



## **Public Service Agencies Conducting a Review of Appointment Process**



## Table of Contents

WHY HAVE A REVIEW OF APPOINTMENT PROCESS?.....	3
REVIEW OF APPOINTMENT PROCESS REQUIREMENTS .....	3
How is a review of appointment triggered?.....	4
Who can seek a review?.....	4
<i>Public service employees</i> .....	4
<i>External applicants</i> .....	5
<i>Secondees</i> .....	5
What can be the subject of review?.....	5
WHO CONDUCTS A REVIEW OF APPOINTMENT PROCESS?.....	6
Chief executive to establish reviewer arrangements .....	6
Single reviewer vs review committees .....	6
CONDUCTING A REVIEW OF APPOINTMENT PROCESS .....	6
Requirement to conduct a review .....	6
Matters to be considered when conducting a review of appointment .....	7
<i>Principles to apply when considering a complaint</i> .....	7
<i>Fivolous or vexatious complaints</i> .....	7
Providing information to support the review process .....	8
<i>Representations to the reviewer or review committee</i> .....	8
Recommendations of the reviewer or review committee .....	8
Making a decision on the review of appointment process .....	9
Concluding a review of appointment process .....	9
FURTHER INFORMATION AND RESOURCES .....	9
Guidance.....	9
Legislation .....	10
APPENDIX 1 – OFFICIAL INFORMATION ACT 1982, PRIVACY ACT 2020, AND EMPLOYMENT RELATIONS ACT 2000 PROVISIONS .....	11
Providing information about themselves or material issues of fact .....	11
Request for personal information about another person .....	12
Personal grievances .....	12
APPENDIX 2 – EXAMPLE OF STEPS IN A REVIEW OF APPOINTMENT PROCESS .....	14
Stage 1 – Initiation .....	14
Stage 2 – Conducting the review process .....	15
Stage 3 – Results of the review process .....	16



## Why have a review of appointment process?

Appointment to the Public Service is based on a foundation of open, merit-based selection that upholds the public's trust<sup>1</sup>. Appointments are subject to a review period prior to being confirmed<sup>2</sup>. The purpose of a review period is to ensure, if challenged, an appointment meets required standards and has been fairly made.

Beyond the legal requirements, a complaint about an appointment, such as a complaint about any activity undertaken by an agency, is an opportunity for decision-makers and leaders to gain insight into their agencies. Genuine complaints, raised constructively, provide opportunities for continuous improvement that may otherwise go unnoticed.

Schedule 8, Clause 5 of the Public Service Act 2020 (the Act) requires the chief executive of each department and the board of each interdepartmental venture to put in place a process for reviewing appointments within their agency that are the subject of a complaint by an employee<sup>3</sup>.

A review of appointment process should provide confidence that an agency has integrity in its selection process.

An agency's review of appointment process should enable the appointment process to be evaluated against statutory requirements including key provisions of the Act<sup>4</sup>, and ensuring the absence of unlawful discrimination<sup>5</sup>. An agency's review of appointment process should also enable the appointment process to be evaluated against good decision-making practices, such as the:

- Provision of appropriate job descriptions and related information
- Use of objective selection criteria
- Open advertising of vacancies
- General fairness of interview processes

## Review of appointment process requirements

The chief executive must ensure:

- Their employment policy meets section 73(3)(d) of the Act regarding section 14 (Crown relationships with Māori) and section 75 (prompting diversity and inclusiveness)
- Their agency has prepared appropriate review procedures and complies with the guidelines prescribed by the Public Service Commissioner to be approved by the Public Service Commissioner (or the Commissioner's delegate)

---

<sup>1</sup> The requirement for an open and fair appointment process is an important foundation for a politically neutral public service, one free of nepotism or the influence of personal interests at the expense of the public interest.

<sup>2</sup> Appointments made under sections 66 to 69 of the Act

<sup>3</sup> Schedule 8, Clause 5 of the Act is only applicable when an appointment is made. There is no requirement under the Act for a review of a decision not to fill a vacancy.

<sup>4</sup> Making appointments on merit (s 72); the obligation to notify vacancies (Schedule 8, Clause 1); the obligation to notify appointments (Schedule 8, Clause 4); and the requirement to be a good employer (s 73(3)).

