CPANI

The Commissioner
for Public Appointments
Northern Ireland

Complaint investigation and report on the appointment of councillors to the Board of the Londonderry Port and Harbour Commissioners

Department for Regional Development

November 2015

Glossary of Terms

Board of the Londonderry Port and Harbour Commissioners - The Port Board

Code of Practice for Ministerial Appointments for Northern Ireland - The Code

Department for Regional Development - the Department

Derry City and Strabane District Council - The Council

The then Minister for Regional Development - DRD Minister

Introduction

1. The complainant was one of a number of local councillors whose name was put forward by the Derry City and Strabane District Council (the Council) to the Department for Regional Development (the Department) for consideration by the then Minister for Regional Development (the then DRD Minister) for appointment to the Board of the Londonderry Port and Harbour Commissioners (the port Board).

2. Having failed to be appointed by the then DRD Minister the complainant submitted a complaint to the Department in accordance with the Code of Practice for Ministerial Appointments for Northern Ireland (the Code).

3. The complainant was not satisfied with the response from the Department, and wrote to me as the Commissioner for Public Appointments for Northern Ireland (CPANI) on 16 September 2015 (received 25 September 2015) requesting me to investigate the matter. I agreed to the request.

4. At this stage I draw attention to my role as Commissioner for Public Appointments for Northern Ireland which is to regulate, monitor, report and advise on the way in which Ministers make appointments to the Boards of many public bodies in Northern Ireland. I may also investigate complaints by an applicant dissatisfied with an appointments process. However, decision making on whether there has in fact been unlawful discrimination in this or any other public appointments process lies outside my jurisdiction. My findings in this report do not, therefore, constitute a decision on whether there has been or has not been unlawful discrimination at any stage throughout the process under scrutiny.

Summary of Findings and Observations

5. I do not uphold the aspect of the complaint that alleges breach of the Code because of the failure to apply a D'Hondt type allocation for the appointment of councillors to the port Board. Nor do I uphold that aspect of the complaint that alleges that the lack of Sinn Fein representation reflected by the appointments list in itself amounts to a breach of the Code.

6. I find that although in itself not a breach of the Code, the outcome of this appointment process inevitably and foreseeably created a situation wherein perceptions of discrimination and unfairness could arise.

7. I find that the assessment panel both failed to follow and misinterpreted the Code in relation to the handling of perceived conflicts of interest and in doing so breached the Code in its handling of the conflict of interest issue in relation to a successful applicant. The panel provided the then DRD Minister with an applicant summary which was flawed as a result of this breach. The then DRD Minister relied upon this information in setting out his reasons for appointing an applicant. I further find that this reasoning put forward by the then DRD Minister for appointment of one of the successful applicants was flawed in a way that may have been to the detriment of other applicants including the complainant.

8. The Department now accepts fully that it should have documented these discussions and flagged up to the Minister the perceived conflicts of interest issues raised by Applicant A. It also accepts that the panel should have advised the Minister of its views on the perceived conflicts of interest and provided advice on how the Minister might have handled them.

9. I find that, although there may have been mitigating circumstances, in not declaring his longstanding relationship with one of the councillors whom he appointed, the then DRD Minister was in breach of that part of the Code relating to transparency and the handling of perceived conflicts of interests. This breach is relevant to the complaint.

10. I find that although the assessment process may not have been optimum all applicants were treated in the same way and the complainant was not disadvantaged in relation to the other applicants by the scale of the process. I, therefore, do not uphold that part of the complaint that alleges that the complainant was disadvantaged because the then DRD Minister did not have enough information to make an informed choice.

11. I make the observation that the fact that the appointment of councillors as Harbour Commissioners is provided for by legislation emphasises the important role of the local representative on the port Board. Such important commercial appointments involving local councillors are bound to be politically sensitive. There is a great onus on the Department and the appointing DRD Minister to ensure that these appointments are made fully in accordance with the Code in the most transparent and justifiable manner. A breach of the Code in such circumstances has the potential to undermine public confidence in both these particular appointments and the public appointments system more generally.

