

Ethical Standards Commissioner

REPORT ON AN INVESTIGATION

January 2024

Reference: 8006/2023

TITLE: COMPLAINT – UNFAIR TREATMENT DUE TO AN UNWRITTEN POLICY TO PROGRESS APPLICANTS SHARING PROTECTED CHARACTERISTICS OUTLINED IN POSITIVE ACTION (DIVERSITY) STATEMENTS IN APPLICANT PACKS BEFORE THOSE WHO DO NOT

APPOINTING MINISTER: 15 ROUNDS INVESTIGATED INCLUDING APPOINTMENTS BY 11 DIFFERENT MINISTERS. DETAILS OF EACH INCLUDED IN THE MAIN REPORT

DIRECTORATE: 15 ROUNDS INVESTIGATED COVERING 6 DIRECTORATES. DETAILS OF EACH INCLUDED IN THE MAIN REPORT

PUBLIC BODY: 15 ROUNDS INVESTIGATED COVERING 15 PUBLIC BODIES. DETAILS OF EACH INCLUDED IN THE MAIN REPORT

SUMMARY

- 1) As part of an independent review of shortlisted applicants, for all 15 appointment rounds, the independent panels agreed with the original panels assessment that those shortlisted had met the criteria for selection. Shortlisting had therefore been carried out on the basis of merit, as required by the Code;
- 2) In all 15 appointment rounds investigated, the independent review of applications agreed that the complainant's applications were not as closely matched to the criteria as those who were shortlisted for interview;
- 3) There was no evidence whatsoever of any unwritten policy by the Scottish Ministers to progress applicants with protected characteristics as outlined in the positive action statement;
- 4) The analysis of news releases and management information available showed that protected characteristics could be deduced from some of the information provided but that those with protected characteristics are not being progressed in any way that could lead the Commissioner to conclude that there was an unwritten policy to progress these applicants;
- 5) The Scottish Ministers have implemented a number of measures to try and increase diversity in a number of appointment rounds, which appeared (in the scope of the rounds investigated following this complaint) to be having a positive result in attracting women and minority ethnic applicants. There was no action being considered or used which gave any cause for concern;
- 6) Analysis of the news releases uncovered a concern about compliance with section G of the Code of Practice, which was not initially considered relevant to the complaint. It was established that a high number of news releases provided information about successful candidates that was not directly related to the criteria for selection which were sought. Although the information published about the successful candidates demonstrates considerable achievements and experience – and Scotland is very fortunate to have such experienced, qualified and talented individuals on its boards – the information published in such news releases are required under the 2022 Code to link directly to the criteria for selection that were set out when the vacancy was publicised. The investigation found that seven rounds were not compliant with the Code in this regard. In relation to the complaint, it is understandable that the complainant, having reviewed these news releases, had concerns about the reasons for others progressing before him and sought to find a reason to explain this;
- 7) Although the Scottish Government's complaint procedure was followed, the defensive approach taken meant that no discussion seems to have been had with the complainant to understand his concerns. Had such a discussion taken place, and an offer of detailed

and constructive feedback been made and an understanding about why he had concerns around the news releases, it is possible that the complaint may have been resolved at an earlier stage. Given that our investigation, inclusive of independent review, found that the complainant, with some feedback and opportunity to improve, showed potential to be a credible applicant, the Commissioner recommends that the Scottish Government should consider providing this feedback to the complainant. Furthermore, the Commissioner recommends that the Scottish Government should consider in every stage 1 complaint, whether providing detailed and constructive feedback to the complainant could be beneficial, and to make the offer as part of its frontline resolution, if relevant.



Ian Bruce
Ethical Standards Commissioner
26 January 2024

CONTENTS	PAGE
BACKGROUND	5
THE COMPLAINT	6
DETAILS OF THE INVESTIGATION	7
RESULTS OF THE INVESTIGATION	9
Element 1	9
The Diversity Statement (also referred to as the “positive action” statement)	9
The current demographic situation and experience of disadvantage	12
Explaining the difference between positive action and positive discrimination	12
Other measures regularly used in appointment rounds to improve diversity	13
Actions taken to mitigate unconscious bias	15
Independent review of the applications	16
The Commissioner’s Representative	16
Review of panel discussions and any relevant information for the round	16
Outcome of the appointment rounds – analysis of Management Information	17
Press / News Releases	17
Element 2	17
ANALYSIS AND CONCLUSIONS	21
APPENDIX 1 – Relevant sections of the Code of Practice and Statutory Guidance (2013 and 2022 Codes)	25
APPENDIX 2 – Overview of the appointment rounds covered by the investigation	32
APPENDIX 3 – Positive Action (Diversity) statements from each of the appointment rounds	34
APPENDIX 4 – Summary of measures to increase diversity used in each of the appointment rounds	37
APPENDIX 5 - Action taken to mitigate bias	45
APPENDIX 6 - independent review of applications (report provided by PAA – Bill Smith)	47
APPENDIX 7 - Comments or concerns raised by PAAs	54
APPENDIX 8 - Scrutiny of panel reports and exchanges to check for any evidence of an unwritten policy to progress applicants who share protected characteristics as outlined in the positive action (diversity) statements before those who do not	56
APPENDIX 9 – Summary of management information	59
APPENDIX 10 – Summary of press / news release information	61

BACKGROUND

The Commissioner for Ethical Standards in Public Life in Scotland, known as the Ethical Standards Commissioner, independently regulates how Scottish Ministers make appointments to the boards of public bodies that are within his remit.

The Commissioner's statutory functions in relation to public appointments are set out in the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and (in summary) are to:

- prepare, publish and, as necessary, revise a Code of Practice for Ministerial Appointments to Public Bodies in Scotland (the Code)
- issue guidance on the Code and promote compliance with it
- examine the methods and practices employed by the Scottish Ministers when making appointments
- investigate complaints about how an appointment was made
- report to the Scottish Parliament instances of material non-compliance with the Code; the Commissioner may direct the minister to delay making the appointment until Parliament has considered the report.

The Commissioner is to exercise these functions with a view to ensuring that appointments are made fairly and openly and allow everyone, where reasonably practicable, the opportunity to be considered for an appointment.

The most recent Code of Practice was introduced in March 2022 and took effect from October 2022. Appointments made before this were done so under the 2013 Code of Practice. The appointment rounds being investigated in this report were conducted under both the 2013 and 2022 Codes of Practice.

Appointments are made through a process called an appointment round. Under both the 2013 and 2022 Codes, the appointing minister will choose a selection panel to run the appointment round on their behalf. The panel chair selected is usually a senior civil servant who has a good understanding of the workings of the public body. Both codes also encourage the minister to consider including an independent panel member.

The Commissioner oversees a selection of appointment rounds by assigning a Public Appointments Adviser (PAA). PAAs are independent consultants who contract with the Commissioner and are answerable to him for their professional conduct and competence when overseeing appointment rounds on his behalf. They do not answer to ministers or their directorates, nor to any of the public bodies. The Commissioner decides on the appropriate level of oversight for an appointment based on a range of factors, including the body's budget and its functions. Depending on the level assigned, the PAAs provide no oversight, oversight during planning only or as a full selection panel member throughout the whole appointment round until the panel has reached its conclusions on which candidates to present to the minister as "most able". In appointment rounds conducted under the 2022 Code, PAAs may be assigned for any parts of the process that the Commissioner considers appropriate.

PAAs work to a service level agreement (SLA) with the Commissioner. This SLA requires the PAA to draw instances of potential non-compliance to the attention of the responsible person during an appointment round. This will usually be the chair of the selection panel and/or a senior civil servant. It is anticipated that the responsible person will take steps to

ensure that the Code is complied with. Where the responsible person, for whatever reason, is unable or unwilling to address any instance of potential or actual non-compliance highlighted by the PAA, the PAA will:

- set out the relevant facts in writing
- provide this to the responsible person and
- copy the correspondence to the Commissioner.

Whether to take action in response to such a report and the form that any such action might take are matters for the Commissioner.

PAAs also provide the panel with advice and guidance on good practice in recruitment and selection techniques and assist with guidance on how to mitigate unconscious bias throughout the appointment round.

At the conclusion of their involvement in the appointment round, the PAA will also provide a written report to the Commissioner (end of involvement report) on what they have observed during each stage of the round that they have overseen.

THE COMPLAINT

A complaint was received by email on 31 August 2023 from a complainant who believed that he may have been unfairly treated during the course of 16 different appointment rounds when he had applied for advertised vacancies over the course of 2022 and 2023. The complainant believed that those progressed to interview stage and then appointed were progressed and appointed as a result of an unwritten policy by Scottish Ministers (the panels conducting the rounds on behalf of ministers) to progress and subsequently appoint on the basis of the protected characteristics set out in the positive action statement within the pack, rather than on merit. The complainant had already complained to the Scottish Government and, following a stage 2 investigation, had received a letter indicating that his complaint had not been upheld. The complainant was advised of his option to ask the Commissioner to investigate his complaint and chose to do so.

Following receipt of information held by the applicant and a discussion to clarify the basis of his complaint, a statement of complaint was agreed with him on 18th September 2023. The statement was as follows:

1. You applied for 16 different appointment opportunities and were not invited to an interview for any one of those. On inspecting the news releases for those who were appointed to the positions, you believe that you have equivalent qualifications and experiences to the successful applicants. Due to the diversity statement in the applicant packs for the positions that you applied for, you believe that you have been unfairly treated by not being invited to interview. You believe that this is due to a politically motivated intention to progress applicants who belong to the protected characteristic groupings outlined in the diversity statement over those who do not belong to these groupings. You believe that the appointment panel for each selection process, by applying this intention, have acted in an unethical manner.

2. On submission of your first formal complaint, you copied in four of the relevant appointing ministers, namely Angela Constance MSP, Jenny Gilruth MSP, Michael Matheson MSP and Shirley-Ann Somerville MSP. You wish to complain about not receiving any response from these ministers as you expected to receive at least an acknowledgement.

In the letter setting out the statement of complaint, the complainant was advised that in respect of element 2 of his complaint, there is no requirement in the Code of Practice for Scottish Ministers to respond personally to correspondence from unsuccessful applicants so this part of the complaint would not be investigated, given that a breach of the Code could not be found. The Commissioner would however, investigate how he was treated when he raised a formal complaint with the Scottish Government about his unsuccessful applications and whether that complaint was handled in accordance with the Code. In correspondence, the complainant indicated disappointment, but understanding of the reasons for this part of the complaint not being investigated.

In correspondence, the complainant also agreed that one of the appointment rounds was not within the Commissioner's regulatory remit and therefore would not be included in the scope of the investigation.

DETAILS OF THE INVESTIGATION

In conducting the investigation, due to the number of different directorates involved, the Commissioner notified the Permanent Secretary, copying in the relevant Directors General. With prior agreement, the Public Appointments Team (PAT) undertook to provide a coordinated response on behalf of the various Directorates.

The information requested for each of the 15 appointment rounds involved was as follows:

- a. the advertisement and applicant pack (containing the person specification and role description), and all panel notes relating to the assessment of applicants up to and including the recommendations put to ministers in the form of an applicant summary.
- b. the monitoring data collected from all applicants who applied for each of the rounds, including a breakdown of those who were selected for interview and those who were appointed. The ESC understands that there are data protection considerations in providing this level of personal data and can confirm that there is no intention to share any data that would allow any individual applicant to be recognised. However, in order to investigate the complainant's concerns fully, this level of detail was required.
- c. copies of any minutes or notes of meetings where the appointment round was being planned.
- d. details of any written or unwritten policy, should one exist, relating to intention to progress applicants who are listed in the applicant pack diversity statement.
- e. all correspondence between the Scottish Government and the complainer relevant to this complaint and any communications between officials and the minister relevant to the complaint; and

- f. any additional information that the directorate considers pertinent to the Commissioner's consideration of this case.

A discussion took place with Scottish Government officials on 4th October 2023 about the information requested, seeking reassurance about the requirement for the information to ensure that General Data Protection Regulation (GDPR) requirements were being met. The Commissioner clarified that the Scottish Ministers had a legal obligation under the 2003 Act to provide the material to him. He explained during the course of the meeting his understanding that the lawful basis for their providing this information to him is set out in Article 6(1)(c) of the UK GDPR, that being compliance with a legal obligation. During the discussion the Commissioner also clarified that he would in addition require all the applications received for each of the 15 appointment rounds. This was followed up in writing.

A co-ordinated response was provided on 27th October 2023. Along with the information provided, officials also confirmed that individual demographic data is not saved for applicants, other than the successful applicant.

An examination of the material provided on 27th October 2023 found that not everything requested had been included. There followed a series of exchanges with the Scottish Government between 9th November and 8th December 2023 requesting the missing material. By 8th December, all materials had either been provided or it was confirmed that they did not exist or that it was definitely not possible to provide these. For clarity, by 8th December the majority of information was provided and there were only 5 documents missing – one round (NHS ES) had not made any notes of the planning meeting and two rounds (the Care Inspectorate and NHS ES) did not have any shortlisting report or candidate summaries available for those who were not recommended to the minister. This was attributed to a staff member being absent for an indeterminate period and the files not having been saved on a shared drive.

The materials provided by the complainant, the case file of material provided by the Scottish Government and any relevant information from the Commissioner's own files have all been assessed in undertaking the full investigation.

The assessment was undertaken to determine whether the Code had been complied with. The relevant Code paragraphs are set out in Appendix 1 to this report. As the appointment rounds concerned cover the time period when a revised Code came into effect, the relevant paragraphs of each Code and accompanying Statutory Guidance for each are included. They concern: consistency of assessment; the importance of defining merit in accordance with ministerial requirements for the role(s) in question and then assessing applicants consistently against the defined merit; the importance of reducing the impact of personal bias; and the effectiveness of complaint handling.

RESULTS OF THE INVESTIGATION

Element 1

In element 1 of the complaint, the complainant stated that he had applied for 16 different appointment opportunities (15 of these were within the remit of the Commissioner). An overview of all the relevant appointment rounds included is provided in Appendix 2. He was not offered an interview for any of these appointments. He had noticed the “diversity statement” in the application packs for the various appointments and on inspecting the news releases believed that those described did not have any better experience or qualifications than him and a number of them seemed to possess the characteristics set out in the diversity statement. He therefore believes that an unwritten policy is being applied so that panels are progressing and appointing applicants who share the protected characteristics mentioned in the diversity statement, over the required merit for the role.

