



# Ethical Standards Commissioner

## CONSULTATION PAPER

Recommendations for change to the  
Code of Practice for Ministerial Appointments  
to Public Bodies in Scotland *and*  
A proposed draft Code for further consultation

14 July 2021

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This document is available in alternative formats on request by telephoning 0300 011 0550 or by e-mailing [info@ethicalstandards.org.uk](mailto:info@ethicalstandards.org.uk).

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

The members of the boards of nearing 100 regulated public bodies in Scotland have responsibility for providing the governance oversight of vital services that affect us all. These touch every aspect of our lives; from health to housing, the environment to education, the economy to enterprise, the creative and cultural sectors to crofting, or policing to public transport. Each Board within its different sector and particular remit provides strategic direction, scrutiny of performance and of course, stewardship of significant amounts of public money. It is in everyone's interests that these important public bodies are led by people who have a diverse range of the most appropriate skills and experience, who act with integrity and commitment and who are reflective of Scotland's geography, demography and breadth of experiences and insights.

The Code of Practice is an important tool in securing the appointments of the right people for the right roles. It is rooted in good practice in recruitment and selection and intended to help selection panels design appointment rounds that deliver the skills, knowledge and experience needed as well as being welcoming and accessible to people from all backgrounds.

Diverse Boards benefit from fresh perspectives, new ideas, vigorous challenge and breadth of experience. A more diverse membership and skillset enables the Board of a public body to keep better pace with often changing contexts. While the current global pandemic is an extreme example of a world-wide system shock, Scotland's public bodies are already having to adapt flexibly to changes in services, resources, public needs and expectations and approaches to delivery.

Organisations that understand and reflect the people and communities that they serve are more likely to have credibility with them and deliver better services; this in turn promotes wider engagement and public trust in board decision-making.

We are strongly supportive of diversity of thought and contribution resulting in better corporate governance and decision-making, and, in turn, supporting the continuous improvement of our public services in Scotland. For this reason, our review and proposed revisions to the Code in 2021 are unashamedly focused on enabling more creative and ambitious approaches to attracting and appointing the best new board members from the widest possible pool of applicants.

We consulted on prospective revisions to the Code from August 2020 and are grateful to all of the individuals and organisations who took the time to respond. For those with an interest, a short and a fuller document, setting out the results of the analysis of responses, are available to download from our website from the following links:

<https://www.ethicalstandards.org.uk/publication/full-summary-analysis-code-practice-ministerial-appointments-public-bodies-scotland-consultation-and-draft-new-code>

<https://www.ethicalstandards.org.uk/publication/short-summary-analysis-code-practice-ministerial-appointments-public-bodies-scotland-consultation-and-draft-new-code>

This document includes only the recommendations arising from the analysis and the revised draft code itself. Views on both would be very welcome and should be submitted to [info@ethicalstandards.org.uk](mailto:info@ethicalstandards.org.uk) no later than 30 September 2021.

A handwritten signature in blue ink, appearing to read 'John B. Smith', is positioned above the title of the signatory.

Acting Ethical Standards Commissioner

## 1 Respondent Information

This consultation paper invites comments on the recommendations made by the Commissioner about the ways in which the Code of Practice could be improved upon. It also seeks views on the revised draft Code.

Comments are invited by **Thursday 30 September 2021**.

Please complete the details below. This will help ensure we handle your response appropriately. For information about how we process data we collect, including how we process personal data, please see our privacy policy at [www.ethicalstandards.org.uk/privacy-policy](http://www.ethicalstandards.org.uk/privacy-policy).

<b>Name:</b> [REDACTED]	
<b>Address:</b> [REDACTED]	
<b>1. Are you responding as (please tick appropriate box):</b>	
1a. An individual (go to 2a/b, 3)?	X
1b. On behalf of a group or organisation (go to 2c/d, 3)?	
<b>2. Individuals:</b>	
2a. Do you agree to your response being made public (on the Commissioner's website or otherwise published) (please tick one box)?	
Yes (go to 2b below)	X
No	
2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick one box):	
Yes, make my response and name available	
Yes, make my response available, but not my name	X
<b>On behalf of groups or organisations:</b>	

2c. Do you agree to your response being made public (on the Commissioner's website or otherwise published) (please tick one box)?	
Yes (go to 2d below)	
No	
2d. Your organisation's name as a respondent will be made available to the public (on the Commissioner's website or otherwise published) unless you request otherwise. Are you content for your response to be made available (please tick one box)?	
Yes, make my response and organisation's name available	
Yes, make my response available, but not my organisation's name	
<b>Further contact</b>	
3a. We may wish to contact you again in the future to clarify comments you make.	
Are you content for us to do so (please tick one box)?	
Yes	X
No	
3b. We may wish to contact you again in the future for consultation or research purposes. Are you content for us to do so (please tick one box)?	
Yes	X
No	

## 2 Recommendations arising from the analysis

### 2.1 Defining diversity and securing it

#### Recommendation 2.1

The revised draft Code will balance specific measures with a focus on appropriate outcomes for each board in terms of diversity and succession planning. Over and above this, the term diversity will be expanded to provide a better understanding of what the appointments process should deliver.

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
I think it's important to broaden the term diversity to include more than protected characteristics but I think the Code needs to be leave flexibility for boards to determine what they need.	