The Appointment Process

12. Under the Londonderry Harbour Order (Northern Ireland) 2002 up to a maximum of three of the persons appointed as Commissioners of the port Board must be members of the Council and appointed by the Department (ultimately the DRD Minister) following consultation with the Council. The port lies within the Council area and is a major commercial entity therein.

13. In early 2015 as a result of the reorganisation of local Councils the Department commenced the process of appointing three new councillors as Commissioners on the port Board. The Council was asked to put forward at least two nominees for each available position. The Council put forward the names of eight councillors for consideration one of which was the complainant. The eight councillors were invited to complete an application form and to attend for interview.

14. An assessment panel comprising two representatives from the Department and an Independent Assessor provided by CPANI conducted an assessment of each of the councillor applicants. The basis of assessment was the information provided on the application form together with a short interview.

15. The outcome of the panel assessment process was that all eight councillors were found suitable for appointment to the port Board. A short applicant summary relating to each of the eight councillors was agreed by the panel following interview and presented to the then DRD Minister by the Chair of the panel (a senior civil servant). The names were set out in alphabetical order and without ranking as had been agreed with the then DRD Minister at the outset. The then DRD Minister selected three councillors for appointment to the port Board and selected one other applicant to be placed on a reserve list.

Nature of the Complaint

16. The complainant is a councillor representing the Sinn Fein party which is the largest party within the Derry City and Strabane District Council. The political make-up of the Council in terms of Council seats is as follows: Sinn Fein 16; SDLP 10; DUP 8; UUP 2; Independent 4. The appointing DRD Minister is a member of the UUP. The three councillors appointed

represent the SDLP, the UUP and the DUP respectively. This information is relevant because it is raised by the complainant as a factor in his complaint.

17. The original complaint made to the Department is summarised as follows.

I. The complainant asserted that given the fact that Sinn Fein represents the largest party in the Council and that other positions within the Council were made using the D'Hondt system of allocation, "in reason and fairness" the appointment of councillor members to the port Board should have been made using that system. (The D'Hondt system is a highest averages method for allocating seats in party-list proportional representation. Under it the Sinn Fein party could have expected to have at least one of their councillors appointed to the port Board on the basis of its vote share). He further asserted that the then DRD Minister's failure to use the D'Hondt system when making the appointments meant that "the Board is not reflective of the community it serves and there has been a clear breach of the Code of Practice due to perceived political discrimination". (The complainant referred to the fact that his Sinn Fein colleague was also not appointed.)

II. The complainant requested details on what criteria are applied by Ministers when making appointments to boards when those deemed suitable for appointment outnumber available posts.

III. The complainant also requested "a logical rationale for how a Minister can justify denying the largest selection of voters a voice on a body as crucial to the infrastructural development of the North-West region as the Port and Harbour Commission".

In the subsequent letter to the Commissioner, the complainant outlined further elements of the complaint as follows:

IV. The brief interview with the selection panel could not possibly have afforded the DRD Minister enough information to make an informed choice.

V. The complainant suspects the DRD Minister made his decision on the basis of party political affiliations.

Scope of the Investigation

18. The investigation involved a detailed review of the following documentation.

    - Application forms for all applicants.
    - Selection Panel documentation for all applicants.
    - A submission to the then DRD Minister containing applicant summaries for all eight applicants, all of whom were found suitable for appointment.
    - Written record of the then DRD Minister's decision on whom to appoint, and the reasons for the decision.

19. Interviews were conducted by CPANI with the selection panel and the appointing DRD Minister.

Findings

20. Each element of the complaint is dealt with below.

Element I

21. As a result of appointments to the Board of the Londonderry Port and Harbour Commissioners being made without reference to the D'Hondt system of allocation, the complainant believes that "the Board is not reflective of the community it serves and there has been a clear breach of the Code of Practice due to perceived political discrimination".

22. Legal advice acquired by the Department and shared with my office states that councillor positions on the Board of the Londonderry Port and Harbour Commissioners are not positions of responsibility as defined by section 6 of the Local Government Act (Northern Ireland) 2014. The appointments do not, therefore, attract the application of the D'Hondt system of allocation. They are, however, appointments which are regulated by CPANI and are required to comply with the Code.

