



**Ethical Standards
Commissioner**

Guidance on the 2013 Code of Practice

*for Ministerial Appointments
to Public Bodies in Scotland*

May 2020

ESC

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1. Guidance by the Commissioner

1.1 This guidance is issued by the Commissioner for Ethical Standards in Public Life in Scotland to assist in the implementation of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code) which came into force on 1 October 2013.

1.2 This guidance is issued in terms of section 2 (6) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and is effective from 29 May 2020.

1.3 The Scottish Ministers may also approach the Commissioner at any time for guidance on application of the Code in relation to a particular case.

2. Merit and most able

2.1 In order to comply with the Code the appointment process must lead to the identification and appointment of the most able candidate(s). Most able can be defined as:

“The applicant(s) who has(have) demonstrated the skills and knowledge that most closely match those required to be effective in the role.”

2.2 The principles of Merit and Integrity apply to the entirety of the appointment process, including the stage at which the Minister chooses whom to appoint. Merit is defined by the appointing Minister at the point at which he or she advises the panel on “the skills, knowledge and experience required to meet the needs of the board”. Should Ministers decide at the outset that applicants only have to meet a given criterion to a given extent then this must be made clear to potential applicants. Ministers may also wish to weight criteria for selection. Ministers in this way can provide absolute clarity on the attributes of the people whom they wish to appoint.

2.3 The Code provides that new requirements will not be introduced during any stage of an appointment process, as that would be incompatible with the principle of Integrity. It should be noted that new requirements are not limited to an additional requirement, but can include a change to the level required for a skill, knowledge or experience.

2.4 The most able candidates will therefore be those who meet the requirements to the extent specified by the Minister.

2.5 In cases where the candidates who meet the criteria for selection to the extent specified by the Minister are assessed as being of equal merit either against all of the criteria for selection or having relatively equal strengths and weaknesses against an equal proportion of the criteria for selection then the panel should present these candidates to the Minister as suitable for appointment. Other than in cases in which a candidate has not passed the fit and proper person test, the Minister should always exercise their choice about whom to appoint on the basis of the criteria for selection. There are exceptions to this in certain cases:

- a) In accordance with section 4 (3) of the Gender Representation on Public Boards (Scotland) Act 2018, the appointing Minister must take positive action and select a woman candidate from the choice of candidates offered when the circumstances dictate that this is required to meet the gender representation objective set out in section 1 of the 2018 Act but subject to the following provisions.
- b) The appointing Minister may alternatively and in accordance with section 4 (4) of the 2018 Act, select for appointment the person(s) who has(have) another protected characteristic on the basis of that characteristic. It is anticipated that such decisions will be based on the composition of the board in question. In exceptional circumstances the appointing Minister may, with the prior agreement of the Commissioner, make an appointment decision on the basis of another situation or characteristic. Such other situations or characteristics should be identified during planning and before vacancies are publicised. All cases to select on the basis of another situation or characteristic will be considered by the Commissioner on their individual merits in accordance with section H of the Code.

2.6 For provision 2.5 to take effect, candidates will be asked to provide information on those situations or characteristics which are identified in the applicant information pack as factors that an appointing Minister may take into account in making an appointment decision. Information on those characteristics and situations will be provided to the Scottish Ministers in cases in which they are offered a choice of candidate. The fact that the Scottish Ministers may take the factors set out in 2.5 b) into account when making their appointment decisions will be made clear in the information provided to applicants.

2.7 There may still be a choice of candidates for the other position(s) to be filled. In such circumstances the Minister may also take into consideration the combination of attributes offered by different groupings of appointments.

2.8 In cases where one candidate clearly meets the criteria for selection more closely than others, and only a single position is being filled, the application of the principles means that the selection panel is obliged to present only this candidate to the Minister as suitable for appointment. It is not appropriate to present a less able candidate as suitable for appointment in such circumstances.

2.9 The record of Ministers' decisions on whom to appoint and not to appoint must clearly be based on how closely or otherwise the candidates concerned met the criteria for selection.

2.10 Ministers always have the choice not to appoint at the conclusion of an appointment round.

3. The selection panel

3.1 The Code sets out the obligations on the Scottish Ministers when specifying panel members and the obligations on panel members themselves.

3.2 The Scottish Ministers are encouraged to consult the chair of the public body concerned as the body chair will have in-depth knowledge of the developing needs of the board and how these might be most effectively met through succession planning. The body chair will usually be a member of the selection panel for new board member appointments.

