

Ethical Standards Commissioner

CONSULTATION DOCUMENT

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

06 August 2020

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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

1.0 Introduction and Statutory Provisions

1.1 The [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#) (“the Act”) makes provision for the [Code of Practice for Ministerial Appointments to Public Bodies in Scotland](#) (the Code).

1.2 In accordance with the Act, the Ethical Standards Commissioner for Scotland (“the Commissioner”) is required to prepare and publish the Code which is to include guidelines in respect of the methods and practices used by the Scottish Ministers in the making of public appointments. The Commissioner is also to keep the Code under review, promote compliance with it and, from time to time, to revise it and publish it as so revised.

1.3 In making any revisions, the Commissioner must consult the Scottish Ministers and Scottish Parliament and invite other persons to make representations in respect of potential changes.

1.4 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.

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

2.0 The 2013 Code of Practice

2.1 The current Code came into effect in October 2013.

2.2 The 2013 Code was itself a revision of the previous Code made in 2011. The main changes made in relation to the 2011 Code included –

- a. revising the underpinning principles which had been “applicant focused” and “outcome focused” in the 2011 version. Whilst these requirements remained, the underpinning principles introduced were as follows:

Merit

All public appointments must be made on merit. Only persons judged best able to meet the requirements of the post will be appointed.

Integrity

The appointments process must be open, fair and impartial. The integrity of the process must earn the trust and have the confidence of the public.

Diversity and Equality

Public appointments must be advertised publicly in a way that will attract a strong and diverse field of suitable candidates. The process itself must provide equality of opportunity.

- b. including a reference on the face of the Code to the fact that the provision of guidance on its application is a statutory function of the Commissioner.
- c. Replacement of the principles of external scrutiny with a more general statement advising that scrutiny will be undertaken based on independence and impartiality, efficiency and effectiveness and reasonableness and proportionality.
- d. Introducing new indicative timescales for appointment rounds and for discrete stages within them, intended to reduce the time taken to run an appointments process.
- e. Introducing greater levels of clarity about the role of the Commissioner’s representative, where one is assigned by the Commissioner to provide oversight, and a new recommendation for the Scottish Ministers to include an independent panel member.
- f. The introduction of a new section setting out that the Commissioner is able to agree variations from the Code’s usual requirements in response to requests from the Scottish Ministers and in order to deal with exceptional circumstances such as when emergency appointments have to be made.

The revised Code and [statutory guidance](#) also placed more emphasis on proportionate regulation, with the Commissioner's representatives fulfilling a contemporaneous advisory role as opposed to a more audit based retrospective approach.

3.0 Why a Code Revision is Considered Necessary

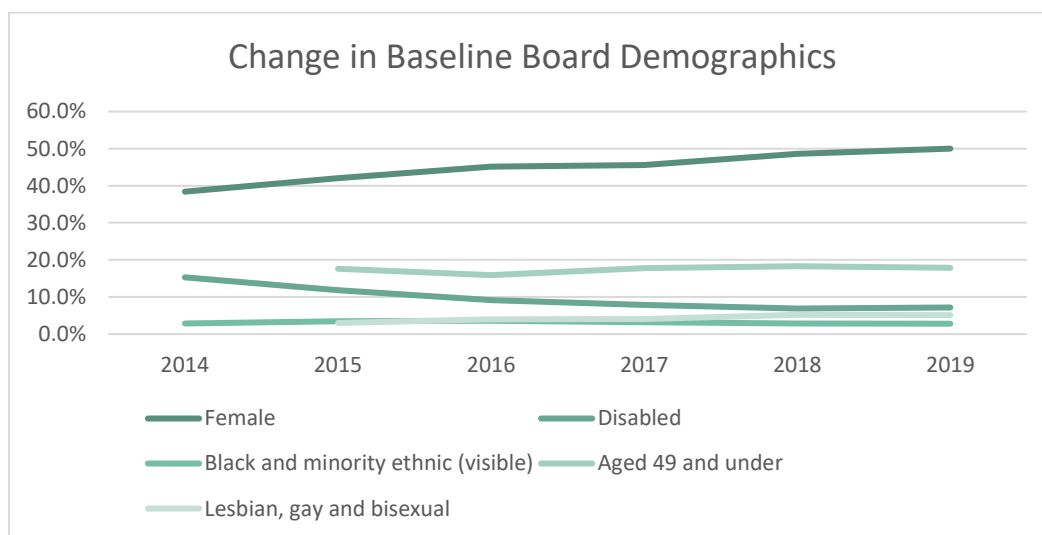
Equality and Diversity

3.1 The need for board diversity in its widest sense has never been keener. The vastly different operational environment for boards must be properly considered when the Government plans for succession. The phrase "we are living in unprecedented times" is one that has been uttered on a regular basis since the beginning of this year. Rarely have we seen such rapid change in many aspects of society over such a short period of time. The ways in which we as a society will need to consider and respond to issues such as health and social care in the coming years will require swift but well-considered attention. The interest and importance of diversity issues to the general public as demonstrated by movements such as "Me too" and "Black lives matter" will also need to be considered in some way by every organisation in Scotland. We also cannot forget the ongoing effect of climate change which continues to have an impact across the world and which was front and foremost in the Scottish Government's most recent Programme for Government. Our public bodies are at the forefront of leading and addressing how Scotland as a nation responds to these issues. As such the ministerial responsibility to consider what gaps in skills, knowledge and experience there are on each board will be especially critical at this time; board needs now are likely to be quite different from what might have been required even 6 months ago. The exceptional change to the operational context of public bodies in Scotland will clearly necessitate the recruitment of any new chairs and board members with the requisite skills, knowledge and experience to handle the situation effectively. This is one aspect of board diversity that the Code should seek to deliver against.

