

Ethical Standards Commissioner

FULL CONSULTATION ANALYSIS

An analysis of responses to a
consultation on potential revisions to the
Code of Practice for Ministerial Appointments
to Public Bodies in Scotland

31 March 2022

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ANALYSIS OF RESPONSES TO A CONSULTATION ON THE CODE OF PRACTICE FOR MINISTERIAL APPOINTMENTS TO PUBLIC BODIES IN SCOTLAND

The members of the boards of nearing 100 regulated public bodies in Scotland have responsibility for providing the governance oversight of vital services that affect us all. These touch every aspect of our lives; from health to housing, the environment to education, the economy to enterprise, the creative and cultural sectors to crofting, or policing to public transport. Each Board within its different sector and particular remit provides strategic direction, scrutiny of performance and of course, stewardship of significant amounts of public money. It is in everyone's interests that these important public bodies are led by people who have a diverse range of the most appropriate skills and experience, who act with integrity and commitment and who are reflective of Scotland's geography, demography and breadth of experiences and insights.

The Code of Practice is an important tool in securing the appointments of the right people for the right roles. It is rooted in good practice in recruitment and selection and intended to help selection panels design appointment rounds that deliver the skills, knowledge and experience needed as well as being welcoming and accessible to people from all backgrounds.

Diverse Boards benefit from fresh perspectives, new ideas, vigorous challenge and breadth of experience. A more diverse membership and skillset enables the Board of a public body to keep better pace with often changing contexts. While the current global pandemic is an extreme example of a world-wide system shock, Scotland's public bodies are already having to adapt flexibly to changes in services, resources, public needs and expectations and approaches to delivery.

Organisations that understand and reflect the people and communities that they serve are more likely to have credibility with them and deliver better services; this in turn promotes wider engagement and public trust in board decision-making.

We are strongly supportive of diversity of thought and contribution resulting in better corporate governance and decision-making, and, in turn, supporting the continuous improvement of our public services in Scotland. For this reason, our review and proposed revisions to the Code are unashamedly focused on enabling more creative and ambitious approaches to attracting and appointing the best new board members from the widest possible pool of applicants.

I am grateful to the many individuals and organisations whose comments and suggestions have led to the publication of a revised Code of Practice. It is my sincere hope that implementation of the revised Code will bring about the positive changes to board diversity, governance and effectiveness that we collectively want to see.

A handwritten signature in black ink, appearing to read 'John [unclear]', written in a cursive style.

Acting Ethical Standards Commissioner

1.0 Introduction

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 The Commissioner decided in 2020 that she should consult on prospective revisions to the Code of Practice. This decision was attributable to the fact that, in spite of ministerial ambitions for effective boards reflective of society, the methods and practices commonly being used in pursuit of this outcome had not yet shown themselves to be achieving the desired effect.

1.5 The Commissioner launched the consultation exercise on 6 August, inviting the Scottish Ministers, Scottish Parliament, regulated public bodies and other bodies with an interest to respond by 9th November. The Commissioner agreed to extend that deadline by over a month in response to requests from a range of organisations in order to secure views from the widest possible spectrum of stakeholders.

1.6 Following the results of that exercise, and due to requests from both the Scottish Parliament and the Scottish Government, the Acting Commissioner published in July 2021 an analysis of all consultation responses received. The Acting Commissioner also published a revised Code, based on views received thus far, for further consultation. All bodies invited to respond to the consultation are listed in appendix one. An initial deadline of 30 September was set for responses although this was extended to December to allow the Scottish Ministers to fully consider the ramifications of the

prospective changes and to respond substantively to them. The Acting Commissioner is committed to taking a pragmatic approach to regulation and the final version of the Code was informed by that approach, as well as the views of officials and the responsible Cabinet Secretary about which changes would lead to improved as well as cost-effective practices. The response rate to this subsequent consultation exercise was lower, primarily due to the fact that many of the views previously expressed had already been incorporated into the revised draft Code.

1.7 The Acting Commissioner is grateful to all of those individuals and organisations who engaged with his office to discuss the consultation exercise and who took the time to respond. The remainder of this document provides an analysis of responses. The final version of the revised Code, based on that analysis, is available to download from our website. It will come into force on 3 October 2022 and will be applicable to all appointment activity started on or after that date.

2.0 Findings, Conclusions and Recommendations

2.1 A total of 153 organisations/individuals were invited to provide views. As this was the second round of consultation and as many organisations and individuals had responded substantively to the first, responses were fewer in number. Responses were received from five individuals, including from the Cabinet Secretary for Finance and the Economy, and 15 organisations inclusive of the NHS Chairs group which was counted as a single organisation. One of the individuals who responded did not wish their response to be made public and two requested anonymity. Ten organisations were content for their responses to be made public, one wished not to be named and the others did not respond to these questions. The responses of all respondents who were content for these to be published are available to download from the Commissioner’s website:

www.ethicalstandards.org.uk/consultation-prospective-revisions-code-practice-ministerial-appointments-public-bodies-scotland

Only those organisations and individuals that specifically stated that they were content for their responses and identities to be published are named in the summary of findings below. A proportion of organisations, including the Scottish Government, chose not to respond to the specific recommendations and questions, preferring instead to provide a general response to the consultation paper or the draft revised Code itself. We have endeavoured to capture those responses below in relation to the questions and recommendations that they appeared to have views on.

Question 1 – defining diversity and securing it

Recommendation 2.1

The revised draft Code will balance specific measures with a focus on appropriate outcomes for each board in terms of diversity and succession planning. Over and above this, the term diversity will be expanded to provide a better understanding of what the appointments process should deliver.

2.1. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views. Thirteen organisations agreed with the recommendation, including the Equality and Human Rights Commission (EHRC), the Scottish Women’s Convention and Changing the Chemistry. No group or individual disagreed. One individual agreed in principle but felt that it was difficult to achieve diversity at board level due to the numbers involved. The views of respondents on the change were generally very positive:

“Boards having a more diverse membership with a wide range of skills will enable organisations to keep pace with a sector which is both complex and fast changing. Most people would agree that this would go some way to ensuring that boards better understand and reflect the people and the communities which they serve. Therefore given that the Code can assist in that, we should welcome further change and improvement.”

The Mental Welfare Commission for Scotland

Conclusion on defining diversity and securing it

The Commissioner has concluded that these revisions to the Code are supported and that the recommendation should be followed.

Question 2 – Learning lessons and basing decisions on evidence

Recommendation 2.2

The Commissioner will, in making revisions to the Code, balance the need to allow for flexibility with some very clear requirements about the need for panels to base decisions on evidence of what works and for the Scottish Government to maintain, update and use that evidence-base. In the absence of such measures, and based on past experience, the Commissioner does not see how such good practice will become the norm. Clearer focus on what works and why will help increase the pace and improve the focus of measures to deliver more diverse appointments of people with the right skills and experience.

2.2. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views. Twelve respondents answered “Yes” to this question and one answered “No”. Responses were positive and constructive:

“CtC is supportive of the requirement for Panels to report on the approach taken and results achieved. Building evidence of what works and requiring consideration of the evidence to justify methods used is a good thing. We agree with the Commissioner’s view that there is an over reliance on competency based assessment in the public appointments process and believe there is room for more creativity and new approaches to attracting a diverse pool of applicants. The Commissioner being able to provide a range of case studies and evidence of different approaches to suit different circumstances and desired attributes would be helpful.”

Changing the Chemistry

The response of the EHRC felt that the Code should go further:

“This will encourage transparency and accountability and address evidence gaps which should, in turn, help to inform equality impact assessments. However, as set out in our response last year, we also think the following requirement should be considered: - a clear reference in the Code to the Ministerial obligations under the Public Sector Equality Duty (PSED) and the Fairer Scotland Duty (FSD), to ensure clear vertical accountability for public bodies’ diversity targets, and to encourage better overall compliance with these duties.”

The Commissioner already publishes [good practice case studies](#) and anticipates that this revision to the Code will assist with the generation of more, and more consistent, good practice.

Conclusion on learning lessons and basing decisions on evidence

The Commissioner has concluded that these revisions to the Code are supported and that the recommendation should be followed. Taking account of the EHRC’s response, and whilst the Commissioner has no statutory locus to enforce the PSED and the FSD, he will make reference to these in the guidance on application of the Code, intended to assist in the understanding and interpretation of its provisions.

Question 3 – Nationwide, regional or characteristic-specific positive action measures that could be taken

Recommendation 2.3

The Commissioner has concluded that the Code should place a requirement on the Scottish Government to publish an action plan each year which includes the SMART, evidence-based measures that it proposes to take in the year ahead in order to secure more diversity on boards. The Scottish Government will also be required to report annually on progress against the previous year's plan. Thus, the Code will not be prescriptive about the specific measures to be taken round by round but will rather be clear that it is a responsibility of the Scottish Ministers to undertake clear positive action measures. The production of and reporting against an annual action plan are appropriate for inclusion in the Code. This will increase transparency and allow for the Scottish Government to more effectively measure its own performance and to be held to account publicly for the longer-term measures that they put in place to support change over and above any specific activities delivered on an appointment round by appointment round basis.

2.3. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

Fourteen respondents, inclusive of the Standards Procedures and Public Appointments Committee of the Scottish Parliament replied “Yes” to this question. The Scottish Government was the only respondent to reply “No”; the reply of the Cabinet Secretary and of officials being counted as a single response. One individual respondent “unsure” on the basis that it may result in a “tick box exercise”. A selection of the responses are reproduced below.

“We welcome the proposal for annual SMART, evidence-based action plans, where the Scottish Government can more effectively monitor its own performance and be held to account publicly. As in our previous response, we think that the Code should also promote the need for the intersection of protected characteristics to be taken into account. As set out in our previous response, there is a need to develop the appointing panel members’ accountability for diversity, targets and equalities competence (the skills, knowledge and analytical capacity to think about equality and the intersectionality of inequalities); unconscious bias; and any positive action measures, with particular strategies and expertise for different protected characteristics.”

The Equality and Human Rights Commission

“While we are cautious about placing more regulatory requirements on Ministers, we view the recommendation that the Scottish Government create a plan to increase diversity on boards and review progress against this annually, as a positive development. That is provided that positive action in this sense is viewed as a range of possible actions, such as engagement with employers and board-ready training; and that it does not lead to the Ministers setting blunt targets for Boards and recruitment Panels around specific characteristics which may or may not be relevant for the organisation at the time.”

Changing the Chemistry

“Agree with all of these measures but need real mechanisms for accountability – otherwise it is just gesturing:

What will happen if/when the annual report shows they didn't meet last year's plan?

Who holds the Scottish Government to account?

What mechanisms are there by which the public/civil society can challenge the Scottish Government's record and expect to get a response?"

The Scottish Women's Convention

"The Chairs were largely in agreement that an action plan would be a positive measure as it would promote transparency and aid in measuring progress. There was some concern regarding whether or not the action plan would reduce flexibility for Boards and may drive a 'tick box' process. Chairs would wish to see an approach that takes this risk into account, with measures designed to achieve the intended outcomes without restricting flexibility to respond to local needs using good judgement."

NHS Scotland Board Chairs Group

"We support the proposed requirement on the Scottish Government to publish annual action plans and progress reports that will promote transparency about the activities that the Government is taking to widen the pool of potential candidates."

Standards, Procedures and Public Appointments Committee, the Scottish Parliament

"My preference is that we don't spend time duplicating effort and that officials should work to ensure that action plans and improvement activity are clear, transparent and deliver according to the needs of the National Performance Framework and Ministerial aims."

