

Ethical Standards Commissioner

CONSULTATION DOCUMENT

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

06 August 2020

Contents

Respondent information.....	3
Issues on which Views are Invited	5
Equality and Diversity	5
Thematic Reviews of the Code’s Operation and Diversity Delivers Progress.....	8
Pragmatic, Proportionate and Public Interest Focused	10
Additional Issues that Code Revisions Could Address	11
Responses	19

Laid before the Scottish Parliament on 6 August 2020 in accordance with section 2(4) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.
Reference CES/2020/03.

This document is available in alternative formats on request by telephoning 0300 011 0550 or by e-mailing i.bruce@ethicalstandards.org.uk.

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

Respondent information

This consultation paper invites comments on the existing Code and, in particular, asks those with a role or otherwise having an interest in the public appointments process whether the Code is operating as effectively as possible or whether they consider any improvements should be made to the Code. This paper should be read in conjunction with the main consultation document, available to download from our website:

<https://www.ethicalstandards.org.uk/publication/consultation-document-prospective-code-revisions>

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

Please complete the details below. This will help ensure we handle your response appropriately. For information about how we process data we collect, including how we process personal data, please see our privacy policy at www.ethicalstandards.org.uk/privacy-policy.

Name: Office of the Commissioner for Public Appointments (OCPA) on behalf of the Commissioner for Public Appointments (UK), Rt Hon Peter Riddell	
Address: 1 Horse Guards Road, London SW1A 2HQ publicappointments@csc.gov.uk	
1. Are you responding as (please tick appropriate box):	
1a. An individual (go to 2a/b, 3)?	
1b. On behalf of a group or organisation (go to 2c/d, 3)?	X
2. Individuals:	
2a. Do you agree to your response being made public (on the Commissioner’s website or otherwise published) (please tick one box)?	
Yes (go to 2b below)	

No	
2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick one box):	
Yes, make my response and name available	
Yes, make my response available, but not my name	
On behalf of groups or organisations:	
2c. Do you agree to your response being made public (on the Commissioner's website or otherwise published) (please tick one box)?	
Yes (go to 2d below)	X
No	
2d. Your organisation's name as a respondent will be made available to the public (on the Commissioner's website or otherwise published) unless you request otherwise. Are you content for your response to be made available (please tick one box)?	
Yes, make my response and organisation's name available	X
Yes, make my response available, but not my organisation's name	
Further contact	
3a. We may wish to contact you again in the future to clarify comments you make.	
Are you content for us to do so (please tick one box)?	
Yes	X
No	
3b. We may wish to contact you again in the future for consultation or research purposes. Are you content for us to do so (please tick one box)?	
Yes	X
No	

Issues on which Views are Invited

Equality and Diversity

Q1 – Should the Code have clear and specific provisions about the measures that the Scottish Ministers should adopt when planning to appoint new members in respect of diversity and should diversity be expanded to include other factors such as household income, sector worked in and skills, knowledge and experience?

Evidence on the positive impact of diversity of thought, background, experience for boards - in both the public and private sector, in the UK and other countries - has become clearer and firmer in recent years. Setting out specific provisions in the Code could help to produce improvements in diversity performance, but there are also risks in writing such measures into the Code.

First, evidence about the impact of particular interventions can change (as the recent debate on unconscious bias training has highlighted), so the Code could require regular revision as the evidence base changes. A standard set of measures may suit some recruitment campaigns more than others, whilst others do not benefit. It may also make initiatives appear prescriptive rather than helping to foster a continuing system of cultural change ('the way we do things here'). In the UK and Welsh Government, measures are outlined in respective diversity action plans, and the principles within the Governance Code for Public Appointments - owned by HM Government, rather than the Commissioner - which support the delivery of the targets.

