

Ethical Standards Commissioner

Contract for Consultancy Services

between

«Title» «First Name» «Surname»

**(Diversity Consultant for the Commissioner for Ethical Standards
in Public Life in Scotland)**

and

The Commissioner for Ethical Standards in Public Life in Scotland

**The Commissioner for Ethical Standards in Public Life in Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE**

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1. SIGNATORIES TO THE AGREEMENT

This document is a Contract Agreement between the Commissioner for Ethical Standards in Public Life in Scotland (the “Commissioner”) and <name> working for the Commissioner as a consultant to provide the Deliverables. This Agreement does not represent an employment contract and is not intended to set up the relationship of employer/employee, agent, partner or worker between the Commissioner and the Consultant – the Consultant shall not hold themselves out as such. The relationship of the Consultant to the Commissioner will be that of independent contractor under a contract for the provision of services. Accordingly, the Consultant shall indemnify the Commissioner for and in respect of (a) any income tax, National Insurance and social security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with the performance of the Project, where the recovery is not prohibited by law. The Consultant shall further indemnify the Commissioner against all reasonable costs, expenses and any penalty, fine or interest incurred or payable by the Commissioner in connection with or in consequence of any such liability, deduction, contribution, assessment or claim other than where the latter arise out of the Client's negligence or wilful default; and (b) any liability arising from any employment-related claim or any claim based on worker status (including reasonable costs and expenses) brought by the Consultant against the Commissioner arising out of or in connection with the performance of the Project, except where such claim is as a result of any act or omission of the Commissioner. The Commissioner may at its option satisfy such indemnity (in whole or in part) by way of deduction from any payments due to the Consultant.

Signatories to this Agreement

Signed and dated on behalf of the
Commissioner:

Commissioner for Ethical Standards in
Public Life in Scotland

Signed and dated by the consultant:

«Title» «First_Name» «Surname»

Please provide your VAT registration
number (if applicable):

2. INTRODUCTION

The Commissioner has contracted with a suitably qualified consultant in order to progress a review and refreshed version of the diversity strategy. This is in pursuance of the Commissioner's requirement to encourage increased board diversity by publishing and promoting a strategy.

This Agreement sets out the responsibilities of the Consultant when performing the Project to the Commissioner. The Annexes and Schedules form part of the Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Annexes and Schedules.

3. SERVICE DELIVERY AND SERVICE REQUIREMENTS

The following sets out the service delivery and service requirements for the Consultant:

(i) During the term of this Agreement, the Consultant shall (a) perform the Project (and provide the Deliverables) with all due care, skill and ability and use their best endeavours to promote the interests of the Commissioner; and (b) promptly give to the Commissioner all such information and reports as it may reasonably require in connection with matters relating to the performance of the Project, including the Deliverables.

(ii) If the Consultant is unable to perform the Project due to illness or injury, they shall advise the Commissioner of that fact as soon as reasonably practicable. For the avoidance of doubt, no fee shall be payable by the Commissioner to the Consultant in respect of any period during which the Project is not being performed.

(iii) The Consultant shall use reasonable endeavours to ensure that they are available at all times on reasonable notice to provide such assistance or information as the Commissioner may require.

(iv) Unless they have been specifically authorised to do so by the Commissioner in writing, the Consultant shall not (a) have any authority to incur any expenditure in the name of or for the account of the Commissioner; or (b) hold themselves out as having authority to bind the Commissioner.

(v) The Consultant will fulfil their obligations under this Agreement in a manner which is in accordance with the policies of the Commissioner, or be able to demonstrate that they have comparable policies, appropriate to their own business structure, that are acceptable to the Commissioner. The Consultant will demonstrate the highest standards of practice and probity when undertaking their work, including upholding the values adopted by the Commissioner and as set out in the strategic plan. For reference, the particular policies of the Commissioner that set out these expectations

are included in the following documents (copies are available to download from the Commissioner's website and can also be provided on request):

- Equality, Diversity and Inclusion Policy
- Code of Conduct
- Confidentiality Policy
- Data Protection Policy
- IT Policy

And the values as set out in the Strategic Plan are:

- We will conduct all of our activities in an ethical way, characterised by effective stewardship of public money, accountability, honesty, integrity, propriety, fairness and transparency.
- We will treat each individual and organisation that comes into contact with us with empathy, kindness and respect, recognising that we must earn their trust and ensure that our commitment to equality, diversity and inclusion informs all of our work.
- We welcome constructive criticism and challenge. If we get things wrong we will remedy our errors and learn from these in order to improve our future performance.

To comply with the Commissioner's Code of Conduct the Consultant must complete and submit to the Commissioner a declaration of interests form. The Consultant is responsible for advising the Commissioner of any relevant changes to their interests. If the Consultant is part of a team who are working on the project, everyone involved with also have to complete a declaration of interests form. In the event that the Commissioner considers any of the Project team to have interests that are considered incompatible with the work to be carried out, he reserves the right to ask for that individual to be removed from the Project. In the event of this being a sole trader, the Agreement will be immediately terminated.

In relation to Data Protection, the Consultant will comply with the provisions set out in Annex Two and Schedules One and Two of this Agreement.