23. I see no reason to demur from the legal advice provided in relation to the applicability of section 6 to these appointments. I am, therefore, content that there was no legal obligation to allocate the councillor Harbour Commissioner positions on the basis of the D'Hondt system.

24. I am conscious, however, that the complainant is not necessarily alleging a breach of section 6 as the basis for this part of his complaint. He articulated the issue in terms of reason and fairness referring to the practice of using D'Hondt in the allocation of positions of responsibility within the Council suggesting it should have been used on this occasion in order to 'ensure that appointments are fair and proportionate to the vote cast by the citizen of the area.' Accordingly this aspect of the complaint goes beyond the strict question of whether section 6 applied to the appointment of councillors to the port Board.

25. In this part of the complaint the question is whether the non implementation of the D'Hondt system even if it were not a legal requirement in this appointment process amounts to a breach of the Code because it resulted in the largest political party in the Council not being represented by one of the three councillor members appointed to the port Board. The complainant believes that the outcome of the councillor appointments process results in a port Board which is not reflective of the community it serves insofar as the councillor Commissioners do not represent the majority of the voting community. In putting forward this position the complainant asserts that the failure to appoint him was politically motivated and therefore a breach of the Code.

26. Under the heading of Diversity (paragraph 2.3) the Code states that the make-up of the Boards of Northern Ireland public bodies does not adequately reflect the make-up of the population. It urges Departments to ensure as far as possible that boards are balanced in terms of skills and experience and that opportunities to apply for positions on boards are open to the communities they serve. This part of the Code does not require appointments to be made on the basis of balancing the Board membership to reflect the community it serves. Appointments must be made on merit. The Code does, however, require Departments and Ministers to carefully consider diversity issues when making appointments. This applies to all appointments including those made from a pool of councillor nominees. Undoubtedly in the process under examination the small size of the pool of applicants and the fact that it was made up exclusively of local representatives from one Council area meant the concept of diversity was limited. In this situation weight should be given to the fact that statute provides for a number of Commissioner positions on the port Board to be retained for local councillors. By making this provision the legislature clearly considered that local representation on the port Board is important. It follows that at the same time as observing the merit principle and taking account of anti-discrimination

legislation, careful consideration should be given to the representative nature of these appointments.

27. With regard to unlawful discrimination the Code opens with the heading Important Notice. Under this heading it is stated that it is important for all those engaged in public appointments processes to note that antidiscrimination laws apply to public appointments. A little later in the Code under the heading Equality at paragraph 2.4 attention is again drawn to the importance of adherence to anti-discrimination law. Paragraph 2.4 states that it is for Ministers and their Departments to ensure that they are fully versed in these matters. The warnings in the Code about ensuring compliance with anti-discrimination law are also emphasised in a mandatory section in the officials' advice which goes to Ministers engaged in a public appointments process. The purpose of highlighting anti-discrimination law in this way is to ensure the mindfulness of those involved in the processes for making public appointments. Such mindfulness should include awareness of how perceptions of equality and fairness are also very important in the making of public appointments.

28. When consulted by the Department the Council put forward a list of nominees that was inclusive across the spectrum of political representation within that body. The list went intact to the then DRD Minister as the list of applicants suitable for appointment.

29. The list of successful candidates appointed to the port Board was less diverse in its political representation. Although by far the largest party represented on the Council no Sinn Fein councillor was appointed.

30. I have earlier observed that there is no strict requirement in the Code to ensure balanced representation on public boards. Rather it is expected that a full implementation of the Code in both spirit and letter will result in diverse appointments which reflect the community served by the Board.

31. I therefore do not uphold the aspect of the complaint that alleges breach of the Code because of the failure to apply a D'Hondt type allocation for the appointment of councillors. Nor do I uphold that aspect of the complaint that alleges that the outcome of the appointments process, that is, the lack of Sinn Fein representation (and therefore a majority section of the local community) reflected by the appointments list, in itself amounted to a breach of the Code.

32. Whilst I find that the outcome of this appointment process does not automatically mean that there was a breach of the Code it does inevitably and foreseeably create a situation which allows perceptions of discrimination and unfairness to arise. This in turn puts a focus on the application of the merit principle and the need for the Department and the appointing DRD Minister to show conformity with every aspect of the Code during the appointment processes. It is to these processes that I turn in answering the next part of the complainant's case.

