

# Commission for Ethical Standards in Public Life in Scotland

## Consultation on the Code of Practice for Ministerial Appointments to Public Bodies in Scotland



August 2012





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# Commission for Ethical Standards in Public Life in Scotland

## CONSULTATION ON THE CODE OF PRACTICE FOR MINISTERIAL APPOINTMENTS TO PUBLIC BODIES IN SCOTLAND

### 1.0 INTRODUCTION

- 1.1. The Public Appointments Commissioner for Scotland (“the Commissioner”) is required to prepare and publish a Code of Practice in respect of appointments to public bodies made by Scottish Ministers.
- 1.2 This consultation paper invites comments on the existing Code and, in particular, asks those with a role or otherwise having an interest in the public appointments process whether the Code is operating as effectively as possible or whether they consider any improvements should be made to the Code.
- 1.3 Comments are invited by 31 October 2012.

### 2.0 STATUTORY PROVISIONS

- 2.1 The Public Appointments and Public Bodies etc. (Scotland) Act 2003<sup>1</sup> (“the Act”) makes provision for the Code of Practice.
- 2.2 The Commissioner is required to prepare and publish a Code which is to include guidelines on appointment methods and practices.<sup>2</sup>
- 2.3 The Commissioner is also required to keep the Code under review, revise the Code and promote compliance<sup>3</sup>.

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<sup>1</sup> <http://www.legislation.gov.uk/asp/2003/4/contents>

<sup>2</sup> Section 2 (1) and (2) of the Act

<sup>3</sup> Section 2(3) of the Act

### **3.0 THE 2011 CODE OF PRACTICE**

3.1 The current Code was made in April 2011 and came into effect in September 2011.

3.2 The 2011 Code was itself a revision of the previous Code made in 2006.

The main changes made in relation to the 2006 Code included –

a. revising the underpinning principles with a clearer focus on the outcomes, on the experience of applicants and on tailoring each appointment round to be proportionate and appropriate to the position to be filled

b. changing the way that the Commissioner fulfils his statutory functions.

The Commissioner continues to monitor appointments but public appointments assessors<sup>4</sup> are no longer panel members or active participants in every stage of every appointment process

c. providing greater clarity on the role and responsibilities of panel members

d. requiring evidence-based decision-making about publicity and application and assessment methods

e. introducing a fit and proper person test and

f. providing more clarity on succession planning for boards.

3.3 The reasons for reviewing the Code one year on are

- to ensure the Code is operating on the basis of effectiveness, efficiency and economy

- to ensure that regulation under the Code is proportionate

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<sup>4</sup> Assessors oversee public appointment rounds on behalf of the Commissioner

- to act as a real aid to Ministers to ensure appointments are made openly, fairly and with due regard to equal opportunity requirements.

#### **4.0 CONSULTATION**

4.1 Since the 2011 Code became operational, there have been on-going discussions between the Commissioner and Scottish Government. Indeed, it may be that some concerns about the operation of the Code are attributable to the fact that the new Code has not yet been fully understood or implemented by the Scottish Government as intended.

4.2 There have also been discussions with a number of public bodies as part of their on-going appointment responsibilities.

4.3 Public appointment issues have also been included on the agendas for the Standards, Procedures and Public Appointments Committee of the Scottish Parliament.

4.4 As a result, it is considered it would be timely and appropriate to review the Code's provisions to see if it is operating well or whether its effectiveness could be improved by amending or adjusting its provisions.

4.5 The issues that seem to be most appropriate for consideration are set out below.

4.6 If, as a result of this consultation, changes to the Code are to be made, the intention will be to implement these by early 2013.

4.7 Changes to guidance may be required consequent and subsequent to any Code changes introduced<sup>5</sup>. Concerns have been expressed that the requirements of the guidance can be disproportionate.

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<sup>5</sup> See section 2(6) of the Act

4.8 It may also be appropriate to consider whether the equal opportunities strategy document *Diversity Delivers*<sup>6</sup> published in 2008 should also be reviewed subsequent to any Code changes.<sup>7</sup>

## **5.0 ISSUES ON WHICH COMMENTS ARE INVITED**

### **5.1 Guidance on Particular Cases** (section 2(6) of the Act)

5.1.1 The Act provides that the Commissioner may issue guidance to Ministers either generally or specifically in a particular case.

5.1.2 There is however no reference in the Code to specific case guidance that could be offered by the Commissioner.

5.1.3 Given the changes to the roles of the Commissioner and assessors in the 2011 Code, there have been concerns that there has been too much of a change of emphasis towards an audit approach (which is seen as largely retrospective) and a loss of contemporaneous and constructive advice previously given during the appointment process.

