



The appointment and conduct of departmental NEDs

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Matt Hancock's appointment of Gina Coladangelo at the Department of Health and Social Care has amplified concerns about the role of non-executive directors in Whitehall departments. This paper sets out how the government should improve the governance surrounding the appointment and activity of departmental NEDs to restore public confidence in the role they play.

Introduction

Non-executive directors on the boards of government departments (departmental NEDs) have been an overlooked element of Whitehall's governance. Because executive power rests with ministers, supported by the civil service, it has been tempting to think of departmental boards as a side issue. Those boards do not have the executive power of company boards in the private sector, nor should they. But they can be a valuable source of expertise and a route to strengthening governance.

Departmental NEDs are tasked with advising on important aspects of departmental affairs – recruitment, management, risk – and can recommend to the prime minister the sacking of the permanent secretary. They chair departments’ audit and risk committees, a significant function taken seriously in Whitehall. They also have considerable access to people and information and, in some cases, influence with ministers. In his recent speech on government reform Michael Gove argued that departmental NEDs are an important source of “new perspectives” and “enhanced scrutiny” for departments.¹ That means it is important to appoint people capable of performing those roles effectively, and for their role to be clear.

There is considerable variation in how departmental boards are respected and used. In some departments, such as the Ministry of Defence (MoD), they meet frequently and are seen as useful and productive forums for deliberation and decision making. In others, boards meet less frequently and may be seen as less useful, or even as a distraction, by the secretary of state.² Concerns have also increased since the end of the coalition government that some ministers may have appointed NEDs on grounds of political loyalty to use them as sources of political support – the role of a special adviser rather than a NED. Most current departmental NEDs do have useful commercial skills but there are several appointments with a significant political background, where it could be questioned whether the distinct value they add to the existing ministerial and adviser teams in departments has been maximised.

If further evidence were needed that governance around departmental NEDs should be clarified, Gina Coladangelo’s role as a NED at the health department has provided it.³ She may have been appointed to this paid role before her relationship with the former health secretary, Matt Hancock, began. But their closeness would in any case have suggested a potential conflict of interest: she was already working as an unpaid adviser to Hancock in the department and had previously helped his campaign for the Conservative Party leadership, meaning that she was not well placed to provide the independent challenge and scrutiny expected of NEDs. The government maintains that normal processes were followed in her appointment but the lack of transparency surrounding what those processes are makes it impossible to judge whether they are truly competitive and based on merit.⁴

This short paper briefly reviews the origin of the problem and sets out proposals to tighten the governance around NEDs’ appointment and conduct. It is anomalous that the clear and transparent process already in place to regulate public appointments does not apply to departmental NEDs; we argue that, in future, it should. We also propose making existing guidance more binding, introducing checks on the appointment of those with political experience or alignment to departmental NED positions, and creating mechanisms to increase transparency and accountability – including to parliament as well as ministers.

Recommendations

On the appointment of departmental NEDs

- The appointment of departmental NEDs should be treated like that of other members of public boards and regulated by the commissioner for public appointments.
- The existing guidance on the appointment of departmental NEDs should be incorporated into the governance code on public appointments, to support the commissioner's regulation.
- Permanent secretaries should ensure that, in line with existing guidance, every department publishes information about each departmental NED appointment. This should include information about the vacancy, the person specification, the application process, the successful candidate and any conflicts of interest, and should be in an easily accessible and standardised form. The cabinet secretary should ensure departments publish this information and the commissioner for public appointments should note any failures to do so in their annual report.
- The government lead NED, appointed by the prime minister to co-ordinate and represent NEDs across Whitehall, should be made a 'significant appointment' under the governance code on public appointments, bringing enhanced independent oversight to the recruitment of this role.
- Future government lead NEDs should undertake a pre-appointment hearing by the Public Administration and Constitutional Affairs Committee (PACAC).
- Secretaries of state should not appoint sitting elected representatives with party affiliation (such as MPs, councillors and members of devolved parliaments) or current special advisers as departmental NEDs. Politically affiliated members of the House of Lords, former special advisers, significant party donors or those otherwise substantially affiliated with a political party (such as by holding or previously holding senior party posts) should not be precluded but the appointing secretary of state should publicly justify their decision.

