



ombudsman  
for children : do leanáí



# annual report 2005

*an independent voice for children and young people*

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# Message from the Ombudsman for Children



The hard work towards and long wait for the establishment of an Office of Ombudsman for Children in Ireland is finally over and it is my pleasure to be able to provide to the children, young people, all of the people of Ireland and the Houses of the Oireachtas, the report of the first year's work of the Office.

Following my appointment by Her Excellency, President Mary McAleese in December 2003, I took up office on March 26th 2004. I am proud that my appointment was facilitated by the active participation in the recruitment process of fifteen lively and engaged young people who represented the clients of my work: children and young people. I would like to thank and pay tribute to the visionary individuals and departments who developed such a progressive recruitment campaign, for which they deservedly received an award.

The development of a new institution is invariably more difficult and complex within than it appears from without. This first year has been the usual mix of challenge, frustration and the excitement generated by the goodwill and collaboration of so many interested parties and stakeholders. Setting up the Office has been a significant piece of organisational development, an area of activity which tends to be invisible to the media and the public. Despite the enormous expectations of the Office, it was important to give particular consideration to establishing it with the appropriate values, culture, management systems and staff profiles which will serve it well for the long-term. It has often been said that a working culture is engrained at a very early stage. In this respect, considerable effort was invested in establishing a culture of independence, of commitment and hard work for the interests of children and young people, of developing clear and high standards in dealing with complaints and with the public.

A considerable amount of time was invested in developing an understanding of existing stakeholders and work dedicated to children's interests and the safeguarding of children's rights. It is important that our Office acknowledges the work of existing agencies and seeks, within the confines of our purpose and role, to augment rather than duplicate existing work being carried out on behalf of children and young people. While the Office, as a human rights institution and monitor of public policy and practice, has a unique mandate, we believe in the principles of complementarity and partnership and seek to work both collaboratively and constructively at all times. I have focused on building external relationships by meeting with people across all sectors. Consistent with international experience has been the emphasis on the independence of the Office, both from Government and non-governmental sectors.

## The context of inequality in Ireland

Despite Ireland's significant economic growth and development, we continue to have inequality, disparate social strata and marginalisation, with 67,000 children living in consistent poverty. I have met families in real difficulties and parents struggling with systems and structures. We need to review structures, systems and processes to ensure that they enable the achievement of rights by the most vulnerable since these are the people and children who have least resources and means at their disposal to access their rights.

## The International Context

The Ombudsman for Children's Office is one of a growing number of international offices that share a common purpose: to promote and safeguard the rights of children and young people. When Norway was the first country to appoint an Ombudsman for Children in 1981, the institution was viewed singularly as an independent complaints handler. Since the adoption of the United Nations Convention on the Rights of the Child (UNCRC), legislation across Europe has clearly positioned Ombudsman for Children offices not only as complaints handlers but also as advocates for children's rights. We belong to the European Network of Ombudsmen for Children (ENOC) and hope to develop a British and Irish network.

The establishment of this Office is part of a growing international consensus and momentum on how we should respect our children. In Ireland, the development of the Office is a strong statement and demonstration of policy change in relation to children and young people in Irish society.

## Organisational structures and functions

The organisational structures are based on the functions of the Office outlined in the Ombudsman for Children Act, 2002, namely: complaints handling; promotion and safeguarding of children's rights; and research and policy advice.

### Complaints

While dealing with complaints is of great importance to the complainants, it is recognised that complaints can provoke sufficient analysis to recommend strategic policy and practice change to ensure that children's rights are fulfilled. I suggest that my strategic actions should have a wider impact than simply responding to or solving individual complaints.

Therefore, when we make an approach to a public body on behalf of an individual, we will seek greater change than simply sorting out the case of the individual. Indeed, this strikes at the very heart of the nature of rights, that notion of universality and that people are entitled to common standards of treatment and outcomes. This is in stark contrast to some Irish traditions of patronage and doing favours for individuals.

### Promoting Children's Rights

One of the most motivating, rewarding and instructive aspects of the job of Ombudsman for Children has been the direct contact with children and young people. It has been very refreshing and humbling to hear young people so openly and honestly articulate their perspectives and to see some of the real issues for them growing up in Ireland today.

In promoting children's and young people's rights, we seek to use the UNCRC as our guide. The three fundamental principles that will underpin our work include:

- a) non discrimination - that all children living in Ireland regardless of their legal status are treated equally
- b) that decisions made are in the best interests of the child
- c) the right of children and young people to have a say in decisions that affect them.

(A list of groups I have met with is listed in Appendix A, page 28)

### Research and Policy

Good research, proper in-depth analysis, improved knowledge and understanding are essential if children and young people's needs are to be taken seriously in Ireland. Without a vote, they remain politically vulnerable and therefore are at risk of remaining invisible in our society. In this regard we hope to contribute to an understanding of children's and young people's lives in Ireland. We will promote and publish research relating to the rights and welfare of children in an effort not just to highlight issues of concern but also to advocate and press for change.

The Office does not have an 'Oireachtas vote' (enabling independence of budget), and while I accept that it is a growing organisation, I may review whether to seek a separate Oireachtas vote consistent with the independence of the Office. I also expect that an incremental development of the Office will be supported over the coming years.

Finally, I would like to express my sincere thanks to the many people who have supported me and my staff on the first steps of this important journey.



Emily Logan  
Ombudsman for Children  
June 2005

Áras an Úachtaráin, December 2003.



## 2. Introduction

This is the first Annual Report produced by the Ombudsman for Children. It has been submitted to the Oireachtas<sup>1</sup> pursuant to Section 13(7) of the Ombudsman for Children Act, 2002. The report covers the period 25 April 2004 to 25 April 2005.

### 2.1 Period under review

The Ombudsman for Children Act, 2002 was commenced in full on 25 April 2004. Emily Logan was appointed the first Ombudsman for Children in December 2003 and took up office in March 2004. Since April 2004, the Office has been in a set-up phase, becoming fully operational at the end of April 2005 with the completion of the recruitment process and the commencement in office of all staff members.

This report details the activities of the Ombudsman for Children's Office during this set-up period.

### 2.2 Background to the establishment of the Ombudsman for Children's Office

At national level, efforts to bring about the establishment of an Ombudsman for Children in Ireland commenced in 1995 with discussions and debates among civil society actors. These efforts were advanced by the publication, in 1996, of a report commissioned by the Children's Rights Alliance on potential models for a Children's Ombudsman's Office in Ireland.<sup>2</sup>

Later that year, the then Minister of State at the Department of Health and Children, announced a commitment to the establishment of an Ombudsman for Children. Since that time, many civil society and other actors have worked to ensure the realisation of the establishment of the Ombudsman for Children. There were calls for the established of a children's rights mechanism in Ireland at international level too.

In 1998, the UN Committee on the Rights of the Child called for the establishment of an Ombudsperson or Child Rights Commissioner accessible to children and with the power to deal with complaints and provide remedies.<sup>3</sup>

At international level, Ombudsmen for Children and Children's Commissioners have been established in many European Countries, Australia, New Zealand and other countries. The trend commenced with the establishment of the first Ombudsman for Children in Norway in 1981. As already noted by the Ombudsman for Children earlier in this report, this Office is now a member of the European Network of Ombudsmen for Children (ENOC).

The emergence of children's rights mechanisms should also be seen in the context of the development of more generalised human rights institutions at national level worldwide. The United Nations considers that Specialised Institutions, such as the Ombudsman for Children in Ireland, are National Human Rights Institutions.<sup>4</sup> As such, the UN Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights apply to the workings of this Office. These Principles, known as the Paris Principles, lay down important markers for the functioning of human rights institutions including guarantees of independence and the vesting of adequate competences and responsibilities in the mandates of the such institutions. The Ombudsman for Children's Office will work to ensure that its mandate complies with the Paris Principles.<sup>5</sup>

1. The Oireachtas is the Irish Parliament.

2. Cousins, M. *Seen and Heard: Promoting and Protecting Children's Rights in Ireland*. Children's Rights Alliance, 1996.

3. Concluding Observations of the Committee on the Rights of the Child: Ireland 04/02/98. CRC/C/15/ADD.85.

4. See United Nations Office of the High Commissioner for Human Rights, Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights.

5. The Ombudsman for Children's Office is concerned that a Ministerial veto provision contained in Section 11(4) of the Ombudsman for Children Act, 2002 is not in compliance with the Paris Principles. For further information, see Section 5 of this report.



Having fun at the Ombudsman for Children's Big Day Out, St. Patrick's Festival.

## 3. Organisational matters

The Ombudsman for Children's Office was established under primary legislation; the Ombudsman for Children Act, 2002. The Act was commenced in its entirety on 25 April 2004.

### 3.1 Legislation

The Ombudsman for Children's Office was established under primary legislation; the Ombudsman for Children Act, 2002.

The Act was commenced in its entirety on 25 April 2004.

### 3.2 Budget

The Ombudsman for Children's Office does not have its own Oireachtas vote, through which funds would be allocated by the Oireachtas directly to the Ombudsman for Children.

Budgetary provision is made for the Ombudsman for Children within the budget allocated to the Department of Health and Children. The budget is therefore negotiated through the usual government department estimates process.

The original allocation for the establishment of the Office was €282,000. This was subsequently acknowledged as inadequate by the Department of Health and Children and was, through the estimates process, enhanced for 2005 to €2,500,000. €1,500,000 of this amount is a capital investment allocation in respect of the Office's premises and equipment. The remaining €1,000,000 is in respect of the Office's annual costs (pay and non-pay).

During the period under review in this report, the expenditure of the Office was administered directly by the Department of Health and Children.