The Diversity Statement (also referred to as the “positive action” statement)

The diversity statement in applicant packs is an example of a positive action measure. The positive action provisions can be found in s.158 and s.159¹ of the Equality Act 2010. These are lawful measures that can be taken to encourage and support those who share a protected characteristic and are disadvantaged or under-reflected in an organisation. Protected characteristics under the Equality Act 2010 are: Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Positive action is encouraged in the 2022 Code of Practice:

*B4 When planning a new appointment, the Scottish Ministers will communicate to the selection panel their desired outcome for the appointment exercise. The skills, knowledge, experience and related attributes represent “Merit” for the purposes of the appointment being made. The definition of “Merit” cannot include protected characteristics. **Where the Scottish Ministers wish to see the under-reflection of protected characteristics on a board addressed, this will also be communicated to the panel.***

C1 The selection panel will design an appointment plan to deliver the appointing minister’s preferred outcome. The plan will include:

- i. a clear and accurate description of the role to be performed (the role description). This must include an accurate assessment of the time commitment required to fulfil the role and of the remuneration and expenses paid, where applicable. If the role is being offered on a role share, or other flexible basis, details will be provided on what this will mean in practice for those who might wish to take up the role*
- ii. a clear and accurate description of the attributes that the minister requires of the ideal appointee (the person specification). The attributes will be described in a*

¹ [Equality Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)

way that is readily understandable, is capable of assessment and reflects the requirements of the role. They will not be unnecessarily restrictive. They will not include protected characteristics. The person specification will be clear about the extent to which criteria have to be met and whether some attributes take priority over others. The attributes set out in the person specification constitute “the criteria for selection”

- iii. the publicity, application and assessment methods to be used*
- iv. **any positive action measures intended to redress the under-reflection of protected characteristics on the board concerned***
- v. a timetable specifying key prospective dates within the round.*

The panel chair is responsible for finalising the appointment plan and will take the views of the panel members into account in doing so.

*C2 The application and assessment methods and **any positive action measures selected will be based on evidence of what works** well to attract and lead to the appointment of a diverse range of able applicants, taking account of relevant information held by, maintained and regularly updated by the Scottish Government for this purpose.*

The guidance on the Code provides the following advice:

*2.13 The principle of “Equality, Diversity and Inclusion” states that the boards of Scotland’s public bodies should be reflective of the communities that they serve and requires the Scottish Ministers to take substantive steps to achieve that aim. This guidance recognises that this will not always be possible at individual board level due to the numbers involved. By way of example, the visible ethnic minority community makes up a relatively small proportion of the overall population – although this varies by geographical area – and some boards only have a relatively small number of members. **The Scottish Ministers are therefore encouraged to consider taking positive action and other suitable measures by reference to not just individual boards but the board population overall.** The latter should particularly be the case when an appointment to the cohort of public body chairs is under consideration.*

The 2013 Code of Practice made no direct reference to the use of positive action during appointment rounds. It did, however, make reference to a need to attract a diverse range of applicants:

C1 Selection panel members will agree an appointment plan containing

- i. the publicity, application and assessment methods to be used. **The agreed methods will be those the panel considers most likely to attract a diverse range of able applicants, taking account of relevant information held by or available to the Scottish Government.***
- ii. a timetable specifying key prospective dates within the round.*

The statutory guidance on the 2013 Code, meanwhile, provides the following advice:

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

Ministers may take positive action and select on the basis of a protected characteristic in accordance with section 159 of the Equality Act 2010.

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

It can be seen from the provisions in the Equality Act 2010 and the Code of Practice that diversity statements are a proportionate and appropriate form of positive action to take to try and increase applications from groups of potential applicants who are under-reflected on public body boards, particularly where the under-reflection has been over a period of time and therefore it can be concluded that the group of potential applicants who share the protected characteristic are experiencing a disadvantage in relation to other applicants.

The current demographic situation and experience of disadvantage.

The Commissioner reports the current demographic make-up of boards in his annual report and how this has changed over time. The most recent figures (which are as at 31st December 2022) are:

Figure 1

Target Group	Change in board membership profile	Profile of board members [†] at 31 December 2022	Profile of board members [†] at 31 December 2021	Scottish Population (2011 Census)
Female	0.46%	51.26%	50.80%	51.50%
Disabled	1.20%	9.80%	8.60%	19.60%
Black and minority ethnic ^{††}	1.20%	4.90%	3.70%	4.00%
Aged 49 and under	1.03%	19.33%	18.30%	54.3%*
Lesbian, gay and bisexual	0.32%	5.32%	5.00%	6.0%**

[†]All board members inclusive of the chair unless otherwise stated. Percentages do not include those who did not make a declaration.

^{††}Black and minority ethnic figures reflect people from a non-white minority ethnic background.

* Scottish Population aged 18 to 49 as a percentage of the whole population aged 18 and over.

** Estimated based on information from Stonewall Scotland website.

Based on these figures and the fact that none of the target groups fully reflect the Scottish Population (although the female group is very close), it is open to Scottish Minister’s to consider positive action in pursuit of improving the situation.

It is expected that the statement would either be tailored specifically to the situation on the board (for example):

“Scottish Ministers particularly welcome applications from people with protected characteristics who are currently under-represented on the Board of {name of the body} such as, disabled people, LGBTI+ people, those from Minority Ethnic communities, people aged under 50, and men.”

Or be a more general statement (for example):

“Scottish Ministers particularly welcome applications from people with protected characteristics who are under-represented on Scotland’s public bodies, such as women, disabled people, LGBTI+ people, those from Minority Ethnic communities and people aged under 50.”

The diversity statements from each of the 15 rounds covered in the report can be found in Appendix 3.

Explaining the difference between positive action and positive discrimination

As described above, positive action is a lawful action (s.158 of the Equality Act 2010) that can be taken during an appointment round in order to encourage those who experience a disadvantage connected to a protected characteristic, have needs that are different from the

needs of persons who do not share that characteristic or have disproportionately low participation in an activity compared to others who do not share that protected characteristic. These are the 'stated aims' to apply for public appointments (e.g. targeted advertising, mentoring, 'diversity statements' in adverts.)

This is different from positive discrimination, which is unlawful and is where those who are under-reflected are deliberately advanced and progressed in front of those who are not on the basis of their protected characteristics.

In the Commissioner's Code of Practice (paragraphs B4 and C1ii) it specifically mentions that merit, as defined by the appointing minister, cannot include protected characteristics. This is to ensure that panels are clear that positive discrimination should not occur and decisions on who to appoint should not be based on any protected characteristic that an applicant has, but should be based on their assessment against the merit (skills, knowledge, experience or other attribute) as defined in the application pack. (The one caveat to this being where Section 159 of the Equality Act 2010 and 2.7 to 2.9 of the Statutory Guidance take effect in a "tie break" situation and the minister can rely on an under-reflected protected characteristics to make a decision.)

Indirect discrimination can occur when a policy or practice is put in place which appears to treat everyone equally but, in practice, is less fair to those with a certain protected characteristic under the Equality Act 2010.

It is therefore possible to positively discriminate indirectly as well as directly. In this investigation, as it is a complaint investigation rather than an investigation under the Equality Act 2010 (which is the remit of the Equality and Human Rights Commission), we sought to establish whether the complainant has been treated inappropriately in comparison to other applicants, rather than whether there was discrimination, although it is helpful to understand what positive action, direct and indirect positive discrimination are for context.

Other measures regularly used in appointment rounds to improve diversity

It may be helpful to understand what other types of measures are regularly used during appointment rounds and why and how this might also impact on the outcome.

Gender Representation Objective - The Gender Representation on Public Boards (Scotland) Act 2018 sets a 'gender representation objective' that a board should have 50% of non-executive members who are women. In circumstances where two or more equally qualified candidates could be recommended to the minister for appointment (a tie break), at least one of whom is a woman and one who isn't, then section 4(3) of the 2018 Act requires the appointing minister to appoint a woman, if doing so will result in the board achieving (or making progress towards achieving) the gender representation objective. Conversely, under the 2018 Act, the minister can choose to appoint a candidate who is not a woman where another demographic characteristic, currently under-represented on the board, is held by this other candidate (section 4 (4) of the 2018 Act). If the appointing minister wishes to, they may appoint a candidate against the gender representation objective because of a situation

that was not specified in the applicants' pack. In such cases, the appointing minister must make a request to the Ethical Standards Commissioner to vary the Code of Practice in order to allow this to happen. This is laid out in the statutory guidance for both the 2013 and 2022 Codes.

In the 15 appointment rounds covered in this report, none had included a different situation in the applicant pack, nor did any appointing ministers approach the Commissioner to request to vary the Code of Practice.

Guaranteed Interview Scheme – the Guaranteed Interview Scheme (GIS) can be used in public appointment rounds. GIS is intended to encourage applications by disabled candidates, by offering an interview to disabled applicants who meet the minimum threshold for all essential criteria during the first stage of assessment. It is a measure taken under S.13 (3) of the Equality Act 2010 which allows for more favourable treatment of disabled people. Applying a GIS to appointment rounds offers an opportunity to reduce barriers that disabled people experience in recruitment processes, and improve the participation of disabled people in public life. At present, the use of a GIS in any regulated public appointment round requires a formal request for Code variation by the appointing minister to the Ethical Standards Commissioner, who, based on evidence provided to substantiate this request, may decide to accept or reject the use of GIS in the round. One round in this investigation had a GIS in place, but any applicant who had requested a GIS and was subsequently interviewed, had been interviewed solely on the basis of merit and not due to the GIS request (i.e. it was not engaged).

Targeted advertising and publicity – targeted advertising involves publicising the appointment opportunity with contacts and networks of communities with a particular interest or outreach potential to pools of potential applicants who share a protected characteristic which is sought by the appointing minister. The Scottish Government's Public Appointments Team have a list of organisations who can be contacted to notify them of the opportunity and the public body concerned will often also have similar connections. This measure to increase diversity does not provide any individual support or advantage but instead strengthens awareness of public appointment opportunities within communities currently under-reflected on the boards of public bodies in Scotland, and encourages applications from these communities.

Mentoring or other support mechanisms – mentoring and other support mechanisms can be wider than other forms of positive action and measures to increase diversity, sometimes being incorporated into wider board processes. Some examples of such support mechanisms on the boards of public bodies in Scotland include: board shadowing schemes, which seek to match a board member with an aspiring board member looking to gain insight and experience in the day-to-day activities of the board, training sessions or outreach events that provide guidance to prospective applicants on how to complete an application form.

Reasonable Adjustments ²– reasonable adjustments are required by the Equality Act 2010 and are a duty on the Scottish Government - it applies in employment, provision of goods and services and clubs and associations etc. It allows disabled applicants to have adjustments made to the recruitment process (or other situation) in order to overcome a disadvantage that their disability imposes.

A table summarising any measures taken to improve diversity in the 15 appointment rounds is included in Appendix 4.

The diversity statement and other measures taken to improve diversity are all intended to encourage those sharing under-reflected protected characteristics to apply for public appointments.

However, the baseline of assessment is clearly identified in the Commissioner's Code of Practice as being merit, as defined by the minister at the outset of the appointment round and translated into the person specification which is published in the applicant pack.

In order to ensure that the panel are focussed on assessing applicants against the merit in the person specification, they may also consider taking action to mitigate unconscious bias.

Actions taken to mitigate unconscious bias

Unconscious bias can be defined as; “a subconscious attitude that affects the way individuals feel and think about others around them.”

Some of the action panels might take to understand and mitigate unconscious biases include:

- A briefing on understanding and mitigating unconscious bias at the beginning of the appointment round
- Training on the Commissioner's Code, good practice in recruitment and selection and / or unconscious bias and how to mitigate it.
- Anonymising applications
- Allowing sufficient time during each assessment stage to ensure that the panel have time to fully consider the evidence against the criteria for selection and are not making rushed decisions.
- Rotating the panel lead for giving assessment views.

A table is provided in Appendix 5 which examined all paperwork provided for each of the rounds (both from the Scottish Government and the PAA end of involvement reports). It identifies any evidence provided which shows whether specific action was taken to mitigate bias in any of the 15 appointment rounds. It should be noted that such action may have been taken in the appointment rounds but not specifically noted, therefore a blank entry denotes lack of evidence to show that the action was taken, and not an indication that it definitely was not taken.

² [Equality Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)

Independent review of the applications

In order to understand whether the complainant has been treated fairly in the 15 appointment rounds, the Commissioner decided it would be appropriate to review the applications made by the complainant and the applications made by those invited to interview. He considered whether to review all applications for all 15 appointment rounds and decided that a review of those shortlisted for interview, alongside the complainant who was not, was proportionate and should allow identification of any significant outliers (any that definitely should not have been invited for interview but had been). To carry out this exercise, a PAA was asked to take responsibility for the overall review of all 15 appointment rounds involved in this investigation. He, another PAA, and two members of staff from the Commissioner's office formed review panels to evaluate all shortlisted applications for each individual appointment rounds involved in this investigation. It should be noted that the PAA who took overall responsibility for the review had provided oversight on two of the appointment rounds initially. In carrying out the review, the other PAA was allocated to review the applications for these two rounds to ensure that this part of the review was also conducted independently. A full report by the PAA is available in Appendix 6.

The Commissioner's Representative

As mentioned in the background section, the Commissioner will decide at the beginning of each appointment round whether to allocate a PAA to oversee part or all of an appointment round. The decisions on whether or for which parts of the appointment round to allocate a PAA are based on a range of factors which are outlined in the statutory guidance which accompanies the Code. If a PAA has any concerns about non-compliance with the Code, they are to alert the responsible person (usually the panel chair) to these concerns and to the Commissioner if the concerns remain unresolved.

In addition, the PAA writes a report at the end of each appointment round with observations that they have made during the course of the round on both good practice and any concerns (including any concerns that may not have amounted to potential non-compliance).

These reports and any other reports made by the PAA during the course of the appointment round, through phone calls or emails, have been examined for each of the 15 appointment rounds included in the investigation.

A table summarising any relevant comments or concerns mentioned at any point during the appointment rounds is included in Appendix 7.

Review of panel discussions and any relevant information to the round

The Commissioner asked the Scottish Government to provide any notes of planning meetings or email exchanges between panel members. He also asked for shortlisting reports and final candidate summaries. All these documents (not including the 5 documents identified in the introduction as not being available) were scrutinised as part of the investigation to check for any evidence that the panel may have applied an unwritten policy

to progress applicants who shared a protected characteristic as outlined in the diversity statement. The results of this part of the investigation are contained in Appendix 8.

Outcome of the appointment rounds – analysis of Management Information

An analysis was carried out in order to consider whether the successful applicants in each of the appointment rounds did in fact share the protected characteristics as listed in the diversity statement of each applicant pack. The results of this (without identifying any applicants or appointees) are shown in Appendix 9.

Press / News releases

The complaint was based on the fact that the complainant considered that he had equivalent qualifications and experiences to those who were appointed, as described in the press / news releases. He therefore concluded that the main reason these people had been successful, rather than he, was due to the protected characteristics of the successful applicants and an unwritten policy to advance applicants with protected characteristics outlined in the diversity statement. In order to understand what information about protected characteristics was contained in the press releases an analysis was undertaken. On doing this, it became apparent that a further analysis should be undertaken in relation to G1 of the 2013 and 2022 Codes examining how closely the press releases compare with the criteria set out in the person specification. The results are outlined in Appendix 10.