On the conduct of departmental NEDs

- Every department should publish a quarterly register of interests that includes each member of their departmental board. These registers should be prominently available on departmental websites and should include details of how any conflicts of interest have been addressed.
- Permanent secretaries should report any material breach by their departmental NEDs of the code of conduct for board members of public bodies to the government lead NED and the cabinet secretary. Breaches should be published in the government lead NED's annual report.

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- Permanent secretaries should ensure that, in line with existing guidance, their department explains any deviation from the corporate governance code for central government departments – which covers the role of departmental NEDs and some aspects of their appointment – in the governance statement of their annual report. The cabinet secretary should ensure departments publish this information and the government lead NED should note any failures to do so in their annual report.
 - The government lead NED and all departmental NEDs should appear in front of relevant parliamentary select committees if called. They should do so independently and free from ministerial instruction.

Departmental NEDs exist to provide independent challenge to government decisions, particularly from a commercial perspective

Central government departments first established corporate boards in the early 1990s, and they were standardised in 2005 by new Treasury guidance on departmental governance.⁵ But it was Lord Maude who really pushed the agenda of improving departmental boards as Cabinet Office minister from 2010 to 2015.

Maude pushed for more prominence to be given to departmental boards as a way of bringing together key decision makers in the department and driving improvements in performance and efficiency.⁶ As part of this, he made secretaries of state chairs of their own departmental boards and, crucially, shifted decision making powers over NED appointments from permanent secretaries to ministers.

Maude wanted more private sector experience in those hired as NEDs – a programme that has largely been successful, with around 80% of departmental NEDs now having considerable commercial experience (see Annex 1). Just 44% of NEDs had a predominantly commercial background in 2010.⁷ His reforms also brought in departmental lead NEDs and reduced the number of civil servants on departmental boards, in an effort to make the boards more rigorous and provide “robust scrutiny and challenge on departmental progress” in implementing the government’s agenda.⁸

To a large extent these reforms were helpful, bringing in commercial rigour and advice without overriding the democratic accountability appropriate to government departments. However, the fact that Maude made departmental NEDs ministerial appointments – and allowed ministers considerable discretion in how the roles would be performed – arguably created the diverse range of practice we now observe across departments both in who is appointed and what they do. Ministers today have flexibility to use departmental boards in a very different way than Maude intended.

A notable minority of departmental NEDs are politically connected

NEDs with political as well as commercial backgrounds are more common on departmental boards than on the boards of other public bodies

We have compared the relevant experience of current departmental NEDs and current significant public appointees. The findings are described in detail in Annex 1. We found that by contrast to the situation before Maude's 2010 reforms, four fifths of NEDs do now have considerable commercial experience. However, there is also some evidence of a greater political bent among departmental NEDs relative to significant public appointees (albeit that this might be expected, given the technical nature of some public bodies).

The Committee on Standards in Public Life recently identified "an increasing trend amongst ministers to appoint supporters or political allies as NEDs" of government departments that "undermines the ability of NEDs to scrutinise the work of their departments".⁹

Gina Coladangelo is not the only potential example of NEDs hired more for their political support and advice than their relevant experience. Michael Gove appointed the former Labour MP and chair of Vote Leave, Gisela Stuart, as a NED in the Cabinet Office, and Gavin Williamson made Nick Timothy, former special adviser and chief of staff to Theresa May, a NED in the Department for Education (DfE), in March 2020.¹⁰ Boris Johnson appointed Lord Nash, who has donated more than £400,000 to the Conservative Party and was previously a government minister, as the government lead NED.¹¹

It could be that some of these appointments were made competitively on the basis of the candidates' wider, relevant experience rather than their political standing. It is also acceptable under the current guidance for ministers to take into consideration candidates' governmental experience, as long as it is declared transparently and ministers fully consider all other forms of relevant experience. But without regulation by an independent authority and greater transparency it is impossible to know whether candidates are genuinely being appointed on merit, or if advantage is being given on grounds of political affiliation. The point here is not to criticise individuals who have taken on a role when asked and may have performed it diligently, but rather to say that the appointment process should transparently prioritise candidates with experience as suitable as possible to the specific role being performed.