### 2.2 Learning lessons and basing decisions on evidence

#### Recommendation 2.2

The Commissioner will, in making revisions to the Code, balance the need to allow for flexibility with some very clear requirements about the need for panels to base decisions on evidence of what works and for the Scottish Government to maintain, update and use that evidence-base. In the absence of such measures, and based on past experience, the Commissioner does not see how such good practice will become the norm. Clearer focus on what works and why will help increase the pace and improve the focus of measures to deliver more diverse appointments of people with the right skills and experience.

Your response to the recommendation (please enter a 'X' in one box):	
YES	x
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	



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## 2.3 Nationwide, regional or characteristic-specific positive action measures that could be taken

### Recommendation 2.3

The Commissioner has concluded that the Code should place a requirement on the Scottish Government to publish an action plan each year which includes the SMART, evidence-based measures that it proposes to take in the year ahead in order to secure more diversity on boards. The Scottish Government will also be required to report annually on progress against the previous year's plan. Thus, the Code will not be prescriptive about the specific measures to be taken round by round but will rather be clear that it is a responsibility of the Scottish Ministers to undertake clear positive action measures. The production of and reporting against an annual action plan are appropriate for inclusion in the Code. This will increase transparency and allow for the Scottish Government to more effectively measure its own performance and to be held to account publicly for the longer-term measures that they put in place to support change over and above any specific activities delivered on an appointment round by appointment round basis.

Your response to the recommendation (please enter a 'X' in one box):	
YES	
NO	
UNSURE	X
Please give your reasons for your answer and include any comments you wish to make in the free text box below:	
<p>I'm not sure if this will reduce flexibility for Boards to be able to recruit to the specific needs of the Board. My concern is that it could drive a 'tick box' process to meet a government goal to the detriment of the Board.</p>	

## 2.4 Updating the Diversity Delivers strategy

### Recommendation 2.4

As there still remains significant opportunity to increase diversity on Scotland's boards and to embed more sustainable and replicable ways of maintaining that, the Commissioner has concluded that he should seek parliamentary support for to update Diversity Delivers. He hopes that

developing a more forward-looking and integrated approach through a refreshed and up to date strategy will aid in bringing a shared understanding and accountability to its achievement across the range of partners who are committed to improved outcomes in this area

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free text box below:	
I agree but think some focus needs to be given to the application process to make it easier for applicants and also to help the panel identify certain characteristics.	

2.5 Which provisions of the Code and Guidance are detracting from the delivery of appropriate outcomes?

#### Recommendation 2.5 a

The Commissioner accepts that the language of the Code could be simplified and that this should apply also to all of the materials that the Scottish Government employs for the appointments process.

#### Recommendation 2.5 b

The Commissioner also sees a greater role for boards themselves in planning for succession being an important addition for inclusion in the next iteration of the Code.

#### Recommendation 2.5 c

The Commissioner acknowledges and accepts that there could be an inherent conflict of interest attached to PAAs acting as decision makers in the appointments process. Although this practice was adopted with the agreement and, in fact, encouragement of the Scottish Government when the 2013 Code was introduced on the basis that PAAs became Public Appointment 'Advisers' rather than 'Assessors' at that time (with an increased focus on good practice and support rather than enforcement), he is happy to consider the issue again in light of the responses received to this consultation.

Your response to recommendation 2.5 a (please enter a 'X' in one box):	
YES	X
NO	

UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
I think this is key to ensuring that Boards don't end up with huge skill gaps.	

Your response to recommendation 2.5 b (please enter a 'X' in one box):		
YES		X
NO		
UNSURE		
Please give your reasons for your answer and include any comments you wish to make in the free test box below:		

Your response to recommendation 2.5 c (please enter a 'X' in one box):		
YES		
NO		
UNSURE		X
Please give your reasons for your answer and include any comments you wish to make in the free test box below:		
I'm undecided on this one.....but more inclined towards Advisor.		

### Recommendation 2.5 d

The Commissioner does not intend to meet the Scottish government's request to remove a large proportion of the requirements set out in the current Code as part of this revision. Where the Commissioner considers it appropriate, he will amend or remove a proportion of requirements that detract from the adoption of methods and practices that could prove to be less resource-intensive. By way of example, the Code already allows for multiple posts on different boards to be filled by way of a single competition and this will explicitly be written on the face of the Code so that there

can be no confusion. The Commissioner considers that the Code itself and also the materials used for the appointments process should be simplified and made more accessible. The Commissioner also considers it appropriate to place greater emphasis on the role of boards themselves in planning for succession.

### Recommendation 2.5 e

The Commissioner is minded to place greater responsibility for key decisions on the selection panel, and potentially the chair of the panel who represents the appointing minister, on the face of the Code. It is proposed that prescription in this area should involve placing an obligation on the panel chair to devise an evidence-based plan for each appointment round which, when implemented, will meet a given board's needs and also redress any identified under-reflection (of skills, characteristics or other relevant factor). The panel chair will also be required to report on the extent to which the plan delivered its anticipated outcome. This provides the Scottish Government with maximum flexibility whilst still allowing for appropriate accountability. To ensure that the importance of this change is fully understood, the Commissioner will include a new principle of "Accountability" in the Code. In that context, the Commissioner will also consider the most appropriate role for the PAA, his representative, in the appointments process.