Element II

33. The complainant requested details on what criteria are applied by Ministers when making appointments to boards when those deemed suitable for appointment outnumber available posts.

34. The complainant considered the Department's response to this element of his complaint as unsatisfactory.

35. The criteria for the posts of Commissioners on the port Board are set out in Schedule 1 of the 2002 Order.

6.—(1) The Department in making appointments under paragraph 2(1) shall select persons who appear to it to have experience of, and to have capacity in, one or more of the matters mentioned in sub-paragraph (2) or to have in some other respect special knowledge or experience which would be of value to the Commissioners in the discharge of their functions, or to have any other skills and abilities considered from time to time by the Department to be relevant or useful to the Commissioners.

(2) The matters referred to in sub-paragraph (1) are the management of harbours, shipping, port usage, industrial, commercial or financial matters, administration, and the organisation of workers.

36. Candidates applying for positions on the port Board must ordinarily show proficiency across a range of the statutory competencies under sub paragraph (2) or have proficiency in other competencies specified by the Department under sub paragraph (1). All candidates must answer questions relating to conflict of interests and probity/integrity and time commitment.

37. In the case of the appointment of councillors the Department agreed with the then DRD Minister at the outset of the process that the fact of being a serving councillor would be sufficient to satisfy the statutory experience and capacity requirements of the appointments. As a result the only competency tested during the interview of the councillors was corporate governance. All applicants were given an equal opportunity to address this competency.

38. On the application forms the applicants were asked to inform the interview panel whether they had any conflict of interest which might affect their application, state that they would abide by the seven principles of public life and inform the panel whether there were any other probity issues which might cause embarrassment if in future they were to be raised in public. During the interview process the applicants were questioned on these same issues although in more detail with regard to conflicts of interests. At the interview candidates were asked if they had any conflict of interest real, perceived or potential. (The increased detail of the question is relevant since it elicited further information from one of the successful candidates as described below).

39. It is relevant to note that corporate governance was the only competency upon which the councillors were examined at interview. Although, conflicts of interest is one aspect of corporate governance, the questions around conflict of interest, probity and adherence to the principles of public life are not generally considered competencies (and as such are not generally subject to the same performance measure as competencies). Their inclusion are about ensuring that individuals are appointed who are willing and able to commit to high ethical standards in public life and equally important that the appointments themselves are made free of political or personal patronage. This latter point is one to which I will return.

40. Of the eight councillors interviewed there were varying degrees of competency in corporate governance observed by the panel (and recorded in the applicant summary provided to the then DRD Minister by the Chair of the panel and agreed by the panel). The complainant was assessed against the sole competency as being at the same level as one of the successful candidates (whom I will refer to as Applicant A). There was a reference in both the applicant summary relating to the complainant and that of Applicant A to the nature of the two applicants' experience of corporate governance. No conclusion was drawn in either the

applicant summaries or the then DRD Minister's reasoning as to whether one type of experience was better than the other.

41. At this point I emphasise that the appointing DRD Minister is entitled to appoint any individual from the list of suitable applicants presented to him. These are Ministerial public appointments which, under the legislation covering each of the public bodies for which a Minister is responsible, are for the Minister to make. By Ministerial choice the applicants were not ranked. This is common practice but it does put considerable responsibility on the Minister to show that his appointment is made in compliance with the Code, on merit and free from any unlawful discrimination. In accordance with the Code the Minister must set out the reasons for his decision. The reasons cannot include new criteria and must be based on objective, correct and factual information gathered from the applicant's application form and interview and summarised in the applicant summary. In this case the then DRD Minister used only the information provided to him within the applicant summary. He relied solely on the wording of the applicant summary for the reasoning for his appointment decision without added comment. As has been set out above according to the applicant summaries Applicant A (one of the appointed applicants) was assessed by the panel as being on the same level as that of the complainant in the sole competency of corporate governance.