The extent of political experience or alignment among departmental NEDs is variable by department. Most NEDs on the Department for International Trade's (DIT) board have political experience or alignment, as do three out of the four NEDs appointed by Gove as Cabinet Office minister.¹² On the other hand, the Home Office, MoD, Ministry of Justice (MoJ) and others have boards with no obvious political experience or alignment. This suggests considerable discretion – and differences of view – among ministers as

to whom they should appoint as departmental NEDs. If NEDs are appointed for their political experience, the risk is that they may be less likely to have the independence or external skills required for their intended role. Unsurprisingly given that the Conservatives have been in power, including in coalition, since 2010, current appointees with political experience or alignment (for instance as an elected official, special adviser, major donor or party-political peer) are overwhelmingly supporters of the Conservative Party.

NEDs have been appointed to political positions after leaving their role

There are also reasons for concern about appointees leaving departmental NED roles for explicitly political roles afterwards. At least two current ministers, Lord Grimstone (DIT) and Lord Agnew (Cabinet Office) were departmental NEDs before being elevated to ministerial briefs. Simone Finn, who served on the Cabinet Office board between 2020 and 2021, left her position to be appointed deputy chief of staff in No.10.¹³ Such moves should be exceptional if departmental NEDs are providing independent scrutiny rather being seen as a step in a political career. Routinely appointing former NEDs to political roles could give the impression that NEDs might be being rewarded for being acquiescent.

Guidance on departmental NEDs' role, conduct and appointment already exists, but most of it is not binding

There is already considerable guidance relating to departmental NEDs

Despite apparently limited public awareness of the purpose of departmental NEDs, extensive guidance does exist about how they should be appointed, their role in departments and how they should conduct themselves in office.

In 2014 the Cabinet Office updated its guidance on the role of government NEDs and departmental boards.¹⁴ In 2017 the Cabinet Office and the Treasury published an updated corporate governance code for central government departments (the Corporate Governance Code) and accompanying guidance, which covers the appointment and function of departmental boards and their members.¹⁵ Then in 2019 the Cabinet Office updated the code of conduct for board members of public bodies (the Code of Conduct), to which all departmental NEDs must adhere.¹⁶

Together these contain a considerable body of information covering how NEDs should be appointed, the skills and experience they need, the work they should undertake in departments, the way they should conduct that work and how potential conflicts of interest should be identified and addressed.

A lot of the guidance on departmental NEDs is not binding, leaving too much room for interpretation and misuse

The above documentation on departmental NEDs is not binding, aside from what is in the Code of Conduct. The Corporate Governance Code applies on a “comply or explain” basis, meaning departments should be prepared to justify how they have deviated in the annual governance statement accompanying the department’s accounts. Such justifications by departments are rare and it is difficult to know whether the Corporate Governance Code is being upheld in practice, or what the consequences of any deviation would be. This is made worse by the fact that departments are explicitly “not required to follow” the guidance that accompanies the code, which includes more detailed provisions including on how the appointment process for departmental NEDs should be managed – for example, suggesting that appointments should be made “on merit” and in an “open and transparent” way, with both the permanent secretary of the department and either the government or the departmental lead non-executive sitting on the assessment panel.¹⁷

By contrast, the commissioner for public appointments regulates the process of hiring board members to more than 300 public bodies. The 2016 governance code on public appointments describes how such appointments are to be undertaken, who needs to be involved at each stage of the process, how information is to be made public, how decisions are to be made and how conflicts of interest are to be addressed.¹⁸ The commissioner accounts publicly for their work through annual reports that include details of any appointments made without competition and the reasons why, any complaints made to and upheld by the commissioner, and any other breaches of the code.

The fact that departmental NEDs are not subject to the governance code on public appointments means there is far less transparency and scrutiny over their appointment compared with their counterparts in arm’s length bodies (ALBs). Although the government lead NED does publish an annual report that includes information on the skills, diversity, turnover and work of departmental NEDs, it does not include the same level of detail as the commissioner for public appointments reports for the roles they regulate. For example, it does not specify which appointments were made without competition or whether any appointments were made against the advice of civil servants.

