

Ethical Standards Commissioner

SHORT CONSULTATION ANALYSIS

A short summary analysis of responses to a consultation on potential revisions to the Code of Practice for Ministerial Appointments to Public Bodies in Scotland *and* A proposed draft Code for further consultation

14 July 2021

Contents

1.0	Introduction	6
2.0	Summary of Findings, Conclusions and Recommendations	7
	Questions 1 to 3 – defining diversity and securing it.....	7
	Questions 4 to 6 learning lessons and basing decisions on evidence	9
	Questions 7 to 9 – nationwide, regional or characteristic-specific positive action measures that could be taken.....	10
	Questions 10 to 12 – updating the Diversity Delivers strategy	11
	Questions 13 and 14 – which provisions of the Code and Guidance are detracting from the delivery of appropriate outcomes?	12
	Questions 15 to 17 – using evidence to inform decisions and adopting measures to achieve wider diversity on boards	15
	Questions 18 to 23 – should the Code refer to the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions?.....	16
	Questions 24 to 27 – appointments requiring approval by the Scottish Parliament	17
	Questions 28 to 30 – should diversity be expanded to include other attributes and, if so, what should those be?.....	19
	Analysis of Questions 31 and 32 – should the Code be more explicit about matching assessment methods to the attributes sought?.....	20
	Question 33 – should issues that the Commissioner has provided guidance on since the 2013 code came into force be included in the Code, guidance or both?.....	21
	34 to 37 – what should the Code say about panel members?	22
	Questions 38 to 40 – should the Commissioner commence audits and report more frequently to the Scottish Parliament on the Scottish Government’s public appointments activities?	25
	Questions 41 and 42 – is the current regulatory model appropriate and, if not, what should replace it?	27
	Questions 43 and 44 – views on other issues that the Code and Guidance should take into account and on the appointments process more generally.....	27
	Appendix One – Organisations Invited to respond to consultation	30
	Appendix Two – Draft Revised Code of Practice.....	33
	Foreword.....	33
	The Code in Context.....	33
	The Principles of the Code	33
	A The responsibilities of the people who uphold the principles	34
	B The appointing minister’s priorities for the board	36
	C Diversity by design	37
	D Assessment is appropriate	38
	E The most able people are appointed.....	39

F The board has continuity of skills, knowledge, experience and other relevant attributes	40
G The appointments process is transparent.....	40
H Exceptional circumstances	41
H Respect for applicants	41
Annex 1 The Principles of Public Life in Scotland	43
Annex 2 Publicity and Information to be provided to applicants	44

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ANALYSIS OF RESPONSES TO A CONSULTATION ON THE 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.

For those with an interest, a fuller analysis documents is available to download from our website here: <https://www.ethicalstandards.org.uk/publication/full-summary-analysis-code-practice-ministerial-appointments-public-bodies-scotland-consultation-and-draft-new-code>

A separate document has been produced which includes only the recommendations set out in this analysis and the revised draft code itself. Views on both would be very welcome and should be submitted to info@ethicalstandards.org.uk no later than 30 September 2021. This separate document, seeking views, is available to download on the following page on our website: <https://www.ethicalstandards.org.uk/publication/consultation-paper-code-practice-ministerial-appointments-public-bodies-scotland>

A handwritten signature in black ink, appearing to read 'John [unclear]', is positioned above the title.

Acting Ethical Standards Commissioner

1.0 Introduction

1.1 The [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#) (“the Act”) makes provision for the [Code of Practice for Ministerial Appointments to Public Bodies in Scotland](#) (the Code).

1.2 In accordance with the Act, the Ethical Standards Commissioner for Scotland (“the Commissioner”) is required to prepare and publish the Code which is to include guidelines in respect of the methods and practices used by the Scottish Ministers in the making of public appointments. The Commissioner is also to keep the Code under review, promote compliance with it and, from time to time, to revise it and publish it as so revised.

1.3 In making any revisions, the Commissioner must consult the Scottish Ministers and Scottish Parliament and invite other persons to make representations in respect of potential changes.

1.4 The Commissioner decided in 2020 that she should consult on prospective revisions to the Code of Practice. This decision was attributable to the fact that, in spite of ministerial ambitions for effective boards reflective of society, the methods and practices commonly being used in pursuit of this outcome had not yet shown themselves to be achieving the desired effect.

1.5 The Commissioner launched the consultation exercise on 6 August, inviting the Scottish Ministers, Scottish Parliament, regulated public bodies and other bodies with an interest to respond by 9th November. The Commissioner agreed to extend that deadline by over a month in response to requests from a range of organisations in order to secure views from the widest possible spectrum of stakeholders. All bodies invited to respond to the consultation are listed in appendix one.

1.6 The Commissioner is grateful to all of those individuals and organisations who contacted her office to discuss the consultation exercise and who took the time to respond. The remainder of this document provides an analysis of responses. The draft revised Code, based on that analysis, is included as an appendix for further consultation.

2.0 Summary of Findings, Conclusions and Recommendations

Questions 1 to 3 – defining diversity and securing it

2.1 The first three survey questions sought views on the expansion of the definition of diversity and on whether the Code should include specific measures for securing it.

It's apparent from the responses received and the reasons given for the views shared that there is an appetite for change and improvement on the part of a wide range of bodies, particularly those working in the field of equalities. It is also apparent that the Code is viewed as an appropriate vehicle for securing that change and improvement.

2.2 We saw some very consistent messages from the majority who were in support of this change. The Standards, Procedures and Public Appointments Committee of the Scottish Parliament welcomed the inclusion of specific provisions on diversity measures and outcomes in the Code with a view to securing more tangible progress on board diversity. The Committee also wanted diversity to be expanded to include other factors beyond the 'protected characteristics' defined in the Equality Act, such as household income, sector worked in and geographic location. The Committee in Standards in Public Life also endorsed a move to include more specific measures on board diversity, recognising the importance of boards reflecting the public that they serve. The Equalities and Human Rights Commission echoed this view, suggesting that positive action should specifically be mentioned.

2.3 Respondents made reference to a range of specific measures that a revised Code might include. Reasons given for these views varied but were primarily related to concerns that the current appointments system (and/or the way it was being implemented) was not achieving board diversity. These respondents also shared a strong perception that a change to the Code could help address this issue. Many respondents also had views on the different attributes that constitute true board diversity. "Lived experience" was an oft repeated phrase across a range of responses.

2.4 Whilst still recognising the need for change and improvement around diversity, a smaller proportion of respondents were nonetheless ambivalent about introducing new requirements on the face of the Code for a range of reasons. Some, such as the SPSO, were keen to ensure that prescription did not stifle innovation in practices. Others, such as OCPA and Changing the Chemistry noted that ministerial commitment to change and improvement would be required if a revised Code was to be successful in its aims and it may be more productive to focus on increasing education and support in this area.

2.5 The Scottish Government were the only respondents to specifically answer 'no' to this question. Overall, their response focuses on the premise that the Code should be purely principles based instead of having any (more) specific provisions. That argument is predicated on their view that prescription in the current Code has stifled innovation and that, in the case of public appointments regulation, further prescription would be disproportionate.

2.6 The Commissioner notes and takes cognisance of the views expressed by the Scottish Government in response to these questions. For the purposes of ensuring greater understanding and a common foundation for working collaboratively moving forward, it seems appropriate to directly address this premise of a 'principles-only' Code and its relationship to the aspirations of diversity at the outset of this analysis:

- The 2003 Act, which established regulation of public appointments in Scotland, made it clear that the Code was "to include guidelines as to the methods and practices to be employed in the making of such appointments". The views of the Scottish Parliament as expressed in this

primary legislation therefore appear to be incompatible with any proposal to move to purely principles-based regulation.

- The Scottish Government's response and the covering letter from the responsible minister, the Cabinet Secretary for Finance, both include their perception that the current Code and regulation have hampered innovation and that further prescription will therefore preclude the adoption of better practice. As set out in the consultation document issued in August, the current Code is already very flexible and there are practical examples on the Commissioner's website of innovative good practice taking place on some individual rounds.
- The Commissioner agrees that a focus on 'outcomes' is essential and is therefore committed to using the Code to establish clear, effective and proportionate routes to ensuring such 'outcomes' can be both achieved, measured and systematically replicated.
- The Scottish Government's response to the consultation questions the Commissioner's reference in the consultation document to the potential pitfalls of principles-only based regulation, including her reference to the consequences of that type of regulation for the financial sector.