Element 2

In element 2 of the complaint, the complainant had initially complained that four of the appointing ministers, on being copied into the first stage of the complaint, had made no response, including no acknowledgement of his complaint. In the letter that we sent to the complainant, setting out the statement of complaint, the complainant was advised that in respect of element 2 of his complaint, there is no requirement in the Code of Practice for Scottish Ministers to respond personally to correspondence from unsuccessful applicants, so this part of the complaint would not be investigated, given that a breach of the Code could not be found. The Commissioner would however, investigate how he was treated when he raised a formal complaint with the Scottish Government about his unsuccessful applications.

Both the 2013 and 2022 Codes of Practice state that:

A1 Fair, open and merit-based appointments are the responsibility of the Scottish Ministers who will
iii. have in place an effective system for handling, and recording details of, all complaints about the appointment process

The Scottish Government complaints procedure is available on their website:

<https://www.gov.scot/publications/public-appointments-guide/pages/complaints-process/>

All exchanges pertaining to the complaint were provided to the Commissioner and were reviewed.

The complainant sent an initial email on 22 June to the Public Appointments complaints email address. However, as it was labelled “Public Appointment concerns” it was not treated as a complaint but instead a query / concern. It was responded to initially by an administrator within the team, and on further queries being presented, it was responded to more fully by a more senior official within the Public Appointments Team. This response answered the queries, clarified that the initial email had not been treated as a complaint thus far due to it being titled “concerns” and explained how a formal complaint could be made should the complainant wish to do so.

The complainant then raised a formal complaint on 9th July. The complainant asserted that the grounds for his complaint were ‘not being fairly treated’, which is listed in the relevant reasons for complaint on the Scottish Government’s website.

The complaint was acknowledged on the 11th July by the Public Appointments Team who committed to a response by the 4th August. This is in line with the timescales advised in the Scottish Government complaints procedure.

The 1st stage – frontline complaint was responded to by letter on the 3rd August and provided a comprehensive response, explaining how the appointments process works including confirmation that personal monitoring information provided in the application is not seen by panels and how scoring of applications is carried out by panels. In describing the scoring system, the response mentioned that the complainant’s application failed to progress beyond the application stage due to not demonstrating sufficient evidence against the criteria sought for that role. No further personalised feedback was provided nor an offer made to provide it. Whilst this is not required within a complaints process, it is clear from the complaint made that the complainant had applied for a high number of appointments (the initial complaint covered 16) and had not succeeded in securing an interview for any of these. If seeking to get to the source of the complainant’s concerns (rather than purely defending against the allegations made within the complaint), it seems that checking whether feedback had been requested and provided might have been considered at this early and frontline stage. If not already provided, giving some detailed, constructive and honest feedback could have helped to resolve the complaint, before it escalated further.

The 1st stage complaint response did also consider the news releases which the complainant had suggested raised the concern in the first place, but only in so far as to report how many men and women had been appointed. It does not appear that any further questions were asked about what had led the complainant to believe that he had been unfairly treated due to not falling into one of the protected groups, in his view favoured by Scottish Ministers, to the extent that it caused the complainant to be so concerned as to feel the need to raise a formal complaint.

The response then went on to answer the complainant’s questions about what positive action was being undertaken in order to attract applicants who shared protected characteristics currently under-reflected on Scottish body boards and to give a description of how appointments are made on merit. All of this information was helpful and informative for

context as to how Public Appointments are made. The description of appointments being made on merit was accurate and based on the Code of Practice requirements.

The complainant raised a stage 2 complaint on the same day as receiving the outcome of the 1st stage frontline complaint (3rd August). This was acknowledged on the 10th August and an investigating officer was assigned on the 16th August. The investigating officer stated that the intention was to respond fully by 30th August. All these timescales are within the Scottish Government complaint process timelines.

The investigating officer in the stage 2 of the complaint provided a response on the 29th August. The Scottish Government's complaint procedure states that at stage 2:

"The Scottish Government Complaints Team will:

- where appropriate, discuss the complaint with you to understand why you are dissatisfied and what outcome you are looking for;*
- liaise, as appropriate, with those responsible for the appointment process you have complained about or others who can help us to understand the issues. It is likely we will need to share a copy of your complaint with them, along with any supporting information you have provided to be able to properly investigate the matters raised and come to a fair decision*
- give you a full response as soon as possible and normally within 20 working days of receipt of the complaint*
- tell you if their investigation will take longer than 20 working days. If this is the case, they will keep you updated on progress, the reasons for the delay and inform you of next steps"*

No report was provided which demonstrates that first point was actioned as part of the stage 2 investigation or that anyone discussed the complaint with the complainant at stage 2 to understand more about what the underlying the complaint was. Instead, the written response seems to be a critique of the response provided at stage 1 and whether it had accurately investigated the complaint. It confirms that all the information provided by the Public Appointments Team in the stage 1 report are accurate and therefore concludes that it must be a correct outcome.

The report at stage 2 also determines that the process was fair, open and transparent. However, there did not appear to have been any investigation into whether that actually was the case and whether each of the panels involved actually acted within the scope of the Code. It also states that because the majority of rounds had anonymised applications, it was not possible for the panel to determine the protected characteristics of the applicants. Our own investigation showed that applicants regularly disclosed these in the content of their applications.

In conclusion, the Scottish Government's complaint process was run in line with the timescales presented in the complaints procedure and responses were provided to the complainant at each stage as the procedure states will happen. However, the responses appeared to have taken a defensive position of trying to set out why the complaint is unfounded, rather than trying to understand what has caused the complainant to become so concerned as to need to raise a formal complaint, and to try to assist with addressing this.

The Scottish Government Model Complaints Handling Procedure Overview on the Scottish Public Services Ombudsman website³ includes the following wording:

“Our Complaints Handling Procedure will enable us to address a customer’s dissatisfaction and may help us prevent the same problem from happening again. For our staff, complaints provide a first-hand account of the customers’ views and experience, and can highlight problems we may otherwise miss. Handled well, complaints can give our customers a form of redress when things go wrong, and can also help us continuously improve our services.”

Although the complaint responses at stages 1 and 2 were detailed and informative, they did not include a discussion with the complainant to understand what might have caused the concern in the first place, in order to learn from and potentially address his concerns, ideally at an earlier stage. It may have been that had the earlier stages of the complaint been dealt with differently (through the offer of comprehensive and helpful feedback for example) the complainant may never have felt the need to progress the complaint through to stage 3.

³ <https://www.spsso.org.uk/sites/spsso/files/csa/SGMCHPPart1.pdf>

ANALYSIS AND CONCLUSIONS

A key element of this investigation was the independent review (Appendix 6) of applications carried out by the Commissioner's PAA (supported by another PAA and two members of staff from the Commissioner's office). This independent review examined the applications made by the complainant against the criteria and agreed with the original shortlisting panels in the majority of appointment rounds that the complainant's applications did not provide enough evidence to meet the criteria. There were at least two rounds where the panels in the independent review found the complainant's applications to be "borderline" (close to meeting the criteria) and the review panels believe that they might have been able to be progressed to interview stage, depending on how many positions were being sought and if more interview slots had been available. For all the rounds examined and the numbers of interview slots which were available, the independent review panels agreed that those who were progressed to interview had demonstrated stronger evidence against the criteria than the complainant had.

The independent review panels also examined all 154 applications which were progressed to interview, against the criteria sought. In doing this, they were seeking to check for any applications which they felt definitely did not meet the criteria and therefore may have been progressed due to another reason which could have included the unwritten policy of progressing those with shared protected characteristics outlined in the diversity statements. The panels found one application which they considered "only just" met the criteria, and some others who met the criteria but would require detailed probing within the interview stage to demonstrate that they are an appointable candidate. There were none which they considered definitely did not meet them. As outlined in the independent report, it is not surprising that the review panels would have some small variation in their assessment against the initial panel judgements due to the subjective nature of assessment. However, there was no outlying or unduly concerning assessment decisions made by any of the initial panels.

The additional investigation carried out backed up and confirmed these findings. There was no concern raised by any of the PAAs involved in the different appointment rounds suggesting that there had been any unfair treatment of the complainant or an unwritten policy to progress those who share protected characteristics outlined in the diversity statement (Appendix 7). The examination of all paperwork involved in each of the appointment likewise raised nothing of concern (Appendix 8).

The analysis of the statistics in Appendix 9 indicates that a relatively high number of applications were made by those who shared the protected characteristics of being female and / or being from an ethnic minority background but those sharing other protected characteristics have not appeared to apply in the same numbers. This was established by comparing the percentage of applicants declaring this protected characteristic against the percentage of those in the Scottish population sharing the protected characteristic. In all cases, the percentages of those applying did not translate to interview or appointment to the same extent. The investigation showed that a number of measures to increase diversity have been identified as having been put in place (Appendix 4) along with a number of actions taken to try and mitigate bias on the part of the panel (Appendix 5). Given the lack of any evidence to suggest that there has been concerning or inappropriate action taken by

panels, this would suggest that such measures are being successful in attracting women and minority ethnic applicants, if not allowing them to progress at the same extent.

Analysing the news releases showed that it was reasonable to conclude that a proportion of appointees shared certain protected characteristics as outlined in Appendix 10.

A different concern was noted with the news releases. The complainant stated that the complainant, on examining the news releases, believed “that [he had] equivalent qualifications and experiences to the successful applicants.” The complainant concluded that the reason for non-selection must be something other than qualifications and experiences and complained that it was an unwritten policy of progressing those with protected characteristics as outlined in the diversity statement. Although the section of the Code (G1 for both 2013 and 2022 Codes) was not initially considered relevant to the complaint, during the course of the investigation it became relevant to consider. An analysis of the news releases, against the criteria for each of the roles, uncovered that a high proportion of the news releases made statements about skills, knowledge, experience and other attributes that the successful candidates would bring to the role, which did not directly correlate to the criteria which had been sought. If the complainant has similar qualifications and other experiences as these successful candidates and has read this in a news release, it is not unnatural to query why these candidates had been successful instead. As outlined in the analysis in Appendix 10, news releases made under the 2022 Code require this announcement to link directly to the attributes that were set out when the vacancy was publicised. This analysis therefore found that seven rounds run under the 2022 Code were not compliant with this requirement. In terms of the complaint, the complainant had considered the progression of applicants sharing protected characteristics outlined in the diversity statement to be the reason for his not progressing in the appointment round. The investigation has not found this to be the case. However, the fact that information in the news releases for approximately half of the appointment rounds involved is not directly linked to that outlined in the applicant pack, it is understandable that the complainant had concerns about the reasons for others progressing instead and sought to find a reason to explain this.

For the second part of the complaint, regarding how the complainant’s complaints at stages 1 and 2 were treated, the investigation concluded that although the Scottish Government had followed its complaint procedure, it immediately took a defensive stance to the complaint, rather than trying to understand the complainant’s concern and assist him. In particular, had comprehensive and helpful feedback been given, or at least offered, this may have provided the complainant with the answers as to why his own applications had not progressed, particularly given that the independent panel review found that some of the applications were close to meeting the criteria and that with extensive and constructive feedback, the complainant may have the opportunity to be a credible candidate for a board position.

The Commissioner has concluded, on the basis of the findings and analysis, that:

- i. As part of an independent review of shortlisted applicants, for all 15 appointment rounds, the independent panels agreed with the original panels assessment that

those shortlisted had met the criteria for selection. Shortlisting had therefore been carried out on the basis of merit, as required by the Code;

- ii. In all 15 appointment rounds investigated, the independent review of applications agreed that the complainant's applications were not as closely matched to the criteria as those who were shortlisted for interview;
- iii. There was no evidence whatsoever of any unwritten policy by the Scottish Ministers to progress applicants with protected characteristics as outlined in the positive action statement;
- iv. The analysis of news releases and management information available showed that protected characteristics could be deduced from some of the information provided but that those with protected characteristics are not being progressed in any way that could lead the Commissioner to conclude that there was an unwritten policy to progress these applicants;
- v. The Scottish Ministers have implemented a number of measures to try and increase diversity in a number of appointment rounds, which appeared (in the scope of the rounds investigated following this complaint) to be having a positive result in attracting women and minority ethnic applicants. There was no action being considered or used which gave any cause for concern;
- vi. Analysis of the news releases uncovered a concern about compliance with section G of the Code of Practice, which was not initially considered relevant to the complaint. It was established that a high number of news releases provided information about successful candidates that was not directly related to the criteria for selection which were sought. Although the information published about the successful candidates demonstrates considerable achievements and experience – and Scotland is very fortunate to have such experienced, qualified and talented individuals on its boards – the information published in such news releases are required under the 2022 Code to link directly to the criteria for selection that were set out when the vacancy was publicised. The investigation found that seven rounds were not compliant with the Code in this regard. In relation to the complaint, it is understandable that the complainant, having reviewed these news releases, had concerns about the reasons for others progressing before him and sought to find a reason to explain this;
- vii. Although the Scottish Government's complaint procedure was followed, the defensive approach taken meant that no discussion seems to have been had with the complainant to understand his concerns. Had such a discussion taken place, and an offer of detailed and constructive feedback been made and an understanding about why he had concerns around the news releases, it is possible that the complaint may have been resolved at an earlier stage. Given that our investigation, inclusive of independent review, found that the complainant, with some feedback and opportunity

to improve, showed potential to be a credible applicant, the Commissioner recommends that the Scottish Government should consider providing this feedback to the complainant. Furthermore, the Commissioner recommends that the Scottish Government should consider in every stage 1 complaint, whether providing detailed and constructive feedback to the complainant could be beneficial, and to make the offer as part of its frontline resolution, if relevant.

Element one of the complaint is not upheld. However, non-compliance has been found with the 2022 Code in relation to G1 (news releases not being linked directly to the attributes set out when the vacancy was publicised) in seven of the appointment rounds.

Element two is also not upheld. This is because the complaint procedure was followed. However, the Commissioner's view is that if more consideration had been given to trying to understand why the complainant was concerned, rather than defending the complaint, it may have been resolved earlier. The Scottish Government is recommended to consider in every stage 1 complaint, whether providing detailed and constructive feedback to the complainant could be beneficial, and to make the offer, if relevant.

APPENDIX ONE

Relevant Principles and Sections of the Codes of Practice

2013 Code

Principles of the Code

Merit

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

Integrity

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

Diversity and Equality

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

Sections of the Code

A1 Fair, open and merit-based appointments are the responsibility of the Scottish Ministers who will

iii. have in place an effective system for handling, and recording details of, all complaints about the appointment process

A9 The role of the selection panel is to identify and recommend to the Scottish Ministers for appointment applicants who, on the basis of merit, best meet the requirements of the post in question.

