

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: Lauren Murdoch	
Address: Public Appointments Team, Scottish Government.	
1. Are you responding as (please tick appropriate box):	
1a. An individual (go to 2a/b, 3)?	
1b. On behalf of a group or organisation (go to 2c/d, 3)?	X
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)	
No	
2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick one box):	
Yes, make my response and name available	
Yes, make my response available, but not my name	
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	

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?

No. The independent Crerar Review of regulation, audit, inspection and complaints handling posited that “primary responsibility for improving services lies with the organisations that provide them” and this still holds true.¹ Building further provisions into Code would go against this.

Specific provisions about measures will hamper innovation and build in further rigidity. A principles-based framework only would instead allow for flexibility to respond efficiently and effectively and attract diverse talent. This would mean proportionate regulation and a reduction of burden: the consultation document made an unrealistic comparison between the regulation of a process that recruits around 110 to 170 individuals a year with regulation of the financial sector - as the Crerar Review noted, a key principle of regulation should be proportionality in the issue, context or environment.²

The Scottish Government agrees with the purpose set out in the Code of Practice 2013 that:

‘The purpose of the Code is to provide the framework that enables the Scottish Ministers to attract and appoint the most able people in a manner that meets the requirements of the Act’ [Public Appointments and Public Bodies etc. (Scotland) Act 2003 (‘the Act’)].

Practical flexibility is crucial to plan for the recruitment of public appointees based on succession planning, priorities of the board and on direction from Scottish Ministers. Specific provisions about further measures will have a chilling effect on any flexibility and on the effective and efficient delivery of appointment rounds.

Without seeing draft versions of potential changes to wording in the Code of Practice it’s difficult to provide further comment at this stage over and above our view that the Code and Guidance should be a principles-based framework only, against which compliance is then assessed.

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

Regulation should be proportionate and reduce unnecessary burden. Section 3 of the consultation document refers to exceptional change to the operational context of public bodies in the last 6 months: that in itself emphasises the need for a much less prescriptive Code of Practice and associated Guidance, with fewer measures, to allow for a flexible response to rapidly changing circumstances.

¹ <https://www.gov.scot/publications/crerar-review-report-independent-review-regulation-audit-inspection-complaints-handling/> pp2-3

² <https://www.gov.scot/publications/crerar-review-report-independent-review-regulation-audit-inspection-complaints-handling/> pp20-21

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

The Scottish Government does not agree that the measures suggested in the consultation document at 5.1 would be appropriate additions to the Code of Practice. These are dealt with in turn:

Equality impact assessment of application and assessment methods

The Scottish Government is already aware of its obligations to impact assess arising from The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016³. The decision about assessing impact of policies and practices rests with the bodies listed in the schedule for the regulations. Duplicating this requirement in the Code of Practice or placing a blanket requirement for equality impact assessment is disproportionate and not in keeping with the requirements of the regulations. It also potentially interferes with or fetters Ministers' discretion under the legislation.

The Scottish Government is committed to meeting its legal obligations and already works to ensure that the public appointments process meets the Public Sector Equality Duty. As per the guidance⁴ from the Equality and Human Rights Commission, the Public Appointments Team has considered how policy and practice meets the requirements of the General Equality Duty and has determined that carrying out an equality impact assessment in relation to each individual appointment round (circa 50 per year) would cause significant delay and be a disproportionate burden in terms of resources on the public appointments process.

Inclusion of specific provisions relating to positive action measures

In terms of positive action measures, the Equality Act 2010 enables 'employers' (including those responsible for public appointments) to take action where they see that people from protected groups experience disadvantage, or they have specific needs or they have disproportionately low participation rates.⁵

The Scottish Government has used evidence to take steps to introduce positive action measures into the Public Appointments process, including:

- Action at every appointment round to target advertising of vacancies to under-represented groups
- Making a statement in every application pack about Scottish Ministers desire to see applications from people from under-represented groups
- Providing opportunities exclusively for people with protected characteristics for example the shadowing project for disabled people
- Providing training opportunities for people with protected characteristics for example women and people from ethnic minority backgrounds.

