



## **TITHE AN OIREACHTAIS**

### **AN COMHCHOISTE UM FHORMHAOIRSÚ AR AN tSEIRBHÍS PHOIBLÍ AGUS ACHANÍOCHA**

**Tuarascáil maidir le héisteachtaí i ndáil le Ról agus  
Cúram Ombudsman**

**Eanáir 2016**

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## **HOUSES OF THE OIREACHTAS**

### **JOINT COMMITTEE ON PUBLIC SERVICE OVERSIGHT AND PETITIONS**

**Report on hearings in relation to the Role and Remit of  
an Ombudsman**

**January 2016**





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### **Chairman's Foreword**

I have been Chairman of the Joint Committee on Public Service Oversight and Petitions since 16 January 2013. In that time the Members and I have worked closely with and built up a professional working relationship with the various Ombudsmen. From this the members and I have become aware of the desire to strengthen and enhance the offices of the ombudsmen across the different sectors. Members agreed that there was merit in conducting a focused piece of work that would address the benchmarks that determine what an Ombudsman is, what an Ombudsman does and what the citizens/public expect an Ombudsman to do. The Committee, initially, focused on the following questions:

- What is an Ombudsman?
- Do citizens get access to independent redress?
- Should all Ombudsmen and any future Ombudsman be statutorily based?
- Should Ombudsmen be funded directly from the central fund?
- Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority'?
- Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?
- Should professional legal privilege apply where an Ombudsman initiates a formal investigation?

I welcome this report, I welcome the work that the various Ombudsmen have done to highlight the concerns they have. In conclusion I would like to express my appreciation to the Members of the Joint sub-Committee, the Clerk, Mr. Ronan Lenihan and the staff working in support of the Joint Committee, Ms. Anita Gibbons, Ms. Gráinne Ní Néill, Ms. Pauline O'Neill and Ms. Margaret O'Donnell for their commitment and dedication.

*Pádraig MacLochlainn*

Pádraig MacLochlainn T.D.  
Chairman  
21 January 2016.



## Réamhrá an Chathaoirligh

Tá mise i mo Chathaoirleach ar an gComhchoiste um Fhormhaoirsiú ar an tSeirbhís Phoiblí agus Achainíocha ón 16 Eanáir 2013 i leith. Le linn an ama sin, d'oibrigh mé féin agus na comhaltaí go dlúth leis na hOmbudsmain éagsúla agus tá caidreamh oibre gairmiúil bunaithe agam leo. Tá sé foghlamtha agamsa agus ag na comhaltaí ón obair seo go bhfuil mian ann chun oifigí na nOmbudsman sna hearnálacha éagsúla a neartú agus a fheabhsú. Chomhaontaigh na comhaltaí gurbh fhiú cion oibre spriocdhírithe a dhéanamh a thabharfadh aghaidh ar na tagarmharcanna a chinneann a bhfuil i gceist le hOmbudsman, a ndéanann Ombudsman agus na hionchais a bhíonn ag na saoránaigh/ag an bpobal ó thaobh cúraimí Ombudsman de. Dhírigh an Coiste, i dtosach báire, ar na ceisteanna seo a leanas:

- Cad is Ombudsman ann?
- An mbíonn rochtain ag saoránaigh ar shásamh neamhspleách?
- An cóir bonn reachtúil a bheith le gach Ombudsman agus le haon Ombudsman amach anseo?
- An cóir Ombudsmain a mhaoiniú go díreach ón bPríomh-Chiste?
- An cóir do gach comhlacht poiblí moltaí a dhéanann Ombudsman a éiríonn as fiosrúcháin fhoirmiúla a dhéanann an tOmbudsman sin a chomhlíonadh agus a chur i ngníomh go hiomlán, agus más rud é, ar Thairiscint, gur mian leis an Oireachtas tuarascáil ó Ombudsman, nó moladh nó moltaí atá i dtuarascáil ó Ombudsman, a dhiúltú, an cóir vótáil Oireachtais is mó ná 'Tromlach Aoireachta Rialtais' a éileamh?
- An cóir gach seirbhís phoiblí, cibé acu is í an earnáil phríobháideach nó an earnáil phoiblí a sheachadann í, a bheith faoi chúram Ombudsman?
- An cóir feidhm a bheith ag pribhléid ghairmiúil dhlíthiúil i gcás Ombudsman do thionscnamh fiosrúchán foirmiúil?

Fáiltím roimh an tuarascáil seo agus roimh an obair atá déanta ag na hOmbudsmain éagsúla chun aird a tharraingt ar an imní atá orthu. Mar fhocal scoir, ba mhaith liom buíochas a ghabháil le comhaltaí an Chomh-Fhochoiste, leis an gCléireach, Rónán O'Luineacháin Uas. agus leis an bhfoireann atá ag tacú leis an gComhchoiste, Anita Gibbons Uas., Gráinne Ní Néill Uas., Pauline O'Neill Uas. agus Margaret O'Donnell Uas. as a gcuid tiomantais agus a gcuid dúthrachta.

*Pádraig Mac Lochlainn*

Pádraig Mac Lochlainn T.D.  
Cathaoirleach  
21 Eanáir 2016.





## **Executive Summary**

The Dáil and Seanad agreed the Orders of Reference for the establishment of the Joint Committee on Public Service Oversight and Petitions in July 2012. Under Standing Order 165A 4 (a) & (b) of the Orders of Reference; which established the Joint Committee on Public Service Oversight and Petitions also included the establishment of two Joint sub-Committees:

- 1) the Joint sub-Committee on the Ombudsman [SO 165A 4 (a)], and;
- 2) the Joint sub-Committee on Public Petitions [SO 165A 4 (b)].

The Joint sub-Committee on the Ombudsman has a number of functions. Among these it can consider the reports of the Ombudsman which are laid before the Houses of the Oireachtas and

- (i) Shall agree guidelines on collaborative working between the Joint sub-Committee and the Ombudsman, including a right of initiative for the Joint sub-Committee in bringing specific matters to the attention of the Ombudsman, and;
- (ii) May liaise with such other Ombudsmen, regulatory public bodies or bodies established for the purpose of redress, as the Joint sub-Committee considers appropriate.

The Joint sub-Committee on the Ombudsman has within its remit 7 different variations of Ombudsman and these are:

1. Public Service Ombudsman;
2. Ombudsman for Children;
3. Financial Services Ombudsman;
4. Pensions Ombudsman;
5. Ombudsman for the Defence Forces;
6. Garda Ombudsman;
7. An Coimisinéir Teanga.

The members, while aware that the number of Ombudsmen will reduce from 7 to 6, consider it important that it had agreed to examine the role and remit of an Ombudsman. Notwithstanding the proposed merger of the Financial Services Ombudsman and Pensions Services Ombudsman into the new office of the Financial Services and Pensions Ombudsman, what is evident for the existing offices of Ombudsmen - in their roles as Ombudsman - is that each has different variations and remits and that leads to confusion for the public. In this regard the Joint Committee

notes that there are both Public Sector and Private Sector Ombudsmen and, therefore, not all the Offices of Ombudsmen will have the same powers.

Members agreed that there was merit in conducting a focused piece of work that would address the benchmarks that determine what an Ombudsman is, what an Ombudsman does and what the citizens/public expect an Ombudsman to do. Following engagement with the various Ombudsmen, it became evident to members that a further issue arose; that of *Professional Legal Privilege*. Accordingly, the following questions, which inform this report, were considered by the Committee:

- A. What is an Ombudsman?
- B. Do citizens get access to independent redress?
- C. Should all Ombudsmen and any future Ombudsman be statutorily or constitutionally based?
- D. Should all Ombudsmen be funded directly from the central fund?
- E. Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority'?
- F. Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?
- G. Should professional legal privilege apply where an Ombudsman initiates a formal investigation?

## **Recommendations**

1. The Joint Committee recommends that for an office with the title or function of Ombudsman then the Ombudsman or An Coimisinéir Teanga must have the following five powers/features: be an officer of parliament; be independent of the executive; receive all complaints directly; have the power to investigate them and recommend remedies and redress. The Joint Committee note that the provisions of section 1.1<sup>o</sup> of Article 15 of the Constitution which states "*The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas*" and section 1.2<sup>o</sup> states that "*The Oireachtas shall consist of the President and two houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.*" The Joint Committee, in regard to the Ombudsman for Children, note that this Ombudsman is by statute an Officer of the State and is appointed by the President and given the Joint Committee's recommendation there may be, for the Ombudsman for Children, an impediment in the nomenclature of

being an 'office of parliament'. Accordingly, in drawing attention to this dichotomy the Joint Committee further recommends that it may be more prudent to use the wider definition of Oireachtas in Sections 1.1° and 1.2° of Article 15, which defines the parliament as the Oireachtas which includes the President. The Joint Committee raise this matter as it may have a Constitutional consequence in which case the Office of Ombudsman for Children needs further examination within the context of the overall recommendation.

2. The Joint Committee recommends that where an Ombudsman identifies injustice they should seek to put that injustice right and central to putting an identified injustice right, is redress.
3. The Joint Committee recommends that all ombudsmen who have a full or partial public service remit be constitutionally based; as a minimum both the Office of the Ombudsman for the Public Service and the Office of the Ombudsman for Children must be constitutionally based.
4. The Joint Committee recommends that all Ombudsmen with a Public Service remit should be funded directly from the Central Fund; as a minimum both the Office of the Ombudsman for the Public Service and the Office of the Ombudsman for Children must be funded from the central fund.
5. The Joint Committee recommend that provision should be made to allow the rejection, overturning or setting aside a report or a recommendation or recommendations in a report of the Ombudsman, but this must require a Dáil Vote where 75% of those present and voting assent to the proposal.
6. The Joint Committee recommend that where a private sector entity receives public money to fund the delivery of public services then oversight must be vested with the relevant Ombudsman. Further, the Joint Committee recommends that Irish Water be within the remit of the Ombudsman for Public Service.
7. The Joint Committee recommends that the provisions of confidentiality associated with professional legal advice be addressed by way of amendment(s) to the primary legislation establishing each of the 6 offices of Ombudsman. Further, the Joint Committee also recommends that the amendments, in regard to the 6 offices of Ombudsman including An Coimisinéir Teanga, addresses and strengthens the level, in terms of confidentiality, that each office possesses so as to permit each Office confidential access or power of access to confidential or professional legal advice. This should be at the level afforded the judiciary or the Oireachtas - which would further enforce the role of 'Officer of the Parliament'. In recommending the approach of amending the powers of access to confidential or professional advice by an Ombudsman the Joint Committee is cognisant that the 'general privilege' afforded

confidential or professional legal advice should not have to be changed or; by using the approach recommended, have 'general privilege' weakened.

## **Achoimre Fheidhmeach**

Chomhaontaigh an Dáil agus an Seanad na Téarmaí Tagartha maidir leis an gComhchoiste um Fhormhaoirsiú ar an tSeirbhís Phoiblí agus Achainíocha a bhunú i mí Iúil, 2012. Faoi Bhuan-Ordú 165A 4(a) agus (b) de na Téarmaí Tagartha, áiríodh freisin i mbunú an Chomhchoiste um Fhormhaoirsiú ar an tSeirbhís Phoiblí agus Achainíocha bunú dhá Chomh-Fhochoiste:

- 1) an Comh-Fhochoiste um Ombudsman [B-O 165A 4(a)], agus;
- 2) an Comh-Fhochoiste um Achainíocha Poiblí [B-O 165A 4(b)].

Tá roinnt feidhmeanna éagsúla ag an gComh-Fhochoiste um Ombudsman. Mar chuid de na feidhmeanna sin, is féidir leis breithniú a dhéanamh ar thuarascálacha an Ombudsman, a leagtar faoi bhráid Thithe an Oireachtais, agus

- (i) comhaontaíonn sé treoirlínte maidir le comhoibriú idir an Comh-Fhochoiste agus an tOmbudsman, lena n-áirítear ceart tionscanta don Chomh-Fhochoiste maidir le nithe áirithe a chur ar a shúile nó ar a súile don Ombudsman, agus
- (ii) féadfaidh sé dul i gcomhar le cibé Ombudsmain eile, comhlachtaí poiblí rialaitheacha nó comhlachtaí arna mbunú chun críche sásaimh, is cuí leis an gComh-Fhochoiste.

Tá 7 nOmbudsman éagsúla faoi chúram an Chomh-Fhochoiste um Ombudsman, agus is iad sin:

1. An tOmbudsman um an tSeirbhís Phoiblí;
2. An tOmbudsman do Leanaí;
3. An tOmbudsman um Sheirbhísí Airgeadais;
4. An tOmbudsman Pinsean;
5. An tOmbudsman d'Óglaigh na hÉireann;
6. Ombudsman an Gharda;
7. An Coimisinéir Teanga.

Measann na comhaltaí, agus a fhios acu go laghdófar líon na nOmbudsman ó 7 go 6, gur tábhachtach gur chomhaontaigh siad ról agus cúram Ombudsman a scrúdú. D'ainneoin gur beartaíodh oifigí an Ombudsman um Sheirbhísí Airgeadais agus an Ombudsman Pinsean a chumasc agus oifig nua a chruthú d'Ombudsman um Sheirbhísí Airgeadais agus Pinsean, is éard is léir ó na hoifigí Ombudsman atá ann faoi láthair - ina ról mar Ombudsman - go bhfuil difríochtaí éagsúla ag baint leo agus cúraimí éagsúla acu a fhágann go mbíonn mearbhall ar an bpobal. Tugann an Comhchoiste dá aire chuige sin go bhfuil Ombudsmain de chuid na hEarnála Poiblí agus de chuid na hEarnála Príobháidí ann agus, dá bhrí sin, nach mbeidh na cumhachtaí céanna ag gach oifig Ombudsman.