3.2 There are other aspects of diversity that also require attention. The Commissioner's 2008 strategy document, Diversity Delivers, set targets, which were agreed with the Scottish Government, for applications from people who shared protected characteristics that were under-reflected on the

boards of Scotland’s public bodies. As limited progress against the targets had been made, the introduction of the principle of Diversity and Equality in 2013 was intended to bring greater focus to this work on the part of the Scottish Government. As successive annual reports have shown, there has been limited success in this area, other than in the case of gender status. Women have tended to be more successful when they apply in comparison with other groups. Application rates and whether or not people are successful when they do apply clearly both have ramifications for the make-up of our boards. Information on application and appointment rates from 2014 to 2019 are included in appendix two.

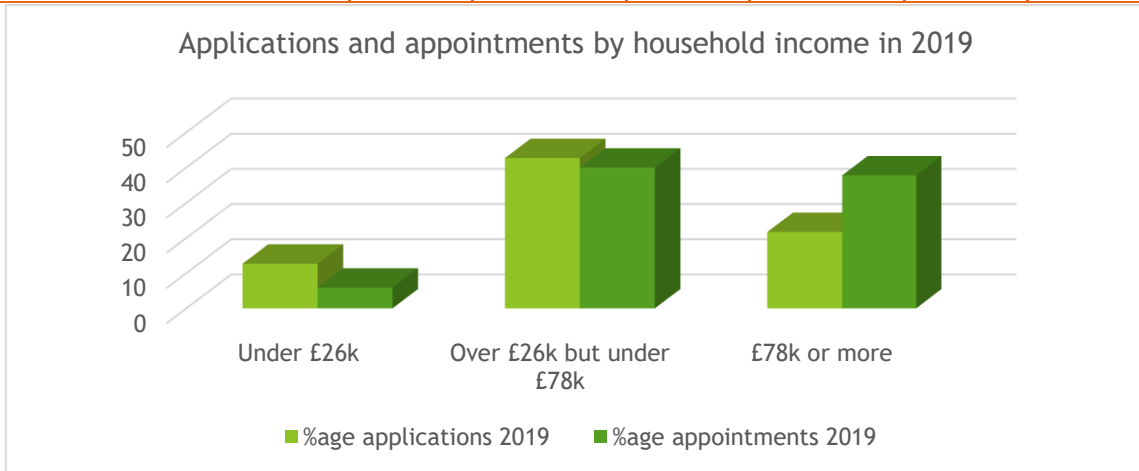
3.3 Whilst gender parity on boards was achieved in June 2020, the Scottish Ministers have not attracted sufficient successful applications from people from other currently under-reflected groups. The Commissioner has therefore also been tracking and reporting on the baseline demographic membership of boards. The proportion of people under 50 and people from a visible BME background are almost the same as they were a year after the 2013 Code was introduced. The proportion of people on our boards who declare a disability has seen a steady decline.



3.4 Additionally, for the first time, the Commissioner published the results of an analysis of household income and sector worked in in her 2020 public appointments annual report. Although these covered only applications and appointments, the results highlighted another dimension of diversity that requires to be addressed.

Applications and appointments by household income (as declared by applicants)

Household income	2017		2018		2019	
	applied	appointed	applied	appointed	applied	appointed
	%	%	%	%	%	%
a. Less than £5,200 per year	0.7	0	0.6	0	1.2	0
b. £5,200 to £10,399 per year	2.1	0.9	1.3	0.6	1.8	0.7
c. £10,400 to £15,599 per year	2.7	0	2.3	1.2	2.1	1.5
d. £15,600 to £25,999 per year	7.4	3.7	7	3	7.6	3.7
e. £26,000 to £36,399 per year	10.2	6.5	9.3	5.4	10.2	3.7
f. £36,400 to £49,399 per year	13.7	9.3	12.9	17.9	13.4	11.9
g. £49,400 to £62,399 per year	11.4	8.3	10.2	10.1	10.2	11.1
h. £62,400 to £77,999 year	7.3	3.7	6.6	7.7	8.9	13.3
i. £78,000 or more per year	19.9	39.8	16.9	29.8	21.7	37.8
j. Prefer not to say	24.7	27.8	32.9	24.4	22.8	16.3
All	100	100	100	100	100	100



The Scottish Government publication *Poverty and income inequality in Scotland: 2016-2019* gives the median weekly household income figure as £517 per week, equivalent to £26,884 per annum. This means that, in 2019, roughly 64% of applicants and 78% of appointees had household incomes above the median. It is also apparent that in this and in previous years, those with household incomes in excess of £78,000 per year, the top 5% of earners in the UK according to HMRC estimates, are far more likely to be appointed than others who have applied.

Although there is no exact national comparator for the distribution of the population sitting in each of these income bands, the following extract from the same Scottish Government publication provides information on the proportion of the population in each of the ten income decile groups.

Income distribution and poverty thresholds

Distribution of weekly household income

Figure 22 - Equivalised weekly household income distribution before housing costs, Scotland 2016-19



This chart shows the distribution of weekly income before housing costs across Scotland in 2016-19 with relative poverty threshold, UK median income, and income decile groups. Incomes of £0 and below and those above £1,200 are excluded from this chart.

