

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: Jim Martin, Chair	
Address: Scottish Legal Complaints Commission, The Stamp Office, 10-14 Waterloo Place, Edinburgh, EH1 3EG	
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	

About the Scottish Legal Complaints Commission

The Scottish Legal Complaints Commission (SLCC) is an independent statutory public body providing a single point of contact for all complaints against legal practitioners operating in Scotland. The SLCC investigates and resolves complaints about inadequate professional services; refers conduct complaints to the relevant professional body, and has oversight of complaint handling across the legal profession.

Our [annual report](#)¹ and [website](#)² have more information on our work.

We welcome the opportunity to respond to this consultation. We have only answered questions where we have a specific view or comment to make.

¹ <https://www.scottishlegalcomplaints.org.uk/about-us/who-we-are/our-annual-report/>

² <http://www.scottishlegalcomplaints.org.uk>

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?

Yes and Yes

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

The Code should set out at a broad level what elements of positive action should be adopted in the appointment process. These should include a recruitment campaign targeted at soliciting applications from identified groups (which will be context dependent), a focus on complementing the skills and viewpoints of the existing Board and (potentially) the use of a tie-break principle if candidates are genuinely of equal merit.

Geographical spread of candidates should be a factor to be considered.

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

Positive action should not stray into positive discrimination. It would be helpful if the Code could set out a suitable broad approach with a small number of key measures.

As a result of changes to working practices triggered by the response to the current pandemic, it is apparent that organisations can have more geographical freedom to recruit outside their normal catchment area. This could help Boards to be more representative of Scotland's population.

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?

Yes

Q5 – If so, what requirements should be included?

There should be a requirement to take into account centrally held anonymised information about previous appointments – what specific positive actions have resulted in what outcomes. The PA team could hold the information repository.

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

The context of each appointment will be different and solutions should also differ. Having access to information about how other organisations have gone about it would be a valuable source of potential solutions.

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?

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

High-level targets for various aspects of diversity have been set. The SG should have agency and autonomy with regard to the choice of positive action measures, other than the broad approach described in Q2.

There also appears currently to be a lack of (UK) data about the effectiveness of positive action and specifically about which factors lead to successful outcomes. Any specific positive action measures included in the Code should be evidence-led.

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

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?

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?

No

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.

The context of each Board appointment will be different and requires a decision on which specific group(s) to target, based on available data.

In terms of ‘achieving’ Board diversity, it is unlikely that data are good enough at present to assess this. There are 3 main contributory factors. Firstly, while organisations will hold data about age and sex, they need permission to hold other types of personal data and they may not have this for existing Board members. Secondly, applicants are not obliged to disclose such data at recruitment stage. And thirdly, applicants may not disclose e.g. a disability if it doesn’t affect working arrangements.

Overall, organisations are likely not to have access to good quality data about how the different diversity characteristics intersect, both for existing Board members and for applicants.

Organisations should not be set up to fail, and there can be a challenge when legislation already requires certain criteria. The SLCC is a good example. At least 3 Board Members must be lawyers (and there are further specifications regarding the balance of experience they should bring). The

requirement to appoint members with specific experience may mean that 'achievement' of this measure must necessarily be flexible.

The appointments cycle or Board numbers can also cause issues in individual recruitment exercises, for example, in the SLCC's statutory appointments cycle, where the Chair is always recruited as a single role at a different time to other appointments.

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.

No

Q22 – If so, which duties should be included?

Q23 – What are your reasons for these views?

Scottish Ministers are accountable for understanding and fulfilling the new duties placed on them by the Act. Under Section 7 of the Act, the Scottish Government has a duty to publish guidance to support the implementation of the Act. There may not be benefit, and it may cause some confusion, to duplicate this in the Code.

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?

Q25 – Please give reasons for your views.

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

Q27 – Please give reasons for your view.

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

Yes

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

Social responsibility

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

One of the lasting impacts of the current pandemic is likely to be a focus on meaningful social responsibility and the salient role of the ethical dimension in decision-making. Organisations will be making moral judgments on behalf of their customers and stakeholders, e.g. support for health & wellness, domestic sourcing of products and services, and in general better serving their customer base.

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

No

Q32 – Please give reasons for your answer to Q31.

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.

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?

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

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)?

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?

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?

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

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

Q42 – Please provide reasons for your answer to Q41.

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:

Ian Bruce

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EH12 5HE

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