

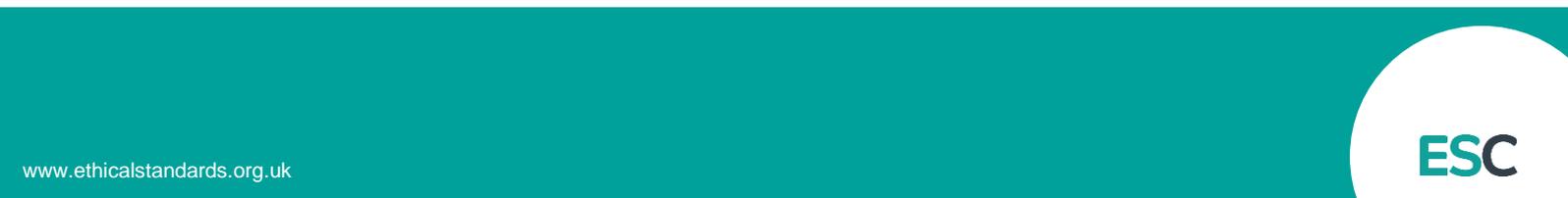


**Ethical Standards
Commissioner**

Guidance on the 2022 Code of Practice

*for Ministerial Appointments
to Public Bodies in Scotland*

September 2022



ESC

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1. Guidance by the Commissioner

1.1 This guidance is issued by the Commissioner for Ethical Standards in Public Life in Scotland to assist in the implementation of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) which was published on 31 March 2022.

1.2 This guidance is issued in terms of section 2 (6) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and is effective from 3 October 2022, the same date on which the Code will come into effect.

1.3 The Scottish Ministers may also approach the Commissioner at any time for guidance on application of the Code in relation to a particular case or class of cases.

2. Application of the Principles

2.1 Neither the Code nor this guidance can foresee all of the circumstances that might arise relating to ministerial appointments. Securing the right outcome is, subject to adherence to the principles, more important than following processes. The Commissioner will refer to the principles of the Code when providing guidance on its application. The Commissioner will not compromise on the principles of the Code but is happy to allow for the practices set out in it to be varied in order for the right outcome for a board to be achieved.

Accountability – The Scottish Ministers are ultimately responsible for making appointments in accordance with this Code and all other applicable legislation. The Commissioner is responsible for encouraging compliance with the Code and overseeing and reporting publicly on the practices employed by the Scottish Ministers and the people to whom they delegate responsibility.

Equality, Diversity and Inclusion – The boards of Scotland’s public bodies should be reflective of the communities that they serve and the Scottish Ministers will take substantive steps to achieve that aim. Public appointments must be advertised publicly in a way that will attract a strong and diverse field of suitable candidates. The process itself must provide equality of opportunity and the practices employed must be inclusive for people from all walks of life and backgrounds.

Merit - All public appointments must be made on merit. Merit is defined by the Scottish Ministers for each board position to be filled, based on that board’s specific needs at the time of, and anticipated period for, that appointment. Only persons judged most able to meet the requirements of the post will be appointed.

Openness, Transparency and Integrity – The appointments process must be open, fair and impartial. The integrity of the process must be transparent and earn the trust and have the confidence of the public.

Respect – Applicants and ultimately the people appointed to boards are integral to the good governance of Scotland’s public bodies. Applicants will be accorded the respect that they are due for their interest and their efforts and appointees for their contribution to public life.

2.2 “Merit”, as defined for each position to be filled, is specified by the Scottish Ministers. The Scottish Ministers can specify that some criteria for selection should be met on a simple “pass/fail” basis or only to a given extent. They can specify that, due to the board’s needs, one or more criteria are more important than the others in a person specification and weight

them accordingly. How merit is defined will determine the outcome of each appointment round, including how likely it is that there will be a choice of suitable candidates. The following table shows how this can work in practice.

By way of illustrative example:

Essential Criteria	Panel view	Priority Weighted Criteria	Panel view
Communication and influencing skills (to an enhanced level)	✓ (Met)	Experience of audit and risk committee	Exceptional evidence
Analysis and decision-making skills (to a core level)	✓ (Met)	Knowledge/understanding of ethnic minority communities	Acceptable evidence
Longer term planning / seeing the bigger picture (to a core level)	✓ (Met)		

2.3 The principles of “Merit” and “Openness, transparency and integrity” apply to the entirety of the appointment process, including the stage at which the Minister chooses whom to appoint. Application packs must be clear about how “Merit” has been defined.

2.4 In order to comply with the Code, the appointment process must lead to the identification and appointment of the most able candidate(s). Most able can be defined as:

“The individuals who have met the criteria for selection most closely, provided that they have also met all of the criteria specified as essential and to the required standard.”

2.5 Under the principles of openness, transparency and integrity, those involved in delivering the process act in a way that ensures that the process is transparent and earns the trust and confidence of the public. e.g. there are no surprises in the process. The Code provides (at D3 and E1) that new requirements will not be introduced during any stage of an appointment process, as that would be incompatible with the principle of Integrity. It should be noted that new requirements are not limited to an additional requirement, but can include a change to the level at which a skill, knowledge, experience or other attribute has to be demonstrated. The following table illustrates what the Code does and does not allow for.

The approach set out in this table as an illustrative example would not comply with the Code

Essential Criteria	Panel view	Weighted Priority Criteria	Panel view
Communication and influencing skills (to an enhanced level)	✓ (Met)	Experience of audit and risk committee	Acceptable evidence
Analysis and decision-making skills (to a core level)	✓ (Met)	Knowledge/understanding of ethnic minority communities	Acceptable evidence
Longer term planning / seeing the bigger picture (to a core level)	✓ (Met)		

The panel noted that this applicant had a great deal of financial experience which could be helpful to the board. Although not one of the criteria for selection, the panel felt that this made the applicant more suitable than others who met the above criteria to the same extent.

2.6 The most able candidates, as defined above, will therefore be those who meet the requirements to the extent specified by the Minister.

2.7 In cases where the candidates who meet the criteria for selection to the extent specified by the Minister **are assessed as being of equal merit** either against all of the criteria for selection or having relatively equal strengths and weaknesses against an equal proportion of the criteria for selection, the panel should present these candidates to the Minister as suitable for appointment. Other than in cases in which a candidate has not passed the fit and proper person test, the Minister should always exercise their choice about whom to appoint and whether to appoint on the basis of the criteria for selection. There are exceptions to this in certain cases. Ministers may in certain circumstances take account of other factors in “tie-break” situations by reference to the applicable legislation in force at the time, such as the Equality Act 2010.

2.8 For provision 2.7 to take effect, candidates will be asked to provide information on those situations or characteristics which are identified in the applicant information pack as factors that an appointing Minister may take into account in making an appointment decision. Information on those characteristics and situations will be provided to the Scottish Ministers in cases in which they are offered a choice of candidate. The fact that the Scottish Ministers may take the factors set out in 2.7 into account when making their appointment decisions will be made clear in the information provided to applicants.