The Consultant, during the period of their appointment with the Commissioner, is not permitted to serve as a councillor or board member of any board listed in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000. The required additional standards of anticipated conduct, and behaviours to be displayed by the consultant whilst performing the Project, are set out in the Annexes to this Agreement.

The Consultant shall comply with all applicable laws, regulations, codes, policies (including the Commissioner's own policies, as notified to the Consultant from time to time) and sanctions relating to anti-bribery and corruption, including the Bribery Act

2010. The Consultant will promptly report to the Commissioner any request or demand for any undue financial or other advantage of any kind received by the Consultant in connection with the performance of this Agreement; and will ensure that all persons associated with the Consultant or other persons who are performing the Project or providing Deliverables in connection with this Agreement comply with this paragraph. The Consultant will promptly provide such supporting evidence of compliance as the Commissioner may reasonably request. Failure to comply with this obligation may result in immediate termination of this Agreement.

The Consultant shall:

(a) not engage in any activity, practice or conduct which would constitute either (i) a UK tax evasion facilitation offence under section 45(1) of the Criminal Finances Act 2017; or (ii) a foreign tax evasion facilitation offence under section 46(1) of the Criminal Finances Act 2017;

(b) promptly report to the Commissioner any request or demand from a third party to facilitate the evasion of tax within the meaning of Part 3 of the Criminal Finances Act 2017 or any suspected tax evasion offences or facilitation of tax evasion offences, whether under UK law or under the law of any foreign country, in connection with the performance of this Agreement;

(c) ensure that all persons associated with the Consultant or other persons who are performing the Project or providing the Deliverables in connection with this agreement comply with this paragraph; and

(d) promptly provide such supporting evidence of compliance as the Commissioner may reasonably request. Failure to comply with this obligation may result in immediate termination of this Agreement.

(vi) The Consultant will be required to deliver the Works to the Commissioner – this includes the provision of two Deliverables, each of which will include wide ranging consultation of key stakeholders during development.

Key stakeholders include:

- Commissioner and Public Appointment Advisers
- Scottish Government officials on behalf of Scottish Ministers
- Groups with a particular interest in public appointments (those who share protected characteristics which are under-reflected and those representing wider diversity)
- General public

The “state of the nation” report Deliverable will consider:

- The history of public appointments in Scotland over the last 20 or so years – what has been done to make a difference so far, what has changed in the

overall landscape and how all this will affect the future strategy and recommendations

- The opinions of “interested groups” – those who share protected characteristics that are currently under-reflected on public body boards and those who might bring wider diversity to such boards.
- The general public perception about what board appointments are and the process to apply to them.
- What the enablers and barriers are to achieving diversity on public body boards.

On conclusion the “state of the nation” report Deliverable will contain the following:

- Diversity Delivers strategy and recommendations – what has been achieved and what is still to be done.
- what has changed in the public appointments landscape since Diversity Delivers and what that will mean for any future strategy.
- detailed consultation with “interest groups” – those who share protected characteristics that are currently under-reflected on public body boards and those who might bring wider diversity to such boards.
- general public perception about what board appointments are and the process to apply to them.
- enablers and barriers to achieving diversity on public body boards.

The draft diversity strategy Deliverable will consider:

- The opinions of Scottish Ministers (and civil servants on their behalf) who are responsible for making public appointments.
- The opinions of “interested groups” – those who share protected characteristics that are currently under-reflected on public body boards and those who might bring wider diversity to such boards.
- Good practice that exists elsewhere in the world and in other sectors.
- What the strategy and recommendations should be, based on the “state of the nation” report.
- What review facilities should be put in place to ensure that the recommendations are met.

On conclusion the draft diversity strategy Deliverable will contain the following:

- The “State of the Nation” report and how that impacts on the revised strategy.
- A revised vision to fit with the new strategy.
- What the definition of diversity should include and how Human Rights should intersect with diversity.
- The main enablers and barriers for achieving further diversity on boards.
- Recommendations for achieving greater diversity on boards.
- Recommendations for a review function to ensure that actions and recommendations are put in place and achieved.

The Commissioner reserves the right to amend the requirements of either or both of these reports, in consultation with the Consultant, should circumstances arise that leads to a change in scope of requirement.

(vii) The Consultant will carry out the work required as specified in the Tender which will form part of this Agreement. Regular communication with the Commissioner's office will be required and will be agreed as part of the Tender.

The Commissioner will also be provided with a list of all those consulted with and a summary of the discussions taking place with each of these. A list of all research conducted will also be provided to the Commissioner.

(viii) The Consultant shall not assign or sub-contract any portion of the Agreement without the prior written consent of the Commissioner. Sub-contracting any part of the Agreement shall not relieve the Consultant of any obligation or duty attributable to the Consultant under this Agreement.