<sup>5</sup> Sections 104 and 105 of the Employment Relations Act 2000 expressly prohibit unlawful discrimination (as defined in the Human Rights Act 1993) from detrimentally impacting an individual's employment in the public service.



- Information on the review of appointment process is accessible to all employees
- Complete appointment records are maintained (in line with records management and disposal requirements) – examples include interview documentation, panel member notes, and selection reports
- Provisional appointees are told their appointment is provisional until the review period has passed without application of review (“complaint”) or until the outcome of a review has confirmed the appointment
- Unsuccessful applicants are notified of the outcome of the selection process
- Adequate records are kept of the number, types, and outcomes of appointment reviews
- Staff have tools and training to manage bias and discrimination in decision-making

**Note:** Additional resources on addressing bias and discrimination in decision-making are available the [Te Kawa Mataaho website](#).

### ***How is a review of appointment triggered?***

A review period should balance the need to ensure adequate time for any concerns to be raised alongside the need to ensure timely and conclusive recruitment processes for all parties involved.

Typically, there should be a window of no more than two weeks, from the date of notifying the appointment, in which a review of appointment can be requested.

This deadline may be extended where there are reasonable grounds for doing so.

### ***Who can seek a review?***

#### ***Public Service employees***

Any permanent, fixed term, or casual employee of an agency<sup>6</sup> may seek a review of an appointment made in their agency, except for acting appointments or appointments of ministerial staff as outlined in Schedule 8, Clause 5(3) of the Act. Nor does it apply to appointments made under sections 86 and 88 of the Act<sup>7</sup>.

However, it may be useful to have a process for employees affected by these types of employment decisions to seek reviews of decisions that impact them (see further detail below on personal grievances).

It is not a requirement that an employee seeking a review (“the complainant”) applied for the appointment that is the subject of their complaint. If a position was not advertised, an employee who would have applied had it been advertised should be entitled to a review.

**Note:** in keeping with the Act, vacancies should normally be advertised<sup>8</sup>

<sup>6</sup> Public service agencies covered under Schedule 2 of the Public Service Act 2020.

<sup>7</sup> Regarding decisions to transfer employees between public service agencies and alternative positions.

<sup>8</sup> As part of the reforms introduced under the Public Service Act 2020, recruitment is an enabler for achieving a modern, agile, and trusted public service. Advertising vacancies is an opportunity to enhance attraction of candidates to a career in the public service.



### ***External applicants***

The Act requires a chief executive to have review procedures in place for complaints from employees only. However, external applicants have rights to information under section 23 of the Official Information Act 1982 and Part 3, section 22, Information Privacy Principle 6 of the Privacy Act 2020.

External applicants have grounds to raise concerns with other authorities if they believe an appointment process was discriminatory or unfair<sup>9</sup>. Although not required by the Act, a chief executive may wish to allow for a review to be made available to external applicants where they raise these types of concerns.

The elements of a review of appointment process in Schedule 8, Clause 5 of the Act may provide helpful guidance on designing any additional review processes for external applicants but doing so is at the discretion of the chief executive.

### ***Secondees***

Some secondments may be acting appointments to which Schedule 8, Clause 5 of the Act does not apply. However, it may be appropriate, in some cases, where the complaint is about a secondment to provide for some form of review – this is at the discretion of the chief executive and not required under the Act.

### ***What can be the subject of review?***

A complaint may relate to any aspect of an appointment. Reviews cover matters of both substance (the merit of the provisional appointee) and process (how the selection process was conducted that led to the appointment).

Review procedures should:

- Be fair to the provisional appointee, the person seeking the review (complainant), and other applicants for the position
- Allow substantive consideration of any complaint
- Give staff confidence the agency's appointments process is robust and fair
- Allow the complainant to have an advocate, should they wish, e.g., a support person, union, or other representative in the review process
- Provide for a timely resolution – normally no longer than six weeks from the time the complainant requests the review of appointment

---

<sup>9</sup> As detailed in the Human Rights Act 1993.



## Who conducts a review of appointment process?

### *Chief executive to establish reviewer arrangements*

Where a review is conducted, the chief executive will need to appoint a person, or a review committee, to investigate the complainant's concerns. The chief executive may decide to have one enduring committee, with permanent membership, for the whole agency or for a particular region, workforce, or group within the agency.