Kate Forbes MSP, Cabinet Secretary for Finance and the Economy

"In particular the Code should reflect the requirements of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 which provides that the Commissioner should publish a Code which includes guidelines about the methods and practices to be employed in the making of public appointments - the Code is not a means of introducing mandatory duties on Scottish Ministers. It should also reflect the requirements of legislative provisions on equalities issues.

*"The Scottish Ministers and the Commissioner share a commitment to improve the diversity of public appointees and good progress has been made. The Scottish Ministers are of the view that action plans and reporting schedules are operational activities of which they rightly have oversight. In addition, there is no power in the 2003 Act for the Commissioner to direct Scottish Ministers to publish an action plan. The 2003 Act does set out the scope of the Code of Practice which is 'to include guidelines as to the methods and practices to be employed in the making of such appointments and recommendations and may, in particular, include guidelines as to—
(a) how vacancies in the specified authorities are to be publicised;
(b) how applications to fill those vacancies are to be encouraged; and
(c) the basis on which the Scottish Ministers are to consider persons for, and for recommendation for, appointment to the specified authorities.'*

"The Scottish Government regularly monitors diversity data about public appointees to inform ongoing improvement and engagement activity. The Scottish Government also provides a set of end of year statistics for the Commissioner which are published in the Commissioner's Annual Report. The Scottish Ministers are of the view that the data monitoring systems together with the oversight that the Commissioner has of individual appointment rounds and improvement work provides a proportionate level of transparency on the Scottish Government's work in this area."

The Scottish Government

Conclusion on Nationwide, regional or characteristic-specific positive action measures that could be taken

It is apparent that the majority who responded to this question were in favour of the Scottish Ministers having an overarching plan, inclusive of SMART actions, in order for progress to be planned, monitored and publicly reported on. It is clear however that the preference of the Scottish

Ministers is for the Commissioner to restrict his regulatory remit to appointments on a round-by-round-basis. Two arguments have been made for this position. The Commissioner is not persuaded by the first argument that including such an obligation in the Code represents “a means of introducing mandatory duties on the Scottish Ministers”. The legislative position is that compliance with the Code is not mandatory. The Scottish Ministers have no statutory obligation to comply with the Code’s provisions.

The second argument made is that the Scottish Ministers already have a range of statutory obligations, a proportion of which require them to report on progress. In this case, it is suggested that including a requirement for another plan would represent a duplication of effort. This argument does hold more water. In the interests of being pragmatic, the Code will therefore require the Scottish Ministers to provide to the Commissioner with those plans and progress reports that they are already obliged to produce either under legislation or under other self-imposed undertakings to improve board diversity. This is in order that he in turn is able to provide a view on these and to update the Scottish Parliament on progress.

The Commissioner will also seek to introduce the requirement for national, regional and characteristic-specific SMART plans to be produced when Diversity Delivers is refreshed. The Commissioner remains of the view that these are a vital component for the achievement of substantive progress and that a coordinated approach to the activity, rather than compliance piecemeal with other statutory obligations, can only aid with monitoring, and reporting transparently on, progress.

Question 4 – Updating the Diversity Delivers strategy

Recommendation 2.4

As there still remains significant opportunity to increase diversity on Scotland’s boards and to embed more sustainable and replicable ways of maintaining that, the Commissioner has concluded that he should seek parliamentary support for to update Diversity Delivers. He hopes that developing a more forward-looking and integrated approach through a refreshed and up to date strategy will aid in bringing a shared understanding and accountability to its achievement across the range of partners who are committed to improved outcomes in this area

2.4. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

Twelve respondents agreed with this recommendation and two did not although the response of one those in the “no” category, Changing the Chemistry, was supportive of the change. A selection of responses is reproduced below. The organisations that said “No”:

“Diversity Delivers is a document owned by the Commissioner and is over 10 years old so an update would make sense. However any update should ideally be agreed with all key stakeholders to ensure appropriate buy-in. Furthermore there should be regular monitoring and reporting of the outcomes against the strategy.”

Changing the Chemistry

“Updating documents like Diversity Delivers is beneficial but has a limited effect. It is no use having a document made for the sake of it. Real change comes from:

- *The campaign to bring attention to the issue surrounding the launch of any such document*
- *Long-term commitment to keeping people engaged on the topic*

- *Demonstrating the tangible benefits of diversity to all stakeholders – guidelines such as these can often feel like a telling off and need to be reframed as the positive thing that they are”*
The Scottish Women’s Convention

Notwithstanding the apparent disagreement of these stakeholders, the Commissioner agrees with their observations. Some of the organisations that said “Yes”:

“The Chairs agreed that ‘Diversity Delivers’ should be updated and suggested that a more accessible application process should be put in place with a timeline for reviewing success of the re-launch.”

NHS Scotland Board Chairs Group

“While we offered no comment on this matter in the previous consultation, we would underline our support for measures designed to increase diversity on Scotland’s public bodies and accountability in the appointments process supporting those bodies.”

The Accounts Commission for Scotland

The responses received have assured the Commissioner that there is clear support for the strategy to be refreshed, other than in the case of the Scottish Government itself. In response to the prior consultation on prospective Code revisions, the view of the Scottish Government was that a refresh of the strategy was not necessary. Our own progress reports, available to download from [this page](#) on our website, have found that a proportion of the strategy’s original recommendations were not implemented at all or only partially implemented. In particular, substantive work on raising the general public’s awareness of these opportunities and enabling them to apply has been very limited.

Parliamentary support for a refresh of the strategy is clear:

“We are supportive, in principle, of the introduction of legislation by the Scottish Government, to allow updates to the Diversity Delivers strategy.”

Standards, Procedures and Public Appointments Committee, the Scottish Parliament

The Committee corresponded with the Cabinet Secretary for Finance and Economy on this issue and received the following response:

“Although the 2003 Act does not expressly make provision in respect of revising the strategy, there is nothing in the legislation that would prevent an update of the strategy, further legislation would not be required.

I would welcome further information from the Commissioner about where revisions to the current strategy would add value to the current public appointments process given the considerable legislative and policy change in the area of equal opportunities since 2008, including:

Legislation:

- *The Equality Act 2010*
- *The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012*
- *Gender Representation on Public Boards (Scotland) Act 2018*

Policy drivers:

- [*Race Equality Framework and Action Plan \(2016 – 2030\)*](#)
- [*A Fairer Scotland for Disabled people: Delivery Plan \(2016 – 21\)*](#)
- [*British Sign Language \(BSL\) National Plan \(2017 – 2023\)*](#)
- [*A Fairer Scotland Disabled People: Employment Action Plan \(2018\)*](#)
- [*Public Appointments: Race Equality Action Plan \(2019\)*](#)

In addition, there have been wide ranging changes to the operational delivery of public appointments since 2008, the Commissioner is sighted on these changes...”

The reference here to the delivery plan and action plan for disabled people is somewhat concerning as it implies that they seek to address the under-reflection on our boards. Each document makes only one vague mention of public appointments and neither refers to practical recommendations to improve on the under-reflection of this section of society on our boards. It is one of several areas in which progress has been limited.

Conclusion on Updating the Diversity Delivers strategy

It is apparent that a refresh of the strategy will not be blocked and the Commissioner therefore plans to refresh it, following extensive consultation, once the new Code has had an opportunity to bed in.

Questions 5, `a` to `e` Which provisions of the Code and Guidance are detracting from the delivery of appropriate outcomes?

Recommendation 2.5 a

The Commissioner accepts that the language of the Code could be simplified and that this should apply also to all of the materials that the Scottish Government employs for the appointments process.

Recommendation 2.5 b

The Commissioner also sees a greater role for boards themselves in planning for succession being an important addition for inclusion in the next iteration of the Code.

Recommendation 2.5 c

The Commissioner acknowledges and accepts that there could be an inherent conflict of interest attached to PAAs acting as decision makers in the appointments process. Although this practice was adopted with the agreement and, in fact, encouragement of the Scottish Government when the 2013 Code was introduced on the basis that PAAs became Public Appointment ‘Advisers’ rather than ‘Assessors’ at that time (with an increased focus on good practice and support rather than enforcement), he is happy to consider the issue again in light of the responses received to this consultation.

Recommendation 2.5 d

The Commissioner does not intend to meet the Scottish government’s request to remove a large proportion of the requirements set out in the current Code as part of this revision. Where the Commissioner considers it appropriate, he will amend or remove a proportion of requirements that detract from the adoption of methods and practices that could prove to be less resource-intensive. By way of example, the Code already allows for multiple posts on different boards to be filled by way of a single competition and this will explicitly be written on the face of the Code so that there can be no confusion. The Commissioner considers that the Code itself and also the materials used for the appointments process should be simplified and made more accessible. The Commissioner also considers it appropriate to place greater emphasis on the role of boards themselves in planning for succession.

Recommendation 2.5 e

The Commissioner is minded to place greater responsibility for key decisions on the selection panel, and potentially the chair of the panel who represents the appointing minister, on the face of the Code. It is proposed that prescription in this area should involve placing an obligation on the panel chair to devise an evidence-based plan for each appointment round which, when implemented, will meet a given board's needs and also redress any identified under-reflection (of skills, characteristics or other relevant factor). The panel chair will also be required to report on the extent to which the plan delivered its anticipated outcome. This provides the Scottish Government with maximum flexibility whilst still allowing for appropriate accountability. To ensure that the importance of this change is fully understood, the Commissioner will include a new principle of "Accountability" in the Code. In that context, the Commissioner will also consider the most appropriate role for the PAA, his representative, in the appointments process.

2.5a. Respondents were asked to reply to each of these recommendations with "Yes", "No" or "Unsure" and to give reasons for their views.

Twelve respondents answered "Yes" to question 2.5a. No respondents answered "No" or "Unsure".

Conclusion on simplified language in the Code and for all materials used in appointment rounds

The Commissioner will redraft the Code in line with Clear English good practice. He and his team have received recent training on the topic and will apply it to this task. The Code will include a provision that the materials used for appointment rounds should be drafted using easy to understand language.

2.5b Eleven respondents agreed with this recommendation. None said no and none were unsure. A selection of the responses is included below.

"The convener of a board is the most appropriate person to consider the succession planning of their Board. This should be made part of their role description."

The Mobility and Access Committee for Scotland

"The Boards need to take ownership of recruitment and be supported on how to undertake appropriate succession planning as Boards know best what skills/attributes are required for their strategic objectives. I think Boards do not fully understand how they can play into this but need to ensure Code is not prescriptive on how this is done."

Permission to publish name not given

"We support the suggestion that each board articulates appropriate outcomes in terms of diversity and succession planning. The Board understands its stakeholders and can therefore ensure the Board representation reflects the communities they serve."

Mental Welfare Commission for Scotland

"Chairs agreed that boards holding a greater role in planning for succession was an important addition for inclusion in the next iteration of the Code."

NHS Scotland Board Chairs Group

The Scottish Government's response and that of Changing the Chemistry are closely aligned and set out here:

"In regard to A2, we request that the wording of this be changed. As per A1 and A3, Scottish Ministers are ultimately responsible for an appointment to a board and for determining the period for which an appointment, reappointment or extension to an appointment term is to be made. The additional detail about succession planning is the responsibility of the board chair; guidelines on succession planning would thus sit more happily in Section C, in Diversity by Design.

We suggest the following replacement wording for A2: "Succession planning is led by the board chair, with the support of the Scottish Government sponsor and the knowledge and expertise of the Chief Executive and other executive officers. Plans should take account of the board's composition, and the public body's purpose, strategic objectives, and operational context, and reflect those in aims and plans for developing and retaining current board members, and attracting and developing prospective new board members."

