

PLANNING APPEALS COMMISSION AND WATER APPEALS COMMISSION

INDEPENDENT COMPLAINTS AUDIT PANEL

2019/20 AND 2020/21

INTRODUCTION

1. This is the report of the Planning Appeals Commission and Water Appeals Commission (“PACWAC”) Independent Complaints Audit Panel for the years 2019/20 and 2020/21.
2. The PACWAC is an independent statutory body with responsibility for determining planning and water appeals. It has a published complaints policy which defines a complaint as *“any expression of dissatisfaction by any party involved in an appeal or examination/enquiry/hearing”*. The policy is non-statutory and makes provision for an Independent Complaints Audit Panel to conduct an annual audit of complaints. On account of the Covid-19 pandemic, it was not possible for the Panel to convene in the 2019/20 year. This report therefore relates to complaints received in both the 2019/20 and 2020/21 years.

COMPLAINTS PROCEDURE

3. The central features of the PACWAC Complaints Procedure are the following:-
 - a) Complaints should be made within 6 months of the date of a decision;
 - b) Complaints will be acknowledged within 7 days and a full response normally issued within 4 weeks;
 - c) All complaints will be investigated by the Chief Commissioner, Deputy Chief Commissioner or Senior Administration staff who were not involved in the appeal;
 - d) A response is issued to the complainant in writing, explaining the outcome of the complaint;
 - e) The PACWAC has no power to change or vary its decision after it has been issued. It therefore has restricted powers in relation to complaints which concern the outcome or reasoning of an appeal decision. Where an error is identified, an apology should be issued, if appropriate.

OVERVIEW OF COMPLAINT REVIEW PROCESS

4. The PACWAC received 16 complaints during the 2019/20 year and 4 complaints during the 2020/21 year.
 5. In relation to each complaint, the complaint file was reviewed by a member of the Panel. For each complaint, the underlying appeal file was also available. Access to all materials was facilitated by the Deputy Chief Commissioner. In relation to a number of complaints, we requested further
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information, which was provided in full. The assistance and accommodation provided by the Deputy Chief Commissioner and staff members was exemplary.

6. We considered that the issues raised in the complaints fell into 3 broad categories, with some complaints raising issues in more than one category:
 - i) Administration;
 - ii) Conduct of the appeal; and
 - iii) Content of the decision.
7. One member of the Panel had a professional involvement in the underlying subject matter of one complaint and declared a conflict of interest. This complaint was reviewed by the other Panel member.
8. Both members of the Panel had an underlying professional involvement in the subject matter of another complaint and declared a conflict of interest. The PACWAC therefore requested the nominating body to nominate an alternate who reviewed the complaint in question.
9. The Panel decided for itself the review methodology which it would follow. We decided that each complaint should be reviewed against the following criteria:-
 - a) Timeliness of response;
 - b) Subject matter of the complaint;
 - c) Compliance with complaints procedure;
 - d) Outcome;
 - e) Complaint handling
10. In one case, correspondence between the complainant and the PAC was on-going at the time of this review. This was the case in which one Panel member had declared a conflict of interest. The PAC had already provided two substantive responses to the complainant at the time of the review. In addition, the PAC had met with the complainant on two separate occasions. However, in more recent correspondence the complainant also made a request for an independent review of the complaints procedure/outcome. In the opinion of the Panel, the main issues raised by the complainant were addressed in the PAC responses and so the review of this complaint was included in the 2019/20 and 2020/21 review rather than being held in abeyance to be reviewed in 2021/22.
11. In this particular case, the Panel found that the PAC had handled the complaint in accordance with their published procedures and, indeed, had gone beyond those requirements by agreeing to meet with the complainant on two separate occasions. Following review of the substantive responses by the PAC, the Panel found that no further action was required.

FINDINGS

(a) Timeliness

12. We found that PACWAC complied with its guideline timeframes for acknowledging complaints and issuing a response in every case. In two cases, a substantive response was issued within 7 days, which obviated the need for an acknowledgment. In one case, the substance of the complaint fell outside the remit of the complaints procedure. The individual in question was provided with a copy of the complaints procedure within 7 days. No complaint was received and no formal response was required.

