



Commission for Ethical Standards in Public Life in Scotland

Statutory Guidance

Application of paragraphs 1 iv, 16, H1 and section I of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the code)

Status of this guidance

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the Act) at section 2 (6) provides that

“The Commissioner may issue guidance to the Scottish Ministers (either generally or in a particular case) as to compliance with the code of practice.”

This document has been issued in accordance with section 2 (6) of the Act.

Interpretation of the code

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the Act) places a statutory obligation on the Commissioner to examine the methods and practices employed by the Scottish Ministers in the making of appointments. The Act is silent on how the Commissioner is to acquit that obligation. The Commissioner believes that the most appropriate method for the obligation to be acquitted is by way of risk-based and proportionate scrutiny. This guidance explains how the Commissioner will achieve this from 01 September 2011.

The code advises that the Commissioner will scrutinise appointment activity in accordance with the principles of external scrutiny (paragraph 16.1). These principles are set out in annexe one to the code. This reflects the Commissioner's position that there should not be a one-size-fits-all approach to oversight and that areas for, and levels of, oversight should be proportionate and subject to change over time and according to the circumstances.

This guidance sets out the position of the Commissioner at the point at which the new code comes into force.

The Commissioner will provide proportionate, independent, risk-based scrutiny of new appointments, reappointments, extensions to appointment terms and promotions to the position of deputy chair. The current methods for providing oversight are set out in this guidance.

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SCRUTINY OF NEW APPOINTMENTS

The Commissioner's office will allocate a Public Appointments Assessor to all appointment rounds. The Assessor will not be a member of the selection panel. Their role is to scrutinise proposed and actual appointment activity, to offer an opinion on code compliance and to intervene where actual or potential non-compliance is observed. The extent of the involvement of the Public Appointments Assessor will vary according to two overarching factors. These are:

- the **impact** of the appointment not being made in compliance with the code and
- the **likelihood** of that happening.

Each factor is made up of several constituent parts. The following matters are considered when working out **impact**:

- the nature of the vacancy and the number of positions to be filled (for example a chair or board member position, one board member or a whole board)
- the type of body concerned (for example an executive or an advisory body)
- the impact of the body's work (for example the difference between providing frontline services and providing advice to ministers)
- the scope of the body (how many people does the body's work have the potential to affect?)
- the perception of the body and the position(s) being filled (for example whether it is a high profile body with significant public interest in the appointment or a body the work of which is less well known)
- the budget of the body (how much public money does the body spend each year)
- the remuneration for chairs and members (how much do people appointed to the board receive each year)
- other factors not listed above but considered relevant by a stakeholder such as the Scottish Government, the body itself, the Public Appointments Assessor or the Commissioner.

The following matters are considered when working out **likelihood**:

- how the sponsor directorate performed the last time it ran an appointment round
- how experienced the selection panel members are (based on the panel chair's assessment and on feedback from previous rounds)
- how the sponsor directorate has dealt with any complaints received about the appointment process
- whether the selection panel members have attended workshops on the code

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- whether selection panel members have attended Scottish Government workshops on recruitment and selection skills with specific emphasis on equality and diversity issues
- whether the advice provided by the Scottish Government's centre of expertise and/or the Public Appointments Assessor will be followed (this will be established at the planning meeting)
- whether the proposed timetable for the appointment round is achievable (this will be established at the planning meeting)
- whether the selection panel's proposals are based on sound management information (this will be established at the planning meeting)
- other facts not listed above but considered relevant by a stakeholder such as the Scottish Government, the body itself, the Public Appointments Assessor or the Commissioner.

The overall rating for likelihood may be revised following the planning meeting in accordance with the last three bullet points above.

To calculate the rating for each overarching factor a figure of between 0 (little or no impact/likelihood) and 3 (high impact/likelihood) is assigned to each of these sub-factors. The impact and likelihood factors are added and divided by two to give each new appointment round a "risk rating" of between 0 and 3. An illustrative example is provided overleaf. The factors are not multiplied, as is often the case with risk calculation, for a specific reason. It ensures that very high impact appointments are always afforded appropriate levels of scrutiny. The process of considering these factors together to determine how risks should be handled will be familiar to most boards and board members. It is a similar process to that used to identify and manage the range of risks that a public body has to consider.

The Commissioner has set cut-off points for three risk ratings; low, medium and high. These three ratings will determine the appropriate level of oversight for a given appointment round. The cut-off point for low risk appointment rounds is 1.6. Medium risk rounds have a score of between 1.61 and 2.0. Any round with a risk rating of 2.01 or more is considered high risk. The Commissioner may revise these cut-off points over time in the light of experience of implementation of the risk framework. The full risk framework can be downloaded from the Commissioner's website.

The illustrative example provided overleaf demonstrates that the Scottish Government can directly influence the overall risk rating for an appointment round by decreasing the likelihood of non-compliance. This can be done by, for example, training panel members and effective appointment planning. As the level of oversight has a direct relationship to



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the risk rating, well-performing directorates will reduce the level of oversight of their activities over time by demonstrating continuing compliance with the code.

Illustrative example

Calculating Impact

A relatively little known (score 1) advisory body (score 0) which has little direct impact on people (score 1) and little scope (score 1) with an annual budget of less than £50,000 (score 0) has to recruit a single board member (score 1). The position is remunerated (score 1). There are no other factors relating to the impact of this appointment that are considered relevant by the body, Scottish Government or the Commissioner. The impact score for this appointment is 0.67.