Under Section 17 of the Ombudsman for Children Act, 2002, the Ombudsman for Children must submit accounts to the

Comptroller & Auditor General's office and attend before the Public Accounts Committee. The Ombudsman for Children's Office, through the accounts section of the Department of Health and Children, complied with its statutory obligations in relation to the reporting, preparation and auditing of the financial statements for the year 2004.

### 3.3 Staff

In developing staffing structures, regard was had to staffing arrangements in other national Ombudsman for Children Offices in Europe and beyond, more specifically, their development and relevance to the Irish context.

The structures employed by this Office are based on the functions of the Ombudsman for Children outlined in the Ombudsman for Children Act, 2002, namely complaints handling, promotion and safeguarding of children's rights and research and policy advice.

The original allocation for the establishment of the Office was seven staff. Before the appointment of the Ombudsman for Children, it had been envisaged that all of the staff of the Office might be seconded from the Civil Service. However, given the nature of the work of the Office particularly in relation to the population we serve, children, it was the Ombudsman for Children's view that a number of posts needed to be advertised nationally to ensure that people with the right skills were involved in providing the best service to children.

Gaining approval for this external recruitment process through the Department of Finance turned out to be a time-consuming process. Nonetheless, approval was finally granted on October 10th 2004, some seven months after the Ombudsman for Children took up office.

Three posts were advertised nationally through the Public Appointments Service. Candidates were interviewed by panels which included children and young people as equal voting members. By the end of April 2005 all staff were in place.

While we appreciate that, at present, the Office is too small to have its own Oireachtas vote, it is of concern that, under current arrangements, the Office may be considered as part of the Department of Health and Children ceiling for staff numbers. In other words, we are concerned that the Office

might be subject to the current recruitment restrictions which apply to the Department of Health and Children. Effectively this arrangement could inhibit the development of the Office. I wish for the record to note my concern in this regard.

The members of Staff of the Ombudsman for Children's Office are:

Emily Logan	Ombudsman for Children
Paul Bailey	Head of Communication and Participation
Sophie Magennis	Head of Research and Policy
Marianne Azema	Head of Investigations
Nikki Gallagher	Communications Advisor
Siobhain Phelan	Office Manager
Mairead O'Hora	Caseworker
Leigh Snedker	Administrative Support
David Walsh	Administrative Support



Pictured left to right: **back row**; Paul Bailey, Siobhain Phelan, Marianne Azema, **middle row**; Sophie Magennis, Emily Logan (Ombudsman for Children), David Walsh, **front row**; Nikki Gallagher, Leigh Snedker, Mairead O'Hora.



Hearing the views of young people, the Crib, Sligo.



Meeting children at the Life Start project, Sligo.

### 3.4 Premises

The Ombudsman for Children's Office operated from 94 St. Stephen's Green, Dublin 2, from July 2004 to June 2005. This space was kindly shared by the Social Services Inspectorate during the design and fit out of the permanent premises at Millennium House, 52 - 56 Great Strand Street, Dublin 1.

At the outset of the search for suitable premises, the needs of the Office were identified by the Ombudsman for Children. A suitable location was identified by the Ombudsman for Children in April 2004. The feasibility of the usage and suitability of the building was then established by the Office of Public Works (OPW). While the capital investment was negotiated by the Ombudsman for Children through the Department of Health and Children, the process of procurement of the premises was managed entirely by the OPW. Work on the "fit-out" of the premises began on 1 December 2004. The completion date is June 2005.

### 3.5 Data Protection

The Ombudsman for Children registered with the Data Protection Commissioner, under the Data Protection Acts, 1988 and 2003, in early 2005. The details of the Ombudsman for Children's Office have been entered in the Public Register of the Data Protection Commissioner.



The Ombudsman for Children  
as drawn by Gráinne, aged 7.



Gráinne

## 4. Role and functions

The role of the Ombudsman for Children is to promote the rights and welfare of children. The functions of the Ombudsman for Children are: to conduct investigations of complaints regarding actions by public bodies; to promote children's rights, including through participation and communication activities; and to provide research and policy advice.

### 4.1 Introduction

Activities undertaken and envisaged in respect of each function are set out below.

#### **Synergy between the three main functions of the Office**

Although each function of the Ombudsman for Children is described separately in this section of the report, we are very conscious of the potential synergy between each function and aim to capitalise on this in our work. In particular, we have adopted a strategic approach to the handling of complaints and will ensure that relevant issues brought to light in complaints received, such as evidence of systemic or grave violations of children's rights, are addressed under the policy and research function where appropriate. In addition, through the 'participation forum' with children, to be established shortly, and other participation activities, the Office will seek to be informed by children of issues of concern to them and to address these issues in its investigation, research, policy or other promotional work.

#### **Complementarity of action with other bodies**

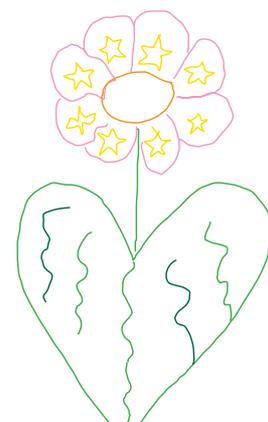
The Ombudsman for Children's Office will seek to bring 'added value' to the field of children's rights and welfare, a field where many actors in the governmental, non-governmental, statutory, legal, academic and other sectors have been active for many years. In particular we will seek to complement

activities already underway and to contribute to the promotion and safeguarding of children's rights through the robust exercise of our unique statutory mandate. In furtherance of this, the Ombudsman for Children has met with many organisations active in the field (see Appendix A) and work has commenced on the preparation of a memorandum of understanding with the Ombudsman (established under the Ombudsman Act, 1980). Memoranda with other organisations charged with a similar role to that of the Ombudsman for Children may be developed in the future.

### 4.2 Complaints

#### **(a) Introduction**

The Ombudsman for Children's complaints handling function is set out in Sections 8 to 16 of the Ombudsman for Children Act, 2002.



According to the Act, the Ombudsman for Children can investigate an action by a public body, a school or a voluntary hospital where, it appears that: <sup>6</sup>

- the action has or may have adversely affected a child, and
- the action was or may have been -
  - taken without proper authority,
  - taken on irrelevant grounds,
  - the result of negligence or carelessness,
  - based on erroneous or incomplete information,
  - improperly discriminatory,
  - based on an undesirable administrative practice, or
  - otherwise contrary to fair or sound administration.

The Ombudsman for Children can investigate an action on her own initiative or where a complaint has been made to her. A complaint can be made by a child or by an adult on behalf of a child.

The policy of the Office is to respect existing local complaints mechanisms or procedures in order to afford an opportunity to the body complained about to respond to the complaint. We will actively encourage complainants to have recourse to such procedures in the first instance. However, where this Office considers that a complaint raises special circumstances it may decide to initiate an investigation at an early stage. These complaints functions provisions were broadly modelled on the existing Ombudsman Acts of 1980 and 1984, however, the Ombudsman for Children Act, 2002 extends the investigative powers of the Ombudsman for Children to include schools and voluntary hospitals.

### **Investigatory powers and conduct of investigations**

Section 14 and 15 of the Ombudsman for Children Act gives this Office the same investigatory powers as the Ombudsman (established under the Ombudsman Act, 1980). These powers are set out in Section 7, 8 and 9 of the Ombudsman Act, 1980 and reproduced at Appendix B to this report. The Ombudsman for Children's investigatory powers are robust and include the power to compel the production of documents, information and things (language used in the Act) and the attendance of witnesses. There is no doubt that these powers must be exercised with great care and responsibility.

When considering complaints brought to its attention, the key consideration of the Office shall always be the best interests of the child or children concerned. We will, at all times, have regard for the dignity and human rights of everyone we deal with and ensure that the Office is accessible to all.

When reviewing complaints received, the Office undertakes a number of steps. In the first instance, we determine whether the complaint is within the remit of the Office and whether the complainant has taken reasonable steps to resolve the matter locally. If these grounds are not met, the Office aims to refer the complainant to the appropriate body/bodies.

The Office conducts a preliminary examination of admissible complaints. If, following a preliminary examination, the Office feels that further enquiries are necessary, it will undertake a full investigation of the matter complained of. This will result in a report of the case investigated. If the Office is not satisfied with the implementation of recommendations set out in a full investigation report, it can refer the matter to the Oireachtas through a special report.

### **(b) Review of complaints received during the period under review**

This section of the report contains an analysis of the complaints received by the Ombudsman for Children's Office to date. As noted earlier in this report, the Ombudsman for Children's Office was in a set-phase during the period under review becoming fully operational in April 2005. As such, this analysis is of value in terms of the context in which it was prepared.

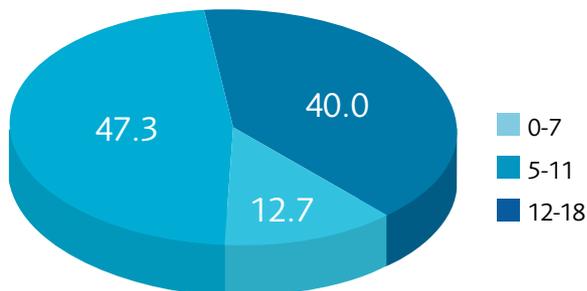
There is a growing interest in the work of the Office. Since our website went live on 23 September 2004 there has been a total of 110,906 hits. The number of complaints began to grow in November 2004 following targeted communication activities undertaken by the Office. Figures for 2005 support the assumption that as the public becomes more aware of the Office and its functions, complaint numbers will rise.

The information set out below relates to the period under review in this report (25 April 2004 to 25 April 2005).