(ix) The Commissioner shall pay the Consultant a total fee of £45,000 (inclusive of VAT and any expenses) following receipt of appropriate invoices from the Consultant, in each case giving details of the parts of the Project performed, the Deliverable achieved to the satisfaction of the Commissioner in accordance with the relevant terms of this Section 3 and the amount of the fee payable for the achievement of the Deliverable. The aforementioned fee will be payable in 2 parts – half (£22,500) on provision of the final version of the initial "State of the Nation" report Deliverable and half (£22,500) on provision of the final version of the draft strategy Deliverable (including completion of informal consultation on the draft Strategy). For the avoidance of doubt, the aforementioned fees shall only be payable to the Consultant following the achievement of a Deliverable to the satisfaction of the Commissioner.

The Consultant must issue an invoice within thirty (30) days following acknowledgement of receipt of the final version of each report.

The Commissioner will make payment to the Consultant within thirty (30) days of receipt of the above. The Commissioner reserves the right to withhold payment if, in the opinion of Commissioner, the Project has not been performed and/or the Deliverables have not been provided to a satisfactory standard. Payments will be made by BACS transfer. Payment in full or in part of the fees claimed under this subsection (ix) shall be without prejudice to any claims or rights of the Commissioner against the Consultant in respect of the performance of the Project and/or provision of the Deliverables.

(x) The Consultant will be credited in the final report for their contribution.

(xi) The Commissioner's IT policy as referenced at 3(v) above does not allow those covered by the policy to work outside the UK. It is similarly expected that the Consultant will be based in and work within the UK. The Consultant should not (under

any circumstances) access or process sensitive data from a location outside the UK. Failure to comply with this obligation may result in immediate termination of this Agreement.

4. CONTACT WITH AND SUPPORT FROM THE COMMISSIONER'S OFFICE

Support for the project is available through:

- administrative support to the project (an average 18.5hrs per week over the length of the Agreement);
- Up to 12 days of Public Appointment Adviser (PAA) time;
- Provision of information about the history and work of the office as required; and
- Use of the meeting space in the Commissioner's office accommodation as agreed in the tender submission (the consultant will be accompanied by a member of the Commissioner's staff at all times whilst in the office).

The main point of contact and the Agreement manager will be the Public Appointments Officer, although work will be reviewed and supported by any of the Public Appointments team.

Contact details for the Public Appointments Officer are as follows:

Amy Smith
Public Appointments Officer
The Commissioner for Ethical Standards in Public Life in Scotland Thistle House, 91
Haymarket Terrace
Edinburgh, EH12 5HE
Telephone: 0131 202 8976
E-mail: a.smith@ethicalstandards.org.uk

Contact details for the full Public Appointments Team Telephone 0131 347 3890
(option 3)

Email: appointments@ethicalstandards.org.uk

5. MONITORING AND REVIEWS

The Public Appointments Team (usually the Public Appointments Officer) will monitor the adherence of the consultant to this Agreement and will draw service delivery failures to the attention of the consultant if these arise. In coming to a view on the extent to which this Agreement has been adhered to the Public Appointments Officer will refer to:

- the update reports received;
- the quality and quantity of the final Deliverable; and

- adherence to the policies required to be adopted and the way in which the Commissioner is represented during any interactions with key stakeholders (e.g. our values must be upheld).

Section 3 and the Annexes set out the Commissioner's specific service requirements.

6. DISPUTE RESOLUTION

The parties must attempt in good faith to resolve any dispute between them arising out of or in connection with the Agreement.

If, for any reason, any dispute cannot be resolved in good faith within thirty (30) Business Days of commencement of the good faith discussions, the dispute shall be referred to and finally resolved by the courts of Scotland in accordance with Section 12. No party may commence any court proceedings in relation to the whole or part of the dispute until it has attempted to settle the dispute through such good faith discussions, provided that the right to issue proceedings is not prejudiced by a delay.

7. DURATION AND TERMINATION

Duration

Unless and until terminated early in accordance with the terms of the Agreement, the engagement of the Consultant by the Commissioner will run initially from xx/xx/2024 (which will be deemed to be the start date for the performance of the Project) to xx/xx/2025, with the option to extend the engagement on mutual agreement.

Termination

The Agreement will terminate on provision of the final Deliverable by the Consultant to the Commissioner and subsequent payment by the Commissioner for this work. The Commissioner reserves the right to cancel the Agreement following provision of the initial Deliverable if the contents are not considered to be in line with the specification.

In the case of any unexpected and adverse circumstances, the Commissioner or the consultant may terminate this Agreement on giving twenty Business Days' written notice. This clause is limited to extreme circumstances such as serious illness preventing performance of the Project by the Consultant, death of the Consultant or a change in the legislative function of the Commissioner's office.

Without prejudice to any other rights that it might have at law, the Commissioner reserves the right to terminate the Agreement immediately by written notice with no liability to make any further payment to the Consultant (other than in respect of amounts accrued before the date of termination of the Agreement) in the event of:

(a) a serious or repeated breach or non-observance of any of the Agreement's terms or refusal or neglect to comply with any reasonable and lawful directions of the Commissioner;

(b) is convicted of any criminal offence (other than an offence under any road traffic legislation in the United Kingdom or elsewhere for which a fine or non-custodial penalty is imposed);

(c) is in the reasonable opinion of the Commissioner negligent or incompetent in performance of the Project;

(d) suffers an Insolvency Event;

(e) commits any fraud or dishonesty or acts in any manner which, in the opinion of the Commissioner, brings or is likely to bring the Commissioner or the Scottish Ministers into disrepute or is materially adverse to the interests of the Commissioner or the Scottish Ministers; or

(f) commits any breach of the Commissioner's policies and procedures or any applicable laws.