42. The applicant summary for Applicant A did draw attention to one particular strength. It stated under the heading ‘Information from application form and interview’ that the applicant had 'a very strong awareness of conflict of interest issues both actual and perceived '. The then DRD Minister included the reference to this particular strength in his reasoning for appointing Applicant A. Under the heading Probity and Conflict of Interest the applicant summary for Applicant A stated 'No issues of conflict of interest'. In the complainant's applicant summary under the same heading the panel stated that there were 'no issues of probity or conflicts of interest'. On the face of it, therefore, it seems that apart from the different types of experience highlighted in a neutral way in the summaries of the complainant and Applicant A the then DRD Minister's preference for Applicant A, may have been informed by the fact that the latter was presented as stronger in terms of understanding conflict of interest issues than the complainant.

43. A number of difficulties arise on examination of the applicant summary relating to Applicant A and the question of conflicts of interest. The first observation is that the panel presented

information on Applicant A in relation to the question of conflicts of interest as if it was assessing a competency. This is problematic because currently the question is framed predominantly to establish whether the applicant has any conflicts of interest although undoubtedly the panel must be satisfied that he/she can give an informed response and understands the concept of conflict of interest. The question is, therefore, not framed in a way that makes clear to interviewees that they are being tested on their general understanding of the principles of conflicts of interests. In the process under scrutiny it seems from the documentation that the question was used to some extent in this wider way in relation to Applicant A but not in relation to the other applicants, including the complainant. But more seriously still the information contained in the applicant summary in relation to Applicant A and conflicts of interest was in my view substantially incorrect.

44. The application form asked candidates to indicate by ticking a yes or no box whether any conflict of interest arose in relation to their application for the position. Applicant A responded by ticking the no box. At interview applicants were questioned in more detail about this issue in that they were asked whether they had a conflict of interest, real, perceived or future. During interview Applicant A declared five perceived conflicts of interest. At least two of these were in my view potentially significant (the other three situations declared did not in my view constitute perceived conflicts of interest). The first significant declaration was that he was a 'friend' or 'close friend' of the then DRD Minister (one of the panel members recorded 'friend', one recorded 'close friend' and one recorded that 'Applicant A referred to his relationship with the DRD Minister'). The second was that he had a close relative on a body which was an important stakeholder of the port Board. (The stakeholder/port Board relationship which is promoted in the Department's guidance to the port Board did not involve any financial, commercial or governance element.)

45. At this stage the assessment panel adopted a surprising and mistaken approach to the handling of declared conflicts of interests. The Code sets out clearly and at length how conflicts of interest and matters of integrity should be dealt with. It is worthwhile to set out the paragraphs in full here:

Integrity and Potential Appointees

All those involved in the assessment of applicants should be familiar with how conflicts of interest and matters of integrity can affect the workings of a public body. They should be

familiar with the recommendations of the Westminster and Northern Ireland Public Accounts Committees relating to conflicts of interest and the public appointment process.

a. *Some manageable conflicts of interest will not be a barrier to appointment, but the selection panel should discuss all real, perceived and potential conflicts with all applicants.*

b. *The selection panel must:*

    i. *determine whether each applicant is aware of the standards of behaviour required of public appointees and can demonstrate his or her understanding of the issue;*

    ii. *ensure that conflicts of interest have been explained to, and explored with, each applicant.*

c. *Whether or not an applicant has made reference to any conflict of interest, he or she must still be asked whether there are any real, perceived or potential conflicts of interest between his or her circumstances and the appointment applied for.*

d. *Applicants must also be asked to declare whether or not they are involved, or have been involved, in activities that could call into question their own reputation and/or damage the reputation of the body to which they are applying. When dealing with matters of conflict of interest, or integrity issues, the selection panel must consider fully the answers and if necessary question further or challenge the applicant, particularly if the panel is aware of issues that have been in the public domain.*

e. *The selection panel members must assess whether there is an integrity or conflict of interest issue, and how it will be handled. The panel must document the discussion and conclusions arrived at. If the conflict appears to be irreconcilable or, given the circumstances it would be inappropriate to proceed with the application, the panel must advise the applicant of its decision and may either remove him or her from the competition, or ensure that the issue is fully explained in the records, and in the applicant summary to the Minister should the applicant be otherwise suitable for appointment.*

f. *The applicant summary to the Minister must include clear written reference to any perceived, actual or potential conflicts of interest, or integrity issues, connected to any applicant put forward as suitable for appointment. It must include sufficient information to ensure that the Minister is fully aware of these matters and can make an informed decision.*

g. *If an applicant fails to demonstrate an understanding of, or clear commitment to, the principle of integrity, he or she should be judged not suitable for appointment.*