3.3 The Scottish Ministers are also encouraged to consider including an independent panel member for each appointment round, particularly in cases where the Commissioner has not specified a representative to serve on the panel. Independent panel members can offer a constructively critical perspective to the panel's decision making process. It is anticipated that in order to fulfil their role most effectively they must be and must also be seen to be independent of the Scottish Government and the body concerned. Where independent panel members are included, their role, status and responsibilities are the same as those of other panel members designated by the Scottish Ministers. Independent panel members should be provided with appropriate terms of reference and briefed on their role and responsibilities.

3.4 In all cases, panel members must guard against impropriety or the appearance of impropriety. This means that if a panel member has or has had a relationship with an applicant that may be considered close – such as but not restricted to being a friend or a business associate – they should always refer the matter to the panel chair who, as appropriate, should consult the Commissioner for a view on whether they should recuse themselves from any and all stages of assessment.

3.5 Similarly, there may be a perception of a conflict of interest in cases where a panel member who has had a substantive role in planning for an appointment round withdraws from the panel and subsequently applies for appointment in that round. As a consequence, no such individual should be identified as suitable for appointment.

3.6 The Code stipulates that the selection panel will remain the same throughout the appointment round, unless a change of membership is required in certain cases through ill health or due to an official moving to other responsibilities. Other proposed changes to panel membership, because they represent divergence from the Code, must be referred to the Commissioner for consideration.

3.7 In all cases where a request is made to the Commissioner to consider a change in panel membership, it will be preferable for the change to be effective for the remainder of the round. It will also be preferable for such changes to be made between as opposed to during the distinct phases of an appointment round. In cases in which the Commissioner considers the change to membership to be appropriate, or where a panel member can no longer participate due to ill-health or through moving to other responsibilities, any new panel member must be briefed on and prepared to be bound by all decisions made by the panel prior to the new panel member joining.

4. Learning lessons

4.1 The Scottish Government has established a mechanism for capturing lessons learned such that a repository of information on good practice in inclusive attraction, application and assessment methods is instituted and added to over time. This will be informed by the experiences of selection panels and the views and demographic data of applicants and appointees.

4.2 The purpose of the lessons learned process is to capture and share what does and doesn't work in recruiting candidates for effective, diverse boards, and to support the continuous improvement of the public appointments process. The Public Appointments

Development Manager is the officer with responsibility for the upkeep and operation of the lessons learned framework and records. There are a number of officers responsible for the input of lessons and sharing learning. Lessons are drawn from a variety of sources including applicant surveys, end of round panel surveys, management information for rounds and best practice examples from other organisations. There is a standard set of mechanisms for sharing learning and any stakeholder may request an additional report/summary at any time by writing to the Development Manager who will agree content and timescales with the requester.

4.3 The good practice information should be available to panels to enable them to select methods for publicity and application and assessment that they know will not represent barriers for people from particular under-represented groups and that can be used to address underrepresentation on boards.

5. The appointment plan

5.1 The Code requires the appointing minister to agree a range of matters when appointments are planned. This includes reaching a conclusion about the gaps to be filled on a board based on a review of the current members' roles, skills, knowledge and experience. It is anticipated that the appointing minister will have obtained clarity from the board about its needs taking into account its strategic plans and operational context. Provided that ministers have fulfilled their obligations set out in section B of the Code they may delegate to officials any or all of the matters that the Code requires them to agree at the planning stage, either generally or in particular cases, whilst ultimately remaining responsible for them.

5.2 The Code anticipates that the selection panel will meet at the outset of each appointment round to agree an appointment plan that will generate a successful outcome. A successful outcome is one that identifies one or more appointable applicants who meet the needs of the board as defined by the minister and adheres to the principles of the Code. It should contribute to board effectiveness and also to the ministerial aim of redressing imbalances of representation among protected characteristics.

5.3 The Commissioner recognises that most appointment activity involves a planning phase during which a number of matters are discussed prior to their agreement. How the planning phase is conducted is at the discretion of the selection panel. The Code requires panel members to understand the purpose of and participate fully in a planning meeting at which the appointment plan will be substantively agreed. This meeting will be most effective when all participants are able to attend in person. Exceptionally, where due to circumstances this is considered impractical, a panel member may participate in another way such as by conference call or video conferencing facilities.

5.4 The Code does not require all panel members to meet to conduct the initial stages of assessment such as shortlisting.

5.5 The panel should decide what information they require to inform their decision-making on advertising and the process to be used to select the most able candidates. The panel should review lessons learned from previous rounds and generate such information itself at the conclusion of the appointment round so that it can be added to the store of lessons learned to aid with continuous improvement.

5.6 The final materials agreed by the panel should be plainly expressed using easy to understand language. The objective of the panel is to encourage the optimum number of people to apply for positions and for people to find it a comparatively easy exercise to submit applications. Applicant views on such materials will be gathered at the conclusion of each competition and used to improve on them for future competitions.