(Calculated as follows - $1+0+1+1+0+1+1$ divided by 7, which is the total number of sub factors considered = 0.71)

Calculating likelihood

The sponsor directorate running the round failed to comply with the code for the last appointment round that it oversaw. The non-compliance was material as the outcome of the round was affected and the principles of the code were compromised (score 3).

None of the selection panel members have participated in a previous code-compliant appointment round although they have each assessed themselves as competent to fulfil the role on this occasion (score 3).

Only one panel member (not the panel chair) has attended a Scottish Government workshop on recruitment and selection skills with specific emphasis on equality and diversity issues (score 2) and none have attended a workshop on the code (score 3). At the planning meeting the panel chair made it clear that he would be reserving his position on following advice from the Scottish Government's centre of expertise (score 3). The Assessor at the planning meeting was concerned that the timetable was unrealistic in some non-critical areas (score 2). Only some of the selection panel's proposals could demonstrate that they were based on management information (score 2). There are no other factors relating to the likelihood of this appointment not being made in a code-compliant way that are considered relevant by the body, Scottish Government or the Commissioner.

The likelihood score for this appointment round is 2.57.



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(Calculated as follows - $3+3+2+3+3+2+2$ divided by 7, which is the total number of sub-factors considered = 2.57)

Calculating the risk rating

The risk range is from 0 to 3. The impact of this appointment not complying with the code is low (0.71) but the likelihood of non-compliance is very high (2.57). The risk rating for the round is 1.64 ($0.71 + 2.57$ divided by 2).

This is therefore a medium risk round.

How regulatory oversight varies according to the level of risk is explained below and overleaf.

How the Commissioner's oversight will vary according to the level of risk

Low risk appointment rounds

For low risk appointment rounds the Commissioner will assign a Public Appointments Assessor to oversee the following stages of the appointment process:

- they will attend the planning meeting
- they will review the material to be provided as an application pack or otherwise made available to applicants (see Annexe Two of the code)
- before the applicant summary is submitted to the appointing minister, they will subject the records generated during the appointment round (paragraph 1 iv) to independent scrutiny (paragraphs 16 and H1).

At each of these stages the Public Appointments Assessor will offer the chair of the selection panel, who is responsible for compliance with the code, an opinion on the extent to which the appointment activity will comply or has complied with the code. The purpose of this is to, where possible, offer the chair of the selection panel an opportunity to take corrective action if necessary. Where the Public Appointments Assessor identifies potential or actual non-compliance they will also advise the chair of the panel of the timescale within which corrective action should be taken and demonstrated or within which a response to the report of potential or actual non-compliance must be submitted.

If at any stage the Public Appointments Assessor identifies potential or actual non-compliance, this will also be communicated to the Commissioner who will consider whether to intervene.

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Medium risk appointment rounds

For medium risk appointment rounds the Commissioner will assign a Public Appointments Assessor to oversee the same stages of the appointment process as for low risk rounds but additionally the Assessor will oversee the shortlisting stage.

High risk appointment rounds

For high risk appointment rounds the Commissioner will assign a Public Appointments Assessor to oversee the same stages of the appointment process as for medium risk rounds but additionally the Assessor will oversee the interview stage (or final stage of assessment).

SCRUTINY OF REAPPOINTMENTS

In accordance with paragraph I1 of the code, ministerial decisions to reappoint board members will be based on evidence of effective performance during the first term and evidence that the board member concerned has the skills and knowledge required on the board at the time of reappointment and for the reappointment period.

For all reappointments a Public Appointments Assessor will be allocated to scrutinise the material that demonstrates compliance with these requirements of the code. The material will be provided to the Public Appointments Assessor prior to any submission.

The Commissioner has taken the decision to scrutinise all reappointment activity further to her audit of reappointments which identified high levels of non-compliance. The Commissioner will review this decision periodically on the basis of the results of her scrutiny of reappointment activity for the first year of the revised code's operation.

SCRUTINY OF TERM EXTENSIONS

In accordance with paragraph I2 of the code, ministerial decisions to extend board members' terms will be based on evidence of effective performance during the current term and evidence that the board member concerned has the skills and knowledge required on the board at the time of the extension and for the extension period. The code requires such extensions to meet only relatively short term needs of the board.

The code requires the Scottish Ministers to obtain the written agreement of the Commissioner before extending a member's term. The Commissioner has agreed with the Scottish Ministers that all requests will be relayed to her by the Scottish Government's centre of expertise. The centre of expertise will review requests before they are passed to

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the Commissioner to identify trends and to ensure that each case made is underpinned by a clear rationale in line with the code's requirements.

The Commissioner will scrutinise the material that demonstrates compliance with these requirements of the code before agreeing that a term extension is appropriate.

The Commissioner will not grant extensions to first terms of appointment as it is open to Ministers to reappoint for a second term.

SCRUTINY OF PROMOTION TO DEPUTY CHAIR

In accordance with paragraph 13 of the code, ministerial decisions to promote board members to the position of deputy chair will be based on evidence of effective performance during the current term and evidence that the board member concerned has the skills and knowledge required for the position to which they are promoted.

The Commissioner will sample promotions to positions classified as "high impact" in the risk framework and scrutinise the material that underpins them to assess compliance with these requirements of the code.

Guidance on paragraph 17 of the code

The 2003 Act advises that:

"The Commissioner may issue guidance to the Scottish Ministers (either generally or in a particular case) as to compliance with the code of practice".

Paragraph 17 broadly reflects the wording of the 2003 Act.

The Commissioner reserves the right to issue guidance on compliance with the code to ensure that there is a clear understanding of what is expected. Guidance issued in accordance with paragraph 17 has statutory force and will be clearly marked as such as in the case of this document.

Karen Carlton
Public Appointments Commissioner for Scotland
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