The Agreement will be reviewed in keeping with the reviewing and monitoring arrangements set out above.

Consequences of Termination

On the date of termination of this Agreement, howsoever arising, the Consultant shall immediately deliver to the Commissioner all Works, Commissioner Property, and any other confidential information in their possession or under their control.

8. INDEMNITIES AND INSURANCE

The Consultant shall indemnify and keep indemnified the Commissioner against all actions, claims, demands, costs and expenses incurred by or made against the Commissioner in respect of any loss or damage or personal injury (including death) which arises from

(a) any breach by the Consultant of the terms of this Agreement, including any negligent or reckless act, omission or default in the performance of the Project; and/or

(b) any advice given or anything done or omitted to be done under this Agreement, in each case to the extent that such loss, damage or injury is caused by the negligence or other wrongful act of the Consultant, or the Consultant's servants or agents.

The Consultant shall ensure that the Insurance Policies are taken on with reputable insurers acceptable to the Commissioner and that the level of cover and other terms

of insurance are acceptable to and agreed by the Commissioner. The Consultant shall comply with all terms and conditions of the Insurance Policies at all times. If cover under the Insurance Policies shall lapse or not be renewed or be changed in any material way or if the Consultant is aware of any reason why the cover under the Insurance Policies may lapse or not be renewed or be changed in any material way, the Consultant shall notify the Commissioner without delay.

The Consultant shall, on request produce to the Commissioner copies of such Insurance Policies and evidence that the relevant premiums have been paid. The Consultant shall notify the insurers of the Commissioner's interest and shall cause the interest to be noted on the Insurance Policies.

9. INTELLECTUAL PROPERTY RIGHTS

All existing and future Intellectual Property Rights in the Works and all materials embodying these rights are hereby assigned to, and shall vest in, the Commissioner absolutely to the fullest extent permitted by law.

Except as may expressly be provided for in the Agreement, neither party acquires any interest in or license to use the other party's Intellectual Property Rights owned or developed prior to or independently of the Agreement.

The Consultant undertakes:

(a) to notify the Commissioner in writing full details of any Works promptly on their creation;

(b) to keep details of all Works confidential;

(c) whenever requested to do so by the Commissioner and in any event on the termination of the Agreement, to promptly deliver to the Commissioner all correspondence, documents, papers and records on all media (and all copies or abstracts of them), recording or relating to any part of the Works and the process of their creation which are in the Consultant's possession, custody or power;

(d) not to register nor attempt to register any of the Intellectual Property Rights in the Works unless requested to do so by the Commissioner; and

(e) to do all acts necessary to confirm that absolute title in all Intellectual Property Rights in the Works has passed, or will pass, to the Commissioner.

The Consultant warrants to the Commissioner that:

(a) they have not given and will not give permission to any third party to use any of the Works, nor any of the Intellectual Property Rights in the Works;

(b) they are unaware of any use by any third party of any of the Works or Intellectual Property Rights in the Works; and

(c) the use of the Works or the Intellectual Property Rights in the Works by the Commissioner will not infringe the rights of any third party.

The Consultant must not infringe any Intellectual Property Rights of any third party in carrying out the Project or otherwise performing its obligations under the Agreement. The Consultant shall indemnify the Commissioner against all actions, claims, demands, losses, charges, costs and expenses which the Client may suffer or incur or become liable with respect to any intellectual property infringement claim or other claim relating to the Works supplied by the Consultant to the Commissioner during the course of performing the Project.

The Consultant waives any moral rights in the Works to which they are now or may at any future time be entitled under Chapter IV of the Copyright Designs and Patents Act 1988 or any similar provisions of law in any jurisdiction, including (but without limitation) the right to be identified, the right of integrity and the right against false attribution, and agrees not to institute, support, maintain or permit any action or claim to the effect that any treatment, exploitation or use of such Works or other materials infringes the Consultant's moral rights.

The Consultant undertakes at any time either during or after the term of this Agreement, to execute all documents, make all applications, give all assistance and do all acts and things as may, in the opinion of the Commissioner, be necessary or desirable to vest the Intellectual Property Rights in, and to register them in, the name of the Commissioner and to defend the Commissioner against claims that works embodying Intellectual Property Rights or Works infringe third party rights, and otherwise to protect and maintain the Intellectual Property Rights in the Works.

The Consultant acknowledges that, except as provided by law, no further fees or compensation other than those provided for in this Agreement are due or may become due to the Consultant in respect of the performance of their obligations.

The provisions of this Section shall apply during the continuance of this Agreement and after its termination howsoever arising.

10. CONFIDENTIALITY AND FREEDOM OF INFORMATION

Confidentiality

Notwithstanding the terms of the Commissioner's confidentiality policy which the Consultant is obligated to comply with in accordance with Section 3 above, the Consultant undertakes that it shall not at any time disclose to any person the Commissioner Property, Works or any other confidential information provided to them

in connection with performance of the Project, except as permitted under this Section 10.