Many people have household incomes near the poverty threshold. This means that small movements in the overall distribution can sometimes lead to sizeable movements in poverty rates.

Decile groups are groups of the population defined by the decile points. The first decile group is the ten percent of the population with the lowest incomes. The second decile group contains individuals with incomes above the lowest decile point but below the second decile point.

Applications and appointments by current or most recent sector worked in (as declared by applicants)

Current or most recent sector of work [†]	2017		2018		2019		Scottish Population
	applications	appointments	applications	appointments	applications	appointments	
	%	%	%	%	%	%	
Private	35.9	30.6	31.2	25	33.9	27.4	78.5*
Public	42.6	49.1	36.5	52.4	41.4	45.8	21.5*
Voluntary	10.8	11.1	10.1	10.7	13.2	14.1	4.1**

[†]A small proportion of applicants declared their sector as “other” and have not been included in these figures.

*Figures obtained from the Scottish Government publication “Public sector employment in Scotland: statistics for third quarter 2019”.

**Figure used is the number of paid staff in the third sector obtained from the SCVO publication “State of the Sector 2020: Scottish Voluntary Sector Statistics” (c 108,000 headcount) as a percentage of the overall population figure used at *.

3.5 The Commissioner has also taken into consideration the work of the First Minister’s Advisory Council on Women and Girls in respect of the importance of intersectionality and plans to report on some key intersectional data in future. If the principle of Equality & Diversity is going to achieve its desired aim, the Commissioner considers that the Code should be more prescriptive about the anticipated outcome in terms of board diversity at the conclusion of all appointment rounds.

Thematic Reviews of the Code’s Operation and Diversity Delivers Progress

3.6 The Commissioner has conducted two thematic reviews of the operation of the 2013 Code and reported publicly on the results of those:

<https://www.ethicalstandards.org.uk/publication/report-thematic-review-operation-2013-code>

<https://www.ethicalstandards.org.uk/publication/2018-follow-thematic-review-operation-code>

The Commissioner also published a detailed and summary report on the progress that the Scottish Government has made in implementing the recommendations set out in Diversity Delivers:

<https://www.ethicalstandards.org.uk/publication/delivering-diversity-ten-years-full-report>

<https://www.ethicalstandards.org.uk/publication/delivering-diversity-dd10>

These reports in combination painted a mixed picture. Although progress had been made in some areas, the appointments process was not delivering diverse boards. The Commissioner recommended a range of measures intended to address that lack of diversity and to improve on appointments practices. In particular, the Commissioner considered that the Scottish Government should:

- have in place bespoke plans including SMART (Specific, Measurable, Achievable, Realistic and Timely) actions to redress the under-reflection of disabled people and people under 50 and
- implement its prior commitment to properly learn lessons from appointment round to appointment round in order to continually improve on practices.

The Scottish Government in response indicated that bespoke plans for these groups were not necessary and that how it ran the appointments process was a matter for officials. In the view of the Commissioner, the Scottish Government has not posited a credible alternative to the recommendations made. In the absence of agreement in these areas, the only lever remaining to the Commissioner to effect positive change is to revise the Code of Practice and to report on Scottish Government progress, or lack of it, in relation to public appointments activities.

Pragmatic, Proportionate and Public Interest Focussed

3.7 The Code should require practices that are efficient and effective and which deliver successful outcomes on each occasion whilst also providing best value for the public purse. The Commissioner views her regulatory role as an essential element of the success of the public appointments process. Each appointment has to be made on merit and to be fair and be seen to be fair. In the absence of reassurance in this area, a wide and diverse range of people will not be encouraged to apply. The Commissioner has to strike a balance between pragmatism and expediency on the one hand and prescription on the other.

3.8 The current Code is more flexible than its predecessors but that flexibility has not been capitalised on to the extent that it could have been by officials and selection panels. The Scottish Ministers and

officials have nevertheless intimated that a principles only, less detailed and prescriptive Code and Guidance would allow for greater flexibility on recruitment practices for public appointments and that it would also appropriately shift the risk to those making the appointments rather than the regulator. They have not however provided any details on what they would do differently if certain Code requirements were changed or, indeed, which requirements preclude their adopting better practices.

3.9 The Commissioner is committed to right touch regulation. She considers that principles only regulation is not appropriate; there is clear evidence of regulatory failure in the financial sector that can be attributed in part to such an approach. Additionally, the Commissioner is obliged to report to the Scottish Parliament in cases in which the Code is not complied with in a material regard. If there are no practices specified in the Code then there is little possibility of material non-compliance arising. That would be incompatible with the need for transparency in a statutorily regulated appointments process. The regulator and the regulated as well as the Scottish Parliament and the public must have a shared understanding of what is anticipated. A principles only Code could be subject to multiple and inappropriate interpretations and would not lend itself to the required levels of transparency that the public appointments process should rightly obtain.

3.10 The Commissioner does however adhere to the view that only those practices that deliver appropriate outcomes in the context of fairness and transparency should be included in the Code. The Commissioner is therefore minded to consider the removal of any practices that the Scottish Ministers and their officials deem to be detracting from this aim, subject to their provision of evidence in support of that view. The Commissioner will also consider taking a “one in one out” approach to this Code revision rather than simply adding new requirements to those already in place. Additionally, the Commissioner is willing to consider whether her approach to regulation of the appointments process is appropriate and whether a revised approach might foster better outcomes.