The Commissioner purposely drew that comparison because principles-based regulation in that sector allowed for poor governance and lack of appropriate oversight to proliferate. Principles based regulation in the context of public appointments would mean that none of the Parliament, the Scottish Government, potential applicants or the public would know precisely what is expected under the Code for regulated appointments. In the absence of such clarity and common understanding, it would be difficult for any of those parties (and indeed for Ministers themselves) to measure performance and progress towards goals, to provide appropriate oversight and scrutiny and to hold to account those charged with delivering each part of the process. From appointing Ministers to panel Chairs to the teams supporting a forward-looking process – it would be difficult to assess both their achievements as well as any opportunities for further improvement.

Discussions following receipt of the response helped to establish why this argument was made. The Scottish Government's response to the consultation was based on the idea that a 'principles' based code might be preferable to a Code which sought to add further prescription to its processes. This is understandable and the Commissioner will be happy to consider changes to the code that will enable the removal of unnecessary bureaucracy. The Scottish Ministers continue to respect the role of the Commissioner and value the regulation of the appointments process, they also recognise the crucial role that public appointees play.

The individuals appointed to these boards are responsible for the financial stewardship of more than a third of all public spending in Scotland. The services that these bodies provide have a direct impact on everyone in Scotland. Amongst a smaller sub-set of office holders, the issue of diversity becomes even more acute and often more challenging. The Commissioner therefore firmly believes that the overall appointments system remains worthy of the highest and most appropriate standards of regulatory oversight – in line with the expectations of both primary legislation, public scrutiny and ministerial ambitions.

2.7 The Commissioner is content that there is majority and well-argued support for a change to the Code in this area and that it is appropriate to do so. The Commissioner has taken into account the views of those who made suggestions for specific measures that should be included and what those might consist of. The Commissioner has also taken account of views expressed on the expansion of the term diversity and those other attributes that it should encapsulate. Additionally, the Commissioner has considered the concerns expressed about over-prescription and the scope for this to hamper innovation and will recognise these in the revised draft Code.

Recommendation

As a consequence, 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.

Questions 4 to 6 learning lessons and basing decisions on evidence

2.8 Survey questions 4 to 6 sought views on whether the Code should require the Scottish Government to learn lessons on an ongoing basis and on whether panels should base their decisions on their particular approach to a given round to take on evidence and learning from elsewhere.

2.9 The vast majority of respondents answered yes to this question. The Colleges Good Governance Steering Group made reference in its response to the need to involve public bodies themselves, as well as the Scottish Government, in the dissemination and adoption of good practice. Community Justice Scotland also saw the need for a diversity assessment to be made for each board as well as the sharing of good practice. The Standards Procedures and Public Appointments Committee noted that there was good practice in some appointments rounds, as identified by the Commissioner, but wanted to see that become the norm by way of a revision to the Code, a view which was echoed by the Poverty and Inequality Commission.

2.10 The response of the SPSO was classified as a yes for the purposes of the analysis although they included a note of caution about how such a requirement should be framed, preferring a requirement for reports on lessons learnt and actions taken to be included as a performance measure.

2.11 The Scottish Government responded no to this question alongside Changing the Chemistry who felt that although 'capturing lessons-learned and evidence-based decision making' was an important principle to endorse, it should not be made a 'prescriptive requirement' on Ministers. The Scottish Government felt that each appointment round was already "informed by evidence, the needs of the board, the legislation underpinning the public body board, and the role of the appointing Minister".

2.12 The Commissioner notes and takes cognisance of the views expressed by the Scottish Government in response to these questions. When providing reasons for their views, the Scottish Government stated that appointing ministers and panels already make evidence-based decisions and suggest that they are researching the barriers faced by groups other than women.

The Commissioner recognises that such evidence is indeed developed and deployed in relation to some rounds. In her consultation document nonetheless, the Commissioner referred not only to the fact that the diversity figures for a number of groups were simply not improving but also to the fact that her thematic reviews had revealed a lack of any system in place to improve on practices based on solid information and evidence, consistently applied. The Commissioner also notes that her office has raised concerns about these issues for some years now, and therefore while recognising some instances where this works, she remains unconvinced of the case made for the status quo or, indeed, that the Scottish Government's latest proposals will lead to the levels of sustained improvement required. The Commissioner's case studies demonstrate that the Scottish Government does engage in good practice and can, when it dedicates time, resources and thinking, redress the under-reflection of groups not currently serving on boards. The issue is that these practices have not been adopted as a matter of course nor rolled out in a systematic way.

2.13 The Commissioner is content that there is clear majority support for a change to the Code in relation to these matters and plans to do so as a consequence. The Commissioner believes that the

ambitions and public expectations for improvement around diversity and public appointments more generally are unlikely to be met in a timely fashion on the basis of current figures. Other than in respect of achievements relating to the appointment profiles in respect of sex, the Scottish Government's analysis of its own performance, does not provide a compelling argument to the contrary.

Recommendation

As with questions 1 to 3, 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.

Questions 7 to 9 – nationwide, regional or characteristic-specific positive action measures that could be taken

2.14 A preponderance of those responses in favour were received from organisations working in the field of equality and diversity with a clear message about the need for positive action measures to be included on the face of the Code. The Colleges Good Governance Steering Group and a couple of bodies in the field of health and social care were also supportive. The Equalities and Human Rights Commission made specific reference to successful positive action measures that could be taken and recommended a need to set and report on aspirational diversity targets within particular timescales. They recommended the use of bespoke SMART action plans to redress the under-reflection of people who shared protected and lower socio-economic backgrounds whilst emphasising the need for the intersection of these characteristics to be taken into account. The Colleges Good Governance Network cited specific measures that should be taken such as working with employers and trade unions to support and encourage individuals in employment to apply for public appointed positions; introducing national mentoring programmes and board-ready training and establish professional networks within local communities.

2.15 Five respondents, two of which did not want their identities or responses to be published, were ambivalent about the proposed change. Their concerns related primarily to the need for the Code to stay relevant during its period in force. OCPA was of this view and also suggested that the evidence base should guide what interventions to pursue.

2.16 Five respondents weren't in favour of this measure. The SPSO reiterated the importance of not stifling creativity or innovation. The Scottish Government, Accounts Commission for Scotland and the Scottish Legal Complaints Commission all suggested that such measures were matters for the Scottish Ministers although none argued that such measures should not be put in place. Changing the Chemistry was very supportive of increasing positive action measures but felt that this was a role for the public appointments team and should not be on the face of the code or an obligation for Ministers.

2.17 The Commissioner recognises that there is clear overall support for national, regional and characteristic-specific positive action measures to be put in place in order for board diversity to be secured. The Commissioner recognises that the views on how this should be done and who is ultimately responsible are more mixed. The support for specific positive action measures to be detailed on the face of the Code is lower than the overall number of respondents supporting the use

of positive action measures per se and there are some valid reasons put forward for those differences in perspective. It is clear nonetheless that a large proportion of respondents, including the Scottish Government, felt that these are ultimately measures that the Scottish Ministers are responsible for.

Recommendation

Balancing the disparate viewpoints provided to in response to these questions, 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 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.

[Questions 10 to 12 – updating the Diversity Delivers strategy](#)

2.18 Survey questions 10 to 12 sought views on whether the Commissioner should seek the approval of the Scottish Parliament and the Scottish Ministers to update the Diversity Delivers strategy. Approval is required because this would involve a change to primary legislation.