A10 Members of the selection panel will

- i. be competent to fulfil their role on the panel
- ii. understand and comply with the requirements of the Code

B4 When planning an appointment the Scottish Ministers will review the current board members' roles, skills, knowledge and experience and identify any gaps to be filled.

B5 The Scottish Ministers will communicate to the selection panel

- i. the role to be performed
- ii. the skills, knowledge and experience required

to meet the needs of the board.

C1 Based on the above, selection panel members will agree

- i. a clear and accurate description of the role to be performed (the role description)
- ii. a clear and accurate description of the skills, knowledge and experience envisaged to be effective in the role (the person specification). The skills, knowledge and experience will be described in a way that is readily understandable, is capable of

assessment and reflects the requirements of the role. They will not be unnecessarily restrictive.

D1 The methods used to assess applicants will

- i. be capable of assessing whether applicants have the skills, knowledge and experience needed to be effective in the role
- ii. be open and transparent
- iii. accommodate the needs of different groups
- iv. provide applicants with fair and equal opportunities to demonstrate their merit
- v. remove as far as reasonably possible the impact of personal bias on selection decisions

D2 Selection panel members will assess the merits of applicants against the skills, knowledge and experience needed using the methods they have agreed. New requirements will not be introduced during the appointment round.

D3 Assessment will be undertaken by individuals who are

- i. consistent in their assessment of applicants

D4 Assessment activity will identify the applicants who have demonstrated the skills, knowledge and experience required to be effective in the role and those who have not.

D5 The selection panel will identify the most able of the applicants who have demonstrated the skills, knowledge and experience required.

D6 The selection panel will agree an applicant summary for the appointing minister. The summary will set out the panel's decisions on how each applicant did or did not demonstrate the skills, knowledge and experience required to be effective in the role. The applicant summary will be based on the information provided by each applicant during the appointment round and will be sufficiently detailed to:

- i. identify to the appointing minister the most able applicants
- ii. provide evidence that the panel's decisions are valid.

The detail provided should be reasonable and proportionate having regard to the stage of assessment reached by the applicant.

D7 The applicant summary will contain the selection panel's recommendations for appointment. The panel will recommend only the applicants they have identified as the most able.

Sections of Statutory Guidance

2.1 In order to comply with the Code the appointment process must lead to the identification and appointment of the most able candidate(s). Most able can be defined as: "The applicant(s) who has(have) demonstrated the skills and knowledge that most closely match those required to be effective in the role."

2.2 The principles of Merit and Integrity apply to the entirety of the appointment process, including the stage at which the minister chooses whom to appoint. Merit is defined by the appointing minister at the point at which he or she advises the panel on "the skills, knowledge and experience required to meet the needs of the board". Should ministers

decide at the outset that applicants only have to meet a given criterion to a given extent then this must be made clear to potential applicants. Ministers may also wish to weight criteria for selection. Ministers in this way can provide absolute clarity on the attributes of the people whom they wish to appoint. 2.3 The Code provides that new requirements will not be introduced during any stage of an appointment process, as that would be incompatible with the principle of Integrity. It should be noted that new requirements are not limited to an additional requirement, but can include a change to the level required for a skill, knowledge or experience. 2.4 The most able candidates will therefore be those who meet the requirements to the extent specified by the minister.

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

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

6.2 The Code requires those charged with assessment to be consistent in doing so. This does not mean treating everyone the same. By way of example, some candidates may require reasonable adjustments in order for their treatment to be equitable.

2022 Code

Principles of the Code

Merit - All public appointments must be made on merit. Merit is defined by the Scottish Ministers for each board position to be filled, based on that board's specific needs at the time of, and anticipated period for, that appointment. Only persons judged most able to meet the requirements of the post will be appointed.

Accountability – The Scottish Ministers are ultimately responsible for making appointments in accordance with this Code and all other applicable legislation. The Commissioner is responsible for encouraging compliance with the Code and overseeing and reporting publicly on the practices employed by the Scottish Ministers and the people to whom they delegate responsibility.

Openness, Transparency and Integrity – The appointments process must be open, fair and impartial. The integrity of the process must be transparent and earn the trust and have the confidence of the public.

Equality, Diversity and Inclusion – The boards of Scotland's public bodies should be reflective of the communities that they serve and the Scottish Ministers will take substantive steps to achieve that aim. Public appointments must be advertised publicly in a way that will attract a strong and diverse field of suitable candidates. The process itself must provide

equality of opportunity and the practices employed must be inclusive for people from all walks of life and backgrounds.

Respect – Applicants and ultimately the people appointed to boards are integral to the good governance of Scotland’s public bodies. Applicants will be accorded the respect that they are due for their interest and their efforts and appointees for their contribution to public life.

Sections of the Code

A1 Fair, open and merit-based appointments are the responsibility of the Scottish Ministers who will:

iv. have in place an effective system for handling, and recording details of, all complaints about the appointment process

A7 The implementation and outcome of an appointment round are the responsibility of the selection panel chair. This includes responsibility for:

- i. fulfilling the role of a panel member
- ii. making key decisions on behalf of the Scottish Ministers
- iii. complying with the requirements of this Code
- iv. taking action when it appears the requirements may not be met
- v. providing the Scottish Ministers with assurance that the requirements of the Code have been met.

A9 Members of the selection panel will:

- i. be competent to fulfil their role on the panel
- ii. understand and comply with the requirements of the Code

B1 When considering any appointment activity, the Scottish Ministers will take into account the effectiveness of the board and how well it is functioning. They should consider the current composition of the board in terms of the attributes and the diversity of its membership. Attributes may include skills, knowledge, experience – including lived experience – values, perspectives, backgrounds – including socio-economic background and sector worked in – and geographical location. Diversity will be considered in relation to the protected characteristics of the current members, to the extent that that is known, in comparison with the protected characteristics of the population of Scotland or the region served by the board as appropriate.

The Scottish Ministers will then determine what skills, knowledge, experience and other attributes are needed by the board for it to perform its statutory functions and to do so economically, efficiently and effectively.

B4 When planning a new appointment, the Scottish Ministers will communicate to the selection panel their desired outcome for the appointment exercise. The skills, knowledge, experience and related attributes represent “Merit” for the purposes of the appointment being made. The definition of “Merit” cannot include protected characteristics. Where the Scottish Ministers wish to see the under-reflection of protected characteristics on a board addressed, this will also be communicated to the panel.

C1 The selection panel will design an appointment plan to deliver the appointing minister's preferred outcome. The plan will include:

ii. a clear and accurate description of the attributes that the minister requires of the ideal appointee (the person specification). The attributes will be described in a way that is readily understandable, is capable of assessment and reflects the requirements of the role. They will not be unnecessarily restrictive. They will not include protected characteristics. The person specification will be clear about the extent to which criteria have to be met and whether some attributes take priority over others. The attributes set out in the person specification constitute "the criteria for selection"

D1 The methods used to assess applicants will:

- i. be capable of assessing whether applicants have the skills, knowledge, experience and other relevant attributes specified by the appointing minister (the criteria for selection)
- ii. be open and transparent
- iii. accommodate the needs of and not present a barrier for people from different groups; reasonable adjustments will be proactively offered in the applicant information pack so that applicants do not feel compelled to or awkward about requesting them
- iv. provide applicants with fair and equal opportunities to demonstrate their merit
- v. remove as far as reasonably possible the impact of personal bias on selection decisions

D3 Selection panel members will assess the merits of applicants against the attributes specified by the appointing minister, and published in the applicant information pack, using the methods they have agreed. New requirements will not be introduced during any stage of the appointments process.

D5 Assessment will be undertaken by individuals who will be:

- i. consistent in their assessment of applicants

D6 Assessment activity will identify the applicants who have met the criteria for selection specified by the appointing minister and those who have not.

D7 The individuals who have most closely met the criteria for selection will be the 'most able' candidates recommended to the appointing minister.

D8 The selection panel will draft an applicant summary. The summary will set out the panel's view on how each applicant did or did not meet the criteria for selection. The content of the applicant summary is a matter for the selection panel chair, taking the views of the selection panel members into account.

The detail included in the applicant summary will be reasonable and proportionate to the stage of assessment reached by the applicant and the number of applications received.

The applicant summary will be based on the information provided by each applicant during each stage of the appointment round and will be sufficiently detailed to:

- i. identify to the appointing minister the most able applicants
- ii. provide evidence that the panel's decisions are valid

- iii. Include a summary of the fit and proper person test, where that has been delegated to the panel
- iv. provide feedback to applicants.

The appointing minister may choose to receive the entire summary or only that part which identifies the most able applicants.

D9 The applicant summary will contain the selection panel and panel chair's recommendations for appointment. The panel and panel chair will recommend only the applicants they have identified as the most able.

Sections of Statutory Guidance

1.2 "Merit", as defined for each position to be filled, is specified by the Scottish Ministers. The Scottish Ministers can specify that some criteria for selection should be met on a simple "pass/fail" basis or only to a given extent. They can specify that, due to the board's needs, one or more criteria are more important than the others in a person specification and weight them accordingly. How merit is defined will determine the outcome of each appointment round, including how likely it is that there will be a choice of suitable candidates.

2.4 In order to comply with the Code, the appointment process must lead to the identification and appointment of the most able candidate(s). Most able can be defined as: "The individuals who have met the criteria for selection most closely, provided that they have also met all of the criteria specified as essential and to the required standard."

2.13 The principle of "Equality, Diversity and Inclusion" states that the boards of Scotland's public bodies should be reflective of the communities that they serve and requires the Scottish Ministers to take substantive steps to achieve that aim. This guidance recognises that this will not always be possible at individual board level due to the numbers involved. By way of example, the visible ethnic minority community makes up a relatively small proportion of the overall population – although this varies by geographical area – and some boards only have a relatively small number of members. The Scottish Ministers are therefore encouraged to consider taking positive action and other suitable measures by reference to not just individual boards but the board population overall. The latter should particularly be the case when an appointment to the cohort of public body chairs is under consideration.

2.14 The principle of "Respect" means that the applicant journey from application to, where successful, appointment and induction should be a positive experience. Even if unsuccessful, applicants should feel that the time they spent on applying has been appreciated. The provision of meaningful feedback to people is a key element of this principle.

5.3 The Code anticipates that designing an appointment plan should be conducted by the selection panel whilst recognising that responsibility for deciding on the final plan rests with the panel chair (C1). How the planning stage is conducted is at the discretion of the selection panel chair, taking into account the views of the panel members. The plan should be evidence-based (C2) and designed to meet the appointing minister's preferred outcome. This extends to appointing the individual or individuals who meet the person specification most closely, including where the minister has identified particular criteria for selection that are priorities and that can be weighted over others, as well as redressing the under-

reflection of people who share protected characteristics, where that has also been requested by the appointing minister.

5.4 The Code anticipates that the application and assessment methods and any positive action measures selected will be based on evidence of what works well to attract and lead to the appointment of a diverse range of able applicants, taking account of relevant information held by, maintained and regularly updated by the Scottish Government for this purpose. Any positive action measures taken must be compatible with the applicable legislation.

5.5 This information will be made available to panels to enable them to select methods for publicity and application and assessment that they know will not represent barriers for people from particular under-represented groups and that can be used to address the under-reflection of people who share protected characteristics on boards. Panel chair reports will be used to add to this knowledge base on an ongoing basis.

5.6 The Code anticipates that both positive action measures and equality impact assessments should be used, as appropriate, in order to increase board diversity. Positive action measures do not have to be restricted to an appointment round by appointment round basis. By way of example, they can include board activity such as mentoring, training or shadowing schemes which supports succession planning (see 3.4). The results of such measures and assessments should also be captured for the knowledge base.

6.1 The Code sets out the range of requirements that assessment methods must adhere to in order to be considered compliant. These requirements are included on the basis that they are representative of good practice in recruitment and selection and with a view to ensuring that the process accommodates the needs of, and does not present a barrier to, people who currently share under-reflected characteristics on the boards of public bodies.

APPENDIX TWO

OVERVIEW OF THE APPOINTMENT ROUNDS COVERED BY THE INVESTIGATION

Body Name	Appointment made by:	Directorate	Code of Practice
NHS 24	Cabinet Secretary for NHS Recovery, Health and Social Care, Humza Yousaf MSP	Health and Social Care	2022 Code
Care Inspectorate	Minister for Social Care, Mental Wellbeing and Sport, Maree Todd MSP	Health and Social Care	2022 Code
Scottish Fire and Rescue Service	Minister for Victims and Community Safety, Siobhan Brown MSP	Education and Justice	2022 Code
Loch Lomond and the Trossachs National Park Authority	Minister for Green Skills, Circular Economy and Biodiversity, Lorna Slater MSP	Net Zero	2022 Code
Judicial Appointments Board for Scotland	Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP	Education and Justice	2022 Code
Creative Scotland	Minister for Culture, Europe and International Development, Christina McKelvie MSP	Economy	2022 Code
Grampian NHS	Cabinet Secretary for NHS Recovery, Health and Social Care, Michael Matheson MSP	Health and Social Care	2022 Code
NHS Education for Scotland	Cabinet Secretary for NHS Recovery, Health and Social Care, Michael Matheson MSP	Health and Social Care	2022 Code
Risk Management Authority	Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP	Education and Justice	2013 Code
Scottish Legal Aid Board	Minister for Victims and Community Safety, Siobhan Brown MSP (the initial application pack had Minister for Community Safety Elena Whitman MSP as appointing minister)	Education and Justice	2022 Code
Historic Environment Scotland	Minister for Culture, Europe and International Development and Minister with Special Responsibility for Refugees from Ukraine, Neil Gray MSP	Economy	2013 Code
Scottish Commission on Social Security	Minister for Social Security and Local Government, Ben Macpherson MSP.	Corporate	2013 Code
Mental Welfare Commission for Scotland	Minister for Mental Wellbeing and Social Care, Kevin Stewart MSP	Health and Social Care	2013 Code
Scottish Social Services Council	Minister for Children and Young People, Clare Haughey MSP	Health and Social Care	2013 Code

Ethical Standards Commissioner

Scottish Local Authority Remuneration Committee	Minister for Local Government Empowerment and Planning, Joe Fitzpatrick MSP (the initial application pack had Minister for Social Security and Local Government, Ben Macpherson MSP as appointing minister)	Communities	2013 Code
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APPENDIX THREE