Your response to recommendation 2.5 d (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
I agree with the proposed recommendation 2.5d	

Your response to recommendation 2.5 e (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
Fully support	

## 2.6 Using evidence to inform decisions and adopting measures to achieve wider diversity on boards

### Recommendation 2.6

The Commissioner accepts that responsibility for the necessary improvements lies with the Scottish Government. It is therefore proposed that the revised Code should place an obligation on selection panel chairs to devise an appropriate evidence-based plan for making appointments to a given board. The factors to be considered for inclusion in these plans, such as those suggested by respondents to the consultation, will be set out in the statutory Guidance.

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free text box below:	
I do agree and assume that there will still be the flexibility to take into account the needs of the Board at the time.	

## 2.7 – Should the Code refer to the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions?

### Recommendation 2.7

The Commissioner has decided that he should delay making any final decisions about which provisions of the Act, if any, should be reflected in the provisions of the Code.

The Commissioner notes the Scottish Government's position that the Commissioner has no locus to determine compliance with its adherence to this legislation – although it clearly relates to the majority of public appointments in Scotland which he regulates. In that event, and given that there appears to be no clear path for scrutiny and accountability for adherence to the Act, any measures that the Commissioner considers it appropriate for the Scottish Government to follow will not be specifically linked to the provisions of the Act to ensure that his determinations on compliance relate to the Code alone.

Your response to the recommendation (please enter a 'X' in one box):	
YES	
NO	
UNSURE	X

Please give your reasons for your answer and include any comments you wish to make in the free test box below:

I think the legislation re: gender balance is well known and understood so I'm don't feel there's a need to specifically call it out in the code.  
I feel there's more need to raise awareness of the other diversity elements.

## 2.8 Appointments requiring approval by the Scottish Parliament

### Recommendation 2.8 a

The Commissioner is minded to follow the advice of OCPA with a view to ensuring that the disparate and not entirely satisfactory practices in Whitehall are not replicated in the Scottish Parliament. As per the view of the Standards, Procedures and Public Appointments Committee, the Commissioner intends to include a provision in the Code, requiring the Scottish Ministers to consult the Scottish Parliament meaningfully at appropriate stages for appointments requiring parliamentary approval.

Your response to the recommendation (please enter a 'X' in one box):

YES	X
NO	
UNSURE	

Please give your reasons for your answer and include any comments you wish to make in the free test box below:

### Recommendation 2.8 b

There was clear support for applicants to be able to base their decisions on all of the facts for such appointments and so the requirement for the applicant information pack to be clear about what parliamentary approval will entail will be included in the Code.

Your response to the recommendation (please enter a 'X' in one box):

YES	X
NO	

UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	

2.9 Should diversity be expanded to include other attributes and, if so, what should those be?

### Recommendation 2.9

The Commissioner will amend the Code to include reference to other attributes cited by respondents to the consultation, such as lived experience and values, as appropriate for consideration when the Scottish Ministers plan to appoint new board members.

Your response to the recommendation (please enter a 'X' in one box):		
YES	X	
NO		
UNSURE		
Please give your reasons for your answer and include any comments you wish to make in the free test box below:		

2.10 Should the Code be more explicit about matching assessment methods to the attributes sought?

### Recommendation 2.10

The Commissioner proposes to include a requirement in the Code that the assessment methods chosen should be selected on the basis of their validity and clear evidence that they are effective and that they do not have an adverse impact on the success of people who share given protected characteristics. This will require equality impact assessments of methods to be undertaken. The Code will also require evidence to be maintained about decisions taken on assessment methods and the reasons for their selection. Their effectiveness will also require to be monitored. The

Commissioner has also taken cognisance of the EHRC's views on the need for the provision of reasonable adjustments to be made more proactively and intends to strengthen the Code in that area also.

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	

2.11 Should issues that the Commissioner has provided guidance on since the 2013 code came into force be included in the Code, guidance or both?

### Recommendation 2.11

The Commissioner has concluded that there were clear and cogent arguments made in support of certain issues to be included in the Code itself, particularly by organisations working in the field of equality, and will do so. The Commissioner will also consult the Scottish Government further on the issues of concern to them before making a final determination on which guidance should be codified.

Your response to the recommendation (please enter a 'X' in one box):	
YES	
NO	
UNSURE	X
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
<p>While I can agree that there might be certain elements that make sense to be included in the code, I think we need to place a level of trust on the panel and the process and do not think that all of the points raised need to be included in the code</p>	



## 2.12 What should the Code say about panel members?

### Recommendation 2.12 a

The Commissioner will include a requirement in the Code for panel chairs to be trained in recruitment and selection for chair and member appointments to boards, with that training to specifically cover equality and diversity, before they can participate. Whilst the Commissioner notes that there were a number of respondents who felt that all panel members should be trained, his view is that this would represent a disproportionate requirement, other than in the case of independent panel members, given the important nature of the role that they fulfil. The Code will, however, ensure that training is made available to any other panel member who wishes to receive it.

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free text box below:	
I agree, I think training for panel chairs is important. I also support the view that training should be made available to other panel members who wish to receive it. No everyone who sits on a panel will have experience of public appointments.	

### Recommendation 2.12 b

The Commissioner has decided to provide more clarity on the face of the Code about how independent panel members are to identified, the provision of terms of reference to them and the minimum standards of support and training that they should be provided with.

## 2.13 Should the Commissioner commence audits and report more frequently to the Scottish Parliament on the Scottish Government's public appointments activities?