Alternatively, a new committee or individual reviewer may be appointed for each review.

### *Single reviewer vs review committees*

A single reviewer or review committee must be, and be seen to be, unbiased and fair. The chief executive should, in determining their agency's review arrangements, consider:

- Whether a single person committee would be, and be seen to be, impartial
- How conflicts of interest will be identified and managed
- Whether to include someone external to the agency
- Whether the reviewers, either individual reviewers or members of a review committee, are independent of the original appointment decision
- Whether a review committee should include a range of diverse members. For example gender, ethnic, cultural, religious, Rainbow communities, or other forms of diversity
- Whether to include staff or union representatives

As part of ensuring a fair process, the complainant and appointee should be advised in advance who will conduct the review (individual reviewer or panel) and given an opportunity to comment on those arrangements.

Any representations a complainant wishes to make about the composition of the review committee should be considered prior to a review commencing.

## Conducting a review of appointment process

### *Requirement to conduct a review*

When conducting a review, the chief executive or their delegate should ensure:

- The procedures for conducting the review are clear, simple, and accessible
- The procedures are efficient and economical to operate





- Employees have the means to seek a review without having to seek legal redress<sup>10</sup>
- Both the provisional appointee and complainant are informed of the review's progress

### ***Matters to be considered when conducting a review of appointment***

#### ***Principles to apply when considering a complaint***

In considering a complaint, the reviewer or review committee should ensure there has been substantive consideration of the complaint, including whether:

- Requirements of the Public Service Act 2020, Human Rights Act 1993, Privacy Act 2020, and Employment Relations Act 2000 were followed
- The appointment was made in accordance with good employer principles, including promoting, developing, and monitoring equal employment opportunities and promoting diversity and inclusiveness
- The appointment process followed the agency's relevant policies and processes
- The provisional appointee was the person best suited to the position

#### ***Frivolous or vexatious complaints***

A request to review an appointment should not be dismissed without proper consideration. The threshold for determining a request for review is high and, if not appropriately considered, could itself be the subject of a further complaint or external challenge of a decision-maker's actions.

Complaint handling agencies routinely consider the substance of complaints, including whether they are 'frivolous' or 'vexatious'<sup>11</sup>.

A frivolous request for review would be one about a minor or trivial matter, or an issue so vague or poorly explained that it cannot be meaningfully pursued. It might also be about an issue that has already been resolved, or about a point of so little value that investigating it would be an unjustifiably disproportionate use of public resources.

A vexatious request for review would be one made with the intention, or having the effect, of being disruptive – e.g., an unreasonable escalation by the complainant. This may be through a series of similar complaints without a substantive basis for the concerns.

The chief executive may consider taking some form of appropriate action where complaints are deemed frivolous or vexatious, or in the opinion of the chief executive are not made in good faith.

<sup>10</sup> Where there are grounds to bring a personal grievance action under the provisions of the Employment Relations Act 2000, an employee may decide to seek redress under that Act – see Appendix 2 for details. Alternatively, an employee may decide to seek redress under the Human Rights Act 1993 on the basis that in assessing his or her application the employee was discriminated against.

<sup>11</sup> The terms 'frivolous' and 'vexatious' are common terms that apply to administrative decision-making during business-as-usual activities undertaken by Public Service agencies. An example of the application of these terms can be found at:

<https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Frivolous%2C%20vexatious%20or%20trivial%20August%202019.pdf>



### ***Providing information to support the review process***

Unsuccessful applicants, and employees with a complaint about an appointment, may seek information relating to the background of the appointment. A request for information must be considered under the provisions of the Official Information Act 1982 or the Privacy Act 2020 (refer to Appendix 1).

A complaint about an appointment may be effectively addressed, outside formal review procedures, when the complainant is given information that gives them a clear understanding of the reasons for the appointment.

It is important to ensure all applicants for a position are told that any relevant information they provide about themselves may be provided to an employee who seeks, or is considering seeking, a review of the appointment. This should be outlined in recruitment documentation/policy.

### ***Representations to the reviewer or review committee***

All complainants have the right to present their case in writing, setting out the basis for their complaint. This written material, along with the agency's documentation relating to the appointment, will form the basis of the reviewer or review committee's deliberations.