The Governance Code does this by setting the overall direction: boards must reflect the society in which they serve and ministers must be presented with diverse fields of candidates who all have been found to have the requisite skills by a panel ('found appointable'). Its most detailed sections on diversity are not about actions, but on information provided to ministers and candidates. It is specific on the information that must be provided to ministers on the field of candidate at every stage. Departments are asked to advertise widely, to remove language in advertisements which might deter or discourage candidates, to use a wide range of networks and to prioritise ability over experience. Crucially, as in Scotland, the Code does not specify more specialist recruitment methods, such as equal merit as a tie break, anonymised applications, or novel ways of assessing merit. This does not mean these things do not, or should not, happen. Instead, UK Government Departments and the Welsh Government are able to use the Code to support particular targeted initiatives that are right for them.

It is OCPA's view that in England and Wales, it is not necessarily the lack of specific provisions in the Code that has prevented or stalled quicker progress on diversity of public appointees. It is the Commissioner's view that the key driver of change is political will.

The most recent version of the UK Government's Diversity Action Plan, including targets for women and ethnic minorities, was published in June 2019 and the Welsh Government's in February 2020. Notably, they did so without requiring a nudge from OCPA. Whether these strategies have been sufficient for the embedding of diversity actions into appointment processes is difficult to judge, not least because of the political upheaval and ministerial changes over the past 18 months. A general election, several ministerial reshuffles and now a pandemic, have not surprisingly diverted ministers' time and energy away from appointments; the volume of appointments and reappointments made in

2019-20 and, one can assume in 2020-21, has fallen significantly. The Cabinet Office had four ministers responsible for appointments in a six month period from the 2019 general election to summer 2020..

This political turmoil has sapped the energy from diversity initiatives. Government plans to increase diversity are widely accepted, and OCPA has had many conversations with officials, across the piece, about the various initiatives they are trying (outreach events, social media advertising, liaising with networks and stakeholders, talent development, etc). One department has also used equal merit in a recruitment campaign with great success. But all 22 departments are different, and there is no standard approach. Very few of the initiatives specified in the UK Government plan have been achieved in the timelines set out when it was published in July 2019.

Diversity of appointees, as in Scotland, has increased significantly over the last ten years in terms of gender, less so for ethnic minorities, and plateaued for those with disabilities. (The big rise in the number of women appointed during the 2010-15 period reflected a strong political drive from ministers in the Cabinet Office, and the gains have been consolidated and built upon since 2015). This underlines the limited power both of a Code and of robust and well-meaning Action Plans without political will and leadership to bring the intentions to life.

There are also practical problems that hamper the efforts to implement specific measures. Public appointments teams, in their self-assessment of their performance (which forms part of OCPA's annual audit reports), note that they are often under-resourced, under-appreciated and, increasingly, working on a wide range of appointments, which sit outside of the regulated public appointments. OCPA's experience is that turnover in teams is high and skills are understandably lost.

Another problem is cultural: the perceived 'risk' of appointing talented candidates who haven't operated at a senior level before. In England, NHS Improvement began its Next director and Aspirant Chair programmes to train diverse 'near miss' candidates and new NEDs in governance skills. This was intended to help these candidates to become 'board and chair' ready. OCPA finds that NHSI is more active in talent acquisition and development than any other department. Nonetheless, NHS Trusts still face criticism for a lack of diversity in their boards. Evidence also suggests that recruiting in bulk (two or more appointments from the same round) increases the chance that a candidate from an underrepresented group will be chosen, while when there is only one slot, more conventional, and less diverse, choices are made. OCPA's data for 2019-20 supports this evidence base: when chairs of public bodies are recruited, as a single appointment, men still obtain over 60 per cent of those posts, and white people 95 per cent. OCPA finds that leaders are still seeing risk in 'different' candidates instead of seeing the risk in appointing the same, familiar types of people to lead organisations.

On the question of broader definitions of diversity, OCPA's diversity monitoring reflects the protected characteristics set out in the Equality Act, as well as other social factors such as the sector where applicants have worked, the region where they live and the number of other appointments they hold. OCPA would support the Scottish Commissioner in similarly enhancing data collection to capture the full width of diversity as it sees fit.