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	

Please give your reasons for your answer and include any comments you wish to make in the free test box below:

### Recommendation 2.13 a

The Commissioner has determined that an audit of a proportion of appointment rounds will be a helpful supplement to the oversight already provided. The Commissioner's view is that should be used to identify both good and poor practice with a view to driving improvement. The first of these audits will commence approximately one year after the revised Code comes into force and it will assess the extent to which it is being followed.

Your response to the recommendation (please enter a 'X' in one box):

YES X

NO

UNSURE

Please give your reasons for your answer and include any comments you wish to make in the free test box below:

I support this as a learning & improvement mechanism

### Recommendation 2.13 b

The Commissioner will consult the successor subject committee in the next parliamentary session about the form, frequency and content of such reports.

Your response to the recommendation (please enter a 'X' in one box):

YES X

NO

UNSURE

Please give your reasons for your answer and include any comments you wish to make in the free test box below:

--

## 2.14 Is the current regulatory model appropriate and, if not, what should replace it?

### Recommendation 2.14

The Commissioner notes that few of the respondents overall had a view on the current regulatory model and that, of those that did, most were in favour of the status quo. The Commissioner does have some sympathy with the view that his representatives have a conflict of interest when taking part in decision-making and has therefore already concluded that it is appropriate to review this arrangement. The Commissioner is less persuaded by the Scottish Government's further arguments for principles-based regulation and notes that no reasons were given in support of the two other regulatory models posited by them. The Commissioner has concluded that the current regulatory model is therefore appropriate but that it should in fact be more robust in order to drive improvement by way of more regular and transparent reporting on practices.

Your response to the recommendation (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free text box below:	
Support on the basis of driving improvements and more regular and transparent reporting	

## 2.15 Views on other issues that the Code and Guidance should take into account and on the appointments process more generally

### Recommendation 2.15 a

The Commissioner concurs with many of the views expressed in response to these questions. It is apparent that many boards feel that they have a more important role to play in planning for succession as well as community engagement to encourage applications and so both of these issues will be included in the revised Code.

### Recommendation 2.15 b

There are longstanding and legitimate concerns that the current appointment process and the language that characterises it represent a barrier to people from a range of under-reflected groups and that boards and their impact/effectiveness are poorer for it. The Code will be revised to ensure that how merit is defined and assessed takes these concerns into account.

Your response to recommendation 2.15 a (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	

Your response to the recommendation 2.15 b (please enter a 'X' in one box):	
YES	X
NO	
UNSURE	
Please give your reasons for your answer and include any comments you wish to make in the free test box below:	
<p>I think this is an important change</p>	

### Recommendation 2.15 c

The Commissioner intends to strengthen the Code in this area, by following OCPA's recommendation about the inclusion of a "candidate care" section in the Code. That section will also specifically address concerns about timescales for the appointments process. The Commissioner notes but disagrees with the Scottish Government's view that these were operational matters that did not belong in the Code. It is apparent that both issues have an impact on board diversity and the pool of qualified and motivated applicants and that improving practices in this area should also. To ensure that there is no dubiety over the importance of the willingness of people to apply for roles and the way in which they are treated when they do, the Commissioner will include a new principle of "Respect" in the Code to that effect. Code provisions will reflect this principle, and also take into account the results of the board member survey that the Commissioner ran on time commitment and remuneration.

Your response to the recommendation (please enter a 'X' in one box):
--

YES	X
NO	
UNSURE	
<p>Please give your reasons for your answer and include any comments you wish to make in the free test box below:</p>	
<p>I like the idea of a candidate care section and a web-tracker</p>	

## Share your views on the revised draft Code of Practice

The revised draft Code of Practice, based on and incorporating the recommendations set out above, is included in at Appendix one. Please use the text box below to set out any comments, questions or recommendations for change to the revised draft Code.

My views on the revised draft Code are as follows:

## Appendix One – Draft Revised Code of Practice

### Foreword

### The Code in Context

[Will be included following further consultation].

### The Principles of the Code

**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 best able to meet the requirements of the post will be appointed.

**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.

**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.

**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.

**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.

The public appointments process will be outcome focused and applicant focused.

## A The responsibilities of the people who uphold the principles

### The Scottish Ministers

**A1** Fair, open and merit-based appointments are the responsibility of the Scottish Ministers who will

- i. ensure that the requirements of relevant legislation and this Code are reflected in all appointment activity
- ii. be satisfied that the practices applied at each stage of an appointment round are appropriate for the role to be filled and ensure a record is made of decisions and actions taken during every appointment round. The record will be sufficient to demonstrate that decisions are appropriate
- iii. have in place an effective system for handling, and recording details of, all complaints about the appointment process
- iv. publish an action plan each year which includes the SMART, evidence-based measures that they propose to take in the year ahead in order to secure more diversity on boards
- v. report annually on progress against the previous year's plan
- vi. provide the Commissioner timeously with whatever information the Commissioner reasonably requires to perform the statutory functions set out in the Act.

**A2** The Scottish Ministers are responsible for succession planning to ensure boards have the skills, knowledge, experience, values and other attributes necessary to fulfil their role economically, efficiently and effectively. They will determine the period for which an appointment, reappointment or extension to an appointment term is to be made based on the needs of the board concerned. The Scottish Ministers must consult the boards concerned to ensure that plans for succession are well-informed. They will encourage boards to develop and maintain succession plans for this purpose. Succession plans will take account of the current board's composition, its purpose, its strategic objectives, where applicable, and its operational context.