³ The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016. Available at: <https://www.legislation.gov.uk/ssi/2012/162/made>

⁴ Equality and Human Rights Commission (2016), Assessing Impact and the Public Sector Equality Duty. Available at: <https://www.equalityhumanrights.com/en/publication-download/assessing-impact-and-public-sector-equality-duty-guide-public-authorities>

⁵ Section 159 of The Equality Act 2010. Available at: <https://www.legislation.gov.uk/ukpga/2010/15/section/159>

Positive action is an ‘enabling’ provision of the Equality Act 2010⁶ and the responsibility for evidencing the ‘stated aims’ is clearly a decision for the Scottish Government. The Scottish Government is already using the provisions to justify positive action where evidence supports this in a recruitment round. Indeed, identifying whether or not positive action should be carried out is already a part of the discussion at the planning stage of an appointment round. Adding further provisions to the Code of Practice that simply reiterate the positive action stated in legislation is, in our view, unnecessary and could potentially fetter, in a restrictive or negative way, the Scottish Government’s discretion to take positive action in appropriate circumstances.

The reference to succession planning tightened to ensure proper consideration of board needs when planning appointments (restricted to address under-represented groups (PCs) or expanded to socio economic factors, sectoral experience, etc.)

The current Code of Practice (2013) states that:

A2. The Scottish Ministers are responsible for succession planning to ensure boards have the skills, knowledge and experience 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 body concerned.

Although the consultation document suggests that this reference to succession planning is ‘relatively wide in scope’ this wording is wholly appropriate given that the Scottish Ministers are ultimately responsible for public appointments. Scottish Government officials and public body boards work to ensure that succession planning is complete and informs each appointment round. This is operational activity that is already in place and in our view it works effectively to meet the requirements of the Code of Practice and to deliver a high calibre of candidates. Our concern is that further prescription or restriction of applicants based on either protected characteristics or socio economic factors may be unlawful or work to narrow the range of people who can apply for these roles at a time when we are working to broaden their appeal. There is no explanation in the consultation document that creates a case to suggest that adding further prescription about succession planning to the Code of Practice is necessary or would provide any added value.

In response to the suggestion that the Code should expand the definition of ‘diversity’ to include other factors such as household income, sector worked in and skills, knowledge and experience.

The Commissioner’s current Code of Practice refers to ‘equality and diversity’ but does not define what is meant by that. In practice the Scottish Government has worked to address under-representation of people with protected characteristics, as listed in the Equality Act 2010 (we note that the consultation document uses the phrase ‘under reflection’ to refer to people with protected characteristics being represented on public body boards. We use ‘under-represented’ which is consistent with language used in the Equality Act 2010.) The ESC has set targets for applications for women, disabled people, black and minority ethnic people, people whose sexuality is not heterosexual, and people aged under 50. The Scottish Government has a robust system for monitoring the protected characteristics at each stage of the appointments process and has used the data to identify steps Scottish

⁶ Equality and Human Rights Commission (2011), Pg. 159 Employment Statutory Code of Practice. Available at: <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

Ministers should take to address under-representation of people with protected characteristics.

The consultation suggests that household income and sector worked in represents another dimension of 'diversity that requires to be addressed'. While we agree that public appointments must be open to the widest possible range of people, prioritisation of specific aspects are for the appointing Minister, the public body board through its succession plans, and legal requirements (including what is specified in the founding legislation for a public body board).

Note that while data from applicants' monitoring forms provides some basic information about household income and sector worked in this information is not sufficient to draw conclusions about either the socio economic *status* or the socio economic *background* of public appointees.

[Thematic Reviews of the Code's Operation and Diversity Delivers Progress](#)

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?

No, more prescriptive requirements are not required. Operational delivery matters are rightly for the Scottish Government and can operate within an outcomes-focused framework with principles of merit, openness, fairness and impartiality, and diversity and equality. Each appointment round is informed by evidence, the needs of the board, the legislation underpinning the public body board, and the role of the appointing Minister.

We do not agree with assertions that there are no compelling plans in place for redressing under-reflection more generally. We have a strategy and two action plans in place and have engaged frequently with the Commissioner's office on what our priorities are. The success of our work in 2019 indicates that the approach we are taking is bearing fruit.

Q5 – If so, what requirements should be included?

N/A

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

Selection panels already use evidence to inform each recruitment round. Management information, good practice information and anonymised diversity data are already available to the appointing Minister, board chair, Scottish Government officials and selection panels. Public body boards also undertake skills audits and succession planning which informs selection panel discussion and decision making. Scottish Government officials are able to draw on data and information on round by round basis, or collated across Directorate or across all public appointments.