POSITIVE ACTION (DIVERSITY) STATEMENTS USED IN EACH APPOINTMENT ROUND

Body	Code	Diversity statement
NHS 24	2022	<p>'The Scottish Government is committed to appointment on merit, diversity and equality for public appointments.</p> <p>We value very highly the benefits of having different experience and points of view on our Boards and we are keen that people from all walks of life apply for public appointments. Scottish Ministers particularly welcome applications from disabled people, LGBT+ people, people from ethnic minority communities and people aged under 50.'</p>
Care Inspectorate	2022	<p>'The Scottish Ministers are committed to diversity and equality. This is particularly important to the Care Inspectorate right now, as care services in Scotland are likely to change significantly. Having Board members who represent the people of Scotland will help the Care Inspectorate be better at the work we do.</p> <p>We value very highly the benefits of having different experience and points of view on our Boards and we are keen that people from all walks of life apply for public appointments. Scottish Ministers particularly welcome applications from women, disabled people, LGBTI+ people, people from ethnic minority communities and people aged under 50.'</p>
Scottish Fire and Rescue Service	2022	<p>'Scottish Ministers welcome applications from people from a wide range of backgrounds. We particularly welcome applications from people that are currently under-represented at Board level, such as women, disabled people, LGBTI+ people, people from ethnic minority communities and people aged under 50.'</p>
Loch Lomond and the Trossachs National Park Authority	2022	<p>'We particularly welcome applications from women, LGBT+ people, young people, disabled people and those from minority ethnic communities.'</p>
Judicial Appointments Board for Scotland	2022	<p>'Scottish Ministers particularly welcome applications from people with protected characteristics that are currently under-represented on the boards of Public Bodies, such as disabled people, LGBTI+ people, those from black and minority ethnic communities and people aged under 50.'</p>

Creative Scotland	2022	<p>‘We particularly welcome applications from women, LGBT+ people, young people (under 50), disabled people, those from minority ethnic communities and people with a range of socio-economic backgrounds.</p> <p>Applicants will wish to be aware that for the board member roles to Creative Scotland we are operating a guaranteed interview scheme for disabled applicants. For further information, please see the applicant information pack.’</p>
Grampian NHS	2022	<p>‘We value very highly the benefits of having different experience and points of view on our Boards and we are keen that people from all walks of life apply for public appointments. Scottish Ministers particularly welcome applications from people that are currently under-represented such as women, disabled people, LGBTI+ people, people from ethnic minority communities and people aged under 50.’</p>
NHS Education for Scotland	2022	<p>‘Scottish Ministers particularly welcome applications from people with protected characteristics who are currently under-represented on the Board of NES such as, disabled people, LGBTI+ people, those from Black, Asian and Minority Ethnic communities, people aged under 50, and men.’</p>
Risk Management Authority	2013	<p>‘Scottish Ministers particularly welcome applications from people with protected characteristics who are under-represented on Scotland’s public bodies, such as women, disabled people, LGBTI+ people, those from Black, Asian and Minority Ethnic communities and people aged under 50.’</p>
Scottish Legal Aid Board	2022	<p>‘Scottish Ministers particularly welcome applications from people with protected characteristics that are currently under-represented on the Scottish Legal Aid Board, such as women, disabled people, LGBTI+ people, those from black and minority ethnic communities and people aged under 50.’</p>
Historic Environment Scotland	2013	<p>‘We value very highly the benefits of having different experience and points of view on our Boards. Scottish Ministers welcome applications from people with protected characteristics, such as, disabled people, LGBTI+ people, those from minority ethnic communities, people aged under 50 and women.’</p>

<p>Scottish Commission on Social Security</p>	<p>2013</p>	<p>‘We value very highly the benefits of having different experience and points of view on our Boards and we are keen that people from all walks of life apply for public appointments. Scottish Ministers particularly welcome applications from women, LGBTI+ people, people from ethnic minority communities and people aged under 50.</p> <p>We particularly encourage applications from people with personal experience of disability, which may include carer responsibilities. Given the work of SCoSS Ministers expect to make at least on appointment to someone with such experience.’</p>
<p>Mental Welfare Commission for Scotland</p>	<p>2013</p>	<p>‘We value very highly the benefits of having different experience and points of view on our Boards and we are keen that people from all walks of life apply for public appointments. Scottish Ministers particularly welcome applications from women, disabled people, LGBTI+ people, people from ethnic minority communities and people aged under 50.’</p>
<p>Scottish Social Services Council</p>	<p>2013</p>	<p>‘Scottish Ministers particularly welcome applications from people with protected characteristics that are currently under-represented on the boards of Public Bodies, such as disabled people, LGBTI+ people, those from black and minority ethnic communities and people aged under 50.’</p>
<p>Scottish Local Authority Remuneration Committee</p>	<p>2013</p>	<p>‘We particularly welcome applications from people with protected characteristics that are currently under-represented on the Boards of Scottish Public Bodies, including those from minority ethnic communities, disabled people and people aged under 50.’</p>

APPENDIX FOUR

SUMMARY OF MEASURES TO INCREASE DIVERSITY USED IN EACH OF THE APPOINTMENT ROUNDS

Body	Code	Gender Representation on Public Body Boards requirements	Guaranteed Interview Scheme	Targeted advertising and publicity	Mentoring or other support mechanisms	Reasonable adjustments
NHS 24	2022	N/A	N/A	Planning notes, 2023, p.3 - See 1 below	N/A	Applicant pack, p.12 - See 2 below
<p>1. '... the Board will undertake a publicity campaign which will focus on using a mix of advertising methods, for example: social media, including Vlogs from current Board Members; public/community engagement, including with a range of organisations which champion under-represented groups, such as BAME networks, faith organisations, youth groups etc; stakeholder and partner networks; internal staff and board member communication channels- all of which are designed to encourage a wide range of people from diverse backgrounds to apply.'</p> <p>2. 'If you require any disability-related reasonable adjustments to support you through the application and selection process, you should contact the Public Appointments Team by calling 0300 244 1898 or by emailing Public.appointments@gov.scot'</p>						
Care Inspectorate	2022	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2023, p.15	N/A	Attraction Strategy, 2023 – see 1 below	N/A	Applicant pack, 2023, p.15 – see 2 below
<p>1. 'The Chair of the Board will write to a number of relevant bodies including:</p> <ul style="list-style-type: none"> • Scottish Association for Mental Health (SAMH); • Scottish Commission for Learning Disability (SCLD); • Coalition Of Care And Support Providers In Scotland (CCPS); • Scottish Child Minding Association (SCMA); • National Day Nurseries Association (NDNA); • Citizens Advice; • Carers Scotland; 						

- Scottish Care;
- Advocacy Alliance;
- CoSLA;
- Social Work Scotland;
- Scottish Health Board Chairs;
- Health and Social Care Alliance;
- SOLACE IJB Chief Officers/Chairs;
- The Health and Care Professionals Council (HCPC);
- Children’s Hearings Scotland;
- Royal College of Physicians;
- Royal College of Nursing;
- Relevant Criminal Justice Social Work Organisations;
- Relevant Children & Young People Social Work Organisations;
- Relevant 3rd Sector Organisations;
- Scottish Social Services Council (SSSC);
- Social Work Scotland – Local Practitioners Forum;
- Scottish Public Health Network;
- The Scottish Council for Voluntary Organisations (SCVO).
- Mobility and Access Commission for Scotland
- British Computer Society
- Chartered Institute for IT

In addition, the advert will appear on www.appointed-for-scotland.org, and on the Public Appointments Twitter feed and other social media outlets. Information will also be circulated to the contacts who receive appointment information. They will include:

- Age Concern Scotland;
- the Black and Minority Ethnic Elders Group;
- the Centre for Education for Racial Equality in Scotland;
- Citizens Advice Scotland;
- Edinburgh and Lothian’s Racial Equality Council;
- the Equality Network.

They and others will be asked to publicise the appointments on their websites or through their distribution and network routes. The appointments will also be forwarded to a number of organisations which support and promote women within the workplace including the 2% club; Women on Boards; and Scottish Changing the Chemistry who will be asked to promote the appointments in a similar way. The panel will also use their personal and professional networks to raise awareness of these opportunities, particularly relating to the “Digital Transformation” post.’

2. ‘If you have a disability within the meaning of section 6 of the Equality Act 2010 and wish to discuss an adjustment at any stage of the public appointments process, please get in touch with the Public Appointments Team by email Public.appointments@gov.scot’

Scottish Fire and Rescue Service	2022	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2023, p.18	N/A	Planning meeting note, 2023, p.4 – see 1 below	Planning meeting note, 2023, p.4 – see 2 below	Applicant pack, 2023, p.6 – see 3 below
<p>1. 'The advert will appear on www.appointed-for-scotland.org and will be circulated to over 1500 individuals and over 270 organisations who have registered on the public appointments notes of interest contact list. As well as individuals information will go to bodies such as Age Concern Scotland; Black and Minority Ethnic Elders Group; Centre for Education for Racial Equality in Scotland; Citizens Advice Scotland; the Equality Network; the Two Per Cent Club; Women on Boards; and Changing the Chemistry etc. The appointments will also be publicised on the Public Appointments Twitter, Facebook and LinkedIn accounts as well as on similar accounts from the Scottish Government.'</p> <p>2. 'Sponsor team will work with Changing the Chemistry and arrange an online event.'</p> <p>3. 'If you require a reasonable adjustment at any stage of the public appointments process, please contact with the Public Appointments Team on 0300 244 1898 or email public.appointments@gov.scot.</p> <p>If you need any of the application pack documentation in an alternative format such as plain text, Braille or large print, please contact the Public Appointments Team by calling 0300 244 1898 or by emailing public.appointments@gov.scot.'</p>						
Loch Lomond and the Trossachs National Park Authority	2022	A summary of GRPB, its provisions, and the board composition of Loch Lomond and the Trossachs National Park Authority are mentioned in the Applicant Information	Applicant Information Pack, 2023, p.14	N/A	See 2 below	Applicant Information Pack, 2023, p.14 – see 3 below

		Pack, 2023, p.11 – see 1 below				
<ol style="list-style-type: none"> 1. 'Loch Lomond and The Trossachs National Park Authority does not currently meet their 'gender representation objective' that the board should have 50% women.' 2. The end of involvement report from the PAA allocated to this round mentioned that the public body has a board shadowing scheme in place which supports aspirations of individuals from under-reflected backgrounds on board. 3. 'Sometimes information about a reasonable adjustment is shared with the selection panel to ensure that requirements are met (e.g. if a BSL interpreter is required).' 						
Judicial Appointments Board for Scotland	2022	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2023, p.6	N/A	Planning meeting note, 2023, p.4 – see 1 below	N/A	Advert, 2023, p.3 – see 2 below
<ol style="list-style-type: none"> 1. 'The advert will appear on www.appointed-for-scotland.org and will be circulated to over 1500 individuals and over 270 organisations who have registered on the public appointments notes of interest contact list. As well as individuals information will go to bodies such as Age Concern Scotland; Black and Minority Ethnic Elders Group; Centre for Education for Racial Equality in Scotland; Citizens Advice Scotland; the Equality Network; the Two Per Cent Club; Women on Boards; and Changing the Chemistry etc. The appointments will also be publicised on the Public Appointments Twitter, Facebook and LinkedIn accounts as well as on similar accounts from the Scottish Government.' 2. 'The Scottish Government will always give consideration to disability-related reasonable adjustments that an applicant might request to enable them to demonstrate their merit and participate fully in the selection process.' 						
Creative Scotland	2022	A summary of GRPB, its provisions, and the board composition of Loch Lomond and the	Applicant Information Pack, 2023, p.14	Planning meeting note, 2023, p.2 – see 2 below	N/A	Applicant Information Pack, 2023 – see 3 below

		Trossachs National Park Authority are mentioned in the Applicant Information Pack, 2023, p.7. GRO mentioned in planning meeting note, 2023, p.7 – see 1 below				
<p>1. 'The selection panel discussed the need for the board to meet the GRO objective and recognised that they needed to appoint women.'</p> <p>2. 'A discussion was had in how to promote the vacancy to organisations that represent women and to make sure that the wording around the advert was inclusive.'</p> <p>3. 'If you require a reasonable adjustment at any stage of the public appointments process, please contact with the Public Appointments Team on 0300 244 1898 or email public.appointments@gov.scot. (p.7)</p> <p>All applicants invited to interview by any method will be asked if they require reasonable adjustments to attend the interview. (p.14)'</p>						
Grampian NHS	2022	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2023, p.12	N/A	Note of planning meeting, 2023, p.2 – see 1 below	Note of planning meeting, 2023, p.2 – see 2 below	Applicant Information Pack, 2023, p.11 – see 3 below
<p>1. 'the Board will undertake a publicity campaign which will focus on using a mix of advertising methods, for example: social media; local media; hospital radio; public/community engagement, including with a range of organisations which champion under-represented groups, such as BAME networks, faith organisations, youth groups etc; stakeholder and partner networks; posters in health premises; and board member networking - all of which are designed to encourage a wide range of people from diverse backgrounds to apply.'</p>						

<p>2. 'The Board are also holding two Information Sessions open to those who wish to find out more.'</p> <p>3. 'If you require any disability-related reasonable adjustments to support you through the application and selection process, you should contact the Public Appointments Team by calling 0300 244 1898 or by emailing Public.appointments@gov.scot.'</p>						
NHS Education for Scotland	2022	N/A	N/A	N/A	N/A	Applicant Information Pack, 2023, p.17 – see 1 below
<p>1. 'If you require any reasonable adjustments to support you through the application and selection process, you should contact the Public Appointments Team by calling 0300 244 1898 or by emailing Public.appointments@gov.scot.'</p>						
Risk Management Authority	2013	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack (2023), p.7	N/A	N/A	N/A	Applicant Information Pack, 2023, p.7
<p>1. 'If you require a reasonable adjustment at any stage of the public appointments process, please contact the Public Appointments Team on 0300 244 1898 or email public.appointments@gov.scot.'</p>						
Scottish Legal Aid Board	2022	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2023, p.6	N/A	Planning meeting note, 2022, p.3 – see 1 below	N/A	Applicant pack, 2023, p.6 – see 2 below
<p>1. 'The advert will appear on www.appointed-for-scotland.org and will be circulated to individuals and groups who receive appointment information on all public appointments. They include Age Concern Scotland; Black and Minority Ethnic Elders Group; Council for Ethnic Minority Voluntary Organisations, Centre for Education for</p>						

<p>Racial Equality in Scotland; Citizens Advice Scotland; the Equality Network; the 2% Club; Women on Boards; and Changing the Chemistry. Public Appointments will also circulate details on their social media platforms (Twitter; Facebook; LinkedIn) and the public appointments website.'</p> <p>2. 'If you require a reasonable adjustment at any stage of the public appointments process, please contact with the Public Appointments Team on 0300 244 1898 or email public.appointments@gov.scot.'</p>						
Historic Environment Scotland	2013	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack, 2022, p.17	N/A	N/A	N/A	Applicant Information Pack, 2022, p.6 – see 1 below
<p>1. 'If you require a reasonable adjustment at any stage of the public appointments process, please contact the Scottish Government Public Appointments Team by calling 0300 244 1898; or by emailing, public.appointments@gov.scot.'</p>						
Scottish Commission on Social Security	2013	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack (2022), p.17	N/A	N/A	N/A	Applicant pack, 2022, p.18 – see 1 below
<p>1. 'If you have a disability as defined in section 6 of the Equality Act 2010 and require an adjustment at any stage of the public appointments process, please get in touch.'</p>						
Mental Welfare Commission for Scotland	2013	A summary of GRPB and its provisions is mentioned in the Applicant	N/A	Planning meeting note, 2022, p.2 – see 1 below	N/A	Applicant pack, 2022, p.15 – see 2 below