Chomhaontaigh na comhaltaí gurbh fhiú cion oibre spriocdhírthe a dhéanamh a thabharfadh aghaidh ar na tagarmharcanna a chinneann a bhfuil i gceist le hOmbudsman, a ndéanann Ombudsman agus na hionchais a bhíonn ag na saoránaigh/ag an bpobal ó thaobh cúraimí Ombudsman de. Tar éis dóibh dul i dteagmháil leis na hOmbudsmain éagsúla, ba léir do na comhaltaí go raibh ceist eile ann, is é sin *Pribhléid Ghairmiúil Dhlíthiúil*. Dá réir sin, bhreithnigh an Coiste na ceisteanna seo a leanas, atá mar bhonn leis an tuarascáil seo:

- A. Cad is Ombudsman ann?
- B. An mbíonn rochtain ag saoránaigh ar shásamh neamhspleách?
- C. An cóir bonn reachtúil a bheith le gach Ombudsman agus le haon Ombudsman amach anseo?
- D. An cóir gach Ombudsman a mhaoiniú díreach ón bPríomh-Chiste?
- E. An cóir do gach comhlacht poiblí moltaí a dhéanann Ombudsman a éiríonn as fiosrúcháin fhoirmiúla a dhéanann an tOmbudsman sin a chomhlíonadh agus a chur i ngníomh go hiomlán, agus, más rud é, ar Thairiscint, gur mian leis an Oireachtas tuarascáil ó Ombudsman, nó moladh nó moltaí atá i dtuarascáil ó Ombudsman, a dhiúltú, an cóir tromlach vótaí is mó ná 'Tromlach Aoireachta Rialtais' a éileamh?
- F. An cóir gach seirbhís phoiblí, cibé acu is í an earnáil phríobháideach nó an earnáil phoiblí a sheachadann í, a bheith faoi chúram Ombudsman?
- G. An cóir feidhm a bheith ag pribhléid ghairmiúil dhlíthiúil i gcás Ombudsman do thionscnamh fiosrúcháin foirmiúil?

## **Moltaí**

1. Molann an Comhchoiste, i gcás oifig a bhfuil teideal nó feidhm Ombudsman ag gabháil léi, gur cóir na cúig chumhacht/na cúig ghné seo a leanas a bheith aici: a bheith mar oifigeach don pharlaimint; a bheith neamhspleách ar an bhFeidhmeannacht; gach gearán a ghlacadh go díreach; an chumhacht chun gearáin a fhiosrú agus leigheasanna agus sásamh a mholadh. Tugann an Comhchoiste forálacha ailt 1.1° agus 1.2° d'Airteagal 15 den Bhunreacht dá aire. Luaitear in alt 1.1° *"An tOireachtas is ainm don Pharlaimint Náisiúnta, agus sin é a bheirtear uirthi de ghnáth sa Bhunreacht seo"*, agus luaitear in alt 1.2° *"An tUachtarán agus dhá Theach atá san Oireachtas: Teach Ionadóirí ar a dtugtar Dáil Éireann, agus Seanad ar a dtugtar Seanad Éireann."* Maidir leis an Ombudsman do Leanaí, tugann an Comhchoiste dá aire gur Oifigeach don Stát, le reacht, é nó í an tOmbudsman seo, agus go dtoghann an tUachtarán é nó í, agus go bhféadfadh, ag féachaint do mholadh an Chomhchoiste, go gcuirfeadh aicmiú an Ombudsman do Leanaí mar "oifigeach don pharlaimint" bac ar an Ombudsman sin. Dá réir sin, agus aird á

tarraingt aige ar an déscaradh seo, molann an Comhchoiste thairis sin gur stuama úsáid a bhaint as an míniú is leithne ar an Oireachtas in alt 1.2° d'Airteagal 15, ina mínítear gurb éard é an tOireachtas an Pharlaimint agus an tUachtarán. Tá an Comhchoiste ag tarraingt na ceiste seo anuas toisc go bhféadfadh go mbeadh iarmhairt ó thaobh an Bhunreacht de ag baint léi agus, sa chás sin, is gá Oifig an Ombudsman do Leanaí a scrúdú tuilleadh i gcomhthéacs an mholta ina iomláine.

2. Molann an Comhchoiste gur cóir d'Ombudsman, má aithníonn sé nó sí éigeartas, féachaint chuige go gcuirfear an t-éigeartas sin ina cheart, ar cuid lárnach de sin sásamh a dhámhachtain.
3. Molann an Comhchoiste gur cóir bonn bunreachtúil a bheith le gach Ombudsman ag a bhfuil cúram seirbhíse poiblí, go hiomlán nó go páirteach; ní foláir, ar a laghad, bonn reachtúil a bheith le hOifig an Ombudsman um an tSeirbhís Phoiblí agus le hOifig an Ombudsman do Leanaí.
4. Molann an Comhchoiste gur cóir gach Ombudsman ag a bhfuil cúram seirbhíse poiblí a mhaoiniú go díreach ón bPríomh-Chiste; ní foláir, ar a laghad, Oifig an Ombudsman um an tSeirbhís Phoiblí agus Oifig an Ombudsman do Leanaí a mhaoiniú ón bPríomh-Chiste.
5. Molann an Comhchoiste gur cóir foráil a dhéanamh chun go dtabharfar cead tuarascáil, nó moladh nó moltaí i dtuarascáil, ón Ombudsman a dhiúltú, a chealú nó a chur ar ceal, ach gur cóir, chun é sin a dhéanamh, vótáil a dhéanamh sa Dáil agus go dtoileoidh 75% de na Teachtaí a bheidh i láthair ag an vótáil leis an togra.
6. Molann an Comhchoiste gur cóir, i gcás eintiteas de chuid na hearnála príobháidí d'fháil airgead poiblí chun seachadadh seirbhísí poiblí a mhaoiniú, formhaoirsiú a dhílsiú don Ombudsman ábhartha. Anuas air sin, molann an Comhchoiste go mbeidh Uisce Éireann faoi chúram an Ombudsman um an tSeirbhís Phoiblí.
7. Molann an Comhchoiste gur cóir déileáil leis na forálacha rúndachta a bhaineann le comhairle dlí ghairmiúil trí leasú/leasuithe ar an reachtaíocht phríomha lena mbunaítear gach ceann de na 6 oifig Ombudsman. Ina theannta sin, molann an Comhchoiste freisin go ndéanfar leis na leasuithe, maidir leis na 6 oifig Ombudsman, lena n-áirítear Oifig an Choimisinéara Teanga, aghaidh a thabhairt ar an leibhéal rúndachta atá ag gach oifig, agus an leibhéal sin a fheabhsú, chun go mbeidh rochtain ag gach oifig, nó cumhacht aici rochtain a fháil, ar chomhairle dlí rúnda nó ghairmiúil. Is cóir an leibhéal céanna rúndachta a thugtar don bhreithiúnacht nó don Oireachtas a thabhairt do na hoifigí Ombudsman, rud a chabhródh chun ról an Ombudsman mar "oifigeach don Pharlaimint" a chur i bhfeidhm. Agus é ag moladh leasú a dhéanamh ar na cumhachtaí atá ag Ombudsman rochtain a fháil ar chomhairle dlí rúnda nó ghairmiúil, aithníonn an Comhchoiste nach cóir "an phribhléid

ghinearálta” a thugtar maidir le comhairle dlí rúnda nó ghairmiúil a athrú ná, tríd an gcur chuige a mholtar a ghlacadh, a mhaolú.



## **1. Introduction (Background)**

It was decided by the 31<sup>st</sup> Dáil, under the Programme for Government published in February 2011, to establish for the first time a Joint Committee on Investigation, Oversight and Petitions. In order for the Oireachtas Committees to have proper meaningful power to investigate, an amendment to the Constitution was required.

However, a Referendum held on 27<sup>th</sup> of October 2011, asking the people of Ireland to give additional powers to Oireachtas Committees, was defeated. As a result of the Referendum being defeated, the Orders of Reference for the Joint Committee were amended to exclude an investigatory role for the Committee. The Dáil and Seanad agreed the Orders of Reference for the Committee in July 2012.

Under Standing Order 165A 4 (a) & (b) of the Orders of Reference the establishment of the Joint Committee on Public Service Oversight and Petitions also included the establishment of two Joint sub-Committees:

- 1) the Joint sub-Committee on the Ombudsman [SO 165A 4 (a), and;
- 2) the Joint sub-Committee on Public Petitions [SO 165A 4 (b)].

The Public Petitions System was officially launched to the Public on the 13<sup>th</sup> of September 2012.

Under the Orders of Reference the Joint sub-Committee on the Ombudsman has a number of functions. Among these it can consider the reports of the Ombudsman which are laid before the Houses of the Oireachtas under the Ombudsman Acts 1980 to 1984:

- (i) Shall agree guidelines on collaborative working between the Joint sub-Committee and the Ombudsman, including a right of initiative for the Joint sub-Committee in bringing specific matters to the attention of the Ombudsman, and;
- (ii) May liaise with such other Ombudsmen, regulatory public bodies or bodies established for the purpose of redress, as the Joint sub-Committee considers appropriate.

In carrying out their roles under this standing Order, the Joint sub-Committee on the Ombudsman:

- (i) shall agree guidelines on collaborative working between the Joint sub-Committee and the Ombudsman, including a right of initiative for the Joint sub-Committee in bringing specific matters to the attention of the Ombudsman, and;

- (ii) may liaise with such other Ombudsmen, regulatory public bodies or bodies established for the purpose of redress, as the Joint sub-Committee considers appropriate.

The Joint sub-Committee on the Ombudsman has within its remit 7 different variations of Ombudsman and these are:

1. Public Service Ombudsman;
2. Ombudsman for Children;
3. Financial Services Ombudsman;
4. Pensions Ombudsman;
5. Ombudsman for the Defence Forces;
6. Garda Ombudsman;
7. An Coimisinéir Teanga.

The members of the Joint sub-Committee wish to note the following:

- The role and function of the Financial Services Ombudsman (FSO) is governed by legislation that established 'light touch financial regulation' and while, post the financial crisis, that 2003 architecture has been changed in relation to the Central Bank and the Financial Regulator. The FSO while being legislatively modernised is still operating under the 2003 'light touch financial regulation architecture';
- That the Minister for Social Protection, Joan Burton T.D. announced on the 23rd April 2013, the amalgamation of the offices of the Pensions Ombudsman and Financial Services Ombudsman, as a part of a number of changes to strengthen governance and regulation of the country's occupational pensions and give consumers greater input into pension's policy<sup>1</sup>;
- That the Financial Services and Pensions Ombudsman Bill; to amalgamate the Pensions Ombudsman and the Financial Services Ombudsman Offices (Section C Bills in respect of which heads have yet to be approved by Government) is listed in the Legislative Programme Spring/Summer Session 2015 Published 14th January 2015<sup>2</sup>;
- That the Joint sub-Committee is cognisant of the Department of Finance Public Consultation Paper: *The Amalgamation of the Offices of the Financial Services Ombudsman and the Pensions Ombudsman*: The closing date for receipt of submissions was 4 March 2015<sup>3</sup>.

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<sup>1</sup> Seen [http://www.finance.gov.ie/sites/default/files/Finance\\_FSO\\_PO\\_Amalgamation\\_Consultation\\_Paper.pdf](http://www.finance.gov.ie/sites/default/files/Finance_FSO_PO_Amalgamation_Consultation_Paper.pdf)

<sup>2</sup> Seen [http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/Government\\_Legislative\\_Programme\\_Spring\\_Summer\\_2015.pdf](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/Government_Legislative_Programme_Spring_Summer_2015.pdf)

<sup>3</sup> Seen [http://www.finance.gov.ie/sites/default/files/Finance\\_FSO\\_PO\\_Amalgamation\\_Consultation\\_Paper.pdf](http://www.finance.gov.ie/sites/default/files/Finance_FSO_PO_Amalgamation_Consultation_Paper.pdf)

Accordingly, the members, while aware that the number of Ombudsmen will reduce from 7 to 6, consider it important that it had agreed to examine the role and remit of an Ombudsman and therefore, this report will give members of the Joint Committee an opportunity to give their views which it is hoped will inform the formation of the legislation and, particularly, give members of the Oireachtas an opportunity to influence the legislation as to what the new 'combined' Financial Services and Pensions Ombudsman's function and remit should be.

Notwithstanding the proposed merger of the Financial Services Ombudsman and Pensions Services Ombudsman into the new office of the Financial Services and Pensions Ombudsman, what is evident for the 7 existing offices of Ombudsmen, in their roles as Ombudsman, is that each has different variations and remits that leads to confusion in the public mind. In this regard the Joint Committee notes that there are both Public sector and Private Sector Ombudsmen and, therefore, not all the Offices of Ombudsmen have the same powers.

Members agreed that there was merit in conducting a focused piece of work that would address the benchmarks that determine what an Ombudsman is, what an Ombudsman does and what the citizens/public expect an Ombudsman to do. The Committee, initially, focused on the following questions:

- What is an Ombudsman?
- Do citizens get access to independent redress?
- Should all Ombudsmen and any future Ombudsman be statutorily based?
- Should Ombudsmen be funded directly from the central fund?
- Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman?
- Should, where a Government wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, require an Oireachtas vote greater than a 'Whipped Majority'?
- Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?