Work on improving the representation of women on boards has been hard won and is a significant achievement for the Scottish Government. Our analysis of the participation of other under-represented groups, in particular disabled people and people from an ethnic minority background, has shown that the barriers for them are different and applying the same actions or lessons that were used to improve gender representation will not automatically improve the under-representation of other groups. Our work to understand

these issues and identify actions is set out in our Race Equality Action Plan and our overarching Strategy and Action Plan.

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?

No

Q8 – If so, what should those be?

N/A

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

As intimated in the response to Q3 the Scottish Government is of the view that it is for Scottish Ministers to decide what action should be taken to address under-representation of people with protected characteristics on public body boards, and it is for public body boards to use succession planning to respond appropriately to their circumstances.

As discussed in response to Q3 there are statutory conditions for positive action measures to be introduced. The Scottish Government already uses evidence to identify positive action measures, for example providing shadowing opportunities.

Scottish Ministers are ultimately responsible for public appointments and are democratically elected to decide on priorities. Prescription of the positive action measures Scottish Ministers should take at national and regional level via a Code of Practice is not appropriate.

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

If there is to be a new or refreshed Diversity Delivers strategy, then approval should be sought, however, a new or refreshed one is not necessary because there are legislative provisions and other policy measures which deal with diversity priorities: see the response to Q12.

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

N/A

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

Diversity Delivers was an important report when it was published in 2008 and it informed a number of improvements to the public appointments process. Since then, the legal context, Ministerial priorities and operational environment for the Scottish Government and public body boards have changed significantly.

In an already busy policy landscape the Scottish Government do not see the value in publishing a second edition of Diversity Delivers. Current drivers for Scottish Government action include:

Legal imperatives:

- The Equality Act 2010
- The Public Sector Equality Duties
- Gender Representation on Public Boards (Scotland) Act 2018

Policy drivers:

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

Operational developments:

- [A Fairer Scotland Disabled People: Employment Action Plan \(2018\)](#)
- Scottish Government race recruitment and retention strategy (2020) (unpublished)
- Access to better data and analysis via Engage Start system for applications
- Increased staff resource for the Public Appointments Team
- Public Appointments Team Strategy and Action Plans

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?

In general, the principles in the current Code of Practice provide a clear framework to deliver the public appointments process in a fair, transparent and merit-based way. Public Appointments have been delivered to a consistently high standard and breaches of the Code are very rare.

The Code of Practice – and most importantly its interpretation and implementation by the regulator - needs to remain flexible enough for boards, selection panels and officials to be able to make outcome-focussed decisions about the methods that should be used within an appointment round as required, for example, the use of search consultants, introducing group recruitment exercises, using methods to test potential. There should be flexibility for this to happen without the need for ongoing consultation with the Commissioner.

Specifics about the Code are provided below. The Crerar Review of regulation raised the issue of scrutiny becoming a burden that is “disproportionate to the benefit delivered and to the risk [the regulation] was set up to overcome” – the sections proposed below for removal are to help reduce that disproportionality.⁷

The ‘Code in Context’ section should be changed to indicate that open, fair and merit-based public appointments can be made in a multiple-board recruitment process, since it could currently be interpreted to mean that only one board at a time should be recruited to.

A2 should be updated to refer to ‘bodies’ rather than body so that appointees can be moved to different boards should the need arise.

A5 concerns targets for timescales and should be removed as this is operational policy.

A7: The interpretation of A7 currently in use by the Commissioner that health board chairs cannot be independent panel members on other health board rounds should be abandoned. Health board chairs bring appropriate knowledge and understanding of the

⁷ <https://www.gov.scot/publications/crerar-review-report-independent-review-regulation-audit-inspection-complaints-handling/> pp40-41

skills knowledge and experience required in potential appointees and would have the integrity to act with independence.

A11: Where the Ethical Standards Commissioner's Public Appointments Advisor (PAA) is also a panel member this means that the PAA is also in a regulatory role in respect of him/herself – this is a conflict of interest. In addition, the chair of the panel is responsible for compliance with the Code but the PAA as a member of the selection panel can bypass the panel chair – this is inappropriate. The PAA should raise all issues with the panel chair first including those issues that have a regulatory aspect.

A12 should be updated to, for example, 'It is preferable for membership of the selection panel to remain the same throughout the appointment round'. The current wording does not allow enough flexibility to respond to circumstances and it suggests that there are only two ways for the panel membership to change when in practice there are more e.g. family circumstances, bereavement etc.