		Information Pack (2022), p.10				
<p>1. 'the Board will undertake a publicity campaign which will focus on using a mix of advertising methods, for example: social media, including Vlogs from current Board Members; public/community engagement, including with a range of organisations which champion under-represented groups, such as BAME networks, faith organisations, youth groups etc; stakeholder and partner networks; internal staff and board member communication channels - all of which are designed to encourage a wide range of people from diverse backgrounds to apply.'</p> <p>2. 'If you have a disability within the meaning of section 6 of the Equality Act 2010 and require an adjustment at any stage of the public appointments process, please get in touch with the Public Appointments Team on 0300 244 1898; or by emailing Public.appointments@gov.scot.'</p>						
Scottish Social Services Council	2013	A summary of GRPB and its provisions is mentioned in the Applicant Information Pack (2022), p.12	N/A	N/A	N/A	Applicant Information Pack, 2022, p.13 – see 1 below
<p>1. 'If you require a reasonable adjustment or require information in an alternative format at any stage of the public appointments process, please contact with the Public Appointments Team on 0300 244 1898 or email public.appointments@gov.scot.'</p>						
Scottish Local Authority Remuneration Committee	2013	N/A	N/A	N/A	N/A	Applicant pack, 2022, p.15 – see 2 below
<p>1. 'If you require a reasonable adjustment at any stage of the appointments process please contact the Public Appointments Team by emailing public.appointments@gov.scot'</p>						

APPENDIX FIVE

ACTION TAKEN TO MITIGATE BIAS

Body	Code	Details of actions taken to mitigate unconscious bias
NHS 24	2022	Briefing on unconscious bias Training on the Code and good practice* Anonymising applications
Care Inspectorate	2022	Training on the Code and good practice* Anonymising applications
Scottish Fire and Rescue Service	2022	Training on the Code and good practice* Anonymising applications Allowing sufficient time to evaluate applications (evidenced by an interview timetable in the shortlisting notes which included time for summing up after each interview and which suggested that the panel should discuss this)
Loch Lomond and the Trossachs National Park Authority	2022	Training on the Code and good practice*
Judicial Appointments Board for Scotland	2022	Training on the Code and good practice* Allowing sufficient time to evaluate applications (evidenced by an interview timetable in the shortlisting notes which included time for summing up after each interview and which is presumably on the back of a discussion between the panel about how much time would be needed)
Creative Scotland	2022	Training on the Code and good practice*
Grampian NHS	2022	Training on the Code and good practice* Anonymising applications Allowing sufficient time to evaluate applications (evidenced by a note in the shortlisting notes about the time to be given for interviews which is presumably on the back of a discussion between the panel about how much time would be needed)
NHS Education for Scotland	2022	Training on the Code and good practice* Anonymising applications
Risk Management Authority	2013	Allowing sufficient time to evaluate applications (evidenced by a note in the shortlisting notes about the time to be given for interviews which is presumably on the back of a discussion between the panel about how much time would be needed)

Scottish Legal Aid Board	2022	Training on the Code and good practice* Allowing sufficient time to evaluate applications (evidenced by an interview timetable in the shortlisting notes which included time for summing up after each interview and which is presumably on the back of a discussion between the panel about how much time would be needed)
Historic Environment Scotland	2013	
Scottish Commission on Social Security	2013	Anonymising applications Allowing sufficient time to evaluate applications (evidenced by an interview timetable in the shortlisting notes which included time for summing up after each interview and which is presumably on the back of a discussion between the panel about how much time would be needed)
Mental Welfare Commission for Scotland	2013	Anonymising applications Allowing sufficient time to evaluate applications (evidenced by a note in the shortlisting notes about the time to be given for interviews which is presumably on the back of a discussion between the panel about how much time would be needed)
Scottish Social Services Council	2013	Briefing on unconscious bias Anonymising applications
Scottish Local Authority Remuneration Committee	2013	Briefing on unconscious bias Anonymising applications

*It is a Code requirement for panel chairs and any independent panel members to undertake training on the appointments process and on diversity, equality and inclusion in the context of making public appointments, before participating in appointment round activities under the 2022 Code of Practice. This was not required for appointment rounds allocated under the 2013 Code of Practice.

APPENDIX SIX

INDEPENDENT REVIEW OF APPLICATIONS (REPORT PROVIDED BY PAA – BILL SMITH)

REPLICATION OF SHORTLISTING OF COMPLAINANT'S AND SHORTLISTED CANDIDATES' APPLICATIONS

INTRODUCTION

1 The complainant has asserted that

He applied for 16 different appointment opportunities and was not invited to an interview for any one of those. On inspecting the news releases for those who were appointed to the positions, he believes that he has equivalent qualifications and experiences to the successful applicants. Due to the diversity statement in the applicant packs for the positions that he applied for, he believes that he has been unfairly treated by not being invited to interview. He believes that this is due to a politically motivated intention to progress applicants who belong to the protected characteristic groupings outlined in the diversity statement over those who do not belong to these groupings. He believes that the appointment panel for each selection process, by applying this intention, have acted in an unethical manner.

The purpose of this 'replication' exercise is therefore:

- to assess each of the complainant's applications, by reviewing information and evidence provided in his applications against the criteria being tested at the shortlisting stage. The aim of this is to identify if any pattern and/or information emerges which would assist the Commissioner's investigation. The findings may also provide some feedback for the complainant
- to assess each of the shortlisted candidates' applications for each round in question, by reviewing information and evidence provided in their applications against the criteria being tested at the shortlisting stage. The aim of this is to identify whether there is any indication that one or more clearly unsuitable candidates were progressed to the interview stage. This will allow comparison with the monitoring data to identify if any such candidate is among the groups listed in the diversity statement relative to the round.

2 This paper contains the following sections:

- A description of the shortlisting process
- The methodology for replication of shortlisting of the complainant's and shortlisted candidates' applications
- Findings and conclusions

THE SHORTLISTING PROCESS

3 There is an expectation, supported by the Code and Statutory Guidance, that each round will include a shortlisting stage, to identify those applicants who have, in their applications, best demonstrated the skills, knowledge and experience sought at that stage, and thus should be progressed to the final stage of assessment... Note that, to facilitate the application process for candidates, Panels may decide to limit the number of criteria being tested at this stage, eg if there are six criteria for the role, the Panel may only decide to test three of them at the shortlisting stage. Precise information on the application process, along with guidance for prospective candidates on how to complete applications, is contained in an Applicant Information Pack.

4 it is important to note at this stage that, while the 2022 code includes areas such as 'lived experience' and 'values' within the definition of 'merit', it is not permissible for panels to include 'protected characteristics' within this definition, nor use these in making any selection recommendations. Accordingly, all decisions must be based on merit.

5 The Selection Panel will include a Chair and Panel Members. Depending on the Commissioner's views on appropriate oversight of the round, the Panel may include a Public Appointments Adviser (PAA). A member of the Public Appointments Team (PAT) will act as secretariat and record the Panel's decisions. On and from the introduction of the 2022 Code, all Panel Chairs and independent panel members have received training in the public appointments process, which includes references to conscious and unconscious bias. In addition, many Chairs will previously have received training in these subjects as part of their role in Scottish Government. The PAT representative and PAA will provide advice on these areas as required throughout the selection process

6 Following the closing date for applications, PAT will send Panel Members copies of all application forms received. Depending on the Panel's preference agreed at the Planning Meeting, these may or may not be anonymised, but will not include information used for monitoring purposes, such as protected characteristics. Note, however, that such information may occasionally emerge or be reasonably inferred in a small number of cases, where applicants include the information in their responses to add context.

7 PAT will usually also provide Panel Members with 'Scoring Guidance' to aid the shortlisting process. Use of this document is not a Code requirement, but is normally deployed to help Panel members assess applications consistently against criteria and indicators. The scoring ranges from 1 (very poor or no evidence) to 5 (exceptional evidence). The minimum score normally needed to be considered for being shortlisted is a 3 (acceptable evidence) across all of the criteria being tested at this stage

8 Panel Members will be asked, individually, to review each application against the information and evidence provided by the applicants, and indicate whether, in their opinion, the applicants should be invited to interview. There is often a pro forma document provided by PAT, on which Panel Members can record their views under 'Yes', 'No' and in some cases 'Maybe' columns.

9 At the shortlisting meeting, Panel Members will individually be invited to present their views as a 'first pass' as to whether each applicant should progress to interview. While there is often an initial consensus of decisions in those cases where there are particularly strong

or weak applicants, there are invariably a number of instances where there is no consensus and/or where one or more panel members have reserved judgement with a 'maybe'. The Panel Chair then initiates a discussion on all such applicants, inviting Panel Members to present their rationale for their score and recommendation. This will take the form of a detailed discussion on the information provided by each applicant.

10 A factor coming into play at this point is the number of positions available, and in turn the number of interviews likely needed to identify candidates who can be recommended to the relevant minister. For example, if there is one vacancy, the Panel may wish to identify the best 4 or 5 candidates for interview. At the other end of the scale, if there are say 4 vacancies, the Panel may wish to interview around 15 candidates. What this means is that, for a round with a lot of applications, but fewer positions to fill, the Panel may only shortlist those applicants with an overall score above x, or agree that (say) scores of 4 and 5 will be invited for interview. This in turn means that a number of applicants with 'acceptable' scores (3) across the board (including some initial 'yesses' identified at the first pass described above) may not progress to interview. In some cases the panel will note specific areas to focus on at interview, eg where an applicant has done just enough to be shortlisted, but further information will be helpful. Similarly, in the case of 'near misses,' panels may provide a note of the reason for feedback to the applicant.

11 It should be noted that in the context of final decision making, the 2013 Code required a consensus of Panel Members, whereas the 2022 Code states that the Panel Chair, having taken into account the views of Panel Members, will make the final decision as to who progresses to interview.

12 It should be noted that Application Information Packs will often include the following statement:

*By the end of the process, all successful candidates must meet **all** of the **general essential criteria** and we will draw on the whole process (Application and tailored CV, oral response, board paper, and interview responses) for evidence.*

This statement reflects the evolution of the Code over many years, to improve diversity on boards by encouraging panels to 'rule people in' at the shortlisting stage, rather than to 'rule people out' as was often the case under previous codes. This gives the panel some leeway at the shortlisting process to put forward for interview an applicant who, while not quite having presented all of the information sought, may nonetheless via his or her application, have provided sufficient information and evidence that they are capable of meeting the criteria *by the end of the process*. As described above, the panel will often 'qualify' the shortlisting decision with a note of particular areas to focus on in the final assessment stage. It is made clear to panels that this is not a device to get 'near misses' over the line, but is a measured and proportionate approach to identify good applicants whose application includes specific information, such as in the responses and/or in the tailored CV/life history, which, if probed and developed at interview, may result in the criterion ultimately being met by the candidate. Accordingly, this is a route used sparingly by panels.

METHODOLOGY FOR REPLICATION OF SHORTLISTING THE COMPLAINANT'S AND SHORTLISTED CANDIDATES' APPLICATIONS

13 While it is not possible to precisely replicate the conditions under which the original shortlisting exercises took place, it was considered that it may contribute to the investigation if the complainant's and shortlisted candidates' applications were assessed against the criteria for each round, as originally tested at the application stage.

14 To this end, the Commissioner engaged four experienced and qualified persons (two PAAs and two ESC staff members) to undertake the replication exercise. In order to avoid any of the PAAs assessing applications from rounds in which they had been previously involved, two 'panels' were set up, as follows:

Panel 1 – PAA 1 plus ESC staff member A

Panel 2 – PAA 2 plus ESC staff member B

Each panel were allocated a number of the rounds relating to the complaint. Members of each panel were asked to individually and separately review the complainant's and shortlisted candidates' application forms against the criteria, and, using the scoring guidance, indicate their 'first pass' score and tick the appropriate 'yes/no/maybe' box on the pro forma.

15 The members of each separate panel then met as if in a shortlisting meeting, to make a final recommendation (ie to interview or not), taking into account the wider picture, including the number of applications for each Board and the number of positions available (see para 10 above).

16 It has to be borne in mind that the shortlisting of applications, like the majority of opinion-based decisions, is ultimately a subjective process, with decisions taken at a point in time using information which may be interpreted differently by different Panel Members. This subjectivity is ameliorated by having a defined process, including by the involvement of (typically) three or four Panel Members, allowing for challenge and discussion before arriving at an outcome

17 The findings and conclusions were then provided to the Commissioner for information. These are subject to a caveat in that the outcome needs to be used along with other elements of the investigation to inform the Commissioner's determination, rather than be viewed in isolation.

FINDINGS

18 The following statistics from the outputs from the replication panels are offered in order to provide a context to the investigation findings:

Number of appointment rounds	15
Number of appointment rounds with anonymised applications	9
Number of positions to be filled	41
Number of applications in total	753
Number of candidates shortlisted for interview	154 (20%)
Number of candidates not shortlisted for interview	599 (80%)
Number of candidates shortlisted with a 'qualified*' comment	17
Number of positions to be filled as a % of all applications	5.5%
Number of positions to be filled as a % of shortlisted applications	26.5%
Number of occasions where replication panel disagreed with original panels	1
Number of shortlisted application forms which provided information to indicate that the applicant held a protected characteristic as outlined in the diversity statement of all shortlisted applications)	42 (27.3%)
Number of shortlisted application forms which provided information to indicate that the applicant held a protected characteristic as outlined in the diversity statement and which also had a 'qualified' comment all shortlisted applications)	8 (5.2% of)

*A qualified comment being something to be explored further at interview, or mention that would progress to interview only if there were enough slots for example.

COMPARISON OF REPLICATION PANEL RESULTS WITH ORIGINAL PANEL DECISIONS

19 Results from the replication exercise showed an extremely close (99%) correlation to those from the original shortlisting exercise. In only one instance did the replication panel disagree with the original shortlisting process. This related to one candidate for the Risk Management Authority whom the replication panel did not shortlist for interview. This was noted as 'borderline' and the application did meet the criteria set, but the strength of other applications meant that it would not progress to interview. As is the nature of the shortlisting process, the replication panel identified some candidates who should be progressed to interview with some 'qualified' comments. Those with 'qualified' comments were applicants who the replication panel agreed were correctly identified for interview, but only if there were

enough interview slots available and the panel may seek to elicit more information and evidence from them in certain areas at interview.

In every appointment round, the panel identified whether the applications were anonymised or not and whether anything was mentioned in the application which would identify that the applicant had a protected characteristic as outlined in the diversity statement.