**Table A: Dates of meetings with Ombudsmen.**

Date	Ombudsman	URL to access the transcript of the meeting
24/09/2014	Pensions Ombudsman	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/committees~20140924~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/committees~20140924~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>
01/10/2014	Ombudsman for the Public	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co</a>

	Service	<a href="http://mmittees~20141001~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">mmittees~20141001~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>
05/11/2014	Ombudsman for the Defence Forces	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20141105~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20141105~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>
12/11/2014	Financial Services Ombudsman	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20141112~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20141112~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>
14/01/2015	An Coimisinéir Teanga	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20150114~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20150114~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>
11/03/2015	Ombudsman for Children	<a href="http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20150114~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement">http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/co mmittees~20150114~NVJ/\$File/Daily%20Book%20Unrevised.pdf?openelement</a>

In regard to the Garda Síochána Ombudsman Commission (GSOC) the Joint Committee is cognisant of the following:

- 1) the publication, in August 2014, of the Garda Síochána (Amendment) (No. 3) Bill 2014, which was to strengthen the role and remit of GSOC;
- 2) the work being undertaken by the Joint Committee on Justice, Defence and Equality in relation to its Report: *Report on the Review of An Garda Síochána Act 2005*, published October 2014;
- 3) the statement of Minister Francis Fitzgerald, Minister for Justice and Equality on moving the second stage of the Garda Síochána (Amendment) (No. 3) Bill 2014 – Dáil Record<sup>4</sup> *"I have also stressed my priority objective of strengthening the role and remit of GSOC. This Bill seeks to deliver on this commitment. The primary functions of GSOC are concerned with dealing with complaints against Garda members and examining Garda practices and procedures."*

Accordingly, the Joint Committee agreed that it would not engage with GSOC given the nature of recent controversies, the work of the Joint Committee on Justice, Defence and Equality and the legislative proposals of the Minister.

Subsequent to the engagement with the various Ombudsmen, it became evident to members that a further issue arose; that of *Professional Legal Privilege*. Accordingly, the following questions were considered by the Committee:

- A. What is an Ombudsman?
- B. Do citizens get access to independent redress?
- C. Should all Ombudsmen and any future Ombudsman be statutorily or constitutionally based?

<sup>4</sup> Seen <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014102100036?opendocument>

- D. Should all Ombudsmen be funded directly from the central fund?
- E. Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority'?
- F. Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?
- G. Should professional legal privilege apply where an Ombudsman initiates a formal investigation?



## Report of the Joint committee

### A. What is an Ombudsman?

#### Historical perspective

The development of the Ombudsman is generally taken as having been established by the 1809 Constitution of Sweden. However, the first role of an Ombudsman was that of supervising the observance of the law. This came about when the exiled Swedish King Charles XII established the 'Högste Ombudsman [Supreme Ombudsman]' to ensure that administrators fulfilled their duties in his absence. In a more modern context; Olof Petersson<sup>5</sup> [The Swedish Centre for Business and Policy Studies, SNS Stockholm] set out:

*"An important innovation in the 1809 Instrument of Government was the establishment of a parliamentary Ombudsman. The Ombudsman was given the task to supervise the observance of the laws and statutes as applied by the courts and by public officials and employees. In accordance with these duties the Ombudsman could act as a procurator and institute proceedings before the courts against those who, in the execution of their official duties, had committed unlawful acts or neglected to perform their duties properly.*

*The idea of an office with the specific task of supervising the bureaucracy was not completely new. In fact, the parliamentary ombudsman was modeled after the office of the Chancellor of Justice. This office derived from its predecessor, His Majesty's Supreme Ombudsman, a post established by Charles XII in 1713. After his defeat against Russia at Poltava in 1709 Charles fled to Turkey where he remained for several years. In the long absence of the King the Swedish administration fell into disarray and the King set up an ombudsman to ensure that the administrators fulfilled their duties. In 1719 the title was changed to the office of the Chancellor of Justice. This office still exists, which means that the public administration during two centuries has been checked by two parallel control mechanisms: the Chancellor of Justice (Justitiekanslern, JK) appointed by the government and the Ombudsman ("Justitieombudsmannen", JO) appointed by the Parliament.*

*The office of the Ombudsman turned out to be an efficient tool in the hands of Parliament. The power to prosecute public officials was used to combat*

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<sup>5</sup> Olof Petersson The Swedish Centre for Business and Policy Studies, SNS : Paper prepared for Conference on Contested Sovereignties Constitutional Arrangements and their Relevance for Democracy: European and Middle Eastern Perspectives Swedish Research Institute in Istanbul/Ayvalık 28–31 May, 2009. Revised in June 2009 for inclusion in a conference volume to be published by The Swedish Research Institute in Istanbul. Seen at [http://www.olofpetersson.se/\\_arkiv/skrifter/rf1809.pdf](http://www.olofpetersson.se/_arkiv/skrifter/rf1809.pdf)

*corruption, malfeasance and negligence in the bureaucracy. Over the years the oversight of the Ombudsman changed its focus. Today the primary task of the Ombudsman is no longer to prosecute public officials but to encourage a sound application of the law by aiding central and local authorities to learn from their mistakes. The Ombudsman, who is politically independent of Parliament, receives several thousands of individual complaints each year and its annual reports set the standards for good governance in Sweden.”.*

The Joint Committee note that a fuller academic work on the Högste Ombudsman can be found in the Historiska Institutionen [Department of History], Stockholm University Master Programme in Early Modern Studies – Northern Europe 1450 – 1850 and the Masters dissertation of Mr. Simon Carpels: *Royal Power and Bureaucracy. The Function of the Högste Ombudsman in the Last Phase of the Great Northern War.*<sup>6</sup>

Epistemologically, an Ombudsman, as in the Högste Ombudsman of the exiled Swedish King Charles XII, supervised, on behalf of the King, the observance of the laws and statutes as applied by the courts and by public officials and employees. The 1809 Constitution of Sweden established the ‘philosophical grounding’ that underlines the development of the position of Ombudsman and this formularised the Ombudsman as an officer of parliament.

### **Modern perspective**

As Ireland is both a common law country and bi-lingual; Canada, therefore, provides a focus as it too is bi-lingual and a common law country. Claude-Armand Sheppard, “An Ombudsman for Canada” in the McGill Law Journal (10.4) 1964 291-340<sup>7</sup> gives, in the introduction, an understanding of the complexities of modern government and how this unceasing growth has multiplied the number and nature of the contacts between the state and the citizen:

*“The unceasing growth of government has multiplied the contacts of citizens with the administration. Increasingly detailed regulations govern most business and professional endeavours. In addition, the state has assumed a multitude of positive functions in such fields as welfare, hygiene, education, medical care, traffic and transportation facilities, finances, insurance, agriculture, and housing. As a result, officials are constantly making decisions affecting the material and intellectual interests of individuals. Obviously, the possibilities of dissatisfaction are innumerable. While generally speaking most people in Canada appear to feel that they are being dealt with fairly by the*

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<sup>6</sup> Seen <http://www.diva-portal.org/smash/get/diva2:535578/FULLTEXT01.pdf>

<sup>7</sup> Seen <http://lawjournal.mcgill.ca/userfiles/other/4944700-sheppard.pdf> [p 291/2]



*various levels of authority with which they are in contact, some instances of error, injustice or negligence are inevitable. Misgivings about particular acts or omissions of the Administration have increased in direct proportion to the development of official responsibilities and of the departments, boards and corporations necessary to carry them out."*

Sheppard further goes on to say:

*"The institution of the ombudsman originated in Sweden more than 150 years ago. In 1809 the Swedish Riksdag adopted a new constitution which, inspired by the ideas of Montesquieu and a desire to curb the powers of the executive, gave Parliament the power to appoint a special Commissioner "to act as the attorney of Parliament, under the instructions issued by Parliament, and in that capacity to control the observance of the laws" (article 96 of the Constitution). This official was given the name of Justitieombudsman which he still bears. His function was "to make certain that laws and statutes were adhered to by the courts and other authorities and to prosecute judges and other officials who in their office had committed unlawful acts or neglected their official duties".*

*Fearing an autocratic government, Parliament sought to instill respect for its laws and thereby to safeguard the rights of the individual. The basic idea, in the words of the present incumbent, was "that the courts and other authorities would be less inclined to disregard the laws in order to serve the wishes of the Government, if the activities of the authorities were watched by a People's Tribune who was independent of the Government".<sup>8</sup>*

The Ombudsman Association<sup>9</sup> is the new public name of the British and Irish Ombudsman Association and its web site gives an understanding of the modern function of Ombudsman and the Joint Committee concur with the following

- *"Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.*

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<sup>8</sup> Ibid. [p 293]

<sup>9</sup> History: The office of the UK Parliamentary Commissioner for Administration (Parliamentary Ombudsman) was created in 1967. During the next ten years other UK public sector ombudsmen were appointed, so that by the end of the 1970s there were parliamentary, health and local government ombudsmen services in each country of the United Kingdom. In 1981 the Insurance Ombudsman Bureau, the first UK private sector ombudsman scheme, was established and since then further private sector schemes have been set up. In Ireland, the Office of the Ombudsman was set up in 1990 followed by private sector ombudsmen in 1990 and 1992 for credit institutions and insurance respectively. In 1991 a conference of UK ombudsmen from both the public and private sectors was held, at which it was agreed to set up an association for ombudsmen, their staff, and other organisations and individuals, such as voluntary bodies and academics interested in the work of ombudsmen. The Association came into being in 1993 as the United Kingdom Ombudsman Association and became the British and Irish Ombudsman Association when membership was extended to include ombudsmen from Ireland in 1994. In 2012 it was decided to rename the Association as the 'Ombudsman Association'.

- *They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.*
- *They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.*
- *They are neutral arbiters and not advocates nor "consumer champions".*
- *They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.*
- *They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable.*
- *Where they identify injustice, they seek to put this right.*

*In the private sector, ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the courts. The cost of their services is normally met by a charge to the bodies in their jurisdiction. Most are established by, or as a result of, statute, and the relevant industry or sector is obliged to participate in the scheme."*<sup>10</sup>

In regard to the 'essential features of an Ombudsman', the Joint Committee notes the article by Canadian, Donald C. Rowat, who in *Time for a Federal Ombudsman: Canadian Parliamentary Review* Vol 18 no.4 winter 1995-6<sup>11</sup> notes that while Canada does not have a Federal Ombudsman it has 'five offices' that 'receive complaints and recommend remedies' but that only three of these five offices 'can legitimately be called ombudsman in the sense that they have all four essential features of the ombudsman concept'

*"Though all five of these offices receive complaints and recommend remedies, only three of them can legitimately be called ombudsman in the sense that they have all four essential features of the ombudsman concept: being an officer of parliament and thus independent of the executive, receiving all complaints directly, and having the power to investigate them and recommend remedies..."*

The considered view of the Joint Committee is that the Canadian experience as described by Rowat with Canada having 'five offices' that 'receive complaints and recommend remedies' but that only three of these five offices 'can legitimately be called ombudsman

<sup>10</sup> Seen <http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>

<sup>11</sup> Seen [http://www.revparl.ca/18/4/18n4\\_95e\\_Rowat.pdf](http://www.revparl.ca/18/4/18n4_95e_Rowat.pdf) [p 22/3]

mirrors that of Ireland. The Joint Committee consider that an Ombudsman must have the "...four essential features of the ombudsman concept...", these being:-

- i. an officer of parliament;
- ii. independent of the executive;
- iii. receiving all complaints directly;
- iv. having the power to investigate them and recommend remedies.

The Joint Committee also consider that another essential feature is the ability to give redress.

At the public hearings the Joint Committee had with the various Ombudsmen, the question as to what was the role of an Ombudsman was considered. The views expressed are set out in Table 1 below.

**Table 1: Views expressed as to what is the role of an Ombudsman<sup>12</sup>**

Mr. Peter Tyndall  Ombudsman for Public Service  Meeting with the Joint sub-Committee of 1 October 2014	<p>The Ombudsman is ultimately the top point of the complaints system. It is the point that a complainant reaches before going to the courts. The service that we provide is free and independent. It is not an advocacy service; it provides a balanced review of complaints. Where a complaint is judged to be justified and where there has been a failing by a public service provider, we seek to put the individual concerned back into the position he or she would have occupied if the injustice had not occurred, or achieve some other form of justice where the situation has gone beyond that kind of redress.</p> <p>The defining point of the Ombudsman as a scheme for providing administrative justice is that the Ombudsman will not only seek to put things right for the individual, but also aggregate complaints, whether by looking at a series of complaints on the same topic or by finding systemic causes in individual complaints, in order to use the information drawn from complaints to improve public services. There is, therefore, a unique balance between putting things right for individuals and addressing any difficulties in public services that may lead to complaints.</p>
Dr. Niall Muldoon  Ombudsman for Children  Meeting with the Joint sub-Committee of 11 March 2015	<p>The Ombudsman for Children's office is an independent human rights institution established under the Ombudsman for Children Act 2002 to promote and monitor the rights of children in Ireland. The office has a unique combination of statutory functions. The one that is perhaps most familiar to the committee is the function to examine and investigate complaints made by or on behalf of children. In carrying out this function, the office observes the fundamental principles of an ombudsman, namely, it is independent and impartial, it is neither an advocate for the complainant nor an adversary to the public body, it seeks at all times to promote the swift resolution of complaints at a local level, where possible, and it aims to achieve systemic change through its investigatory work by tackling the root causes of the complaints we receive.</p>
Mr. William Prasifka	<p>We operate in a larger institutional framework. We adjudicate complaints based on principles made by others. The principal basis on</p>