A15: The wording is appropriate but the regulation needs to be proportionate. The professional integrity of panel members and of selection panel chairs should be relied upon more to introduce mitigating measures where required.

Much of Section B of the Code drifts into operational issues and should be moved to non-statutory guidance or removed entirely. If removed entirely then it would be for the Scottish Government to make clear its own operational process – that separates out what is appropriately for the Commissioner and what is appropriately for the appointing Minister.

All of Section C of the Code covers operational issues and should be moved to non-statutory guidance or removed entirely. If removed entirely then it would be for the Scottish Government to make clear its own operational process – that separates out what is appropriately for the Commissioner and what is appropriately for the appointing Minister.

Much of Section D of the Code drifts into operational issues and should be moved to non-statutory guidance or removed entirely. If removed entirely then it would be for the Scottish Government to make clear its own operational process – that separates out what is appropriately for the Commissioner and what is appropriately for the appointing Minister.

Implementation of D6 and its regulation needs to be proportionate. Appointing decisions are based on those identified on the basis of merit as most able for appointment and information put forward should be on that basis and on fairness to applicants. Putting forward information on unsuccessful applicants when it cannot be used in the appointment decision making is disproportionate.

E1: This concerns the applicant summary and should be updated to show that the decision about the content of the summary should be signed off by the panel chair alone, who has responsibility for compliance with the Code. This would help with efficiency in the process.

G2: This concerns feedback and should be removed as this is operational policy.

The Scottish Government welcomes the suggestion in the consultation document at 5.5 that the Code should allow for additional appointments to be made where a board member stands down unexpectedly or the appointing Minister is impressed by the strength of the pool.

There are parts of the Guidance that focus on operational requirements and the Scottish Government is of the view that these sections should be updated or removed to recognise that officials have responsibility for the practice. This includes:

Section 2.5b of the guidance should be updated to reflect the statutory guidance on the Gender Representation on Boards (Scotland) Act 2018.

The regulation of Section 3.4 should be more proportionate to reflect the professional integrity of panel members and the responsibility of the panel chair to ensure Code compliance and take appropriate and reasonable measures.

The regulation of Section 3.6 should be more proportionate to allow for more flexibility, see comments above on A12 of the Code.

Section 4 of the guidance concerns lessons learned which should be removed as this is operational activity.

Section 5.3 is operational policy and should be removed or at the very least updated to show that meetings can all be facilitated by conference call or video conferencing or some other means. The Scottish Government anticipates that this will reflect the new ways of working following the pandemic.

Section 6.3 should be removed, candidate summaries should be signed off by the panel chair alone. In practice, the terms of the summaries are discussed and agreed by the entire Panel during the appointment round. To go back after the fact is inefficient and causes delays. The content of the applicant summary should be agreed by the panel chair and does not have to include every single applicant as this can create an unnecessary administrative burden, particularly in situations where there are large numbers of applications.

Section 7.4 should be broadened to include additional pre appointment checks, not only Disclosure checks. The reference to payment for any checks should be removed because this is a matter of operational policy.

Section 8.2 (vii) should be updated to provide clear information about the process for when those members of the selection panel who are the ESC's public appointments advisors (PAAs) report concerns to the Commissioner. The PAA as a selection panel member should advise the selection panel chair and Scottish Government appointments manager first where they have a concern. That can then be surfaced and discussed by the Panel. The PAA should not be there to unpick decisions "in hindsight" which contributes to bureaucracy, delay and the perception that the PAA does not have the necessary authority to advise the panel effectively.

Section 8.9 Once the changes to the Code are drafted and the Commissioner confirms her regulatory approach further discussion between the Scottish Government and the Commissioner will be required to agree the process for reviews and information sharing.

Sections 10.2 and 10.3 should be removed because they concern operational policy matters for the Scottish Government.

Section 13.1 should include a minimum break (for example 5 years, that being 1 year longer than a 4 year term which is often a standard term) rather than barring someone who has been a member on a board for 8 years from ever being on that board ever again except as a chair.

Q14 – Please give reasons for your views.

See Q13

[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?

We are of the view that the current processes to identify and use evidence and good practice are already established practice and works well. In the few instances where rounds do not deliver the right calibre of people adding yet further prescription to appointment plans is unnecessarily restrictive and would add further bureaucracy to the process when feedback from boards, applicants and selection panel chairs points to the need for greater flexibility within the process.