This lack of regulation and transparency leaves too much room for interpretation and misuse of the NEDs system. In many cases we simply do not know how departmental NEDs were chosen, or what process was followed.

Disclosure of departmental NEDs’ interests is variable

Despite the Code of Conduct’s requirement for NEDs to “declare publicly” any potential conflicts of interest, including financial and non-financial matters, departments publicise registers of interests inconsistently. Most departments (11 out of 20 we looked at) publish NEDs’ interests only when they directly interact

with the department, for instance when organisations they are involved in receive money or services from the department. In most cases, this is reported in the department's annual accounts, meaning the information is often over a year out of date. A handful of departments also register their board members' interests on the gov.uk website, including DIT, the DfE, MoJ, the Cabinet Office and UK Export Finance (UKEF). However, even these do not seem to include all interests (for instance, there are no shareholdings or financial interests included in the MoJ register), and some are still over a year out of date.*

Governance of departmental NEDs' appointment, role and conduct should be more robust

Departmental NEDs' role in providing independent scrutiny and expert advice to ministers and civil servants should be reinforced

The guidance accompanying the Corporate Governance Code already states that "constructive challenge" of ministers and officials in areas including performance and management, operations, HR, audit and risk is an "accepted and expected" part of the departmental NED role and an "essential aspect of good governance".¹⁹ This existing guidance should be reaffirmed and built on as a central plank of NEDs' roles in departments. To deliver on their distinctive role in government, NEDs' added value must come principally from their independence from the department and the knowledge and skills they bring from their external careers and experience – particularly regarding the practical aspects of running large organisations. They should not act as special advisers by another name or substitute for resource needed in the civil service.

For departmental NEDs to provide independent scrutiny their appointments need to be regulated by the commissioner for public appointments

The difference in process between the appointment of departmental NEDs and their counterparts in ALBs is unjustifiable, particularly given the independent scrutiny that departmental NEDs are intended to provide for ministers and senior civil servants. Appointments matter particularly here given that part of the departmental NED role is effectively to mentor and advise permanent secretaries and junior ministers on managerial issues. Extending the remit of the commissioner for public appointments to include the appointment of departmental NEDs, and adapting and incorporating the existing guidance into the governance code on public appointments, would reduce the scope for misuse of the process and improve transparency. It would also help to give potential applicants and incumbents confidence that appointments and renewals will be considered fairly.

* We looked at gov.uk and the annual reports for all 20 departments that have NEDs (the Attorney General's Office and the Offices of the Leader of the House of Commons and House of Lords do not have any NEDs) to find registers of interests for NEDs. As of 1 July 2020 only seven departments had full registers of interests on their websites; of these, only the Scotland Office, Northern Ireland Office, UKEF, DfE and the MoJ's lists had been updated since March 2020.

Ministers would still be responsible for appointing departmental NEDs. But if they wanted to deviate from the governance code on public appointments, for instance by appointing without competition or appointing a candidate whom an advisory assessment panel felt was unappointable – due to conflict of interest, insufficient independence, or lack of qualification for the role, say – they would have to be willing to defend their decision publicly.²⁰ Permanent secretaries should be accountable to the commissioner for public appointments for ensuring their department publishes information about each appointment, and failure to do so should be reported publicly by the commissioner.

We recommend that ministers should not appoint as departmental NEDs any sitting elected representatives with affiliation to a political party, current special advisers, or anyone with whom they have a close personal relationship. If they wish to appoint a politically affiliated member of the House of Lords, an ex-special adviser, a former employee, a major party donor or anyone with substantial links to a political party, they should publicly justify their decision.*

The role of NEDs should be set out in more binding guidance, and publicly reported on, to avoid them operating outside their remit

We have seen that NEDs are appointed and used differently in different departments and have varying levels of influence depending on the attitude of ministers towards their departmental boards. It will be difficult to achieve more consistency in the use of departmental NEDs across government while the guidance about their role remains mostly non-binding, and while ministers can choose how to use NEDs without public scrutiny.