2.19 There was very clear support for this proposal from the majority of those respondents who had a view on the issue. Eleven organisations (85% of those responding to it) said “yes”. One respondent, the Scottish Housing Regulator, said that “the Commissioner should seek to establish if approval is required and also if it would be useful to have that approval in order to support delivery of the strategy”. Of those who did respond, only the Scottish Government indicated that it was not supportive of the change. In support of that view, their response referred to an already busy policy landscape, citing legal imperatives, policy drivers and other operational developments. Given that the majority of these had been brought forward by the Scottish Government itself, the Commissioner does not feel that seeking approval to update the Diversity Delivers strategy is a disproportionate expectation given the importance of this agenda.

Recommendation

The Commissioner notes the range of legal imperatives, policy drivers and operational developments listed by the Scottish Government, the majority of which the Scottish Government itself is responsible for. 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 she should seek parliamentary support for this change. She 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

Questions 13 and 14 – which provisions of the Code and Guidance are detracting from the delivery of appropriate outcomes?

2.20 Questions 13 and 14 asked which provisions of the Code and associated Guidance are detracting from the delivery of appropriate outcomes in the context of a fair, transparent and merit-based appointments system. Ten respondents offered views on this issue. The majority of these ranged from small suggestions for localised improvement to some quite fundamental proposals from the Scottish Government. Well over half of all respondents to this question either did not feel there were any Code or Guidance provisions impacting on the delivery of good outcomes or simply had no opinion to offer.

2.21 The responses from PATH Scotland and the Mobility and Access Committee for Scotland (MACS) suggested that the language of the Code should be simplified to make it more accessible and also that the process itself wasn't sufficiently supportive of prospective applicants from currently under-reflected groups. MACS also noted the need for a review into the impact on benefits for disabled people who might otherwise take up an appointment. Community Justice Scotland felt that more should be done to properly assess board needs and that involvement of the body was pivotal to that. The Scottish Housing Regulator felt that more focus should be placed on the attraction strategy in order to attract a wider range of people to apply for these roles. The response of the Scottish Social Services Council echoed the views of both bodies. They felt that the involvement of the body in determining board needs was very important. They also felt that advertising should be more targeted with diversity in mind, suggesting that there could be specific diversity goals for attraction.

2.22 OCPA's view was that it had "not seen evidence that the Scottish Commissioner's Guidance is preventing appointment processes from being merit-based, fair and transparent".

2.23 The SPSO expressed concerns about the current role that Public Appointments Advisers (PAAs) fulfil in some cases. They are full panel members on a proportion of appointment rounds and take part in making decisions, which the SPSO suggested was inappropriate for the regulator. The SPSO's view on this was also applicable to questions 41 and 42 which sought views on the appropriateness of the current regulatory model.

2.24 The Scottish Government's response shared the view of the SPSO in relation to PAAs having a role in decision making. In several places in the response, their view was that the panel chair should have the responsibility for making final decisions that currently have to be agreed by the whole selection panel.

The Scottish Government response also requested the wholesale amendment and/or removal of significant portions of the current Code and Guidance on the basis that they perceived these were largely operational matters for the Scottish Government. Examples included:

- section B: the obligations placed on the Scottish Ministers to plan appropriately for succession by assessing the needs of boards
- section C: the obligations placed on selection panels to design an appropriate appointment plan inclusive of the role description, person specification, assessment methods and publicity strategy
- section D: the obligations placed on the selection panel in respect of the fair and consistent assessment of applicants and the appropriate identification of candidates suitable for appointment
- paragraph G2: the need to provide feedback to unsuccessful applicants and candidates
- those parts of the Code and Guidance that set targets for timescales in the recruitment process.

Some other amendments were suggested on the basis that they currently precluded courses of action that the Scottish Government wished to take, such as the use of recruitment consultants, the ability to swap appointees from one board to another and the running of appointment exercises to fill posts on multiple boards without distinguishing between the nature and requirements of such posts. More generally, the Scottish Government also reiterated its suggestion that the current Code and its application represented a disproportionate regulation of ministerial public appointments.

2.25 Additionally, the Scottish Government wished the Commissioner to:

- no longer require panel chairs to refer significant conflicts of interest on the part of panel members, such as relationships with applicants, to her office for consideration
- allow for the chairs of NHS boards to be designated as independent panel members on recruitment rounds for other NHS boards and
- remove references from the guidance to the need for the Scottish Government to have in place a system for learning lessons.

Recommendations

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. 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.

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), she is happy to consider the issue again in light of the responses received to this consultation.

2.26 In further considering the comprehensive response and range of views and requests made by the Scottish Government, the Commissioner has also taken cognisance of the obligations placed on her by the 2003 Act. The Act is clear about what is anticipated:

“The code of practice is to include guidelines as to the methods and practices to be employed in the making of such appointments and recommendations and may, in particular, include guidelines as to—

- (a) how vacancies in the specified authorities are to be publicised;*
- (b) how applications to fill those vacancies are to be encouraged; and*
- (c) the basis on which the Scottish Ministers are to consider persons for, and for recommendation for, appointment to the specified authorities.”*

The Commissioner views the many suggestions for change made by the Scottish Government to be incompatible with both the spirit and the content of the 2003 Act and is concerned that such requests could be perceived as removing elements of the Code that enable appropriate oversight and scrutiny from the Commissioner, the public, applicants and appointees, Boards themselves and any other interested parties.

2.27 The Commissioner notes that the Scottish Government was content that the 2013 Code of Practice was appropriate at the time of its introduction, as reflected in its responses to consultation

on its content. The Commissioner is concerned that the very specific and significant changes requested by the Scottish Government in their response at this point in time seem out of step with those of the majority of other views expressed and particularly those organisations with an equalities and/or rights focus. This response in comparison to 2013 and to other consultees would also appear to represent a very different view on what it is appropriate to include in a Code of Practice. As explained in the Code consultation document:

“The regulator and the regulated as well as the Scottish Parliament and the public must have a shared understanding of what is anticipated. A ‘principles only’ Code could be subject to multiple and inappropriate interpretations and would not lend itself to the required levels of transparency that the public appointments process should rightly obtain.”

2.28 Also concerning was the Scottish Government’s apparent view that regulation of appointments is disproportionate although further discussion on the issue has dispelled this notion. We both recognise that Board chairs and members are responsible for the governance of the most significant public bodies in Scotland, inclusive of the NHS. This includes those Board members being accountable for financial performance, strategic direction, legal and ethical probity, judgement of risk and opportunity, performance oversight, expert insight and stewardship of public interest and employee rights. Both the public and the tens of thousands of public sector staff employed in those bodies have a right therefore to expect that these appointments are made on a basis that is appropriate to the scale and importance of the roles and likely to deliver the best outcomes. Any regulator in such circumstances needs to be independent of the appointing Ministers, politically neutral and in a position to provide the evidence and the performance measures that give full assurance to that effect.

2.29 The Commissioner is mindful that some of the proposed changes appear to display a lack of understanding about actual or perceived conflicts of interest and their propensity to undermine confidence in the public appointments process. By way of example, the Code does not preclude the use of recruitment consultants to publicise vacancies and encourage applications but the Commissioner views their involvement in the actual assessment and selection of candidates, when they also have paying clients seeking board roles, as inappropriate. This may be an area where the Commissioner’s office can work more closely with Government staff to support their understanding. It would however be a matter of concern if the Scottish Government were not able to recognise why a recruitment consultant’s judgements might be affected if their own clients were in an assessment pool they were overseeing and how that may consequently be perceived by applicants and the wider public.

2.30 Perhaps of greater concern in respect of our shared commitment to achieving the best and most diverse range of appointees to public boards, are the suggestions in the response itself and in the Cabinet Secretary’s covering letter that creating pre-qualified pools of board members was a cost-effective solution. This appeared to be incompatible with the Scottish Government’s own guidance on succession planning, its On Board guidance for board members, Audit Scotland’s “The Role of Boards” report and over 20 years of research and recommendations about how good governance should be secured. The Commissioner clearly recognises and takes account of the resource pressures that officials in all organisations are under in considering which revisions to the Code are appropriate.