The reviewer or review committee should consider any requests by complainants to appear in person and may also decide to interview the provisional appointee, the complainant, or other relevant persons.

The reviewer or review committee should consider:

- If a complainant would be disadvantaged by a process that relied solely on written submissions
- Whether to allow the complainant to be accompanied by a support person, advocate, or other representative and whether a support person may speak to the committee
- Because of time or cost considerations, a phone or online interview may be appropriate (e.g., the complainant lives in another part of the country)
- Whether there is a need to avoid a protracted process by keeping within timeframes which would apply for a review based solely on written submissions

### ***Recommendations of the reviewer or review committee***

The reviewer or review committee may recommend to the chief executive:

- To confirm the provisional appointment
- To cancel the provisional appointment and advertise or re-advertise the vacancy
- To cancel the provisional appointment and refer the matter back to the appointing manager or appointment panel for further consideration
- To cancel the provisional appointment and appoint the complainant
- Any other means of addressing the concerns of a complainant either in whole or in part

The reviewer or review committee should:





- Make any recommendation without delay as an appointment remains provisional until a final decision on all relevant reviews has been made; and
- Ensure adequate records are kept of its process, information relied upon, and decision

### ***Making a decision on the review of appointment process***

The chief executive is responsible for making a decision based on the recommendation of the reviewer or review committee. The chief executive may decide to delegate their decision-making power to a responsible officer. Further information on good decision making can be found [here](#).

If the reviewer or review committee recommends cancellation of the appointment, the chief executive or their delegate must decide, in the interests of fairness and impartiality, whether to accept a recommendation from the reviewer or review committee to appoint the complainant to the position, or whether an appointment panel should be reconvened.

Prior to making the decision for a review of appointment process, the chief executive or their delegate may wish to provide an opportunity for those affected by the decision (the complainant and the provisional appointee) to comment on the proposed review outcome.

**Note:** An affected employee may still bring a personal grievance (Appendix 1).

### ***Concluding a review of appointment process***

The chief executive is responsible for ensuring the complainant and provisional appointee are advised of the final decision, concluding the review of appointment process.

Depending on insights gleaned from the review process, the findings and recommendations of the reviewer or review committee, the chief executive may wish to commission changes or improvements to their agency's processes or training. An example may be to review the level of tools and training for decision-makers regarding discrimination and bias, cultural competency, and communication and conflict resolution (particularly in relation to providing feedback to applicants).

## **Further information and resources**

### ***Guidance***

Te Kawa Mataaho Public Service Commission - [Public Service Recruitment - Guidance to support Public Service recruiters](#)

Te Kawa Mataaho Public Service Commission - [Papa Pounamu - Addressing Bias](#)

New Zealand Ombudsman (October 2012) - [Good decision making](#)

New Zealand Ombudsman (January 2019) - [Effective complaint handling](#)



## ***Legislation***

All relevant New Zealand legislation is available online<sup>12</sup> including the legislation referenced in these guidelines:

- [Employment Relations Act 2000 No 24 \(as at 01 July 2022\), Public Act Contents – New Zealand Legislation](#)
- [Human Rights Act 1993 No 82 \(as at 30 August 2022\), Public Act – New Zealand Legislation](#)
- [Official Information Act 1982 No 156 \(as at 01 September 2022\), Public Act Contents – New Zealand Legislation](#)
- [Privacy Act 2020 No 31 \(as at 01 September 2022\), Public Act Contents – New Zealand Legislation](#)
- [Public Service Act 2020 No 40 \(as at 08 September 2022\), Public Act Contents – New Zealand Legislation](#)

---

<sup>12</sup> All legislation, current and past, in New Zealand is online at [www.legislation.govt.nz](http://www.legislation.govt.nz)



## Appendix 1 – Official Information Act 1982, Privacy Act 2020, and Employment Relations Act 2000 provisions

### ***Providing information about themselves or material issues of fact***

- 1 Agencies receiving a request for access to certain information must identify whether the Official Information Act 1982 or the Privacy Act 2020 apply to the information at issue. The request may need to be considered under either or both Acts concurrently, depending on the nature of the information requested and its relationship to the requester.