2.9 There may still be a choice of candidates for the other position(s) to be filled. In such circumstances the Minister may also take into consideration the combination of attributes offered by different groupings of potential appointees recommended as most able.

2.10 In cases where one candidate clearly meets the criteria for selection more closely than others, and only a single position is being filled, the application of the principles means that the selection panel is obliged to present only this candidate to the Minister as suitable for appointment. It is not appropriate to present a less able candidate as suitable for appointment in such circumstances.

2.11 The record of Ministers’ decisions on whom to appoint and not to appoint must clearly be based on how closely or otherwise the candidates concerned met the criteria for selection.

2.12 Ministers always have the choice not to appoint at the conclusion of an appointment round.

2.13 The principle of “Equality, Diversity and Inclusion” states that the boards of Scotland’s public bodies should be reflective of the communities that they serve and requires the Scottish Ministers to take substantive steps to achieve that aim. This guidance recognises that this will not always be possible at individual board level due to the numbers involved. By way of example, the visible ethnic minority community makes up a relatively small proportion of the overall population – although this varies by geographical area – and some boards only have a relatively small number of members. The Scottish Ministers are therefore encouraged to consider taking positive action and other suitable measures by reference to not just individual boards but the board population overall. The latter should particularly be the case when an appointment to the cohort of public body chairs is under consideration.

By way of example, depending on the most recent figures available, those involved in running chair appointment rounds should consider positive action measures for all the following groups.

Target Group	Profile of board chairs at the end of 2020	Scottish Population (2011 Census)
Female	39.29%	51.5%
Disabled	10.71%	19.6%
Black and minority ethnic ^{††}	^	4.0%
Aged 49 and under	5.95%	54.3%*
Lesbian, gay and bisexual	^	6.0%**

2.14 The principle of “Respect” means that the applicant journey from application to, where successful, appointment and induction should be a positive experience. Even if unsuccessful, applicants should feel that the time they spent on applying has been appreciated. The provision of meaningful feedback to people is a key element of this principle.

3. The responsibilities of the Scottish Ministers

3.1 The Scottish Ministers are responsible for making fair, open and merit-based appointments in accordance with this Code and other applicable legislation. The Commissioner regulates appointments by reference to the Code and does not regulate adherence to other applicable legislation. This is why other applicable legislation is not referred to in the Code.

The Scottish Ministers are ultimately accountable for the way in which appointments are made and for ensuring that the Code and applicable legislation is followed. Such legislation includes but is not limited to the following:

- the Public Appointments and Public Bodies etc. (Scotland) Act 2003
- the founding legislation of the bodies to which appointments are made
- the Equality Act 2010 inclusive of the Public Sector Equality Duty and the Fairer Scotland Duty
- the General Data Protection Regulation and the Data Protection Act 2018.

The Scottish Ministers may delegate a range of activities to officials and others whilst remaining accountable for the activities that have been delegated. This is with a view to streamlining the process and reducing bureaucracy.

3.2 The Scottish Ministers are required to report on the activities they have undertaken to improve on board diversity, and progress made in doing so, under applicable legislation and other, self-imposed duties. Whilst the Commissioner does not regulate such activity, the Code requires the Scottish Ministers to provide the Commissioner with this information given that it is directly relevant to the Commissioner’s statutory functions. This will allow the Commissioner to assess progress and report on those appointments activities that are not overseen on individual appointment rounds.

The following legislation and other policy documents refer to the activities and reports that the Commissioner should be provided with information on:

Legal imperatives:

- The Equality Act 2010
- The Public Sector Equality Duties

Policy drivers:

- [Race Equality Framework and Action Plan \(2016 – 2030\)](#)
- [A Fairer Scotland for Disabled people: Delivery Plan \(2016 – 21\)](#)
- [British Sign Language \(BSL\) National Plan \(2017 – 2023\)](#)
- [A Fairer Scotland Disabled People: Employment Action Plan \(2018\)](#)
- [Public Appointments: Race Equality Action Plan \(2019\)](#)

3.3 The Code makes it clear that the Scottish Ministers are ultimately responsible for succession planning.

The policy position of the Scottish Ministers is that succession planning should be led by the board chair, with the support of the Scottish Government sponsor and the knowledge and expertise of the Chief Executive and other executive officers.

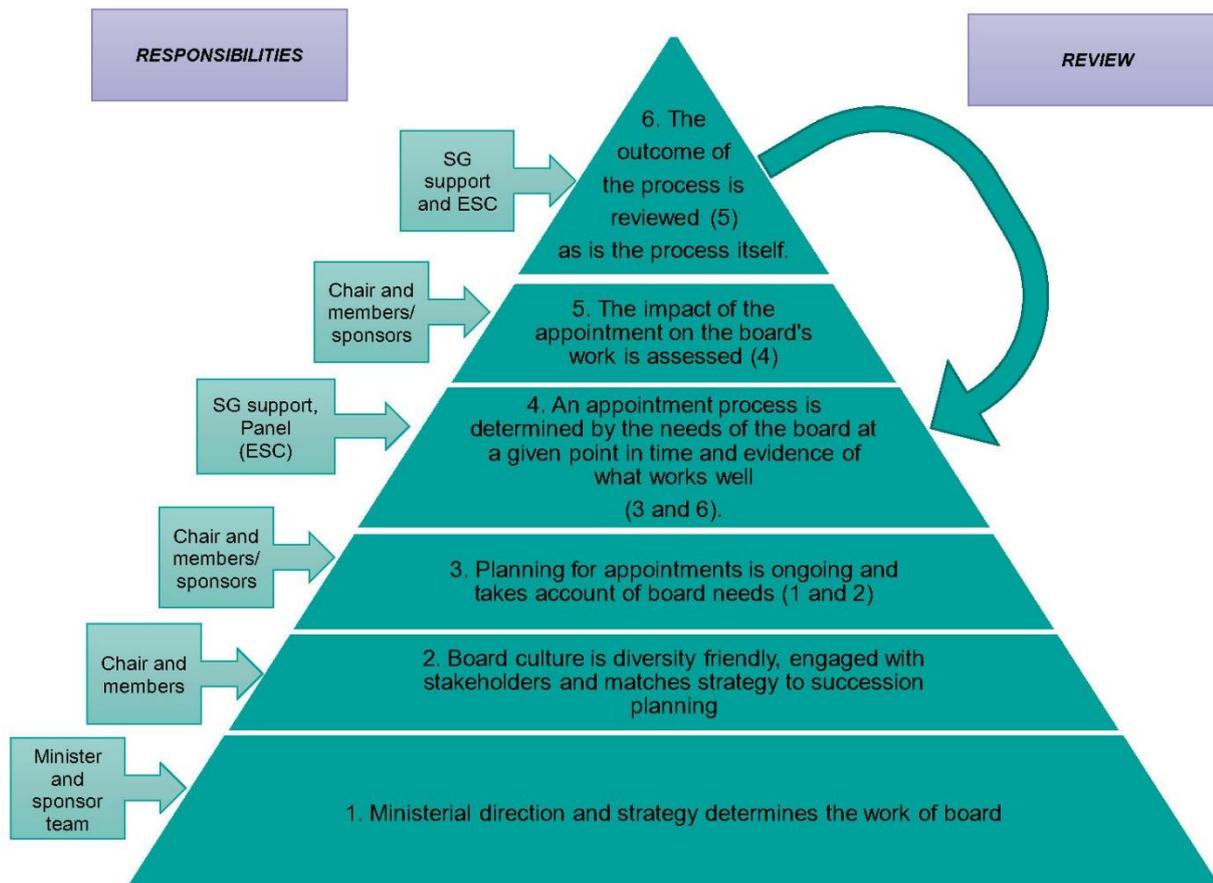
Plans should take account of the board's composition, and the public body's purpose, strategic objectives, and operational context. These should be reflected in aims and plans for developing and retaining current board members, and attracting and developing prospective new board members.

