



The Commissioner  
for Public Appointments  
Northern Ireland

Complaint investigation and report on an unregulated public appointment  
process for the Planning Appeals Commission Water Appeals Commission

Department of Justice

October 2020

## **Introduction**

1. The complainant applied for the position of Commissioner on the Planning and Water Appeals Commissions. The recruitment process was administered by the Department of Justice (the Department). The Department contracted HR Connect, the human resources shared service provider for government departments to carry out the administrative aspects of the selection process on its behalf.
2. The complainant was informed that in the initial sift process he had not met the required standard in all the eligibility criteria for appointment and, therefore, he had not been shortlisted for interview.
3. The complainant submitted a complaint to the Department which was initially handled in line with the Department's complaints procedure. The selection panel considered the complaint in the first instance.
4. The complainant was not satisfied with the response from the selection panel and requested that his complaint be investigated by the Commissioner for Public Appointments. Appointments to the PACWAC are not regulated by the Commissioner, however, in the absence of another complaint avenue I agreed to investigate the matter.

## **Summary findings**

5. The complainant's case is upheld.
6. By many appointment standards, particularly public appointments, the eligibility criteria for the posts in this competition contained significant eligibility restrictions. Given the type of work carried out by PACWAC the restrictions may be capable of objective justification (as was the case for one of the criteria). However, in the absence of a skills audit or other detailed documented evidence of consideration to support their use, in this case I cannot come to the conclusion that the restrictions were individually and collectively justified. Without considered evidence supporting their use such restrictive criteria could reasonably give rise to a good faith perception on the part of the complainant that individually or collectively the restrictions were overly narrow and unnecessarily exclusionary. I recommend that the Department and PACWAC put in place processes to ensure that a skills audit is conducted now and ahead of any future selection processes. I further recommend that careful

consideration be given to the need for the current level of eligibility requirements and whether they should be applied to every appointment to PACWAC. Guidance on carrying out a skills audit is available from CPANI.

7. The lack of any recorded reasoning for the selection panel's decisions at sift stage as to why unsuccessful candidates did not fulfil criteria meant that this appointment process did not meet the public appointment standards for transparency and respect for candidates. The latter includes provision of meaningful feedback to candidates. The complainant was not provided with meaningful feedback on his application. I recommend that the Department amends its appointment procedures (whether carried out within the Department or through HR Connect) to ensure full and transparent documentation of all stages of the decision making processes. CPANI can give advice in this area.
8. The complainant expressed concern that there did not exist a pre-established independent complaints process for challenging the appointment process to PACWAC. I agree that this is a concern and I recommend that the Department consider putting in place an independent appeals process for decisions relating to the appointments to PACWAC.
9. I wish to acknowledge that through the contact the Department had with my office, I am reassured that both the Department and PACWAC were genuine in their efforts to have this unregulated appointment process run in accordance with public appointments standards. As my report makes clear, mistakes were made but these can be learnt from and consequently the appointment process for these important positions strengthened.

### **Background to the PACWAC**

10. The Planning Appeals Commission and the Water Appeals Commission are statutory independent appellate bodies provided for by the Planning Act (NI) 2011 and The Water and Sewerage Services (Northern Ireland) Order 2006 respectively.
11. Although two separate bodies they operate as one entity. For the purposes of this report they will be referred to collectively as the Planning Appeals Commission and Water Appeals Commission (PACWAC).
12. PACWAC functions fall into two broad categories arising from decisions of local Council planning departments and decisions or proposals of Northern Ireland Assembly Departments:

- I. Decisions on Appeals - the Commission makes decisions on appeals against Council decisions on a wide range of planning and environmental matters;
  - II. Hearing and Reporting on Public Inquiries/Hearings/Examinations - the Commission makes recommendations on a wide range of cases referred to it by government Departments or arising from decisions of Departments. The final decision in these matters is taken by the relevant Department.
8. At the time of writing there are fifteen Commissioners who are members of both the Planning Appeals Commission and the Water Appeals Commission. In addition to a Chief Commissioner and deputy Chief Commissioner, the other categories of membership are Principal Commissioner, Senior Commissioner and Commissioner.
  9. The 2011 Act and the 2006 Order (as amended by the Departments (Transfer of Functions) Order (NI) 2016) provide that the Department of Justice appoints the members of the PACWAC. In practice this means that the appointments are made by the DoJ Permanent Secretary with the approval of the Minister of Justice.

### **The Selection process**

10. The Department initiated a selection process in May 2020 to appoint one permanent Commissioner to the PACWAC. A selection panel comprising the PACWAC Chief Commissioner, a PACWAC Principal Commissioner, a senior official from the Department and an Independent Assessor allocated by CPANI was established.
11. Applicants had to demonstrate, in the application form, how they met five eligibility criteria and one shortlisting criterion. These are set out below.