#### Official Information Act 1982

- 2 Section 23 of the Official Information Act gives the right to a person who requests information on decisions affecting themselves. However, an agency may wish to withhold disclosed information that identifies the person who provided it would breach an “express or implied promise” as outlined under section 23(2A) (a) of the Official Information Act.
- 3 Section 23 also applies to a request for information about material issues of facts for a complainant that was an unsuccessful applicant who may want to find out why a certain decision or recommendation was made that has affected them. The person affected is entitled to a written statement of findings on material issues of fact, a reference to the information on which the findings were based and the reasons for the decision. For example – not to appoint, as opposed to any evaluative material, although evaluative material not subject to an obligation of confidence should be provided.
- 4 A statement of reasons under section 23 of the Official Information Act addresses the accountability of the decision-maker and may be sufficient to satisfy the complainant of the reasons why the appointment was made, or why the complainant was unsuccessful.
- 5 A complainant wishing to access information about the general criteria applied in reaching a decision to appoint may make a request under section 12, or under section 22 of the Official Information Act which provides for the right of access to internal rules affecting decisions.

#### Privacy Act 2020

- 6 The Privacy Act applies to requests for personal information about the requester. Part 3, section 22, Information privacy principle 6 states that where an agency holds information about the person who is requesting it, and it is readily retrievable, that person shall be entitled to have access.
- 7 A complainant may, however, believe that relevant information about themselves that was provided to the agency for purposes of the application was not considered in the appointment decision, or that other or incorrect information was taken into account inappropriately. The complainant has the right to access all personal information held by the agency about themselves, in accordance with the Act.
- 8 It is important that information that can properly be released is given to the complainant so that they can accurately assess whether there is any ground to seek a review.



### ***Request for personal information about another person***

- 9 In relation to the review of an appointment, the Official Information Act 1982 covers a complainant who is also likely to request personal information about a person other than themselves, i.e., information about the provisional appointee.
- 10 To meet such a request, agencies are responsible for ensuring that privacy issues are properly dealt with by making sure the following statutory requirements are met.
- 11 Advising applicants for a position that information collected from them may be used for the selection process. Information about the successful applicant relevant to the decision of the best person suited to the position may be disclosed to a person requesting or considering a review. This derives from the Privacy Act 1993, Part 2:
- 11.1 Part 3, Section 22, Information privacy principle 3 - Collection of information from subject;
- 11.2 Part 3, Section 22, Information privacy principle 10 - Limits on use of personal information; and
- 11.3 Part 3, Section 22, Information privacy principle 11 - Limits on disclosure of personal information.
- 12 The following statutory requirements protects the information, as far as it is reasonable, from misuse:
- 12.1 The Privacy Act 1993, Part 3, Section 22, Information privacy principle 5 – Storage and security of person information; and
- 12.2 Section 16 of the Official Information Act sets out the process which can be followed.
- 13 Information may be protected by giving it to the complainant to read in the presence of the Human Resource Manager (or some other senior manager), by not allowing copies to be taken, or by giving a summary of the information that is relevant to the complaint.
- 14 The provisional appointee should be told what information has been given to a complainant. It is unlikely that the identity of the complainant would need to be disclosed to the provisional appointee.

**Note:** Both the Official Information Act and Privacy Act do not require the requester to specify under which section the request is being made or even the particular Act. Agencies are required to provide the information requested unless they have good reasons not to under one of the exceptions in the Acts.

### ***Personal grievances***

- 15 External applicants also have rights under the Employment Relations Act 2000 and Human Rights Act 1993. It is unlawful under these Acts to discriminate against applicants in the appointment process on the grounds specified in the Acts.