This guidance acknowledges the policy position of the Scottish Ministers and notes that the practices related to effective succession planning will frequently, but not always, be delegated in this way. Factors relevant to such decisions to delegate or not will include whether the board has a chief executive and other executive officers, whether the post being filled is for a chair and whether the Scottish Ministers have concerns about the governance of the organisation in question.

3.4 The Scottish Government has created a governance hub for public body boards that includes a module on succession planning. It is anticipated that boards will actively consider the guidance provided in that module and the range of activities that they can engage in in order to plan effectively for succession.

Attracting and retaining new board members can also dovetail with other board priorities and can include measures such as meaningful community outreach and engagement and mentoring, training and shadowing schemes for people who share protected characteristics which are currently under-reflected on the board in question.

The following diagram illustrates where the various responsibilities for making good appointments lie.



3.5 The Code places an obligation on the Scottish Ministers to take steps to confirm that the applicant is a fit and proper person for the position to which they are to be appointed (E6). In practice, conducting the test is often delegated to the selection panel. Regardless of how the test is conducted, the consideration of such matters must take place openly and involve transparent investigation to establish the facts. In all cases, the applicant will be given an opportunity to respond before any final decision on their suitability for appointment is made (see the Code at A14, A15, D1vi, E1 and E6).

3.6 The Code sets out the obligations on the Scottish Ministers when specifying panel members and the obligations on panel members themselves.

3.7 The Scottish Ministers are encouraged to consider including an independent panel member (A5) for each appointment round, particularly in cases where the Commissioner has not specified a representative to serve on the panel. Independent panel members can offer a constructively critical perspective to the panel's deliberations. It is anticipated that in order to fulfil their role most effectively they must be and must also be seen to be independent of the Scottish Government and the body concerned. Questions as to whether individuals should be designated as "independent" panel members may be referred to the Commissioner for a view. Where the Commissioner considers that a panel member should not be designated as "independent" this does not preclude their participating as a panel member.

4. The responsibilities of the panel

4.1 The Code makes it clear that the implementation and outcome of appointment rounds, inclusive of key decisions taken during the course of the appointment round, rest with the chair of the selection panel who is fulfilling the role of the appointing minister's representative. The chair of the panel is expected to take cognisance of the views of their fellow panel members, including those of the Commissioner's representative when allocated, as a panel member, in coming to their decisions.

4.2 In all cases, panel members must guard against impropriety or the appearance of impropriety. This means that if a panel member has or has had a relationship with an applicant that may be considered close – such as, but not restricted to, being a friend or a business associate – they should always refer the matter to the panel chair who, as appropriate, should consult the Commissioner for a view on whether they should recuse themselves from any and all stages of assessment.

4.3 Similarly, there will be a perception of a conflict of interest in cases where a panel member who has had a substantive role in planning for an appointment round withdraws from the panel and subsequently applies for appointment in that round. As a consequence, no such individual should be identified as suitable for appointment. Panels may rule such individuals out at the shortlisting stage on this basis.

4.4 The Code stipulates that the selection panel will remain the same throughout the appointment round, unless a change of membership is required in certain cases due to unavoidable circumstances such as through ill health or due to a panel member moving to other responsibilities. Other proposed changes to panel membership, because they represent divergence from the Code, must be referred to the Commissioner for consideration.

4.5 In all cases where a request is made to the Commissioner to consider a change in panel membership, it will be preferable for the change to be effective for the remainder of the round. It will also be preferable for such changes to be made between as opposed to during the distinct stages (planning, first stage of assessment, second or subsequent stages of assessment, final stage of assessment and recommendation) of an appointment round. In cases in which the Commissioner considers the change to membership to be appropriate, or where a panel member can no longer participate due to ill-health or through moving to other responsibilities, any new panel member must be briefed on and prepared to be bound by all decisions made by the panel prior to the new panel member joining.

4.6 Where an individual is part of a job share and is also a panel member, then the job share partner may also act as a panel member to share responsibilities. The handover of responsibility will ideally be between distinct stages rather than during the stages but the latter may also be accommodated with the agreement with the Commissioner.

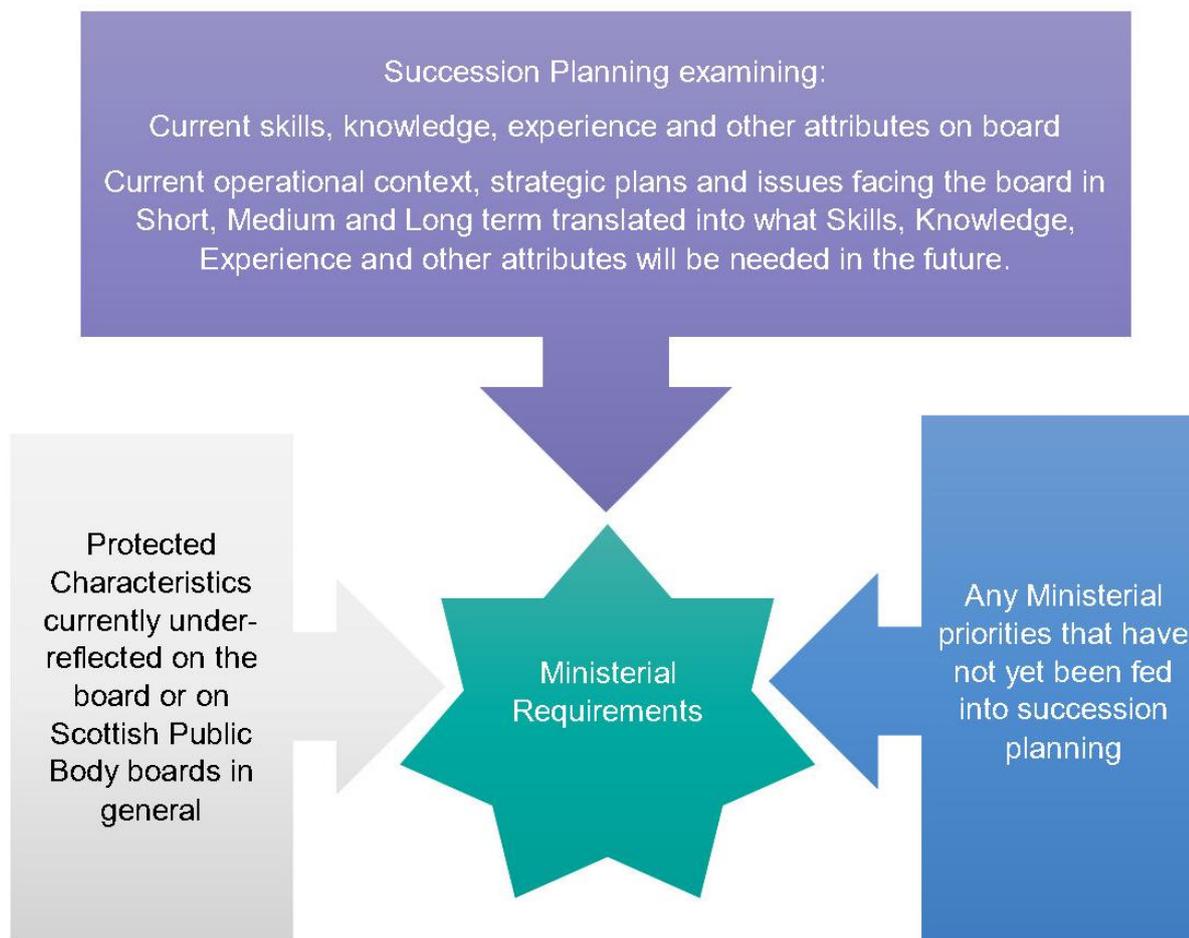
5. Diversity by design – the appointment plan