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

We have addressed this in response to Q1 above. Further, we note that the 2018 Gender Act suggests that positive action should be factored into all recruitment rounds. As primary legislation, this approach could reasonably be considered a 'must do' whilst other recruitment techniques could be left to the Commissioner's or departments' discretion. We think the Scottish Commissioner is

best placed to oversee the use of equal merit provision, and that this may be done in consultation with other regulators in the equalities and human rights area.

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

Answered in Q1 and Q2.

Q4 – Should the Code include more prescriptive requirements to ensure that lessons are learned on an ongoing basis and that decisions taken by panels are always informed by evidence?

Though not party to the detail of what lessons may have or not have been learned, it appears to OCPA that the guidance from the Scottish Commissioner on learning lessons has a statutory basis. It is regrettable that this has not 'been enough' to drive the improvements that the Scottish Commissioner would like to see. The question of whether to enforce this within the Code is best left to the Scottish Commissioner. However, certainty of a process - how candidates will experience the recruitment, how easy it becomes for government consistently to do the right thing - can be supported by a Code that sets out basic guidelines about how things should be done. OCPA suggests that both approaches - a commitment to capturing and sharing best practice, as the Statutory Guidance does now, and clear measures in the Code, which the Commissioner can police - should ensure that lessons are learned. As above, both documents must be supported by clear political will.

Q5 – If so, what requirements should be included?

N/A

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

Answered in Q4

Q7 – Should the Code make reference to other, central activities such as nationwide, regional or characteristic-specific positive action measures that the Scottish Ministers should be engaging in to improve on board diversity?

OCPA would suggest being guided by the evidence base about which interventions to pursue, but again, would caution that reference within the Code risks inflexibility and the Code becoming inadvertently out of date.

Q8 – If so, what should those be?

Actions that stem from legislation and established elsewhere (for example, in UK civil service recruitment) would be a good place to start, if specific provisions were to be included.

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

Addressed in Q7 and Q8

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

OCPA notes the Diversity Delivers strategy was published in 2008 and the long term actions only stretched to 2014. This consultation refers to the recent BLM and Me Too movements; the debate about diversity and inclusion has moved on and the evidence base for specific interventions has too. OCPA would strongly support a new Diversity Delivers strategy and a commitment to its continuing renewal and refreshment.

Q11 – If so, what specifically should be updated/refreshed in the strategy?

OCPA notes that this consultation appears to highlight an impasse whereby the Scottish Commissioner is frustrated at the lack of progress by the Scottish Government, and there are differing views over the roles of the Government and the Commissioner in the diversity and inclusion agenda. Any new strategy could therefore clarify the respective responsibilities of each partner, and also reaffirm the commitment by the Scottish Government to increasing diversity in public appointments. OCPA notes that the respective 2019 and 2020 diversity strategies of the UK and Welsh Governments have offered an opportunity for political leadership to be reaffirmed and demonstrated.

A new strategy would enable some of the issues raised in this consultation to be discussed fully and a roadmap set for how these issues are to be addressed by respective partners.

Q12 – Please give reasons for your responses to Q10 and Q11.

Few would argue the Strategy is out of date. As above, a refresh could help reset the agenda.

Q13 – Which provisions of the Code and associated Guidance are detracting from the delivery of appropriate outcomes in the context of a fair, transparent and merit-based appointments system?

OCPA has not seen evidence that the Scottish Commissioner's Guidance is preventing appointment processes from being merit-based, fair and transparent.

Reflecting on the UK Governance Code and its ability to deliver a fair, transparent and merit-based system, it allows for exceptions from the usual recruitment processes. OCPA has noted that these exceptions - appointing without a competition, and extending appointees beyond two terms or ten years of service - have mainly been used sensibly and in circumstances where the day-to-day running of a board requires some flexibility. The Commissioner must be consulted and notified on these exceptions respectively. The Commissioner does not think these provisions undermine or detract from a fair, transparent and merit based process. OCPA would suggest that exemptions which place particular members into posts or keep them in jobs should be subject to real-time, independent oversight.

Q14 – Please give reasons for your views.