**A3** The Scottish Ministers will consider whether the needs of a board will most effectively be met by an appointment, reappointment or extension to an appointment term. They will balance the continuity provided by reappointment and term extensions with the opportunity to increase the diverse range of relevant skills, knowledge, experience, values and other attributes on a board by making a new appointment through open competition.

**A4** The Scottish Ministers should ensure that all appointment rounds are dealt with as efficiently and effectively as possible. Targets for timescales will be set by the Commissioner in statutory guidance to track the progress of all appointment activity.

**A5** The Scottish Ministers are responsible for specifying members of the selection panel. They will consider whether to appoint an independent person. That person must not be a member or official of the Scottish Government or of the public body or have any other close connection to the Scottish Government or the public body which might in fact or in the eyes of the public call into question their ability to fulfil their role in a truly independent and impartial manner. In appropriate cases, the Scottish Ministers will appoint the public body chair to the panel. Selection panel members will

- i. be knowledgeable about the public body and the appointment to be made
- ii. understand the skills, knowledge and experience required of the person to be appointed
- iii. have demonstrated sound judgment and decision-making
- iv. be competent to fulfil a role on the panel.

The Scottish Ministers will specify who will chair the panel. The chair of the panel must have been trained on the appointments process and on diversity, equality and inclusion in the context of making public appointments. The independent panel member must be similarly trained and provided



with appropriate terms of reference and support to fulfil their role. Other panel members will be provided with the same training at their request.

**A6** In practice, the Scottish Ministers are required to define merit at the outset of the appointments process and to appoint candidates at its conclusion. With a view to streamlining the process and reducing bureaucracy, all other practices required by this Code may be delegated to officials or others as appropriate. Whether to delegate such responsibility will be a matter of choice for each appointing minister.

### **The Selection Panel Chair**

**A7** The implementation and outcome of an appointment round are the responsibility of the selection panel chair. This includes responsibility for:

- i. complying with the requirements of this Code
- ii. taking action when it appears the requirements may not be met
- iii. providing the Scottish Ministers with reassurance that the requirements of the Code have been met.

### **The Selection Panel Members**

**A8** The role of the selection panel is to identify and recommend to the Scottish Ministers for appointment applicants who, on the basis of merit, best meet the requirements of the post in question.

**A9** Members of the selection panel will

- i. be competent to fulfil their role on the panel
- ii. understand and comply with the requirements of the Code
- iii. understand the purpose of and participate fully in a planning meeting
- iv. declare to their fellow panel members any conflicts of interest they may have that are relevant to their participation as a panel member. Where the conflict is considered significant enough to have an impact on either the outcome of the round or public perception of the outcome of the round, the matter will be referred to the Commissioner for consideration before the round can proceed.

**A10** Membership of the selection panel will remain the same throughout the appointment round, unless a change of membership is required through unavoidable circumstances such as ill health or due to an official moving to other responsibilities. Changes to panel membership during a stage of assessment must be avoided where possible.

**A11** If a member of the selection panel knows, or knows of, one or more of the applicants, they will inform their fellow panel members and explain the nature of the relationship or knowledge.

**A12** Applicants will be asked to inform the selection panel chair if they know one or more of the selection panel members.

**A13** If the nature of any relationship between a selection panel member and an applicant means it may be inappropriate for the panel member to assess the applicant the panel chair will consult the Commissioner and agree appropriate action.

**A14** If at any point from the beginning of a round information about an applicant becomes known to a member or members of the selection panel that

- i. calls into question an applicant's suitability for appointment

- ii. may affect the credibility of the appointment process
- iii. may affect the credibility of the public body concerned

they have a responsibility to share this with their colleagues on the selection panel. The panel will consider the potential impact of the information if the applicant were to be appointed.

**A15** The consideration of such matters will take place openly and involve transparent investigation to establish the facts. The applicant will be given an opportunity to respond before any final decision as to their suitability for appointment is made.

### **The Commissioner and the Commissioner's Representatives [Subject to substantive change]**

**A16** The Commissioner will provide independent scrutiny of the methods and practices employed by the Scottish Ministers for making appointments.

**A17** The Commissioner will do so by allocating a representative to oversee all or part of any appointments process. The representative will not be excluded from any stage of a process that the Commissioner considers they should be involved in.

**A18** The role of the representative will be to promote compliance with the Code by providing advice and guidance on applying the Code's provisions and on good practice in recruitment and selection. Panels are not obliged to follow this advice. The Commissioner's representative will produce a report at the conclusion of their involvement in an appointments process, setting out the methods and practices that they have observed and the extent to which their guidance on code compliance and good practice has been followed. The Commissioner will periodically publish such reports in full or in summary.

**A19** Where clarity on the interpretation of the Code is required at any point by an appointing minister, a panel member and/or the Commissioner's representative, they should approach the Commissioner for definitive guidance.

**A20** The Commissioner will also issue statutory and non-statutory guidance from time to time on how the requirements of the Code may be translated into practice.

**A21** The Commissioner will take such action as deemed appropriate under the Act when potential or actual material non-compliance with the Code is identified.

**A22** The Commissioner will, if considered appropriate, refer complaints about the appointment process to the Scottish Government for resolution. The Commissioner will investigate all relevant and competent complaints that complainers believe have not been resolved within a reasonable time following initial investigation by the Scottish Government.