5.1 The Code requires the appointing minister to agree a range of matters when appointments are planned. This includes reaching a conclusion about the gaps to be filled on a board based on a review of the current members' roles, skills, knowledge, experience and other relevant

attributes. It is anticipated that the appointing minister will have obtained clarity from the board about its needs.

Boards should be actively planning for succession on an ongoing basis, taking into account a range of relevant factors. The information generated by that succession planning should inform the decision of the appointing minister (see 3.3 of the guidance above).

5.2 Provided that ministers have fulfilled their obligations set out in section B of the Code, they may delegate to the chair of the selection panel any or all of the matters that the Code requires them to agree at the planning stage, either generally or in particular cases, whilst ultimately remaining responsible for them. This does not preclude the appointing minister from approving the appointment plan if they wish to or from being updated on any aspect of the appointments process whilst it is being run. Such decisions are entirely at the discretion of the appointing minister.



5.3 The Code anticipates that designing an appointment plan should be conducted by the selection panel whilst recognising that responsibility for deciding on the final plan rests with the panel chair (C1). How the planning stage is conducted is at the discretion of the selection panel chair, taking into account the views of the panel members. The plan should be evidence-based (C2) and designed to meet the appointing minister's preferred outcome. This extends to appointing the individual or individuals who meet the person specification most closely, including where the minister has identified particular criteria for selection that are priorities and that can be weighted over others, as well as redressing the under-reflection of

people who share protected characteristics, where that has also been requested by the appointing minister.

5.4 The plan must include a clear and accurate description of the role to be performed (the role description). This must include an accurate assessment of the time commitment required to fulfil the role and of the remuneration and expenses paid, where applicable. The role can be offered on a role share, or other flexible basis. This could include, for example, remote participation in board meetings on a permanent basis, a change to when board or sub-committee meetings are held or other options that might make the role more accessible to a wider range of people such as a later start date for those due to start maternity or paternity leave. In such cases, the available options will be detailed in the pack so that those who might wish to take up the role will know what this will mean in practice.

In the planning process the selection panel may consider whether it would be suitable for the needs of the board and the requirements of the role to accept applications on a role share or other flexible basis and to provide details in applicant information packs if such applications are to be accepted. Considerations might include, for example, the extent to which remote participation in board meetings or activities can be accommodated, whether a change to when board or sub-committee meetings are held can be accommodated or other options that might make the role more accessible to a wider range of people. The selection panel may also consider whether different start dates can be accommodated in respect of the needs of the board, such as a later start date for those due to start maternity or paternity leave. The selection panel must consider the impact of role sharing on the number of board appointees where a maximum or minimum or relative number of appointees is described in the founding or establishing documentation for the board and its operational rules

Panels should consider whether the role can be offered on any type of flexible basis which might encourage a wider range of suitable applicants to apply.

This could include:

- Role share
- Remote attendance
- Varying the time and/or location of meetings
- Flexible date for starting in the role

5.4 The Code anticipates that the application and assessment methods and any positive action measures selected will be based on evidence of what works well to attract and lead to the appointment of a diverse range of able applicants, taking account of relevant information held by, maintained and regularly updated by the Scottish Government for this purpose. Any positive action measures taken must be compatible with the applicable legislation.