### Eligibility criteria

- I. A primary degree in town and country planning or a post graduate qualification in town and country planning or a similar professional qualification in surveying, architecture, civil engineering or be a qualified barrister or solicitor.
- II. Current chartered membership of the Royal Town Planning Institute, Irish Planning Institute or other relevant professional body\*
- III. Demonstrate a sound understanding and application of current legislation and policy in relation to town and country planning and other environmental matters gained through five years experience in the last ten years working within an organisation operating in the field of planning, law, architecture, surveying, the environment or civil engineering.
- IV. Have an in-depth and up to date understanding of quasi-judicial proceedings gained through three years experience in the last five years of presiding over or participating in public inquiries or tribunals or planning appeals / examinations in relation to planning or environmental matters.
- V. Have experience of producing evidenced, legally compliant and well-reasoned reports and recommendations on large or complex\*\* planning, infrastructure or environmental projects.

### Shortlisting criterion

- VI. Have experience of handling and, of presenting to or chairing public events, on complex\*\* planning casework.

\* Relevant professional memberships – give details of the professional membership held, and reasons why you consider it to be equivalent to the membership required. The onus is on you to provide the panel with details of the professional membership so that a well informed decision can be made.

\*\* Complex planning as defined for the purposes of this recruitment exercise are projects which due to their nature, size, or location raise multiple planning issues. The onus is on applicants to provide evidence as to the complexity of the issue.

12. Following a sift exercise the selection panel decided that the complainant had not met the minimum required standard in two of the five eligibility criteria. Subsequently the complainant was not invited for interview. The complainant was informed of this in a letter dated 03 June 2020; the letter advised the complainant which eligibility criteria he had not met.
13. In response to this the complainant wrote to HR Connect requesting to appeal the decision. HR Connect informed him that no such appeal procedure existed but it offered the complainant *'further clarification from the selection panel on their decision'*.
14. The complainant turned down the offer of further clarification from the selection panel and advised HR Connect that he wished to submit a complaint.

### **Nature of the complaint**

15. The complainant submitted a complaint through HR Connect and asked that this be considered by the Northern Ireland Civil Service Commissioners. The complaint was referred to the selection panel and the panel's response was issued to the complainant by HR Connect. The complainant was advised that as this was not a civil service appointment there was no recourse for the complaint to be considered by the Civil Service Commissioners.
16. The selection panel, in responding to the complainant, set out its view on the need for timeframe requirement as part of the eligibility criteria. The complainant was not satisfied with this response and asked that his complaint be directed for consideration by CPANI.
17. In correspondence with the Department the complainant also requested details on how other candidates from this process, as well as candidates from a previous process to appoint senior commissioners, had successfully demonstrated they met the eligibility criteria. The Department dealt with this as a Freedom of Information request, and the complainant was subsequently advised that the information could not be provided due to data protection restrictions. I have not considered the freedom of information aspect in the course of investigating this complaint.
18. I have summarised the issues as described by the complainant into two separate parts. The complainant maintains that:

- I. The criteria were overly restrictive, narrow and exclusionary primarily due to the timeframe in which experience had to be obtained.
- II. The selection process was not open or transparent.

### **Scope of the Investigation**

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

- Record of the competition initiation meeting.
- Documentation relating to the selection panel's assessment of the complainant.
- The complainant's application form.
- The information pack including the application form.
- All departmental correspondence with the complainant.

### **Each element of the complaint is dealt with below**

I. The criteria were overly restrictive, narrow and exclusionary primarily due to the timeframe in which experience had to be obtained.

20. The eligibility criteria for this appointment contained restrictive conditions and standards namely the timeframe for experience, the qualification requirement and the requirement to be member of a professional body.
21. It is a matter for the Department to determine whether such eligibility restrictions are necessary to properly undertake the role of PACWAC Commissioner. However, the use of this approach must be based on sound documented reasoning.
22. The eligibility criteria used in this selection process were similar to those used in the process to appoint a Senior Commissioner which ran in late 2019/early 2020 (the difference being that the shortlisting criterion was considered an essential one in that process). The criteria had been developed by PACWAC in discussion with the Department in preparation for that previous competition and were carried forward for use in this process. The Public Appointments Code states, however, that the person specification (which sets out the criteria) for an appointment must be reviewed each time a vacancy occurs and updated as necessary for each appointment process.

23. In order to comply with the Code it is necessary to carry out a skills audit ahead of each selection process. The purpose of a skills audit is to identify skills, experience and perspectives needed to ensure the organisation/Board/Tribunal has the capacity to carry out its functions effectively and achieve its planned outcomes. The skills audit should assess the current and future challenges and opportunities facing the organisation and assess the current skills level of current members to establish whether there are any gaps. The exercise should be structured and documented. No such skills audit took place ahead of this selection process.
24. The complainant raised concerns specifically about the time restriction contained in criterion 4: Have an in-depth and up to date understanding of quasi-judicial proceedings gained through three years' experience in the last five years of presiding over or participating in public inquiries or tribunals or planning appeals / examinations in relation to planning or environmental matters. In response to the complainant's concerns the selection panel advised that *"The timeframe was established to ensure that the experience is recent while allowing for those candidates who may have been on long term leave to facilitate career breaks or parental leave to apply."*
25. In general I do not favour the use of any timeframe in the criteria for a public appointment. The focus must be on the quality rather than the length of the experience. Such an approach could be seen to exclude applicants who may have the necessary skills but who may not have had the opportunity to use them within the timeframe. A timeframe combined with a requirement for a very specific type of experience as in this criterion, narrows an applicant pool considerably. This may be justifiable in the context of the work of PACWAC but evidence of careful consideration of the eligibility requirements was lacking.
26. Criterion 3 also contained a timeframe restriction: Demonstrate a sound understanding and application of current legislation and policy in relation to town and country planning and other environmental matters gained through five years' experience in the last ten years working within an organisation operating in the field of planning, law, architecture, surveying, the environment or civil engineering. But in this instance there did exist a recorded objective justification for the time restriction. Brief notes in the record of the competition initiation meeting indicate that the time frame was required because: *'Major change in 2011 to legislation - [candidate] must have knowledge/experience of working in*