**(i) Information concerning the complainants**

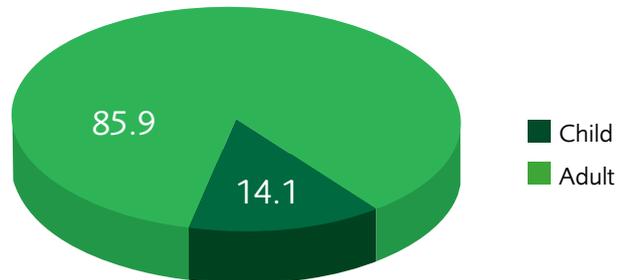
- Gender of children affected by the action complained about  
Of the 177 complaints received:
  - 84 children were male;
  - 56 children were female;
  - 20 complaints concerned both male and female children (for example complaints concerning a number of children in a family or class);
  - In 17 complaints, the gender of the child was not specified.
- Age of children affected by the action complained about  
The chart below illustrates the age of many of the complainants who have lodged complaints with this Office.

AGE GROUP OF CHILDREN (%)



- Communication of complaints to the Office  
As noted above, the Ombudsman for Children's Office can investigate complaints made directly by children or by an adult on their behalf. To date, 14.1% of complaints received were communicated to the Office by children. The Office hopes to increase the ratio of children and young people contacting us by providing more information about the Office and supporting children and young people in taking a more pro-active role in relation to their rights.

WHO IS MAKING COMPLAINTS CHILDREN/ADULTS (%)

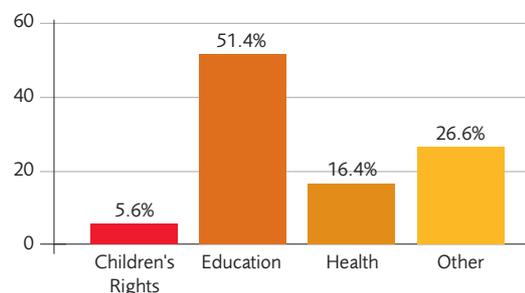


The immediate family (parents, grand-parents, etc) of the child remain the main complainant on behalf of the child. The greatest number of complaints from professionals has been from school principals and solicitors.

**(ii) Information concerning the substance of the complaint**

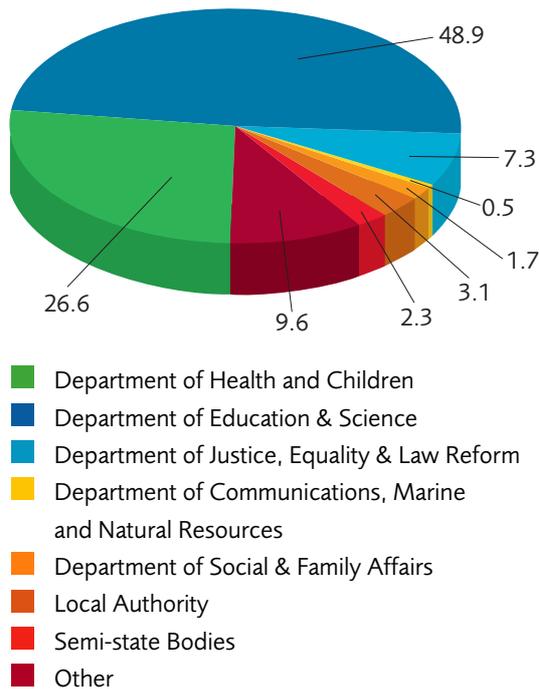
- Issues raised  
51.4% of the complaints received regarded a problem with the education of the child.  
As regards education, 26.4% of the complaints concerned special education, 16.5% regarded material conditions in schools and 13.2% concerned the manner in which complaints of bullying were handled.  
Of the 16.4% complaints concerning health issues, services for children with special needs (24.2%), access to services (24.1%), the standard of Health Service Executive (HSE) services (17.2%) and foster/residential care issues (17.2%) were the primary issues.  
Of the 'other' category of issues:
  - 34% concerned child protection;
  - 27.7% concerned social welfare entitlements;
  - the remaining complaints concerned civil proceedings, custody cases and asylum and immigration issues.

ISSUES RAISED (%)



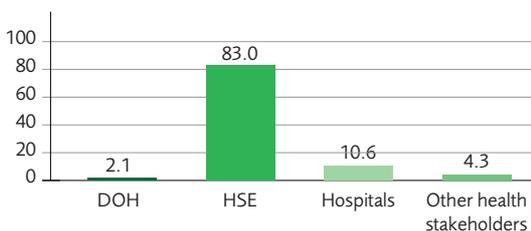
- Bodies the subject of complaints received  
Areas and institutions falling within the responsibility of the Department of Education and Science and the Department of Health and Children were the subject of most of the complaints received by the Office.

WHO ARE THE SUBJECTS OF THE COMPLAINTS (%)

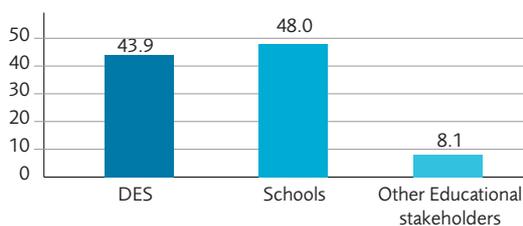


A further breakdown highlights this further.

COMPLAINTS AGAINST BODIES IN THE HEALTH SECTOR (%)



COMPLAINTS AGAINST BODIES IN THE EDUCATION SECTOR (%)



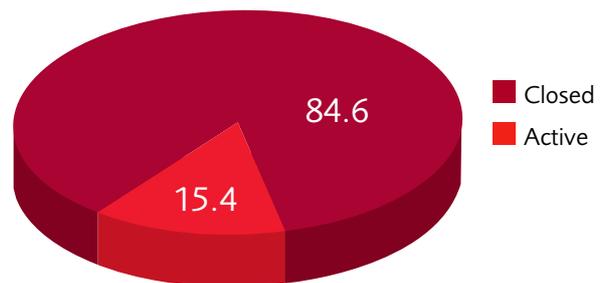
\*\* Note on charts above. The DOH is the Department of Health and Children, the HSE is the Health Service Executive (HSE) and the DES is the Department of Education and Science.

- Geographical Breakdown  
Most of the complaints come from the Dublin Region (31.6%). This mirrors the demographics of the under 18 population. The Ombudsman for Children's Office has been making significant efforts to meet with children and young people living in all counties in Ireland. This effort will be continued in the future.

**(iii) Information concerning the response of the Office to complaints received**

- Complaints within remit  
123 of the complaints received were within remit. 84.6% of those cases have been dealt with and closed. 15.4% remain active.

CLOSED/ACTIVE CASES AS OF 25 APRIL 2005 (%)



It is worth noting that determining whether a complaint is in remit can require a great investment in terms of time and resources particularly in respect of complex complaints.

**(c) Thematic review of complaints received - issues raised**

This thematic review highlights the matters raised in the complaints received by the Ombudsman for Children's Office to date. It is based on the perceptions of the complainants as communicated to the Office and is indicative of issues of concern in the field of children's rights and welfare from the point of view of those complainants. As noted earlier in this report, the Office received 177 complaints during the period under review in this report and the review is based on this number of complaints. The review should therefore be considered in the light of the relatively small number of complaints received so far.

**(i) Administrative practice and barriers to complaints**

- Lack of information

A major barrier which appears to be encountered by complainants is the lack of information on how or where they should go to make a complaint.

While a lot of public bodies (including schools, the Health Service Executive, etc.) undertake efforts to make their complaint procedures known to the public, there seems to be a general lack of awareness regarding local complaint procedures amongst complainants.

This lack of awareness may illustrate the need for public bodies, schools and hospitals to take a more proactive and innovative approach to the promotion of their codes of practice and complaint procedures.

- Delay and reasonable expectations

An issue commonly raised by complainants is that of delays by public bodies in taking a decision and/or responding to an application for services or a complaint. This is a matter of concern for the Ombudsman for Children, not least because at each stage of childhood, the child has different developmental needs. Time is therefore often of the essence in responding to a request for services or a complaint.

This raises the issue of reasonable expectations. For example, what is a reasonable time period that a child can be expected to wait to have a psychological assessment performed or to gain access to special needs resources in a school? What is a reasonable time period for a "bullying" complaint to be investigated by the Board of Management of a school and/or other authorities?

When reviews of public services are undertaken at national level, how are customers' reasonable expectations in terms of the standards of services provided and access to service defined? These queries may demonstrate the need to research and define further the concept of "reasonable expectations" as regards public service delivery and complaint handling by local complaints mechanisms and procedures.

- "One size fits all" approach

A "one size fits all" approach adopted by some public sector actors can lead to a system-orientated approach where children are expected to fit into a system rather than the system being flexible to the individual needs of the child.

- Small communities

People have reported living in small communities as a barrier to making a complaint because of the fear of stigmatisation and of seeing their issue escalating into a whole community issue.

Complainants need to feel that they can complain about a service and that their complaints will be investigated fairly and confidentially.

**(ii) Education**

- Concerns of young people

Most of the concerns expressed by young people thus far relate to material conditions in schools. The issue of the weight of school bags was frequently raised by young people we met during the setting up of the Office. This matter has been raised with the Department of Education and Science.

- Boards of Management

A number of complainants have described a lack of trust in some Boards of Management to deal with the substance of their complaints.

The issues raised included a lack of information about who sits on the Board of Management, what they do, when they meet and the length of time it takes to resolve a complaint. Fear of the authority of the educational professionals was also named as one of the barriers to making a complaint.

- Third party representation and mediation: supporting vulnerable people

There appears to be an issue regarding the inaccessibility of local complaint procedures experienced by some vulnerable parents and young people. When a complainant is having difficulty articulating a complaint (for any reason: confidence; literacy; etc), often there

may be no support available to them. Adequate support such as a mediation service or local advocate would help the most vulnerable to have their voice heard.