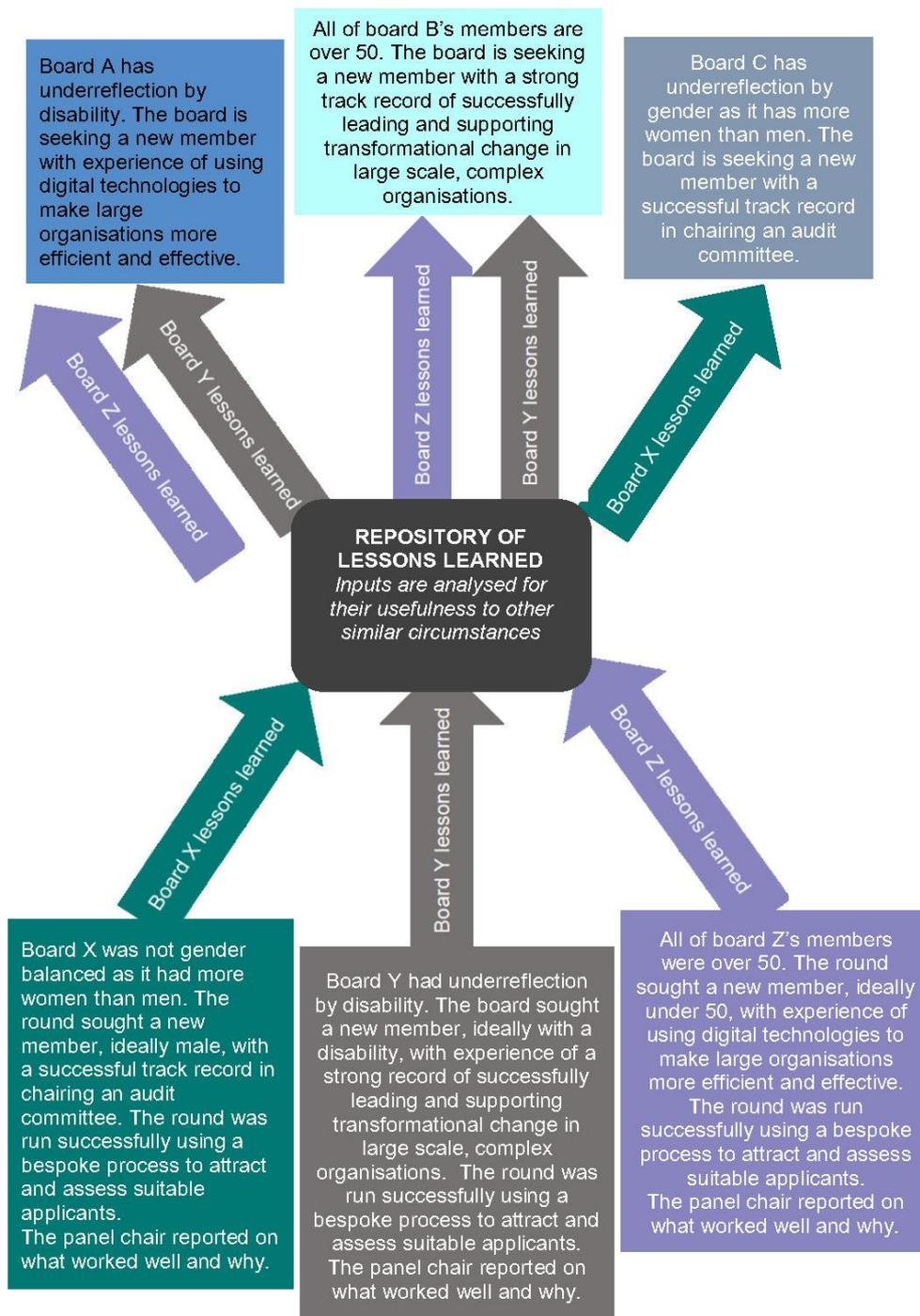
5.5 This information will be made available to panels to enable them to select methods for publicity and application and assessment that they know will not represent barriers for people from particular under-represented groups and that can be used to address the under-reflection of people who share protected characteristics on boards. Panel chair reports will be used to add to this knowledge base on an ongoing basis.

5.6 The Code anticipates that both positive action measures and equality impact assessments should be used, as appropriate, in order to increase board diversity. Positive action measures do not have to be restricted to an appointment round by appointment round

basis. By way of example, they can include board activity such as mentoring, training or shadowing schemes which supports succession planning (see 3.4). The results of such measures and assessments should also be captured for the knowledge base.

5.7 The mechanisms used for maintaining and updating such material and assessing its effectiveness are matters for the Scottish Government. The Commissioner may review the repository of such information from time to time to assess the extent to which it complies with the Code’s provisions.

The following diagram illustrates how this process should work in practice.



5.8 The Code anticipates that all materials provided to prospective applicants should be drafted using simple, easy to understand, language and that submitting an application for a role should be a comparatively easy exercise and at a level appropriate to the role. The Commissioner will provide applicants with an opportunity to give their views on this specific question by way of surveys. The Commissioner will publish the results of such surveys.

5.9 The panel should decide what information they require to inform their decision-making on advertising and the process to be used to select the most able candidates. The panel should review lessons learned from previous rounds which will in turn inform the panel chair's evidence-based appointment plan. The panel chair is responsible for generating such information at the conclusion of the appointment round in the form of a report so that it can be added to the store of lessons learned to aid with continuous improvement.

5.10 Where parliamentary approval for an appointment is required, the selection panel must consult the relevant subject committee with a view to agreeing that the plan will deliver against both parliamentary and ministerial requirements. That consultation must be meaningful and must offer the committee in question an opportunity to provide views on any and all aspects of the draft appointment plan, including, in particular, the draft role description and draft person specification.

5.11 The Code requires the chair of the selection panel to produce a report at the conclusion of the appointment round. It should set out the extent to which the appointment process delivered or failed to deliver the desired outcome set by the appointing minister. Reasons for success or failure must be included in that report. That applies both to meeting the board's needs, as originally specified by the appointing minister, as well as any instructions from the appointing minister about how the board's diversity, in terms of protected characteristics, should be improved. A copy of the report will be provided to the appointing minister and to the Commissioner (C7). The information contained in these reports will be used to contribute to continuous improvement of the appointments process

5.12 The Scottish Government should review and keep under review current practices with a view to facilitating 5.1 to 5.10 and 5.12 above.

6. Assessment is appropriate

6.1 The Code sets out the range of requirements that assessment methods must adhere to in order to be considered compliant. These requirements are included on the basis that they are representative of good practice in recruitment and selection and with a view to ensuring that the process accommodates the needs of, and does not present a barrier to, people who currently share under-reflected characteristics on the boards of public bodies.

In respect of disabled people, who are significantly under-reflected, there is a requirement for reasonable adjustments to be offered proactively.

6.2 The criteria for selection are the way in which 'merit' is described for each post to be filled. The methods of assessment agreed by the panel should be appropriate to assess the criteria for selection.

By way of example, when a board requires experience, this can be gathered by way of life history or CV whereas it is not appropriate to test experience using forms for competency-based assessment.

The Code requires that application and assessment methods have validity in order to ensure that they are appropriate. Assessment methods should be chosen on the basis of their validity.

Validity is increased when indicators are used to describe what good evidence of a criterion being met will look like. It is decreased when indicators are used but they do not do this. In summary, indicators should include:

- A clear/objective distinction between each level of performance
- A focus on specific behaviours, not frequency of behaviours
- Using behaviours that are in the normal range (i.e. no extremes at each end)
- Describing behaviours as clear actions that can be seen (rather than the absence of actions).

Panels should refer to the core skills framework for further guidance on indicators. A simple description of the different types of validity is set out below.

Predictive validity	the extent to which the form of assessment will predict who will perform effectively in the role.
E.g. requiring people to demonstrate that they have a skill by completing a practical test, such as analysing a board paper, have greater levels of predictive validity than unstructured interviews.	
Face validity	the extent to which the applicant considers the form of assessment to be credible and/or acceptable to the applicant pool
E.g. those applying for a chair role may not feel that a group exercise whereby they were assessed alongside other applicants for the same role was a credible or acceptable form of assessment even though it may have a measure of predictive validity.	
Content validity	concerns whether an assessment method assesses the attribute sought, as opposed to something else, and the extent to which it assesses it
E.g. Asking an applicant to assess the accounts of the body to identify potential areas of concern when financial expertise was not sought in the applicant pack.	

Using a range of assessment methods with appropriate validity improves the likelihood of achieving the most successful outcome. All methods chosen for assessment should be agreed during planning and made clear in the information provided to prospective applicants so that they can make an informed decision about whether to apply.

6.3 The Code requires those charged with assessment to be consistent in doing so (D5). This does not mean treating everyone the same. By way of example, some candidates may

require reasonable adjustments in order for their treatment to be equitable.