[Additional Issues that Code Revisions Could Address](#)

3.11 Since the 2013 Code became operational, there have been on-going discussions between the Commissioner and Scottish Government about the way in which its provisions have been

implemented. The Commissioner has also surveyed all panel chairs and board chairs at the conclusion of each appointment round to seek their views on the contribution of the Public Appointments Advisers (PAAs) and on the appointments process itself. The Commissioner also surveys all applicants about their experience of applying and publishes a consolidated annual report on their views each year. Reports on applicant views about individual appointment rounds are shared with panels on subsequent rounds for the body in question. The Commissioner considers that all of this valuable feedback should inform appointments practices with a view to their improvement.

3.12 Public appointment issues have also been included on the agendas for the Standards, Procedures and Public Appointments Committee of the Scottish Parliament. Members of that Committee have repeatedly asked questions about board diversity and the extent to which boards are reflective of the communities that they serve. The Public Audit and Post Legislative Scrutiny Committee also produced a [Key Audit Themes](#) report on board governance which specifically referred to the links between diversity and good governance. The report also indicates that the Scottish Government should be doing more to attract and appoint board members of the right calibre:

“Audit reports continue to point to the difficulties that boards are experiencing in recruiting members with the necessary skills, experience and diversity. In addition, there needs to be consistency across the public sector about the standard of board member that is now required. The Committee considers that the Scottish Government should take action, in collaboration with other public sector leaders, to clarify the skills and experience that board members now require; whether the right type of individuals, based on this description, are being attracted to applying for such positions; and whether and what changes need to be made to the recruitment and appointments processes to facilitate applications from a more diverse group of individuals.”

The Commissioner concurs that more could and should be done but is not in a position statutorily to require the Scottish Ministers or their officials to improve on practices.

3.13 Over and above this, both practices and the law have changed in some key areas that are directly relevant to the public appointments process. The Gender Representation on Public Boards Act (2018)

places new duties on the Scottish Ministers relating to both the attraction of applicants and to appointments decisions. A proportion of appointments to new public body boards also now require parliamentary approval which is a relatively new phenomenon in Scotland. Additionally, all NHS appointments now require the individuals appointed to demonstrate that they share the values of the NHS in Scotland. The Code currently only refers to the skills, knowledge and experience required. The Code should probably be revised to take all of these changes into account.

3.14 The Commissioner has also received reports from the cohort of PAAs about good practice, issues of concern and instances of non-compliance during the course of the 2013 Code's operation. Of particular concern are delayed appointment rounds and low numbers of quality applications for chair roles, especially for NHS boards.

3.15 Of 13 completed rounds run in the fourth quarter of our last reporting year:

- two run to find new chairs for Borders and Dumfries & Galloway regional colleges failed and will have to be rerun.
- another of the rounds that was successful on this occasion, to find a chair for the Bòrd na Gàidhlig, had failed previously with only five people attracted to apply.
- three health board chair appointment rounds completed during this period, albeit successful, were characterised by very low applicant numbers. A prior appointment round run in the year to find three other health board chairs, one of which was a rerun failed round that had attracted only two applicants, saw only 11 applicants in total.

The Commissioner's office has raised concerns about this situation with officials repeatedly. No substantive solutions have been posited. Failed appointment rounds represent a period of uncertainty for the boards in question as well as a waste of public money.

3.16 In respect of delays, for example, the rounds to identify a new chair and new members for the Scottish Police Authority have been characterised by a lack of progress. The Commissioner allocated the latter round for oversight by a Public Appointments Adviser (PAA) as far back as July 2018. Substantive planning for both rounds only commenced in July 2020 with officials describing the need

to make progress as now “urgent”. Lack of progress in such areas will inevitably also have an impact on the governance of the bodies concerned. The Commissioner’s representative repeatedly prompted officials about the lack of progress on the members round but, as there is no breach of a Code provision, the Commissioner is not in a position to intervene.

3.17 These issues continue to inform the Commissioner’s approach. Some of the concerns reported by PAAs have led to the issuing of statutory guidance on the Code’s operation where that is possible. It may be appropriate for such guidance to be incorporated on the face of the Code itself as well as new Code provisions to address the low number of quality applications and delays.

4.0 Consultation

4.1 As a result of the foregoing, it is the Commissioner’s view that it would be timely and appropriate to review the Code’s provisions to see whether its effectiveness could be improved by amending or adjusting its requirements. The Commissioner also plans to review the way in which she acquits her statutory functions in respect of public appointments regulation.

4.2 Taking this into account, the issues that seem to be most appropriate for consideration are set out below. Having considered the results of this consultation exercise, changes to the Code are to be made with an intention to implement these by early 2021.

4.3 Changes to guidance will also be required consequent and subsequent to any Code changes introduced¹. Concerns have been expressed by the Scottish Ministers and their officials that the requirements of the guidance are too prescriptive (see above). The Commissioner will therefore invite views on the guidance also, although that is not a statutory requirement.

4.4 It may also be appropriate to consider whether the equal opportunities strategy document *Diversity Delivers*² published in 2008 should also be reviewed subsequent to any Code changes³. The

¹ See section 2(6) of the Act

² <http://www.publicappointments.org/publications/publication/25/diversity-delivers>

³ See section 2(10) of the Act

Commissioner will invite the views of both the Scottish Ministers and the Scottish Parliament on this, given that it will likely require an update to the 2003 Act.