It is apparent from further discussion with the Scottish Government that concerns about additional bureaucracy had driven its response to the consultation and that there were clearly finite resources available to support the appointments process as currently constituted. The Scottish Government has made it clear that it does not view regulation of the process as disproportionate. The Commissioner must take cognisance of this and work with officials to improve on processes in a way that is proportionate whilst also meeting joint aspirations for effective boards reflective of society. The Commissioner is happy, for example, to consider more cost-effective measures to be adopted such as assessment centre approaches to allow for multiple candidates for roles to be

identified for multiple boards, as long as each of these appointments meets the needs of the board in question at the time that the appointment is made.

Recommendations

The Commissioner does not intend, in conclusion, to meet the Scottish government's request to remove all of the requirements set out in the current Code as part of this revision. Where the Commissioner considers it appropriate, she 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.

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, her representative, in the appointments process.

The Commissioner will write to the Scottish Ministers, separately to this consultation, to ask what they propose to do to address the long-standing issue of the impact on benefits that taking up a public appointment can have as it is clear that this continues to impact on some applicants and potential applicants

Questions 15 to 17 – using evidence to inform decisions and adopting measures to achieve wider diversity on boards

2.31 Question 15 sought views on whether panels should base appointment plan decisions on evidence of what works well to attract and appoint the right calibre of applicants. For those that felt this was appropriate, question 16 asked what these requirements should consist of and what measures should be adopted to achieve board diversity in relation to protected characteristics, sector worked in and socioeconomic background. Question 17 asked for reasons for the views provided.

2.32 The vast majority of those who responded to question 15 were in favour of panels using evidence to support decision-making. As with the responses to a number of other questions, a preponderance of those supportive of the change worked in the field of equality and diversity. Community Justice Scotland felt that the sharing of lessons to be learned should be incorporated into guidance for panels. The Equalities and Human Rights Commission observed "“We cannot simply assume a trickle-down effect from a general focus on equality without being prescriptive in terms of what evidence appointment plan decisions need to take into account. We need only look at the existing inequalities listed on page 5 of this response to know this is true”. The Standards,

Procedures and Public Appointments Committee was also supportive, observing that “All appointment processes begin with the Minister, which is why we are supportive (as set out above) of clear and specific provisions on diversity measures by which Ministers are bound when preparing person specifications and instructing panels. In following instructions from Ministers, we support requirements on panels to demonstrate that their appointment plans are evidence-based”.

2.33 Respondents such as PATH Scotland, MACS, the Scottish Women’s Convention and the Scottish Housing Regulator also shared a number of proposals for the measures that should be adopted to achieve board diversity in relation to protected characteristics, sector worked in and socioeconomic background. These ranged from setting diversity targets based on current board evaluations to taking a revised approach to the way in which roles are publicised.

2.34 The SPSO, the Scottish Legal Complaints Commission and the Scottish Government weren’t supportive of more prescriptive change in this area. The SPSO argued that prescription may be counter-productive and supported training panel members to take innovative, flexible and creative approaches. The Scottish Legal Complaints Commission had concerns about the availability of data to inform decision making. The Scottish Government felt that the use of evidence to inform decision-making was already established practice which worked well and that adding further requirements to the Code would only increase bureaucracy.

2.35 The Commissioner acknowledges that the Code will require to be flexible and that any requirements that it includes should take account of the evidence available to panels to make appropriate decisions. The Commissioner is not persuaded by the Scottish Government’s assertion that “*that the current processes to identify and use evidence and good practice are already established practice and works well*”. The Commissioner also does not accept the Scottish Government’s view that taking into account, for example, income or socio-economic background would mean that “*disabled people would no longer be centred in such measures*”. The Commissioner’s view is that account should be taken of the intersections between different characteristics, such as poverty and disability, to inform planning to fill board vacancies. The response of the Equality and Human Rights Commission coincided with this view.

Recommendations

The Commissioner does however accept 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.

Questions 18 to 23 – should the Code refer to the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions?

2.36 Questions 18 to 23 sought views about whether the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions should be specifically referred to in the Code and whether the Code should be revised to take account of it having come into force.

2.37 In general, respondents were in favour of the Act being referred to in the Code and also for the Code to make reference to a proportion of its provisions without necessarily including those as prescriptive measures. Having said that, a number of respondents were keen to see the inclusion of the need for positive action measures to be on the face of the Code. In some cases, these

suggestions were linked to the provisions of the 2018 Act but in many it appeared that there was an appetite for such a change, regardless of what the Act had to say on the issue.

2.38 The Scottish Government was not against the 2018 Act or its provisions being referred to in the Code in the event that the Commissioner decided that a principles-only framework was inappropriate. Their response did however stress that, “the Commissioner does not have a role in determining compliance with the Gender Representation on Public Boards (Scotland) Act 2018”.

Recommendations

The Commissioner has decided that she 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 she 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 her determinations on compliance relate to the Code alone.

Questions 24 to 27 – appointments requiring approval by the Scottish Parliament

2.39 Questions 24 to 27 concerned the relatively small number of regulated appointments which require parliamentary approval. Questions 24 and 25 asked whether the Scottish Ministers should be obliged to consult the Scottish Parliament during the planning stage for such appointments. The Commissioner has this measure under consideration with a view to ensuring that the outcome of an appointment round was in keeping with the wishes of the Scottish Parliament as well as the appointing minister. It would, for example, be possible under the current Code for a candidate to have gone through an entire appointment process and be identified as suitable by the appointing minister only to have the Scottish Parliament determine that the appointment is not approved. Consultation with the Parliament during planning, to secure a shared understanding of what attributes the most suitable candidate for appointment will have, should preclude this situation arising. Five respondents were in favour of such consultation, including the Standards, Procedures and Public Appointments Committee, and six, two of which did not give permission for their name or response to be published, were not.

2.40 A proportion of those in favour of the measure highlighted the role of the Scottish Parliament in holding the Scottish Government to account and the need for transparency. The Standards, Procedures and Public Appointments Committee responded to the effect that it would welcome this provision. The Poverty and Inequality Commission’s response, in favour, is particularly relevant given that it is one of the few bodies appointments to which require parliamentary approval: “It would be more efficient and less likely to result in conflict if such consultation had occurred prior to an appointment plan being adopted”. The Scottish Housing Regulator felt that the views of such bodies should be relevant to a decision to change the Code in this area.

2.41 The SPSO, MACS, Changing the Chemistry and the Scottish Government were the four respondents to this question that were content for their views to be published and who were not in agreement. The SPSO felt it would add another layer to an already complex process of application. The Scottish Government advised that it was already custom and practice but did not want it to be included in the Code as it “needs to have flexibility to engage with parliamentary timetables and prescribing this in the Code of Practice may impact on the ability of officials to act in a timely manner

to meet timescales that are outwith their control". MACS view was that notifying the appointment minister of the appointment plan should be sufficient. Changing the Chemistry did not believe there was a need to consult with Parliament.

2.42 OCPA made reference to the range of different practices utilised in this area in Whitehall and posited that they weren't necessarily consistent or in keeping with the wishes of all of the parties involved. They recommended that "the Scottish Parliament make its views on this known to the Scottish Government, with the Code able to make an additional reference to what is expected here".

2.43 Questions 26 and 27 asked whether information provided to applicants should be clear about what parliamentary approval will mean for the appointment round in question. Of the thirteen responses to this specific question, twelve said yes and only the Scottish Government said no on the basis that it already happens.

2.44 Those in favour gave a range of reasons for their views. The SPSO agreed, but with the caveat that the Code should not include too much detail on such a requirement. The Accounts Commission for Scotland also agreed but felt that it should not make the process seem more onerous or inaccessible. NatureScot and the Poverty and Inequality Commissioner emphasised the importance of transparency in informing candidates about what to expect. OCPA felt that the requirement was essential on the basis that "Facing a Select Committee hearing is challenging, even for very experienced appointees, and applicants should know whether they will face it". MACS also referred to the need to inform applicants at the onset of recruitment that "these positions have an important part to play in the democracy of the country, and entail hard work and difficult decisions".