Equally, all candidates do not have to be asked the same questions at interview, although the question areas will be the same, as the panel will want to probe some candidates at interview more deeply than others due to the nature and quality of the information they provided prior to that stage.

6.4 In certain cases, candidates may be unable to attend in person, where the panel requires this, on the dates publicised for interview. Panels are not obliged to interview such individuals but may wish to offer to do so using ICT, such as by telephone or teleconference or using another platform such as Zoom or MS Teams, in order to optimise the field. In such cases, where it is clear that there is inconsistency in the assessment method, this will be explained to the candidate concerned alongside any measures that the panel proposes to take to lessen the inconsistency. It is open to candidates to withdraw their application, having taken into account the panel's proposals.

6.5 The selection panel may delegate any or all of the stages of assessment, other than the final stage, to appropriately qualified individuals or organisations. This includes sifting, shortlisting, the running of assessment centres and the application of practical tests at any stage of the appointment process. This allows for assessment to be conducted for multiple bodies at the same time. The panel chair is responsible for ensuring Code compliance when assessment activity is delegated. The Code at D5 gives direction on what is anticipated in respect of all individuals who are responsible for conducting assessment, whether the activity is delegated or not.

6.6 The Code precludes the involvement of any individual or organisation with an actual or perceived conflict of interest from taking part in the assessment of applicants or candidates. The conflict of interest has to be such that it renders the outcome unfair or creates the public perception of unfairness. This is because this can significantly undermine public trust and confidence in the appointment process. By way of example, assessment can be delegated to recruitment consultants but only as long as they do not at the same time have clients who wish to apply for board positions.

Where delegation is allowed, the panel chair is responsible for ensuring that this is done in a way which is compatible with the Code. Where it is not allowed, a Code variation may be permitted by the Commissioner to allow for it, as long as the principles of the Code are not compromised.

6.7 The Code requires the selection panel to draft an applicant summary which records its assessment of all applicants. The final content of the summary is a matter for the panel chair, taking into account the views of the panel members. The applicant summary is to be understood as the key record of the panel's decision about the suitability or otherwise of all applicants. The appointing minister may choose to receive the entire summary or only that part which identifies the most able applicants.

6.8 The applicant summary should be finalised as soon as possible after the final stage of assessment. This is to facilitate the provision of timeous, good quality feedback to applicants. Individual panel member notes and assessments do not have to be retained once the summary has been drafted and finalised. Once the applicant summary has been finalised, neither panel members nor others should seek to revise it. Should a panel member, official

or minister have legitimate grounds for seeking to subsequently revise the summary, the Commissioner must be approached for guidance. Such grounds may include new information relating to the suitability of applicants coming to light that was not considered by the panel.

6.9 The applicant summary will identify the “most able” candidate(s) for appointment. Subject to the results of the fit and proper person test described in section 7 of this guidance, the appointing minister must appoint the most able candidate(s) or, alternatively, choose not to make an appointment. When the minister has made the decision whom to appoint and whom not to appoint, the reasons for these decisions will be recorded. This information will form the basis of additional feedback provided on request to applicants who are recommended to Ministers. Given that new requirements cannot be introduced during any stage of an appointment round, those reasons must relate to the criteria for selection and/or a failure to meet the fit and proper person test. In tie-break situations, characteristics or situations may also be taken into account in accordance with section 2 of this guidance.

7. The fit and proper person test

7.1 Candidates must satisfy Ministers, or the panel where this has been delegated, that they meet the “fit and proper person” test for public appointments. The requirements of the test are set out in the Code in paragraph E6.

7.2 Candidates are required to embrace the Principles of Public Life in Scotland. These should be signposted for applicants in the application pack as either a standalone document or as included in the Members’ Code of Conduct for the body concerned.

7.3 Candidates are also required to provide information relating to their political activity as defined in the political activity declaration form. Guidance provided to applicants will clearly set out what qualifies as political activity so that applicants can make an informed decision about whether a declaration is required. Political activity in itself is no bar to appointment but the information will allow the panel to explore the activity in the context of their ability to perform in the role and can be taken into account in considering the fit and proper person test. The information will only be considered by the panel at interview stage.

7.4 When a panel considers that applicants must provide an up to date disclosure check, this must be made clear to applicants in the applicant information pack. No applicant should be required to pay for such a check unless provisions have been made to reimburse them for it. This too will be made clear in the pack where such disclosure checks are required.

7.5 When a panel considers that an applicant may not meet the fit and proper person test, the provisions of the Code at A14 and A15 apply. Applicants will be given an opportunity to respond to the panel’s concerns before any final decision as their suitability is made. Ideally, this opportunity should be provided during the course of any interview.

7.6 Where the appointing minister has delegated the test to the panel, and the panel has concerns about a candidate that it is unable to resolve and wishes to highlight with the appointing minister, the test can be delegated back to the appointing minister alongside the issues of concern identified by the panel. The process outlined in A14 and A15 of the Code should be applied by the minister or their officials in such circumstances.

8. The Commissioner’s oversight

8.1 The Code refers in paragraphs A16 to A22 to the ways in which the Commissioner will provide regulatory oversight of appointment activity and promote compliance with its provisions. In general terms, the Commissioner’s approach will be pragmatic, proportionate and conducted with the intention of encouraging good and improving practice, meeting the needs of boards, improving board diversity and precluding non-compliance with the Code’s provisions.

8.2 When a new appointment is planned or in cases where a board’s needs are being considered, the Scottish Ministers will contact the Commissioner as early as practicable. Once this has been done, the Commissioner will make a decision on which aspects of any appointment activity may require oversight and communicate this to the Scottish Ministers. The Commissioner will also be approached once a panel has concluded its plans in cases in which assessment is to be delegated. The Commissioner may provide oversight of the following:

- early engagement with the panel and/or body to assess the effectiveness of succession planning undertaken
- planning for specific appointment activity, in which case the Commissioner’s representative may be designated as a panel member
- some or all aspects of assessment, particularly when these have been delegated
- the entirety of a given appointments process from end to end, in which case a representative of the Commissioner will be designated as a panel member.

The following diagram is illustrative of where the oversight might be involved.

	Early Strategic planning	Formal planning stage	Advertising	Early Assessment		Later Assessment		Overall assessment of applicants
				Sift	Shortlisting	Assessment exercises	Interview	
Early Planning	✓							
Detailed Planning	✓	✓						
Assessment methods	✓					✓		
Full competition	✓	✓	✓	✓	✓	✓	✓	✓
Combination ¹	✓			✓	✓	✓		✓

The Commissioner’s decision is made having regard to the need for proportionality and to the assessment of risk.

¹ This combination is for illustrative purposes only – the combination could include any stages of the process that the Commissioner determines as appropriate.