Addressed in Q13

Additional Issues that Code Revisions Could Address

Q15 – Should the Code be more prescriptive in this area and require panels to base appointment plan decisions on evidence of what works well to attract and appoint the right calibre of applicants?

This comes back to the matters addressed in Q1, and the balance between compulsion and encouragement to 'do the right thing'. It appears, from OCPA's reading of this consultation, that the Scottish Commissioner believes the latter approach has failed. OCPA agrees with the Commissioner that "Responsibility for the identification and removal of such barriers [assessment methods/attraction strategies] should lie with the Scottish Ministers." Placing more detail in the Code may encourage ministers, but could lead to a punitive approach which may undermine the other activities of the regulator to improve best practice.

Q16 – If so, what should these requirements consist of and what measures should be adopted to achieve board diversity in relation to protected characteristics, sector worked in and socio-economic background?

OCPA would encourage the Scottish Commissioner to work with stakeholders, such as public body chairs, the Civil Service Commission and the Social Mobility Commission, and other regulators also interested in these issues, such as the Financial Conduct Authority, to determine what indicators should be measured and what interventions may be right to try in public appointments.

Q17 – Please give reasons for your answers to Q15 and Q16.

It isn't clear to OCPA, from this consultation document, as to why the current repository of best practice as described is not being used. OCPA also isn't convinced that placing obligations in the Code alone will break down the barrier to adopting best practice. Some initiatives may cost money, others will require lengthy policy development, others may suffer from a lack of reliable data. Implementing best practice requires resources, time, political will and stakeholder knowledge and insight. The Scottish Commissioner is well-placed to lead these conversations, and the Code can acknowledge and champion them, but the main responsibility must lie with Scottish Government to provide the political will for implementation.

Q18 – What changes, if any, should be made to the Code as a result of the coming into force of the 2018 Act?

With the 2018 Act being primary legislation, it appears to OCPA that it would be proportionate and appropriate for the Code to reflect this. OCPA understands the provisions of the 2018 Act would, if enacted into the Code, allow for ministers to appoint women in an equal merit situation, or if not, to use another protected characteristic (under the Equality Act) to break the tie between equal

candidates. OCPA however also recognises there are very few chances of candidates at the appointment stage scoring equally (if panels score rather than provide a narrative assessment), owing to small numbers of candidates making it to that stage. It may only be a sifting stage where there are genuinely tied candidates. The ability of this provision significantly to change the number of candidates from underrepresented groups to be appointed could be more limited than at first glance, especially for Chair roles, as described above, where there may only be two or three candidates in the running for one role. OCPA would suggest that the Scottish Commissioner undertakes research into the candidates found appointable to ascertain the proportion of competitions where candidates were tied at this stage. This would help increase understanding of the potential impact of this intervention.

Q19 – What legitimate grounds for choice should be specified?

Characteristics protected in the Equality Act 2018 are the best place to start, notwithstanding the reference in the question above about the importance of other kinds of diversity for good governance of public bodies. With the proportion of women appointees in Scotland at 50 per cent already, it may be that other groups are considered more underrepresented, and so the 2018 Act working in the context of public appointments may be less about gender equality than in other sectors, where the 2018 Act applies and gender is still a barrier. Thus case-by-case consideration should be given to a public body's function and purpose, whom it serves and why. This should guide any and every assessment of protected characteristics to use for tie break situations under the 2018 Act.

There should be a recognition that the Disability Confident scheme may be running in parallel to a competition where the 2018 Act's equal merit provision applies. Disability Confident allows those applying for roles who want to avail themselves of the scheme, to be placed through the sift on the basis of meeting minimum criteria (which may mean those scoring higher who do not use the scheme are not picked through the sift). The Lord Holmes Review found much confusion around the Disability Confident and 'guaranteed interview' schemes, so OCPA would advise a clear demarcation between the Disability Confident Scheme and the provisions of the 2018 Gender Equality Act.

Q20 – Please give reasons for your views.