The Scottish Government

"CtC strongly agrees that the role of Boards in succession planning should be highlighted in any Code revision. In this sense we support the Scottish Government's view that assessing the needs of Boards and responsibility for succession planning should not be an obligation placed on Ministers. The responsibility for succession planning in our view, sits with the Board Chair, the Board and the Nomination Committee. They are best placed (not the Minister) to understand the needs of the organisation and recommend periods of appointment, re-appointment or extension.

We suggest that item A2 be re-worded to that effect, with the Board being obliged to consult the Minister in making these plans (rather than the other way around). The Ministers should be accountable for ensuring plans are in place, reviewing and contributing to these, determining whether they will enable the organisation to fulfil its role economically, efficiently and effectively; and for holding the organisation to account against these plans. While the Minister should be clear on the desired outcome they are too removed from the organisation on a day to day basis to be able to define this in isolation."

Changing the Chemistry

Conclusion on the role of Boards in succession planning

The Commissioner is sympathetic to all of the views expressed but nevertheless has the following observations. The 2003 Act and the Code are predicated on the responsibilities of the Scottish Ministers, not boards themselves. Devolving responsibility for succession planning to boards on the face of the Code would mean that those provisions would be incapable of enforcement. The Commissioner also cannot see how the Scottish Ministers might make informed decisions about the skills, knowledge, experience and other attributes that a board might need at a given point in time – information vital to deciding how a person specification should be framed – unless they are assured that succession has been planned for. Additionally, the Scottish Ministers are responsible for succession planning for Chair appointments. It is questionable whether it is appropriate for responsibility for planning for succession for such vital roles should lie with boards themselves. The suggestions for change made by the Scottish Government and Changing the Chemistry take no apparent account of these issues. As a consequence, the Code and Guidance on its application will incorporate those suggestions that allow for boards to take a greater role in succession planning whilst making it clear that the Scottish Ministers remain responsible for the successful implementation of those measures that they are recommending should be taken.

2.5c This question asked whether the Commissioner's Public Appointments Advisers (PAAs) should continue to take decisions as members of the selection panel. This practice currently only occurs on those appointment rounds that the Commissioner considers require end to end oversight.

This question provoked the most mixed response of all questions asked. On balance, most respondents felt that PAAs should act in an advisory role and a number were very positive about advice they had received from PAAs in the course of previous appointment rounds. The PAAs themselves did highlight the fact that the arguments made about their participation in decision-making didn't appear to be about undue influence or a negative impact on outcomes. Those arguments instead were philosophical in nature and related to the inherent conflict of interest involved in a regulator's representatives making decisions on issues that are ultimately the responsibility of the Scottish Ministers. A selection of responses is set out below.

*"The Scottish Ministers welcome the independent oversight that the Commissioner has of public appointments and value proportionate and appropriate regulation that adheres to the principles of the Crerar Review. We observe that the current Code of Practice provides a helpful statement about the Commissioner's current regulatory approach:
'The responsibilities of the Commissioner regarding scrutiny of the appointments process will be undertaken based on independence and impartiality, efficiency and effectiveness and reasonableness and proportionality.'*

The Scottish Government previously raised the concern that the allocation of the Commissioner's Advisers as full members of a selection panel has the potential to cause a conflict of interest for the Commissioner. As full members of the selection panel the Advisers are responsible for the public appointments process and the decisions made in that appointment round. This can blur the line between participation and regulation of the public appointments process which is a difficult regulatory position.

The wording at A17 of the draft Code suggests that the Commissioner's approach to independent scrutiny of methods and practices used in an appointment round will continue to be carried out by deploying Advisers to 'all or part' of an appointment round. We note that the draft Code seeks to provide clarity about the Advisers' role on a selection panel as at A18, which is a welcome addition, but it is not clear if the Advisers will continue to be deployed as full members of the selection panel.

It would be helpful if the Commissioner could set out a policy for the scrutiny of public appointments so that Scottish Ministers understand the regulatory strategy and how it will be delivered in practice. The could usefully include a policy on complaints handling which is mentioned at A22. This would be an appropriate addition to any guidance published to complement the new Code."

The Scottish Government

"It was felt that this was a more nuanced recommendation and did not have a clear yes or no answer. Chairs mainly commented that they were unsure about PAAs acting as decision makers in the appointments process and noted that they felt PAAs would be more appropriate in an advisory role."

NHS Scotland Board Chairs Group

"PAA ie advisors should be a critical role in the recruitment process to ensure consistency of advice and appointment across all government bodies. Assessment is best placed with the members of the Board. An independent /critical friend may be appropriate as part of the appointment panel."

The Mobility and Access Committee for Scotland

The Commissioner is cognisant of the fact that PAA panel membership has been the model in Scotland since appointments regulation began. This model was revised in 2011 for a brief period when PAAs were in attendance to simply advise on compliance. That revised model didn't work well in the eyes of selection panels, PAAs or the [Scottish Government](#) and it was changed back in 2013

as a consequence. Taking the current views of stakeholders and the Scottish Government into account, the Commissioner has concluded that there is a practical solution available that should satisfy all parties and that will be workable in practice.

The Commissioner has also taken note of the Scottish Governments request for greater clarity on his regulatory role and on complaint handling. The Commissioner would refer to his revised strategic plan and biennial business plan as sources of information on his role and remit and how he intends to fulfil his statutory functions. This includes his plan to publish for consultation a full investigations manual, inclusive of those procedures adopted for handling public appointments complaints and conducting examinations into the appointment practices of the Scottish Ministers. The Commissioner is not persuaded that a standalone policy on his regulation of appointments would add anything to what has been already produced or is in production. The Commissioner is also not persuaded that such issues should feature as prominently as suggested in a Code that, according to the 2003 Act, should include guidelines for the Scottish Ministers. He will however include some wording in the introduction to the Code to set it, and his approach to regulation, in context.

Conclusion of the role of Public Appointments Advisers

PAA's will continue to actively contribute to selection panel consideration of applicant and candidate suitability during the stages of assessment on those appointment rounds that the Commissioner considers to be appropriate for end to end oversight. In practice, this means that they will, for example, continue to review applications against the published criteria for selection and participate in interviews. They will continue to offer views on the suitability of applicants and candidates as well as on the assessment decisions of the panel. They will do all of this in the capacity of panel members. They will highlight instances of potential non-compliance with the panel chair, particularly in relation to parity of treatment for those who apply for roles. Where they believe that a potential panel decision may be incompatible with the Code's requirements, they will highlight this with the panel chair as soon as practicable and, if necessary, refer it to the Commissioner for a view. The chair of the panel will be ultimately responsible for decisions on the suitability of applicants and candidates. In coming to those decisions, the panel chair will take cognisance of the views of the other panel members and the PAA. In cases in which the panel chair does not take cognisance of the PAA's advice, and non-compliance with the Code may result, the PAA will highlight this with the panel chair and report to the Commissioner accordingly. The fact that the final decision on key issues rests with the panel chair satisfies the Commissioner that the perceived conflict of interest attached to PAA's acting as panel members has been addressed.

2.5d In this recommendation, the Commissioner confirmed that a large proportion of the requirements set out in the current Code would not be removed as part of this revision. His ground for doing so was to ensure that all parties with an interest would know what to expect of the regulated process. He also undertook to amend or remove a proportion of requirements that detract from the adoption of methods and practices that could prove to be less resource-intensive. The recommendation referred also to making the materials used for appointments more accessible and to boards having more of a role in succession planning. These two issues drew a lot support and are considered in more detail under other headings in this analysis.

The recommendation that more resource-intensive requirements be removed met with a more mixed response and the Commissioner was unable to reach any firm conclusions in this area.

Conclusion on removing requirements that detract from the adoption of methods and practices that could prove to be less resource-intensive

Based on anecdotal evidence to the effect that the current system is overly bureaucratic and time consuming the Commissioner intends to ensure that the Code's provisions that generate bureaucracy and take up time unnecessarily will be drafted with a view to providing guidance on how the time and resources currently expended by the Scottish Government might be better aligned to successful outcomes. This will include the scope for more assessment activity to be delegated by selection panels and for the Scottish Ministers to delegate more to their representative on the selection panel.

2.5e This recommendation suggested that the chair of the panel should be accountable for delivering a successful outcome in their capacity as the representative of the Scottish Ministers. It included a suggestion that there should be a new principle of "Accountability" to reflect this. It also suggested that panel chairs should plan on the basis of evidence of what works well to achieve successful outcomes. Responses to the recommendation were mixed. Most were in favour of the recommendation in principle but a few expressed concerns about how it might work in practice and whether panel chairs were in a position to take on this responsibility.

"We support any clarification of the Panel's role and responsibility; including the extension of this to include creating an appointment plan which aims to attract a diverse pool of candidates and identifies appropriate assessment methods for the desired attributes. Our only caution is around the positive action measures mentioned in item C1 iv. It is important that this does not infer that the plan must include such measures and that all boards must have all protected characteristics represented. We suggest the wording "where appropriate" be added to the start of this clause. As highlighted in our response to the previous consultation, many organisations are not aware or do not understand the role of the Public Appointments team. We suggest that the role of the Public Appointments team should be considered alongside changes to the Code. We feel that there is scope for them to take a greater role in reviewing and recording best practice, providing or organising training and ensuring the consistent application of best practice across organisations. If so much responsibility is to be placed on the chair of the panel then in situations where the person is not a member of the civil service, this individual should be paid for this work. Additionally there needs to be some oversight that the individual conducts their role effectively. CtC has recently heard a horror story where the panel chair appears to have fallen very short of what's expected."

Changing the Chemistry

"Panel chairs may not have sufficient skills and knowledge of recruitment and selection, so support of PAA and assistance with the process from officers is vital if required."

The Mobility and Access Committee for Scotland

"We would welcome the introduction of a principle of accountability in the Code, to be fulfilled in a way that is proportionate to the resources available."

The Accounts Commission for Scotland

"Chairs noted that this recommendation required more consideration and clarity, in particular with regard to what the panel chair would be expected to report on. There is the possibility that the proposed amendments would make the recruitment process more onerous and bureaucratic."

NHS Scotland Board Chairs Group

Conclusion on the principle of "Accountability" and the role of the panel chair in planning and delivering successful outcomes

Discussions with the Scottish Government have reiterated the view of officials that the Code should set out the "what" and that they are responsible for the "how". In the absence of any clear objection

from the Scottish Government to the recommendation, the Commissioner believes that the “in principle” agreement to this change is sufficient for it to be implemented. The Commissioner is happy to provide guidance on what is anticipated and will seek to agree this with those who are responsible for implementation. The Commissioner will also contribute to training for panel chairs on the revised Code’s provisions. Panel chairs will be responsible, on behalf of the Scottish Ministers, for all of the key decisions taken during appointment rounds.

Question 6 – Using evidence to inform decisions and adopting measures to achieve wider diversity on boards

Recommendation 2.6

The Commissioner accepts that responsibility for the necessary improvements lies with the Scottish Government. It is therefore proposed that the revised Code should place an obligation on selection panel chairs to devise an appropriate evidence-based plan for making appointments to a given board. The factors to be considered for inclusion in these plans, such as those suggested by respondents to the consultation, will be set out in the statutory Guidance.

2.6. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

Ten respondents were in agreement with the recommendation and three were unsure. No respondents answered no to this question although a negative response from the Scottish Government may be implicit in their overall response to the revised draft Code. A proportion of respondents were concerned that the requirement may add to bureaucracy in the system.

“No recruitment process/ selection of appointees should be done without an evidence based selection process. Applicants need to know that they will or will not be appointed on merit, not on inappropriate measures such as political views, friendships within the Board etc”

The Mobility and Access Committee for Scotland

“As stated earlier, this can work either way. A lot will depend on how committed panel chairs are to the values we are trying to promote here in relation to diversity. We need to ensure that panel chairs buy-into what we want to see changing in relation to Boards. Perhaps there could be a requirements for Panel Chairs to undergo training on diversity to ensure that they understand the principles behind diversity and the benefits it can bring.”