*the legislation*'. The explanation for the time restriction in this criterion is coherent and reasonable.

27. With regards to the requirement for a degree level qualification and membership of a professional body, it is not for me to make a judgement on whether these are necessary eligibility requirements for appointment as a Commissioner. However, the lack of any skills audit or other documented consideration means there is no recorded justification for including these as eligibility criteria for appointment as a Commissioner.
28. In response to a query submitted as part of the complaint investigation PACWAC advised that the requirement to hold the degree level qualification was driven by the entrance requirement for membership of professional bodies. However, the appointment process for Commissioners is not the same as that seeking admittance to a professional body. The use of such eligibility criterion must be based on sound documented reasoning which relates the eligibility criteria directly to the skills required as set out in the skills audit.
29. A skills audit should encourage broad based thinking about the current work of the Tribunal and its future challenges and would help determine the appropriate level of experience and skills required to fulfil the role. In addition the skills audit would provide a recorded rationale for the use of any restrictive criteria such as a degree qualification or membership of professional bodies where these are truly required.
30. By most appointment standards and certainly by public appointment standards the eligibility criteria do contain significant restrictions. These may be appropriate for a Tribunal type body and, therefore, be objectively justifiable. However, in the absence of any skills audit or other documented consideration to support their use, such restrictive criteria can give rise to a reasonable and good faith perception that they are narrow and exclusionary - as in the case of the complainant.
31. The Department and PACWAC should put in place processes to ensure that a skills audit is conducted now and ahead of any future selection processes. I further recommend that careful consideration be given to the need for the current level of eligibility requirements and whether they should be applied to every appointment to PACWAC. Guidance on carrying out a skills audit is available from CPANI.

II. The selection process was not open or transparent.

32. HR Connect wrote to the complainant on 03 June to advise that he had been considered ineligible against two criteria. This letter contained what was described as panel feedback against each criterion not met by the complainant. For both the feedback consisted of the following statement.

*"Candidate failed to demonstrate how they met the criterion"*

33. The Public Appointments Code requires that feedback is informative, based on the contemporaneous records kept by the panel of its assessment of the applicant and should provide a clear, jargon-free explanation of the decisions taken with regard to the applicant at each stage of assessment. The purpose of feedback is to provide applicants with useful and pertinent information on their performance during the assessment process.

34. I do not consider the feedback provided to the complainant to meet any of these code requirements.

35. The Public Appointments Code requires that Departments must keep full contemporaneous records of all the assessment procedures, deliberations and outcomes. It is on these records that feedback is based.

36. When assessing the complainant's application form against the eligibility criteria the selection panel recorded only that the complainant had failed to meet two of the criteria. The recorded reason for failure was *"Candidate failed to demonstrate how they met the criterion."*

37. CPANI requested copies of the individual records of the selection panel members in relation to their assessment of the complainant. The response was that the only record kept of the sift was the consensus decision outlined above.

38. Comprehensive and meaningful consensus and individual comments to substantiate the selection panel's decisions are an essential part of any public appointment selection process. This is an issue of respect for candidates as much as it is a responsibility on the Department to promote understanding of the public appointment system. The lack of any supporting comment as to why the complainant had not met the criteria meant that meaningful feedback was difficult if not impossible.

39. In correspondence with the Department the complainant was offered further clarification from the selection panel on their decision. The complainant chose to turn this down. I would recommend that candidates accept any feedback offered by a selection panel. However, in the absence of any recorded reasoning for the selection panel's decision it is unclear what form such feedback would have taken.
40. The lack of any recorded reasoning for the selection panel's decisions meant that the process did not meet the public appointment standards for openness and transparency.
41. The Department should amend their appointment procedures (whether carried out within the Department or through HR Connect) to ensure full and transparent documentation of all stages of the decision making processes.
42. Finally, the complainant expressed concern that there did not exist a pre-established independent complaints process for challenging the appointment process to PACWAC. Appointments to PACWAC do not fall under the public appointments external scrutiny regime nor do they come under any other such regime. While these types of Tribunal bodies are not ordinarily considered public appointments I agree that the lack of some form of external scrutiny is a concern. I recommend that the Department consider putting in place an independent appeals process for decisions relating to the appointments to PACWAC.