Addressed in Q 18 and Q 19

Q21 – Should the Code more generally make specific reference to these new duties placed on the Scottish Ministers as well as the ramifications of those for prospective applicants?

Appointment plans might, for example, require to include specific positive action measures to be taken for each vacancy to be filled.

Transparency is critical for public trust and understanding about how the 2018 Act and equal merit provisions are applicable to a merit-based process. It is also essential for those in any recruitment competition to know how their personal declarations will be used, and their right not to declare anything at all, or to declare but not give their consent to have those characteristics used in an

equal-merit situation. Appointment plans should be explicit at the outset of the competition whether the use of equal merit is justified based on the evidence of representation currently, what particular characteristics will be targeted, how that information is used or seen by officials, panelists and ministers, and the stage/s in which equal merit will be used (at sift and/or after interview).

Q22 – If so, which duties should be included?

OCPA is suggesting a bespoke approach to equal merit in line with the 2018 Act (as described above), so the Code should be clear on conditions when the provision and the transparency requirements are used, leaving ministers to take on duties as appropriate to each competition.

Q23 – What are your reasons for these views?

Addressed in Q19, Q20, Q21 and Q22

Q24 – Should the Code place an obligation on the Scottish Ministers to consult the Scottish Parliament on the prospective appointment plan for roles that require parliamentary approval?

OCPA considers the relationship between ministers' appointments and committees is one for parliament and the executive. In the UK Code, ministers '*should advise the Parliamentary Select Committee of the selection process, selection criteria and publicity strategy,*' which is a reflection of the agreement between parliament and Whitehall. At the time of writing, there is no consistent arrangement between the Welsh Assembly and Welsh Government ministers on pre-appointment scrutiny, being only done on an ad hoc basis for some appointments; the Code's provisions here reflect a policy decision in Whitehall. Select Committees in the UK Parliament expect to be informed and consulted on key aspects of the competition, including advertising, criteria and panel members. Whether this has happened to Select Committees' liking is not for OCPA to assess. (The OCPA Commissioner has provided advice and evidence where requested by committees on particular appointments as part of the pre-appointment scrutiny process, but this has been on an ad hoc basis at the request of committees to inform their scrutiny.) OCPA would suggest that the Scottish Parliament make its views on this known to the Scottish Government, with the Code able to make an additional reference to what is expected here.

Q25 – Please give reasons for your views.

Addressed in Q24

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

It is essential that candidates know whether a role will be subject to pre-appointment scrutiny.

Q27 – Please give reasons for your view.

Facing a Select Committee hearing is challenging, even for very experienced appointees, and applicants should know whether they will face it.

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

OCPA understands that since 2018, all Scottish health board appointments have been made following a version of values based recruitment and so it seems sensible that the appointment plan for any NHS bodies should include references to the NHS Values Act 2018. The Code should allow for this, and any other bodies with particular recruitment practices, to be taken into account where required by law, but not compel any others to do so.

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

Those backed by legislation. OCPA would set the bar this high to ensure that skills, experience and knowledge remain the primary measures of merit.

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

See Q29 and Q30

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

The Code should be clear that assessment methods should be appropriate to the role under appointment and should test candidates against the essential criteria for the role.

Q32 – Please give reasons for your answer to Q31.

The key plank of the public appointments system, both in Scotland and the UK, is appointment on merit. Ensuring assessment captures the merit required for roles is the core task of public appointment officials running recruitment competitions.

Q33 – Please say whether you consider any of these issues is appropriate to be included in the Code, guidance or inappropriate for either. Please give reasons for the views you expressed below.

OCPA sees value in each competition having an independent panel member, to bring rigour and challenge to the process. We would encourage the Scottish Commissioner to define what characteristics would make a panelist not considered 'independent'. For example, the UK Code outlines how independent panel members must be independent from the Department concerned, and also requires panelists to declare any conflicts of interest - this could cover the 'competing personal and professional commitments' mentioned in the question. The criteria for appointing panel chairs should remain the same where possible to ensure merit assessment is consistent and transparent for candidates.