46. The Northern Ireland Audit Office has also published an extensive and up to date Good Practice Guide on the management of conflicts of interest. The Guide in its Introduction quotes the Committee on Standards in Public Life as stating that 'the registration and declaration of interests by public office holders that may constitute or may be perceived to constitute a conflict of interests is one of the cornerstones of probity in public life. The resolution of such conflicts of interest brings together all the aspects of the Seven Principles of Public Life'. The Guide also sets out an extensive checklist for identifying such conflicts. In paragraph 2.7 it defines a friend or associate as someone with whom the individual has a longstanding and/ or close relationship, socialises with regularly or has dealings which may create a conflict of interest. It also states that close relative would usually refer to the individual's spouse or partner, children (adult and minor), parent, brother, sister, in-laws and the personal partners of any of these.

47. The assessment panel did not follow the Code in dealing with the perceived conflicts of interest declared by Applicant A. There is no documentary evidence that the panel questioned the applicant on his declared perceived conflicts of interest or that it considered and decided how these should be handled. The panel failed to document any considerations on this matter. The panel did not, as the Code required, inform the then DRD Minister of the applicant's perceived conflicts of interest. On the contrary it informed the then DRD Minister that Applicant A had no conflicts of interest perceived or actual. The applicant summary presented the applicant's position of awareness of the issue as a matter of strength. This particular strength and the reference to no perceived conflicts of interests were quoted by the then DRD Minister in his reasons for appointing Applicant A.

48. At this point I want to emphasise that there is absolutely no criticism of Applicant A in this matter. He was very open and forthcoming during his interview about what he believed were his perceived conflicts of interest.

49. Evidence was taken from the panel members for the purpose of the investigation leading to this report. The panel indicated that although it was not documented the perceived conflicts of interest raised by Applicant A were in fact discussed at length by the panel members. It was concluded that the relationships described by Applicant A did not constitute conflicts of interest. This conclusion, albeit undocumented, was based on the panel's belief that the conflict of interest issue in the public appointments process relates 'only to the individual's ability to undertake the position for which he/she was applying for'. In this case the panel concluded that the relationships described did not affect Applicant A's ability to undertake the role of Commissioner on the port Board. The panel decided not to inform the then DRD Minister of the perceived conflicts of interest raised by Applicant A because as the Chair stated; the panel 'did not want to unduly influence the Minister'. The panel members also indicated that they had ascertained during the interview although not documented that 'the friendship was of a political nature rather than a close personal one' and the panel concluded that the then DRD Minister had a multitude of such political friendships. The panel stated that it was of the view that Applicant A had inappropriately raised his friendship with the then DRD Minister as a conflict of interest.

50. The panel also indicated that it had discussed and concluded that Applicant A's declaration of a close relative on a stakeholder body did not constitute a perceived conflict of interest because that body had no role in oversight of the Port's operation.

51. I find that the panel's reasoning in this matter is incorrect. First, once the perceived conflicts had been raised, under the Code the panel had to explore the issues with the applicant, document the discussion and its conclusion and relate this to the then DRD Minister. Second, I do not accept the case put forward by the panel Chair that conflicts of interests in public appointments are relevant only where they relate directly to the role being applied for and do not extend to the relationship between the appointing Minister and the applicant. Given that the Minister is appointing to the public body there is immediately a presumption that the Minister has a formal relationship with that body. In this case two of the declared perceived conflicts of interest could be connected substantively to the position

of Harbour Commissioner (See below). However, conflicts of interest under the Code may also relate specifically to the relationship if any between the Minister making the appointment and the applicant. To suggest otherwise is to deny the roles of the Commissioner for Public Appointments for Northern Ireland and the Code of Practice for Public Appointments in ensuring that public appointments are made in an open and transparent way, free from personal or political patronage and on merit.