<sup>12</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

<p>Financial Service Ombudsman</p> <p>Meeting with the Joint sub-Committee of 12 November 2014</p>	<p>which we adjudicate cases is the consumer protection code and other regulations that are promulgated by the Central Bank. We are also guided by legislation and general legal principles. Our decisions are only binding on the parties in front of us. We do not establish legal precedents. That is not our job. We are not a court. We do not investigate financial service providers. We do not investigate complainants. If we come across an issue that we think is of systemic effect, we notify the Central Bank with which we have a very open and productive relationship. It is up to the Central Bank as the regulator to make an investigation, if it wishes. It has administrative powers. It can issue fines and penalties. We do not issue fines. We do not award penalties. We adjudicate individual complaints and we award compensation.</p>
<p>Mr. Paul Kenny</p> <p>Pension Ombudsman</p> <p>meeting with the Joint sub-Committee of 24 September 2014</p>	<p>The Office of the Pensions Ombudsman was established under Part 11 of the Pensions Act 1990 as inserted by the Pensions (Amendment) Act 2002. The object was to permit the grant of redress. ... The Pensions Ombudsman is a statutory officer ... The Pensions Ombudsman investigates and decides complaints and disputes from individuals about their occupational pension schemes, that is, employer-sponsored rather than personal pensions, personal retirement savings accounts, PRSAs, which were also established by the 2002 Act, and trust retirement annuity contracts. These are contracts intended for groups of self-employed people in the same type of employment. For example, the Law Society caters for solicitors who want to opt in to the scheme. These are held under trust. We award redress where maladministration results in financial loss.</p>
<p>Mr. Tony McCourt</p> <p>Ombudsman for the Defence Forces</p> <p>Meeting with the Joint sub-Committee of 6 November 2014</p>	<p>...My office was established by order of the Minister for Defence on 1 December 2005. My office provides military personnel with an independent and impartial external statutory complaint investigation authority. It is entirely separate and distinct from both the military chain of command and the Department of Defence. I believe we are fully compliant with the generally recognised principles of ombudsmanship.</p> <p>The ombudsman provides an appeal from the formal internal military redress of wrongs procedure, a new direct referral complaints system for former service personnel, and a new system for complaints by serving or former service personnel against the actions of a civil servant of the Department of Defence. The outcomes of investigations generally are that the ombudsman makes non-binding recommendations to the Minister.</p> <p>I am inclined to suggest to the committee that consideration should be given to adding some such restrictions to the redress of wrongs system to limit multiple jurisdictions dealing with the same matters. As ombudsman, for example, I am precluded from considering complaints on a list of matters included in section 5 of the 2004 Act. There is also provision in legislation to ensure complaints referred to me are not also referred to the national ombudsman and vice versa. I recommend to the committee that section 5 exclusions should be reviewed. ...I should tell the joint committee there are three models for military ombudsmen throughout the world. The first one is where the ombudsman is integrated within the armed forces, which sometimes is referred to as an inspector general. This probably is the oldest form of military ombudsman extant and it still is operational in some countries. Indeed, the Defence Act in Ireland contains a</p>

	provision for the appointment of an inspector general. The second such model is one in which the ombudsman has exclusive jurisdiction over the armed forces and the third is where oversight of the armed forces is subsumed into the functions of a general ombudsman. In 2004, Ireland opted for the appointment of a civilian ombudsman, entirely independent of the Defence Forces and the Department of Defence, with exclusive jurisdiction over the Defence Forces, that is, the second of the three models I mentioned. ... Independence is of critical importance for an ombudsman. International standards show that the primary indicators of independence for ombudsmen are being independent of government and of those they are appointed to oversee. I am satisfied the 2004 Act contains appropriate statutory provisions providing for the independence of my office along those lines.
Rónán Ó Domhnaill, Uas.  An Coimisinéir Teanga  Meeting with the Joint sub-Committee of 14 January 2015	Tosóidh mé leis an Acht féin mar is é sin an bunchloch ar a bhfuil cearta reachtúil teanga an tsaoránaigh agus mo chumhachtaigh mar Choimisinéara chun na cearta sin a chosaint leagtha amach. Múnlaíodh an tAcht ar dhá chóras a bhí in úsáid i ndlínsí eile - córas an Choimisinéara Teanga a bhí bunaithe i gCeanada agus córas na scéimeanna teanga a bhí in úsáid sa Bhreatain Bheag. Déileálann an tAcht leis na cearta teanga a bhaineann le húsáid na dteangacha oifigiúla i dTithe an Oireachtais, in Achtanna an Oireachtais, sna cúirteanna, i measc comhlachtaí Poiblí agus úsáid na logainmneacha oifigiúla. Go príomha is iad comhlíonadh na ndualgais atá leagtha ar chomhlachtaí poiblí faoin Acht is mó a bhíonn m'óifig ag déileáil leo. Ní miste liom a shoiléiriú gur líon teoranta dualgais dhíreacha a leagtar ar gach comhlacht poiblí a thagann faoi scáth na reachtaíochta.

### Consideration of the Joint Committee: What is the role of an Ombudsman?

The Joint Committee note, in regard to the points made by the Ombudsmen, that it is evident that the powers of each Ombudsman are not equal. In taking the comments of the Ombudsman for the Defence Forces (ODF), the Pensions Ombudsman (PO) and the Financial Services Ombudsman (FSO) it is here that the Joint Committee sees the very stark disparity of the powers and remits, as follows:

FSO: *"We operate in a larger institutional framework. We adjudicate complaints based on principles made by others. ... We do not issue fines. We do not award penalties. We adjudicate individual complaints and we award compensation."*;

PO: *"We award redress where maladministration results in financial loss."*;

ODF: *"The outcomes of investigations generally are that the ombudsman makes non-binding recommendations to the Minister"*.

The Joint Committee notes the powers of these three offices are strongest for the private sector Ombudsmen, but weaker for the public sector Ombudsmen. The three Ombudsmen are 1) a Private Sector Ombudsman - Financial Services Ombudsman 2) a mixture of Private Sector and Public Sector Ombudsman - Pensions Ombudsman and 3)

a Public Sector Ombudsman - Ombudsman for the Defence Forces. In just these three Ombudsmen, the Joint Committee note the discrepancy of powers: FSO awards 'compensation', the PO awards redress where maladministration results in financial loss whereas the ODF 'makes non-binding recommendation to the Minister'.

The Joint Committee also notes the weakness in the effectiveness of the Dáil. The use of the 'Government Majority' to ensure the passing of government legislation or the rejection of non-governmental legislation or non-governmental amendments to government legislation runs counter to the ideas of Montesquieu as cited above in Sheppard's comments "...inspired by the ideas of Montesquieu and a desire to curb the powers of the executive,...". In Ireland the reality of the doctrine of the separation of powers has resulted in an independent judiciary, a strong government and a weak parliament. It is the opinion of the Joint Committee that if an Ombudsman is not empowered to make binding recommendation, then is it oxymoronic that the Office be given the title of Ombudsman? By the use of the term 'Ombudsman' the public automatically have an understanding of the role and function, but when they seek redress they will find that their understanding may prove problematic as not all Ombudsmen have the same or similar powers.

The Joint Committee recommends that for an office with the title or function of Ombudsman then the Ombudsman, or An Coimisinéir Teanga must have the following five powers/features: be an officer of parliament; be independent of the executive; receive all complaints directly; have the power to investigate them and recommend remedies and redress. The Joint Committee note that the provisions of section 1.1° of Article 15 of the Constitution which states "*The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas*" and section 1.2° states that "*The Oireachtas shall consist of the President and two houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.*" The Joint Committee, in regard to the Ombudsman for Children, note that this Ombudsman is by statute an Officer of the State and is appointed by the President and given the Joint Committee's recommendation there may be, for the Ombudsman for Children, an impediment in the nomenclature of being an 'office of parliament'. Accordingly, in drawing attention to this dichotomy the Joint Committee further recommends that it may be more prudent to use the wider definition of Oireachtas in Sections 1.1° and 1.2° of Article 15, which defines the parliament as the Oireachtas which includes the President. The Joint Committee raise this matter as it may have a Constitutional consequence in which case the Office of Ombudsman for Children needs further examination within the context of the overall recommendation.

## B. Access to independent redress

At the public hearings the Joint Committee had with the various Ombudsmen the question of access to independent redress was considered. The views expressed are set out in Table 2.

**Table 2: Views expressed in regard to Independent Redress<sup>13</sup>**

Mr. Peter Tyndall  Ombudsman for Public Service  Meeting with the Joint sub-Committee of 1 October 2014	<p>I do not believe a voluntary arrangement is the way to provide statutory access to redress. <a href="#">[In relation to Irish Water]</a></p> <p>I have discussed with the committee issues like having a standard approach to making complaints. At the heart of all this are the questions of how to ensure people using our public services have unhindered access to independent redress when something goes wrong and how to ensure our public services are improving and learning from their mistakes. The kind of changes I am seeking are designed to do this, namely, to give people an opportunity to have matters put right when they go wrong and to ensure our public services are learning from the mistakes identified following complaints.</p> <p>The office was not consulted about the decision to take water related complaints away from us. When water services were provided by local authorities, if somebody wanted to complain about the water service and he or she did not get a satisfactory response, he or she could have gone to the Ombudsman's office. One day a person could complain to the Ombudsman and the next day he or she could not. I do not think anyone set out to do that but when it did happen, people thought the arrangements could be made the same way as for electricity and gas, which is that one can complain to the regulator. I strongly believe that the role of regulators is to regulate, that they have a particular relationship with the bodies they regulate, which includes such issues as price setting and looking at competition. That means there is some conflict in terms of individual redress.</p>
Mr. William Prasifka  Financial Service Ombudsman  Meeting with the Joint sub-Committee of 12 November 2014	<p>If we turn to the broader network of ombudsmen, there are many voluntary schemes that are not based on statute that effectively provide a very good service. They are forms of complaint handling. Often their jurisdictional limit is quite small. For some of the ombudsmen schemes dealing with telecommunications or other types of commercial services, the remit of the ombudsman may be only €1,000 per complaint - relatively small - whereas ours is €250,000. Those schemes provide a valuable service. They can be quite effective provided there is buy-in from the industry, and putting them on a statutory basis may not gain much more. There are some areas, such as financial services, which because of their importance in people's lives and because it is one area where there is a great disparity in knowledge between the average consumer and the financial institution should be statutorily based. We have learnt from dealing with people that many of them do not understand the nature of the products they have bought. They do not understand their rights. That cries out for the need for effective redress.</p>
Mr. Paul Kenny	<p>The Office of the Pensions Ombudsman was established under Part 11 of the Pensions Act 1990 as inserted by the Pensions</p>

<sup>13</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

<p>Pension Ombudsman</p> <p>meeting with the Joint sub-Committee of 24 September 2014</p>	<p>(Amendment) Act 2002. The object was to permit the grant of redress. Although the Pensions Board established by the Pensions Act 1990 had powers of investigation, it had no power to grant redress where a person had suffered financial loss. The Pensions Ombudsman is a statutory officer and the employees of the office are civil servants in the service of the State. The Pensions Ombudsman investigates and decides complaints and disputes from individuals about their occupational pension schemes, that is, employer-sponsored rather than personal pensions, personal retirement savings accounts, PRSAs, which were also established by the 2002 Act, and trust retirement annuity contracts. These are contracts intended for groups of self-employed people in the same type of employment. For example, the Law Society caters for solicitors who want to opt in to the scheme. These are held under trust. We award redress where maladministration results in financial loss.</p> <p>To succeed with a complaint, it is not enough that the complainant does not agree with a decision by those managing a scheme or a PRSA. The complainant must have reason to believe that the decision was not properly made or implemented and must have sustained actual financial loss to obtain redress. Redress in this case is limited to the actual loss of scheme benefit and there is no facility to make an award for inconvenience or even expense incurred in pursuing a complaint.</p> <p>Financial redress may be awarded in a case where the Pensions Ombudsman decides that the complainant has suffered a loss of entitlement due to the poor administration of a pension scheme or a PRSA. He may make a ruling even if the complaint is withdrawn during the investigation on the basis that the person complained against has as much right to have the matter decided as the person who has made the complaint. A determination, if made, is legally binding on all parties, subject to the right of appeal to the High Court. If a determination is not complied with, action for enforcement may be brought in the Circuit Court, either by the aggrieved party or by me.</p> <p><b>Deputy Noel Harrington:</b> I refer to sanctions. The ombudsman can make redress where there is a financial loss, but it has powers where there is no financial loss. Does that include sanctions against the trustees of a pension fund?</p> <p><b>Mr. Paul Kenny:</b> No. If I felt the trustees had acted improperly and should be removed, I would refer the matter to the Pensions Authority because it has the power to apply to the High Court to deal with that and for the replacement of trustees where it believes they have not acted properly. We do have the right, which I did not mention in my presentation, to exchange information with the Pensions Authority, and we do this regularly. If we believe something of a more general nature is going wrong in connection with the administration of a scheme, we will report it to the Pensions Authority because we take individual complaints.</p>
<p>Mr. Tony McCourt</p> <p>Ombudsman for the Defence</p>	<p>The ombudsman provides an appeal from the formal internal military redress of wrongs procedure, a new direct referral complaints system for former service personnel, and a new system for complaints by serving or former service personnel against the actions of a civil servant of the Department of Defence. The outcome of investigations</p>



<p>Forces</p> <p>Meeting with the Joint sub-Committee of 6 November 2014</p>	<p>generally are that the ombudsman makes non-binding recommendations to the Minister.</p> <p>Complaints should be resolved at the earliest possible opportunity. Every complaint under the redress of wrongs system is notified to my office as an oversight body and recorded on our case management system. The Minister agreed earlier this year to provide me with additional information regarding the nature of each such complaint, and this will improve my oversight of the internal military system. I have also proposed a strengthening of the independence of military investigation officers appointed to investigate and report on complaints under the redress of wrongs system.</p> <p>The position with regard to the exclusions is there are matters about which a member of the forces is entitled to submit an application or complaint under the redress of wrong system. It can be processed all the way up to the Chief of Staff and if the complainant does not get satisfaction there, he or she is perfectly entitled to ask to have it referred to the ombudsman. The first thing the ombudsman must do is to consider whether it is within his or her jurisdiction and sometimes it arises that it actually is outside my jurisdiction because it is excluded by the provisions of section 5 of the Act. I believe that if we have a complaint system that has been in place since 1922 and that if a provision for an ombudsman to be inserted between the Chief of Staff's decision and the Minister's final decision was introduced almost nine years ago, there should be the minimum of restrictions on the powers and jurisdictions of the ombudsman to deal with such complaints. Moreover, I believe that complainants may be dissatisfied, having processed a complaint all the way up to the ombudsman's office, to find that the ombudsman is not empowered to deal with it. There may be reasons he or she is not allowed to so do that are valid under the provisions of section 5 of the Act but sometimes - I refer to matters that can be perceived clearly to be administrative in nature - there should be scope for those to be dealt with, even in the areas that are excluded from the jurisdiction of the ombudsman.</p> <p>We have an excellent system in the redress of wrongs system within the Defence Forces. It has been there since 1922. However, we should explore the possibility of the ombudsman having some involvement in that at an earlier stage rather than the final appeal stage. I would be glad to see the good offices of my office being made available to assist at a much earlier stage so that complaints could be resolved more swiftly than they are at the moment. That would be possible, in a review of the two systems; the redress of wrongs system under the Defence Act and the ombudsman regime under the 2004 Act. There are possibilities there to bring a more unified system of complaint investigation. There would be a lot interest groups who would need to have an input and agree on that before it could be implemented.</p>
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## **Consideration of the Joint Committee: Access to independent redress.**

Referring to the Ombudsman Association web site; the Joint Committee, in regard to the issue of access to redress, concur with the Ombudsman Association<sup>14</sup>

- *"Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.*
- *They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.*
- *They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.*
- *They are neutral arbiters and not advocates nor "consumer champions".*
- *They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.*
- *They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable.*
- *Where they identify injustice, they seek to put this right.*

*In the private sector, ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the courts. The cost of their services is normally met by a charge to the bodies in their jurisdiction. Most are established by, or as a result of, statute, and the relevant industry or sector is obliged to participate in the scheme."*

For parliament and for the citizens whose taxes fund the Ombudsman there is a 'societal or philosophical' pay-off. By having a fully functioning, open and transparent administrative justice system where Ombudsmen, as well as offering individual redress, identify systemic problems, there is a pay-off or other learning from complaints leading to improvements in public services.

