

Ethical Standards Commissioner

CONSULTATION DOCUMENT

A consultation on potential revisions to the
Code of Practice for Ministerial Appointments
to Public Bodies in Scotland
– questions for consideration

06 August 2020

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Laid before the Scottish Parliament on 6 August 2020 in accordance with section 2(4) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.
Reference CES/2020/03.

This document is available in alternative formats on request by telephoning 0300 011 0550 or by e-mailing i.bruce@ethicalstandards.org.uk.

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

Respondent information

This consultation paper invites comments on the existing Code and, in particular, asks those with a role or otherwise having an interest in the public appointments process whether the Code is operating as effectively as possible or whether they consider any improvements should be made to the Code. This paper should be read in conjunction with the main consultation document, available to download from our website:

<https://www.ethicalstandards.org.uk/publication/consultation-document-prospective-code-revisions>

Comments are invited by **Monday 9 November 2020**.

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

Name: Scottish Public Services Ombudsman	
Address: Bridgeside House, 99 McDonald Road, Edinburgh, EH7 4NS.	
1. Are you responding as (please tick appropriate box):	
1a. An individual (go to 2a/b, 3)?	<input type="checkbox"/>
1b. On behalf of a group or organisation (go to 2c/d, 3)?	<input checked="" type="checkbox"/>
2. Individuals:	
2a. Do you agree to your response being made public (on the Commissioner's website or otherwise published) (please tick one box)?	
Yes (go to 2b below)	<input type="checkbox"/>
No	<input type="checkbox"/>

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

Issues on which Views are Invited

Equality and Diversity

Q1 – Should the Code have clear and specific provisions about the measures that the Scottish Ministers should adopt when planning to appoint new members in respect of diversity and should diversity be expanded to include other factors such as household income, sector worked in and skills, knowledge and experience?

See the detailed comments below.

Q2 – If so, what should those measures be and what other factors should be considered?

Q3 – Please provide reasons for your responses to Q1 and Q2.

We recognise the importance of having a public appointment system and code that ensure public appointments are fair, transparent and have integrity. We support fully the good intentions and aim behind this proposal. Our comments should be taken in the context of us having had experience of being involved in public appointments in only a limited way. Our observations relate primarily to the use of the phrase specific and clear in the current code. The current code and supporting guidance, while they contain much that is of benefit, can present problems in practice because the code and guidance are so specific that it can limit the ability to adapt to situations which were not foreseen or which require additional flexibility, leading to situations where specific guidance had to be sought of the Commissioner, adding time and complexity.

One suggestion we offer, is that the Commissioner consider simplifying the code and, in doing so, to shift some of the focus from compliance with the details of a technical process to principles, outcomes and accountability to support and enable improvements in the diversity and quality of appointments. For example, the emphasis on the code might not be on the specific measures but on requiring SG to publish measures and to assess and publish their performance against those measures to ensure

public accountability. SG could be encouraged to consult on those measures before publishing. That is not to say that compliance is unimportant, far from it, but that learning and good practice are also important.

Q4 – Should the Code include more prescriptive requirements to ensure that lessons are learned on an ongoing basis and that decisions taken by panels are always informed by evidence?

See above our comments above and additional comments below.

Q5 – If so, what requirements should be included?

Q6 – Please give reasons for your responses to Q4 and Q5.

Including a requirement to report on lessons learnt and actions taken as a performance measure, may achieve the outcome more effectively without the disadvantages that could arise from adding more detail to the code. We offer this having reflected on the effectiveness of making learning from complaints an integral part of complaint handling. While the functions are clearly different, we believe the principles and approach are relevant.

Q7 – Should the Code make reference to other, central activities such as nationwide, regional or characteristic-specific positive action measures that the Scottish Ministers should be engaging in to improve on board diversity?

See below.

Q8 – If so, what should those be?

Q9 – Please give reasons for your responses to Q7 and Q8.

It would be very helpful for the Commissioner to produce advice and support on these important areas but including detail in the code risks them becoming prescriptive in an area where creativity and innovation are likely to be needed to ensure improved diversity of applicants, appointments and active participation at Board level. Generally, we would recommend the revision of the code should

seek to shift the emphasis in appointments from technical compliance to encouraging creativity and innovation to secure successful outcomes within a fair and flexible process.

Q10 – Should the Commissioner seek ministerial and parliamentary approval to refresh the Diversity Delivers strategy?

It is not clear from the consultation why approval at ministerial and parliamentary level is required but given the age of the initial strategy it would seem sensible to refresh this and to look, in particular, at approaches taken elsewhere across the UK and internationally as well as undertaking broad consultation to identify why barriers remain and what steps are effective at reducing them.

Q11 – If so, what specifically should be updated/refreshed in the strategy?

Q12 – Please give reasons for your responses to Q10 and Q11.

Pragmatic, Proportionate and Public Interest Focused

Q13 – 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?

See comments above on the level of detail and also our comments on the role of the Commissioner below.

Q14 – Please give reasons for your views.

Additional Issues that Code Revisions Could Address

Q15 – Should the Code be more prescriptive in this area and require panels to base appointment plan decisions on evidence of what works well to attract and appoint the right calibre of applicants?

See below.

Q16 – If so, what should these requirements consist of and what measures should be adopted to achieve board diversity in relation to protected characteristics, sector worked in and socio-economic background?