Q34 – What should the Code say about panel members, including panel chairs and independent panel members, with a view to achieving the desired outcome on each appointment round? For example, should other competing personal and professional commitments be taken into account in the designation of a suitable member?

OCPA sees value in each competition having an independent panel member, to bring rigour and challenge to the process. We would encourage the Scottish Commissioner to define what characteristics would make a panelist not considered 'independent'. For example, the UK Code outlines how independent panel members must be independent from the Department concerned, and also requires panelists to declare any conflicts of interest - this could cover the 'competing personal and professional commitments' mentioned in the question. The criteria for appointing panel chairs should remain the same where possible to ensure merit assessment is consistent and transparent for candidates.

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

There is limited evidence about diversity and inclusion training for panel chairs, except that most are now civil servants who receive such training as part of their general official positions. Chairs of panels should have the confidence of ministers and the chair of the public body concerned. The Scottish Commissioner could consult other leaders in recruitment research to determine what training is necessary to aid the achievement of a 'successful appointment outcome' as defined in the Scottish Code and prescribe this as a minimum.

Q36 – Do you have any strong views about the terms of reference that independent panel members should be subject to (e.g. should they have received training, be paid, not be paid, be limited to a certain number of rounds that they are involved with before losing 'independent' status)?

In practice in England and Wales, 'independent' members are often from another public body of the same department - they are involved on the panel as part of their current role. Senior Independent Panel Members (SIPMs) - used for only the most senior campaigns to recruit Chairs - are different. OCPA is consulted on the appointment of SIPMs and OCPA decides about whether they are really

independent from the department and the body concerned, their political independence and their recruitment experience. SIPMs are more like independent contractors, and most are paid for their time. OCPA takes a case-by-case view about SIPMs, and considers how their independence from the department might be affected and perceived if they are used for several recruitment rounds. The Scottish Commissioner could consider a set limit in this respect.

Q 37 – Please give reasons for the views expressed in response to Q34-36.

Addressed in Q34-Q36

Q38 – Should the Commissioner commence audits for a proportion of appointment rounds that will otherwise have had no direct or partial oversight?

It may be most helpful here for OCPA to reflect on its own experience of developing its audit process.

OCPA developed its compliance visits three years ago, a change from the previous rag-rating system. These visits have focused more on cultural improvement, giving departments their own voice within reports of their performance. This has changed the relationship between OCPA and departments, in the hope of becoming more cooperative. This has been recognised in the positive response from Permanent Secretaries to the reports on their departments' performance. OCPA does find breaches in audits, but also, and perhaps more crucially, gets an understanding of what departments are trying to do, the challenges they face, and the realities of making appointments. This must be viewed in the context that, unlike the Scottish Commissioner, OCPA has no direct involvement in campaigns - OCPA Assessors were removed when the new Code was introduced in 2017. For OCPA, audits are an integral part of how the Commissioner can drive up standards, share best practice, identify breaches and provide independent oversight of the system. OCPA would be happy to share its regulatory framework with Scottish Commissioner to show the detail of the paperwork we require in our audits, and share what we have been able to learn from them.

Q39 – Should the results of such reviews and other relevant matters feature in more regular reports to the Scottish Parliament in order to improve on transparency?

Reflecting on our current audit process, related to the step-change in our approach to compliance detailed above, OCPA does not share the results of its compliance visits beyond departments' public appointments teams, permanent secretaries and the policyholder ministers in the Cabinet Office. This allows for a 'safe space', to aid honest discussion of the challenges and successes. OCPA does discuss the broad conclusions of the audits in the Commissioner's annual report.

However, OCPA notes that the Scottish Code already requires a higher level of transparency than the UK Code - ministers must reveal decision making, while the nature of panel reports is much more tightly prescribed. So a different approach may be more appropriate in Scotland.