The Consultant may disclose the Commissioner Property, Works or any other confidential information provided to them in connection with performance of the Project:

(a) to any members of the team working on the Project who need to know such information for the purposes of exercising the Consultant's rights or carrying out its obligations under or in connection with this Agreement, provided that such recipients are bound to comply with confidentiality obligations no less stringent than those contained in this Agreement; and

(b) as may be required by law, a competent court of jurisdiction or any governmental or regulatory authority.

The Consultant shall not use the Commissioner Property, Works or any other confidential information provided to them in connection with performance of the Project for any purpose other than to exercise its rights and perform its obligations under or in connection with this Agreement.

Freedom of Information

The Consultant recognises that the Commissioner is a public authority for the purposes of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 and may be required to disclose information about the Agreement, the Project and the services provided by the Consultant under the Agreement. The Consultant agrees to (a) provide all reasonable assistance and information to the Commissioner as is necessary to enable the Commissioner to comply with its obligations under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004; (b) transfer to the Commission all requests for information relating to this Agreement that it receives as soon as practicable and in any event within three (3) days of receipt; and (c) not respond directly to the request for information unless authorized in writing to do so by the Commissioner.

The Consultant acknowledges that the Commissioner may be required under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 to disclose information without consulting or obtaining consent from the Supplier. The Commissioner shall be responsible for determining in its absolute discretion whether any information is exempt from disclosure in accordance with the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

11. GENERAL

Notices

Any notice given to a party under or in connection with this Agreement shall be in writing and shall be (a) delivered by hand or by pre-paid first-class post or other next working day delivery service at the address given in this Agreement or as otherwise notified in writing to the other party; or (b) sent by email to the following addresses (or an address substituted in writing by the party to be served) – Commissioner: [INSERT]; Consultant: [INSERT].

Unless proven otherwise, any notice shall be deemed to have been received (a) if delivered by hand, at the time the notice is left at the address given in this Agreement or given to the addressee; (b) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; or (c) if sent by email, at the time of transmission.

This subsection does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

Entire Agreement

This Agreement, together with the Tender, constitutes the entire agreement between the parties and supersedes and extinguishes all previous and contemporaneous agreements, promises, assurances and understandings between them, whether written or oral, relating to its subject matter. Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement.

Variation

No variation of this Agreement or of any of the documents referred to in it shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

Third Party Rights

This Agreement does not give rise to any rights under the Contract (Third Party Rights) (Scotland) Act 2017 for any third party to enforce or otherwise invoke any term of this Agreement.

Counterparts

This Agreement may be executed in any number of counterparts, each of which shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement. Transmission of an executed counterpart of this Agreement (but for the avoidance of doubt not just a signature page) by email (in PDF, JPEG or other agreed format) shall take effect as the transmission of an executed “wet-ink” counterpart of this Agreement. No counterpart shall be effective until each party has delivered to the other at least one executed counterpart.

12. GOVERNING LAW AND JURISDICTION

This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of Scotland.

Each party irrevocably agrees that the Scottish courts shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

Annex One – Definitions

In this Agreement, the following definitions and rules of interpretation apply (unless the context requires otherwise):

“Agreement” means the contract between the Commissioner and the consultant consisting of the tender, this agreement and other documents such as policies (or parts thereof) specified in the tender and in this agreement;

“Business Day” means a day other than (a) a Saturday or Sunday, (b) Christmas Day, (c) Good Friday or (d) any other day designated by the government of the United Kingdom or the Scottish Ministers as a public holiday;

“The Code” means the Code of Practice for Ministerial Appointments to Public Bodies in Scotland;

“Commissioner Property” means all documents, books, manuals, materials, records, correspondence, papers and information (on whatever media and wherever located) provided by the Commissioner or any of the other stakeholders listed in Section 3 of the Agreement, including any data, documents or copies produced, maintained or stored by the Consultant during the term of this Agreement in connection with performance of the Project;

“Consultant” means the individual with whom this Agreement has been entered into to perform the Project. Where the individual is part of a team who are delivering the project, the term “Consultant” in this document will apply to each member of the team involved. The individual who signed the Agreement will be responsible for ensuring that any others involved in delivery of the Project are also following the Agreement requirements. If that person is unable to uphold the responsibility for others in the team and if agreed with the Commissioner, it will be permitted to change the name on the Agreement so that a different team member takes on the responsibility;

“Data Protection Laws” means any law, statute, declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding restriction (as amended, consolidated or re-enacted from time to time) which relates to the protection of individuals with regards to privacy and the Processing of Personal Data to which a party to this Agreement is subject, including: (a) the Data Protection Act 2018 (and regulations made thereunder) or any successor legislation and (b) the retained EU law version of the General Data Protection Regulation ((EU) 2016/679) (the “UK GDPR”);

“Data Controller”, “Data Processor”, “Data Subject”, “Data Subject Access Request” “Personal data”, “Processing”, and “Special category data” have the meanings given in the Data Protection Laws;