The Scottish Government agrees with the point at 5.6 of the consultation document that the responsibility for the identification and removal of barriers for people who work in the private sector or have a low household income should be with the Scottish Ministers.

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?

We are of the view that adding further requirements to the appointment plan is not required and is not likely to address under-representation of people with protected characteristics. For example, evidence indicates that disabled people are more likely to live in poverty but a measure that focusses on income or socio-economic background rather than disabled people means that disabled people would no longer be centred in such measures.

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

N/A, see above.

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

Although the Commissioner does not have a role in determining compliance with the Gender Representation on Public Boards (Scotland) Act 2018, the Scottish Government agree that there should be a reference to the Gender Representation on Public Boards (Scotland) Act 2018 within the Code of Practice, were the revised Code of Practice to go beyond the preferred principles-only framework. Such mention should be in accord with the Statutory Guidance on the Act and could include a reference to the tie break provision.

Q19 – What legitimate grounds for choice should be specified?

The Code of Practice should not specify grounds for choice as this could be in conflict with the Gender Representation on Public Bodies (Scotland) Act 2018.

The Scottish Government has already consulted on this issue and notes that the Commissioner was keen to include grounds for choice within the Scottish Government's own guidance. However, the Scottish Government made the decision to keep the grounds for Ministerial choice as widely drawn as possible given that the Act does not define "characteristic or situation" but does provide, at section 4(5), that a "characteristic" referred

to under section 4(4) includes a protected characteristic within the meaning of section 4 of the Equality Act 2010. A characteristic or situation particular to a candidate may be another protected characteristic or another factor: socio-economic background, caring responsibilities or employment sector were given as examples.

Q20 – Please give reasons for your views.

See Q18 and Q19

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.

As noted in response to Q18, the Commissioner does not have a role in determining compliance with the Gender Representation on Public Boards (Scotland) Act 2018, however the Scottish Government agrees that there should be a reference to the Gender Representation on Public Boards (Scotland) Act 2018 within the Code of Practice were that Code to go beyond a framework of principles.

Regarding the example that appointment plans should require positive action measures, the Scottish Government Guidance on the Gender Representation on Public Boards (Scotland) Act 2018⁸ explains that the Act itself does not specify what steps should be taken by appointing persons or public authorities because ‘the relevant appointing person and public authority are best placed to determine the appropriate steps to take in any given appointment round.’

The Scottish Government is of the view that it would not be appropriate for the Code of Practice to require appointment plans to include specific positive action measures for the reasons outlined in response to Q3.

Q22 – If so, which duties should be included?

N/A

Q23 – What are your reasons for these views?

Adding requirements that already exist in other legislation, codes and guidance would be unnecessary duplication.

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 is already established practice. Where parliamentary approval is required the parliamentary committees involved already see planning papers.

⁸ Scottish Government, Gender Representation on Public Boards (Scotland) Act 2018, Statutory Guidance (2020). Available at: <https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance/>

The relevant Committee are involved at the planning stage and again at the point where the appointing Minister has considered the recommendations made by the selection panel. In these situations officials from the Public Appointments Team and relevant sponsor team liaise with the Parliamentary Clerk to ensure that the Committee are satisfied that the requirements meet parliamentary approval. In practical terms, Scottish Government 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. This process has worked effectively in practice and the Scottish Government is not aware of any information from the Commissioner's office or from the consultation document that would make a case for this to change.

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

This already happens.

Q27 – Please give reasons for your view.

The content of application packs should be a matter for the selection panel, it should not be prescribed within the Code. In practice, details about parliamentary approval are already provided in application packs. This would also be discussed with candidates at interview and any further questions on the approval process addressed at that stage.

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

The Code should be robust enough to last for more than a year or two rather than adding in current hot topics. While there are a raft of issues that could be added to any list, further expansion will make public appointments less open and attractive. A more person-focussed approach, rather than a process-focussed approach, that will allow a fuller reflection of what applicants have to offer – for example the opportunity to run appointment rounds that are tests of potential - would be more appropriate. Without seeing the proposed changes to the wording of the Code of Practice it is difficult to comment further.

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

N/A

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

See Q28 answer.