Dr Mohammed Ishaq, University of the West of Scotland - School of Business and Creative Industries

“We agree with including an obligation to create an appointment plan and the items that should be included within this. Note however our earlier response regarding the inclusion of the wording “where appropriate” to Item C1iv in relation to positive action measures. Further guidance could perhaps include an illustration of a range of positive action measures for specific attributes or protected characteristics, to ensure that blunt quotas do not become the default approach. We note that you suggest above that this obligation be placed on Panel Chairs however in the revised Code it appears to be an obligation placed on the Selection Panel. We believe that the latter, as it is written in the revised Code, is more appropriate. As stated above, if so much responsibility is to be placed on the chair of the panel then in situations where the person is not a member of the civil service, this individual should be paid for this work. Additionally there needs to be some oversight that the individual conducts their role effectively.”

“Glad to see recognition of ultimate responsibility falling on Scottish Government.”

The Scottish Women’s Convention

“This fits with our support for a principle of accountability in the Code.”

The Accounts Commission for Scotland

Conclusion on using evidence to inform decisions and adopting measures to achieve wider diversity on boards

The Commissioner notes that the current Code and its prior incarnations required the selection panel to devise an appointment plan and does not consider such a requirement to be burdensome or inappropriate. This revision makes it clear that the plan should be based on evidence of what works well and that it should be designed to achieve greater board diversity. The Commissioner views this to be wholly in keeping with good practice in recruitment and selection and the legislation and policy drivers that the Scottish Government has referred him to. As a consequence, this recommendation will be reflected in the revised Code. How it is put into practice will be a matter for officials.

Question 7 – Should the Code refer to the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions?

Recommendation 2.7

The Commissioner has decided that he should delay making any final decisions about which provisions of the Act, if any, should be reflected in the provisions of the Code.

The Commissioner notes the Scottish Government’s position that the Commissioner has no locus to determine compliance with its adherence to this legislation – although it clearly relates to the majority of public appointments in Scotland which he regulates. In that event, and given that there appears to be no clear path for scrutiny and accountability for adherence to the Act, any measures that the Commissioner considers it appropriate for the Scottish Government to follow will not be specifically linked to the provisions of the Act to ensure that his determinations on compliance relate to the Code alone.

2.7. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

Three respondents answered yes to this question and the others were unsure although the Scottish Government’s response suggested that the Act should be referred to. Of those that were unsure, most respondents felt that on balance the Code should include reference to those provisions that fell within the remit of the Commissioner.

Conclusion on the Code referring to the Gender Representation on Public Boards (Scotland) Act 2018 and its provisions

The Commissioner will continue to include a reference in the Code to the duties of the Scottish Ministers in relation to other relevant legislation. The specific legislation will not be named in the Code itself to preclude it becoming outdated when legislation is updated or abolished. The guidance will set the relevant legislation out for reference purposes, including, where that is known, the lines for reporting and accountability for adherence to those pieces of legislation.

Questions 8 `a` and `b` – Appointments requiring approval by the Scottish Parliament

Recommendation 2.8 a

The Commissioner is minded to follow the advice of OCPA with a view to ensuring that the disparate and not entirely satisfactory practices in Whitehall are not replicated in the Scottish Parliament. As per the view of the Standards, Procedures and Public Appointments Committee, the Commissioner intends to include a provision in the Code, requiring the Scottish Ministers to consult the Scottish Parliament meaningfully at appropriate stages for appointments requiring parliamentary approval.

Recommendation 2.8 b

There was clear support for applicants to be able to base their decisions on all of the facts for such appointments and so the requirement for the applicant information pack to be clear about what parliamentary approval will entail will be included in the Code.

2.8. Respondents were asked to reply to these recommendations with “Yes”, “No” or “Unsure” and to give reasons for their views.

Responses here were mixed with some respondents not being entirely clear about the status of appointments requiring parliamentary approval. Notwithstanding this, the majority of respondents who offered a view, including the SPPA Committee, felt that the recommendations should be reflected in the Code. The suggestion that applicants had to be informed about what such an appointment might entail was agreed to by all respondents.

Conclusion on appointments requiring approval by the Scottish Parliament

The Commissioner will ensure that these recommendations are reflected in the provisions of the Code.

Question 9 – Should diversity be expanded to include other attributes and, if so, what should those be?

Recommendation 2.9

The Commissioner will amend the Code to include reference to other attributes cited by respondents to the consultation, such as lived experience and values, as appropriate for consideration when the Scottish Ministers plan to appoint new board members.

2.9. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

All respondents who chose to answer this question said yes. The Scottish Government expressed some concern about the use of the term “attributes” and the possibility that this may lead panels to view positive discrimination as an option when it is not.

Conclusion on diversity being expanded to include other attributes

The Commissioner will ensure that this recommendation is reflected in the provisions of the Code. He will retain reference to a range of specific attributes on the face of the Code itself. To further address the concerns raised and request made by the Scottish Government, he will include guidance on what is meant by “attributes” in guidance on application of the Code.

Question 10 – Should the Code be more explicit about matching assessment methods to the attributes sought?

Recommendation 2.10

The Commissioner proposes to include a requirement in the Code that the assessment methods chosen should be selected on the basis of their validity and clear evidence that they are effective and that they do not have an adverse impact on the success of people who share given protected characteristics. This will require equality impact assessments of methods to be undertaken. The Code will also require evidence to be maintained about decisions taken on assessment methods and the reasons for their selection. Their effectiveness will also require to be monitored. The Commissioner has also taken cognisance of the EHRC’s views on the need for the provision of reasonable adjustments to be made more proactively and intends to strengthen the Code in that area also.

2.10. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

All respondents who had a view on this recommendation answered yes. The Scottish Government expressed some reservations about the need for equality impact assessments and highlighted the relevant legislative provisions. The Equality and Human Rights Commission was clearly in favour of the change. A number of the responses are set out below and reflect the strength of feeling of respondents about the recommendations made. It should be noted that some respondents were concerned about where the expertise to implement these measures might come from.

“The selection of methods on the basis of validity and evidence is basic good practice and we support this approach. Any equality impact assessment however needs to be linked to the provision of reasonable adjustment so as to mitigate any adverse impact, rather than ruling methods out on that basis. Some assessment methods may be ideal for assessing a particular attribute and care needs to be taken that we do not discount these altogether, on the basis that it may prevent some people from applying or put them at a disadvantage to other candidates. As an example - there were responses in the consultation summary relating to the appropriateness of candidates being required to give a presentation where presentation skills were not required for the role. We would argue that all Board members do require some form of presentation skills both in being able to

express their views in meetings and in acting as organisation representatives. The person's ability to deliver a slide show is not what should be assessed, but the ability to distil ideas into simple points and get these across clearly, should be. That said, this may well put some people at a disadvantage e.g. in the case of some disabilities or where English is not the first language. This is where consideration of the impact of certain methods on certain groups, at the planning stage comes in. We therefore support the requirement for equality impact assessments of methods, but also want to see this linked to the proactive provision of reasonable adjustments, so that such methods are not ruled out or removed from the process, but adapted to ensure a level playing field or to suit candidates' needs as required. It is also worth highlighting that many people (including the disabled) will not see themselves as being at a disadvantage and may not see a need, or ask for adjustment to be made. The panel must be prepared to adapt at the time and consider this in any subsequent decision making. We agree with other respondents that a broad statement of the requirement within the Code is sufficient. Where value can be added by further detail is in providing guidance on effective assessment methods linked to specific attributes."

Changing the Chemistry

"This is important. In fact not only should assessment methods be scrutinised to ensure that they do not disadvantage people with specific protected characteristics but job descriptions and job roles should also be looked at to ensure that they are not excluding applicants from certain groups as this may prevent applications from a greater diversity of individuals."

Dr Mohammed Ishaq, University of the West of Scotland - School of Business and Creative Industries

"Fully support this recommendation and welcome it as good recruitment process"

The Mobility and Access Committee for Scotland

"We welcome this recommendation, and ask that the Commissioner goes further to ensure that assessment methods chosen should be selected not only on the basis that they do not have an adverse impact on the success of people who share protected characteristics, but also on the basis that they:

- Advance equality of opportunity between people who share a protected characteristic and those who do not; and*
- Foster good relations between people sharing protected characteristics and those who do not. This is in line with the Public Sector Equality Duty (PSED), which is found in section 149 of the EA 2010. For more detailed information, see our Technical Guidance on the PSED in Scotland."*

The Equality and Human Rights Commission

"Our experience is some assessment methods are used too routinely for a wide range of appointments but test candidates for skills that they would not be required to use once appointed. This can range from being required to do a presentation to having to undertake complex testing online; the results of which are not then used to determine the eventual appointment. This can be very daunting for potential applicants. In this respect, we are supportive of an equality impact assessment being completed on the methods of assessment being considered. Assessment should be carried out in a valid process, it would be enhanced by including the fact that those engaged in assessment roles should be trained and competent to do so in the assessment methodology chosen and in their understanding of EQIA completion before undertaking any such assessment. We are pleased to see commitment to the provision of reasonable adjustments."

The Mental Welfare Commission for Scotland

"Chairs agreed with this recommendation to some extent but noted that consideration needs to be given to where the expertise to undertake Equality Impact assessments will come from."

The NHS Scotland Chairs Group

"The duty to impact assess policies and practices arises from The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. The specific duty in regulation 5 requires listed authorities to

assess the impact of applying a proposed new or revised policy or practice against the needs of the general public sector equality duty (under section 149 of the Equality Act 2010). The wording at clause C5 should be amended to reflect the requirements of the duty accurately. It is important to note that the decision to carry out an equality impact assessment sits with the Scottish Government who will assess, where and to the extent it is necessary to fulfil the public sector equality duty, the impact of applying a proposed or revised application or assessment method.”

The Scottish Government

Conclusion on the Code being more explicit about matching assessment methods to the attributes sought and on reasonable adjustments be offered more proactively

Based on the views received, the Commissioner will include a requirement in the Code that the assessment methods chosen should be selected on the basis of their validity and clear evidence that they are effective and that they do not have an adverse impact on the success of people who share given protected characteristics. The Commissioner has already provided [guidance online](#) on a range of application and assessment methods which panels may refer to.

The Code will make it clear that the decision on conducting equality impact assessments of methods to be undertaken will be one for the Scottish Government to take. The Code will also require evidence to be maintained about decisions taken on assessment methods and the reasons for their selection. Their effectiveness will also require to be monitored. The Code will also require reasonable adjustments to be offered more proactively than is currently the case.

Question 11 – Should issues that the Commissioner has provided guidance on since the 2013 code came into force be included in the Code, guidance or both?

Recommendation 2.11

The Commissioner has concluded that there were clear and cogent arguments made in support of certain issues to be included in the Code itself, particularly by organisations working in the field of equality, and will do so. The Commissioner will also consult the Scottish Government further on the issues of concern to them before making a final determination on which guidance should be codified.

2.11. Respondents were asked to reply to this recommendation with “Yes”, “No” or “Unsure” and to give reasons for their views.

The majority of respondents answered yes to this question, two were unsure and none answered no. Only Changing the Chemistry offered a specific view on which issues should be included in the Code rather than in the guidance:

“Looking at the appendix three in the original consultation we would agree that items which affect whether someone might apply for the role – eg: information about role sharing (c) and deferral of start dates (f) are worth including in the Code. Likewise items relating to applicants’ data eg: the applicant summary (d) and applicant confidentiality (k) would be reasonable to include. We feel that the inclusion of these items into the Code would be a positive step and would not place an undue burden on those involved.”