Q17 – Please give reasons for your answers to Q15 and Q16.

Innovative, flexible and creative approaches are likely to be needed and, while we appreciate the frustration at progress that lies behind the suggestion of prescription, we believe it runs the risk of being counter-productive in the medium to long-term. Generally, we recognise the value of training for panel members prior to their involvement in creating appointment plans, and consider this may be more effective at sharing best practice and helping them understand the importance of key decisions than prescription in the code.

Q18 – What changes, if any, should be made to the Code as a result of the coming into force of the 2018 Act?

Q19 – What legitimate grounds for choice should be specified?

Q20 – Please give reasons for your views.

Q21 – Should the Code more generally make specific reference to these new duties placed on the Scottish Ministers as well as the ramifications of those for prospective applicants? Appointment plans might, for example, require to include specific positive action measures to be taken for each vacancy to be filled.

See our comments above about the disadvantages that including too much detail can have in the code of practice.

Q22 – If so, which duties should be included?

Q23 – What are your reasons for these views?

Q24 – Should the Code place an obligation on the Scottish Ministers to consult the Scottish Parliament on the prospective appointment plan for roles that require parliamentary approval?

No.

Q25 – Please give reasons for your views.

This would add another layer to an already complex process of application. Instead we would recommend a requirement to report on steps taken when parliamentary approval is sought for appointments.

Q26 – Should information provided to applicants be clear about what parliamentary approval will mean for the appointment round in question?

Yes.

Q27 – Please give reasons for your view.

It seems sensible to provide full information. We do not though think this needs to be a matter for the code to include in detail. Instead, the emphasis should be on providing clear and helpful information for candidates.

Q28 – Should the description of the attributes sought in new board members be expanded to include more than skills, knowledge and experience?

See below

Q29 – If so, what other attributes should be included?

Q30 – Please give reasons for your answers to Q28 and Q29.

An ability to identify with and demonstrate values appropriate to a post are critical for a successful appointment and could be a useful addition. However, there is already a high level of complexity in the application form and process that is likely already deterrent for many potential applicants. One approach might be to put more emphasis on identifying the *minimum* requirements to enable a broader range of applicants can go through initial sift to later assessment stages.

Q31 – Should the Code be more explicit about the need to match assessment methods to the attributes sought?

See below

Q32 – Please give reasons for your answer to Q31.

We do not think there is benefit in prescription in this area and refer to our previous comments on the need at times for flexibility, creativity and innovation to achieve outcomes.

Q33 – Please say whether you consider any of these issues is appropriate to be included in the Code, guidance or inappropriate for either. Please give reasons for the views you expressed below.

Q34 – What should the Code say about panel members, including panel chairs and independent panel members, with a view to achieving the desired outcome on each appointment round? For example, should other competing personal and professional commitments be taken into account in the designation of a suitable member?

The Code could provide indicators of what factors should be considered to enable reasoned and balanced decisions to be taken.

Q35 – Should panel chairs be required to undertake any training, and if so, what should that entail?

We would support training for chairs as a way of ensuring consistency and best practice. The type and level of training could be tailored to the appointment round requirements and the needs of the individual chair.

Q36 – Do you have any strong views about the terms of reference that independent panel members should be subject to (e.g. should they have received training, be paid, not be paid, be limited to a certain number of rounds that they are involved with before losing ‘independent’ status)?

Again, we see the benefit in the Code allowing for flexibility but suggest that all the matters noted should be clearly considered before the terms of references are finalised in any individual appointment round and reasons given for decisions.

Q 37 – Please give reasons for the views expressed in response to Q34-36.

Q38 – Should the Commissioner commence audits for a proportion of appointment rounds that will otherwise have had no direct or partial oversight?

Potentially, see our comments below on the current regulatory approach.

Q39 – Should the results of such reviews and other relevant matters feature in more regular reports to the Scottish Parliament in order to improve on transparency?

Reporting is a key method of ensuring accountability and a move away from prescription in the process to reporting of outcomes of assessments and other matters may be more effective in achieving the goals of the Code. .

Q40 – Please provide reasons for your answers to Q38 and Q39.

See above

Q41 – Do you consider the current regulatory model to be appropriate? If not, what should replace it?

Our understanding is that the Commissioner's office is currently committing significant resources to direct involvement in individual appointments rounds, approving the detail of individual appointment plans and providing members for some panels. Our concern is that this level of active involvement in individual appointment processes blurs the line between regulation and implementation of the code and risks creating the perception of a conflict of interest. We would strongly support a move to a model which ensures the Commissioner has appropriate distance from individual processes and, in particular, would suggest that the Commissioner consider discontinuing the practice of providing members for panels (who are part of the decision making process, and have an oversight role). This might then enable the Commissioner to focus on a more clearly defined and targeted support and guidance role at the start of the process and then on a compliance/audit role for the process itself (this could, for example, include observing significant panel discussions or processes, providing self-assessment templates). The Commissioner could then report publicly to Parliament on their findings and any concerns and do so from a fully independent position.

Q42 – Please provide reasons for your answer to Q41.

See above.

Q43 – Are there any other issues relating to the Code or associated guidance you wish to raise?

Q44 – Are there any other issues relating to appointment practices you wish to raise?

Responses

Responses should be submitted by **Monday 9 November 2020**.

They should be sent, ideally by email, to:

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