- Codes of behaviour/discipline: consulting students. The development of codes of behaviour without consulting children is an area of concern for the Ombudsman for Children's Office. Teachers and parents have to be consulted when developing a school's code of behaviour (according to Section 23 of the Education Welfare Act, 2000). While we are aware that some schools have taken a proactive approach in involving students, there is no obligation to consult with the main target group i.e. the students themselves. Such practices are not in keeping with the spirit of Article 12 of the UN Convention on the Rights of the Child. We consider that students should be involved in developing their schools' code of behaviour and we have made known our position to the Department of Education and Science on this matter through our submission to the Department's task force on Student Behaviour.

### **(iii) Vulnerable children and administrative process: going the extra mile**

- Children with disabilities: the intricacy of the support system  
17.5 % of complaints received during the period under review related to access to services for children with disabilities (children with disabilities represented 24.2% of complaints concerning the health sector and 26.3% of complaints concerning the education sector). The level of complexity in accessing services was the main problem encountered by children with disabilities and their families.

As regards the education sector, the lack of access to special needs assistants and resource teachers were the main areas of concern. The Ombudsman for Children's Office has met with and conveyed its views on this matter to the newly established National Council for Special Education (NCSE). We will regularly communicate relevant information to the NCSE that comes to light through the Office's complaints, participation and research and policy functions.

- All alone?

The welfare of children in care, unaccompanied minors and other children who do not have immediate access to adults (parents, etc) to protect their rights and welfare is a cause of concern for the Office. A very small number of complaints were received from such children and the Office will aim to communicate better with such vulnerable groups and professionals to support them in taking a more pro-active role in relation to their rights.

On a number of occasions, the Ombudsman for Children's Office was delighted to learn of the commitment of education and health professionals who often act as advocates for children in vulnerable situations. We have received many reports of teachers going out of their way to support parents and children through their education and of social workers striving to enhance the welfare of children.

## **4.3 Communication and Participation**

### **(a) Participation**

In all of its work, the guiding principle for the Ombudsman for Children's Office is the best interest of the child. As such, in all of its activities, the Office will be informed by the views of children and young people. Through its communication and participation work, the Office will develop strategies and mechanisms aimed at ensuring that children and young people inform and are informed by the work of the Office. Perhaps one of the most challenging aspects of the realisation of the United Nations Convention on the Rights of the Child for governments, policy makers, researchers and practitioners alike has been how to honour and facilitate participation by children. In rising to meet this challenge, the Office will have regard to innovative participation work already undertaken in this field in Ireland and internationally and will identify ways in which its participation work can bring 'added value' to this area.

There is a sound statutory basis for the Ombudsman for Children's participation activities. Section 7(2)(a) of the Ombudsman for Children Act, 2002 provides that "the Ombudsman for Children shall establish structures to

consult regularly with groups of children" as regards the promotion of the rights and welfare of children. Section 7(2)(b) provides that in such consultations "the views of the child shall be given due weight in accordance with the age of the child".

The Ombudsman for Children's Office hopes that its participation work will advance the realisation of Article 12 of the UN Convention on the Rights of the Child which provides that children should be guaranteed the right to express their views freely in all matters affecting them.

### **Involvement of children in the work of the Office during the period under review**

As noted previously, the Office has been in a set-up phase during the period under review. In the absence of the 'participation forum' with children which we plan to establish shortly (see below), children have been involved in the work of the Office in a number of ways, some of which are described below:

- **Recruitment of Ombudsman and staff**

The Ombudsman for Children was interviewed by a panel of 15 young people aged between the ages of 11 and 17 years. These young people actively participated in every stage of the selection process for the post, from designing the person specification right up to and including the final interview. Young people also participated in the recruitment process for members of staff as full voting members of interview panels.

- **Design of the logo**

Children and young people were involved in the design of the logo for the Ombudsman for Children's Office and we are very happy with the result.



- **Development of the Website**

In December 2004, a competition was launched through schools across the country for the redesign of the temporary website of the Ombudsman for Children. Children and young people responded by e-mail and twelve winners were selected to work with a professional website design company to design a website aimed at children and young people. A website design workshop involving the winners and the website design company was held in May 2005. The new website is due to go live this summer.

Children and young people will continue to be involved in many aspects of the Ombudsman for Children's Office's work.



Participating in the workshop to design the new website.

### **Future involvement of children in the work of the Office**

The Ombudsman for Children's Office is keen to encourage the ongoing participation and involvement of children and young people, not just in the work of the Office, but in all matters which affect their lives. Over the coming twelve months the Office will aim to enhance participation in a number of ways including those described below.

- **Young persons reference group**  
Children and young people will be involved in the development of the terms of reference of the group. However, at this stage, it is envisaged that the roles of the group will include some or all of the following functions:
  - to advise the Ombudsman for Children on issues of concern to young people;
  - to advise the Ombudsman for Children on how to communicate with children and young people;
  - to advise on the ongoing development of the website of the Ombudsman for Children;
  - to act as a sounding board for the Ombudsman for Children on issues she may be concerned about relating to children and young people.
- **Potential of the new premises**  
The Ombudsman for Children was fully involved in the conceptualisation and design of the fit-out for the Ombudsman for Children's Office premises. The principal design aim was to develop a space which would respond well to the needs of the diverse range of children and young people who will visit the Office in the future. The functions of the space include, providing an open area for exhibitions and the display of other work by children, providing a participation room designed to help children feel at ease and providing comfortable, unthreatening private areas in which to receive children who wish to make a complaint.

The Office plans to develop the participatory and education spaces in the premises as an interactive, live environment for use by children and young people. It is envisaged that the space will be used by schools and other groups to engage with the Ombudsman for

Children's Office and learn about their rights and the way the work of the Office relates to them. The space will also function as a venue for young people's 'peer run' organisations.

### **(b) Communication**

Section 7(1)(d) of the Ombudsman for Children Act, 2002 provides that the Ombudsman for Children shall promote awareness among members of the public, including children, of the UN Convention on the Rights of the Child, the rights and welfare of children and how children's rights can be enforced.

Section 7(1)(c) and (e) of the Act provide that the Ombudsman for Children shall collect and disseminate information on matters relating to the rights and welfare of children and highlight issues of concern to children.

The Ombudsman for Children's Office will develop this statutory mandate in all of its work and, in particular, in its communication activities.

The Office will also work to raise awareness about the existence of the Ombudsman for Children's Office and to promote the work of the Office. During the period under review, the Office has noted that there has been a direct correlation between particular instances of media coverage and other external communications undertaken by the Office and the subsequent increase in calls to and complaints made to the Office. Broadcast coverage, in particular, always results in a significant increase in the number of calls received by the Office.

Communication activity undertaken by the Office during the period under review has included the use of a variety of public relations tools including media relations, the interaction of staff with children and young people at events such as the Irish Wheelchair Association national youth conference, the No Name Club youth awards, sponsorship of and participation in the St. Patrick's Festival Big Day Out, direct mailings, the redevelopment of our website and relationship building with key stakeholder groups.

It was very important to us that, at this early stage in our development, we communicated our message in a way that reflected the ethos of our Office. We took a careful, outcome-orientated approach to our communications. We were, and still are, determined to be open and accessible to vulnerable people who seek our help. Cognisant of the early development of the Office we took a proactive approach to promoting the work of the Office, taking steps to inform the public about the many things we can do.

It is crucial for us that we engage with our audiences and young people in particular. We must hear young voices so that our Office can make a real difference to children and young people's lives. In terms of engaging with young people, the teenage group presents a particular challenge because, although they are legally defined as children up to the age of 18, they do not identify themselves as children. This may often mean that they do not consider that the Ombudsman for Children's Office is relevant to them when of course we can be. Reaching this group and encouraging their participation is fundamental to the success of our Office.

Media interest and assistance in generating understanding and awareness of the Office is vital. International evidence has demonstrated that a positive relationship with the media has a real impact on the success of the Office. Many media opportunities occurred in the course of the first year. Some were sought out by the Office; others came to the Office without solicitation.

Local media is proving to be especially effective. Each time the Ombudsman for Children travels to meet groups outside of Dublin, interviews with local radio or press are organised. Local radio also covers many national issues that may have a local angle.

Many communications challenges were presented during the period under review in this report. Many others lie ahead. A five-year communications strategy will be developed this summer. This will outline the communications objectives and identify how they will fit into the overall strategy of the Office.

## 4.4 Policy and Research

The Ombudsman for Children's function to safeguard and promote the rights and welfare of children will be underpinned by this Office's research and policy activities.

The Ombudsman for Children Act, 2002 authorises the Office to conduct policy and research-related work including:

- Advising Ministers on the development and co-ordination of policy relating to children;
- Encouraging public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights and welfare of children;
- Monitoring and reviewing the operation of legislation relating to the rights and welfare of children;
- Monitoring and reviewing the operation of the Ombudsman for Children Act and, whenever necessary, making recommendations for amending it;
- Undertaking, promoting and publishing research into any matter relating to the rights and welfare of children.

In addition, the 2002 Act makes clear that the Ombudsman for Children may, on her own initiative (and shall, at the request of Ministers) give advice to Ministers on any matter relating to the rights and welfare of children. This includes the important right to give advice to Ministers about the probable effect on children of the implementation of proposals for legislation.

As regards work undertaken during the period under review, it is important to note here that the Ombudsman for Children's Office made a submission to the All Party Oireachtas Committee on the Constitution in January 2005. The submission recommended an amendment to the Constitution to grant express rights to children and is available on the Ombudsman for Children's website.

This section of the report outlines how the Office plans to develop its policy and research work and build upon the solid statutory foundation for this work set out in the Ombudsman for Children Act, 2002.

