments.** The duties of Executive Agencies especially are “fundamental to department policy”, carrying out “functions on behalf of ministers”. Although their CEOs are responsible “day to day” to Ministers, they are responsible to Permanent Secretaries for funding (via the latter’s role as PAO), so Permanent Secretaries advise ministers on budget, delivery on objectives, and value for money.<sup>10</sup> Agency management appoints its own internal Audit Committee.<sup>11</sup>
  - The **sponsor department** – through a sponsor team within it, not the minister – agrees and reviews a framework document;<sup>12</sup> it ensures delivery or improvement, advising ministers on performance; and carries out quarterly performance management reviews.
  - Department and agency also agree a **Corporate Plan** (with objectives, financial/performance targets, and efficiency<sup>13</sup>). Only larger agencies need ministerial agreement for these; accounts are consolidated into departments’ own accounts,<sup>14</sup> with only top-line financial information made public through the *Public Bodies* dataset.

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<sup>7</sup> Those regulating or supervising actions of Government itself, or with “major impact” on public life. *Cabinet Office Guidance: pre-appointment scrutiny by House of Commons select committees* (January 2019), Annex D.

<sup>8</sup> The document *Departmental Evidence and Responses to Select Committees* (a.k.a. the Osmotherly Rules) also outlines that they are not personally responsible to Parliament. Since 1997, the Ministerial Code has also stated: “Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and next steps agencies”.

<sup>9</sup> Around 35 per cent of NDPBs.

<sup>10</sup> According to *Managing Public Money*.

<sup>11</sup> External audit is by the National Audit Office.

<sup>12</sup> Based on the model template in Annex 7.2 in *Managing Public Money*. These set out: Key elements of policy and resources; responsibilities of the main staff, board, and Chief Executive; procedures for audit, review and if necessary dissolution.

<sup>13</sup> The first year of this Plan is the Business Plan. Efficiency is set out in Annex B, *Tailored Review Guidance*.

<sup>14</sup> Published in line with Government’s *Financial Reporting Manual*.

## 3. Reform

### 3.1. An appointment unit at the centre

There needs to be strategic oversight of the appointment of the heads of most Non-departmental public bodies and Executive Agencies, as well as of the appointment of those non-executives and commissioners whose job it is to oversee the governance of such bodies.

Rather than leaving it to individual departments to take the initiative – or to civil servants within those departments who act under the notional authority of their ministers – a dedicated unit at the centre should oversee the process, including drawing up shortlists of candidates to fill vacancies.

Based in Downing Street or the Cabinet Office, this appointment unit should have responsibility for running the appointment process, working with the relevant department to enable the views of the department and ministers within each department to be fed in.

All regulated public appointments should be the ultimate responsibility of this unit.

#### a. Amending the governance code for public appointments

This code should be amended to explicitly allow ministers within the Cabinet Office to draft the selection criteria for appointments and make decisions about who to include on the shortlists.

#### b. Parliamentary oversight of the appointments process

House of Commons Select Committees already hold pre-appointment confirmation hearings. The use of these should be extended to allow Commons committees to request a hearing for the head of any Non-departmental public body or executive agency. This would serve as an important check against excessive centralisation of the appointment process.

The Cabinet Office currently publishes a list of regulated public appointments. To ensure enhanced accountability to Parliament, the Cabinet Office should also publish regularly a list of all unregulated public appointments, with an explanation as to why such appointments are unregulated, and an indication each time a former civil servant is appointed to run one of these agencies.

### 3.2. Financial accountability

The heads of most Non-departmental public bodies and Executive Agencies should be expected to appear before the relevant House of Commons select committee to have their annual budget approved.

Many bodies do not produce publicly accessible accounts that can be scrutinised meaningfully. Most public administration bodies are not asked to explain their strategic

priorities in public. Requiring the heads of such agencies to appear annually before a Commons select committee to have their spending plans for the following year approved would dramatically improve accountability and ensure that those that run such organisations do so in ways that can be justified to the public.

### 3.3. Changes to relevant codes and legislation

In order to make the changes outlined above, the following Codes and legislation will need to be amended:

- *Governance Code for Public Appointments* (an Order in Council mandates the Minister for the Cabinet Office prepare, publish and review the Code, but this will also require new rules for the Commissioner for Public Appointments);
- *Civil Service Recruitment Principles* (and therefore rules on the Civil Service Commission which publishes them);
- *Code of Practice for Ministerial Appointments to Public Bodies*;
- *Public Appointments: Guidance to Departments*;
- *Making and Managing Public Appointments* and *Managing Public Money*;
- *Departmental Evidence and Responses to Select Committees* (the “Osmotherly Rules”);
- *Civil Service Management Code*;
- *Constitutional Reform and Governance Act 2010*.

Amending the *Civil Service Recruitment Principles* (and *Code of Practice for Ministerial Appointments*) requires new **Civil Service Commission** rules, because the Commission currently defines “merit”, approves external hires’ pay, prevents ministers proposing candidates, controls exceptions to hiring rules, and can change departmental recruiting procedures.

Amendments to the ***Civil Service Management Code*** are needed especially for Chapters 1 (Taking up appointment), 6 (Management and development) and 7 (Pay and allowances). For example, Section 1.6 (Appointment and Management of Specialists) states that these should be recruited by Heads of Profession with agreement from “central management”; 6.4 (Promotion and lateral transfers) should prevent transfer rules keeping under-performing staff on payroll; 7.1 (Remuneration) currently stipulates that pay frameworks are made by the Cabinet Office.

Legislation itself should also change. The **Constitutional Reform and Governance Act 2010** reduced ministers’ scope to appoint non-civil servants to roles other than Special Advisers and a few short-term appointments. The most important chapters are:

3. *Management of the Civil Service*, 5. *Civil Service Code*, and 10. *Selection for appointments to the Civil Service*, to allow the Minister for the Civil Service to appoint non-civil servants to more roles, and for oversight of the Civil Service Commission;

11. *Recruitment principles*, for exceptions to established practice;

12. *Approvals for selections and exceptions*, to widen the scope of non-civil servant appointments on fixed-term contracts beyond Commission discretion;

And *Explanatory Notes*, which state that the power to appoint is delegated to the Head of the Civil Service and departments, as in the Civil Service (Management Functions) Act 1992.