5.1.4 It may, therefore, be appropriate to have an explicit provision about providing specific guidance on cases. This may be particularly apposite in cases where the Government or the selection panel are positively seeking advice and guidance from the Commissioner and assessors in relation to an appointment.

**Questions A – Should the Code have a clear provision on specific guidance being available by the Commissioner to the Government on particular cases? Is it appropriate the Commissioner should facilitate**

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<sup>6</sup> <http://www.publicappointments.org/publications/publication/25/diversity-delivers>

<sup>7</sup> See section 2(10) of the Act

**this by ensuring that assessors are available to provide appropriate guidance hands-on throughout the appointment process?**

## **5.2 Skills and Knowledge** (Section A of the Code)

5.2.1 The Code states that skills and knowledge are the basic essentials and criteria for appointment.

5.2.2 The term is wholly appropriate but can be narrowly interpreted. Often attributes which Ministers will look to see in candidates such as experience/judgement/vision may be seen as falling outwith the definition and it may be helpful to ensure the term is given a wider context.

5.2.3 It may also be appropriate to make it clear that statutory provisions in founding legislation must be applied in appropriate cases.

**Questions B – Should skills and knowledge be expanded to cover the wider qualities that Ministers might be expected to look for in candidates? If so, what other qualities are suitable for inclusion?**

**Should the Code make it clear that statutory provisions in founding legislation that qualify certain appointments should be specifically referred to in publicity material for these posts?**

## **5.3 Management Information** (Section C2)

5.3.1 The Code requires the selection panel to agree an appointment plan, with publicity, application and assessment methods taking into account appointment-specific management information held by the Scottish Government.

5.3.2 This is intended to attract a diverse range of able applicants as set out in *Diversity Delivers* to ensure continuous process improvements and increased board diversity but it may be that the process of identifying and setting down the key information has become over-prescriptive and time consuming.

5.3.3 Concerns have been expressed that the identification of such information is less than clear and that compliance with the requirements can be disproportionate.

**Questions C – Should a requirement for appointment-specific management information to inform publicity, application and assessment methods be retained? If so, how should the requirements be clarified and made more proportionate?**

**If not, how will panels ensure that resources are expended appropriately on publicity that will succeed in meeting equal opportunities requirements?**

#### **5.4 Selection Panel** (Paragraphs 7 and 11 of the Code)

5.4.1 The Code provides that panel members must be competent to fulfil their role and must fully understand the requirements of the Code. There is some concern that not all panel members transparently meet these standards and, therefore, that there should be a requirement for prospective panel members to demonstrate that they have met these standards, such as by having taken part in dedicated training on the Code.

5.4.2 Having said that, it has to be acknowledged that those sitting on selection panels can be very experienced and senior in their field and it would be

concerning if any formal requirement for training were to lead to a reduction in the numbers of those willing to act as panel members.

5.4.3 Training workshops were held in 2011 relating to the 2011 Code but with limited attendance levels. It may be there is merit in carrying out a similar exercise again, targeted at achieving a high level of attendance by panel members.

5.4.4 Paragraph 11 of the Code also provides that a significant conflict of interest by a panel member should be referred to the Commissioner.

5.4.5 If there is such a conflict, the member should recuse himself/herself and only if there is doubt should the matter be referred to the Commissioner.

5.4.6 The Code also provides that the membership of the panel must remain the same throughout the process.

5.4.7 There may be merit in providing that this will not apply in appropriate cases, for example where a member is ill, has resigned etc. In such cases, there should be no need to refer to the Commissioner.

5.4.8 It may also be helpful to make it clear that, in the case of reappointments, it will be accepted that the chair will, no doubt, have an established business relationship with the member seeking re-appointment and that this should not, by itself, prevent the chair from carrying out an assessment role.

**Questions D – Should the terms of the Code be amended to clarify all or any of these matters? Should prospective panel members be required to undertake dedicated training on the requirements of the Code before taking up their responsibilities? Should further training workshops be held?**

**5.5 Regulation of Appointments by the Commissioner** (Paragraphs 16 and 17 and sections D, H and J of the Code)

5.5.1 Scrutiny by the Commissioner must be proportionate.

5.5.2 In this connection the key provisions, together with the related statutory guidance, provide for scrutiny that is risk-based with the level of scrutiny depending on whether the appointment round has been assessed as low, medium or high risk.