### **Research and policy work will be child-centred and human rights-based**

It is a fundamental tenet of the work of the Ombudsman for Children that the best interests of children and young people shall be at the heart of all work undertaken. Clearly, in the research and policy area, this implies that the subject matter of the work must relate to the safeguarding and promotion of the rights and welfare of children. However, it also means that efforts will be made to ensure that the voices of children and young people are heard as regards the priority areas in which research and policy work should be undertaken, and in respect of the manner in which that work is conducted. Effective consultation with children will be an important component in the planning of research and policy initiatives.

A child-centred approach will be one element of the human rights-based approach to research and policy that will be adopted by the Ombudsman for Children's Office. This means that all research and policy work will be designed to contribute to the practical realisation of the human rights of children as laid out in international law, in particular the UN Convention on the Rights of the Child and other relevant instruments and standards.

### **Research work will be action-orientated**

The rights of children can be more fully realised when research work is action-orientated and designed to deliver results.

The primary goal of the research conducted by the Ombudsman for Children will be to identify the most urgent and pressing problems affecting children in Ireland, and to propose the most effective means to intervene to address them.

Evaluating the impact of measures taken to improve the lives of children will be another important element of this action-orientated research programme.

The Ombudsman for Children's Office research will be action-orientated at all stages, including preparation, design, data collection, analysis / report writing and follow-up. At all of these stages, the advice and assistance of other relevant stakeholders in Ireland will be indispensable.

(In this respect, see also the remarks at the end of this section regarding the complementary nature of our research and policy work).

### **Research and policy work will assist the Ombudsman for Children to provide timely and pertinent advice to Ministers**

The Ombudsman for Children greatly welcomes the fact that the 2002 Act specifically provides that she may, either on her own initiative, or upon request, provide advice to Ministers on matters falling within her mandate. This statutory possibility to make known her views at the highest political level is a valuable additional means through which to ensure that children's voices resonate with the Executive.

In order to ensure that the Office is in a position to provide such advice in a timely and pertinent manner, the Ombudsman for Children's Office intends that its research and policy work will include ongoing monitoring of social, political and legal developments of potential relevance to the rights and welfare of children. In consequence we hope that, when our advice is proffered to, or sought by, Ministers, it will be accepted as timely, well-informed and persuasive.

### **Research and policy work will equip the Ombudsman for Children to advise on the probable effects on children of implementing legislation**

One specific matter on which the Ombudsman for Children's Office may statutorily provide advice to Ministers concerns the probable effect on children of the implementation of proposals for legislation.

This is a very important function, and one which the Ombudsman for Children's Office is committed to discharge in a thorough and effective manner. Where the rights and welfare of children are involved, it is preferable that proposed legislation should be scrutinised from a child's rights perspective before, rather than after, it reaches the Statute Book.

In order to ensure that the Ombudsman for Children is well-equipped to provide such advice, research and policy work will include particular attention to matters which could foreseeably be the subject of legislation.

Naturally, the effective discharge of this function by the Ombudsman for Children's Office will require close co-operation with operational government departments involved in the drafting of legislation potentially affecting children. This will include the adoption of appropriate means through which draft legislation may be submitted to the Ombudsman for Children's Office for consideration or review. Preliminary discussions about this matter have already been held with representatives of certain departments, and there are promising indications that Ministers will be prepared to seek (and, hopefully, also to act upon) the views of the Ombudsman for Children on proposed legislation. Formalising the necessary arrangements to enable the Ombudsman for Children to review all potentially-relevant legislation will be accorded a high priority.

### **Research and policy work will include ongoing reviews of the Ombudsman for Children Act, 2002**

Section 7 (1) (h) of the Ombudsman for Children Act, 2002, provides that the Ombudsman for Children shall:

"monitor and review the operation of this Act and, whenever, he or she thinks it necessary, make recommendations to the Minister or in a report under Section 13 (7) or both for amending this Act'.

A report under Section 13 (7) of the 2002 Act is one relating to the Ombudsman for Children's functions (other than an annual report) which she chooses to lay before each House of the Oireachtas.

This annual report contains a short section in which the Ombudsman for Children's Office makes known its preliminary concerns regarding certain of the limitations and exclusions provided for in the Ombudsman for Children Act, 2002 (the exclusions concerned are set out in Section 11 and Part 2 of the Schedule to the 2002 Act).

In 2005, research and policy work will include a more detailed review of the nature and possible effect of these exclusions. The Ombudsman for Children's Office envisages that, using section 13 (7) of the 2002 Act, it will present a report on this matter to the Oireachtas before the submission of the next annual report in 2006.

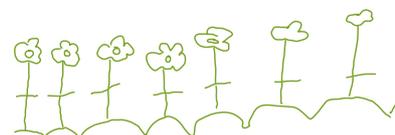
More generally, future research and policy work will include ongoing reviews of the Act under which the Ombudsman for Children holds office.

### **Research and policy work will be conducted in a way that is complementary to other research and policy activities in Ireland**

The Ombudsman for Children's Office is a new institution, established in a context in which many other organisations and individuals in Ireland have been working for many years to protect and promote the rights and welfare of children.

The Ombudsman for Children's Office recognises the very significant contribution that has been made by such individuals and organisations, and is keen to ensure that its future research and policy activities will be complementary to other - ongoing and planned - research and policy activities in Ireland.

In this connection, the Ombudsman for Children has been holding a series of meetings with stakeholder organisations which are active in the research and policy fields in Ireland. She hopes, in this way, to build the positive and constructive working relationships which will be necessary to ensure that the work of the office will genuinely "add value" to existing research and policy initiatives.





Emily meeting young people from counties in the North West of Ireland.



## 5. Limitations and exclusions in the Ombudsman for Children Act, 2002

The Ombudsman for Children's Office is concerned that certain of the limitations and exclusions provided for in the Ombudsman for Children Act, 2002, concerning the Ombudsman for Children's investigatory powers, may preclude the Office from executing effectively its role and functions as set out in the Act.

### 5.1 Introduction

#### (a) Background

The exclusions of concern to the Ombudsman for Children's Office are set out in Section 11 of the Ombudsman for Children Act, 2002 and in Part 2 of the Schedule to the Act. The limitations and exclusions of greatest concern to the Ombudsman for Children are those which apply to: children in certain places of detention; An Garda Síochána, the administration of the law relating to asylum, immigration, naturalisation or citizenship, a provision providing for the exercise of a Ministerial veto on investigations and the Defence Forces.

It is important to note at the outset that these exclusions and limitations apply only to the Ombudsman for Children's powers of investigation. They do not apply to the Ombudsman for Children's policy, research, advocacy or other functions.

Central to the Office's concern is that these limitations and exclusions will remove from its investigatory remit some of the most vulnerable children and young people in the State. Section 7 (1) of the Ombudsman for Children Act provides that "The Ombudsman for Children shall promote the rights and welfare of children...". The Ombudsman for Children considers this an obligation to promote the rights of all children equally. To exclude any group or class of children

from the reach of the Ombudsman for Children's investigatory powers by virtue of, for example, their immigration status or detention in a place not covered by the Act, is to go against the primary objective of the Ombudsman for Children Act: the establishment of an Ombudsman to promote the rights and welfare of all children.

The exclusion of certain groups of children from the Ombudsman for Children's investigatory remit also goes against both the letter and spirit of the UN Convention on the Rights of the Child. The UN Committee on the Rights of the Child has stated that children's rights institutions should proactively reach out to all groups of children in particular the most vulnerable and disadvantaged, such as children in care or detention, refugee and migrant children and other groups. In particular, institutions should have the right of access, in conditions of privacy, to children in all forms of alternative care or other places.<sup>7</sup>

Concerns regarding several of the limitations and exclusions contained in the Act were raised by members of the Oireachtas in both the Seanad and the Dáil during the passage of the Ombudsman for Children Bill, 2002. Indeed, members of the Oireachtas expressed the hope that the exclusion pertaining to the detention of children in places other than those included in the Schedule to the Act would be raised in

7. UN Committee on the Rights of the Child, General Comment No. 2 (2002). The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, CRC/GC/2002/2

8. See Dáil Éireann, Volume 552, 24 April, 2002, Committee and Remaining Stages.

the Ombudsman for Children's annual report(s).<sup>8</sup>

As mentioned in the introduction to this report, the Ombudsman for Children's Office has been in a set-up phase for the period under review, becoming fully operational only in April 2005. Consequently, the Office is not yet in a position to report fully on the limitations and exclusions contained in the Act and the actual and potential consequences thereof. What we intend to do, therefore, is to highlight our key concerns in this first Annual Report and, separately, to report to the Oireachtas on these matters in accordance with Section 13(7) of the Act which provide that the Ombudsman "may from time to time cause to be laid before each House such other reports with respect to those functions as he or she thinks fit". Such a report will be submitted to the Oireachtas prior to submission of the next annual report.

A summary of our key concerns is set out below. This summary is not exhaustive and we may include matters additional to those listed below in our future report to the Oireachtas pertaining to the limitations and exclusions set out in the Act and/or any additional functions or powers which the Ombudsman for Children may consider important to add to the existing functions and powers set out in the Act.

### **(b) Comparison with other Children's Institutions**

In its present form, the Ombudsman for Children Act, 2002 falls short of the level of protection offered to children in other countries. This is demonstrated by way of comparison with the situation in two neighbouring jurisdictions, Northern Ireland and Scotland.

The Commissioner for Children and Young People (Northern Ireland) Order 2003, which sets out the investigatory powers of the Commissioner, does not contain any specific exclusions in relation to asylum, immigration, naturalisation, or citizenship nor in relation to the administration of prisons or other places of detention or of the custody of children.