“Data Security Breach” means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to the Shared Personal Data;

“Deliverable” means any outputs of the Project, namely (a) the initial “state of the nation” assessment report analysing the current strategy, how the landscape has changed since it was implemented and how the general public (particularly interest groups and those sharing protected characteristics that are under-reflected) view public appointments and the process of applying for them and (b) the final draft revised diversity strategy based on the findings of the “state of the nation” report and including recommendations to improve the diversity of Scotland’s Public Body Boards;

“Insurance Policies” means commercial general liability insurance cover, professional indemnity insurance cover, cyber insurance cover, employer's liability insurance cover, public liability insurance cover and any other policies of insurance covering all the matters which are the subject of the indemnities and undertakings on the part of the Consultant contained in this Agreement;

“Intellectual Property Rights” means all copyright and neighbouring and related rights, patent, utility models, rights to inventions, ideas, discoveries, developments, improvements or innovations, moral rights, trade marks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, design right, database right, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and any other right in the nature of intellectual property whether or not registered, in whatever form (including but not limited to any materials stored in or made available by means of an information technology system and the computer software relating thereto), and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;

“Insolvency Event” means in respect of a party death/liquidation, provisional liquidation, voluntary administration, compromise, arrangement, amalgamation, administration, re- construction, winding up, dissolution, assignation for the benefit of creditors, arrangement or compromise with creditors, the appointment of a receiver, the inability of a party to pay its debts when they fall due, bankruptcy or the filing for bankruptcy or any event that is analogous to the aforementioned events under any applicable law;

“Personal Data” means personal data, including Special Category Data detailed in Schedule One of this Agreement, to be shared between the consultant and the Commissioner in fulfilling the Agreement;

“Project” means the services to be provided as specified in the Invitation to tender document;

“Supervisory Authority” has the meaning given in the Data Protection Laws. In Scotland, this is the Information Commissioner’s Office (ICO);

“Tender” means the document setting out the Commissioner’s requirements for the Agreement and the tenderer’s response.

“Works” means the Deliverables and all records, reports, documents, papers, guidance, drawings, designs, transparencies, photos, graphics, logos, typographical arrangements, software, specification, instructions, toolkits, plans, data, databases, patterns, models, inventions, ideas, discoveries, developments, improvements, innovations and all other materials in whatever form (including hard copy and electronic form) which are prepared, created or developed by the Consultant in the performance of the Project.

The headings in this Agreement are inserted for convenience only and shall not affect its construction.

A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.

Annex Two – Data Protection

1. COMPLIANCE WITH DATA PROTECTION LAWS

1.1 The Consultant and the Commissioner acknowledge that under the Data Protection Laws, the Commissioner is a Data Controller and the Consultant is a Data Processor when Processing Personal Data under the terms of the Agreement. Each party must ensure compliance with its obligations under the Data Protection Laws at all times for the duration of the Agreement.

2. USE, DISCLOSURE AND PUBLICATION

2.1 The Consultant agrees to process the Personal Data described in Part 1 of Schedule One of this Agreement for the purposes of fulfilling their obligations under this Agreement, or in pursuance of any other written instructions of the Commissioner communicated to the Consultant from time to time, and strictly for no other purpose unless legally required to do so. In such a case, the Consultant shall inform the Commissioner of that legal requirement before commencing such Processing, unless that law prohibits such information being disclosed on important grounds of public interest.

2.2 The Consultant will not disclose or share the data processed under the Agreement with any third party without the written authority of the Commissioner.

2.3 The consultant is prohibited from publishing, copying, transferring or duplicating any Personal Data they hold in terms of this Agreement without the written authority of the Commissioner.

2.4 The Consultant must have their own policies and procedures for the handling of records including Personal Data. The Commissioner has provided an IT and data protection policy to the consultant for reference purposes.

2.5 The Consultant agrees to store or record the personal data processed under the Agreement in a structured, commonly used and machine readable or otherwise accessible form.

2.6 The Consultant shall not process or otherwise transfer any Personal Data in or to any country outside the UK.

3 PURPOSE

3.1 In performing their obligations under the Agreement the Consultant may Process Personal Data on behalf of the Commissioner.

3.2 In addition to disclosure by the Commissioner and other Project stakeholders, the Scottish Ministers may provide personal data to the consultant in order to comply with section 3 (1) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 which places an obligation on them to provide the Commissioner with such information as the Commissioner reasonably requires in the exercise of his functions.

3.3 The Commissioner (whether directly or through certain Project stakeholders such as the Scottish Ministers) may provide the Consultant with information relating to the methods and practices employed by the Scottish Ministers in the making of appointments to the specified authorities on both live and previous appointment rounds. Such information, relating as it does to the activities and behaviours of selection panel members and others engaged in the appointment process, as well as to the performance of applicants and candidates during the stages of appointment rounds and once appointed, will of necessity include Personal Data. Detail of the specific types and volumes of this Personal Data, and the duration for which the Consultant is permitted to process it, is provided in Schedule One of this Agreement.