Conclusion on issues that the Commissioner has provided guidance on since the 2013 Code came into force that should be included in the revised Code

Based on the views received, the Commissioner will transfer into the Code itself the following provisions:

- how role sharing can be accommodated
- conducting the fit and proper person test
- deferral of start dates in certain circumstances such as to accommodate maternity leave
- use of applicant data and applicant confidentiality
- use of recruitment consultants, where they have an actual or perceived conflict of interest
- designation of independent panel members

Questions 12 `a` and `b` – What should the Code say about panel members?

Recommendation 2.12 a

The Commissioner will include a requirement in the Code for panel chairs to be trained in recruitment and selection for chair and member appointments to boards, with that training to specifically cover equality and diversity, before they can participate. Whilst the Commissioner notes that there were a number of respondents who felt that all panel members should be trained, his view is that this would represent a disproportionate requirement, other than in the case of independent panel members, given the important nature of the role that they fulfil. The Code will, however, ensure that training is made available to any other panel member who wishes to receive it.

Recommendation 2.12 b

The Commissioner has decided to provide more clarity on the face of the Code about how independent panel members are to be identified, the provision of terms of reference to them and the minimum standards of support and training that they should be provided with.

2.12. Respondents were asked to reply to these recommendations with “Yes”, “No” or “Unsure” and to give reasons for their views.

On training for panel members (2.12a), nine respondents answered yes and two were unsure. One respondent, who did not wish to be identified said no, but only on the basis that training should be required for all panel members, in line with a high proportion of those who agreed with the recommendation. All responses were generally very supportive of the recommendation and gave reasons for their views.

“All panel members should be trained to ensure they understand the code, unconscious bias, equality & diversity and what they can/can’t do. We will never implement change unless you support the shift of culture and mind set of panels. This has been evidenced as a positive change in NHS Boards recruitment practices through development support. Recruiting to a Board position is not the same as general recruitment. Would strongly advocate support for all panel members – can be done as a blended /online approach with a check in by the panel Chair at the beginning of each round. This would help transparency and enable questions/issues to be flushed out at an early stage –it is not too much to expect of panels.”

Permission to publish name not given

“We agree with this requirement and feel that this can have a positive impact as the Chair will have a strong voice and set the tone for the panel it leads. We have seen and heard of examples of poor practices in public appointments which could be easily addressed through education, increased awareness along with stronger guidance and oversight. However this does make it a significant commitment from the Chair so if the person is independent (which CtC has come across) then they need to be paid to cover the time involved.”

Changing the Chemistry

“This refers to the training of Chairpersons in equality and diversity. All Panel members would benefit from being trained to the same level and content, as each member holds similar responsibility and their evidence and behaviour could be audited or called in to question, if a formal challenge/complaint were to arise. It also allows candidates to be given an equal understanding and potential application of fairness from the panel decision makers on their application / sift or interview. The Code states members should be competent, therefore competence levels should really be developed to the same standard for each member. It also may safeguard the Chair from having to address lack of knowledge/understanding which could be detrimental to the process, from appointment plan onwards.”

The Mental Welfare Commission for Scotland

“If all panel members get to vote/have a say on who is appointed, then all of them should be given full training on equality and diversity in recruitment. If they are not, there is a risk that their views will outweigh those of members who have been through the training and we will be back to square one in terms of equality.”

The Scottish Women’s Convention

“Generally, Chairs agreed that all panel chairs should be properly trained in recruitment. They noted that training should be made available to all panel members, and updated on a regular basis. It was also suggested that it might be disproportionate to require all panel member to be trained. However, there could be a pool of trained individuals who could be drawn up as needed.”

NHS Scotland Board Chairs Group

“In the previous consultation we expressed the view that all members of a recruitment panel should be required to undertake training, including relating to diversity matters. We note the view of the Commissioner about proportionality and that the Code will make training available to any member who wishes to receive it.

It may therefore be appropriate for the Commissioner to consider a responsibility to be introduced, perhaps on the Panel Chair, to assure themselves that the risk of Panel members not possessing the appropriate skills and/or experience is satisfactorily mitigated.”

The Accounts Commission for Scotland

Conclusion on training for panel members

The Commissioner has taken account of the views expressed by several respondents that training for all panel members should be obligatory. He is nevertheless content that training for the panel chair and independent panel member should be sufficient as long as training is open to all other panel members who wish to receive it. In reaching this decision, which the Commissioner considers to be a pragmatic one, he has taken account of the fact that the panel chair will be ultimately responsible for ensuring that all decisions, which take account of panel views, comply with the Code.

2.12.c recommended that the Code should be clearer about the identification of independent panel members and the terms under which they fulfil that role.

All those who responded to this question said yes. Some had observations about the scope for independent panel members to be paid for their time.

“Clarity on the independent member is to be welcomed, what constitutes independence, their role and remuneration is helpful. Concerned that some Independent members are being used in a tokenistic way to represent visible diversity on the panel but not included/treated as full panel members.”

Permission to publish name not given

“We agree with the view that there is value in independent panel members being drawn from a wider spectrum of society. Consideration could be given to the inclusion of ‘service users’ in this. We agree that clarity on their role and training should be provided. Payment of panel members would enable a wider range of people to participate as it takes them away from their day job.”

Changing the Chemistry

The Scottish Government expressed some concerns about how the role of the independent panel member was described in the draft Code and felt that it may rule some individuals out:

“Scottish Ministers appreciate that one of the aims of A5 is around propriety and transparency but are concerned that the way this is currently drawn will be unworkable. The wording that is of concern is “or have any other close connection to the Scottish Government or the public body which might in fact or in the eyes of the public”. This could rule out from selection panels, for example, people whose 3rd sector body receives funding from the Scottish Government, people the Scottish Government and the Ethical Standards Commissioner have jointly trained as Independent Panel Members in order to improve the diversity of panels, people the Scottish Government engages with or has engaged with regularly from other organisations (including, for example, previous officials and contractors of the Ethical Standards Commissioner). This would lose much expertise and different perspectives from people who have or have had ‘a close connection’ of some form, in fact or as perceived, to the Scottish Government or the public body but are still able to exercise independence. It would be preferable to continue to discuss with the Ethical Standards Commissioner potential conflicts of interest in a selection panel and for each case to be judged on its merits in discussion with the Commissioner.”

The Scottish Government

Conclusion on independent panel members

The Commissioner will implement the recommendation given the clear support that there was for it. He will, however, redraft the relevant wording of the Code to ensure that it is not unnecessarily exclusive. The Commissioner notes also that even those who cannot demonstrate independence are not barred from being designated as panel members. The bar would only apply to their designation as *independent* panel members.

Questions 13 `a` and `b` – Should the Commissioner commence audits and report more frequently to the Scottish Parliament on the Scottish Government’s public appointments activities?

Recommendation 2.13 a

The Commissioner has determined that an audit of a proportion of appointment rounds will be a helpful supplement to the oversight already provided. The Commissioner's view is that should be used to identify both good and poor practice with a view to driving improvement. The first of these audits will commence approximately one year after the revised Code comes into force and it will assess the extent to which it is being followed.

Recommendation 2.13 b

The Commissioner will consult the successor subject committee in the next parliamentary session about the form, frequency and content of such reports.

2.13. Respondents were asked to reply to these recommendations with "Yes", "No" or "Unsure" and to give reasons for their views.

In respect of audits, the majority of respondents were in favour and two were unsure. None responded no to the recommendation but the comments did make it clear that the focus of such reviews should be on outcomes. There was also a concern expressed about the timing of the first of such reviews, with the view expressed that a year would not be sufficient for the revised Code to bed in. Although the SPSO did not comment directly on this recommendation, they noted a potential overlap between the Code requirement that panel chairs report on outcomes with any audit work.

"Yes audits will be important. We cannot leave things as they are without reviewing every so often. It is questionable whether one year would be sufficient time to see change so may wish to do the first audit a year and a half to 2 years and then subsequent ones on an annual basis. We don't want to rush Boards into action whilst they feel there is pressure of an audit not far away. However don't have a very strong view on this one and maybe an audit after the first year may actually be okay. Identifying examples of best practice that go beyond what was requested in the code would be a good thing."

Dr Mohammed Ishaq, University of the West of Scotland - School of Business and Creative Industries

"We see the value in independent audits and share the view expressed by some others that this needs to concentrate on outcomes rather than adherence to processes. We support the routine auditing of processes as a means of driving improvement. The real value of this type of activity however depends on a relationship of mutual trust and support. While the regulator's role is one of promoting compliance, the focus of these audits needs to be to provide constructive feedback not 'name and shame'. This consultation has highlighted that the Commissioner and the Scottish Government do not always see eye to eye. While that is to be expected to an extent, it highlights the need for a more supportive working relationship and openness on both sides."

Changing the Chemistry

"SHR welcomes the use of audit or thematic studies to identify and share good practice and improve outcomes."

The Scottish Housing Regulator

"Generally, Chairs supported this recommendation but requested clarity on the audit process and scope."

NHS Scotland Board Chairs Group

"The proposal accords with our support in the previous consultation for proportionate review of such appointment rounds on the grounds of accountability and transparency. It also provides clarity around purpose, as we also suggested."

The Accounts Commission for Scotland

All respondents bar one, who was unsure, were in favour of more transparent reporting to the Standards, Procedures and Public Appointments Committee.

Conclusion on audits and reporting on their outcomes to the Scottish Parliament

The Commissioner's intention is primarily to review those rounds that have not had end to end oversight by PAAs and believes that comparing the panel chairs' self-assessment reports on such rounds with the outcomes achieved will be a valuable activity. The Commissioner will also continue to plan and conduct thematic reviews to assess whether the revised practices adopted under the new Code are having a positive impact on board diversity. Other reviews may look at whether the Code revisions have achieved their additional intended aims of making the process more accessible, less bureaucratic and less time consuming. In deciding which types of review and subsequent report are in the public interest, the Commissioner will consult with the Standards, Procedures and Public Appointments Committee. The Commissioner will publish the results of those reviews and provide them to the Committee to inform its own work plans and areas of focus. These intentions will be summarised in the Code itself under the heading "the Code in Context".

It is intended that the first of these reviews should commence, at the earliest, a year after the revised Code has come into force.

Question 14 – Is the current regulatory model appropriate and, if not, what should replace it?

Recommendation 2.14

The Commissioner notes that few of the respondents overall had a view on the current regulatory model and that, of those that did, most were in favour of the status quo. The Commissioner does have some sympathy with the view that his representatives have a conflict of interest when taking part in decision-making and has therefore already concluded that it is appropriate to review this arrangement. The Commissioner is less persuaded by the Scottish Government's further arguments for principles-based regulation and notes that no reasons were given in support of the two other regulatory models posited by them. The Commissioner has concluded that the current regulatory model is therefore appropriate but that it should in fact be more robust in order to drive improvement by way of more regular and transparent reporting on practices.

2.14. Respondents were asked to reply to this recommendation with "Yes", "No" or "Unsure" and to give reasons for their views.

The majority of respondents were in favour of the current regulatory model. No respondent answered no to this question although three were unsure on the basis that they either did not know enough to comment or, in one case, they were not persuaded that a change to the role of the PAA was appropriate.

"PAAs bring a wealth of experience and knowledge to the process, with significant contributions at the planning and assessment stages. While there is a perceived inherent conflict of interest in the decision making process, the risk is surely no less manageable than that regularly considered by panels in respect of candidates – and for the most part managed and mitigated. Is there any actual evidence to suggest that the risk is not manageable?"