2.45 In relation to the need to consult parliament on proposals for appointments during planning, the Commissioner notes the SPSO's view that this change has the propensity to perhaps further complicate the appointments process but considers that this is preferable to having to rerun an appointment round for the lack of consultation and subsequent parliamentary approval. Any round needing to be re-run because Parliament fails to approve a Ministerial selection would also run a high risk of reputational damage and an undermining of public and applicant confidence. The Commissioner notes the Scottish Government's assertion that this is already custom and practice but with the caveat that the custom and practice might be dropped to accommodate a tight timetable. Custom and practice can also change over time to suit the circumstances of any given administration and the Scottish Government's caveat gives the Commissioner little comfort that it won't be sacrificed in certain situations. The Scottish Government also asserts that the practice is working well. The Commissioner is aware that the Scottish Ministers recently reappointed members to a board which required parliamentary approval and only sought that approval after the fact and without prior consultation.

Recommendation

Taking these issues into account, 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.

2.46 In respect of informing prospective applicants about what parliamentary approval will mean for the appointments process, the Commissioner is, for the same reasons stated above, not convinced that custom and practice gives sufficient reassurance that this will always happen unless required by the Code.

Recommendation

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.

Questions 28 to 30 – should diversity be expanded to include other attributes and, if so, what should those be?

2.47 Questions 28 to 30 sought views on whether the description of the attributes sought in new board members should be expanded to include more than skills, knowledge and experience. Respondents were also asked to proffer views on the other attributes that boards would benefit from. Of those that responded to this question, there was very clear support for this change with 17 of 21 respondents saying yes, three saying no and one being ambivalent.

2.48 This was one of the very few questions that the Committee on Standards in Public Life provided a view on. The Committee endorsed the inclusion of values where these aligned to, for example, the principles of public life and the ethical values of the organisation concerned. They cautioned against the introduction of values that could be interpreted as political or partisan so as not to undermine the principle of appointment on merit. The Colleges Good Governance Steering Group felt that changes to the Code should reflect “the multiculturalism of Scotland’s communities”. Other respondents also referred to the inclusion of values as important, albeit potentially challenging to assess.

2.49 There was also a considerable amount of support for “lived experience”, particularly in respect of disability and socio-economic inequality, to be specifically included as attributes that boards would benefit from. This theme was woven throughout the responses of many of the organisations who contacted us and not just in answer to this question. The service-user perspective was posited frequently as vital to decision-making.

2.50 The Scottish Government’s response appeared to be less keen on the types of changes that the consultation document suggested were possible and that many respondents were supportive of. Its response described these as “current hot topics” and indicated that “While there are a raft of issues that could be added to any list, further expansion will make public appointments less open and attractive”. The response also suggested that a preference would be for appointment rounds to be run to test for potential, which is already possible under the current Code and which was trialled successfully some years ago but not repeated as a matter of course.

2.51 The Commissioner concurs with the majority of those who responded to these questions. It is apparent from many responses and from the approach taken by NHS Scotland that the personal values of candidates, particularly those aligned to the principles of public life and to those of the body itself, can be very relevant to consider when planning to make appointments. It is also apparent from many of the responses received that several organisations, particularly those working in the fields of diversity and inclusion, feel that lived experience of the many forms of inequality that individuals face would add an important contribution to the work of our public bodies and that that contribution should be made at a strategic level.

Widening the range of attributes that Ministers and panels may consider when planning an appointment does not simply mean adding more complexity. Rather it is about making clearer judgements at the outset about what specific factors may be relevant and beneficial to a Board’s composition and effective governance performance at any given point in time. Most positive

responses saw this about the 'outcome' that is achieved through widening the attributes that are considered and were not advocating new forms of 'tokenism'.

2.52 The Commissioner does not agree with the characterisation of these aspirations for the qualities needed by board members as "hot topics". The preceding year has only seen inequality deepen in our society and the suggestion that maintenance of the status quo is appropriate in these circumstances seems unfitting to the aspirations of the Scottish Ministers and the public for more diverse boards and their commitment to diversity and inclusion more generally. As the Equalities and Human Rights Committee's response set out, "the pandemic and the protests at home and abroad in the wake of George Floyd's death in Minnesota have forcefully reminded us of the many significant inequalities that persist in Scotland. In this context, the importance of diverse public boards has never been clearer, and more diverse boards are an essential response to these moments". The Commissioner also disagrees with the view that expanding the type of attributes sought will make appointments less open and attractive. It is apparent that they aren't sufficiently open and attractive to people from many walks of life at the current time.

Recommendation

The Commissioner will therefore 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.

Analysis of Questions 31 and 32 – should the Code be more explicit about matching assessment methods to the attributes sought?

2.53 Questions 31 and 32 asked whether the Code should be more explicit about the need to match assessment methods to the attributes sought. Eleven respondents were supportive of this and two others indicated that this should probably or possibly happen. Four indicated that this wasn't necessary for a range of reasons. The remainder of respondents did not have a view on these questions.

2.54 The Equality and Human Rights Commission felt that the Code should be more prescriptive about the need to offer reasonable adjustments. Their response referred also to a recommendation made by Lord Holmes, following his review into access to public appointments for disabled people, to the effect that the offer to make adjustments should be made proactively and involve asking people what they need rather than making assumptions based on their disability. Other respondents, such as Healthcare Improvement Scotland, PATH Scotland and the Scottish Housing Regulator felt that this would represent a more open and transparent approach. OCPA noted the vital importance of ensuring that merit is appropriately assessed and that this was a core task for officials. The Scottish Housing Regulator's response felt that guidance on using appropriate methods should be made available to panels whilst leaving the choice of which method to use to their discretion. The Accounts Commission also felt that this was sensible but not at the expense of making the process inaccessible. The Scottish Social Services Council provided a very helpful example of how an ideal candidate could be ruled out by simply choosing the wrong assessment method.

2.55 The SPSO, the Scottish Government and the Scottish Legal Complaints Commission weren't in favour of this change. The SPSO felt that there was no benefit in prescription in this area and reiterated previous comments about the need for flexibility. The response of the Scottish Government suggested that there was no evidence that appropriate methods weren't already being used and also reiterated the need for flexibility. Although the Scottish Legal Complaints Commission

wasn't in favour of the change, it did feel that a broad statement of the requirement would be helpful "but anything more detailed should be based on data linking specific attributes with associated effective assessment methods".

2.56 The Commissioner agrees with OCPA's view that the use of appropriate assessment methods is fundamental to the identification of the most able candidates for board roles. The Commissioner views the example given by the Scottish Social Services Council of requiring candidates to make a presentation when presentation skills are not a requirement for the role to be a case in point. The Commissioner has published [guidance on good practice](#) in this area on her website which draws on extensive research on the subject from recognised experts in the field. The Commissioner's view is that good practice in this area is not currently standard in appointment rounds. There is an over-reliance on competency-based assessment which is not always appropriate to the attributes sought but which officials are familiar and comfortable with due to its predominance in civil service recruitment. The Scottish Government has also introduced a standard psychometric test for NHS appointments which is not wholly appropriately aligned to the attributes sought or to the NHS values which it purports to be assessing. The Code is not currently prescriptive about assessment methods and the Commissioner continues to be keen to allow panels the flexibility to employ new approaches. There are nevertheless clearly barriers for certain currently under-reflected groups in the appointments process and some of the current methods used to assess applicants are, in the Commissioner's view, a contributory factor.

Recommendations

The Commissioner therefore 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.

Question 33 – should issues that the Commissioner has provided guidance on since the 2013 code came into force be included in the Code, guidance or both?

2.57 Question 33 advised that the Commissioner had issued statutory and non-statutory guidance during the course of the Code's operation with a view to clarifying its provisions. The Scottish Government had expressed the view that some of the requirements thus clarified were disproportionate. Respondents were asked to give a view on whether the issues that guidance had been provided on, which were included in an appendix to the consultation document, should be set out on the face of the Code or in guidance or both. The guidance referred to covered a range of issues such as providing greater clarity on the conduct of fit and proper person tests, candidate confidentiality, precluding delegation of assessment to search consultants when they have conflicts of interest (pre-existing clients seeking board roles), transparency about roles offered on a role share basis and allowing for later start dates to accommodate individuals on maternity leave. Nine respondents provided views in this case. PATH Scotland felt that all of the issues referred to should be included in the Code or guidance and MACS felt that the guidance would be most appropriate for these issues to be included. The Scottish Housing Regulator suggested that all issues should be included in the Code itself and that the guidance could be updated periodically. The Accounts Commission was unclear about what provisions were regarded as disproportionate. A few of the other respondents had views on some of the specific issues that had been referred to.