8.3 The factors taken into account by the Commissioner may include:

- (i) the seniority of the appointments (for example, the chairs of public bodies)
- (ii) the level of public expenditure for which the public body is responsible
- (iii) the nature of the public body and its role and responsibilities
- (iv) the level of public interest in the functions of the public body
- (v) recent performance of the relevant directorates relating to public appointments
- (vi) the nature of any assessment activity delegated by the panel, and to whom that activity is delegated
- (vii) the extent to which the current composition of the board is reflective of society and
- (viii) concerns reported to the Commissioner either prior to or during the course of an appointment round.

8.4 Formal scrutiny of the entirety of an appointment round will be limited to what the Commissioner will describe as high-level appointments with mid-level appointments being scrutinised (where a level of scrutiny is considered appropriate) only up to the stage of the finalisation of the appointment plan. Some appointment activity will involve no contemporaneous oversight and some will require ad hoc oversight, depending on what is planned by the panel.

8.5 Scrutiny will also be undertaken at the request of the Scottish Government (such as in the case of appointments to new public bodies), with the agreement of the Commissioner. The Commissioner may scrutinise any or all aspects of appointment activity, including pre-planning and the consideration of a board's needs, in response to such requests.

8.6 The Commissioner is entitled to scrutinise any appointment activity as he considers necessary to meet his statutory responsibilities.

8.7 The Commissioner may vary the scrutiny level for any appointment round if he feels that this is appropriate.

8.8 The Commissioner's office will augment these procedures by carrying out annual, thematic or ad hoc reviews as considered appropriate. In such cases the Scottish Ministers must provide the Commissioner with such information as the Commissioner reasonably requires in the exercise of the Commissioner's functions.

8.9 The Commissioner will periodically publish reports on the scrutiny of the practices that his office and/or his representatives have observed, also with a view to providing assurance and continuous improvement of the public appointments system and assessing whether the Code is meeting its stated objectives.

9. Ministers meeting recommended candidates

9.1 Ministers should give careful consideration to meeting recommended candidates before making their final decision in the case of senior appointments. All as opposed to a selection of the recommended candidates must be met when the Minister decides to take this course of action.

9.2 Such meetings are anticipated for appointments such as chairs of public bodies with budgets in excess of £5 million or with remits attracting strong public interest such as a body that is being newly established or that has attracted significant recent controversy.

9.3 These guidelines do not preclude the appointing Minister from meeting recommended candidates in any other case.

10. The board has continuity of skills, knowledge, experience and other relevant attributes

10.1 The Code allows Ministers to reappoint or extend a member's appointment provided that the member's total period of appointment does not exceed eight years. The eight year period begins on the date of that individual's first appointment to the board following a publicised appointments process. It applies to any period served on that board whether continuously or discontinuously served. When someone has served in a regulated appointment for eight years, they are not precluded from applying to serve on a different board or to serve as a chair on the same board.

10.2 The positions of chair and member are also treated separately. This means that a member who has served eight years on a board, can apply to serve as chair and, if appointed, may serve for up to a further eight years in that position.

10.3 As the eight year period relates to time in post following a successful application for a publicised opportunity, the time spent as a board member by any individual promoted in role to a deputy chair post will be included as part of the overall total. As with chair roles, a member who has served eight years on a board can apply to serve as deputy chair and, if appointed following open competition, may serve for up to a further eight years in that position.

11. The appointment process is transparent

11.1 The Code requires the Scottish Ministers to publicise all appointment decisions and stipulates the information required. These decisions should be publicised on the Scottish Government's website.

11.2 In the case of senior appointments, such as chairs of public bodies with budgets in excess of £5 million or with remits attracting strong public interest (see 9.2 above), the appointments should also be publicised on the news pages of the Scottish Government's main website.

11.3 To ensure that the public is able to access historic information on previous appointments made, the Scottish Ministers are required to maintain an online easily searchable archive of all such appointment announcements.

11.4 For the same reason, the Scottish Ministers are required to maintain in the public domain an up to date list of regulated public appointments made. The information to be included in the list is also stipulated in the Code. It includes the names of people who hold and have held more than one regulated public appointment made by Scottish Ministers. The details of

current and prior regulated appointments held must be set out so that the Scottish Ministers and others are able to monitor and evaluate the impact of this phenomenon on board diversity. The Scottish Ministers should consider whether their current retention period policy on such information provides sufficient transparency in relation to this particular requirement, given that a proportion of individuals have held several appointments spanning decades.

12. Timescales for appointments and reappointments

12.1 An indicative timescale for carrying out an appointment process has been set in this guidance. Under no circumstances should meeting the indicative timescale be prioritised over the need to ensure that the appointment round is properly planned and implemented.

12.2 Scottish Government officials should record the following key dates in respect of each appointments process:

1. The date on which an appointing minister agrees to proceed with an appointment
2. The date on which the appointment plan is finalised by the panel chair
3. The date on which the position is publicised
4. The closing date for applications
5. Each stage of assessment such as shortlisting and interview
6. The submission of the applicant summary to the appointing minister(s)
7. The date on which the minister's appointment decision is made
8. The date(s) on which successful and unsuccessful candidates are advised of the outcome.

12.3 It is anticipated that up to 16 and no more than 20 weeks should have elapsed between points 2 and 7. As these timescales are indicative, a failure to meet them does not represent a breach of the Code's provisions.

12.4 For reappointments, the ministerial decision to reappoint should be made and communicated to the board member or chair concerned no later than 13 weeks before the reappointment is due to end. This is a firm target date and failure to comply with it will be considered to be a failure to comply with the Code's provisions.

12.5 A note of the key dates from each appointment round run should be provided to the Commissioner. The Commissioner may include this information in his annual report.

12.6 Target dates for appointment and reappointment are to be kept under review by the Scottish Government and the Commissioner.

13. Exceptional circumstances

13.1 The Code advises that the provisions of the Code may be varied to take account of exceptional circumstances and gives examples. In all such cases the agreement of the Commissioner must be sought. The Commissioner considers each case made to vary the provisions of the Code on its individual merits and undertakes to be pragmatic in doing so

(see 2.1). In particular, the Commissioner will take cognisance of unforeseen events that may have an impact on a board and the need for board continuity to be maintained to deal with such events. The Commissioner will not allow for provisions to be varied in cases in which the principles of the Code will be compromised.

14. Respect for applicants

14.1 The Code requires constructive, meaningful and tailored feedback to be provided to all unsuccessful applicants who make a reasonable request for it. This is considered to be fundamental to transparency of the process and respect for those who take the time to apply and also intended to assist people to apply again in future with a clear indication of how they may improve on their previous application(s).

The Code states at D8 that the detail included in the applicant summary will be reasonable and proportionate to the stage of assessment reached by the applicant and the number of applications received. It also requires the summary to be sufficiently detailed to provide feedback to applicants.

To allow for a proportionate approach to be taken in relation to applicant summary production, particularly for appointment rounds that generate a high number of applications, officials (in consultation with the panel chair and panel) may decide to contain the applicant summary to the minimum amount of information needed to allow the appointing minister to make a decision and provide evidence that the panel's decisions are valid. In such cases, the additional information needed to allow constructive meaningful and tailored feedback to all unsuccessful applicants who make a reasonable request (14) will need to be held elsewhere. How, and in what format this is done is entirely at the discretion of officials.