Permission to publish name not given

“This recommendation was seen to be reasonable. It was highlighted that reporting should not just be an act of compliance and that regular transparent reporting should be undertaken.”

NHS Scotland Board Chairs Group

“We are satisfied that the current regulatory model is appropriate. We think that there is a need for an external body to hold Ministers to account in relation to public appointments and to ensure that the processes employed are conducted in a manner that is accessible to all, fair and transparent. We also support the view that the Commissioner’s representatives should be impartial observers and not involved in the decision making process.”

Changing the Chemistry

“I generally agree that the current model for regulation is appropriate but what is required is greater reporting and transparency in relation to various practices. I think this would be sufficient and would instil greater trust and confidence in the approach being taken.”

Dr Mohammed Ishaq, University of the West of Scotland - School of Business and Creative Industries

“We are satisfied that the current regulatory model is appropriate. We think that there is a need for an external body to hold Ministers to account in relation to public appointments and to ensure that the processes employed are conducted in a manner that is accessible to all, fair and transparent. We also support the view that the Commissioner’s representatives should be impartial observers and not involved in the decision making process.”

Changing the Chemistry

The Scottish Government felt that it would be helpful for the Commissioner to set out a policy position on his regulation of appointments.

“It would be helpful if the Commissioner could set out a policy for the scrutiny of public appointments so that Scottish Ministers understand the regulatory strategy and how it will be delivered in practice. The could usefully include a policy on complaints handling which is mentioned at A22. This would be an appropriate addition to any guidance published to complement the new Code.”

The Scottish Government

Conclusion on the current regulatory model

The Commissioner has already set out above some key changes to the Code in relation to where respective responsibilities lie in the appointments process. These concern, for example, the role of his representatives and the role of the panel chair. The Commissioner is content that these changes are in keeping with the views of stakeholders on the recommendations that they were asked to consider. The Commissioner is content that, with these Code changes included, the regulatory model is an appropriate one. In order to address the request of the Scottish Government, the Commissioner will include some wording in the introductory part of the Code that will explain his regulatory strategy and set the Code in its wider context.

Questions 15 `a`, `b` and `c` – Views on other issues that the Code and Guidance should take into account and on the appointments process more generally

Recommendation 2.15 a

The Commissioner concurs with many of the views expressed in response to these questions. It is apparent that many boards feel that they have a more important role to play in planning for succession as well as community engagement to encourage applications and so both of these issues will be included in the revised Code.

Recommendation 2.15 b

There are longstanding and legitimate concerns that the current appointment process and the language that characterises it represent a barrier to people from a range of under-reflected groups and that boards and their impact/effectiveness are poorer for it. The Code will be revised to ensure that how merit is defined and assessed takes these concerns into account.

Recommendation 2.15 c

The Commissioner intends to strengthen the Code in this area, by following OCPA's recommendation about the inclusion of a "candidate care" section in the Code. That section will also specifically address concerns about timescales for the appointments process. The Commissioner notes but disagrees with the Scottish Government's view that these were operational matters that did not belong in the Code. It is apparent that both issues have an impact on board diversity and the pool of qualified and motivated applicants and that improving practices in this area should also. To ensure that there is no dubiety over the importance of the willingness of people to apply for roles and the way in which they are treated when they do, the Commissioner will include a new principle of "Respect" in the Code to that effect. Code provisions will reflect this principle, and also take into account the results of the board member survey that the Commissioner ran on time commitment and remuneration.

2.15. Respondents were asked to reply to these recommendations with "Yes", "No" or "Unsure" and to give reasons for their views.

All respondents who offered a view were in agreement with recommendation 2.15a. The following responses were representative.

"Community involvement is useful to try and seek a representative Board, but it should be noted that a community exists outside the Central belt."

The Mobility and Access Committee for Scotland

"We strongly advocate for more community engagement to encourage applications.

- We need more representation of a variety of lived experiences on boards.*
- The people whose voices we most need to hear are not the ones who will automatically come forward. There needs to be more proactive work trying to identify and support individuals from underrepresented groups to come forward."*

The Scottish Women's Convention

"We welcome a role for Boards in how we plan for succession and engagement. We think recruitment of a more diverse set of Board members should be seen as one part of a body's engagement strategy. The use of advisory committees and other mechanisms can both give views and also engage people who gain an interest and understanding - and may therefore become future applicants for board positions."

The Mental Welfare Commission for Scotland

“SHR supports boards having a role to play in planning for succession as well as community engagement to encourage potential applicants.”

The Scottish Housing Regulator

“Chairs agreed with this recommendation and agreed that boards do have an important role to play in planning for succession, as well as community engagement, to encourage applications.”

NHS Scotland Board Chairs Group

“We would reiterate our response to recommendation 2.5b, that any measure that underlines the importance of boards considering succession planning is welcome. It also accords with our view in the previous consultation in relation to community engagement, that empowering people and communities is a theme that should run through the process.”

The Accounts Commission for Scotland

The Scottish Government went further, by adopting a policy position that succession planning should be devolved to boards themselves.

“In regard to A2, we request that the wording of this be changed. As per A1 and A3, Scottish Ministers are ultimately responsible for an appointment to a board and for determining the period for which an appointment, reappointment or extension to an appointment term is to be made. The additional detail about succession planning is the responsibility of the board chair; guidelines on succession planning would thus sit more happily in Section C, in Diversity by Design.

We suggest the following replacement wording for A2: “Succession planning is led by the board chair, with the support of the Scottish Government sponsor and the knowledge and expertise of the Chief Executive and other executive officers. Plans should take account of the board’s composition, and the public body’s purpose, strategic objectives, and operational context, and reflect those in aims and plans for developing and retaining current board members, and attracting and developing prospective new board members.”

The Scottish Government

Conclusion on the role of boards in succession planning and community engagement

The Commissioner is heartened by the clear support for this recommendation.

He notes that the 2003 Act and the Code are predicated on the responsibilities of the Scottish Ministers, not boards themselves. Entirely devolving responsibility for succession planning to boards on the face of the Code would mean that those provisions would be incapable of enforcement. The Commissioner also cannot see how the Scottish Ministers might make informed decisions about the skills, knowledge, experience and other attributes that a board might need at a given point in time – information vital to deciding how a person specification should be framed – unless they are assured that succession has been planned for. Additionally, the Scottish Ministers are responsible for succession planning for Chair appointments. It is questionable whether it is appropriate for responsibility for planning for succession for such vital roles to rest with boards themselves.

As a consequence, the Code and Guidance on its application will incorporate those suggestions made by the Scottish Ministers and others that allow for boards to take a much greater role in succession planning and community engagement whilst making it clear that the Scottish Ministers remain responsible for the successful implementation of those measures that they are recommending should be taken.

All respondents who provided a view were in agreement about the recommendation that the material used in the appointments process should be more accessible to a wider range of people. Many respondents had very strong views on the importance of this change and about the negative impact of the current materials used on board diversity.

“Borders College is pleased that the commissioner recognises the important role that Boards have to play in the succession planning of Chairs and that the bureaucracy heavy process that individuals have to undertake can be a barrier to recruiting from a more diverse pool of candidates. The language used throughout the process and the application form is very public sector oriented, and the amount and detail of information required is unnecessary. This is likely to deter a number of candidates not used to this public sector approach. As an organisation focussed on delivering skills, the employer and industry perspective is extremely important with regard to our Board membership. It is essential that any potential Chairs or Board Members have the opportunity of interacting with the organisation and Board prior to submitting an application, and that the important dynamic between the Chair, Principal and Board Secretary is recognised. We would suggest that the Principal or a Board Member acts as advisor to the selection panel beyond the consultation meeting.”

Borders College

“I think the process needs to be streamlined. Role and responsibilities required for positions should be clearly set out and the terminology and jargon used should be simplified so as to stimulate interest rather than be off putting”

Dr Mohammed Ishaq, University of the West of Scotland - School of Business and Creative Industries

“We agree with the view that the “language of public sector governance” including the application form and interview methods used, can be a barrier to participation for some groups. Again we suggest stronger guidance from the Public Appointments Team and Panel Chair training, as necessary to improvement in this area. We note the changes made to the definition of Merit in the principles of the revised Code but do not feel that this change on its own addresses the issues raised. Our perception is that beyond meeting the defined criteria, candidates’ understanding of the political landscape, or wider context of the organisation along with public and political credibility, are factors that influence Ministers’ decision making. That is not to say that this is not important, but if it is a desirable or necessary attribute, then it should also be defined at the outset. It is our view that it is not just the Minister who is responsible for defining merit but that this is a joint activity with the Board Chair or Chair of the Nomination Committee. While the Minister should be clear on the desired outcome they are too removed from the organisation on a day to day basis to be able to define this in isolation. Hence our recommendation to include a section on the Board’s role.”

Changing the Chemistry

“This is a very important point and should be at the heart of any overhaul. Work needs to go into building confidence for people from underrepresented groups, and addressing systemic change that makes people feel they are underqualified or do not have the desired ‘qualities’ for the role. Focus on valuing people’s lived experience. Build more networks with grassroots organisations so that they can be called on to recommend people rather than having to rely on people coming forward (as people who self-nominate are more likely to be from certain backgrounds).”

The Scottish Women’s Convention

“Chairs agreed with this recommendation and noted it was an important change. They anticipate that the Code will be written in plain English and accessible to all members of the public.”

NHS Scotland Board Chairs Group

Conclusion on the language used in appointment materials

The Commissioner is persuaded that this recommendation in particular has very strong support. The Code will require all materials provided to applicants and used in the appointments process to be drafted in clear English. He has already concluded earlier in this paper that the Code should also be drafted in clear English.

All respondents who provided a view were in agreement about the recommendation that there should be a dedicated candidate care section in the Code, underpinned by a new principle of “Respect”. Respondents were also in favour of tracking timescales for the appointments process.

The introduction of a new candidate care section represents a significant departure from the current Code and those who supported it had very strong views in favour of the change. Several also mentioned that time commitment and remuneration continued to be barriers.

“Board membership has changed over the decades from ‘who you know’, who you vote for or which armed service you were an officer in, so it is important to continue to have open and fair recruitment with care for the candidates as a central feature.”

The Mobility and Access Committee for Scotland

“We need to support unsuccessful candidates better so that they are encouraged to apply again or understand what development is required. The length of the process is disrespectful to candidates and off putting. Should compliance standards be applied on this. Unacceptable delays need to be addressed. Need to understand why there is so much variability in practice. Remuneration, time commitment and lack of pension rights have all been highlighted as key barriers”

Permission to publish name not given

“The procrastination of Scottish Government in the recruitment of a new Chair of Borders College, could have put the organisation at risk if we didn’t have such a diligent, conscientious and very experienced vice chair who will have been Interim Chair for a minimum of 22 months by the time a Chair is potentially appointed. We understand the capacity challenge that Scottish Government has had during the COVID pandemic, however there has been little or no communication with the acting chair to clarify that they were able and willing to continue in the role. The support necessary to carry out this role, during what has been a very challenging time for the College too, has been disappointing and indicates that Scottish Government has no appreciation of the responsibility that the Interim Chair found themselves taking on. We understand the important role that Scottish Government has in ensuring that the process of public appointments is fair and transparent, but the lack of feedback from Scottish Government and the minimal engagement of the current Board makes it very difficult to ensure that the recruiting organisation is playing a significant role in attracting candidates. The Code should be clear on remuneration and remove the current disparities, or at least explain why the disparities exist. Reflection on the quality and suitability of candidates for remunerated and non-remunerated posts would be useful.”