52. Third, the appointment was as a Commissioner on the Board of a major commercial entity. The port Board governs a commercial body independent of government that must take its decisions only in the best interests of the business and its stakeholders. The possibility of a close friendship between one of its Commissioners and the Minister who has responsibility for the strategic oversight of the development of the region within which the commercial body operates could be perceived negatively in terms of the independence of the Board and its freedom from political influence. Likewise a close family relationship within a body that is considered a key stakeholder of the port Board has implications for perceptions of influence and the Commissioners' independence.

53. Fourth, it is my view that once the possibility of a close friendship was raised the panel was unlikely to be in a position to take a definitive view on the substance of the matter without first speaking to the Minister.

54. In saying this I am not taking the position that the declaration of these relationships meant that Applicant A was not suitable for appointment but rather that the relationships could constitute perceived conflicts of interests and needed to be managed accordingly.

55. It follows that I find that the panel ought to have addressed the conflicts of interests with Applicant A, documented the discussion and conclusion and advised the then Minister of the perceived conflicts of interests declared by Applicant A. The Department now accepts fully that it should have documented these discussions and flagged up to the then Minister the perceived conflicts of interest issues raised by Applicant A. The panel should also have advised the then Minister of its views on the perceived conflicts of interest and provided advice on how the Minister might have handled them.

56. In addition there is inconsistency in the panel's assessment of Applicant A's understanding of the issues. Of the five instances put forward by Applicant A the panel concluded that in fact none of these were conflicts of interest perceived or real, that they should not be raised

with the then Minister and that at least one of them was put forward inappropriately. This evidence of the panel's thinking does not support its statement in the applicant summary that Applicant A had a strong understanding of conflict of interest issues.

57. The panel therefore put forward muddled, conflicting and incomplete evidence in its applicant summary for Applicant A. The then DRD Minister relied on this evidence in his reasoning for appointing Applicant A and on the basis of the documentation seemed to use the evidence as a main means to differentiate between Applicant A and other applicants including the complainant.

58. I find that the assessment panel breached the Code in its handling of the conflict of interest issue in relation to Applicant A.

59. That the panel was aware of the need to assess a conflict of interest issue and record it is apparent in how it handled the point when it arose during the interview of one of the other applicants (whom I will refer to as Applicant X). Applicant X did not declare any conflict of interest either in the application form or at interview. Nevertheless during the course of his interview evidence emerged which suggested a perceived conflict of interest. Although the panel did not raise this directly with the applicant as a conflict of interest issue (as it ought to have as required under the Code) the matter was recorded in the applicant summary that went to the then DRD Minister. The panel had concluded that the conflict of interest was unlikely to be substantiated and in any event could be managed at Board level. Applicant X's failure to recognise this perceived conflict of interest was not commented on in a negative way in the applicant summary.

60. In addition to looking at the actions of the assessment panel it is required of me to look at the role of the appointing Minister in this appointment process. The applicant summary provided to the then DRD Minister in relation to Applicant A was flawed in a number of respects with regard to the information on conflicts of interest. The then DRD Minister relied upon this information in giving his reasons for appointing Applicant A. I accordingly find that the reasoning put forward by the then DRD Minister for appointment of one of the successful applicants was flawed. Given that the flawed information seemed to positively differentiate Applicant A its use may have been to the detriment of other unsuccessful applicants including the complainant.

61. Applicant A stated in his interview that he was a 'friend' or 'close friend' of the then DRD Minister. In his evidence in response to this complaint investigation the then DRD Minister described his relationship with Applicant A not as a close friend but as a "friendly professional and political working relationship within the Northern Ireland Assembly and in local government".

62. The question whether to declare a relationship as a perceived conflict of interest is one of personal judgment guided by the Nolan Seven Principles of Public Life and the direction provided by both the Code and the NIAO Good Practice Guide. (The Guide provides the detail underpinning the Code.)