This is what each office of an Ombudsman should do, not because it's what the Joint Committee say or propose; but because it is what the citizens understand and expect an Ombudsman to do. It must not alone say what it does, it must reflect the understanding of the citizens and as an administrative justice system its prime benefit is that it allows the parliament, which is the democratic assembly of the citizens of the state, have

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<sup>14</sup> <http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>

effective oversight of the Executive and those charged with upholding and implementing the laws the parliament has passed. The Joint Committee make the observation that the State, given the complexity of the contacts between the state and the citizen as observed by Claude-Armand Sheppard, is not omnipotent or immune from maladministration and, therefore, instances of error, injustice or negligence are inevitable. It is rhetorical, but true, if the Ombudsman system was not present – it would have to be invented.

The Joint Committee recommends that where an Ombudsman identifies injustice they should seek to put that injustice right and central to putting an identified injustice right, is redress.

### **C. Should all Ombudsmen and any future Ombudsman be statutorily or constitutionally based?**

At the public hearings the Joint Committee had with the various Ombudsmen the question of whether all Ombudsmen and any future Ombudsman should be statutorily or constitutionally based was considered. The views expressed are set out in Table 3.

**Table 3: Views expressed by Ombudsmen in regard to all Ombudsmen and any future Ombudsman be statutorily or constitutionally based?**<sup>15</sup>

Mr. Peter Tyndall  Ombudsman for Public Service Meeting with the Joint sub-Committee of 1 October 2014	My predecessors have spoken about the need to provide a constitutional status for the office. I believe that is important. The appointment of the Ombudsman by the President on the recommendation of the Oireachtas following a vote is a good way of securing independence but constitutional status would give the office a better standing than underpinning it by statute.
Mr. William Prasifka  Financial Service Ombudsman  Meeting with the Joint sub-Committee of 12 November 2014	We were set up in 2005 on a statutory basis as the Financial Services Ombudsman. Prior to the establishment of the financial services ombudsman, there were voluntary schemes, set up by industry, such as a banking ombudsman, a credit institutions ombudsman and an insurance ombudsman. Those roles were amalgamated and we were put on a statutory basis.  We are a statutory officeholder who deals independently with complaints from consumers about their individual dealings with all financial service providers that have not been resolved by the providers. It is a requirement that before someone should come to us that he or she engages with the provider first. The provider is required to inform the eligible consumer of our existence. If the consumer is not satisfied with the resolution the financial service provider has given, he or she can then complain to us.
Mr. Tony	I have noted the proposal of the national Ombudsman to the joint

<sup>15</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

<p>McCourt</p> <p>Ombudsman for the Defence Forces</p> <p>Meeting with the Joint sub-Committee of 6 November 2014</p>	<p>committee that his appointment be made a constitutional one and I would support such a development in his case. As for the extension of the powers of ombudsmen generally, I have three further recommendations I could make to members if they so wish. This concludes my presentation to the joint committee.</p> <p>I have three additional short recommendations which I could make to the committee at this stage. First, I am mindful of representations which have been made to my Office by families of members or former members of the Defence Forces which I was satisfied were related to genuine concerns but which were clearly outside my jurisdiction under the statute as currently drafted. I would suggest my Office should have a discretionary authority to undertake in exceptional circumstances own-initiative investigations. This, of course, could be subject to prior agreement with the Minister, on a case-by-case basis. Such investigations should also be allowed to include historic matters and not be subject to the 12 months rule applicable in the Act at the moment.</p> <p>Second, I would suggest that section 8 of the 2004 Act should be amended in line with the provisions of section 10 of the Ombudsman (Amendment) Act 2012 together with any future amendment to the Ombudsman Act to provide my office with improved procedures for compelling the production of documents and information. That would be a very important provision.</p> <p>The third additional recommendation I would make is that there is a need for the establishment of a mechanism for the provision of independent legal advice and services to my office from time to time. Clearly, that is based on my experience since I came into office. I do not think I need to elaborate further on that.</p>
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**Consideration of the Joint Committee: Should all Ombudsmen and any future Ombudsman be statutorily or constitutionally based?**

There are variants, as mentioned previously, of an Ombudsman operational in Ireland - Ombudsmen that deal only with Public Service matters, Ombudsmen that deal with matters related to the Private Sector and Ombudsman that have a remit that covers both the Public and Private Sectors. The Joint Committee, cognisant of this reality is nonetheless advocating that all Ombudsmen who have a Public Service remit should have constitutional status. In the view of the Joint Committee the office of an Ombudsman who has a remit or part remit within the Public Service will have a better standing if it has constitutional status rather than just underpinned by statute. At a minimum both the Office of the Ombudsman for the Public Service and the Office of the Ombudsman for Children must be constitutionally based.

In relation to the point raised by the ODF:

- i. That the Office of the ODF should have a discretionary authority to undertake in exceptional circumstances own-initiative investigations. Such investigations

should also be allowed to include historic matters and not be subject to the 12 months rule applicable in the Act at the moment;

- ii. Second that section 8 of the 2004 Act should be amended in line with the provisions of section 10 of the Ombudsman (Amendment) Act 2012 together with any future amendment to the Ombudsman Act to provide ODF with improved procedures for compelling the production of documents and information;
- iii. Thirdly that there is a need for the establishment of a mechanism for the provision of independent legal advice and services to my ODF from time to time.

The Joint Committee support the proposals of the Ombudsman for the Defence Forces and recommends that all ombudsmen who have a full or partial public service remit are constitutionally based.

The Joint Committee recommend the all Ombudsmen who have a remit or part remit within the Public Service will have a better standing if it has constitutional status rather than just underpinned by statute. At a minimum both the Office of the Ombudsman for the Public Service and the Office of the Ombudsman for Children must be constitutionally based.

#### **D. Should all Ombudsmen be funded directly from the central fund?**

Just as noted in Section C. above, there are variants of an Ombudsman operational in Ireland, so also are there variants in how Public Sector Ombudsmen and Private Sector Ombudsmen are funded. The Joint Committee is cognisant of the reality that most Private Sector Ombudsmen are not funded from public funds; rather they are funded by industry levies.

At the public hearings the Joint Committee had with the various Ombudsmen the question of whether all Ombudsmen be funded directly from the central fund was considered. The views expressed are set out in Table 4.

**Table 4: Views expressed by each Ombudsman in regard to being funded directly from the central fund.<sup>16</sup>**

Mr. Peter Tyndall Ombudsman for Public Service Meeting with the	However, real independence requires more than a legal status; it requires that the office has the resources needed to do its job. We all know what happened in the past when one of my predecessors, Mr. Michael Mills, was deemed by the Government to be too critical and an attempt was made to cripple the office by cutting its funding sharply. Although ultimately that was undone, given the importance of having sufficient resources to do the job properly, this should be a
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<sup>16</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

Joint sub-Committee of 1 October 2014	<p>matter for the Oireachtas rather than the Government of the day because the decisions of the Government of the day are often within the jurisdiction of the office and while, as members will see from the casebook, as often as not we do not uphold cases, on occasions there will inevitably be tension. It is the Ombudsman's job to hold public service providers to account and this will generate tension on occasions. It is important, therefore, to separate the funding and accountability mechanisms.</p>
<p>Dr. Niall Muldoon</p> <p>Ombudsman for Children</p> <p>Meeting with the Joint sub-Committee of 11 March 2015</p>	<p>The independence of my office should be enhanced. Independence has a number of dimensions but one of the most important is having adequate resources to discharge the functions given to the office by the Oireachtas and being free from any potential political pressure that could be applied through changes to the office's financial resources. At present, the OCO receives its funding through the Department of Children and Youth Affairs. In practical terms, the control of the OCO's budget by the Department has not proven to be problematic. However, it is inappropriate for an independent human rights institution to receive its funding through a public body that it can investigate. I believe that the situation should be remedied by providing for the OCO's funding to come directly from the Oireachtas. This was also a recommendation made by the UN Committee on the Rights of the Child. That UN committee will certainly raise the question once again when it examines Ireland in January 2016 regarding its compliance with the UN Convention on the Rights of the Child.</p>
<p>Mr. William Prasifka</p> <p>Financial Service Ombudsman</p> <p>Meeting with the Joint sub-Committee of 12 November 2014</p>	<p>The legislation that established us is the Central Bank and Financial Services Authority of Ireland Act 2004. It provides that we should deal with complaints efficiently, effectively and fairly, that complaints should be dealt with in an informal and expeditious manner. We are funded by a levy on the industry, not by the Exchequer, and consumers who make a complaint to us pay no fee and can do so free of charge.</p> <p>We operate in a larger institutional framework. We adjudicate complaints based on principles made by others. The principal basis on which we adjudicate cases is the consumer protection code and other regulations that are promulgated by the Central Bank. We are also guided by legislation and general legal principles. Our decisions are only binding on the parties in front of us. We do not establish legal precedents. That is not our job. We are not a court. We do not investigate financial service providers. We do not investigate complainants. If we come across an issue that we think is of systemic effect, we notify the Central Bank with which we have a very open and productive relationship. It is up to the Central Bank as the regulator to make an investigation, if it wishes. It has administrative powers. It can issue fines and penalties. We do not issue fines. We do not award penalties. We adjudicate individual complaints and we award compensation.</p> <p>The Financial Services ombudsman is appointed by the Financial Services ombudsman's Council. He is not a member of the council. The council operates in a supervisory and advisory capacity. It is a separate body. It has no role with regard to how the ombudsman and the bureau deal with a particular complaint. The ombudsman and the bureau are completely independent, not only of the stakeholders but also of the council. We have been issuing a report about our complaints twice a year, our biannual review. The latest one was</p>

	issued for the second half of last year. We have given the committee a copy of that review. It tells a very important story about what has been happening in terms of complaints to our office in the past year. By way of background, it is important to know that if one considers the financial crisis and the record of complaints before the ombudsman, between 2006 and 2009 the volume of complaints doubled and trebled. That put a significant strain on the work of the office. From 2009 to 2013 the complaints levelled off, broadly speaking. Since the second half of last year, however, there has been a very significant reduction in the numbers of complaints of approximately 50%.
Rónán Ó Domhnaill, Uas.  An Coimisinéir Teanga  Meeting with the Joint sub-Committee of 14 January 2015	Tá sé ar cheann d'fhorálacha an Achta gur oifig neamhspleách í Oifig an Choimisinéara Teanga. Is féidir liom a dhearbhu go bhfeidhmíonn m'oifig ar an mbunús sin. An méid sin ráite tá an soláthar airgid agus acmhainní daonna atá ar fáil do m'oifig ag brath ar thoil an Aire. Mar atá ráite agam roimhe seo, is oifig an-bheag í m'oifig agus cosúil le heagraíochtaí eile beidh éifeacht agus tionchar ár gcuid oibre ag brath ar dóthain foirne a bheith ar fáil dúinn chun ár gcuid dualgais a chomhlíonadh. Cé nach raibh aon tionchar aige ar m'oifig go dtí seo is éasca an ceangal a dhéanamh gur féidir tionchar a imirt ar éifeacht eagraíocht nuair atáthar ag brath ar sholáthar airgid agus foirne an mháthair eagraíocht. Tacaím mar sin leis an dearcadh a léiríodh roimhe seo gur cheart an múnla atá in úsáid do mhaoiniú a dhéanamh ar sheirbhísí Ombudsman a scrúdú.