In Scotland, Section 7 of the Commissioner for Children and Young People (Scotland) Act 2003 provides that the

Commissioner may investigate any service provider providing a service to children or young people in regard to "whether, and to what extent, the service provider has regard to the rights, interests and views of children and young people in making decisions that affect those children and young people." Section 16 of the Act defines a service provider as "any person providing services for children and young people but does not include a parent or guardian exercising the responsibilities imposed or the rights conferred by sections 1 and 2 of the Children (Scotland) Act 1995". The Act contains no express exclusions in relation to asylum, immigration, naturalisation, or citizenship; or to the administration of prisons or other places of detention or custody of children.

Under the Good Friday Agreement, the Irish and British Governments are committed to providing parity of protection for the rights of all people on both sides of the border. Through the Ombudsman for Children Act, 2002, the State has fallen short of the level of protection offered to Children in Northern Ireland by the Northern Ireland Commissioner for Children and Young People. This is a situation that this Office will seek to resolve by way of amendment of the Ombudsman for Children Act, 2002.

## **5.2 Exclusion of children in certain places of detention**

Section 11(1)(e)(iii) of the Ombudsman for Children Act, 2002 provides that the Ombudsman shall not investigate an action "taken in the administration of the prisons or other places for the custody or detention of children" other than the children detention centres and the secure care centres.<sup>9</sup> As such, children detained in prisons and Garda stations are outside of the Ombudsman for Children's investigatory mandate. This exclusion is a cause of great concern to the Ombudsman for Children.

The UN Convention on the Rights of the Child provides that detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.<sup>10</sup>

9. Section 11(1)(e)(iii) provides that places for the custody or detention of children certified under Part IV of the Children Act, 1908 are within the remit of the Ombudsman for Children. In effect, all institutions which fall under the aegis of the Department of Education and Science and the Department of Health and Children are included under the Act. All relevant institutions which fall under the aegis of the Department of Justice, Equality and Law Reform are excluded. The Children Act 1908 will be repealed once the Children Act, 2001 is fully implemented.

10. UN Convention on the Rights of the Child, Article 37 (b).

The Convention also provides that children deprived of their liberty should not be held together with adults and that they should have the right to prompt access to legal and other appropriate assistance.<sup>11</sup>

The Ombudsman for Children's Office is concerned that, at present, significant numbers of children are detained in St. Patrick's Institution and adult prisons throughout the State and that the Ombudsman for Children is currently precluded from acting on complaints received from such children insofar as they relate to matters pertaining to their detention.<sup>12</sup>

Members of the Oireachtas expressed concern regarding this exclusion during the passage of the Ombudsman for Children Bill, 2002. In response, the Minister of State at the Department of Health and Children sought to assuage members concerns by stating that "in relation to children in prisons, the Senators will know that when the Children Act (2001) is enforced, it will be illegal for children to be held in inappropriate places".<sup>13</sup> Despite this assurance, it should be noted that Section 56 of the Children Act, 2001 provides that a detained child can be kept in a cell where no other place is available. In addition, it is clear from statistics received from the Irish Prisons Service that, over three years on from the Oireachtas debates on the Ombudsman for Children Bill, children are consistently detained in adult prisons in the State.

It is important to note the intention expressed by the Oireachtas in relation to this exclusion during the passage of the Ombudsman for Children Bill, 2002. In response to mounting calls for the removal of this exclusion, Section 11(2)(a), providing for the removal of the exclusion at the discretion of one Minister with the consent of another, was inserted into the Bill by way of amendment.<sup>14</sup>

Commenting on this provision, the Minister of State at the Department of Health and Children stated:

"I believe that these children (children in detention) will be included which is why the words 'shall cease to have effect' are included in the amendment. Young people in such institutions will be included, which I am certain that we and the Ombudsman will ensure. It is just not practical to do immediately and I want to set up the office without any delay".<sup>15</sup>

It seems that the only reason advanced for retaining this exclusion was that prisoners already have recourse to complaints mechanisms such as the Inspector of Prisons, the visiting committees, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Court of Human Rights. As regards the later two mechanisms, although highly regarded, they are supra-national institutions which consistently call for the establishment of appropriate, independent national complaints mechanisms and the incorporation of international standards and best practice at national level. In addition, the CPT visits Ireland only twice a decade and it can take many years to bring a case to the European Court of Human Rights. As regards existing national complaints mechanisms, the Ombudsman for Children's Office is of the view that such mechanisms may not be the appropriate mechanisms to deal with complaints from all children in every case. One of the core principals which led to the establishment of an Ombudsman for Children was the principal that children require specific and tailored services when it comes to safeguarding their rights. In this regard, the view of the UN Committee on the Rights of Child on this matter is of note:

"While adults and children alike need independent human rights institutions to protect their human rights, additional justifications exist for ensuring that children's human rights

11. UN Convention on the Rights of the Child, Article 37 (c) and (d)

12. 166 children aged from 15 to 17 were detained in prisons in Ireland in 2004. The latest statistics for 2005 put the number of detentions so far this year at 147 (as at May 2005).

13. Seanad Éireann – Volume 169 – 27 February 2002, Ombudsman for Children Bill, 2002, Committee Stage

14. Section 11(2)(a) provides that the exclusion concerning children in certain places of detention "shall cease to have effect on and after such date as may be specified in an order made by the Minister (for Health and Children) with the consent of the Minister for Justice, Equality and Law Reform".

15. Dáil Éireann – Volume 552 – 24 April, 2002, Ombudsman for Children Bill, 2002, Second Stage

are given special attention. These include the facts that children's developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines governments' response to human rights; children encounter significant problems in using the judicial system to protect their rights and seek remedies for violations of their rights; and children's access to organisations that may protect their rights is generally limited."<sup>16</sup>

In the event that all detained children are brought within the remit of the Ombudsman for Children Act, any potential overlapping of mandates as between the Ombudsman for Children and existing national complaints mechanisms could be addressed in a memorandum of understanding as between the bodies involved. As mentioned previously, the Ombudsman for Children's Office intends to proceed in this manner as regards other existing organisations with remits similar to its own.

Children in detention are amongst the most vulnerable children in the State and, as such, they should have recourse to the Ombudsman for Children on the same basis as all other children in the State. As already noted above, this is a matter the Ombudsman for Children will return to in a future report to the Oireachtas.

### 5.3 Exclusion concerning An Garda Síochána

Part 2 of Schedule 1 of the Ombudsman for Children Act, 2002 excludes a number of public bodies from the ambit of the Ombudsman's investigatory powers under the Act. The Ombudsman for Children's Office is concerned about the exclusion of two of these bodies; An Garda Síochána and the Defence Forces (see 5.6).

An Garda Síochána has a key role to play in both protecting children and young people against criminal activity and in dealing with children caught up in such activity. As regards child protection, the Gardaí are charged with protecting

children and young people against criminal assaults, other offences and abuse in the home and elsewhere.

The Children Act, 2001 sets out an important role for the Gardaí as regards children involved in offending behaviour, including the operation of Garda diversion programmes and other measures. An Garda Síochána is in contact with some of the more vulnerable children in our society on a daily basis and possesses a wide range of powers in dealing with such children, including the power to detain.

Given this central role played by An Garda Síochána, the Ombudsman for Children's Office is concerned that it is precluded by the Act from investigating any action taken by An Garda Síochána which would ordinarily fall within the remit of the Ombudsman for Children. Similar concerns were raised by members of the Oireachtas during debates on the Ombudsman for Children Bill, 2002. At that time, no reasons for the exclusion were advanced by the Government other than that a new Garda complaints mechanism, to be established shortly, would handle complaints from children.

The Ombudsman for Children's Office welcomes the future establishment of an independent Garda complaints mechanism and looks forward to working together with the institution once it is established. The Ombudsman for Children's Office is however of the view that such a mechanism may not, in each and every case, be the most appropriate mechanism to deal with complaints from children. As mentioned above, one of the core principals which led to the establishment of an Ombudsman for Children was the principal that children require specific and tailored services when it comes to the investigation of complaints and other matters. The exclusion of An Garda Síochána from the Ombudsman for Children's remit seems at odds with this well established principal.

In the event that An Garda Síochána is brought within the remit of the Act, any potential overlapping of mandates as between the Ombudsman for Children and a new Garda complaint mechanism could be addressed in a memorandum of understanding as between the two organisations.

16. UN Committee on the Rights of the Child, General Comment No. 2 (2002): The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, CRC/GC/2002/2

## 5.4 Exclusion concerning the administration of the law relating to asylum, immigration, naturalisation or citizenship

The Ombudsman for Children Act, 2002 precludes the Ombudsman for Children from investigating an action "taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship" (Section 11(1)(e)(i)). In response to concerns raised regarding this exclusion in the Oireachtas debates on the Bill in 2002, the Minister of State at the Department of Health and Children (hereafter the Minister of State) stated that:

"Children seeking refugee status or asylum can go to the Ombudsman for Children in relation to that process. It is only the decisions that are excluded".<sup>17</sup>

The Minister of State expanded on her view that the intention of this provision was to exclude only decisions relating to status and to prevent any duplication of the refugee appeals process.

"If, however, there are problems in relation to delays, the provision of accommodation, nutrition, housing, etc, those issues are covered. This provision is only to ensure there is not a duplication of the actual process of the administration of the law...I have checked this carefully with the Department of Justice, Equality and Law Reform. Its intention is that only the final decision is covered, in other words, the administration of the law and not the provision of services surrounding their being in this country".<sup>18</sup>

Notwithstanding these assurances, commentators have warned that, on a plain reading, this provision goes well beyond excluding complaints about official decisions regarding refugee status or citizenship claims.<sup>19</sup> The Ombudsman for Children's Office is therefore concerned that if a broad interpretation is given to the provision the Ombudsman may be precluded from investigating actions in these fields.