The government lead NED, currently Lord Nash, convenes non-executives across government, shares best practice, and works with secretaries of state to improve governance throughout Whitehall.²¹ The resulting networks of NEDs and departmental lead NEDs enable experienced professionals with intimate knowledge of individual departments to openly discuss common machinery of government challenges and work together on them. This requires not only an independent cast of participants but also the kind of managerial and professional skills of leadership in large organisations that political appointees may be less likely to demonstrate.

It is correct that secretaries of state should have the authority to apply the guidance on NEDs and boards in the way that works best for their department. However, permanent secretaries should also be accountable to the Cabinet Office and the government lead NED for their department's use of NEDs and their conduct. The government lead NED should additionally provide independent oversight and accountability regarding the use and work of departmental NEDs, akin to that which

* Political activity is not currently an automatic bar to appointment as a departmental NED, but they are expected to avoid political activity on matters directly related to the work of their department, and to be "even-handed" in all official dealings with political parties. Departmental NEDs must not hold a paid party political post or a "high-profile" role in a political party – although there is a list of exceptions to this in the Code of Conduct that includes being an MP, member of the House of Lords, member of a devolved legislature, directly elected mayor, local councillor or police and crime commissioner.

the commissioner for public appointments provides for the appointment process to the boards of public bodies. They should do this by raising any breaches of the Corporate Governance Code or the Code of Conduct with the cabinet secretary and reporting it publicly through their annual reports.²²

Secretaries of state could still deviate from the guidance on NEDs' roles and work if they choose to, but permanent secretaries would have to consult the Cabinet Office and the government lead NED, and the secretary of state would need to be willing to publicly defend their decision.

To strengthen the government lead NED's independence, the government should make this role a 'significant appointment' under the governance code on public appointments. Doing so would require a senior independent panel member to be part of the appointment process for future government lead NEDs.²³ The government lead NED should also be subject to a pre-appointment hearing in front of the Public Administration and Constitutional Affairs Committee (PACAC), and attend PACAC as a witness if called to do so.

Greater transparency is needed to make departmental NEDs more legitimate and effective

Even in cases where departmental NEDs are hired properly and are doing valuable work in departments, little is known about who they are, what they do and how they are appointed – as has been shown by the news coverage following Matt Hancock's departure. This lack of public understanding and scrutiny is a consequence of the lack of transparency over the process, rules and guidance that govern departmental NEDs.

Regulating the appointment of departmental NEDs – as is already the case with NEDs on other public bodies – would entail publishing much more consistent information on the competitiveness of appointment processes and how decisions were made. Departmental NEDs should also attend relevant parliamentary select committees, if called to do so as witnesses. Giving the government lead NED an independent oversight and assurance function, and making that role accountable to parliament, should also lead to a greater level of public disclosure: about which departments regularly publish complete registers of interests including their NEDs, and which fail to do so; about the work NEDs are doing; about any cases where they are working in ways contrary to the Corporate Governance Code and accompanying guidance; and about any breaches of the Code of Conduct.

Ultimately, the government can disincentivise misuse of the system by illuminating its workings. Doing so could restore public confidence in a role that, when undertaken well, has significant potential to make government more effective.

Conclusion

Some may object to the recommendations in this paper on the grounds that they could limit ministers' ability to bring in the people they need to help them achieve their priorities. Setting any potential conflicts of interest aside, some ministers may feel they need more bandwidth to cover their portfolios. Perhaps they would like more people they trust as knowledgeable interlocutors on ministerial business, more 'eyes and ears' across the department to hold the civil service to account, or a greater capacity to engage the media or apply policy expertise in a particular area. But these are duties that should properly accrue to special advisers or civil servants, not departmental NEDs.

Ministerial jobs are hugely demanding – perhaps unreasonably so – and the potential need for these kinds of extra resources may deserve consideration. But however tempting it may be, exploiting opacity around departmental NED appointments cannot be an acceptable solution to ease the pressure. Departments will get the best from NEDs if they can be clear about the role they play and how they are appointed and managed. Using NEDs as a means of solving a different problem will only jeopardise their independence and weaken their value.