Borders College

“We believe that the provision of feedback to unsuccessful candidates is appropriate and important; in helping to improve future applications and diversity on boards. We agree that this needs to be constructive, tailored and meaningful, for this to be the case. Simply saying “other candidates better met the profile” or “demonstrated the competencies more effectively” is not enough. This feedback needs to be drawn from the view of the Panel as a whole, not just a single member or the Panel Chair. Nor should it be just a standard letter written by the Public Appointments Team. We appreciate that this does require some additional thought and input from panel members but it is fundamental good practice from a recruitment point of view, to be able to demonstrate why someone was included or not, on a short list. CtC can state from the experience of our members that helpful or critical feedback has a big impact on their likelihood of applying again for public sector board roles. We suggest that the applicant summary as set out in D7 could provide the basis

for individual candidate feedback and with this requirement in place, a better standard of feedback could be provided. We therefore propose the addition of a third point in the list under D7 to “provide detailed feedback to any candidate who requests it”.

Changing the Chemistry

“We agree with the Commissioner that timescale is a matter for the code. Timescales can definitely have an impact on people’s likelihood of applying in the first place or dropping out of the process. This will have a negative effect on diversity. People may be put off from applying if there is going to be travel involved in the application process. Remuneration is vital in ensuring that the process is accessible to all, but some of this needs to be pre-emptive because there may be some people who do not have the money upfront to afford the costs.

Similarly, people should not be excluded from the process if they do not have access to technology (e.g. if a Zoom interview will be required).

In the same way political candidates can get financial support during their campaign, there could be grants to support people from underrepresented groups applying for other positions in public life. In the way that we are moving to more flexible and hybrid ways of working after the lockdown, more could be done to make participation on boards more accessible to those with caring responsibilities etc.”

The Scottish Women’s Convention

“This recommendation was welcomed. The candidate care section was considered a positive addition. Time commitment and remuneration issues were highlighted as areas of concern that need to be addressed.”

NHS Scotland Board Chairs Group

“We welcome the inclusion of the proposed “respect” principle within the Code and hope that this will underpin work with candidates who are not successful initially but may be encouraged to reapply.”

The Standards, Procedures and Public Appointments Committee

The Scottish Government made a case for those timescales not to be enforceable under the Code.

“The Scottish Ministers are committed to improving the process and the time taken to appoint. They are of the view that setting targets for all appointment activity is not an appropriate addition to the Code or the guidance. The operational delivery of the public appointments process is the responsibility of the Scottish Government on behalf of the Scottish Ministers. Officials will continue to make improvements to the process and these will meet the principles of the Code of Practice.

In practice, appointment activity is variable and driven by a number of factors including Ministerial preferences, the needs of the boards, the availability of the selection panel and the selection methods chosen. The public appointments process is administered by a central team who work to ensure that the appointments are efficient, effective and meets the principles and requirements of the Code. Officials aim to deliver all appointment rounds within 20 weeks (from the planning meeting to ministerial decision). In addition, they already monitor the time taken between discrete stages of the public appointments process, these are as follows:

<i>From:</i>	<i>To:</i>
<i>Closing date for applications</i>	<i>Date when all applicants are informed about the final appointment decision</i>
<i>Date of interviews</i>	<i>Date when all applicants are informed about the final appointment decision</i>
<i>Selection panel report</i>	<i>Ministerial decision</i>

<i>Date on which the round is planned</i>	<i>Date on which the minister makes their appointment decision (overall time for purposes of target)</i>
<i>Date on which the round is planned</i>	<i>Date on which applicants are informed of the appointment decision</i>

The Scottish Government provides this information to the Commissioner on an annual basis, which is published in the Commissioner’s Annual Report. This would seem sufficient and proportionate in terms of maintaining clarity about the responsibilities of Scottish Ministers and provides transparency of the process while maintaining the operational flexibility that is required by the Scottish Government and public body boards.”

Conclusion on the candidate care section, the principle of respect and time taken for appointment activity

The Commissioner is content that there is significant support for a candidate care section in the Code. This in turn has ramifications for the quality of feedback that should be provided and the time taken for the appointments process.

He will include a candidate care section and this will have more to say about the quality of feedback. He will continue to use indicative as opposed to strict timescales for appointment rounds. Sufficient notice will however have to be given in respect of reappointments and a failure to do so will represent non-compliance.

The Commissioner notes that time commitment and remuneration continue to be considered to be barriers to diversity. The Scottish Government’s response to the Commissioner’s report on these issues disagreed. The Commissioner will continue to monitor this situation although he currently views the terms and conditions of those appointed to be a matter for the Scottish Ministers. He will therefore suggest that the Standards, Procedures and Public Appointments Committee take more of an interest in the impact of these issues on boards and on the willingness of people to apply.

4.0 Views on the draft revised Code

4.1 The final question in the consultation paper allowed respondents to share their views on the draft revised Code. Respondents were invited to submit any comments, questions or recommendations for change.

Below are a number of responses that did not relate directly to the consultation questions asked but which are nevertheless relevant to the prospective Code revisions. Where the Commissioner considers that the recommendations set out above already address the views received from the respondents to this part of the consultation, those views have not been included below.

The Commissioner's response to each of these additional recommendations from respondents is included below and immediately following them.

"The revised code is a very comprehensive document with good, plain English explanations of all aspects of the recruitment of Board members. I have the following comments: -A7. The role of chair needs to be expanded and to include the roles of a panel member as well as the additional duties of a chair. It also needs to state: chair the panel appropriately and comply with the requirements of this code. -C3. Need to state that all documents are available in alternative formats, eg Braille."

The Mobility and Access Committee for Scotland

The Commissioner will provide greater clarity on the roles of panel members, including the panel chair, on the face of the Code.

A reference to alternative formats is already included in the Code's appendix which concerns materials to be provided.

"However, as above, the revised draft Code is missing a clear reference to the Ministerial obligations under the Public Sector Equality Duty (PSED) and the Fairer Scotland Duty (FSD), and reference to the need for the intersection of protected characteristics to be taken into account. Furthermore, as per the PSED, assessment methods chosen should be selected not only on the basis that they do not have an adverse impact on the success of people who share protected characteristics, but also on the basis that they:

- Advance equality of opportunity between people who share a protected characteristic and those who do not; and*
- Foster good relations between people sharing protected characteristics and those who do not.*

We would suggest that the wording in section B4 and E1 is considered carefully to ensure that it does not inadvertently lead to positive discrimination, which is unlawful. The Code should directly refer to the positive action provisions in the EHRC statutory Code of Practice on Employment and the Scottish Government guidance on the Gender Representation on Public Boards (Scotland) Act 2018."

The Equality and Human Rights Commission

The Commissioner will refer to the other relevant statutory obligations placed on the Scottish Ministers, such as the PSED, in the guidance rather than on the face of the Code itself.

The Commissioner will revise the wording of the Code and any related guidance to clarify that positive discrimination is only possible in certain circumstances.

“1. With reference to recruitment, the broad recruitment process can sometimes appear overwhelming and intimidating for people who may not be accustomed to applying for Non-Executive roles. Career Non-Executives are very experienced and practised at this process.

2. MERIT – This includes: ‘Only persons judged best able to meet the requirements of the post will be appointed.’ Section 4 of the Gender Representation on Public Boards (Scotland) Act 2018 discusses what to do if there is no particular candidate is best qualified for appointment and it notes that in these circumstances the appointing person is then to identify equally qualified candidates therefore the language in the Code needs to be consistent with the requirements of the Act. This issue also applies to Section E ‘The most able people appointed.’

3. ‘The public appointments process will be outcome focused and applicant focused.’ It was noted that it would be helpful to explain what the outcomes focus would be exactly and that this principle does not have a heading like the others.

4. A7 (iii) – It was suggested that this refers to ‘assurance’ rather than ‘reassurance’ for consistency with governance language elsewhere.

5. A9 – It was noted the Code should state who will appoint the selection panel members.

6. A14 – A15 – It was felt that these sections could be open to interpretation as it implies that at any stage of the recruitment process that an applicant may be deemed unsuitable simply because he or she does not meet the criteria and would consequently not be short-listed. It was queried whether all unsuccessful applicants are provided an opportunity to respond where they are not short-listed, or only in the instances that relate to an applicants’ suitability or where their appointment may negatively affect the credibility of the process or a public body.

7. B1 – It was noted that the Gender Representation Act should be specifically mentioned in this section as the Scottish Ministers have to take into account the requirements of the Gender Representation Act when considering appointment activity.

8. B1 – It was suggested that a reference to the ‘Duty of Best Value in Public Services’ may be more appropriate and comprehensive than ‘economically, efficiently and effectively’. Best value in public services: guidance for accountable officers - gov.scot (www.gov.scot)

9. B3 (and elsewhere) – It should be considered that NHS Boards have vice-Chairs rather than ‘deputy Chairs’ and that may also be that case for other public bodies covered by this Code.

10. C4 – It was advised that the public bodies support the recruitment process through local communication plans. The selection panel does not directly approve all locally-produced information that is available to applicants.

11. C5 – Some clarity was requested as to the meaning of ‘appropriate predictive, content and face validity’.

12. E2 – It was suggested that ‘wish to’ could be removed from the sentence ‘The appointing minister may wish to meet the recommended applicants before making their final decision.’”

NHS Scotland Board Chairs Group

1. The Commissioner agrees with this assessment. The revised Code’s provisions if properly implemented should address this concern.

2. The Commissioner will revise the Code to reflect the provisions of the Act but will not refer to the Act itself on the face of the Code as he is unable to enforce its provisions.

3. to 4. The Commissioner will revise the Code to address these comments.

5. This is already set out in the Code.

6. The Commissioner will revise the Code to address these comments.

7. See response to point 2.

8. The Commissioner will consider this but may not include it as there is a lot to unpack in the Duty and hopes that the Code's provisions will be easily understood by those not familiar with public sector terminology.

9. and 10. The Commissioner will revise the Code and guidance to address these comments. Panels can delegate activities such as community engagement plans.

11. These terms are all explained in detail in the Commissioner's [guidance on assessment methods](#). The Commissioner will use this in the guidance on application of the Code to clarify what is required.

"In practice, many chairs and panels only see diversity as just relating to gender, as it is the most obvious and visible characteristic, and seen by many people as 'politically correct' to appoint women to boards. This is in fact missing the point of true diversity. The Code should indicate that 'equal' consideration of positive action should be taken in respect of all under represented characteristics on a board, and a record maintained of this."

Permission to publish name not given

The Commissioner will make the requested changes to the Code and/or guidance as appropriate. The changes will have to take account of the obligations placed on the Scottish Ministers by both the Equality Act 2010 and the Gender Representation on Public Boards (Scotland) Act 2018.

"While the Committee appreciates that the Code of Practice cannot be prescriptive about arrangements for the support and development of Board Members, it welcomes the range of induction activities which are in place.

The Committee would welcome the inclusion, within the Code, of a requirement to gather board members' feedback on their induction and training. We would also wish to see the Code explicitly address the fact that reappointment should give the opportunity for board members to show appropriate skills, knowledge and experience."

Standards, Procedures and Public Appointments Committee

The Commissioner will include these requirements on the face of the Code.

"While we heard that you have no concerns regarding this issue, the Committee is concerned that the phenomenon of a small number of individuals moving from board to board may mitigate against diversity and discourage new entrants to the pool of active board members by giving the impression of a "closed shop". We would encourage provision in the Code for a requirement on the Scottish Government to monitor and evaluate this issue as part of their monitoring of appointments."

The Commissioner will include this requirement on the face of the Code. It will have to take account of the Scottish Government's current records management policy and procedures as they apply to the retention of this information.