3.4 The Commissioner will process the Consultant's Personal Data for the purposes of fulfilling the terms of the Agreement. Detail of the specific types and volumes of this data is provided in Part 2 of Schedule One of this Agreement. The Commissioner will process the Consultant's personal data in accordance with the Commissioner's data protection policy (a copy of which can be provided upon request).

4 DATA SECURITY

4.1 The Consultant must ensure the security of Personal Data Processed by them in terms of this Agreement.

4.2 The Consultant must implement and ensure that it continues to have in place appropriate technical and organisational measures (which may, from time to time, be subject to review and approval by the Commissioner) to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures. Such measures, having regard to the nature of the processing and the risks posed, may include as appropriate:

- the pseudonymisation and encryption of personal data and password protection (including two factor authentication (2FA) where possible) for access to any device used to store or transfer data;
- ensuring that processing systems and services are able to provide ongoing confidentiality, integrity, availability and resilience in relation to the processing of personal data. In practical terms this includes ensuring that the operating systems and software are appropriately licensed, security fixes for the operating

system and software are regularly applied and reliable cyber security software is installed;

- ensuring that systems have the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
- implementation of a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

4.3 The Consultant must ensure that the technical and organisational measures employed facilitate immediate detection of relevant infringement events.

4.4 The Consultant agrees to notify the Commissioner of any material change to the measures they employ in pursuance of clause 4.2 of this Schedule One.

5 DATA SUBJECTS' RIGHTS AND REQUESTS FOR INFORMATION

5.1 The Commissioner and the Consultant shall each ensure that they Process the Personal Data fairly and lawfully during the term of the Agreement

5.2 Individuals have rights in relation to their personal data under the Data Protection Laws. Those rights include:

- i. The right to be informed
- ii. The right of access
- iii. The right to rectification
- iv. The right to erasure
- v. The right to restrict processing
- vi. The right to data portability
- vii. The right to object
- viii. Rights in relation to automated decision making and profiling

5.3 The Consultant must advise the Commissioner without undue delay, or in any event within three days of receipt, of any request made to them for information or notification under the Data Protection Laws, including:

- any request, complaint or communication from a Data Subject relating to Personal Data or the Consultant's or Commissioner's obligations under the Data Protection Laws;
- any communication from the Supervisory Authority or any other regulatory authority in connection with Personal Data Processed under this Agreement; and
- any request from a third party for disclosure of Personal Data where compliance with such request is required or purported to be required by law or regulatory order.

5.4 The Consultant shall assist the Commissioner in responding to any Data Subject access request and to ensure compliance with its obligations under the Data Protection Laws with respect to security, privacy impact assessments and consultations with Supervisory Authorities or regulators.

6 DATA SECURITY BREACHES AND REPORTING PROCEDURES

6.1 The Consultant must notify any alleged, suspected, threatened or actual Data Breach in relation to any Personal Data Processed by them under this Agreement to the Commissioner without undue delay and in any event no later than 24 hours after becoming aware of it, following the procedure in Schedule Two of the Agreement.

6.2 The Consultant shall assist the Commissioner in relation to the Commissioner's obligation to notify any Data Breach to the Supervisory Authority and with communication of a Data Breach to a Data Subject.

7 OTHER DATA PROTECTION OBLIGATIONS

7.1 From time to time the Consultant will support the Commissioner with preparation of data protection impact assessments and with consultation with the Supervisory Authority on data protection measures.

7.2 The Consultant will act only under the Commissioner's instructions in relation to any activities undertaken to resolve any complaints or comply with any requests from individuals under clause 5 of this Schedule One.

7.3 The Commissioner does not agree to the Consultant appointing any third-party Data Processor of Personal Data under this Agreement.

8 DUTY OF CONFIDENCE

8.1 The Consultant will treat Personal Data that they Process in terms of the Agreement in the strictest confidence. In addition to Section 10 of the front end of this Agreement, the Commissioner's confidentiality policy provides guidance.

9 FREEDOM OF INFORMATION

9.1 The Consultant recognises that the Commissioner is a public authority for the purposes of the Freedom of Information (Scotland) Act 2002 and may be required to disclose information about the Agreement, the services provided by the Consultant under the Agreement and the Processing carried out under the Agreement. The Consultant agrees to provide all reasonable assistance to the Commissioner as is

necessary to enable the Commissioner to comply with its obligations under the Freedom of Information (Scotland) Act 2002.

10 RECORD KEEPING, RETENTION, AND INSPECTION

10.1 The Consultant must delete or return all Personal Data Processed in terms of the Agreement if requested by the Commissioner to do so at any time.

10.2 The Consultant shall, at the conclusion of the provision of services in relation to any particular assignment the Consultant is engaged in under the terms of the Agreement, delete or return as required all Personal Data that they have processed in relation to that assignment. The Personal Data will (at the Commissioner's sole discretion) be deleted or returned to the Commissioner.

10.3 The Consultant must provide such information as is necessary to enable the Commissioner to be assured of the Consultant's compliance with the requirements imposed by the Agreement and the Data Protection Laws in terms of data protection.