### **B The appointing minister's priorities for the board**

**B1** When considering any appointment activity, the Scottish Ministers will take into account the current composition of the board in terms of the attributes and diversity of its members and how well it is functioning. Such attributes may include skills, knowledge, experience – including lived experience – values, perspectives, backgrounds – including socio-economic background and sector worked in – and geographical location. Diversity will be considered in relation to the protected characteristics of the current members in comparison with the protected characteristics of the population of Scotland or the region served by the board as appropriate. The Scottish Ministers will determine what is needed by the board for it to perform its statutory functions and to do so economically, efficiently and effectively.

**B2** When the Scottish Ministers decide the effective functioning of the board requires a new appointment sections C to E apply.

**B3** When the Scottish Ministers decide the board requires a reappointment, term extension or the promotion of member to a deputy chair role, section F applies.

**B4** When planning a new appointment, the Scottish Ministers will communicate to the selection panel their desired outcome at the conclusion of the appointment exercise in terms of the attributes and diversity sought to meet the needs of the board. This is the definition of “Merit” for the purposes of the appointment being made.

## C Diversity by design

**C1** The selection panel will design an appointment plan to deliver the appointing minister’s preferred outcome. The plan will include:

- i. 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.
- ii. a clear and accurate description of the attributes that the minister requires of the ideal appointee (the person specification). The attributes will be described in a way that is readily understandable, is capable of assessment and reflects the requirements of the role. They will not be unnecessarily restrictive. The person specification will be clear about the extent to which criteria have to be met and whether some attributes take priority over others
- iii. the publicity, application and assessment methods to be used
- iv. positive action measures intended to redress the under-reflection of protected characteristics on the board concerned
- v. a timetable specifying key prospective dates within the round.

**C2** The application and assessment methods and positive action measures will be based on evidence of what works well to attract and see 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.

**C3** All materials to be made available to prospective applicants such as publicity or advertisements about posts, details about posts, the assessment criteria to be applied, and the application forms (or equivalent) should be clearly and plainly drafted using simple, easy to understand, language. The objective should be to encourage the optimum number of people to apply for positions and for people to find it a comparatively easy exercise to submit applications.

**C4** Publicity content, appropriate, resource-efficient publicity methods and information to be made available to potential applicants will be agreed by the selection panel. Matters relating to publicity and information which must be considered by selection panels are listed in Annex Two. Publicity will explain that the appointment is regulated by the Commissioner.

**C5** Application and assessment methods will not present a barrier to people currently under-reflected on boards and will have appropriate predictive, content and face validity. They will enable and encourage people to describe how they meet the requirements of the role. Where a class of new application and/or assessment methods are to be introduced, they must first undergo an equality impact assessment to ensure that they meet these requirements.

**C6** When the appointment concerned requires parliamentary approval, the selection panel will consult the relevant subject committee with a view to agreeing that the plan will deliver against parliamentary as well as ministerial intentions for a successful outcome.

**C7** Whether or not to approve the appointment plan is up to the appointing minister. Once the plan has been agreed the appointing minister may be kept informed about the progress of the appointment round. They will not be actively involved in the deliberations of the selection panel but may be approached for a view if any issues arise during the course of the round.

**C8** At the conclusion of the appointment exercise the panel chair must set out in a report the extent to which it delivered or failed to deliver the desired outcome set by the appointing minister. Reasons for success or failure must be included in that report. A copy of the report will be provided to the appointing minister and to the Commissioner. The information contained in these reports will be used to contribute to continuous improvement of the appointments process (see C2).

## D Assessment is appropriate

**D1** The methods used to assess applicants will

- i. be capable of assessing whether applicants have the attributes specified by the appointing minister
- ii. be open and transparent
- iii. accommodate the needs of and not present a barrier for people from different groups; reasonable adjustments will be proactively offered in the applicant information pack so that applicants do not feel compelled to or awkward about requesting them
- iv. provide applicants with fair and equal opportunities to demonstrate their merit
- v. remove as far as reasonably possible the impact of personal bias on selection decisions
- vi. enable panels to explore whether each applicant is a fit and proper person for the position for which they have applied and accepts the Principles of Public Life in Scotland (Annex One) and the public body's Members' Code of Conduct.

**D2** Selection panel members will assess the merits of applicants against the attributes specified by the appointing minister and published in the applicant information pack using the methods they have agreed. New requirements will not be introduced during any stage of the appointments process.

**D3** The selection panel may delegate any and all of the stages of assessment, other than the final stage, to appropriately qualified individuals or organisations. This includes longlisting, 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 posts for multiple bodies at the same time and is intended to make best use of resources. The panel chair is responsible for ensuring Code compliance when assessment activity is delegated.

**D4** Assessment will be undertaken by individuals who are

- i. competent to assess using the methods chosen
- ii. consistent in their assessment of applicants
- iii. knowledgeable about equality and diversity issues and the impact the chosen methods may have on different groups of applicants.

Where specialist knowledge is to be assessed by an expert panel member, that member may not be required to demonstrate iii. above.

No individual or organisation with a conflict of interest that might render the outcome or public perception about the outcome of appointments process may conduct assessments.

**D5** Assessment activity will identify the applicants who have demonstrated the attributes specified by the appointing minister and those who have not.

**D6** The selection panel will identify the most able of the applicants who have demonstrated the attributes required. These will be the applicants who most closely meet the priority attributes set out in the person specification.