5.0 Issues on which Views are Invited

Equality and Diversity

5.1 Whilst one of the underlying principles of the Code is Equality and Diversity, the Code is not prescriptive about measures that the Scottish Ministers should take to redress the under-reflection of people who share protected characteristics on our boards. The Code does not require equality impact assessment of application and assessment methods and there are no specific provisions relating to positive action measures. Nor is there a requirement to consider all aspects of diversity of a current board when planning to fill vacancies. The reference in the Code to succession planning is relatively wide in scope and could be tightened to ensure proper consideration of board needs when appointments are under consideration.

5.2 It may, therefore, be appropriate to have explicit provisions about the measures that the Scottish Ministers should adopt when planning to appoint new members. These may be restricted to redressing under-reflection by protected characteristics or expanded to include other aspects of diversity such as household income, sector worked in and skills, knowledge experience and other relevant qualities that boards require to be effective.

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?

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

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

Thematic Reviews of the Code's Operation and Diversity Delivers Progress

5.3 Having conducted thematic reviews of the Code's operation as well as a review of the implementation of the equal opportunities strategy *Diversity Delivers*, the Commissioner has concluded that the Scottish Ministers could do more than at the current time to improve on board diversity. On individual appointment rounds, insufficient evidence is being generated to foster better practices in future and panels are paying insufficient attention to the evidence that is available. Whilst these requirements are included in the Code, they are not expressed prescriptively. The statutory guidance on learning lessons is more prescriptive and its wording was provided by officials. It has not however been implemented in a systematic way.

5.4 Centrally, there are no compelling plans in place for redressing under-reflection more generally. Officials have proffered the view that how the Scottish Government learns lessons on a round by round basis are matters for the Scottish Government and not the Commissioner. They have also advised that central activities to redress under-reflection, such as running training for prospective applicants and other positive action measures not done on a round by round basis, are not matters for the Commissioner to provide a view on because they are not included within the ambit of the Code of Practice.

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?

Q5 – If so, what requirements should be included?

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

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?

Q8 – If so, what should those be?

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

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

5.5 The Scottish Ministers and officials have intimated that the Code and Guidance are overly prescriptive and that this in turn is precluding the adoption of more outcome focused practices. They have not however been specific about which requirements in either the Code or Guidance fall into this category. The Commissioner has therefore considered where greater flexibility might be introduced. Additional appointments appear to be being made relatively regularly. This tends to happen following commencement of a round, or shortly after conclusion of a round – usually due to a board member standing down unexpectedly or the strength of the pool being such that the minister is keen to make an additional appointment. The Code and guidance should perhaps allow for these without the need for a Code variation but only on the basis that they are additional rather than attributable to a failure to plan for succession and/or an attempt to preclude running an open competition. The Commissioner has also provided guidance on what types of assessment can be delegated by selection panels and advised that shortlisting for interview cannot under the 2013 Code. The potential unavailability of panel members for planning meetings and other key stages is increasingly necessitating Code variations to allow for panel changes to be made. PAAs' availability has on occasion appeared to be treated as subsidiary to the availability of other panel members and in order to accommodate new commitments. The Code and/or guidance might seek to address all of these issues as well as others that are not immediately obvious.

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

5.6 Parliamentary interest in public appointments has been increasing with a proportion of Committees indicating that more should be done to see the attraction and appointment of the right calibre of board members. Whilst the Code requires selection panels to design an appointment plan which includes methods for publicising opportunities and which has to be agreed with the appointing minister, the extent to which vacancies are publicised is variable. The Commissioner has issued good practice case studies for panels to consider as part of their planning but there is limited evidence that these are taken into account and that practices that have proven to be successful have been rolled out or become the norm. There is also clear evidence that individuals from the private sector and those with lower household incomes are not attracted to these roles and that they fare less well in the appointments process in comparison with other applicants when they do. It may be that there are inherent barriers in the process such as the language used and/or the methods used to assess people that are skewing the result to the detriment of board diversity. Responsibility for the identification and removal of such barriers should lie with the Scottish Ministers.

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?

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.

5.7 The Gender Representation on Public Boards (Scotland) Act 2018 places new duties on the Scottish Ministers:

“Subject to subsection (4), the appointing person must give preference to a candidate identified under subsection (2) who is a woman if appointing that candidate will result in the board achieving (or making progress towards achieving) the gender representation objective.

(4) The appointing person—

(a) must consider whether the appointment of a candidate identified under subsection (2) who is not a woman is justified on the basis of a characteristic or situation particular to that candidate, and

(b) if so, may give preference to that candidate.

(5) In subsection (4), “characteristic” includes a protected characteristic (within the meaning of section 4 of the Equality Act 2010).”

In order to give effect to these measures, sensitive personal data will have to be shared with the appointing minister.

Additionally, and as things stand under the legislation, the appointing minister could choose to appoint one candidate over another, when they are equally meritorious, on the basis of an inappropriate characteristic such as political affiliation.

The Scottish Ministers are also required to take such steps as considered appropriate “to encourage women to apply to become non-executive members of the public board” and “in addition to anything done under sections 3 to 5, take such other steps as it considers appropriate with a view to achieving the gender representation objective by 31 December 2022”.

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.