All children, without regard to their citizenship or other immigration status, should have equal access to the Ombudsman for Children. To seek to limit access to the Ombudsman for Children on grounds relating to their immigration or other status would be contrary to the UN Convention on the Rights of the Child, Article 2 of which provides:

"State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political, or other opinion, national, ethnic or social origin, property, disability, birth, or other status".

The UN Committee on the Rights of the Child has interpreted Article 2 as placing a requirement upon States to ensure that all the rights in the Convention on the Rights of the Child apply to all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally.<sup>20</sup>

The Ombudsman for Children's Office will revert to the Oireachtas on this matter in a future report to the Oireachtas as noted above.

## 5.5 Ministerial veto

Section 11 (4) of the Ombudsman for Children Act provides that "Where a Minister of the Government so requests in writing...the Ombudsman for Children shall not investigate, or shall cease to investigate, an action specified in the request". This provision is also contained in the Ombudsman Act 1980 under which the Ombudsman (established under that Act) operates.

The Ombudsman for Children's Office considers that this provision fundamentally contradicts Section 6(1) of the Ombudsman for Children Act, 2002, which provides that "The Ombudsman for Children shall be independent in the performance of his or her functions under this Act". The Ombudsman for Children will call for the removal of this provision in her future report to the Oireachtas under Section 13(7) of the Act (see the introduction above).

17. Seanad Éireann – Volume 169 – 21 February 2002, Ombudsman for Children Bill, 2002, Second Stage.

18. Seanad Éireann – Volume 169 – 27 February 2002, Ombudsman for Children Bill, 2002, Second Stage.

19. See Child Law, Geoffrey Shannon, 2005, at page 260 and "The Ombudsman for Children: An Analysis of the Strengths and Weaknesses of the Irish Model", Frank Martin, Administration, vol.52, no. 1 (Spring 2004), at page 57.

20. See UNICEF: "Implementation Handbook for the Convention on the Rights of the Child", at page 26.

When queried about the inclusion of this provision in the Ombudsman for Children Act, 2002, the Minister of State advocated its retention on the basis that it gave protection to the Minister and to the Ombudsman: the Minister could prevent an investigation into any matter for which he or she would be accountable to the Oireachtas and avoid any interference in the role of the Minister; the Ombudsman was protected because any request to stop any investigation had to be made in writing.

The Ombudsman for Children's Office is of the view that things have moved on since this provision was recommended by an all-party committee on administrative justice in the late 1970's and thereafter included in the Ombudsman Act 1980. As noted earlier in this report, the Ombudsman for Children's Office is a specialised national human rights institution to which the UN Principles Relating to the Status and Functioning of National Human Rights Institutions for the Protection and Promotion of Human Rights (otherwise known as the Paris Principles) apply. As such, this Ministerial veto power should be removed from the Ombudsman for Children Act 2002, in order to ensure that the Act complies with the requirement of independence set out in the Paris Principles.

It is worth noting that the Ministerial veto provision contained in the Ombudsman Act 1980 has never been used. However, for as long as it remains in the Ombudsman for Children Act, this provision will have an adverse impact on the way in which the independence of this Office is perceived.

## 5.6 Exclusions concerning the Defence Forces

The Ombudsman for Children is precluded from investigating any action undertaken by the Defence Forces as per the Schedule to the Act and Section 11(1)(b) of the Act which states that the Ombudsman for Children shall not investigate an action which affects "national security or military activity". As children aged 17 can be and are recruited into the Irish Army, the Ombudsman for Children's Office is concerned that actions taken with respect to these children lie outside its remit.

The Ombudsman for Children welcomes the establishment of the Ombudsman for the Defence Forces and looks forward to working together with this new office. It is, however, important to note that for the reasons set out above in relation to both the prisons complaints mechanisms and the envisaged Garda complaints mechanism, the Ombudsman for Children's Office considers that such a body may not always be the most appropriate complaints mechanism for all complaints by all children in the Defence Forces.

## 5.7 Conclusion

The Office looks forward to presenting a full report to the Oireachtas on the limitations and exclusions contained in the Ombudsman for Children Act, 2002. In this regard, it is worth noting that these provisions were never viewed as being cast in stone. Indeed, during debates on the Ombudsman for Children Bill, 2002, the Minister of State stated in the Oireachtas that "this legislation should be seen as a first step. Over time, as legal difficulties are addressed, other organisations in the voluntary and private sectors will be brought within the aegis of the Ombudsman for Children".<sup>21</sup>



Participating in the workshop to design the new website.

21. Dáil Éireann – Volume 552 – 23 April 2002 – Ombudsman for Children Bill, 2002, Second Stage

# Appendix A

Groups the Ombudsman for Children has met (as of June 2005)

## Government Ministers and Departments

Tánaiste and Minister for Health and Children, Mary Harney, T.D.

Minister for Justice, Equality and Law Reform, Michael McDowell, T.D.

Minister for Education and Science, Mary Hanafin, T.D.

Minister of State, Department of Health and Children, Brian Lenihan, T.D.

Minister of State, Department of Health and Children, Tim O'Malley, T.D.

Secretary General, Department of Education & Science

Secretary General, Department of Health and Children

Representatives from Department of Justice Equality and Law Reform

Representatives from Department of Health and Children

Primary Schools Inspectorate, Department of Education and Science

National Children's Office

## State Agencies

Adoption Board

Commissioner of An Garda Síochána, Mr. Noel Conroy

Deputy Commissioner of An Garda Síochána, Mr. Fachtna Murphy

Health Service Executive Representatives

Irish Social Services Inspectorate

National Council for Special Education

National Educational Welfare Board

Special Residential Services Board

## Statutory Bodies

Broadcasting Commission of Ireland

Equality Authority

Mental Health Commission

The Office of the Ombudsman

## Non Governmental Organisations/Voluntary

Amnesty International

ATD Fourth World

Barnardo's

Campaign against Bullying

Children at Risk Ireland

Children's Rights Alliance

Combat Poverty Agency

Educate Together

ECO-UNESCO

Irish Red Cross

Irish Refugee Council

Irish Society for the Prevention of Cruelty to Children

Jack and Jill Foundation

Pavee Point

Mental Health Ireland

One Family

Treoir

## Community Bodies

Ballymun Residential Project

Childcare Network Loch Garman

Cleary Resource and Training Centre

Dun Laoghaire Refugee Project

Encompass

Knocknamona Children's Residential Unit (Letterkenny)

Learning Disability Consultative and Development Committee (Donegal)

Lifestart Sligo

North West Children and Young People Committee Sub-Group

## Young Peoples Organisations

Ballinfolle Neighbourhood Youth Project

Ballybane Youth Development Project

Belong To

Blakestown & Mountview Initiative

Bray Youth Service

Dáil na nÓg

Donegal Youth Council

Dublin City Childcare Committee

Common Purpose, Darndale

Cootehill and Ballybay Adolescent Friendly Health Project

CRIB, Health and Youth Café, Sligo  
 Fingal Comhairle na nÓg  
 Irish Girl Guides  
 Laois Youth Services  
 No Name Club  
 Springboard Resource Centre, Sligo  
 St. Anne's Youth Club, Sligo  
 TeenBetween Group, Laois  
 Union of Secondary Students

## Schools

Ard Scoil na nDeise, Dungarvan, Co Waterford  
 Scoil Mhuire, Ballyboden, Dublin 16  
 Scoil Mhicil Naofa, Athy, Co Kildare  
 S N Baile Raighin, Letterkenny, Co Donegal  
 Scoil Íde, Limerick

## Professional organisations

Association of Secondary Teachers of Ireland  
 Catholic Primary Schools Management Association  
 Irish Congress of Trade Unions Youth Committee  
 Irish Primary Principals Network  
 Irish National Teachers Association  
 National Principals Association  
 National Parents Council  
 OECD Youth Empowerment Partnership Project  
 School Development Planning Support (Primary)  
 National Parents Council Primary

## Political Parties

Fianna Fáil  
 Fine Gael  
 Green Party  
 Independent TD's

## Childrens Rights and Other Human Rights Institutions

Commissioner for Children and Young People in Australia  
 Children's Commissioner for Children and Young People of Wales  
 Irish Human Rights Commission  
 Northern Ireland Commissioner for Children and Young People  
 Scottish Commissioner for Children and Young People

## Attendance at Conference/Events

Age Action Ireland "Grand-parenting Seminar", Dublin, 27/09/2004  
 Amnesty International High Level Seminar, Dublin, 14/03/2005  
 Centre for Early Childhood Development & Education (CECDE) Conference, Dublin, 24/09/2004  
 Childcare Network Loch Garman Conference, Wexford 31/03/2005  
 Childminding Ireland Conference, Mullingar, 21/10/2004  
 Children in an Adult World Conference, Dublin, 06/11/2004  
 Combat Poverty Agency-Seminar on tackling child poverty, Tullamore, Co Offaly, 27/04/2004  
 Comhairle na nÓg Seminar, 27/10/2004  
 Cross Boarder Health Advocacy meeting, Belfast 20/01/2005  
 Cross Border Primary Human Rights Education Initiative Conference 09/10/2004  
 Curriculum Development Unit-Poverty, the Curriculum and the Class Room Project Seminar, Dublin, 17/11/2004  
 Education and the Law Conference, Cork, 16/10/2004  
 Engaging Young People-Challenges and Opportunities Conference, Swinford, Co Mayo, 14/09/2004  
 European Network of Ombudsmen for Children Conference, Cardiff, 13-15/10/2004  
 Foroige-Leaders Conference, Galway, 03/04/2004  
 Garda Youth Diversions Conference, Ballyconnell, Co Cavan, 22-23/02/2005  
 High/Scope Ireland Conference, Dundalk, Co Louth 12/10/2004  
 Irish Catholic Girl Guides Conference, Dublin 02/04/2005  
 Irish Primary Principals Network-Annual Conference, Dublin, 04-05/02/2005  
 Irish Wheelchair Association, Spirit Event, Dublin 20/03/2005  
 L'Europe de l'Enfance meeting, Dublin, 22/04/2005  
 National Children's Research Centre "Children as Carers" Seminar, Dublin, 28/09/2005  
 One Family Conference, Dublin, 03/11/2004  
 Save the Children-Expert Meeting, Rotterdam, 28-29/10/2004  
 South Dublin County Council, Comhairle na nÓg-South Dublin Youth Voices Seminar 01/12/2004  
 St. Patrick's Day-Big Day Out, Dublin, 20/03/2005  
 UNICEF National Committee meeting, Dublin, 26/04/2004  
 Union of Secondary Students General Meeting, Dublin, 29/03/2005  
 Young Social Innovators Conference, Dublin, 13/04/2004

