

Investigation of ministerial reappointment decision relating to the Criminal Cases Review Commission, a public body of the Ministry of Justice.

Introduction

This report sets out the findings of an investigation by the Commissioner for Public Appointments into the 2018 decision to not reappoint a Commissioner of the Criminal Cases Review Commission (CCRC), a public body of the Ministry of Justice (MOJ).

This report has been made under section 4(4) of the Public Appointments Order in Council 2019, which permits the Commissioner to conduct an inquiry into the procedures and practices followed by an appointing authority in relation to any public appointment whether in response to a complaint or otherwise. The Commissioner investigated this reappointment process and ministerial decision in order to consider whether the provisions in the Governance Code had been followed. The Commissioner's investigation and this subsequent report do not consider any matters relating to the work of the CCRC, the relationship between CCRC members or staff, or the way it is run, as these matters lie outside of the Commissioner's remit. The Commissioner's concern is whether the department's decision making was in compliance with the Code.

Background

A judgment from the High Court on 15 July 2020 (*Warner*) dismissed a claimant's application for judicial review of a decision of the Criminal Cases Review Commission (CCRC) to not review the claimant's case. In dismissing the claim, the Court invited the Commissioner for Public Appointments to assure himself of the process of a decision of ministers in 2018 to not reappoint a particular CCRC Commissioner. This Commissioner was in their first term; ministers had declined to appoint them for a second. There was no suggestion by the Court that the decision by ministers to not make the reappointment had prejudiced the CCRC's decision to reject *Warner's* claim for review.

The Commissioner was notified of this judgment and decided to use his power under paragraph 4(4) to conduct an inquiry into the procedures of the appointing authority - in this case, the Ministry of Justice - to assure himself they were in accordance with the Governance Code which governs ministerial appointees to public bodies, which includes the CCRC.

CCRC Commissioners are appointed by Her Majesty The Queen on the recommendation of the Prime Minister; Justice department ministers make an initial decision on CCRC appointments, which are then passed on to the Prime Minister.

Methodology

The Commissioner's office notified the Ministry of Justice of the Commissioner's decision to investigate on 20 August 2020 and requested documentation around the reappointment

decision referenced in *Warner* and any other appointments to the CCRC considered by ministers at the same time. This requested documentation included submissions to ministers at every stage of the reappointment decisions and any relevant internal discussions, including transcripts of phone calls and copies of emails. The Ministry of Justice provided this information within 10 working days as requested.

Findings

Provisions on reappointments are contained in sections 3.1 (bullet 1), 3.4, 3.5 and 3.6 of the Governance Code. Ministers are reminded that reappointments should only be made on merit, and there is no automatic presumption of reappointment. Ministers are directed to provide a satisfactory performance appraisal of those they are reappointing if the Commissioner requests it. When making reappointments, ministers should consider factors including, but not restricted to, the diversity of the current board and its balance of skills and experience. It is the Commissioner's view that the Code places an emphasis on refreshing talent where possible, and gives ministers much discretion within the boundary of the overriding principle of merit to make or not make reappointments as they see fit.

Ministers were considering advice on the potential reappointment of one CCRC commissioner in July 2018 (known as Commissioner X in the *Warner* judgment) who at the time was coming to the end of their first term. Simultaneously, the MOJ was launching a campaign to find six new CCRC commissioners. The terms of appointment for the new commissioners would be different to existing commissioners. From 2017, new CCRC Commissioners had been on a fee-paid, part time basis rather than the previous salaried full time role. Further changes were forthcoming - the upcoming competition would recruit new CCRC commissioners to three year, rather than five year, terms. The Commissioner understands there had been some disagreement expressed by the CCRC to the MOJ over these changes. At this time, in Commissioner X's first term, their appointment was on a full time basis for a salaried, five year term. The Commissioner is satisfied that there was an attempt by MOJ to standardise terms of appointment of CCRC Commissioners with this upcoming competition.

The Commissioner finds that Commissioner X was assessed in a performance appraisal by the Chair of the CCRC before the reappointment decision, in keeping with Para 3.5 of the Governance Code. The assessment of the Chair was included in advice to ministers. The Commissioner notes within the documentation of the appraisal that Commissioner X was recommended remedial action to improve some aspects of performance.

Commissioner X had given indication to the CCRC Chair that they would like to serve a second term of five years, but on the current fee-paying basis of other commissioners. The Commissioner is assured that Commissioner X was not given any false assurances as to their reappointment by MOJ officials.

The Chair of the CCRC did not recommend Commissioner X be reappointed; instead his recommendation to ministers was to extend Commissioner X's current first term for a short period of time, allowing him to continue to serve and apply for the CCRC Commissioner roles that were shortly to be advertised. The Commissioner understands the Chair, whose term was due to end, was recommending to ministers to leave a decision on the long-term

future of Commissioner X to the incoming CCRC Chair and the results of the forthcoming competition. The Commissioner notes that the Chair in this instance was sensitive to the need to not 'tie the hands' of his successor, nor to tie ministers who could assess Commissioner X against the strength of the competition field.

The Commissioner is assured that the advice from the public appointments officials in MOJ to ministers regarding the reappointment was in keeping with the Code; it was clear that ministers were advised to make any reappointment on merit, in keeping with bullet 1 of Para 3.1 and Para 3.4. Officials had taken views from the relevant stakeholders. The CCRC Chair's views on Commissioner X's performance from his appraisal (Para 3.5), his advice to make a short extension to their term, to not make a reappointment, and inviting Commissioner X to apply in the upcoming competition for a role on the new terms of appointment, was accurately relayed to ministers.

Further, the CCRC and governments' own ambitions on diversity for the Commission were included (as per Para 3.4). Officials also were correct in advising ministers of the impracticalities of making a short extension to Commissioner X's term which would require Number 10 and Palace approval versus Commissioner X simply taking part in the upcoming competition, in which those successful applicants would begin their terms as Commissioner X's first term was due to end. (OCPA understands that this timeline was intended when ministers were advised but the competition itself took longer than envisaged; appointments from the upcoming competition were made in May 2019). Ministers were advised that this would allow them to make an assessment of Commissioner X against fresh criteria and applicant field. The new cohort of commissioners - including Commissioner X, were they successful - would be recruited on the same terms of appointment as each other. Commissioner X's views on the changes to the CCRC Commissioner's terms of appointment were provided to ministers, which were pertinent to the discussion on the upcoming competition, the proposed standardisation of CCRC commissioner terms of appointment, and the way ministers envisioned the CCRC commissioners working from these changes. The Commissioner is assured that all these considerations included in the advice to ministers were practical and relevant to the reappointment decision, and, as Para 3.4 states, the decision was considered on its own merits and not 'automatic'.

Conclusion

The Commissioner is satisfied the provisions of the Governance Code on reappointments were adhered to in the decision by ministers to not recommend Commissioner X's reappointment to Number 10 and the Palace. The Commissioner has no further comment on this matter.