**D7** The selection panel will agree an applicant summary. The summary will set out the panel's decisions on how each applicant did or did not demonstrate the attributes required to be effective in the role. The applicant summary will be based on the information provided by each applicant during each stage of the appointment round and will be sufficiently detailed to:

- i. identify to the appointing minister the most able applicants
- ii. provide evidence that the panel's decisions are valid.

The appointing minister may choose to receive the entire summary or only that part which identifies the most able applicants.

The detail included in the summary will be reasonable and proportionate having regard to the stage of assessment reached by the applicant and the number of applications received.

**D8** The applicant summary will contain the selection panel's recommendations for appointment. The panel will recommend only the applicants they have identified as the most able.

## **E The most able people are appointed**

**E1** The applicant summary will be the basis of the appointing minister's appointment decision. Whilst the minister's decision will be based on an applicant's merit in relation to the requirements of the role it may also be based on information considered when determining whether the applicant is a fit and proper person for the appointment. The appointing minister may also select on the basis of currently under-reflected protected characteristics where a choice of most able applicants has been presented. New requirements must not be introduced.

**E2** The appointing minister may wish to meet the recommended applicants before making their final decision.

**E3** The appointing minister will select the applicant who has the attributes that most closely match those required as set out in the published applicant information pack.

**E4** 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.

**E6** The appointing minister will take steps to confirm that the applicant is a fit and proper person for the position to which they are to be appointed. This will require

- i. verification of relevant information provided by the applicant
- ii. confirmation that the applicant's conduct to date has been compatible with the public appointment
- iii. confirmation that the applicant has no inappropriate or unmanageable conflicts of interest incompatible with their appointment
- iv. determining that the applicant's appointment is not barred by reference to the constitution of the body concerned by way of, for example, criminal offences or other relevant matters

- v. ensuring that the applicant agrees to apply the Principles of Public Life in Scotland and be bound by the Members' Code of Conduct for the body concerned
- vi. establishing that the applicant is able to meet the time commitment required.

This activity may be delegated to selection panels and/or suitably qualified individuals or organisations. No applicant will be ruled out on the basis that they do not meet the fit and proper person test until the facts have been established and they have been given the opportunity to respond to that conclusion (see A14 and A15).

## F The board has continuity of skills, knowledge, experience and other relevant attributes

**F1** The Scottish Ministers may reappoint a board member to the same position or extend a member's appointment term provided that

- i. the member's performance has been properly appraised as being effective during the current term
- ii. the reappointment or extension will continue to meet the board's needs for the period concerned
- iii. the member's total period of appointment will not exceed 8 years.

**F2** The Scottish Ministers may promote a board member to the position of deputy chair. Decisions to promote will be based on

- i. evidence of effective performance during the current term
- ii. evidence that the member has the attributes needed for the position to which they are promoted.

An individual promoted in this way is still restricted to 8 years in post overall.

**F3** The Scottish Ministers will encourage boards to have in place and regularly refresh plans for succession. Such plans should be based on the board's composition, operational context and, where applicable, strategic objectives. They may also include other measures such as community outreach and engagement to encourage applications and board apprenticeships, development and shadowing and mentoring schemes, particularly for those from currently under-reflected groups.

## G The appointments process is transparent

**G1** The Scottish Ministers will publicise all appointment decisions. Announcements will include

- i. the name of the individual concerned
- ii. a short description of the body to which the appointment, promotion, reappointment or term extension has been made
- iii. a brief summary of the attributes the individual brings to the role. For new appointments these should be linked directly to those that were set out when the vacancy was publicised
- iv. the length of term of the appointment, promotion, reappointment or extension
- v. whether the appointment is remunerated and, if so, the remuneration amount
- vi. whether the individual holds other public appointments and, if so, what these are and the amount of remuneration for each
- vii. the activity noted in the political activity form completed by the individual appointed, promoted or reappointed or whose term has been extended

The Scottish Ministers will maintain an online easily searchable archive of all such appointment announcements.



**G2** The Scottish Ministers will maintain a list of regulated public appointments made. The list will be in the public domain and will be made available in accessible formats in response to appropriate requests. It will set out

- i. all regulated public bodies
- ii. the names of the board members whose board member positions are regulated
- iii. the date of their initial appointment
- iv. the date, where applicable, of their reappointment
- v. their term of appointment
- vi. the date on which their current appointment ends
- vii. the names of people who hold more than one public appointment
- viii. the amount of remuneration received for their appointment(s).

## H Exceptional circumstances

**H1** The provisions of the Code may require to be varied to take account of exceptional circumstances. Without intending to be comprehensive, exceptional circumstances will include the following –

- i. where a chair, vice chair or member has died, is indisposed through ill health or is otherwise unable or unsuitable to hold office
- ii. where a new appointment has to be made to fill the resulting vacancy as a matter of urgency
- iii. where the constitution of the public body or its board is under review and likely to be changed in the near future and, if necessary, existing members should have their period of office extended beyond the 8 year maximum for continuity purposes
- iv. where a change to panel membership is required and the circumstances are avoidable.

**H2** In exceptional circumstances, the Scottish Ministers may make appropriate appointments (including reappointments or extensions), with the agreement of the Commissioner, to ensure the effective continuing governance of boards. Other Code provisions may be varied with the agreement of the Commissioner, who will respond favourably to reasonable and evidence based requests as long as the principles of the Code are not compromised.