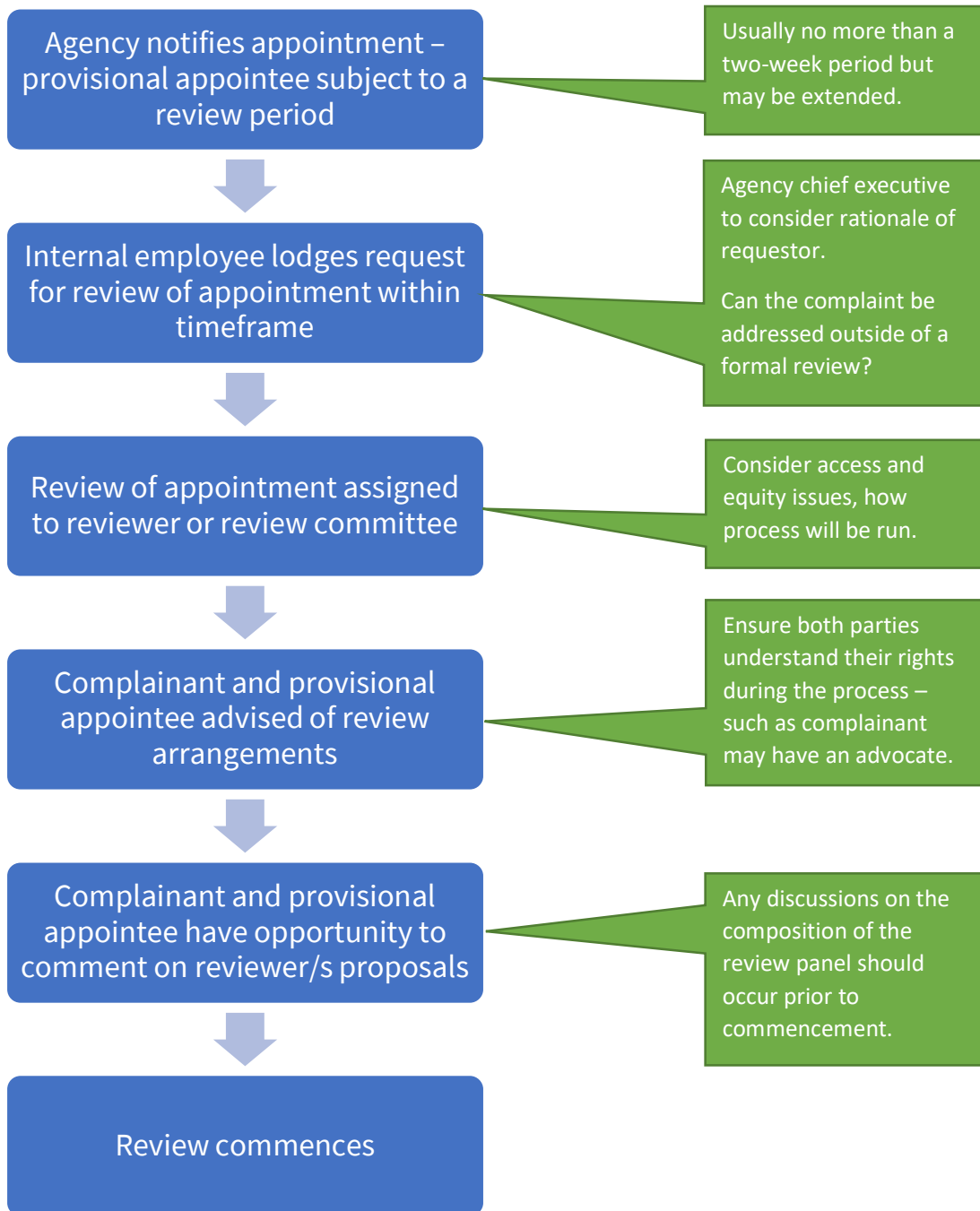


- 16 Agencies may need to consider the personal grievance procedures specified in the Employment Relations Act 2020. A personal grievance is defined as "any grievance that an employee may have against the employee's employer or former employer" and includes:
  - 16.1 That the employee's employment is affected to the employee's disadvantage by some unjustifiable action of the employer; and
  - 16.2 That the employee has been discriminated against in the employee's employment.
- 17 A complainant may only take a personal grievance where, in addition to a non-appointment, there is an issue for which Part 9 of the Employment Relations Act provides (relating to personal grievances, disputes and enforcement).
- 18 All employment agreements must contain a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised.
- 19 A complainant can pursue a review of the appointment under the agency's appointment review procedures and pursue a personal grievance under the Employment Relations Act if the requirements of Part 9 are met, or, if the unjustifiable action includes non-appointment based on discrimination and seeks redress under the Human Rights Act.