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

The consultation does not provide any detail or examples about where assessment methods have not been appropriate for the attributes sought in a round. The Scottish Government is unclear about what rounds the consultation document references at 5.9 where it says: *'the Commissioner has identified that application and assessment methods are not always appropriately aligned to assess the given attribute sought.'* The Scottish Government would welcome further information about what methods the Commissioner would recommend to meet specific attributes within a recruitment round but are of the view that prescribing these in the Code would risk attacking any current flexibility and efficiency within the appointments process.

Q32 – Please give reasons for your answer to Q31.

N/A

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.

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.

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?

In practical terms, and because of the level of bureaucracy already required in any appointment round, it can be challenging for people to make the time commitment required for a selection panel. Nevertheless, panel members take the role seriously, bring their professionalism, and work to understand the requirements of the Code of Practice. Adding further requirements on the basis of a professional's personal or professional commitments would be an unnecessary and potentially intrusive step. It's not clear from the consultation document who would make the decision about the 'suitability' of a panel member but it is likely that this would reduce already limited flexibility and could slow down the process further.

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

The Code of Practice and Guidance provide the framework for chairs to deliver the process. Most panel chairs already receive briefing or have discussions with the Public Appointments Team about the Code of Practice and the role of a chair in a regulated appointment round. The Scottish Government is not aware of any complaints or feedback that would suggest that chairs should receive additional training.

In practice panel chairs are supported by two and sometimes three other panel members in addition to a full time government Public Appointments Manager and often support from staff from sponsor teams. Selection panels are frequently allocated a Public Appointments Adviser from the Commissioner: in this situation it is vital that the selection panel understand what the Adviser's capacity is and with what authority and autonomy they operate. Taken as a whole this seems like enough to manage the recruitment process in a fair and merit-based way.

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)?

The Scottish Government is of the view that the number of rounds that independent panel members (IPMs) sit on does not impact on their 'independent' status, they are independent

because they are not employed by central Scottish Government. Payment of IPMs is a decision for the Scottish Government.

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

N/A

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

We would welcome proportionate and timely regulatory practices that are in keeping with the principles and recommendations made in the Crerar Review.⁹ The Scottish Government is of the view that introducing additional auditing on top of the measures already in place would be disproportionate.

The Commissioner already has significant oversight of the Scottish Government's appointments activity even though the scale of the operation is relatively small, c50 rounds per year. The Commissioner is sighted on a majority of these rounds, for example in 2019, PAAs were assigned to 75% of the rounds (43 out of 57 rounds). 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. Advisors appear not to have the authority to act autonomously and this can cause additional work for officials as well as delays to a round. It would be helpful if the Commissioner were to review the way that Advisors are deployed and the approach that they take within a round, so that Advisors are providing advice about compliance with the code.

The Scottish Government notes that the consultation document made little criticism of how the process is delivered. There is a dedicated team of people delivering public appointments, co-ordinating appointment rounds with boards and working to deliver a well-established process and deliver to a very high standard. The Scottish Government is keen to avoid engaging in processes that extend the regulatory burden, require further staff resource or that add to the costs of delivering this already time and resource intensive process.

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?

This is a matter for the Scottish Parliament and the Commissioner.

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

N/A

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

We welcome and value proportionate and appropriate regulation that adheres to the principles of the Crerar Review. In practice, the Scottish Government finds that narrow or

⁹ Scottish Government, The Crerar Review: the report of the independent review of regulation, audit, inspection and complaints handling of public services in Scotland (2007). Available at: <https://www.gov.scot/publications/crerar-review-report-independent-review-regulation-audit-inspection-complaints-handling/pages/3/>

inflexible interpretation of the Code and Guidance can cause unnecessary delay or disruption to the process.

A proportionate, principles-based and outcome-focussed Code of Practice would provide a framework for the Scottish Government to deliver the public appointment process on behalf of Scottish Ministers in a fair, transparent and merit-based way and in an efficient and cost effective manner.

In terms of what should replace the current regulatory model: An alternative is for the Scottish Government to write its own Code of Practice and for the Ethical Standards Commissioner to then select a proportion of appointment rounds, noted at the beginning of each year, and independently assess whether they have been conducted in accord with that Code of Practice.

Another alternative is for the regulatory function around public appointments to be subsumed into another regulatory body.

Q42 – Please provide reasons for your answer to Q41.

N/A

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

The Scottish Government does not support further prescription in the Code of Practice or Guidance.

In applying the Code and Guidance the Scottish Government is of the view that there are sections within these that should be removed or amended because they concern operational processes: these are decisions for the Scottish Government to make on direction from Scottish Ministers.

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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