5.7 The methods of assessment agreed by the panel should be appropriate to assess the criteria for selection. By way of example, when a board requires experience, this can be gathered by way of life history or CV whereas it is not appropriate to test experience using forms for competency-based assessment.

5.8 Agreement by the panel in relation to the appointment plan and the assessment of applicants should be understood to mean the agreement of all panel members. Neither agreement by a majority of panel members nor the chair taking the final decision, having consulted other panel members, would represent a compliant course of action. If a panel cannot reach agreement on any of the matters required by the Code, the panel chair should approach the Commissioner for guidance.

5.9 The Scottish Government should review and keep under review current practices with a view to facilitating 4.1 to 5.8 above.

6. Assessment and recording assessment

6.1 Panels must maintain the confidentiality of applicants and not seek to involve others in assessment unless by way of formal delegation to suitably qualified individuals.

6.2 The Code requires those charged with assessment to be consistent in doing so. This does not mean treating everyone the same. By way of example, some candidates may require reasonable adjustments in order for their treatment to be equitable. In certain cases, candidates may be unable to attend on the dates publicised for interview. Panels are not obliged to interview such individuals but may wish to offer to do so using ICT, such as by telephone or teleconference, in order to optimise the field. In such cases, where it is clear that there is inconsistency in the assessment method, this will be explained to the candidate concerned alongside any measures that the panel proposes to take to lessen the inconsistency. It is open to candidates to withdraw their application having taken into account the panel's proposals.

6.3 The Code requires the selection panel to agree an applicant summary which records its assessment of all applicants. The applicant summary is to be understood as a single document which represents the key record of the panel's decision about the suitability of applicants. The applicant summary is to be provided in its entirety to the appointing minister. The appointing minister may choose to have the part of the summary relating to unsuccessful applicants provided as an appendix to the part that relates to the most able applicants.

6.4 The applicant summary should be finalised as soon as possible after the final stage of assessment. This is to facilitate the provision of timeous, good quality feedback to applicants. Individual panel member notes and assessments do not have to be retained once the summary has been agreed by all panel members. Once the applicant summary has been

agreed by the panel, neither panel members nor others should seek to revise what has been agreed. Should a panel member, official or minister have legitimate grounds for seeking to subsequently revise decisions made by the panel about the suitability of applicants, as reflected in the agreed summary, the Commissioner must be approached for guidance. Such grounds may include new information relating to the suitability of applicants that were not considered by the panel.

7. The fit and proper person test

7.1 Candidates must satisfy Ministers, or the panel where this has been delegated, they meet the “fit and proper person” test for public appointments. The requirements of the test are set out in the Code in paragraph E6.

7.2 Candidates are required to embrace the Principles of Public Life in Scotland. These should be signposted for applicants in the application pack as either a standalone document or as included in the Members’ Code of Conduct for the body concerned.

7.3 Candidates are also required to provide information relating to their political activity as defined in the political activity declaration form. Guidance provided to applicants will clearly set out what qualifies as political activity so that applicants can make an informed decision about whether a declaration is required. Political activity in itself is no bar to appointment but the information will allow the panel to explore the activity in the context of their ability to perform in the role and can be taken into account in considering the fit and proper person test. The information will only be considered by the panel at interview stage.

7.4 When a panel considers that applicants must provide an up to date disclosure check, this must be made clear to applicants in the applicant information pack. No applicant should be required to pay for such a check unless provisions have been made to reimburse them for it. This too will be made clear in the pack where such disclosure checks are required.

7.5 When a panel considers that an applicant may not meet the fit and proper person test, the provisions of the Code at A16 and A17 apply. Applicants will be given an opportunity to respond to the panel’s concerns before any final decision as their suitability is made. Ideally, this opportunity should be provided during the course of any interview.

8. Scrutiny levels for appointment rounds and the role of the adviser

8.1 When a new appointment is planned or in cases where a board’s needs are being considered, the Scottish Ministers will contact the Commissioner as early as practicable. The Commissioner makes a decision on which appointments are regarded as high, mid or low level for the purpose of scrutiny when appointment rounds are formally notified to him. The decision is made having regard to the need for proportionality and to the assessment of risk.

8.2 The factors to be taken into account by the Commissioner include:

- (i) the seniority of the appointments (for example, the chairs of public bodies)
- (ii) the level of public expenditure for which the public body is responsible
- (iii) whether the public body is executive or advisory in nature
- (iv) the level of public interest in the functions of the public body
- (v) recent performance of the relevant directorates relating to public appointments
- (vi) the extent to which the current composition of the board is reflective of society and
- (vii) concerns reported to the Commissioner either prior to or during the course of an appointment round.