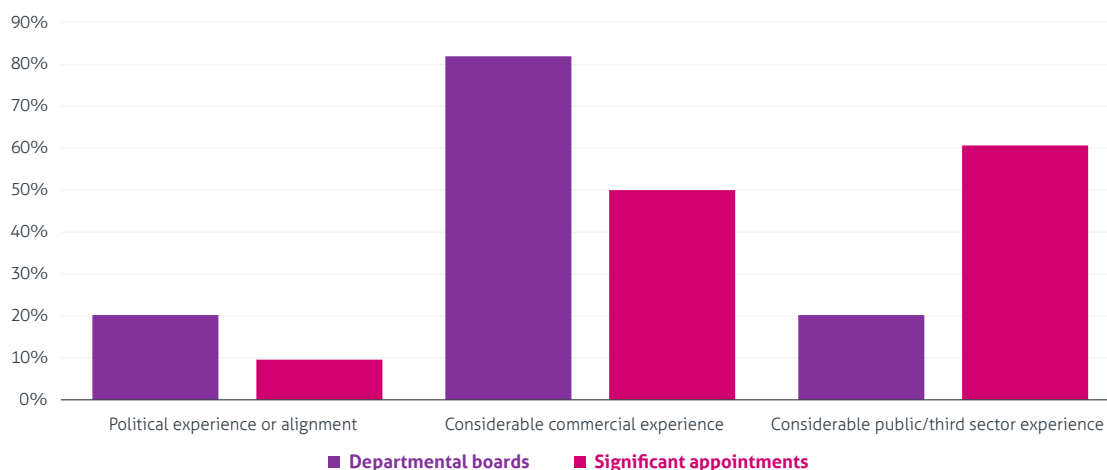
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Annex 1: The backgrounds of departmental NEDs

Figure 1 **Backgrounds of serving departmental NEDs and serving 'significant appointments'**



Source: Institute for Government analysis of gov.uk, LinkedIn and other website data as of 1 July 2021. Columns do not add up to 100% as appointees can have more than one type of experience.

To understand the skills and experience being recruited into departmental boards, we conducted a study of the backgrounds of the 94 departmental NEDs and the 94 people in positions designated by the UK government as 'significant appointments' as of the end of June 2021. We categorised each of these people as to whether or not they had considerable experience in the private sector, public or third sector, or any experience in politics – as politicians, holders of party office, prominent donors or special advisers.*

We found that 82% of departmental NEDs now have considerable commercial experience, an increase on 2010, when Institute for Government research (using slightly different methodology) showed that only 44% of NEDs came from a predominantly commercial background.²⁴ In practice, this means that departmental NEDs are now better able to bring the experience they have from managing large, private organisations to bear when advising departments on key administrative tasks such as recruitment, audit, risk management and procurement. Regulated appointments generally have more public and third sector experience, perhaps because these roles can require more specialist subject knowledge than departmental NED positions.

* We used gov.uk, LinkedIn and other websites to look at the careers of:

- the 94 NEDs in position (according to gov.uk) on 30 June 2021, including the government lead non-executive
- the 94 people in position on 30 June 2021 in the roles listed by the commissioner for public appointments in his most recent report as 'significant appointments', including interim candidates.

Anyone with more than ten years' consecutive employment throughout their careers, or five years in the past ten, were counted as having considerable commercial experience or public / third sector experience. We did not include non-executive directorships in this. Anyone with experience of holding a party position or being an elected politician, a party-political peer, a special adviser or similar, or a significant public donor or supporter of a party was described as having political experience or alignment.

Around 20% of departmental NEDs have political experience or alignment. Of the 19 NEDs we were able to identify in this category, 15 appear to have exclusively supported the Conservatives, two (Ben Goldsmith, brother of former minister Zac Goldsmith, and Douglas Carswell, a former Conservative MP) have campaigned for the Conservatives alongside other parties, and one (Gisela Stuart) worked with Conservative politicians on the Vote Leave campaign. Only one does not have obvious links to the Conservative Party (Ross Finnie, a former Liberal Democrat MSP).

Political experience or alignment is more common among departmental NEDs than among those in roles already regulated by the commissioner for public appointments. Of the 94 people currently in roles designated as 'significant appointments', only nine have obvious political experience or alignment – less than half the proportion we have found on departmental boards.²⁵

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