14.2 The Code also requires those who are appointed to be asked to give feedback on their induction and training. It is anticipated that the information generated in this way will be used to improve over time on the induction and training provided.

Glossary

Act

The Public Appointments and Public Bodies etc. (Scotland) Act 2003.

Applicant

An individual who has applied for a role on a public body board. Where applicant appears in the text, this may be taken to refer to more than one.

Applicant summary

A written summary of the performance of each applicant that describes the selection panel's view on how each applicant did or did not demonstrate the skills, knowledge, experience and other attributes required to be effective in the role.

Application form

A form that is completed by an individual to describe how they meet some or all the requirements of a role, as set out by the panel. It may also seek other information such as a

tailored CV.

Application pack

A pack containing a range of documents relating to a specific appointment (see Annexe Two for contents).

Appointment plan

A plan that sets out the actions to be taken and the timescales for these actions for a specific appointment round.

Appointment round

The process of selecting an individual or individuals for appointment to the board of a public body.

Assessment

Any method agreed by the selection panel for evaluating the merit of applicants in relation to the skills and knowledge required to be effective in the role.

Attributes

Criteria for selection that aren't readily identifiable as skills, knowledge or experience. Examples include an individual's values, socio-economic background or geographical location. For the purposes of the Code, they don't include protected characteristics as defined by the Equality Act 2010.

Board member

A person appointed through the ministerial public appointments process to a non-executive or equivalent position on the board of a regulated public body.

Code/Code of practice

The Code of Practice for Ministerial Appointments to Public Bodies in Scotland.

Commissioner

The Commissioner for Ethical Standards in Public Life in Scotland. Also the Ethical Standards Commissioner for Scotland or the Ethical Standards Commissioner (ESC). Unless otherwise clear from the wording or context, references to the Commissioner should be taken to include the Commissioner's representative(s).

Confidentiality

Handling information related to applicants in a way that is compatible with applicable data protection legislation and ensuring that applicants understand why their personal data are used and to whom they may be disclosed.

Disclosure information

Information provided by Disclosure Scotland under the Disclosure Scotland Act 2020 about an applicant's criminal history that is relevant for assessing the applicant's suitability for appointment.

Final stage of assessment

The final stage of assessment normally consists of an interview, although that is not a Code requirement, as well as assessment of all of the evidence provided by applicants at the

preceding stages and the final stage in order to identify the most able candidate(s).

Fit and proper person

An individual who is suitable for appointment because they meet the requirements of the role and because their past or present activities and/or behaviours do not render them unsuitable for a given appointment.

Key decisions

Decisions made that will have an impact on the outcome of the round or the experience of applicants. Examples include decisions taken on the chosen methods of assessment and on the suitability of applicants for a role.

Members' model code of conduct

Also, Code of Conduct. A statutory code introduced under the Ethical Standards in Public Life etc (Scotland) Act 2000. The Members' Model Code of Conduct is issued by the Scottish Ministers and public bodies are required to adopt their own codes based on the model. The Code is underpinned by nine principles of public life in Scotland and sets out standards of conduct with which members of public bodies should comply. The Commissioner investigates complaints that members have not complied with their body's code. The Standards Commission for Scotland adjudicates on whether the code has been complied with on receipt of a report into an investigation conducted by the Commissioner. Information on the Codes of Conduct can be downloaded from the Standards Commission for Scotland's website.

Minister (also appointing minister)

The minister responsible for setting out their preferred outcome for an appointment round and for making an appointment decision at the end of a specific appointment round.

Most able

The applicant(s) who has(have) demonstrated that they meet all of criteria for selection such as the skills, knowledge, experience and other attributes and who additionally most closely match those required to be effective in the role.

Open competition

A publicised appointment round that is open to an appropriately wide and diverse range of applicants; anyone who becomes aware of the opportunity may choose to apply.

Personal bias

Decisions made on the basis of information that does not relate to an applicant's ability to meet the criteria in the person specification and role description. Personal bias may relate to information such as name, home location, age, gender, ethnicity, educational establishments attended and qualifications gained (unless qualifications are specified as a requirement for the role).

Person specification

A document that describes the particular skills, knowledge, experience and other attributes required of the person to be appointed. The person specification will state the minimum requirements for the role – the essential criteria – and may include priority criteria that are weighted over other criteria for selection.

Person to be appointed

References to the person to be appointed should be taken to mean references to the people to be appointed where a minister plans to make more than one appointment to a board during one appointment round.

Political activity

Information about political activity during the previous five years of a person to be appointed to a board. This does not include personal or private information such as membership of political parties or voting preferences.

Political activity declaration form

A form used to declare the political activity during the previous five years of those appointed to public bodies' boards. The form does not ask for personal or private information such as membership of political parties or voting preferences.

Public body

A body for which the Scottish Government is responsible and with whom they have a direct relationship. They carry out statutory, regulatory and advisory functions at arm's length from central government. All public bodies that fall within the Commissioner's remit are noted in schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 as amended by statutory instrument. A list of the bodies currently regulated by the Commissioner is available on the Commissioner's website: www.ethicalstandards.org.uk.

Publicity

The process of making an appointment opportunity known publicly. This may be through advertising, or through the use of websites or other electronic communications, and may include informing individuals or organisations of the appointment opportunity.

Regulated public bodies

See also "Public body". Public bodies appointments to which fall under the regulatory remit of the Commissioner by virtue of their inclusion in schedule 2 to the Act.

Role description

A document that describes the nature, purpose and responsibilities of the role on the public body board. It will state the length of the appointment term, any remuneration, allowable expenses and a realistic indication of the time commitment required. Specific requirements particular to the role, for example the location of an applicant's home or place of work, will be included.

Schedule 2

Schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 which (as amended by statutory instrument) lists the public bodies that fall within the Commissioner's remit.

The Scottish Ministers

Ministers of the Scottish Government responsible for recommending for appointment and/or for making appointments to the boards of public bodies within the Commissioner's remit.

Scottish Parliament

The devolved Parliament of Scotland as defined in Part 1 of the Scotland Act 1998.

Selection panel

Those people responsible for assessing applicants and identifying applicants who they believe are suitable for appointment.

Shortlisting

A stage of assessment in which those applicants who will move to the final stage of assessment are identified.

Sifting

Also “longlisting”. A stage of assessment in which those applicants who clearly do not meet the criteria for selection are identified.

Term

The length of an appointment as specified in the role description.

Under-reflected

This refers to people who share protected characteristics that are not reflected on boards to the extent that they should be, based on the demographic profile of the people of Scotland or in particular regions of Scotland. The Commissioner uses the term under-reflected rather than under-represented as the latter term suggests that people who share protected characteristics such as, for example, ethnic minority backgrounds are appointed to boards in order to “represent” those protected characteristics. That is not the case. Appointments are made to meet the needs of boards; they are not made tokenistically.