8.3 Formal scrutiny of the entirety of an appointment round will be limited to high level appointments with mid-level appointments being scrutinised (where a level of scrutiny is considered appropriate) only up to the stage of the approval of the appointment plan. A third category of appointment (low level) will involve no contemporaneous oversight.

8.4 In respect of the higher level rounds, the Commissioner will assign a public appointments adviser to be a full member of the selection panel. The adviser will provide advice, guidance and oversight throughout the process of the round as well as participating in the panel's collective decision-making.

8.5 For mid-level rounds, the adviser will only be involved up to the point when the appointment plan has been agreed and will not be involved at any subsequent stage. In these cases the adviser will not be a formal member of the selection panel. It is not envisaged that the adviser will be required to complete a compliance report unless there is any indication or concern that the appointment is likely to proceed or has proceeded in a way that is inconsistent with the Code.

8.6 Scrutiny will also be undertaken at the request of the Scottish Government (such as in the case of appointments to new public bodies), with the agreement of the Commissioner. The Commissioner may scrutinise any or all aspects of appointment activity, including pre-planning and the consideration of a board's needs, in response to such requests.

8.7 The Commissioner is entitled to scrutinise any appointment as he considers necessary to meet his statutory responsibilities.

8.8 The Commissioner may raise or lower the scrutiny level for any appointment round if he feels that this is appropriate.

8.9 The Commissioner's office will augment these procedures by carrying out annual, thematic or ad hoc reviews as considered appropriate. The Scottish Ministers have committed to co-operating fully with such reviews with a view to providing assurance and continuous improvement of the public appointments system.

9. Ministers meeting recommended candidates

9.1 Ministers are required to give careful consideration to meeting recommended candidates before making their final decision in the case of senior appointments.

9.2 Such meetings are anticipated for appointments such as chairs of public bodies with

budgets in excess of £5 million or with remits attracting strong public interest such as a body that is being newly established or that has attracted significant recent controversy.

9.3 These guidelines do not preclude the appointing Minister from meeting recommended applicants in any other case.

10. Appointment announcements

10.1 The Code requires the Scottish Ministers to publicise all appointment decisions. In practice, these decisions are always publicised on the pages of the Scottish Government's public appointments website. The anticipated time commitment must be included in the announcement alongside the rate of remuneration.

10.2 In the case of senior appointments, such as chairs of public bodies with budgets in excess of £5 million or with remits attracting strong public interest (see 8.2 above), the appointments should also be publicised on the news pages of the Scottish Government's main website.

10.3 Whilst the Code requires any request for feedback to be made within 2 weeks of being advised that the application was unsuccessful, in extenuating circumstances the Scottish Ministers may extend this to four weeks.

11. Timescales for appointments and reappointments

11.1 An indicative timescale for carrying out an appointment process has been set in this guidance. Under no circumstances should meeting the indicative timescale be prioritised over the need to ensure that the appointment round is properly planned and implemented.

11.2 Scottish Government officials should record the following key dates in respect of each appointments process:

1. The date on which an appointing Minister agrees to proceed with an appointment
2. The date of the planning meeting
3. The date on which the position is publicised
4. The closing date for applications
5. Each stage of assessment such as shortlisting and interview
6. The submission of the applicant summary to the appointing Minister(s)
7. The date on which the Minister's appointment decision is made
8. The date(s) on which successful and unsuccessful candidates are advised of the outcome.

11.3 It is anticipated that up to 16 and no more than 20 weeks should have elapsed between points 2 and 7.

11.4 For reappointments, the Ministerial decision to reappoint should be made and communicated to the board member or chair concerned no later than 13 weeks before the reappointment is due to end.

11.5 A note of the key dates from each appointment round run should be provided to the Commissioner. The Commissioner may include this information in his annual report.

11.6 Target dates for appointment and reappointment are to be kept under review by the Scottish Government and the Commissioner.

12. Exceptional circumstances

12.1 The Code advises that the provisions of the Code may be varied to take account of exceptional circumstances and gives examples. In all such cases the agreement of the Commissioner must be sought. The Commissioner considers each case made to vary the provisions of the Code on its individual merits. The Commissioner will not allow for provisions to be varied in cases in which the principles of the Code will be compromised.

13. Continuing appointment

13.1 The Code allows Ministers to reappoint or extend a member's appointment provided that the member's total period of appointment does not exceed 8 years. The 8 year limit will apply even where someone applies for a position through open competition and applies to any period served on that board whether continuously or discontinuously served. When someone has served in a regulated appointment for 8 years, they are not precluded from applying to serve on a different board.

13.2 The positions of chair and member are also treated separately. This means that a member who has served 8 years on a board, can apply to serve as chair and, if appointed, may serve for up to a further 8 years in that position.