2.58 The Equality and Human Rights Commission was in favour of the Code referring to extended start dates to accommodate maternity leave and setting parameters around the use of recruitment consultants viewing both issues through an equality lens.

2.59 OCPA felt that the Code should be clearer in defining what would preclude a panel member from being designated independent and that there was scope to strengthen the provisions relating to panel members declaring conflicts of interest.

2.60 The Scottish Government's response stated that "It is not clear from the consultation document what issues this question refers to. The Scottish Government is concerned about sections of the Code and of the guidance where they are directive about operational or administrative decisions that can be most effectively made by selection panels and officials rather than the regulator. Please refer to the answer at Q13". The Scottish Government's response to question 13 is set out above.

2.61 No clear overall picture emerged in response to this question. It was apparent that some issues, such as those referred to by the EHRC, were considered to have an impact on diversity and therefore appropriate for inclusion in the Code itself. Others related to the integrity of the process and public confidence in it, such as the designation of independent panel members. The Scottish Government had not referred to the appendix in the consultation document and was therefore unable to articulate precisely which pieces of guidance it felt was disproportionate. The Commissioner has articulated above why the wholesale removal of methods and practices to be used in the making of appointments would go against both the statutory expectations of the Code as a regulatory tool as well as the delivery of improved outcomes (in respect of diversity and Board effectiveness).

Recommendations

The Commissioner has concluded that there were clear and cogent arguments made in support of certain issues to be included in the Code itself 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.

34 to 37 – what should the Code say about panel members?

2.62 Questions 34 to 37 all concerned selection panel membership. In the preface to question 34, the Commissioner noted that from the good practice case studies published on her website that panel member designation, and particularly the designation of the panel chair seemed very important to the outcome of an appointment round. The question itself asked what the Code should say about panel members, including panel chairs and independent panel members, with a view to achieving the desired outcome on each appointment round.

2.63 Eleven respondents provided views in response to question 34 although a proportion of the responses weren't clear about the nature of the question and appeared to think it was about board members as opposed to selection panel member. OCPA felt that it would be helpful to be clear about what constituted an independent panel member and also to require panellists to declare conflicts of interest. The Scottish Housing Regulator noted that recruitment does require a time commitment from participants and that they needed to be made aware of this. The Scottish Government had concerns about additional bureaucracy and about who would make the decision on panel member suitability.

2.64 Question 35 asked whether panel chairs should be required to undertake any training and, if so, what that should consist of. Nineteen respondents provided views in response to question 35 or referred to the need for training elsewhere in their response. Of these, fourteen felt that panel chairs

and in some cases all panel members should be trained. Several respondents, including the Equality and Human Rights Commission, the Scottish Women's Convention, PATH Scotland, the Accounts Commission for Scotland and Community Justice Scotland recommended that the training should have an emphasis on equality and diversity. The SPSO felt that the training should be tailored to the needs of the individuals and OCPA suggested a minimum standard should be set, based on the advice of leaders in recruitment research. The Public Appointments Commissioner for Northern Ireland noted that training was already a Code requirement there and has certification of the training provided under consideration.

2.65 Four respondents were ambivalent about whether training should be a requirement. MACS felt that those who hadn't been involved in senior level recruitment would benefit from it but that they would expect panel chairs to have the common sense to ask for training if they needed it. The Poverty and Inequality Commission felt it would probably be helpful but with the caveat that it could slow up the appointments process. The Scottish Housing Regulator had experience of working with panel chairs with hadn't taken part previously and felt that training would be *"helpful to support them in understanding what is involved so that the exercise is effective and adequately resourced"*.

2.66 Only the Scottish Government was not in favour of training. Their response suggested that panel chairs already receive a briefing or have discussions with the Public Appointments Team (PAT) about the Code and their role. They felt that there had been no complaints or feedback that would suggest that training was required. The Scottish Government's response also referred to the fact that a Public Appointments Adviser could be allocated to panels and that *"it is vital that the selection panel understand what the Adviser's capacity is and with what authority and autonomy they operate"*. The Scottish Government felt that the support provided by PAT and the sponsors was already sufficient to run a fair process.

2.67 Reasons provided by respondents for whether or not training should be a requirement varied. The Scottish Government felt it was unnecessary as it was unaware of concerns, had received no complaints and that panels already had sufficient support to fulfil their role. The EHRC were clear that training did make an appreciable difference to appointment outcomes in terms of diversity and recommended it on that basis. MACS put it very succinctly *"If we are to select the best candidates for a role, the success of a recruitment round relies on the skills of the recruiters"*. The Poverty and Inequality Commission felt that training for interview panel members on disability and race equality, unconscious bias and the value of lived experience could be a specific measure taken to increase the representation of disabled people, members from BAME communities and those from lower income households.

2.68 Question 36 sought views on the role of the independent panel member and their terms of reference such as whether they should have received training, be paid to fulfil the role and whether they should be limited to a certain number of appointment rounds before losing their 'independent' status. Thirteen respondents had views on these issues. OCPA took a rigorous approach to the identification of truly independent panel members and felt that there should be a set limit for the number of rounds they took part in. PATH Scotland shared this latter view and also thought that these panel members should be paid for their time. NatureScot saw value in drawing these panel members from currently under-reflected groups and that refreshing the available pool would help with diversity of panel thinking. They also felt that remuneration was important. The Accounts Commission for Scotland felt that *"They must be trained and be provided with sufficient support and time to participate fully in the appointments process"* – a view shared by Changing the Chemistry, who also commented on the positive impact on diversity of for example, a disabled independent panel member. MACS felt that they should be paid also with a fixed appointment term of perhaps two years. The Scottish Housing Regulator also felt that payment should be made and training provided. They did not though see a need for a fixed term for such panel members as long as they remained independent and effective.

2.69 The Commissioner noted that there was considerable support for selection panel chairs, who are ultimately responsible for the outcome of an appointment round, to be trained to fulfil this very important role. Whilst a few respondents were ambivalent about the value of training, the majority of respondents felt that it was vital, with many of those citing the need for equality and diversity training to form a key component. The Scottish Government felt that such training was unnecessary due to the fact that they had had no complaints or negative feedback and that sufficient support is available. The Commissioner does not agree with that view. The Commissioner's advisers in fact frequently raise concerns about, in particular, new panel chairs with no experience of running regulated appointment rounds who are clearly unfamiliar with their role and responsibilities from planning the round through to competent delivery of varied assessment techniques. The advisers are instructed to provide support and guidance to such individuals and do so as a matter of course. This does not detract from the fact that there is a clear training need and it is also perhaps indicative of some reluctance to use the existing flexibility and permissiveness of the current Code to approach rounds in ways that deviate from the most common approach to planning and assessment. The Scottish Government's response has expressed their perception that the Commissioner's advisers have too much of a role and that responsibility for running effective appointment rounds lies with officials: "In our view this regulatory engagement with appointment rounds has shifted recently in a way that is unhelpful. The Commissioner's Public Appointments Advisors have become engaged in the detail of an appointment round that is the responsibility of the Scottish Government and the Panel Chair".

The Commissioner is not confident that those officials are currently always equipped, through no fault of their own, to do so. It is clear that officials are also under significant time pressure which may impact on the decisions they make in relation to achieving the most effective and successful appointment round. The Commissioner notes also that officials cannot participate in running recruitment exercises to appoint civil servants until they have been trained to do so and is concerned that the Scottish Government's response might be perceived as representative of operating inappropriate double standards in this case. Although the processes run to find civil servants and board members may share similarities, they do differ and it is important that people are trained appropriately for the process that they are to participate in.

Recommendations

The Commissioner will therefore 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, her 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.