### **Consideration of the Joint Committee: Should all Ombudsmen be funded directly from the central fund?**

The Joint Committee concur with the Ombudsman for the Public Service in his comments *"real independence requires more than a legal status; it requires that the office has the resources needed to do its job."* Lest we forget, nothing so inhibits human endeavour than an absence of money. The Joint Committee, fully aware of the event that Mr. Tyndall mentioned, note *"what happened in the past when one of my predecessors, Mr. Michael Mills, was deemed by the Government to be too critical and an attempt was made to cripple the office by cutting its funding sharply."* The Joint Committee very strongly agrees with the comments of Mr. Tyndall that funding of the Ombudsman *"should be a matter for the Oireachtas rather than the Government of the day"*. The Joint Committee regards this as central to the arguments being made in regard to an Ombudsman being a 'officer of the Parliament' who oversees for the parliament that the laws parliament passed are being observed and the public services for which it appropriated funds are being delivered.

Further, the Joint Committee very strongly support the comments of Dr. Niall Muldoon, the Ombudsman for Children when he advised the Joint Committee *"In practical terms, the control of the OCO's budget by the Department has not proven to be problematic. However, it is inappropriate for an independent human rights institution to receive its funding through a public body that it can investigate. I believe that the situation should*

*be remedied by providing for the OCO's funding to come directly from the Oireachtas. This was also a recommendation made by the UN Committee on the Rights of the Child. That UN committee will certainly raise the question once again when it examines Ireland in January 2016 regarding its compliance with the UN Convention on the Rights of the Child."*

The Joint Committee, in terms of Government Reform, advocate that it is more appropriate that the funding for public service Ombudsmen be by way of access to the central fund. The Joint Committee want to make it very clear this is not politically motivated. Rather, as pointed put by Dr. Muldoon "...the control of the OCO's budget by the Department has not proven to be problematic. However, it is inappropriate for an independent human rights institution to receive its funding through a public body that it can investigate" – it is this type of inappropriateness that motivates the considerations of the Joint Committee. The Joint Committee considers that under the current construction - by the actions of turning on or off the taps of funding - a Government can and will exert influence over an Ombudsman. This begs a question: should it be Government or Parliament who have the control?

The tension between Government and an Ombudsman which has been seen in the past, with the former Ombudsman Michael Mills, should never be seen in Irish Public Administration again and direct access to the central fund removes a potential threat while strengthening the independence of the Ombudsman.

The Joint Committee recommends that all Ombudsmen with a Public Service remit should be funded directly from the Central Fund; as a minimum both the Office of the Ombudsman for the Public Service and the Office of the Ombudsman for Children must be funded from the central fund.

**E. Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority'.**

At the public hearings the Joint Committee had with the various Ombudsmen the question of whether all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a



recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority' was considered. The views expressed are set out in Table 5.

**Table 5: Views expressed that all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a 'Whipped Government Majority'**<sup>17</sup>

<p>Mr. Peter Tyndall</p> <p>Ombudsman for Public Service</p> <p>Meeting with the Joint sub-Committee of 1 October 2014</p>	<p>I have examined some of the issues arising in respect of the legislation in Ireland. The legislation was amended as recently as 2012 and in many respects it represents good international practice. As I do not wish to be too negative in this regard, I will focus on ways in which the legislation might be enhanced or extended. The committee has asked me to address the issue of recommendations. From my perspective, the democratic process is the correct way of dealing with Ombudsman recommendations in the public domain but the implied suggestion in the committee's questions about whether the current arrangements are sufficient deserves debate. For example, it was suggested that a certain level of majority might be needed in deciding whether recommendations should be implemented.</p> <p>I have encountered a difficulty that I have not seen in other jurisdictions, namely, the bodies in my jurisdiction must get permission to comply with my recommendations. The Ombudsman legislation should give them the explicit ability to comply without needing to ask for permission.</p> <p><b>Chairman:</b> I know it is the view of all committee members that we want to pursue any matters that Mr. Tyndall or any of the sectoral ombudsman offices are raising either on the back of reports or of their own instigation. At the very least we want to seek responses from Government and as much as possible strengthen those offices in respect of the issues they raise. It is important that these engagements are constrictive and actions follow from them. This is the first Dáil in which this committee has been in place. One of the important elements of this new committee is to ensure we, in Parliament, strengthen the role of the Ombudsman. We need to send a clear signal to Government from the Oireachtas that we expect recommendations to be implemented and, if not, clear explanations to be given as to why not.</p>
<p>Dr. Niall Muldoon</p> <p>Ombudsman for Children</p> <p>Meeting with the Joint sub-</p>	<p><b>Chairman:</b> As I pointed out at the outset of the meeting, we have heard from the various sectoral Ombudsman offices. We will be putting together a report on their perspectives on the implementation of their recommendations, any lacunae that might exist in the law and how we can strengthen the current legislation. Dr. Muldoon identified a number of issues in that regard. We are also investigating the level of independence of Ombudsman offices in terms of finance</p>

<sup>17</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

<p>Committee of 11 March 2015</p>	<p>and funding streams. Is it Dr. Muldoon's experience that public bodies implement the recommendations he makes on foot of investigations?</p> <p><b>Dr. Niall Muldoon:</b> It is part of our strategy in all investigations that we carry out a six month review after the investigation to ensure we are satisfied with the recommendations and the response to them. As Ombudsman, I would not sign a statement of satisfaction without being happy with what was produced by the public body. That sometimes mean we stay on the pitch for up to two years to carry out further reviews and reports and we look for continuous updates.</p> <p><b>Chairman:</b> I presume that if recommendations are not implemented, Dr. Muldoon has the option of submitting a special report to the Oireachtas. This committee takes seriously its role of following up recommendations where they are not implemented. In some cases we brought in Ministers and Secretaries General. We corresponded with the Taoiseach on the lost at sea scheme, in respect of which the previous Ombudsman, Ms Emily O'Reilly, raised concerns. Dr. Muldoon can use that option.</p> <p><b>Dr. Niall Muldoon:</b> We have used that option on a number of occasions. My predecessor, Ms Emily Logan, would have written to the appropriate public body to highlight the fact that we could bring a special report to the office. We find that often focuses minds. Ms Logan was able to sign off as satisfied with responses to recommendations subsequent to this. In the nearly 11 years the office has been in existence, we have not needed to prepare a special report but it is an important power for us.</p>
<p>Rónán Ó Domhnaill, Uas.</p> <p>An Coimisinéir Teanga</p> <p>Meeting with the Joint sub- Committee of 14 January 2015</p>	<p>I bhformhór na gcásanna a chuir m'óifig faoi bhráid Thithe an Oireachtais go dtí seo níor shéan na comhlachtaí poiblí na fionnachtain a bhí déanta sna tuarascálacha imscrúdaithe. Is é gur mhaígh siad nach raibh dóthain acmhainní acu chun na seirbhísí ábhartha a bhí á gcur ar fáil i mBéarla a chur ar fáil i nGaeilge chomh maith. Tá ról tábhachtach ag an gcoiste seo mínithe a lorg ó chomhlachtaí poiblí ar na cúiseanna a roghnaíonn siad gan moltaí a bhíonn déanta I dtuarascáil reachtúil a chur i bhfeidhm i gcásanna den chineál seo. Is é ár dtaithí go bhfuil tionchar éifeachtach ag an bhforáil seo sa chinneadh a dhéanann comhlacht poiblí maidir le moltaí reachtúla a chur i bhfeidhm.</p> <p>Má bhíonn an comhlacht poiblí den tuairim áfach go raibh na fionnachtain a rinneadh sa chéad dul síos lochtach tá an rogha ar fáil dóibh dúshlán an chinneadh sin a thógáil sna cúirteanna, áit gur féidir léirmhíniú dlíthiúil a fháil. Feicim mar sin féin go bhféadfadh comhlachtaí Poiblí a easaontaíonn le cinntí imscrúduithe, ar bhonn léirmhínithe, a bheith ag roghnú gan dúshlán cúirte a thógáil i gcoinne na gcinntí sin ach ina ionad sin teacht i láthair Coiste Oireachtais chun a gcás a chur os a gcomhair. D'fhéadfadh gur iarracht a bheadh anseo an dá thrá a fhreastal.</p> <p>Cé go ndírítear aird phoiblí ar thuarascálacha a chuirim faoi bhráid Thithe an Oireachtais ag tráth a bhfoilsithe níl aon chlár lárnach poiblí ann a thugann le fios go héasca agus go leanúnach cé hiad na comhlachtaí poiblí atá neamhghéilliúil do reachtaíocht teanga nó go</p>

	deimhin do reachtaíocht eile. D’fheicfinn go bhféadfadh ról a bheith ag a leithéid de chlár mar shlí le cur ina luí ar chomhlachtaí poiblí cloí le moltaí a bhíonn déanta in imscrúduithe reachtúil. D’fheicfinn go bhféadfadh ról a bheith ag coiste Oireachtais comhlachtaí poiblí a chlárú nó a bhaint den taifead, tar éis an cás a mheas. Ba ionann a leithéid de thaifead agus aitheantas an Oireachtais go raibh an sárú suntasach a dhóthain le bheith aitheanta.
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**Considerations of the Joint Committee: Should all public bodies respect and implement, in full, recommendations made by an Ombudsman arising from formal investigations by that Ombudsman and if, on a Motion, the Oireachtas wishes to reject a report of an Ombudsman, a recommendation or recommendations in a report of an Ombudsman, should require a vote majority greater than a ‘Whipped Government Majority’.**

The Joint Committee note the concerns of An Coimisinéir Teanga and for the Joint Committee it is not acceptable that legislation enacted by the Oireachtas is being ignored or not implemented by public bodies even if by claiming they do not have the resources. The Joint Committee support the establishment of a Register of Public Bodies who are non-compliant with the Irish language legislation.

The Joint Committee is aware of the Report of Joint Committee on Finance, Public Expenditure and Reform: *Report on the Principle of Acceptance by Public Bodies of Recommendations of the Ombudsman published July 2012*<sup>18</sup>.

In relation to this report the background is that in June 2003, through correspondence forwarded by the Public Accounts Committee, the then Joint Committee on Finance and the Public Service became aware of a case involving an individual taxpayer and his dealings with the Ombudsman and the Revenue Commissioners. Following a complaint by a member of the public, the Ombudsman commenced a formal investigation into the Revenue Commissioners’ dealings with the individual concerned. The Ombudsman concluded that the individual *‘had been adversely affected by the improper, unfair and unsound actions of the Revenue Commissioners’* and recommended that *‘they take specified measures to mitigate the adverse affect of their action’*. The Ombudsman assessed the redress he considered appropriate and recommended payment [of an amount] to the individual. The Revenue Commissioners rejected this recommendation. Subsequently, the Revenue Commissioners offered a significantly reduced sum of [less than half] which was acceptable to the Ombudsman and also accepted by the individual concerned at that time. The Revenue Commissioners agreed that compensation was due in this case, which is supported by documentation which accompanied the payment to

<sup>18</sup> [http://www.oireachtas.ie/parliament/media/committees/finance/Report---Principles-of-Acceptance-\[Final\].pdf](http://www.oireachtas.ie/parliament/media/committees/finance/Report---Principles-of-Acceptance-[Final].pdf)

the individual concerned. The then Joint Committee on Finance and the Public Service had a concern to ensure that the principle of acceptance by a public body of a recommendation of the Ombudsman should be upheld including, as in this case, a payment of compensation for 'maladministration'. The matter is not about the tax affairs of an individual and the Committee wishes to stress that it would never intervene in the tax affairs of any person.

Further, in Section 2.5 of the report published July 2012, the Joint Committee note the following:

*"The Joint Committee on Finance, Public Expenditure and Reform further note that in 2009 the current Ombudsman, Ms. Emily O'Reilly, issued, under Sections 6(5) and 6(7) of the Ombudsman Act, 1980, the second ever special report to each House of the Oireachtas. This related to the Department of Agriculture, Food and Fisheries and the Lost at Sea Scheme.*

*Further, the Joint Committee on Finance, Public Expenditure and Reform note that in the 2011 Annual Report of the Ombudsman, published June 2012, the Ombudsman noted "I have to report to the Houses of the Oireachtas that the Department of Health has failed to comply with the recommendation I made in my investigation of the Mobility Allowance case ... .. the then Secretary General wrote to say that his department had accepted this recommendation and intended "to act on it within six months as recommended". ... .. This has not happened and, at the time of writing, the Mobility Allowance scheme remains unchanged. This means that the scheme continues to include a condition which is contrary to the Equal Status Act. In view of the foregoing examples, the Joint Committee is concerned that the principle of acceptance by a public body of the recommendation of the Ombudsman is being further eroded."*

Within the above the Joint Committee on Public Service Oversight and Petitions expresses, in the strongest terms possible, its concerns as expressed in the Report of the Joint Committee on Finance, Public Expenditure and Reform, that *"the principle of acceptance by a public body of the recommendation of the Ombudsman is being further eroded."*

The Joint Committee while not wishing to labour the point is clear in its thinking and position that an Ombudsman is an officer of Parliament. This has been noted and stated

previously, not least in the Historical and Modern perspectives of an Ombudsman as delineated in Section A in this report. The Joint Committee again hold in the strongest terms that public bodies MUST adhere to the principle of acceptance by a public body of the recommendation of the Ombudsman. However, given the nature of the recent financial crisis the Joint Committee also see great merit and necessity for a public administration that can be responsive and flexible when a crisis of the magnitude recently experienced befalls the State and the Citizens. The Joint Committee understand and accept that desperate times may require desperate measures.

Accordingly, and given the position of the Joint Committee (which seeks to protect and strengthen the role, function and respect for Ombudsmen) it is not proposing that the principle of acceptance by a public body of the recommendation of the Ombudsman take precedence over the survival of the state. Rather, the Joint Committee wish to have the Office of the Ombudsman respected and where a Dáil Motion proposes the setting aside of a report or a recommendation or recommendations in a report of the Ombudsman, be that in the national interest or for any other reason, then the bar to overturning or setting aside must not simply be by way of a 'Majority of the votes cast'.