Q22 – If so, which duties should be included?

Q23 – What are your reasons for these views?

5.8 Appointments to the boards of certain bodies such as the Poverty & Inequality Commission and the Scottish Fiscal Commission are subject to parliamentary approval. In order to give effect to the will of the Scottish Ministers and the Scottish Parliament, as reflected in the founding legislation that established these new arrangements, the Commissioner's view is that the Scottish Ministers should consult the Scottish Parliament on any appointment plan before vacancies are publicised. The information provided to applicants should also be clear about how parliamentary approval for appointments is obtained and what difference these arrangements make to the use of their personal data.

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.

5.9 Since 2018, all health board appointments are made following a version of values based recruitment. Board chairs and members are required to demonstrate that they share the NHS values and that these values inform their behaviours. The Code currently refers only to the skills, knowledge and experience required to fulfil the role. Values could be specifically added to this list or the broader term "personal qualities" could be included to allow for more leeway in the specification of the attributes that the Scottish Ministers are seeking in new board members. Additionally, the

Commissioner has identified that application and assessment methods are not always appropriately aligned to assess the given attribute sought.

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

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

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

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

Q32 – Please give reasons for your answer to Q31.

5.10 The Commissioner has issued statutory and non-statutory guidance during the course of the Code's operation with a view to clarifying its provisions. The Scottish Government has expressed the view that some of the requirements thus clarified are disproportionate. The guidance issued is included for reference in appendix three.

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.

5.11 The Commissioner has other issues under consideration which she would appreciate views on. The Commissioner has noted from the good practice case studies published on her website that panel member designation, and particularly the designation of the panel chair seems very important to the outcome of an appointment round.

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.

5.12 The Commissioner notes also that, although thematic reviews have been run under the 2013 Code there has been no auditing of appointment rounds. A proportion of rounds under the 2013 Code are run without oversight for all or part of their duration. The results of such audits could inform the Scottish Ministers and the Scottish Parliament about appointment practices that are otherwise not subject to scrutiny.

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.

5.13 The Commissioner is willing to consider whether the way in which she fulfils her statutory functions in respect of appointments is appropriate. Her Public Appointments Advisers currently engage early with panels and provide support and advice. In the case of high level rounds, they also participate as full panel members including making decisions on the suitability of appointment plans and candidates. It could be argued that this is not a traditional regulatory role and that the Commissioner might fulfil her statutory obligations in a different way in order for the best outcomes for boards to be achieved.

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.

5.14 The issues set out above appear to be the main ones which currently need to be given further consideration. The Commissioner will, however, welcome comments on any other issues relating to the Code of Practice or Guidance on its application that consultees wish to submit.

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?

6.0 Responses

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

6.2 We have produced a separate questionnaire document for responders to complete and return. The questionnaire is available on our website at this address:

<https://www.ethicalstandards.org.uk/publication/consultation-questionnaire-potential-code-revisions>

Completed questionnaires should be sent, ideally by email, to:

Ian Bruce

Public Appointments Manager

Ethical Standards Commissioner

Thistle House

91 Haymarket Terrace

Edinburgh

EH12 5HE

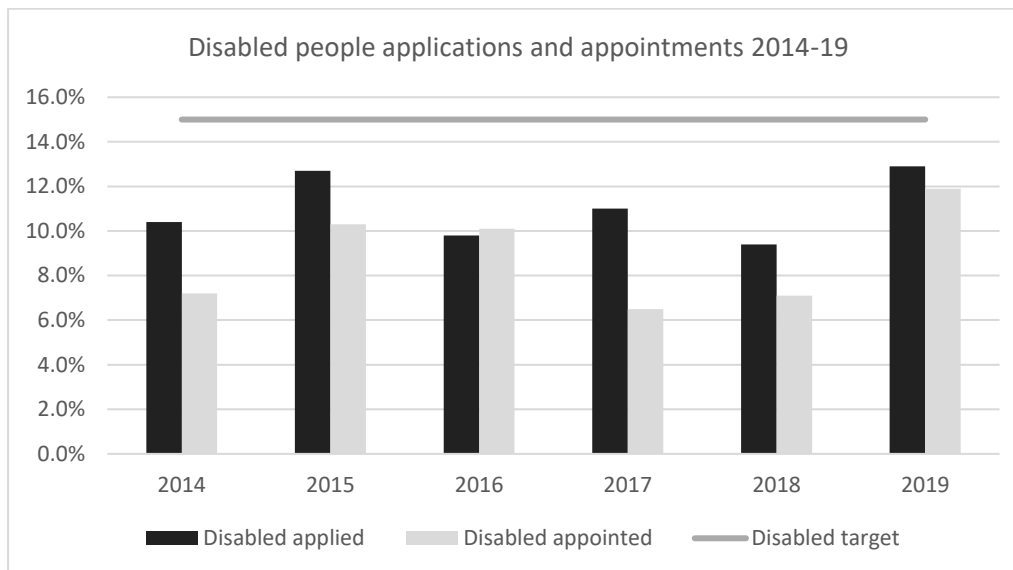
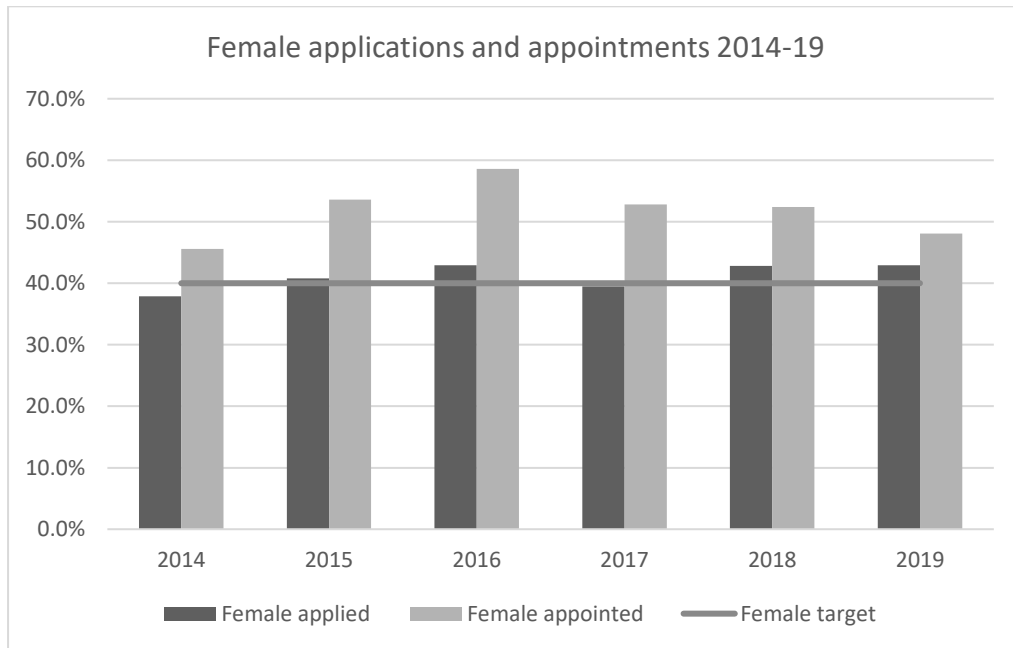
E mail: i.bruce@ethicalstandards.org.uk