2.70 The Commissioner notes also the responses provided about the designation of independent panel members and particularly the recommendations made by OCPA, the Public Appointments Commissioner for England and Wales. Including independent members on panels was one of the recommendations made by the Nolan Committee; the first Committee on Standards in Public Life, and it remains one of the cornerstones of assurance about public appointments. Public perception is very important to confidence in the appointment process. The Scottish Government had adopted the custom and practice of designating the chairs of NHS boards as independent panel members on appointment rounds for other NHS bodies, a practice which the Commissioner indicated was not appropriate. This is and was no reflection on the integrity of the individuals involved and they do continue to serve as panel members on appointment rounds for other NHS boards, albeit not designated as independent. They are however subject to performance appraisals conducted on behalf of their appointing minister by the Director-General Health and Social Care. Their appointing

minister also has the power to remove them from office. As such, it is unlikely that the public would view them as truly independent, despite the fact that the Scottish Government would prefer to designate them as such. It was also apparent from respondents that they felt that independent panel members should be drawn from a wider spectrum of society as that could only aid with the drive to secure greater board diversity. There were also calls for support for such individuals to ensure that they are able to acquit their roles effectively.

Recommendations

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

Questions 38 to 40 – should the Commissioner commence audits and report more frequently to the Scottish Parliament on the Scottish Government’s public appointments activities?

2.71 Question 38 sought views on whether the Commissioner should run audits to review appointment practices on those appointment rounds on which her office provided no or only partial oversight. Currently, the Commissioner can designate her representatives to be full panel members to oversee every stage of an appointment round, designate them to oversee planning only or provide no oversight at all. This proportionate approach to regulation has been adopted over the years. The first Code in Scotland saw a representative of the Commissioner allocated to provide end to end oversight of every appointment round as a full panel member.

2.72 Of those who responded to this question, eight said yes, one was ambivalent and the remaining two said no. The somewhat ambivalent response was from OCPA. In England and Wales, there is no longer direct oversight of appointment activity although they do conduct retrospective audits. For OCPA, “audits are an integral part of how the Commissioner can drive up standards, share best practice, identify breaches and provide independent oversight of the system”. Of the affirmative responses received, Community Justice Scotland shared OCPA’s view that the purpose of such reviews should be to drive improvement. The SPSO’s view was that such reviews should concentrate on outcomes rather than necessarily adherence to processes.

2.73 The Scottish Government and MACS both responded no to this question. MACS felt that the documentation provided to the appointing minister at the conclusion of an appointment round, if sufficiently robust, was all that was required. The Scottish Government contended that there was already sufficient contemporaneous oversight of appointment rounds and again expressed concerns about the role of the adviser. The Scottish Government argued that oversight is already disproportionate, that the system was working well and that further reviews would add to the regulatory burden.

2.74 In question 39, the Commissioner asked whether the results of such reviews and other relevant matters should form the basis of more regular reports to the Scottish Parliament. The Commissioner currently provides an annual report to the Scottish Parliament on Scottish Government appointment activity. It may be that more frequent reporting would provide the relevant subject committee with a more contemporaneous account of that activity and more opportunities to hold the Scottish Government to account for poor practice or a lack of progress. Question 40 sought respondent’s reasons for the prior two questions.

2.75 Eleven substantive responses were provided with eight either in favour or viewing this as potentially helpful, inclusive of the Standards, Procedures and Public Appointments Committee,

PATH Scotland and the SPSO. The Scottish Government indicated that this would be a matter for the Commissioner and the Scottish Parliament.

2.76 Although not a great many respondents provided specific views on question 38, it was apparent from those that did that there was majority support for the Commissioner to commence audits. The Scottish Government argued that further oversight of appointment activity, citing that 75% of appointment rounds had some form of oversight in 2019. This is not, however, the whole picture. The following table shows appointment activity during the course of the 2019/20 reporting year.

Scrutiny of appointment rounds	2019/20	HIGH	HIGH (SG request)	MEDIUM	MEDIUM (SG request)	LOW	TBC
Started in year	70	37	1	9	0	9	14
Carried forward from previous year	58	40	1	5	0	10	2
Total active in year	128	77	2	14	0	19	16
Incomplete at year end	45	20	1	4	0	8	12
Total completed in year	83	57	1	10	0	11	4

Sixty two percent of appointment rounds active in the year had oversight throughout. Eleven percent had oversight at planning only and fifteen percent had no oversight at all. The remainder did not yet have an oversight level decided. In the case of the sixty two percent that did have oversight throughout, the Commissioner’s advisers were required on more than a few occasions to issue guidance to prevent non-compliance occurring. They also reported more frequently than this that their good practice recommendations were not being followed. That continues to be the case at the current time. The Commissioner is not therefore wholly confident that good and code compliant practices are necessarily the norm, particularly in the absence of her advisers.

Recommendations

The Commissioner has determined therefore 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.

2.77 The Commissioner notes also that there was majority support for more frequent reporting on the Scottish Government’s appointment practices to the Scottish Parliament and that there was support for this from the appropriate subject committee. Reasons given in support of both audits and reporting related to the need for transparency, for assurance on performance measures and in order to drive practice improvements.

Recommendation

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

Questions 41 and 42 – is the current regulatory model appropriate and, if not, what should replace it?

2.78 Questions 41 and 42 sought views on the appropriateness of the current regulatory model and whether an alternative approach should be taken, as well as views on respondent's reasons. Only eleven respondents proffered a view in this case.

2.79 MACS, the Poverty and Inequality Commission and the Scottish Social Service Council were the three of the five organisations which were content for their responses to be published and that felt that current practices were appropriate. A sixth respondent, the Scottish Housing Regulator, observed that it had worked effectively for its board. OCPA's response was somewhat ambivalent expressing the view that regulation was no substitute for "policy and political will" on the basis that "Both are essential for a well-functioning system".

2.80 PATH Scotland, the SPSO and the Scottish Government wished to see changes made to the current system. PATH Scotland recommended that there should be further training on diversity and equality and that "an external advisory panel with expertise in this area be set up to offer specialist knowledge and advice". The SPSO reiterated the view that the direct involvement of the Commissioner's representatives in decision-making blurred the lines of accountability and that they should instead be deployed in a more traditional and fully independent regulatory role.

2.81 The Scottish Government's responses to this question was perhaps the most radical of the views proffered, expressing again a desire for principles-based regulation. The response also posited the possibility of the Scottish Ministers drafting their own Code of Practice or for regulation to be subsumed by another body. No additional reasons or explanations were given to suggest how such alternative models might work or why these other options would be better.

Recommendations

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 her 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, as has been explained above, 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.

Questions 43 and 44 – views on other issues that the Code and Guidance should take into account and on the appointments process more generally

2.82 Questions 43 and 44 were the last two in the consultation document. They provided respondents with an opportunity to offer views on any other issues related to the Code, guidance or appointments practices that they had not already referred to. A range of respondents provided answers to these specific questions. A proportion of respondents did not provide answers to any of the specific questions in the consultation document but instead preferred to make a general submission which included their views on public appointments. In those cases, their views were included as appropriate under the preceding questions or under questions 43 and 44 where their views were more general in nature.

2.83 Generally speaking, it was clear from all respondents that there was an appetite for further and faster change (particularly in respect of diversity) and that the Code was one vehicle for such change to be given effect. The response of the Colleges Good Governance Steering Group emphasised the important role that bodies themselves played and were keen to see that role, and the need for the Scottish Government to consult with bodies, to be made more explicit. Community Justice Scotland felt that more should be done to strengthen succession planning for boards on the basis that it was not currently planned as well as it should be, with too much focus on immediate needs.

2.84 OCPA shared the Commissioner's view that a Code based on principles alone "risks government not being given clear direction on the basics required for each appointment". OCPA also noted "the value in the Statutory Guidance, which, as stated earlier, reduces the burden upon the Commissioner to give advice on practical issues that are regularly encountered when making appointments, such as: giving feedback, being fair when candidates cannot attend in person, and what panels need to document and declare".

2.85 The Accounts Commission for Scotland viewed the Code as an important tool in ensuring that the right checks and balances were in place for the appointments process and, in common with some other respondents, saw a role for the Code and process in "empowering people and communities". The Office of the Scottish Charity Regulator identified the "language of public sector governance" as a potential barrier to participation for the wider community.