"A glossary to define key terms would be a welcome addition to the draft Code to help ensure a shared understanding of the terms used."

The Scottish Government

The Commissioner will include this in the guidance.

"The principles [of the Code as redrafted] outlined here are broadly welcomed. The Scottish Ministers agree that all public appointments should be made on merit and that the process used is open, fair and impartial. The principle of Accountability could be more focussed to reflect the Commissioner's role in statute."

We request that the principle of Equality, Diversity and Inclusion be reworded to align better with the requirements of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. We suggest the following for this principle: "The public appointments process must be conducted in a way that ensures equality of opportunity and that attracts a strong and diverse field of suitable candidates."

The Scottish Government

Given that the Code, according to the 2003 Act, concerns the appointment practices of the Scottish Ministers and not the Commissioner, he is content with the principle of Accountability. He will nevertheless include more on his role and that of the PAAs in the Code and in order to provide greater clarity.

The redrafted principle of Equality, Diversity and Inclusion takes account of section 2(9)(b): of the 2003 Act:

*(9) The Commissioner is to exercise the Commissioner's functions with a view to ensuring that—
(a) appointments, and recommendations for appointment, to the specified authorities are made fairly and openly; and
(b) so far as reasonably practicable, all categories of person are afforded an opportunity to be considered for appointment, and recommendation for appointment, to the specified authorities.*

As such, the Commissioner is content that the redrafted principle is compatible with the provisions of the Act.

"A6 has a reference to requiring of Scottish Ministers that they appoint candidates at the conclusion of a round. This should be deleted since Ministers should be free not to appoint, also."

The Scottish Government

The Commissioner acknowledges that the Scottish Ministers are under no obligation to appoint at the conclusion of an appointment round and the Code will be revised reflect this.

"A10 has a reference to 'an official moving to other responsibilities'. Should this say 'selection panel member'?"

The Commissioner will revise this requirement to take account of the question asked.

“[We refer you to B4 of the Code as currently drafted]: When planning a new appointment, the Scottish Ministers will communicate to the selection panel their desired outcome at the conclusion of the appointment exercise in terms of the attributes and diversity sought to meet the needs of the board. This is the definition of “Merit” for the purposes of the appointment being made.

The draft Code introduces the word ‘attribute’ which refers to a characteristic or quality that a person has. It is important that the code reflects that an appointments process requires criteria for assessment and that those criteria should be based on skills, knowledge and experience. Introducing an attribute based on a protected characteristic and including this as part of the definition of merit for the appointment would risk unlawful practice. References elsewhere in the Code to attributes should be replaced with ‘criteria’ or ‘merit’, as appropriate.”

The Scottish Government

The Commissioner will revise the wording of the Code to include key attributes such as skills, knowledge, experience (including lived experience), values etc. and also provide an explanation for the term attribute in the guidance. He will also provide an explanation of the different dimensions of diversity in the introduction to the Code. In order to allow maximum flexibility now and in the future, the word attribute will continue to be used. It will be the responsibility of the Scottish Government to ensure that it complies with the relevant legislation and not discriminate unlawfully.

“The wording used at C1 iv. suggests that positive action will always be relevant. The wording should be amended to reflect that positive action measures can only be taken in limited circumstances. In order to rely on the positive action, the Scottish Ministers must ‘reasonably think’ that people with a protected characteristic suffer a disadvantage connected to that characteristic, or have needs that are different from the needs of persons who do not share that characteristic, or have a disproportionately low participation rate in public appointments.

Not all appointment rounds will meet the conditions required to use positive action. It would be helpful to ensure the wording at C1.iv. references the legislative requirements and reflects that the decision to use positive action will depend on the circumstances. A reference to the relevant provisions of the Equality Act 2010 and the Gender Representation on Public Boards (Scotland) Act 2018 could also be added here to direct the reader to more detailed information.”

The Scottish Government

The Commissioner will revise the wording of the Code to reflect the fact that positive action is not obligatory but that when the conditions for the use of such action are satisfied, it should be considered.

“The final phrase of C3 is highly subjective in respect of finding it comparatively easy to submit applications. We would suggest that this be deleted. The overall principle of affording equality of opportunity to apply suffices.”

The Commissioner is content with this wording given that it reflects a widely held view that the process is not as accessible as it should be. The Commissioner acknowledges that the term is subjective and will therefore include a question in applicant surveys in future to track how easy

applicants found it to submit applications. The Commissioner will also consider surveying the public on this issue, as opposed to applicants who are already `in the system`.

[In response to draft Code provision C5] *“Application and assessment methods will not present a barrier to people currently under-reflected on boards and will have appropriate predictive, content and face validity. They will enable and encourage people to describe how they meet the requirements of the role. Where a class of new application and/or assessment methods are to be introduced, they must first undergo an equality impact assessment to ensure that they meet these requirements.”*

“The duty to impact assess policies and practices arises from The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 . The specific duty in regulation 5 requires listed authorities to assess the impact of applying a proposed new or revised policy or practice against the needs of the general public sector equality duty (under section 149 of the Equality Act 2010). The wording at clause C5 should be amended to reflect the requirements of the duty accurately. It is important to note that the decision to carry out an equality impact assessment sits with the Scottish Government who will assess, where and to the extent it is necessary to fulfil the public sector equality duty, the impact of applying a proposed or revised application or assessment method.”

The Scottish Government

The Commissioner will revise the wording of the Code to provide the Scottish Ministers with greater flexibility in this area. There will continue to be a presumption that such measures will be taken when the circumstances determine that revised practices are having an impact on the diversity of applicants and appointees.

[In response to draft Code provision E1] *“The applicant summary will be the basis of the appointing minister’s appointment decision. Whilst the minister’s decision will be based on an applicant’s merit in relation to the requirements of the role it may also be based on information considered when determining whether the applicant is a fit and proper person for the appointment. The appointing minister may also select on the basis of currently under-reflected protected characteristics where a choice of most able applicants has been presented. New requirements must not be introduced.”*

“We note that the draft Code uses the phrase ‘under reflection’ to refer to people with protected characteristics being under represented on public body boards. The Scottish Government uses ‘under-represented’ which is consistent with language used in the Gender Representation on Public Boards (Scotland) Act 2018.”

“In terms of appointing on the basis of protected characteristics, the circumstances in which this is permitted are very narrowly drawn in the relevant legislation. This clause would therefore benefit from greater specificity about the legislative basis and should contain appropriate references to section 159 of the Equality Act 2010 and sections 3 and 4 of the Gender Representation on Public Boards (Scotland) Act 2018.”

The Commissioner has adopted a policy position on appropriate wording and has previously communicated this to the Scottish Government. He will continue to use the term under-reflection on the basis that individuals who share certain protected characteristics do not “represent” the people who share those characteristics once appointed. Giving that impression contributes to tokenism in the Commissioner’s view. The Commissioner will include an explanation for his stance in the glossary. As set out earlier in this paper, the Commissioner will refer in the guidance to the applicable legislative provisions as opposed to on the face of the Code itself.

Appendix One – Organisations Invited to respond to consultation

Statutory consultees

- The Scottish Parliament (Standards, Procedures and Public Appointments Committee)
- The Scottish Ministers (The Cabinet Secretary for Finance and the Permanent Secretary of the Scottish Government)

Regulated public bodies

- Aberdeen and Aberdeenshire Regional College
- the Accounts Commission for Scotland
- Architecture and Design Scotland
- Ayrshire and Arran NHS
- Ayrshire Regional College
- the Bord na Gaidhlig
- Borders NHS
- Borders Regional College
- the Cairngorms National Park Authority
- Caledonian Maritime Assets Ltd
- the Care Inspectorate
- Forth Valley College
- Children's Hearings Scotland
- NHS National Services Scotland
- Community Justice Scotland
- Creative Scotland
- the Crofting Commission
- Crown Estate Scotland
- David MacBrayne Ltd
- Dumfries and Galloway NHS
- Dumfries & Galloway Regional College
- Dundee and Angus Regional College
- Edinburgh Regional College
- Fife NHS
- Fife Regional College
- Food Standards Scotland
- Forth Valley NHS
- the Regional Board for Glasgow Colleges
- Grampian NHS
- Greater Glasgow and Clyde NHS
- Healthcare Improvement Scotland
- Highland NHS
- Highlands and Islands Airports Ltd
- Highlands and Islands Enterprise
- Historic Environment Scotland
- the Independent Living Fund
- the Judicial Appointments Board for Scotland
- Lanarkshire NHS
- the Regional Board for Lanarkshire Colleges
- the Local Government Boundary Commission for Scotland
- Loch Lomond and the Trossachs National Park Authority

- Lothian NHS
- the Mental Welfare Commission for Scotland
- the Mobility and Access Committee for Scotland
- the National Confidential Forum
- the National Galleries of Scotland
- the National Library of Scotland
- the National Museums of Scotland
- the Golden Jubilee Foundation Board
- NHS 24
- NHS Education for Scotland
- the Office of the Scottish Charity Regulator
- Orkney NHS
- the Parole Board for Scotland
- the Poverty and Inequality Commission
- Public Health Scotland
- Quality Meat Scotland
- Revenue Scotland
- the Risk Management Authority
- the Royal Botanic Garden Edinburgh
- the Schools Closure Review Panel
- the Scottish Agricultural Wages Board
- the Scottish Ambulance Service
- the Scottish Children's Reporter Administration
- the Scottish Commission on Social Security
- the Scottish Criminal Cases Review Commission
- Scottish Enterprise
- the Scottish Environment Protection Agency
- the Scottish Fire and Rescue Service
- the Scottish Fiscal Commission
- the Scottish Further & Higher Education Funding Council
- the Scottish Futures Trust
- the Scottish Housing Regulator
- the Scottish Land Commission
- the Scottish Law Commission
- the Scottish Legal Aid Board
- the Scottish Legal Complaints Commission
- NatureScot (Scottish Natural Heritage)
- the Scottish Police Authority
- the Scottish Qualifications Authority
- the Scottish Social Services Council
- Scottish Water
- Shetland NHS
- Skills Development Scotland
- South of Scotland Enterprise
- sportscotland
- the State Hospitals Board for Scotland
- Tayside NHS
- VisitScotland
- the Water Industry Commission for Scotland
- West Lothian Regional College
- West Regional College
- Western Isles NHS

Organisations and individuals working in the field of equality and diversity

- Inclusion Scotland
- the Equality and Human Rights Commission Scotland
- CEMVO
- Age Scotland
- the Scottish Women's Convention
- MECOPP
- Changing the Chemistry
- Stonewall Scotland
- the Scottish Youth Parliament
- BEMIS
- Women on Boards
- the Equality Network
- Disability Equality Scotland
- the Coalition for Racial Equality and Rights
- Neish Training
- Young Scot
- LGBT Youth Scotland
- EQUATE Scotland
- the Glasgow Centre for Inclusive Living
- VOX Scotland
- Youth Scotland
- Engender
- the First Minister's National Advisory Council on Women and Girls
- Close the Gap
- the University of the West of Scotland
- Heriot-Watt University (research fellows)
- PATH Scotland
- the West of Scotland Regional Equality Council
- Central Scotland Regional Equality Council
- Edinburgh and Lothians Regional Equality Council

Other organisations and individuals with an interest in public appointments

- Public Appointments Advisers
- the Scottish Public Services Ombudsman
- Scottish Commission for Human Rights
- Audit Scotland
- National Library of Scotland
- Commissioner for Public Appointments in Northern Ireland
- Commissioner for Public Appointments
- Committee on Standards in Public Life
- COSLA
- STUC
- SCVO
- Scottish Chambers of Commerce
- Institute of Directors
- ICAS
- the Law Society of Scotland
- CIPFA