63. The Good Practice Guide describes a relationship which may fall under the definition of perceived or actual conflict of interest as 'a friend or associate with whom the individual has a longstanding and/or close relationship, socializes with regularly or has dealings which may create a conflict of interest'. The friendship described by the then DRD Minister was of a longstanding friendly political and professional relationship. This falls under the first element of the above Good Practice Guide definition. Therefore in terms of the Code's requirement for openness, transparency and independence it would have been best practice for the then DRD Minister to have declared his relationship with Applicant A. I accept that in the small scale political environment of Northern Ireland such longstanding political associations and friendships are both common and well known to many. These are mitigating circumstances but they do not obviate the need for overt transparency on the part of the Minister particularly in this case where the appointments were politically sensitive and commercially important. I therefore find that the then DRD Minister breached those aspects of the Code relating to conflicts of interest and transparency in not declaring his longstanding relationship with Applicant A one of the councillors whom he appointed as Harbour Commissioner. This is particularly relevant to the complaint since the applicant summaries for the complainant and Applicant A were very similar apart from the information on types of experience and the flawed information relating to conflicts of interests.

64. During its evidence for this report the Departmental officials on the panel strongly expressed the view that even if there were a close friendship (which they concluded there was not) it would not constitute a perceived conflict of interest that required to be

considered and declared because such a relationship would not affect the applicant's ability to carry out the responsibilities of the post.

65. This incorrect understanding of the applicability of the Code to such a relationship requires me to make a clear statement as follows: Where an appointing Minister has a longstanding and/or close relationship, socializes with regularly or has dealings which may create a conflict of interest or a close family relationship with an applicant for a public appointment for which he or she is the appointing Minister such relationships must be declared as a perceived conflict of interest (or it may be an actual conflict of interest depending on the appointment). Failure to do so would amount to a breach of the Code.

66. It is also necessary to state here the general point that the existence of such a relationship between an applicant and a Minister is not of itself a bar to appointment by that Minister of the applicant. But it must be declared. The transparency created by such a declaration is part of the management of any conflict of interest.

Element III

67. The complainant requested “a logical rationale for how a Minister can justify denying the largest selection of voters a voice on a body as crucial to the infrastructural development of the North-West region as the Port and Harbour Commission”.

68. A consideration of the then DRD Minister's stated reasons for the councillor appointments is set out under the previous complaint heading.

Element IV

69. The brief interview with the selection panel could not possibly have afforded the Minister enough information to make an informed choice.

70. It has already been referred to in this document that the Department had agreed at the outset with the then DRD Minister that the fact of being a serving councillor would be sufficient to satisfy the statutory experience and capacity requirements of the appointments. As a result the only competency tested during the interview of the councillors was corporate governance. Conflicts of interest, probity and time commitment were also explored. The interview for each councillor applicant lasted around ten minutes. This contrasts with the interviews held earlier in the year for non councillor Commissioners.

These interviews lasted around forty five minutes and a range of competencies were tested. Conflict of interest, integrity/ probity and time commitment were also explored. In addition the application forms for non councillor applicants were much more extensive covering the same range of competencies as these applicants were interviewed on.

71. Clearly councillor applicants are in a different position to other applicants for positions on the port Board because of the separate legislative provision for their appointments. In this case all councillor applicants were subject to a limited assessment process. They were all treated in the same way so the complainant was not disadvantaged with respect to his fellow councillor applicants. If there was limited information from the assessment process upon which the then DRD Minister could base his decision this situation pertained to all of the candidates.

72. There is a wider question as to whether the current truncated assessment process for councillor appointments is fit for purpose or if there is scope for improvement. This is not a matter to be dealt with within the context of this complaint except to say that I believe there is scope for improvement and this is a matter I will be raising with Departments in the near future. I find, therefore, that although the assessment process may not have been optimum all applicants were treated in the same way and the complainant was not disadvantaged in relation to the other applicants by the scale of the process. I do not uphold this element of the complaint.

Element V

73. Complainant suspects the Minister made his decision on the basis of party political affiliations.

74. Earlier in this Report I have set out the limitations of my role in relation to this aspect of the complaint, that is that consideration and findings of unlawful discrimination in a public appointments process are matters beyond my jurisdiction as the Commissioner for Public Appointments for Northern Ireland.