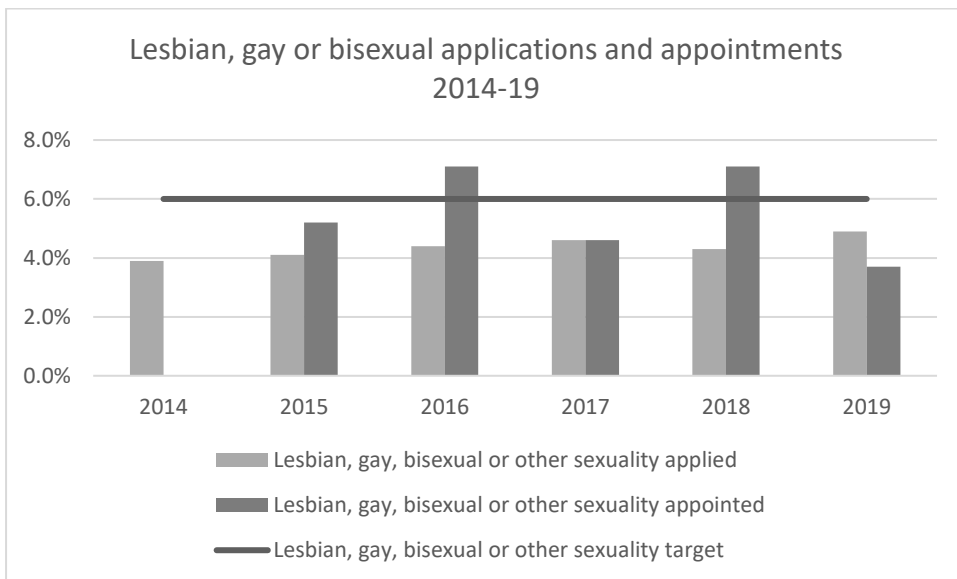
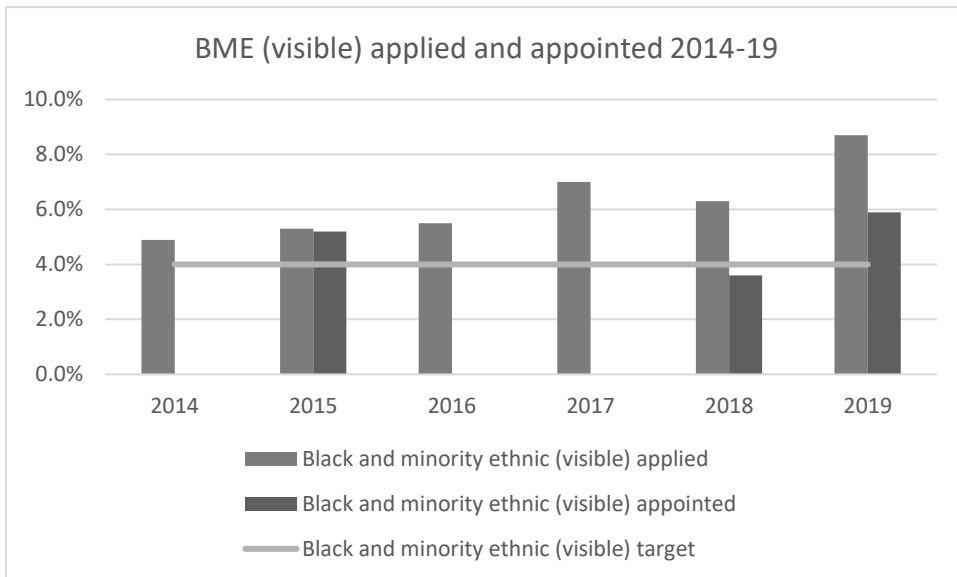
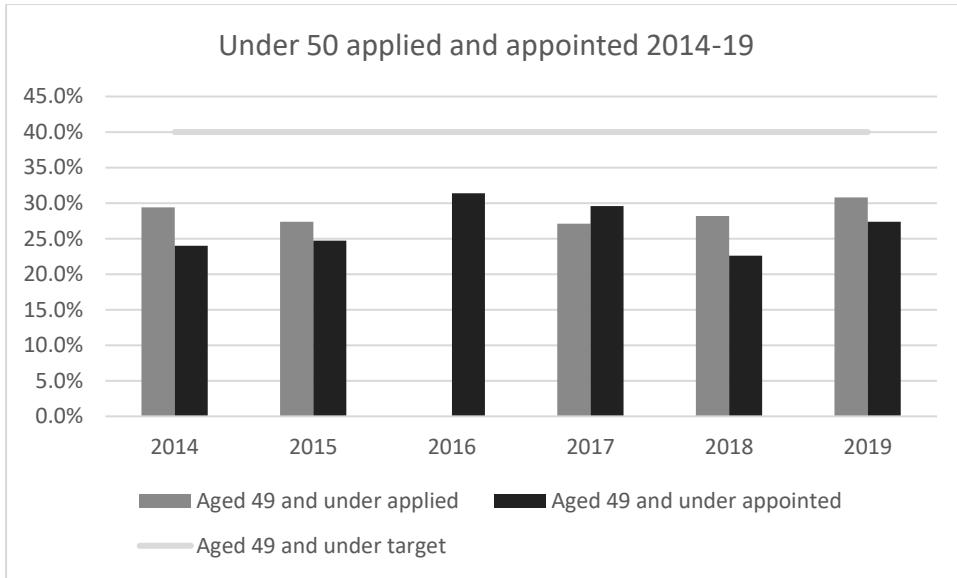
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Appendix One – Other Changes Made to the 2011 Code of Practice