# Appendix B

Ombudsman Act 1980, Sections 7,8 and 9

## Powers of the Ombudsman in respect of examinations and investigations

### Section 7

- (1) (a) The Ombudsman may, for the purposes of a preliminary examination, or an investigation, by him under this Act require any person who, in the opinion of the Ombudsman, is in possession of information, or has a document or thing in his power or control, that is relevant to the examination or investigation to furnish that information, document or thing to the Ombudsman and, where appropriate, may require the person to attend before him for that purpose and the person shall comply with the requirements.
- (b) Paragraph (a) of this subsection does not apply to information or so much of a document as relates to decisions and proceedings of the Government or of any committee of the Government and for the purposes of this paragraph a certificate given by the Secretary to the Government and certifying that any information or document or part of a document so relates shall be conclusive.
- (2) Subject to the provisions of this Act, a person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as if he were a witness before the High Court.
- (3) A person shall not by act or omission obstruct or hinder the Ombudsman in the performance of his functions or do any other thing which would, if the Ombudsman were a court having power to commit for contempt of court, be contempt of such court.
- (4) Any obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to a Department of State or civil servant

imposed by the Official Secrets Act, 1963, shall not apply to an examination or investigation by the Ombudsman under this Act, and, subject to section 9 (2) of this Act, the State shall not be entitled in relation to any such examination or investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

- (5) The Ombudsman may, if he thinks fit, pay to the person affected by an action in respect of which an investigation is held by the Ombudsman under this Act and to any other person who attends or furnishes information for the purposes of the investigation-
- (a) sums in respect of travelling and subsistence expenses properly incurred by them, and
- (b) allowances by way of compensation for loss of their time, of such amount as may be determined by the Minister.
- A statement or admission made by a person in a preliminary examination, or investigation, under this Act by the Ombudsman shall not be admissible as evidence against that person in any criminal proceedings.
- (7) Nothing in subsection (3) of this section shall be construed as applying to the taking of any such action as is mentioned in section 4 (7) of this Act.

## Conduct of investigations

### Section 8

- (1) An investigation by the Ombudsman under this Act shall be conducted otherwise than in public.
- (2) Where the Ombudsman proposes to carry out an investigation under this Act into an action he shall afford-
- (a) any Department of State, or other person specified in Part I of the First Schedule to this Act, concerned, and
- (b) any other person who appears or, in a case where a complaint in relation to the action has been made to the Ombudsman, is alleged, to have taken or

authorised the action,  
 an opportunity to comment on the action and if a  
 complaint in relation to the action has been made  
 to the Ombudsman, on any allegations contained in  
 the complaint.

- (3) Subject to the provisions of this Act, the procedure for conducting an investigation shall be such as the Ombudsman considers appropriate in all the circumstances of the case.
- (4) The Ombudsman may determine whether any person may be represented, by counsel, solicitor or otherwise, in an investigation by him under this Act.

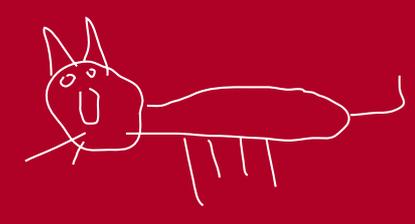
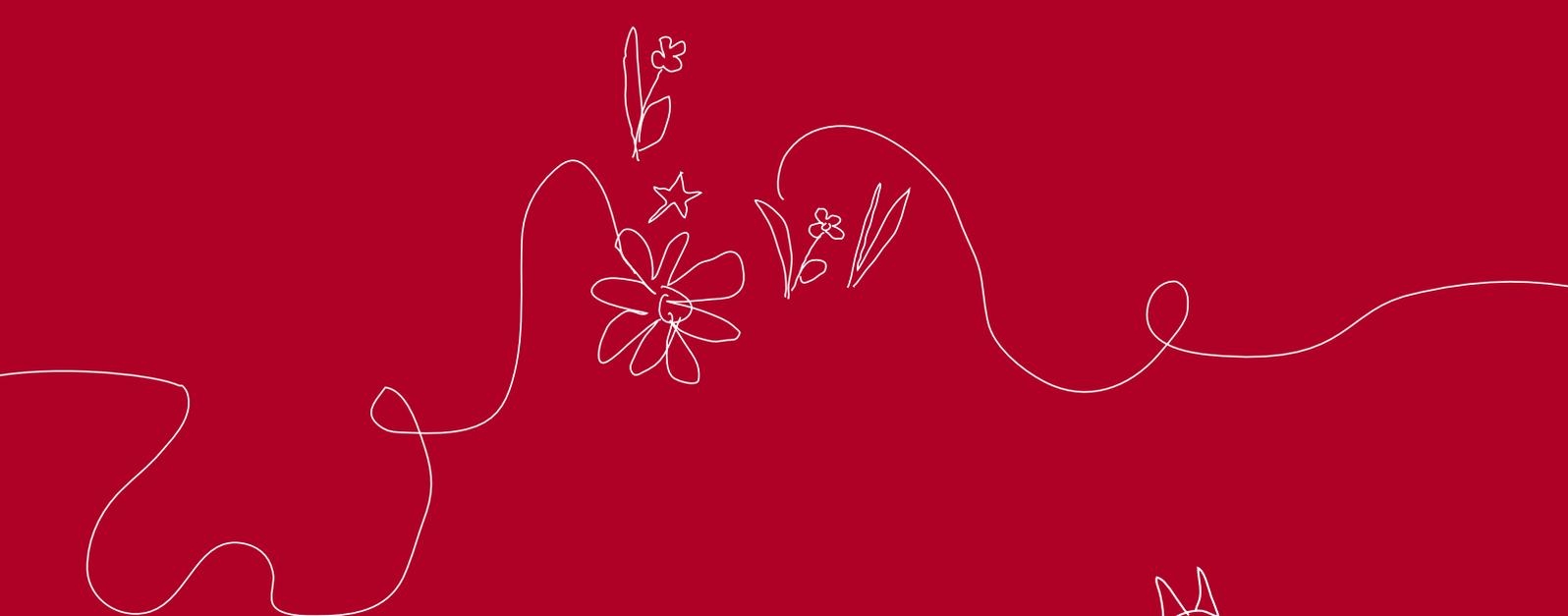
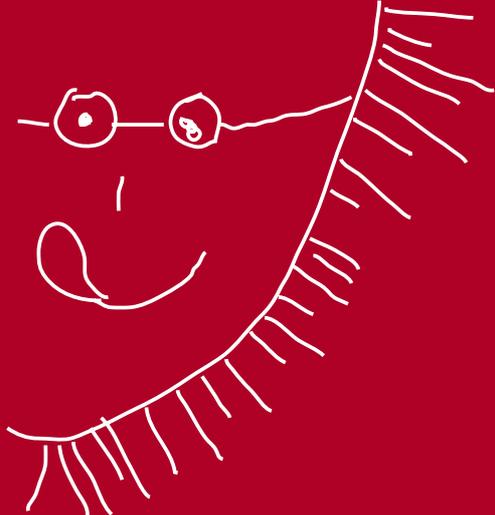
## Secrecy of information

### Section 9

- (1) Information or a document or thing obtained by the Ombudsman or his officers in the course of, or for the purpose of, a preliminary examination, or investigation, under this Act shall not be disclosed except for the purposes of-
- (a) the examination or investigation and of any statement, report or notification to be made thereon under this Act, or
- (b) any proceedings for an offence under the Official Secrets Act, 1963, alleged to have been committed in respect of information or a document or thing obtained by the Ombudsman or any of his officers by virtue of this Act,
- and the Ombudsman or his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of a preliminary examination, or an investigation, under this Act.
- (2) (a) A Minister of the Government may give notice in writing to the Ombudsman, with respect to any document, information or thing specified in the notice, or any class of document, information or thing so specified, that, in the opinion of the

Minister of the Government, the disclosure (other than to the Ombudsman or officers of the Ombudsman) of that document, information or thing or of documents, or information or things of that class, would, for the reasons stated in the notice, be prejudicial to the public interest.

- (b) The Revenue Commissioners may give notice in writing to the Ombudsman, with respect to any document, information or thing in their power or control specified in the notice, or any class of such document, information or thing so specified, that in the opinion of the Revenue Commissioners the disclosure (other than to the Ombudsman or officers of the Ombudsman) of that document, information or thing or of documents, information or things of that class, would, for the reasons stated in the notice be prejudicial to the public interest.
- (c) Where a notice is given under this subsection, nothing in this Act shall be construed as authorising or requiring the Ombudsman or any officer of the Ombudsman to communicate to any person or for any purpose any document, information or thing specified in the notice or any document, information or thing of a class so specified.



The drawings in this report were done by children from Rutland Street National School, Dublin 1.