(b) Subject Matter

13. The majority of the complaints received related to the outcome of the appeal decision or the reasoning followed by the Commissioner. In these cases, it was not legally possible for the PACWAC to take action to redress the complaint, even if it was found to be justified. However, in each such case, we found that a substantive response was provided. In some complaints of this nature, clarity was requested about whether specific evidence had been supplied to or considered by the Commissioner. We found that factual responses of this nature were provided, where it was appropriate to do so.

14. The breakdown of the subject matter of complaints was as follows:-

Administration	4
Conduct of hearing	3
Content of the decision	13

(c) Compliance with Complaints Procedure

15. We considered that the PACWAC had followed its published complaints procedure in all cases which we examined.

16. In a small number of cases, it was not clear from the complaints file how the complaint had been investigated and whether it had involved inquiries with the Commissioner. These were all cases in which the complaint related to the substance of the appeal decision or the reasoning followed by the Commissioner. Further comment on this issue is set out below.

17. In all cases in which it was unclear whether the Commissioner had been contacted in the course of the investigation, a detailed letter of response had been provided which explained the basis for the

Commissioner’s decision and whether the complaint was justified or unjustified. It was therefore clear that an investigation had taken place and we were not concerned by the possibility that the Commissioner may not have been consulted as a part of the investigation.

(d) Outcome

18. The outcome of the complaints considered was as follows:-

Justified	3
Unjustified	17

(e) Complaints Handling

19. In all but one case, we were satisfied that the outcome of the complaint and the manner in which it was handled was appropriate.

20. In the case about which we were not satisfied, we considered that the complaints procedure was followed and that the outcome fell within the discretion which was open to the PACWAC. However we disagreed with decision which the PACWAC made in light of the facts of the case and we were therefore not satisfied with the outcome.

RECOMMENDATIONS

21. While we were satisfied with the manner in which the PACWAC has applied its complaints policy in all but one case, a number of complaints identified issues from which lessons may be learned in the future. The issues in question are set out below.

Form of Investigation

22. In some cases which we considered, the investigative procedure followed was not clear from the file. In particular, it was not clear whether inquiries had been made with the Commissioner. We consider that the procedure followed when investigating a complaint may legitimately differ depending upon the nature and content of the complaint. Where a complaint raises questions of fact (e.g. the administrative procedures followed; the circumstances of site visits; the drawings and evidence actually considered by/available to the Commissioner etc.) the investigation should include inquiry with the Commissioner or relevant administration staff to ascertain the relevant facts. Where the complaint raises issues of substance about the appeal outcome (e.g. Commissioner judgment; interpretation of planning policy; governing statutory provisions), it may be appropriate to limit the investigation to a consideration of the written decision and an inquiry with the

Commissioner may be less important. In many cases, communication with the Commissioner took place in writing and those records were contained on the file. While this is good practice, we do not consider that this is necessary in every case. Where written communication does not occur, we consider that it would further the transparency of the Complaints process if the file at least recorded the fact of the investigative steps which were taken.

We recommend that the complaints file should include a record of the fact and nature of the investigative steps which were undertaken. If no communications with third parties or the Commissioner were considered necessary, a record to this effect should be included in the file.

Notification of Decision

23. One complaint was made by a third party objector who had submitted a statement of case and participated in the appeal, but was not informed of the outcome and did not receive a copy of the decision. The objector discovered the outcome of the appeal when building works commenced some time later. This arose from an unfortunate administrative oversight and an apology was issued. The normal procedure followed by the Commission is for the Commissioner to provide administration staff with a list of all parties to the appeal prior to publication of the decision. The decision is then sent to all parties on the list. In this case, the Commissioner inadvertently omitted the objector's name from the list provided to staff. The objector's details were contained on the appeal file. A failure to inform a participant of the outcome of an appeal may prejudice their ability to challenge the decision and may therefore have important consequences.

We recommend that administration staff check the list of parties provided by a Commissioner against the appeal file before appeal decisions are published. In the event of disparity between the Commissioner's list and those parties named on the appeal file, the Commissioner should be consulted before the decision is published.