The one application for which the replication panel did not agree with the original shortlisting process was a non-anonymised application but it did not provide any information within the content of the application to indicate that the applicant held any protected characteristic outlined in the diversity statement.

Although there were 8 applications which demonstrated that the applicant held a protected characteristic as outlined in the diversity statement and also had a 'qualified' comment, the panels agreed that all applications with a 'qualified' comment were appropriately shortlisted for interview and did not consider that the identification of any protected characteristic made any difference to this outcome.

REPLICATION PANEL COMMENTS ON COMPLAINANT'S APPLICATIONS

20 In the case of the complainant, the replication panels agreed with the original panel decisions to not shortlist for interview in all cases.

21 In at least 2 of the complainant's applications, the replication panel noted that, had there been more appointment opportunities, and therefore interview slots available, or had there been fewer applications, it is possible that the complainant may have been offered an interview. These would have been with a 'qualified' comment that meant fairly substantial evidence would have needed to be sought at interview to elicit the required evidence to show the requirements were met.

22 It may be appropriate to offer feedback on the above to the complainant, with a view to identifying improvement opportunities

CONCLUSIONS

23 There is no evidence to suggest that the complainant should have been shortlisted for any of the roles applied for.

24 There is ample documented evidence to suggest that the original panels were correct in not shortlisting any of the complainant's applications.

25 There is no evidence to suggest that the original panels progressed any candidate to interview for any reasons other than on merit, based solely on the information and evidence presented in application forms.

26 There is no evidence to suggest that, in those rounds where an applicant with a 'welcomed' protected characteristic referenced this fact, such information resulted in them being shortlisted by the panel where they clearly had not provided sufficient evidence to justify this.

27 There is no evidence to suggest that conscious or unconscious bias played any part in the original panels' shortlisting decisions.

28 There is evidence to confirm that, throughout each round, all panels were supported by experienced managers from the Public Appointments Team, and that, in the majority of rounds, by an experienced Public Appointments Adviser.

29 There is evidence to confirm that, for all rounds undertaken under the 2022 Code, all Panel Chairs and Independent Panel Members received appropriate training.

APPENDIX SEVEN

COMMENTS OR CONCERNS RAISED BY PAAS

No concerns in relation to the subject of the complaint were raised by any of the Commissioner's representatives during any of the rounds. The majority (eleven of fifteen) provided comments and observations on under-reflection identified on the board during panel discussions and any measures taken by the panel to address this. This was identified using management information from prior rounds or through discussions of the current board makeup and skillset. Many end of involvement reports noted that measures to encourage a diverse range of applicants would be implemented but did not necessarily turn into formal positive action – this included advertising to wide networks and careful consideration of criteria to ensure accessibility. The following are a selection of comments from PAAs which are taken from a combination of notes from the 'End of Involvement' report, emails from the PAA and comments made by them when checking their recollection for this investigation. These have not been directly associated with the bodies concerned to preclude the identification of board member protected characteristics. Where the body name was mentioned in the quote, it has been substituted as {bodyname}. Where comments note 'GRO applicable' this means that the GRO may have been referred to in the event of a tie break, due to underrepresentation of women on the relevant board at the time of the appointments process, but this did not occur in any of the rounds investigated.

"Used MI to consider how well the board reflects the community it serves. Based on this panel agreed it did not, particularly in relation to gender, disability, sexual orientation and ethnicity. Positive action was agreed in terms of targeted advertising, specific references in the application pack and use of Disability Scheme offering disabled applicants a guaranteed interview if they met the criteria."

"Keen to attract carer / disabled person and sought advice [from the ESC] on seeking applicants with lived experience"

"The Board did not fully reflect the diversity of the communities it serves. Evidence-based discussion around positive action measures in light of current Board composition resulting in targeted outreach workshops to encourage a diverse applicant pool as well as providing advice on the application process to encourage applications from individuals who may not have applied for public appointments before."

"Panel chair hoped to bring on a new board member who is genuinely passionate and enthusiastic about the work of {Bodyname}. During the early stages of the appointment round, the PAA suggested publicising the opportunity with relevant university departments in Scotland, which was a recommendation that the body chair was receptive towards. The PAA also encouraged the panel to ensure that the language used in the applicant information pack was as accessible as possible to people who hadn't previously applied for a public appointment or served as a board member before. GRO was also applied to the round."

"Minister keen for gender diversity on Board and the GRO was applicable. The strategic plan for the board also indicated an aim to increase the diversity of park users. The panel sought to look for someone with a policy level input to join the board, rather than just lived experience perspectives, since the board already has a fixed-term board shadowing scheme

in place, one for an individual from a BME background, and another for an individual with a disability. MI from previous rounds showed some applications from under-reflected groups, and a few going through to interview, but generally not appointed. Publicity strategy considered this but no other specific positive action utilised.”

“The Chair noted that the Board currently had an underrepresentation of men and was keen to consider diversity alongside merit – GRO applicable. The panel at times struggled to work cooperatively but the PAA was assured that there were no breaches of the Code. Additionally, the PAA regularly drew the panel member’s attention to unconscious bias, transparency, consistency and fairness and the panel chair worked well to manage the process, and no concerns were raised in relation to the subject of the complaint.”

“The Panel noted that men were under-represented on the board of {bodyname}, and sought to include this group among under-represented groups in the diversity statement in the Applicant Information Pack. The Public Appointments Team were unsure on this matter, and as a result the matter was referred to the ESC Office for guidance. Following receipt of this, men were included in the diversity statement. In these circumstances, the GRO did not apply to this round.”

“Gender and ethnicity representation on board needed to be strengthened but no specific positive action taken other than GRO.”

“‘Reasonable adjustment’ request from a candidate to be provided with interview questions in advance. Queried by Public Appointments Adviser, and confirmed by Public Appointments Team that it is an SG policy to provide this if requested. In the event, PAT provided questions in what they considered was an appropriate advance timeframe, taking circumstances into account. Flagged to ESC Office at the time and will form part of future discussions and development workshops.”

“Underrepresentation from females and GRO applicable.

Advertising strategy was discussed at length, to ensure that it could be publicised to a wide and extensive network, including seeking to attract applicants from other protected characteristics than gender but no specific positive action described other than GRO.”

“Identified that there were several under-reflected groups on the Council including minority ethnic, under 50 and disabled. This resulted in a discussion as to how these groups could be attracted to apply and an outreach event was considered. In addition, there was careful consideration of the criteria in the person specification to ensure these could be met by people who hadn’t previously held a public appointment or Board role. It was also decided to assess only three of the essential criteria at the application stage to make the application process shorter. No specific positive action other than GRO.”

APPENDIX EIGHT

SCRUTINY OF PANEL REPORTS AND EXCHANGES TO CHECK FOR ANY EVIDENCE OF AN UNWRITTEN POLICY TO PROGRESS APPLICANTS WHO SHARE PROTECTED CHARACTERISTICS AS OUTLINED IN THE POSITIVE ACTION (DIVERSITY) STATEMENTS BEFORE THOSE WHO DO NOT

Panel reports and exchanges for each appointment round were scrutinised to check for any evidence of an unwritten policy to progress applicants who share protected characteristics as outlined in the positive action (diversity) statements before those who do not. For both the 2013 and 2022 Codes, it is a requirement that a record is made of key decisions and actions taken during every appointment round and that the record will be sufficient to demonstrate that decisions are appropriate. All relevant documentation for each appointment round was provided to the ESC by the Scottish Government (other than the five documents mentioned under the “details of the investigation” section), or was already held by the ESC, and the documents relevant to this part of the investigation are detailed below.

Emails between panel members. Where these have been retained and are available, either through provision by Scottish Government or those retained by the ESC where we have been copied into correspondence during the appointment round, they have been scrutinised.

Planning meeting note. Notes taken during planning meetings have been scrutinised where these were taken.

Shortlisting report / note. Notes taken during shortlisting meetings have been scrutinised where these were taken.

Candidate summaries. Candidate summaries are produced by the panel for both appointable and non-appointable candidates following interview. For all appointment rounds these were scrutinised.

Panel chair end of round reports. Under the 2022 Code, panel chairs are required to produce a report setting out the extent to which the appointment exercise delivered or failed to deliver the desired outcome set by the appointing minister. Where these have been submitted to the ESC they have been scrutinised. As this was not a requirement under the 2013 Code, appointment rounds concluded under that Code will not have panel chair reports, and where they are missing from 2022 Code rounds it is because they have not yet been submitted by the panel chair.

No evidence of any evidence of an unwritten policy to progress applicants who share protected characteristics as outlined in the positive action (diversity) statements before those who do not was found in any of the panel reports, meeting notes, candidate summaries or exchanges scrutinised. Issues relating to the complaint – such as any under-representation identified; measures to attract under-represented groups including positive action; how to ensure criteria were worded to attract candidates with the relevant skills, knowledge, experience and other relevant attributes desired – were discussed, and these conversations or observations were all found to be relevant and appropriate to the task of the panel.

The table below shows which documentation was scrutinised within each specific appointment round.

Body	Code	Evidence	Documents checked
Care Inspectorate	2022	No concerns	Candidate summaries Emails
Creative Scotland	2022	No concerns	Planning meeting note Shortlisting report Candidate summaries Emails
NHS Grampian	2022	No concerns	Planning meeting note Shortlisting note Candidate summaries Panel chair end of round report Emails
Historic Environment Scotland	2013	No concerns	Planning meeting note Candidate summaries Emails
Judicial Appointments Board for Scotland	2022	No concerns	Planning meeting note Candidate summaries Emails
Loch Lomond and the Trossachs National Park Authority	2022	No concerns	Planning meeting note Candidate summaries Emails
Mental Welfare Commission	2013	No concerns	Planning meeting note Shortlist report and summary Candidate summaries Emails
NHS 24	2022	No concerns	Planning meeting note Shortlist report and summary Candidate summaries Emails
NHS Education for Scotland	2022	No concerns	Candidate summaries Emails

Risk Management Authority	2013	No concerns	Shortlisting note Candidate summaries Emails
Scottish Commission on Social Security	2013	No concerns	Shortlisting report Candidate summaries Emails
Scottish Fire and Rescue Service	2022	No concerns	Planning meeting note Shortlisting report Candidate summaries Emails
Scottish Legal Aid Board	2022	No concerns	Planning meeting note Shortlisting report Candidate summaries Panel chair end of round report Emails
Scottish Local Authorities Remuneration Authority	2013	No concerns	Planning meeting note Shortlisting note Candidate summaries Emails
Scottish Social Services Council	2013	No concerns	Planning meeting papers Candidate summaries Emails

APPENDIX NINE

SUMMARY OF MANAGEMENT INFORMATION

It would not be possible to provide a full analysis of the management information we reviewed from appointment rounds without providing data which has the potential to disclose personal information about individuals. However, the following analysis provided an overview of how many of the appointment rounds covered by the complaint:

- Included the protected characteristic in the diversity statement
- Managed to attract a percentage of applications equivalent to or greater than the Scottish population for that protected characteristic (see figure 1 in the main report for details about the Scottish population)
- Interviewed a percentage of applicants equivalent to or greater than the Scottish population for that protected characteristic; and
- Appointed a percentage of applicants equivalent to or greater than the Scottish population for that protected characteristic.

The analysis was carried out on information available, which may not be fully accurate as all applicants have the option to “not state” or “prefer not to say”.

In carrying out this analysis, and if we hope to have boards which are truly reflective of Scottish society, then we would ideally anticipate all appointment rounds attracting, interviewing and appointing a proportion of individuals who share protected characteristics at a level equivalent to that of the population. As can be seen from the statistics below, this was not the case and although for some of the protected characteristics there were quite a number of appointment rounds managing to attract individuals at a level equivalent to that in our society, these did not always convert to interview or appointment. We are cognisant of the fact that application and appointment rates will also tend to reflect, among other issues, societal inequalities and sectoral representation.

10 of the 15 appointment rounds included women in the diversity statement

The Scottish population of women is 51.5%

3 appointment rounds attracted 51.5% or higher women applicants

5 appointment rounds interviewed 51.5% or more women applicants

3 appointment rounds appointed 51.5% or more women applicants

Only one round sought to attract men - disclosing the results of this round (as it is one single round) would be low enough to identify individuals.

All 15 appointment round included disabled applicants in the diversity statement

The Scottish population of disabled people is 19.6%

2 of the appointment rounds attracted 19.6% or more of applicants

3 rounds interviewed 19.6% or more disabled applicants

Only one round appointed 19.6% or more disabled applicants

All 15 appointment rounds included Minority Ethnic (ME) in the diversity statement

The Scottish population of ME people is 4%.

14 appointment round attracted 4% or higher ME applicants

10 appointment rounds interviewed 4% or more ME applicants

3 appointment rounds appointed 4% or more ME applicants

All 15 appointment rounds included age (49 or under) in the diversity statement

The Scottish population of 18-49 is 54.3%

3 appointment rounds attracted 54.3% or higher applicant aged 49 or under

2 appointment rounds interviewed 54.3% or more applicants aged 49 or under

2 appointment rounds appointed 54.3% or more applicants aged 49 or under

14 of the 15 appointment rounds included sexual orientation (LGB) in the diversity statement

The Scottish population of LGB people is 6%.

14 appointment round attracted 6% or higher LGB applicants

9 appointment rounds interviewed 6% or more LGB applicants

1 appointment round appointed 6% or more LGB applicants

Considering it in a different way, there were 4 out of the 15 appointment rounds who did not secure any appointments from the 'welcomed' list of protected characteristics.

From the remaining 11 rounds:

46% of all appointments were women

2% of all appointments were disabled

5% of all appointments were LGB

7% of all appointments were minority ethnic

12% of all appointments were under 50.

APPENDIX TEN

SUMMARY OF PRESS / NEWS RELEASE INFORMATION

The complaint was made on the basis that the complainant felt that the press releases for appointment rounds applied for indicated that the successful applicants appeared to have a protected characteristic which had been outlined in the diversity statement in the pack. This led to a belief that people were being appointed on this basis, rather than on the basis of merit. An analysis of the press releases (which can be found at: <https://www.gov.scot/collections/public-appointments-announcements/>) showed that:

- 11 of the press releases demonstrate that at least one woman was appointed (6 of these had stated women in the diversity statement). This is based on the use of “she / her” pronouns in the press releases.
- 4 of the press releases include names of successful applicants from which it may be inferred were of minority ethnic origin (although the applicant may not class themselves as such and although they may not qualify as such). All 4 of these appointment rounds included Minority Ethnic in the diversity statement.
- 1 press release confirms a successful applicant with a long term health condition which it may be reasonable to assume qualifies as a disability. 4 other press releases mention experiences that the successful applicant has had in the area of disability, but this does not necessarily mean that they are disabled themselves. All 5 rounds had included disability in the diversity statement.
- 1 press release provided info which divulged the age range of the successful applicant confirming that they came under the category of “under 50”
- 1 press release provided info which divulged that one of the successful candidates was LGB.