5.5.3 It should not be necessary to presume that all rounds will have some level of scrutiny. There may be merit in making that clear both in the Code and in the associated guidance.

5.5.4 A principal aim of the ethical standards framework must be to bring about continuous improvement so that regulatory action is minimised or reduced considerably.

5.5.5 Complaints about the appointment process can be made to the Commissioner, in terms of section 2(5)(b) of the Act. In practice these are referred to the Government in the first instance. There is no timescale in the Code set for the Government's dealing with the complaint and this may be worthy of consideration.

5.5.6 The Code requires that publicity will explain that appointments are regulated by the Commissioner and that announcements on appointment decisions will include a statement about the extent to which the appointment process was conducted in line with the Code's requirements. It may be felt that these requirements are unnecessary and unduly burdensome.

**Questions E – Should the Code and guidance be amended to provide that scrutiny will be undertaken based on proportionality on the understanding that this may mean that scrutiny (as a matter of course) will not be carried out in a range of cases? Should the Commissioner continue to refer complaints to the Government? If so, should there be timescales laid down for dealing with complaints? Should there still be requirements to publicise that the appointments process is regulated by the Commissioner?**

**5.6 Appointment on merit** (Section G of the Code)

5.6.1 The Code provides that decisions on appointments will be based on the applicant summary as prepared by the selection panel.

5.6.2 It is also provided that the appointment should be based on information about whether the applicant is a fit and proper person.

5.6.3 There are other references and material that could properly play a part in deciding on an appointment, such as the candidate's application form.

5.6.4 Indeed, there may be merit in ensuring that the Code is not over-restrictive regarding the specified criteria intended to form the (exclusive) bases of appointment.

**Questions F – Are the Code's current provisions on setting out the criteria to be used for appointment sufficiently clear or should an element of flexibility be introduced? What additional criteria and/or materials should be considered by panels and Ministers?**

## **5.7 Reappointments** (Section I of the Code)

5.7.1 The Code provides that a member may be reappointed to the same position once.

5.7.2 It is, however, important to note that this will be qualified by any relevant provisions or restrictions in the body's founding legislation.

5.7.3 In most cases where members are eligible for reappointment and wish to be reappointed, they are in fact duly reappointed, usually with the chair of the body playing a key part in the member's appraisal.

5.7.4 This is an area where scrutiny can operate with a light touch but it is essential that the timetable for reappointments is sufficient to afford Ministers an appropriate opportunity (a) to decide whether to fill the vacancy by appointment or reappointment and (b) finally, to decide who should be appointed or to confirm the reappointment as the case may be.

5.7.5 In this connection, there is concern that appropriate timetables for the purpose are not being specified or adhered to thereby restricting the Ministers' capacity to fulfil their responsibilities in terms of the Code.

**Questions G – Are current practices on reappointments effective and proportionate? Could improvements be introduced without impacting on the quality of decisions on reappointments? Should the Code be revised and if so how can reappointment practices be improved?**

## **5.8 Feedback to unsuccessful applicants** (Paragraphs F1 and J2 of the Code)

5.8.1 Feedback is an essential part of the process if Scotland is going to encourage applicants to learn from their application experiences and offer themselves on another occasion for appointment to a public body.

5.8.2 Selection panels should have and retain sufficient records to enable constructive feedback to be provided to applicants, although the extent of these records will undoubtedly vary depending on the stage of the process the applicants have reached.

5.8.3 At the present, there is no time limit laid down in which an applicant can ask for feedback and it may be appropriate for a target timescale to be set down.

### **Questions H – Is the current system of feedback operating well or are there any improvements that can be suggested? Should there be a time limit for applicants to apply for feedback?**

## **5.9 Other Issues**

5.9.1 The issues set out above appear to be the main issues which currently need to be given further consideration.

5.9.2 We will, however, welcome comments on any other issues relating to the Code of Practice for Public Appointments.

### **Questions I – Are there any other issues relating to the Code or associated guidance you wish to raise? Are there any other issues relating to appointment practices you wish to raise?**

## **6.0 RESPONSES**

6.1 Responses should be sent in by **31 October 2012**.

6.2 They should be sent:-

### **By Post to -**

The Public Appointments Commissioner for Scotland

The Commission for Ethical Standards in Public Life in Scotland

39 Drumsheugh Gardens

Edinburgh

EH3 7SW

### **By E-mail to -**

[appointments@ethicalstandards.org.uk](mailto:appointments@ethicalstandards.org.uk)

**August 2012**

**I:/Office/FC2-External/OCPAS**

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