Costs Awards

24. A number of complaints related to applications for costs. While we were satisfied that those complaints had been well handled and that the outcomes were appropriate, we consider that the Commission may wish to consider a minor revision to its published Costs Awards Guidance.
25. The Commission's power to award costs is conferred by ss.205 and 206 Planning (NI) Act 2011. These provisions limit the types of appeals in which costs awards may be made. However, the power to award costs is otherwise unfettered and the 2011 Act does not prescribe any procedures which must be followed when making a claim for costs. The PACWAC has published guidelines relating to the circumstances in which it will normally consider making an award of costs and the relevant procedures to be followed. The normal approach is to award costs only where one party has been

put to an unnecessary expense because of the unreasonable behaviour of another party. The guidelines also prescribe timescales and procedures for making a costs claim.

26. While we consider that it is appropriate for the Commission to set guidelines regarding the circumstances and procedures governing costs awards, we were concerned that the guidelines may use language which did not make sufficiently clear that exceptional cases falling outside the guidelines can still be considered. The Commission cannot, by means of guidance, restrict the scope of discretion which was conferred by legislation. The Commission may wish to consider an amendment of the guidelines and include a paragraph (perhaps after Paragraph [10]) to the following effect:-

“The Commission considers it is appropriate to provide guidance upon the circumstances in which it will normally consider and make awards of costs. These guidelines therefore explain the approach which the Commission will normally take and the procedures which it will expect to be followed before an award of costs is made. Any party which invites the Commission to depart from these guidelines must explain why it invites the Commission to do so any exceptional circumstances which are relied upon”.

Hearing Dates

27. In one complaint, a third party objector who had submitted a statement of case and wished to attend a hearing in person, booked a vacation following notification of the hearing date. The date was then moved at the request of the appellant, with the result that the third party could not attend. Fixing hearing dates is governed by Paragraph [29] of the Appeals Procedure Guidelines. It provides that if a date does not suit an appellant, three alternative dates within the next 6 weeks must be provided. The onus is placed upon the appellant (not the PAC) to check the suitability of the alternative dates with all other parties. The Guidelines state that since the appeal right belongs to the appellant, postponements will “*not normally*” be granted at the request of third parties. In this complaint, it was not clear whether the appellant had communicated with the objector or notified the proposed alternative dates.

28. Where an appellant requests an alternative date, we consider it is important that the Commissioner is informed of the availability of all other parties, before finally fixing a date. The current procedures place responsibility upon the appellant for communication with third parties. Where contact details are unknown or where parties do not wish to share their contact details, problems may arise. We consider that this leaves room for miscommunication, misunderstanding or even the possibility for abuse. We therefore consider it is preferable that the Commission should be responsible for notifying third parties of the postponement request and the alternate suggested dates. This does not mean that the Commission must accommodate third parties in every case, nor that it must wait an unreasonable period of time for response. However, we consider that it would be preferable for the Commission to have responsibility for communications with third parties, prior to a final

postponement decision. This procedure may be of less importance in cases with multiple objectors, where there are overlapping interests. However, it will be of more importance in cases of single objectors or where parties do not wish to share contact details. Where relationships between appellants and objectors are not constructive, placing the burden of communication upon the appellant may not prove to be effective.

We recommend that the Commission should be responsible for communicating with third parties about requests for postponement and alternative hearing dates.