The report on the *Lost at Sea Scheme* was overturned/set aside by the Joint Committee on Agriculture, Fisheries and Food on 14 October 2010 by way of a 'Government Whipped Majority'. The Joint Committee regards the undermining of that report - only the second time in the 29 years since the enactment of the Ombudsman Act 1980 that the Ombudsman laid a special report before the Houses of the Oireachtas - as a very egregious act that undermined public confidence in the Ombudsman.

The Joint Committee recommend that provision should be made to allow for the rejection, overturning or setting aside a report or a recommendation or recommendations in a report of the Ombudsman, but this must require a Dáil Vote where 75% of those present and voting assent to the proposal.

#### **F. Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?**

At the public hearings the Joint Committee had with the various Ombudsmen the question of whether all public services whether delivered by the private or public sectors be within the remit of an Ombudsman was considered. The views expressed are set out in Table 6.

**Table 6: Views expressed should all public services, whether delivered by the private or public sectors, be within the remit of an Ombudsman?<sup>19</sup>**

Mr. Peter Tyndall  Ombudsman for Public Service  Meeting with the Joint sub-Committee of 1 October 2014	I have a couple of issues with where services are privately provided. Democratic accountability in that respect does not work in the same way, as the providers are outside the direct control of the Oireachtas and Government. It would be better if bodies in receipt of substantial State funding, for example, nursing homes, came under the State's jurisdiction, which I hope will happen soon because the legislative provision exists to enable such, because I would then be able to make binding recommendations in those instances. It presents a difficulty that such bodies are not accountable to the Oireachtas like the HSE or a contracted service provider is. I would like to see a change in that respect.
Dr. Niall Muldoon  Ombudsman for Children  Meeting with the Joint sub-Committee of 11 March 2015	In regard to children, it is a situation that has existed for a long time. Many of the services for children with intellectual disabilities and other needs are provided through voluntary organisations, mainly on the basis of service level agreements. We have not encountered any issues in following up investigations. However, the 2012 amendment gives us the ability to designate a body as reviewable if necessary. We take the view that if public funding goes into a private entity to provide a public service, we need to have oversight of it.
Mr. Paul Kenny  Pension Ombudsman  meeting with the Joint sub-Committee of 24 September 2014	When we are amalgamated with the Financial Services Ombudsman, there certainly will be a ground floor for anybody with complaints in that broad spectrum. The Ombudsman for Children is a very special case and needs to be totally separate. The Office of the State Ombudsman has acquired a huge increase in the bodies under jurisdiction under the latest legislation and there may be further expansion in that regard. We are all members of what was formerly the British and Irish Ombudsman Association and is now simply the Ombudsman Association. It is the policy of the Ombudsman Association that, where possible, if public services are devolved into the private sector - that is, where the responsibility for a public service is retained by a public body but contracted out to a private provider - then the ombudsman should retain jurisdiction over that service. In such cases, the ultimate responsibility for providing the service will rest with a local authority or similar, even though the day-to-day provision is done by somebody else in the private sector. In other words, the service remains a public service. There is a case to be made for that approach. The issue arises much more often in the United Kingdom, where the authorities were much quicker to privatise everything in sight than we have been. However, it is happening here more and more often. If there is a possibility that some public utilities might ultimately be sold off, for example, this certainly is a matter that merits consideration.
Mr. William Prasifka  Financial Service Ombudsman  Meeting with the Joint sub-Committee of 12	The final question is whether all bodies and entities providing goods and services, whether delivered by the private or public sector, should be subject to the remit of the ombudsman. The statutory Ombudsman has spoken about this and it is a question that is more relevant for him. That said, we would agree with his position. If services were provided by the public sector previously - and under the public regime, a complaint could be made to the Ombudsman - the privatisation of those services provides no reason to deny aggrieved consumers the ability to access the Ombudsman. It should

<sup>19</sup> Full transcripts for each meeting with the relevant URL is set out in Table A

November 2014	not make any difference whether the service provider is in public or private ownership in terms of the public having access to an ombudsman scheme.
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**Considerations of the Joint Committee: Should all public services whether delivered by the private or public sectors be within the remit of an Ombudsman?**

The Joint Committee notes that since the Ombudsman for Public Services appeared before the Joint Committee in March 2015 the application of the remit of the Freedom of Information has been extended and Private Nursing Homes now are within the remit of the Ombudsman for Public Services.

Notwithstanding this the Joint Committee noted the view expressed by the Ombudsman for Public Services to the effect that where services are privately provided then democratic accountability in that respect does not work in the same way, as the providers are outside the direct control of the Oireachtas and Government. Further, the Joint Committee are particularly concerned in regard to children where the Ombudsman for Children advised the Joint Committee that *"Many of the services for children with intellectual disabilities and other needs are provided through voluntary organisations, mainly on the basis of service level agreements. ...We take the view that if public funding goes into a private entity to provide a public service, we need to have oversight of it."*

Further, having regard to the views of the Ombudsman for Public Service in relation to Irish Water – see Table 2 page 15 that *"The office was not consulted about the decision to take water related complaints away from us. When water services were provided by local authorities, if somebody wanted to complain about the water service and he or she did not get a satisfactory response, he or she could have gone to the Ombudsman's office. One day a person could complain to the Ombudsman and the next day he or she could not"*. The Joint Committee consider that Irish Water be within the remit of the Ombudsman for Public Service.

The Joint Committee recommend that where a private sector entity receives public money to fund the delivery of public services then oversight must be vested with the relevant Ombudsman. Further, the Joint Committee recommends that Irish Water be within the remit of the Ombudsman for Public Service.

## G. Should professional legal privilege apply where an Ombudsman initiates a formal investigation?

At the public hearings the Joint Committee had with the various Ombudsmen the question of whether professional legal privilege should apply where an Ombudsman initiates a formal investigation was primarily only considered with the Ombudsman for Children. The views he expressed are set out in Table 7.

**Table 7: Views expressed: Should professional legal privilege apply where an Ombudsman initiates a formal investigation?**<sup>20</sup>

<p>Mr. Peter Tyndall</p> <p>Ombudsman for Public Service</p> <p>Meeting with the Joint sub-Committee of 1 October 2014</p>	<p>In the course of my work, I have been unable to gain access to the materials I need to see. The 2012 amendment Act provided a way forward in this regard, but it could be improved upon by making it absolutely clear that bodies are required to comply with my request for access to information. In no way would the information be put into the public domain. I am referring to situations in which, for example, a body states its legal advice asserts the body is right and I am wrong, but when I ask to see that advice, I am told that I cannot because it is covered by legal privilege. This type of situation is not conducive to the delivery of effective public services and redress.</p> <p>I also have a personal concern about the fact that clinical judgments are not in my jurisdiction. People complaining about the health service believe they should not have to make two separate complaints about the same issues. The professional bodies are not the correct ones to consider complaints about health services. They properly have a high threshold for dealing with complaints, as they consider whether someone is fit to practice. What I handle are complaints from people about the treatment they or their family members have received. They want joined-up answers. This should also be within the jurisdiction of the HSE, as it is not just the case that my office cannot provide independent redress. The HSE cannot consider complaints about clinical judgment either. This lacuna needs to be addressed. These are the issues concerning clinical judgment and jurisdiction and I have discussed the issues of accountability to the Oireachtas and funding</p>
<p>Dr. Muldoon</p> <p>Ombudsman for Children</p> <p>Meeting with the Joint sub-Committee of 1 October 2014</p>	<p><b>Chairman:</b> ...In relation to the issue of legal professional privilege it is most helpful that Dr. Muldoon is before us here today. I am particularly mindful of the March 2012 report by the then ombudsman, Emily O'Reilly, and it was on the operation of the Ombudsman for Children Act 2002. Section 4 of that report deals with investigation of complaints procedure and access to information. I know Dr. Muldoon does not have the report before him but I draw his attention to points 4.2 and 4.3, which state:</p> <p>An issue that has arisen in this context is access to documents in respect of which public bodies claim legal professional privilege. It is not uncommon for this office to have difficulty obtaining documents germane to an investigation due to a claim of such privilege. This can give rise to serious concerns if, as has been the experience of ombudsmen in other jurisdictions, such an approach is adopted primarily to frustrate an investigation. It then goes on to say:</p>

<sup>20</sup> Full transcripts for each meeting with the relevant URL is set out in Table A



	<p>This is not to call into question the importance of legal professional privilege as such. It is to advocate for its proper use. Understanding decision-making by public bodies is the core of the Ombudsman for Children's investigation and there are instances in which much may turn on the legal advice received by a public body. The purpose of obtaining and considering such documentation is to see what light it can cast on the administrative actions of the public body. It should be emphasised that this relates to legal advice received by an organisation under investigation and not any given individual.</p> <p>I note from that report how the Australian federal ombudsman is empowered by section 9 of the Ombudsman Act 1976 to obtain such information. How much of an issue is this for Dr. Muldoon as a new ombudsman coming in? How does his office find or suspect that the claiming of legal professional privilege is adopted primarily to frustrate an investigation?</p> <p><b>Dr. Niall Muldoon:</b> As can be seen from the 2012 report it has been an issue across the office. It is not widespread but certainly it has happened on occasion and we have been able to negotiate our way around it up to now but we would like to put it beyond doubt. The key role of any ombudsman is to find out how a decision was made and why people came to that decision to generate a certain action within a public body. If legal advice guides them in a certain direction it is important that we have that access to that legal advice. We also point out that anything that comes to our attention through an investigatory remit is confidential and so there is no issue in that regard. There are no issues in this regard. It is about putting beyond doubt our ability to access. We believe we have this right as it is, but it is important to have it beyond doubt from the point of the public bodies.</p> <p><b>Chairman:</b> Are there not already sufficient safeguards regarding confidentiality in the existing legislation? Dr. Muldoon has dealt with this but perhaps he would like to add to it. At what stage in the process is legal professional privilege claimed? Is it during the investigation or when a report is mooted or published?</p> <p><b>Dr. Niall Muldoon:</b> The majority of time it is during the investigation process. A report draws on whatever information we have at that stage. We need to look at the legal advice when we go looking for the files and try to create an understanding of what roads lead to a decision. If we have an investigation meeting with somebody from a public body who tells us something is based on legal advice they received, that is when we would seek it. The confidentiality is there, and we are under the belief we have the right to the information at that point in time, but if anything could strengthen this and make it clearer to the public bodies there is no issue, that certainly would be in our favour.</p>
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**Considerations of the Joint Committee: Should professional legal privilege apply where an Ombudsman initiates a formal investigation?**

The Joint Committee, in regard to the issue of clinical judgements, notes the commitment of Minister Varadkar contained in his press release of 12 November 2015

announcing a major package of patient safety reforms "*We will simplify the complaints process and look to extend the powers of the Ombudsman to cover clinical issues*".<sup>21</sup> The Joint Committee supports the Ombudsman for the Public Service in his efforts to have clinical judgements within his remit.

In regard to legal privilege, as noted by the Chairman, the Australian Federal Ombudsman is empowered by section 9 of the Ombudsman Act 1976 [Australia]<sup>22</sup> to obtain information encompassed by professional legal privilege. It should be noted that in the excerpt from the transcript the Chairman mentions the "then ombudsman, Emily O'Reilly". This is an incorrect reference and should refer to Ms. Emily Logan, the then Ombudsman for Children.

Compilation 41 of the Australia Ombudsman Act 1976 [No. 181, 1976]<sup>23</sup> - this is a compilation of the *Ombudsman Act 1976* that shows the text of the law as amended and in force on 1 July 2015 (the *compilation date*). This compilation was prepared on 19 August 2015. Section 9; paragraph 4 – 6 state:

- (4) Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:
  - (a) would contravene the provisions of any other enactment (whether enacted before or after the commencement of the *Prime Minister and Cabinet Legislation Amendment Act 1991*); or
  - (aa) might tend to incriminate the person or make the person liable to a penalty; or
  - (ab) would disclose one of the following:
    - (i) a legal advice given to a Minister, a Department or a prescribed authority;
    - (ii) a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege; or

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<sup>21</sup> <http://health.gov.ie/blog/press-release/varadkar-announces-major-package-of-patient-safety-reforms/>

<sup>22</sup> Seen at <https://www.comlaw.gov.au/Details/C2015C00459>

<sup>23</sup> Ibid

- (b) would be otherwise contrary to the public interest; but the information, the production of the document or record or the answer to the question is not admissible in evidence against the person in proceedings other than:
  - (c) an application under subsection 11A(2); or
  - (d) proceedings for an offence against section 36 of this Act or an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Act.
- (5) A person is not liable to any penalty under the provisions of any other enactment by reason of his or her furnishing information, producing a document or other record or answering a question when required to do so under this Act.
- (5A) The fact that a person is not excused under subsection (4) from furnishing information, producing a document or other record or answering a question does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that information, document or other record or answer.
- (6) The reference in subsection (1) to an officer, in relation to a body corporate, being a body corporate that is not a prescribed authority, includes a reference to a director, secretary, executive officer or employee of the body corporate.

Under the Australian legislative provisions a person is not excused from non-disclosure of legal advice. Dr. Muldoon, in the opinion of the Joint Committee, has expressed the 'kernel' of the issue when he addressed the Joint Committee he advised that *"The key role of any ombudsman is to find out how a decision was made and why people came to that decision to generate a certain action within a public body. If legal advice guides them in a certain direction it is important that we have that access to that legal advice. We also point out that anything that comes to our attention through an investigatory remit is confidential and so there is no issue in that regard. There are no issues in this regard. It is about putting beyond doubt our ability to access. We believe we have this right as it is, but it is important to have it beyond doubt from the point of the public bodies."*

The investigatory remit of an Ombudsman is confidential. The members of the Joint Committee, in the strongest terms possible, stress the importance of an Ombudsman's investigation being confidential. The Joint Committee notes, reflecting on the words of the Ombudsman for Children, that each Ombudsman, including An Coimisinéir Teanga, should have access to any legal advice where that legal advice guides a Department or a Public Body in a certain direction, a certain course of action or a certain decision. The

public understand that you cannot conduct a 'full' inquiry if you have access to only some of the information, with the rest being denied. With the 6 offices of Ombudsman within the Joint Committee's remit not having power to access professional legal advice which was part of a "*...decision to generate a certain action within a public body*" is akin to taking the same action, but hoping for a different outcome.