## H Respect for applicants

**H1** Applicants will be made aware of the key dates for each appointments process by reference to the timetable published in the pack. Applicants will be advised timeously if any changes to these dates have to be made and consulted to ensure that they are available for prospective new dates for assessment or decision-making.

**H2** Applicants will be advised about what will happen to the information that they provide, including their initial application and monitoring data. Applicant information will be treated in confidence.

**H3** Applicants who reach the final stage of assessment will be asked to complete a political activity declaration form. The reasons for this will be explained, as will the fact that it is not necessarily a bar to appointment in the majority of cases.

**H4** Constructive, tailored and meaningful feedback will be provided to all unsuccessful applicants who make a reasonable request for it.

**H5** Applicants who apply for roles that are subject to parliamentary approval will be provided with full information on what will be shared with the parliament, what will be put into the public domain and what parliamentary involvement in their assessment and appointment will mean for them.

**H6** Applicants will be provided with details of the development and support that they will receive if they are successfully appointed.



## Annex 1 The Principles of Public Life in Scotland

The Principles of Public Life in Scotland apply to all who hold public office including members of public bodies. These principles are stated as follows:

### **Duty**

You have a duty to uphold the law and act in accordance with the law and the public trust placed in you. You have a duty to act in the interests of the public body of which you are a member and in accordance with the core tasks of that body.

### **Selflessness**

You have a duty to take decisions solely in terms of public interest. You must not act in order to gain financial or other material benefit for yourself, family or friends.

### **Integrity**

You must not place yourself under any financial, or other, obligation to any individual or organisation that might reasonably be thought to influence you in the performance of your duties.

### **Objectivity**

You must make decisions solely on merit when carrying out public business including making appointments, awarding contracts or recommending individuals for rewards and benefits.

### **Accountability and Stewardship**

You are accountable for your decisions and actions to the public. You have a duty to consider issues on their merits, taking account of the views of others and must ensure that the public body uses its resources prudently and in accordance with the law.

### **Openness**

You have a duty to be as open as possible about your decisions and actions, giving reasons for your decisions and restricting information only when the wider public interest clearly demands.

### **Honesty**

You have a duty to act honestly. You must declare any private interests relating to your public duties and take steps to resolve any conflicts arising in a way that protects the public interest.

### **Leadership**

You have a duty to promote and support these principles by leadership and example, to maintain and strengthen the public's trust and confidence in the integrity of the public body and its members in conducting public business.

### **Respect**

You must respect fellow members of your public body and employees of the body and the role they play, treating them with courtesy at all times. Similarly you must respect members of the public when performing duties as a member of your public body.

## Annex 2 Publicity and Information to be provided to applicants

### Publicity

1. Publicity will provide potential applicants with the contact details of the individuals whom they may approach to discuss
  - the board role
  - the application process.
2. Publicity will be designed to enable potential applicants to make an informed decision about whether they meet the requirements of the role. It will provide a clear and accurate description of the role to be performed and the attributes required to be effective in the role.
3. Publicity must give an accurate assessment of the necessary time commitment and will state whether the position is remunerated; if remunerated, the amount will be indicated. Publicity must also advise which out of pocket expenses will be reimbursed for people who are appointed.
4. Publicity will describe the application and assessment methods to be used and identify those who are involved in assessment so that applicants are able to declare prior relationships with such individuals and organisations.
5. Information about the role, the appointment timetable and the application and assessment methods will be available to everyone who expresses interest in the position. It will be made available in accessible formats in response to appropriate requests.
6. Publicity will make clear the fact that
  - all information can be made available in alternative formats
  - support will be available for anyone who reasonably requires help to apply.
7. Publicity will make clear the closing date for applications. Any change to the closing date will be agreed by the selection panel and will be fair to applicants and potential applicants.

### Information

8. The information and material to be provided or available to the candidates will be readily accessible, informative, encouraging, brief, plainly expressed and compliant with relevant statutory obligations.
9. The following material should normally be provided:
  - i. accessible contact details for named persons whom applicants may approach with any specific queries regarding the work of the board or the appointment process
  - ii. the appointment timetable
  - iii. the role description
  - iv. the person specification
  - v. specific documentation relevant to the role and/or the public body including details of any disqualifications from membership and signposting the Code of Conduct, including the Principles of Public Life in Scotland, that the board members are bound by
  - vi. material appropriate to the chosen assessment method, such as an application form
  - vii. a statement about Disclosure information where such information is required
  - viii. information on what will happen to documentation generated during the appointment round, advising that all information provided by the applicant will be provided to the Commissioner

and/or the Commissioner's representatives on the request of the Commissioner and that in applying the applicant is deemed to have consented to this

- ix. the leaflet provided by the Commissioner describing what an applicant can do if he or she wishes to make a complaint
- x. information on how the appointment will be announced. This will include the requirement to publicise information about the individual appointed and their political activity within the past five years
- xi. details of reimbursement of expenses incurred if the applicant is invited for interview.

## Responses

Responses should be submitted by **Thursday 1 September 2021**.

They should be sent, ideally by email, to:

Katherine Lafreniere

Corporate Services Officer

Ethical Standards Commissioner

Thistle House

91 Haymarket Terrace

Edinburgh

EH12 5HE

E mail: [info@ethicalstandards.org.uk](mailto:info@ethicalstandards.org.uk)

[www.ethicalstandards.org.uk](http://www.ethicalstandards.org.uk)