10.4 The Consultant will allow the Commissioner, the Commissioner's employees, auditors and/or authorised agents reasonable access to any relevant premises or systems, during normal business hours, to inspect any procedures, measures and records used or employed by the Consultant in relation to the Processing of Personal Data in terms of this Agreement and contribute as is reasonable to those audits and inspections.

10.5 The Consultant shall inform the Commissioner, if in their opinion, an instruction from the Commissioner infringes any obligation under the Data Protection Laws.

10.6 The Consultant must maintain written records including in electronic form, of all Processing activities carried out in pursuance of the Agreement or otherwise on behalf of the Commissioner. This record must contain the name and contact details of the Consultant, the Commissioner and the Commissioner's data protection officer (see the Commissioner's Data Protection Policy for details), the categories of Processing carried out by the Consultant on behalf of the Commissioner and a general description of the technical and organisational security measures referred to in clause 4 of this Schedule One.

10.7 If requested, the consultant must make any records that are requested available to the Supervisory Authority and co-operate with the Supervisory Authority in the performance of its tasks.

11 TERMINATION

11.1 The Consultant shall, on termination or expiry of this Agreement, delete or return (as required by the Commissioner) any Personal Data which they have processed under the Agreement.

11.2 In the event legislation requires the consultant to retain Personal Data contrary to the provisions of clauses 10.1 or 11.1 of this Schedule One, the Consultant shall notify the Commissioner accordingly unless the law prohibits such disclosure.

12 LIABILITY

The Consultant shall have personal liability for and shall indemnify Commissioner for any loss, liability, costs (including legal costs), damages, or expenses resulting from any breach by the Consultant of the Data Protection Laws, and shall maintain in force full and comprehensive Insurance Policies.

SCHEDULE ONE – DESCRIPTION OF PERSONAL DATA AND DURATION OF PROCESSING

Part 1

Personal data to be processed by the consultant in terms of the Agreement

For the duration of the project, the Commissioner (whether directly or through certain Project stakeholders such as the Scottish Ministers) will provide the Consultant with any information necessary to understand the history and current practices in relation to public appointments. The personal data of data subjects involved in the public appointments process which might be uncovered, includes but is not limited to:

- names;
- addresses including email addresses;
- application and monitoring forms which may include protected characteristics under the Equality Act 2010 such as gender, sexual orientation, religion or belief and ethnicity;
- political affiliation; and
- the views of PAAs, Scottish Government officials, independent panel members and public body chairs on applicants, on appointees and on each other's performance, views, beliefs, activities and behaviours.

Duration of the processing

The earlier of (a) complete performance of the Project or (b) expiry or termination of this Agreement.

Part 2

The personal data of the Consultant to be processed by the Commissioner

Personal data provided by the Consultant relating to their ability to fulfil the role of consultant and to allow for administration of the Agreement, including but not limited to:

- contact details, which are forwarded to others for the fulfilment of the Project;
- data on the Consultant's personal health and wellbeing (only if likely to impact on the Project);
- the Consultant's banking details to allow for the payment of invoices; and
- information on the Consultant's experience, expertise and specialisms.

The Commissioner also processes Personal Data the Consultant provides during tendering processes, including diversity monitoring information, in order to comply with obligations under the Equality Act 2010.

Duration of the processing

For the term of the Agreement plus seven years or such further term as agreed between the Consultant and the Commissioner.

SCHEDULE TWO - DATA SECURITY BREACHES

Data Breaches can arise as a result of both accidental and deliberate causes. The Commissioner has obligations in relation to Data Breaches which the Consultant has an obligation to assist with as detailed elsewhere in this Agreement. Where a Data Breach has occurred, the Commissioner and the Consultant have an obligation to establish the likelihood and the severity of the resulting risk to people's rights and freedoms as a result.

The Commissioner, on becoming aware of a breach, must

- make all reasonable attempts to contain it. For example, contact IT Support to contain a virus or retrieve documents from backup.
- identify what the risks to an individual's rights and freedoms might be. It's important to focus on the potential negative consequences for individuals.
- assess the likelihood of the risks occurring. If it's likely that a risk will occur, then the Supervisory Authority must be notified of the Data Breach; if it's unlikely to occur then the Data Breach does not have to be reported. In any event, the Data Breach and the reasons for reporting or not reporting to the Supervisory Authority should be documented.
- finally, assess the likelihood and impact of the risk occurring. If this is assessed as 'high' then those concerned directly should be informed without undue delay.

PROCEDURE TO BE FOLLOWED BY THE CONSULTANT IN THE EVENT OF A DATA SECURITY BREACH

In the event of a Data Breach the Consultant must contact the Commissioner's Public Appointments Team, within 24 hours of discovering it, and provide the following information:

- the nature of the breach, including – where possible – the categories and approximate number of individuals and personal data records concerned;
- the name and contact details of the Consultant's Data Protection Officer or relevant person (this may simply be the Consultant);
- a description of the likely consequences of the Data Breach; and
- a description of the measures taken or proposed to be taken to respond to the Data Breach.

The Commissioner's Public Appointments Team will inform its Corporate Services Team and agree the next steps to take.

The Commissioner's Corporate Services Team and/or Public Appointments Team will provide guidance on how the results of the Data Breach are to be handled.