The Joint Committee recommends that the provisions of confidentiality associated with professional legal advice be addressed by way of amendment(s) to the primary legislation establishing each of the 6 offices of Ombudsman. Further, the Joint Committee also recommends that the amendments, in regard to the 6 offices of Ombudsman including An Coimisinéir Teanga, addresses and strengthens the level, in terms of the confidentiality, that each office possesses so as to permit each Office access or power of access to confidential or professional legal advice. This should be at the level afforded the judiciary or the Oireachtas - which would further enforce the role of 'Officer of the Parliament'. In recommending the approach of amending the powers of access to confidential or professional legal advice by an Ombudsman the Joint Committee are cognisant that the 'general privilege' afforded confidential or professional legal advice should not have to be changed or; by using the approach recommended, have that 'general privilege' weakened.

## **Appendix 1: Members of the Joint Committee**

List of Members of the Joint Oireachtas Committee on Public Service Oversight and Petitions

Chairman: Pádraig MacLochlainn TD (SF)

Vice Chairman: Derek Nolan (LAB)

Deputies: Richard Boyd-Barrett TD (PBP)  
Paul J Connaughton TD (FG)  
Pat Deering TD (FG)  
John Halligan TD (Ind)  
Sean Kenny TD (Lab)  
Seamus Kirk TD (FF)  
Michael P. Kitt TD (FF)  
Michael Healy-Rae TD (Ind)  
Anthony Lawlor (FG)  
Michelle Mulherin TD (FG)  
Mary Mitchell O'Connor TD (FG)  
Aengus Ó Snodaigh TD (SF)  
Jack Wall TD (Lab)

Senators: Tony Mulcahy (FG)  
Trevor Ó Clochartaigh (SF)  
Susan O'Keeffe (LAB)  
Ned O'Sullivan (FF)

1. Deputy Seán O Ferghail was appointed in place of Deputy Dara Calleary on 28 February 2012
2. Senator Thomas Byrne was appointed in place of Senator Darragh O'Brien on 14 June 2012
3. Deputy Richard Boyd-Barrett was appointed in place of Deputy Mick Wallace on 27 June 2012
4. The Committee on Investigations, Oversight and Petitions was renamed the Committee on Public Service Oversight and Petitions on 11 July 2012
5. Deputy Noel Harrington was appointed in place of Deputy John Paul Phelan on 28 November 2012
6. Deputy Peadar Tóibín resigned as Chairman with effect from 10 December 2012
7. Senator Thomas Byrne was discharged from the Committee on 19 December 2012
8. Deputy Pádraig Mac Lochlainn was appointed in place of Deputy Peadar Tóibín on 16 January 2013 and was elected as Chairman to the Committee on 30 January 2013.
9. Deputy Mick Wallace was appointed in place of Deputy Joan Collins on 23 January 2013
10. Deputy Seamus Kirk was appointed in place of Deputy Charlie McConalogue on 18 July 2013
11. Deputy Michael P. Kitt was appointed in place of Deputy Seán Ó Ferghail on 18 July 2013
12. Deputy Helen McEntee was appointed in place of Deputy Peter Mathews on 18 July 2013
13. Deputy Jack Wall was appointed in place of Deputy Michael Conaghan on the 7 October 2013.
14. Deputy Willie Penrose was appointed in place of Deputy Michael McCarthy on the 9 October 2013.
15. Deputy John Halligan was appointed in place of Deputy Mick Wallace on 5 February 2014
16. Deputy Patrick O'Donovan was appointed in place of Deputy Alan Farrell on the 12 February 2014
17. Deputy Sean Kenny was appointed in place of Deputy Willie Penrose on the 5 March 2014
18. Senator Ned O'Sullivan was appointed on the 6 March 2014
19. Deputy Flanagan Automatically discharged from the Committee on his appointment as Minister For Children and Youth Affairs on the 15 May 2014
20. Deputy Pat Deering was appointed in place of Deputy Charlie Flanagan on the 16<sup>th</sup> June 2015
21. Deputy Paul J Connaughton was appointed in place of Deputy Helen McEntee on the 16<sup>th</sup> June 2015
22. Deputy Anthony Lawlor was appointed in place of Deputy Patrick O'Donovan on the 16<sup>th</sup> June 2015
23. Deputy Mary Mitchell O'Connor was appointed in place of Deputy Noel Harrington on the 16<sup>th</sup> June 2015
24. Senator Jimmy Harte was discharged from the Joint Committee on 23<sup>rd</sup> September 2015.

## **Appendix 2: Orders of Reference of the Joint Committee**

### Orders of Reference of the Joint Committee on Public Service Oversight and Petitions

That, notwithstanding anything in Standing Orders—

- (1) the Order of the Dáil of 8th June, 2011 relating to the Joint Committee on Investigations, Oversight and Petitions, as amended by the Order of the Dáil of 29th September, 2011, is amended—
    - (a) in paragraph (1) by the deletion of all words from and including “Investigations,” down to and including “2011” and the substitution of “Public Service Oversight and Petitions, to consider the activities specified in Standing Order 165A.”, and
    - (b) by the deletion of paragraphs (2) and (3) and the substitution of the following:

“(2) Standing Orders 165A to 165E, inclusive, shall apply to the Joint Committee.”,
  - and
  - (2) the Order of the Dáil of 9th June 2011 relating to membership of the Joint Committee on Investigations, Oversight and Petitions is amended by the deletion of all words from and including “Investigations, Oversight and Petitions” and the substitution of “Public Service Oversight and Petitions”.
  - (3) until further notice in the 31st Dáil, the Standing Orders of Dáil Éireann relative to Public Business are hereby amended—
    - (i) by the adoption of the following additional Standing Orders:

“Joint Committee on Public Service Oversight and Petitions.
- 165A. (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, which shall be joined with a similar Committee of the Seanad, to form the Joint Committee on Public Service Oversight and Petitions.
- (2) The Standing Committee shall consist of fifteen members of Dáil Éireann. The quorum of the Joint Committee shall be six, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann. The Chairman of the Joint Committee shall be a member of Dáil Éireann.
  - (3) The Joint Committee shall have oversight of public service delivery generally, with a particular focus on investigating and identifying improvements in the delivery of such services to citizens.
  - (4)
    - (a) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a sub-Committee which shall be called the sub-Committee on the Ombudsman, which shall be joined with a similar sub-Committee of the Seanad Committee, to form the Joint sub-Committee on the Ombudsman.
    - (b) The sub-Committee shall consist of all fifteen members of the Standing Committee. The quorum of the Joint sub-Committee shall be six, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann. The Chairman of the Joint Committee shall be the Chairman of the Joint sub-Committee.
  - (5)
    - (a) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a sub-Committee which shall be called the sub-Committee on Public Petitions, which shall be joined with a similar sub-Committee of the Seanad Committee, to form the Joint sub-Committee on Public Petitions.

- (b) The sub-Committee shall consist of all fifteen members of the Standing Committee. The quorum of the Joint sub-Committee shall be six, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann. The Chairman of the Joint Committee shall be the Chairman of the Joint sub-Committee.
- (6) Without prejudice to the generality of paragraph (3),
  - (a) the Joint sub-Committee on the Ombudsman shall consider—
    - (i) the reports of the Ombudsman which are laid before the Houses of the Oireachtas under the Ombudsman Acts 1980 to 1984,
    - (ii) motions pursuant to section 2 of the Ombudsman Act 1980, which shall stand referred to the Joint Committee for consideration and report to the Houses of the Oireachtas thereon, and
    - (iii) such other matters as may be referred to the Joint sub-Committee by the Houses of the Oireachtas,
  - (b) the Joint sub-Committee on Public Petitions shall consider—
    - (i) public petitions addressed to the Houses of the Oireachtas which shall stand referred to the Joint sub-Committee in accordance with Standing Orders 165B to 165E, inclusive, and
    - (ii) such other matters as may be referred to the Joint sub-Committee by the Houses of the Oireachtas,
  - (c) the Joint Committee shall consider—
    - (i) the quality and standards of public service delivery informed by its sub-Committees' consideration of the reports and petitions under paragraphs (a) and (b), including the effectiveness of public service complaints and redress systems,
    - (ii) such other matters as may be referred to the Joint Committee by the Houses of the Oireachtas, and
    - (iii) any other related matters.
- (7) The Joint Committee and the Joint sub-Committee on Public Petitions shall have the following powers:
  - (a) the powers defined in Standing Order 83, other than paragraphs (2A), (4A), (4B) and (6A) thereof; and
  - (b) power to refer any matter which has been considered by it (and which has been concluded to be of sufficient importance to require additional consideration) to the relevant Joint Committee appointed under Standing Order 82A for further consideration and report back to the Committee.
- (8) The Joint sub-Committee on the Ombudsman shall have the following powers:
  - (a) the powers defined in Standing Order 83, other than paragraphs (4A), (4B) and (6A) thereof; and
  - (b) power to refer any matter which has been considered by it (and which has been concluded to be of sufficient importance to require additional consideration) to the relevant Joint Committee appointed under Standing Order 82A for further consideration and report back to the Committee.
- (9) Each Joint sub-Committee shall have the power to report directly to the Dáil

- (10) The provisions of Standing Order 92, other than paragraph (1) thereof, shall apply to the Joint Committee and its sub-Committees.
- (11) In carrying out their roles under this Standing Order—
  - (a) the Joint sub-Committee on the Ombudsman—
    - (i) shall agree guidelines on collaborative working between the Joint sub-Committee and the Ombudsman, including a right of initiative for the Joint sub-Committee in bringing specific matters to the attention of the Ombudsman, and
    - (ii) may liaise with such other Ombudsmen, regulatory public bodies or bodies established for the purpose of redress, as the Joint sub-Committee considers appropriate,
  - (b) the Joint sub-Committee on Public Petitions may engage with the Committee on Petitions of the European Parliament including in relation to the European Citizens' Initiative.
- (12) It shall be an instruction to the Joint Committee and its sub-Committees that they shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 163 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (13) The Joint Committee shall prepare an annual work programme and an annual report as outlined in Standing Order 86, which shall be laid before both Houses of the Oireachtas.
- (14) The Joint Committee shall review its role generally on an ongoing basis and may make recommendations for change by way of report to the Committees on Procedure and Privileges of both Houses.

#### Lodging a petition.

165B. (1) A petition may be addressed to the Houses of the Oireachtas on a matter of general public concern or interest in relation to their legislative powers or an issue of public policy.

(2) A petition may be lodged by an individual person, a body corporate or an unincorporated association of persons.

(3) A petition shall clearly indicate—

- (a) the name of the petitioner;
- (b) an address of the petitioner to which all communications concerning the petition should be sent; and
- (c) the name and address of any person supporting the petition.

(4) All petitions addressed to the Houses of the Oireachtas shall stand referred to a Committee or sub-Committee empowered to consider petitions under this Standing Order and Standing Orders 165C, D and E (referred to in this Standing Order and Standing Orders 165C, D and E as "the Committee").

(5) The Committee shall, from time to time, determine—

- (a) the proper form of petitions,



- (b) the manner in which petitions are to be lodged with the Houses, and
- (c) such other matters in relation to the consideration of petitions as the Committee considers appropriate and which are not otherwise provided for in these Standing Orders.

Admissibility of petitions.

165C. (1) A petition is admissible unless it—

- (a) requests the Dáil to do anything other than the Dáil has power to do;
- (b) does not comply with Standing Orders or is otherwise not in proper form;
- (c) is *sub judice* within the meaning of Standing Order 57;
- (d) contains the name or names of individuals;
- (e) contains language which is offensive or in the nature of being defamatory;
- (f) is the same as, or in substantially similar terms to, a petition brought by or on behalf of the same person, body corporate or unincorporated association during the lifetime of that Dáil and which was closed by agreement of the Committee;
- (g) is frivolous, vexatious or otherwise constitutes an abuse of the petitions system;
- (h) requires the Committee to consider an individual complaint which has been the subject of a decision by the Ombudsman, by another Ombudsman, or by a regulatory public body or a body established for the purpose of redress.

(2) In relation to admissible petitions, where a petition deals with

- (a) local or regional matters,
- (b) matters which are more appropriate to a regulatory public body or a body established for the purpose of redress,

the Committee shall establish that all available avenues of appeal or redress have been utilised by the petitioner prior to the Committee considering the matter.

(3) The Committee shall consider and decide in a case of dispute whether a petition is admissible and shall notify the petitioner of its decision and of the reasons for that decision.

Action on petitions.

165D. (1) If a petition is admissible, the Committee shall take such action as it considers appropriate in relation to that petition.

- (2) Without prejudice to the generality of paragraph (1), the Committee may—
  - (a) refer the petition to the Ombudsman, another Ombudsman or a regulatory public body or a body established for the purpose of redress;
  - (b) refer the petition to any other Committee as it considers appropriate, with a request for further consideration and report back to the Committee;
  - (c) report to the Dáil with recommendations, including a

request that the report be debated by the Dáil

- (3) The Committee shall notify the petitioner of any action taken under paragraph (2).

Closing of petitions.

165E. (1) The Committee may close a petition at any time.

- (2) Where the Committee closes a petition it shall notify the petitioner that the petition is closed and of the reasons for closing it.”,

and

- (ii) by the insertion in Standing Order 82 of the following subparagraph after paragraph (2)(c):

“(ad) that it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Service Oversight and Petitions in the exercise of its functions under Standing Order 165A.”.