On inspection of the press releases to understand the extent to which protected characteristics were clear to those reading them, a concern arose. The section of the Code related to news releases was not initially listed as being relevant to the complaint. However, it became relevant to also consider section G1 of the 2013 and 2022 Codes.

G1 of the 2013 Code states:

“G1 The Scottish Ministers will publicise all appointment decisions. Announcements will include

- the name of the individual concerned*
- a short description of the body to which the appointment, promotion, reappointment or term extension has been made*
- a brief summary of the skills, knowledge and experience the individual brings to the role*
- the length of term of the appointment, promotion, reappointment or extension*
- whether the appointment is remunerated and, if so, the remuneration amount*
- whether the individual holds other public appointments and, if so, what these are and the amount of remuneration for each*
- the activity noted in the political activity form completed by the individual appointed, promoted or reappointed or whose term has been extended.”*

G1 of the 2022 Code states:

“G1 The Scottish Ministers will publicise all appointment decisions. Announcements will include:

- i. the name of the individual concerned*
- ii. a short description of the body to which the appointment, promotion, reappointment or term extension has been made*
- iii. a brief summary of the attributes the individual brings to the role. **For new appointments these should be linked directly to those that were set out when the vacancy was publicised***
- iv. the length of term of the appointment, promotion, reappointment or extension*
- v. whether the appointment is remunerated and, if so, the remuneration amount*
- vi. whether the individual holds other public appointments and, if so, what these are and the amount of remuneration for each*
- vii. the activity noted in the political activity form completed by the individual appointed, promoted or reappointed or whose term has been extended.”*

The section in bold is a change between the two Codes.

An analysis of the information contained in the press / news releases was carried out to determine how close the description of the successful applicant was to the person specification and criteria sought.

Many of the releases included information about other board positions that the new appointees held. The Commissioner is content that this could be characterised as transparent, given the public interest in holding more than one position. Additionally, when reading this analysis, it should be noted that the analysis is in **no way** suggesting that any of the qualities (qualifications, experiences, etc.) that the successful applicants bring to the board will not add value or are anything other than significant backgrounds and achievements. It is also very likely that some of the qualities mentioned about the successful applicants were used as examples in the assessment process to provide evidence of the criteria sought. However, the analysis was undertaken to understand the extent to which information included within the press releases could be directly linked to the criteria outlined in the person specification. As highlighted above, this is a specific requirement in the 2022 Code. It was included to give the public confidence that those appointed were because they were the closest match for the published criteria for selection, rather than the fact that they hold or have held other board positions, or have high profile backgrounds. The following was noted for each of the appointment rounds involved:

2013 Code Rounds

Risk Management Authority

The person spec for RMA outlines 3 priority criteria which are:

- Experience in the field of public protection
- Forensic Psychiatry
- Experience of working within a person centred, and human rights based approach

None of the indicators for these, or any of the general criteria require any formal qualification (although for Forensic Psychiatry appropriate, up to date registration with the GMC is required). Nor do any of the criteria require or mention that previous board experience is required or would be beneficial. The press release for the successful applicant starts with the qualifications that are held and then outlines all the various board positions previously held.

Historic Environment Scotland

Historic Environment Scotland sought 4 general criteria which were:

1. Personal commitment and enthusiasm for Scotland's Historic Environment
2. Challenging the views of others in a constructive and supportive way
3. Seeing the 'bigger picture'
4. Communicating effectively

And applicants had the option to demonstrate any of the following specialist areas, if they wished:

1. Managing heritage assets
2. Customer/Visitor experience
3. Climate change/Net zero
4. Digital/marketing
5. Community development

The pack is keen to emphasise "We are seeking applicants who have the ability and experience to contribute at a strategic level and the capacity and commitment to grow into the role and develop their skills, whether or not they have prior experience of being on a board." None of the criteria have indicators which require or suggest any benefit to having other board experience. Nor do any require or suggest any benefit to holding formal qualifications or membership of professional bodies. Yet, within the news releases for the six successful applicants, there are four mentions of qualifications held, two mentions of other board membership, one mention of fellowship of the Royal Institute of Chartered Surveyors and two mentions of careers which don't appear to bear any relation to any of the criteria sought (lawyer and International Business executive).

Scottish Commission on Social Security

The press release for the successful applicant very clearly aligns to the specialist criteria sought. Although it mentions the successful applicant being a postgraduate student, which qualifications were not sought, the applicant's work as a postgraduate student is clearly linked to the criteria "Experience of policy development and/or delivery; implementation and/or evaluation of policy in a public service context. This may be in a social security or other context"

Mental Welfare Commission for Scotland

By and large the press release for the successful applicant for the Mental Welfare Commission for Scotland ties in directly with the experience which was sought in the person specification. There was one mention of being a lecturer for the open university, teaching leadership and management which does not seem to relate to any of the criteria sought.

Scottish Social Services Council

The person spec for the SSSC sought 3 priority criteria:

- Expertise in finance and audit

- Ability to analyse and review complex issues to reach conclusions
- Understanding of the social services environment in Scotland

Although none of the criteria require or suggest any benefit to holding other board positions, it is clear in this case that the board experience of the successful applicant is clearly linked to expertise in finance and audit. None of the information in the press release indicates that the third priority criteria was met as the experiences outlined are not directly related to social services.

Scottish Local Authority Remuneration Committee

The person specification for SLARC sought one or two of the following priority criteria from applicants

- Experience of chairing effectively or being an effective lead convenor
- Working knowledge and understanding of Scottish local government, and the role of Councillors
- Experience of job analysis and/or workload analysis
- Lived experience or demonstrable understanding of the role of local government in island or remote and rural communities
- Understanding of strategic financial management and resource allocation
- Working knowledge of remuneration and pensions arrangements in Scottish local government and the broader public sector

The press releases of the 5 successful applicants mainly describe backgrounds relating to these criteria. However, there are two mentions of qualifications held by successful applicants which were not mentioned as being required or being beneficial to applicants. There were also two mentions of work experiences that the successful applicants had undertaken which did not appear in any way related to the criteria sought.

2022 Code Rounds

NHS 24

The press release mentions that the successful applicant:

- Has recent NHS board experience when the person specification specifically mentions “previous experience of the NHS is not essential”
- As part of the previous NHS board experience, was the board’s Black, Asian and Minority Ethnic (BAME) Equality and Diversity Champion – the follow on description of what this led to achieve (improving experience and outcomes for patients) is relevant to the person specification, but could have been achieved without being the BAME champion, and the person spec did not require any equality and diversity experience to be demonstrated.
- Has written articles and spoken on the subject at conferences – although this could be linked to “ability to communicate effectively” the person specification does not require nor indicate this level of communication to be an advantage.
- Sound understanding of medical governance – the person spec requires the ability to contribute towards maintaining strategic direction, ability to analyse and review complex issues and ability to provide scrutiny and challenge. Although these criteria clearly link to good governance, understanding of governance is not mentioned in the

person spec, and specifically there is no mention of needing to understand medical governance.

- Has numerous qualifications, currently working toward a PhD. The person spec does not mention any need for qualifications of any sort.

This news release is not compliant with G1 of the 2022 Code of Practice.

Care Inspectorate

The press release for the successful applicant for the digital transformation post has experience on numerous different boards outlining that one of these specifically oversaw a digital transformation and that the others provided him with a broad spectrum of Governance experience and audit and assurance committee experience.

The person spec required “Recent experience of achieving major organisational impact through digital transformation within a complex environment” as a priority but none of the indicators suggested that this experience would be valued more highly if at board level, and in fact the person spec states that “You may have gained them through work, by being active in your community, in a voluntary capacity or through your personal experience”.

The person spec also required “Ability to examine and review complex issues and reach decisions”, “Ability to work effectively in a team or group environment to deliver results” and “Seeing the bigger picture”. None of the criteria indicators suggest that board level experience is required, or would be beneficial. None of the criteria required or suggested that audit and assurance committee experience would be beneficial.

The press release for the successful applicant for the lived experience post accurately described the successful applicants’ experience and abilities against the criteria sought.

This news release is not compliant with G1 of the 2022 Code of Practice.

Scottish Fire and Rescue Service

The Scottish Fire and Rescue Service applicant pack sought the following priority criteria:

- Skills in Change and Innovation in Service Delivery
- Audit, risk and assurance
- Effective financial and performance scrutiny

The general skills / experience sought were:

- Interest in SFRS and Safer Communities whilst seeing the long-term view or the bigger picture
- Analysis and decision making
- Constructive and supportive challenge
- Strong Skills in Communicating and Influencing

Nowhere in the pack does it suggest that previous board experience is required, nor would be beneficial and in fact the pack states “All Board members need to have some general skills and experience which will enable them to make a full contribution to the work of the Board but these do not have to have been gained by working in a management post or at a senior level; you may have gained them through being active in your community or in a voluntary capacity.” Nor is there any requirement or suggestion that experience within the third sector nor brand and marketing experience be of benefit yet two of the successful

applicants emphasise these experiences (albeit there is some references to change and innovation within the description)

The third successful candidate states that he brings experience of change, audit and risk and scrutiny to the board but then goes on to explain a background of being a young carer, then solicitor and now psychotherapist and executive coach, none of which is tied into the relevant experience stated in the first sentence. It then explains twenty five years of board experience which may be relevant to audit, risk and scrutiny, but does not explain how. The final successful applicant describes an early career in engineering and manufacturing which does not seem to link directly to the criteria. However, all later experiences described seem to clearly link to change and innovation.

This new release is not compliant with G1 of the 2022 Code of Practice.

Loch Lomond and the Trossachs National Park Authority

The press release for the successful applicant accurately described the experience and abilities against the priority criteria sought.

Judicial Appointments Board for Scotland

Lay members for the JABS role were asked to demonstrate the priority criterion of “For this role you will be required to make fair and balanced individual assessments of applications and at interview of candidates’ suitability for appointment.” There were 5 successful applicants, 2 of which made no reference to any previous experience of assessment in their press releases.

The other general criteria were “Ability to understand and analyse complex information and to make objective balanced judgements”, “Ability to work collaboratively, challenge constructively and work in a consensual environment” and “Good verbal and written communication skills” – none of these criteria suggest that other board experience is required or will be considered beneficial. Nor do any indicate that leadership, previous chair roles, political experience, honours awards would be any advantage.

Between the 5 successful applicants, the press releases mention that they will bring the following to the organisation:

- a Lay Member of Employment Tribunals since 2010,
- a Lay Member on Fitness to Teach hearings for the General Teaching Council for Scotland since June 2023
- a Lay Member on Fitness to Practise hearings for the Scottish Social Services Council from 2014 to 2021
- executive leader in public service, with a strong emphasis on ethical and compassionate leadership
- held a number of director general posts in Scottish government from 2009 onwards, culminating in the role of chief executive of NHS Scotland and DG health and social care
- served all of the main parties of government in both the UK and devolved administrations
- has a diverse portfolio covering academia and the public, private and third sectors
- is an honorary professor at the University of Glasgow, Scotland’s member of council for the Open University, and patron of Medics Against Violence
- is a senior faculty member at the Royal College of Physicians (Edinburgh)

- a senior advisor to public affairs firm Charlotte Street Partners
- experience in leadership and governance in the public sector
- A former Professor of Cultural Heritage Management at Glasgow Caledonian University
- the Rector and Chair of Foundation for the University of the Highlands and Islands
- a founding board member of Historic Environment Scotland
- sits on the Committee for Scotland for the National Lottery Heritage Fund
- Chief Constable of Staffordshire Police in 2021 and was awarded the Queen's Police Medal for Distinguished Service in the 2022 Honours List
- an Operations Manager for the local RNLI station
- Chair of SEALL who promote music and the performing arts across Skye and Lochalsh
- Director of Lochalsh and Skye Housing Association and is a trustee of Kyle and Lochalsh Community Trusts
- assistant Chief Fire Officer in the Scottish Fire and Rescue Service
- executive experience in a senior management role, working with communities to improve services
- has chaired a number of committees including being appointed to the chair of the integrated joint board, chairs and vice chairs

None of these experiences have been linked to the criteria that were sought and how the successful applicants would bring these to the role.

This news release is not compliant with G1 of the 2022 Code of Practice.

Creative Scotland

The person spec sought the following priority criteria:

- "Experience of financial scrutiny and risk management, with an understanding of public sector budgeting and financial management"
- "Experience of the screen sector, with an understanding of the strategic opportunities and barriers to growth"
- "Experience in a creative sector other than screen, with an understanding of the opportunities and barriers to growth"

By and large most of the descriptions in the press releases directly related to the experiences sought in the priority criteria, other than one where the successful applicant is described as having a very wide range and breadth of business experience across a number of different sectors and including executive and non-executive experiences. These have not been matched specifically to any of the priority criteria.

In addition, one statement in the press release for one of the applicant's relates to them being "one of ICAS' top Chartered Accountants' under 35 in 2015, 2016 and 2017 and one of the top 100 young CA's in 2019" – none of the indicators for the financial scrutiny and risk management role suggest that such an accolade would be required or beneficial to securing the role. Nor does it suggest that the minister had specifically requested the panel to seek Younger applicants (under the age of 50).

This news release is not compliant with G1 of the 2022 Code of Practice.

Grampian NHS

The successful applicant is outlined in the press release to bring the following attributes:

- an MSc with distinction in Business Management, Innovation and Change
- a BSc in Internet Information Systems
- a former member of the Mobility and Access Committee for Scotland (MACS)

The person specification does not suggest that any qualifications or previous board experience will be required or considered as beneficial to the role.

This news release is not compliant with G1 of the 2022 Code of Practice.

NHS Education for Scotland

NHS ES sought four priority criteria which were all related to experience either in the care sector, in digital transformation or improved outcomes within the health and care sector.

The press releases demonstrate where the successful applicants have gathered this experience. One of the successful applicant's press releases mentions previous board experience which none of the criteria mention is required or would be considered as beneficial to the application. However, in this case, the previous board experience is directly related to mental health and social care, and it is mentioned as an aside following the majority of the description which is directly relevant to the criteria sought, this is not significant enough in this case to be not compliant with the Code.

Scottish Legal Aid Board

The Scottish Legal Aid Board sought two specialist attributes which were:

- A professional accountancy qualification and experience of audit and/or serving on an audit committee
- Experience of strategic policy development

From the press release it seems that there was one successful applicant for each of the specialisms. The successful applicant for the accountancy qualification and audit experience role describes relevant finance and audit experience. However, the strategic policy development role mentions nothing in the indicators that knowledge and / or experience of social justice issues, human rights or appreciation of the need to make access to justice accessible are required or would be beneficial to applicants, but a large part of the news release about this successful applicant focusses on these areas.

This news release is not compliant with G1 of the 2022 Code of Practice.