Out of Time Complaints

29. One complaint which we considered was received 7 months after the decision and was therefore out of time. The Chief Administration Officer declined to consider the complaint on grounds of delay. We were concerned about two aspects of how this complaint was handled.
30. First, the complaints procedure does not have the force of law and its contents are not mandatory. While the Commission is entirely within its rights to set a time limit in the interests of finality and certainty, neither the language used in the procedure, nor its legal status justify the use of an absolute deadline. The Commission has a discretion to accept and to consider complaints received out of time. Generally, three factors will be relevant to an extension of time: the length of the delay; the reasons why it was not made within time; and the underlying merits of the issue raised. Where a complaint is received out of time and the Commission decides not to consider it, we consider it is appropriate for the Commission to provide brief reasons for not extending time. In this case, delay was short (1 month) and the complainant expressly requested time to be extended on three separate occasions. In response to each request, no reasons were given other than the existence of a 6 month rule.
31. Second, we were concerned by the failure to consider or respond to the merits of this particular complaint. The complaint related to an alleged failure by the Commissioner to make full disclosure of a personal relationship/friendship with the objectors. The complainant acknowledged that the Commissioner had disclosed at the outset of the hearing that she knew the objectors and that they had consented to the Commissioner hearing the appeal. However, in the complaint it was asserted that the full detail of that relationship was not disclosed and only became known at a later date. The appeal required the Commissioner to form a judgment about residential amenity impacts upon the objectors. The Commissioner considered the impacts to be unacceptable and the appeal was refused, notwithstanding technical evidence to the opposite effect from the appellant. We make no comment about the Commissioner's assessment of the evidence. However, the complainant believed that the relationship affected the Commissioner's judgment and that if fuller details had been disclosed they may not have consented to the Commissioner hearing the appeal. The complaint therefore raised an important question about the appearance of bias and whether the Commissioner had made full disclosure of her interest. We consider that these are extremely

important matters which touch upon public confidence in the discharge by the Commission of its functions.

32. While we consider that it was legitimately open to the Commission to have rejected the complaint on grounds of delay, brief reasons ought to have been provided for not extending time. However, in light of the issues raised in the complaint, we consider that it would have been more appropriate to extend time and to have investigated the complaint, including inquiries with the Commissioner about the nature and extent of the relationship to the objector.

We recommend that where a complaint is rejected on grounds of delay, brief reasons are provided for not extending time.

Submission of Evidence

33. In one complaint, a third-party objector raised a concern/query in relation to the submission and consideration of evidence in the form of CCTV footage. It was acknowledged that the CCTV evidence was originally submitted to the local planning authority as an objection but was not accepted as the local planning authority could not upload or share this information online with the applicant and other parties. Whilst the third-party objector did not submit this evidence at appeal stage, the complaint related to the lack of consideration of the submitted CCTV evidence at application stage and the ability to present this information at the appeal hearing.
34. The PAC response to the complaint was to advise that the onus was on individual parties to ensure that the hearing venue had the capabilities to present video evidence should any party wish to use such evidence at appeal hearings. We would make two recommendations in relation to this issue. Firstly, the PAC should consider introducing the ability to submit Statements of Case and evidence online and allowing access to all parties to view such submissions virtually, rather than relying solely on an exchange of hard copies. It is noted that appeal applications could be made online and during the COVID-19 pandemic and the submission of Statements of Case was permissible via email. The technology exists to allow online submissions, which could include video evidence. This would allow the PAC and all parties to view all submitted evidence online. While we recognise that a permanent change of this nature may have technical and financial implications, we consider that the PAC should begin to give consideration to such an investment. We consider that it is likely to assist the efficient and transparent conduct of appeals, but remote/online procedures is likely to become increasingly important across all tribunals. Secondly, where video evidence forms part of the evidence relied on in an appeal, since the PAC is responsible for arranging the appeal venue and conducting the appeal, we consider that the PAC should also have a greater role in facilitating the presentation of such evidence at appeal hearings, if required. If the matter is left entirely to the relevant party, without adequate communication from the PAC, there is a risk that the fairness of the hearing could be impaired if important evidence is not able to be considered. We recognise that any arrangements may require adequate notice to the PAC; communication between the party and the PAC about the

necessary technical requirements and possibly additional charges to the party in question. It may be that the party can supply all necessary technical requirements from within its own resources, however, this should be confirmed in advance with the PAC.

We recommend that the Commission consider introducing the ability to submit evidence/Statements of Case online, with all parties having access to view such submissions. Where required, the Commission should play the lead role in accommodating the presentation of video evidence at appeal hearings.

Independent Complaints Audit Panel

**Chris Bryson, MRTPI
Paul McLaughlin QC
25 May 2021**