**Appendix 2 – Example of Steps in a Review of Appointment Process**

**Stage 1 – Initiation**

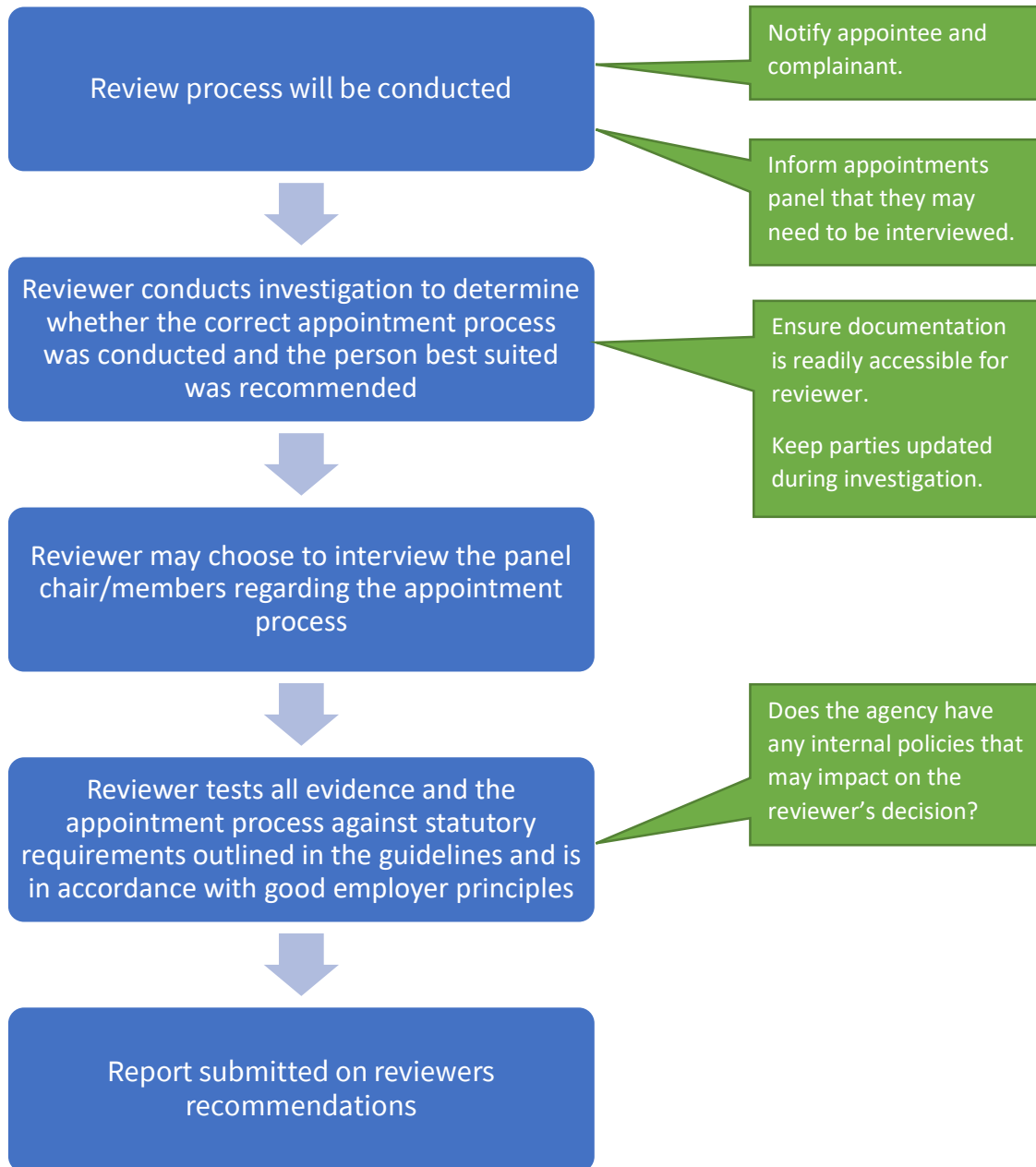






## Appendix 2 – Example of Steps in a Review of Appointment Process

### Stage 2 – Conducting the review process





## Appendix 2 – Example of Steps in a Review of Appointment Process

### Stage 3 – Results of the review process