- a. Allowing for changes to panel membership without reference to the Commissioner in cases in which a panel member is unavailable due to ill health or when officials are moving to other responsibilities.
- b. Removal of the requirement for Scottish Ministers to identify board needs in conjunction with the chair of the body concerned.
- c. reintroducing “experience” as a criterion for selection and making it clear that panels can request CVs to assess it.
- d. Inclusion of the requirements related to publicising opportunities and what should be communicated to applicants in appendices and greater levels of flexibility for panels in this area.
- e. A requirement that application forms, where used, should be clear and easy to complete.
- f. removing a specific requirement for panels to consider appointment-specific management information when planning an appointment round and replacing it with a broader requirement to take into account information held by or available to the Scottish Government.
- g. Greater flexibility in the level of detail provided to the appointing minister in the applicant summary at the conclusion of an appointment round; the detail provided should be reasonable and proportionate having regard to the stage of assessment reached by the applicant.
- h. A new requirement for the Scottish Ministers to give consideration to meeting those candidates identified as most able, particularly for senior appointments.
- i. A change to the requirement to provide feedback to unsuccessful applicants when requested. The previous blanket requirement required feedback for all applicants on request. The new provision required feedback to be provided only to those who reached interview. For other applicants, the Scottish Ministers are required to use their best endeavours to provide feedback.

Appendix Two – Applications and Appointments Demographics





Appendix Three - Guidance issued since the 2013 Code came into force

- a. Clarifying that “Merit” is defined by the Scottish Ministers and that, subject to passing the fit and proper person test, the most able candidate is the one who meets the criteria defined by the appointing minister most closely.
- b. Greater clarity on the fit and proper person test and how the results of the test should be handled. Specifically, applicants are to be given an opportunity to respond to concerns raised under the test before any final decision about their suitability is reached. Also making it clear that people who don’t meet the test can’t be considered suitable and allowing for panels to remit decisions on whether the test is met back to the appointing minister.
- c. Advising that when posts are to be offered on a role-share basis, the information provided to applicants is clear about what this means in terms of application, assessment and, if successful, appointment.
- d. Requiring the applicant summary, which sets out which applicants did and did not meet the requirements for the role, to be treated as a single document and to be provided to the appointing minister as such.
- e. Clarifying the role of the PAA when they are acting as a panel member such that panel chairs are made aware of practices that are considered to be non-compliant with the Code as opposed to not representative of good practice.
- f. Advising that the published start dates for new members may be deferred to take account of maternity.
- g. Allowing for single interviews by potentially different panels to those that conducted shortlisting for applicants who apply for multiple but identical roles (NHS Whistleblower posts).
- h. How the weighting of criteria for selection and setting certain criteria as priorities affects decisions on the suitability of individuals for appointment.
- i. Setting parameters around the role of recruitment consultants to ensure that applicants who do not apply via this route are not disadvantaged in comparison.
- j. When, what and how political activity information is gathered and reported on.

- k. Clarifying the importance of applicant confidentiality and with whom it is appropriate to share applicant data.
- l. Setting parameters around the involvement of external agencies in ministerial appointments where there is no statutory locus for that involvement.
- m. The importance of early engagement with PAAs and the contribution that this makes to effective succession planning.