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

Addressed in Q38 and Q39

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

OCPA notes the Scottish Commissioner's views here, on considering the different ways to carry out her regulatory function. OCPA's regulatory functions changed with the current Governance Code's introduction in 2017. This removed the Commissioner's direct involvement in competitions - which Assessors in Scotland still have - and placed more discretion for appointments in the hands of ministers. OCPA's way of doing things changed, but the core purpose of a regulator to make an independent assessment, and the ability to speak out publicly to hold the government to account, remained. Further, OCPA's experience is that regulation is no substitute for policy and political will. Both are essential for a well-functioning system.

Q42 – Please provide reasons for your answer to Q41.

Addressed in Q41.

Q43 – Are there any other issues relating to the Code or associated guidance you wish to raise?

OCPA sees value in the Code holding specific provisions for appointment activity, as well as overall principles. We agree with the Scottish Commissioner that a principles-only approach risks government not being given clear direction on the basics required for each appointment. We also see the value in the Statutory Guidance, which, as stated earlier, reduces the burden upon the Commissioner to give advice on practical issues that are regularly encountered when making appointments, such as: giving feedback, being fair when candidates cannot attend in person, and what panels need to document and declare. The guidance can be updated as situations change; guidance on appointments during the COVID-19 pandemic is a good example of how it can be flexible to meet novel situations, whilst the Code can include and highlight the measures that must be followed no matter what. OCPA supports this dual approach and so far has not seen evidence on what elements of the Code or Guidance are stopping Scottish ministers from making successful appointments, as defined in section 5.2 of the Scottish Code ("an outcome that identifies one or more appointable applicants who meet the needs of the board as defined by the minister and adheres to the principles of the Code. It should contribute to board effectiveness and also to the ministerial aim of redressing imbalances of representation among protected characteristics"). We also would like to restate our view that political will is the key to any improvement in appointments processes and outcomes, as well as an independent regulator who can champion the cause and hold government to account.

Q44 – Are there any other issues relating to appointment practices you wish to raise?

Like the Scottish Commissioner, OCPA is concerned about the delays in the appointment process. This was subject to research by OCPA in 2019, where we found half of appointments competitions did not meet the three month ambition outlined in the Code. This suggests even when a specific target is listed in the Code, this is not enough to drive adherence. The ambition in the Code is listed under the *Candidate Care* section, and measures the three months from the time applications window closes, to the public announcement of the successful appointee. OCPA's research found the greatest source of delay was after interviews - in short, it is ministers taking their time over deciding whom to appoint - and then time from that decision to it being placed on gov.uk, which is subject to the ever changing priorities of the 'grid' of government press announcements.

OCPA's recommendation from that review was to move the measurement of the three months from announcement to the date candidates were informed, in keeping with the candidate care point of the aspiration. This was rejected by HM Government, who wanted to keep the ambition as is (Welsh Government did not offer a view). Since then, it appears to OCPA that adherence to the three month ambition has not improved, partly because of the interruption caused by the 2019 general election and various changes of ministers, and with COVID-19, delays will have only increased, despite most departments moving to remote interviewing and assessment.

Appointments suffer from being important but considered, by many in the system, as not urgent. Each appointment round requires many actors to see the appointment as a priority. OCPA recognises when departments drop the ball - submissions are slow to get to ministers, roles go live when there is scant chance of replacing an incumbent in time - but these are not the most common errors when appointments take too long. Stakeholders must give their views, not only on the criteria and advertising but on candidates throughout the process, and each of these interactions runs the risk of further delay. Special Advisers will conduct their due diligence, ministers will be concerned by any number of other competing priorities, panel members will have other duties which can cause diary clashes. None of this is a consequence of poor practice of public appointments teams themselves, as taking into account the interests of affected groups, due diligence, and robust ministerial decision making is all right and proper. But all of those actors must have the ability and opportunity to prioritise appointments, to treat them as urgent and important, and this should start with ministers.

Responses

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

They should be sent, ideally by email, to:

Ian Bruce

Public Appointments Manager

Ethical Standards Commissioner

Thistle House

91 Haymarket Terrace

Edinburgh

EH12 5HE

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

www.ethicalstandards.org.uk