2.86 The Scottish Women's Convention observed that, although there was a legislative commitment to gender balance on boards, this didn't take account of wider diversity and that "a clearer consciousness around diversity in all aspects of board membership is fundamental to involve women at a civic level. The current situation calls for a rethink, including ensuring grassroots women are placed in decision making positions. In light of the current Covid-19 pandemic and growing income and health inequalities, now more than ever this is crucial". They felt that this could only benefit the ways in which boards acquitted their functions including:

- *"To preserve trust in Public Boards by ensuring equality is at the heart of the agenda and representative of the population of Scotland as a whole.*
- *To provide new, innovative problem-solving strategies and solutions when implementing policies.*
- *To bring in new ways of consulting with overlooked groups and others who can contribute to consultation.*
- *It may account for many of the income and health-related inequalities faced by women that need to be more accurately represented. "*

2.87 Changing the Chemistry, the Scottish Women's Convention and Healthcare Improvement Scotland all cited barriers in the process for people who aren't currently "in the system", including a lack of insight into what happens in a 'boardroom', the traditional application form and type of competency interviews commonly utilised by panels. Additionally, the Scottish Women's Convention had consulted its members and gleaned some clear recommendations that could be implemented to improve on the current process. These included broadening the way in which merit is defined and ensuring that people who are unsuccessful receive meaningful feedback on why that was the case. Healthcare Improvement Scotland also raised concerns about the length of time that it took between application and appointment, this can be down to the simple resource pressures on panels to come together and it is a view shared by OCPA which observed that delays are often attributable to the time taken by ministers to make appointment decisions. OCPA also referenced the fact that the Code operated in England and Wales included requirements related to candidate care, for which there is no equivalent requirement currently in the Scottish Code. In that context, PATH Scotland

recommended that there should be a web-tracker made available online, as is done in England and Wales, so that everyone could see the progress of a given appointment round.

2.88 The Scottish Government's response repeated its recurring theme in that it did not support further prescription in the Code or guidance and that sections of the current version should be removed or amended on the basis that "they concern operational processes: these are decisions for the Scottish Government to make on direction from Scottish Ministers".

Recommendations

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. 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.

2.89 The Commissioner has also taken note of the view expressed that there is a need for meaningful feedback to be provided to those that are unsuccessful. The current Code also requires that for people who aren't successful at interview but that is, as the statistics attest, often too late for people from currently under-reflected groups as they are ruled out at the shortlisting stage more frequently than others. The Commissioner has also taken cognisance of the applicant surveys that her office runs at the conclusion of appointment rounds and reports on annually. These show quite clearly that a relatively low percentage of people receive feedback on their initial application, even though constructive feedback is considered very valuable. Many applicants complain of generic feedback that doesn't appear to be wholly relevant to them. The 2019 applicant survey report noted that *"it is encouraging that the percentage of respondents reaching interview stage and agreeing that the feedback was useful or very useful has increased year on year (with the exception of 2019), but disappointing that the reverse is true for respondents not reaching the interview stage"*.

Recommendations

The Commissioner therefore 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.

2.90 In conclusion, the Commissioner expresses her thanks to all of the individuals and organisations who took the time and effort to respond to this consultation exercise. The Commissioner has therefore published the results of the consultation alongside a first draft of the revised Code with the purpose of seeking views on whether it will achieve its intended aims.

Appendix One – Organisations Invited to respond to consultation

Statutory consultees

- The Scottish Parliament (Standards, Procedures and Public Appointments Committee)
- The Scottish Ministers (The Cabinet Secretary for Finance and the Permanent Secretary of the Scottish Government)

Regulated public bodies

- Aberdeen and Aberdeenshire Regional College
- the Accounts Commission for Scotland
- Architecture and Design Scotland
- Ayrshire and Arran NHS
- Ayrshire Regional College
- the Bord na Gaidhlig
- Borders NHS
- Borders Regional College
- the Cairngorms National Park Authority
- Caledonian Maritime Assets Ltd
- the Care Inspectorate
- Forth Valley College
- Children's Hearings Scotland
- NHS National Services Scotland
- Community Justice Scotland
- Creative Scotland
- the Crofting Commission
- Crown Estate Scotland
- David MacBrayne Ltd
- Dumfries and Galloway NHS
- Dumfries & Galloway Regional College
- Dundee and Angus Regional College
- Edinburgh Regional College
- Fife NHS
- Fife Regional College
- Food Standards Scotland
- Forth Valley NHS
- the Regional Board for Glasgow Colleges
- Grampian NHS
- Greater Glasgow and Clyde NHS
- Healthcare Improvement Scotland
- Highland NHS
- Highlands and Islands Airports Ltd
- Highlands and Islands Enterprise
- Historic Environment Scotland
- the Independent Living Fund
- the Judicial Appointments Board for Scotland
- Lanarkshire NHS
- the Regional Board for Lanarkshire Colleges
- the Local Government Boundary Commission for Scotland
- Loch Lomond and the Trossachs National Park Authority
- Lothian NHS

- the Mental Welfare Commission for Scotland
- the Mobility and Access Committee for Scotland
- the National Confidential Forum
- the National Galleries of Scotland
- the National Library of Scotland
- the National Museums of Scotland
- the Golden Jubilee Foundation Board
- NHS 24
- NHS Education for Scotland
- the Office of the Scottish Charity Regulator
- Orkney NHS
- the Parole Board for Scotland
- the Poverty and Inequality Commission
- Public Health Scotland
- Quality Meat Scotland
- Revenue Scotland
- the Risk Management Authority
- the Royal Botanic Garden Edinburgh
- the Schools Closure Review Panel
- the Scottish Agricultural Wages Board
- the Scottish Ambulance Service
- the Scottish Children's Reporter Administration
- the Scottish Commission on Social Security
- the Scottish Criminal Cases Review Commission
- Scottish Enterprise
- the Scottish Environment Protection Agency
- the Scottish Fire and Rescue Service
- the Scottish Fiscal Commission
- the Scottish Further & Higher Education Funding Council
- the Scottish Futures Trust
- the Scottish Housing Regulator
- the Scottish Land Commission
- the Scottish Law Commission
- the Scottish Legal Aid Board
- the Scottish Legal Complaints Commission
- NatureScot (Scottish Natural Heritage)
- the Scottish Police Authority
- the Scottish Qualifications Authority
- the Scottish Social Services Council
- Scottish Water
- Shetland NHS
- Skills Development Scotland
- South of Scotland Enterprise
- sportscotland
- the State Hospitals Board for Scotland
- Tayside NHS
- VisitScotland
- the Water Industry Commission for Scotland
- West Lothian Regional College
- West Regional College
- Western Isles NHS

Organisations and individuals working in the field of equality and diversity

- Inclusion Scotland
- the Equality and Human Rights Commission Scotland
- CEMVO
- Age Scotland
- the Scottish Women's Convention
- MECOPP
- Changing the Chemistry
- Stonewall Scotland
- the Scottish Youth Parliament
- BEMIS
- Women on Boards
- the Equality Network
- Disability Equality Scotland
- the Coalition for Racial Equality and Rights
- Neish Training
- Young Scot
- LGBT Youth Scotland
- EQUATE Scotland
- the Glasgow Centre for Inclusive Living
- VOX Scotland
- Youth Scotland
- Engender
- the First Minister's National Advisory Council on Women and Girls
- Close the Gap
- the University of the West of Scotland
- Heriot-Watt University (research fellows)
- PATH Scotland
- the West of Scotland Regional Equality Council
- Central Scotland Regional Equality Council
- Edinburgh and Lothians Regional Equality Council

Other organisations and individuals with an interest in public appointments

- Public Appointments Advisers
- the Scottish Public Services Ombudsman
- Scottish Commission for Human Rights
- Audit Scotland
- National Library of Scotland
- Commissioner for Public Appointments in Northern Ireland
- Commissioner for Public Appointments
- Committee on Standards in Public Life
- COSLA
- STUC
- SCVO
- Scottish Chambers of Commerce
- Institute of Directors
- ICAS
- the Law Society of Scotland
- CIPFA

Appendix Two – 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.