

A report by
the Ombudsman for Children on
the operation of the Ombudsman for
Children Act, 2002

March 2012

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Foreword

This report has been prepared in accordance with section 7(1)(h) of the Ombudsman for Children Act 2002. I am pleased to submit it to the Oireachtas pursuant to section 13(7) of the Act.

The Ombudsman for Children's Office has been fully operational for nearly 8 years and in that time I have had the opportunity to reflect on the aspects of the 2002 Act that function well and those that could benefit from being enhanced or amended. As noted in the report below, a fuller account of the activities of this Office in the exercise of its statutory functions under the 2002 Act is contained in my annual reports to the Oireachtas. I have not reproduced that information in this report but rather focused on the elements of the Act that have been problematic or that could be changed.

In setting out the recommendations for amending the Ombudsman for Children Act, 2002, I am mindful of the challenging fiscal environment facing the State. Most of the changes sought in this review, however, will be cost-neutral. They relate primarily to making this Office more effective in carrying out its investigatory and advisory functions, and to aligning practice in Ireland with the highest international standards. If the recommendations relating to the extension and clarification of this Office's investigatory remit are accepted, however, it is probable that the volume of complaints considered by this Office will increase. This will take place against the background of consistent year-on-year increases in the number of complaints received by the Ombudsman for Children's Office.

I will engage constructively with the Department of Children and Youth Affairs to explore how these challenges can be met in order to ensure that this Office continues to provide an efficient and effective complaints-handling mechanism for children and their families.

Emily Logan

Ombudsman for Children

Introduction

- 1.1 The Ombudsman for Children's Office was established under the Ombudsman for Children Act, 2002 (the 2002 Act) as an independent statutory body with a mandate to promote the rights and welfare of children in Ireland. The Ombudsman for Children, Emily Logan, was first appointed in December 2003 and the Office has been fully operational since April 2004.
- 1.2 The functions and powers conferred on the Ombudsman for Children by the 2002 Act include the following:
- the traditional complaints-handling function of an Ombudsman;
 - advising Government Ministers on law and policy relating to children;
 - encouraging public bodies to develop their policies, practices and procedures in the interests of children;
 - highlighting issues that are of concern to children and young people themselves; and
 - promoting awareness of issues relating to the rights and welfare of children and how these rights can be enforced.
- 1.3 In addition, the 2002 Act provides that the Ombudsman for Children shall monitor and review the operation of the 2002 Act itself and, whenever she thinks it necessary, make recommendations for amending the Act to the Minister for Children and Youth Affairs or in a report to the Houses of the Oireachtas, or both¹. The following report has been prepared in accordance with this statutory function.
- 1.4 The 2002 Act is, in general, a robust and well-functioning piece of legislation that has underpinned the establishment and development of a strong and credible Ombudsman for Children's Office in Ireland. This has been clearly set out in the annual reports of the Ombudsman for

¹ Ss. 7(1)(h) and 13(7)

Children to the Houses of the Oireachtas, which detail how the scope and nature of the Office's work have grown and evolved since it became operational in 2004. The number of complaints received by the Office has risen from 94 in its first year of operation to nearly 1400 in 2011, bringing the total to approximately 6000 complaints. The Ombudsman for Children has also submitted advice on numerous proposals for legislation relating to issues such as youth justice, sexual offences against children, trafficking, the Constitution, immigration and asylum, child care, adoption, civil partnership, vetting and the reporting of child abuse. In addition, the Ombudsman for Children's Office has engaged directly with thousands of children through its education and participatory work, including young people facing multiple barriers to the realisation of their rights due to their situation or background. These include separated children seeking asylum, young people in detention and young people who have experienced homelessness.

1.5 However, the Ombudsman for Children's annual reports to the Oireachtas have also consistently highlighted certain deficiencies in the 2002 Act, particularly with respect to the Office's investigatory remit. In addition to reiterating these long-standing concerns, this report sets out a number of additional aspects of the 2002 Act that could benefit from amendment. The report has been informed by a number of key considerations, including:

- Ireland's obligations under the UN Convention on the Rights of the Child;
- The UN Principles relating to the status of national institutions for the promotion and protection of human rights (The "Paris Principles");
- International best practice and the experience of Ombudspersons for Children of other jurisdictions;
- The experience gained by the Ombudsman for Children's Office since its establishment, particularly with respect to the conduct of investigations; and

- The provisions of the Ombudsman (Amendment) Bill 2008.

- 1.6 In focusing on the provisions of the 2002 Act that could be enhanced, this report addresses itself to an important but necessarily narrow range of aspects of the Act's operation. In the interests of avoiding duplication with the annual reports of the Ombudsman for Children, this report does not include a comprehensive account of the Office's activities under each of the statutory functions set out in the 2002 Act. It should be read in conjunction with the annual reports of the Office submitted to the Oireachtas in accordance with section 13(7) of the Act in order to gain a full understanding of its operation.
- 1.7 This year will mark the tenth anniversary of the enactment of the Ombudsman for Children Act and the twentieth anniversary of Ireland's ratification of the UN Convention on the Rights of the Child. The Government has also indicated that it intends to hold a referendum to give greater protection to the rights of the child in our Constitution later this year. It is therefore an opportune time to consider how the Ombudsman for Children Act - a significant element of the statutory framework for the promotion and protection of children's rights in Ireland - can also be further enhanced.
- 1.8 Notwithstanding the successful operation of the 2002 Act to date, the State must always ensure that the structures it puts in place to promote and protect the rights of the child are as effective and responsive as they can be. In light of this, it is hoped that the practical and focused recommendations set out in this report receive favourable consideration by the Houses of the Oireachtas and by the Government.

2 International children's rights standards and best practice

- 2.1 Ireland assumed a wide range of obligations upon ratification of the UN Convention on the Rights of the Child (UNCRC) in September 1992. One of those is to report periodically to the UN Committee on the Rights of the Child, which is the independent expert body charged with monitoring the implementation of the Convention. During the Committee's first examination of the steps taken by Ireland to fulfil its obligations under the Convention in 1998, the Committee expressed concern at the lack of an independent monitoring mechanism such as an Ombudsman for Children². In spite of moves at a political level to establish such an Office in the mid-1990s and a significant campaign by civil society organisations, it was not until 2002 that the Ombudsman for Children Act was finally passed.
- 2.2 It is important to situate this development in the context of Ireland's international human rights obligations, as well as a growing trend internationally to establish independent institutions for promoting and monitoring children's rights³.
- 2.3 The UN Committee on the Rights of the Child has elaborated on its understanding of the nature of Convention obligations in both its observations on State party reports and in its general comments on particular aspects of the Convention. The UN Committee devoted one of its general comments exclusively to a discussion of independent national human rights institutions (NHRIs) in the promotion and protection of the rights of the child and what States parties' obligations are with respect to such institutions⁴.

² UN Committee on the Rights of the Child, *Concluding observations on the initial report of Ireland*, CRC/C/15/Add.85, (1998), para. 9

³ The first dedicated Ombudsman for Children was appointed in Norway in 1981. Since that time, the number has grown steadily; the European Network of the Ombudspersons for Children, for example, currently has 40 members.

⁴ 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

- 2.4 This general comment is rooted in article 4 of the Convention, which requires States parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. The UN Committee considers that as independent national human rights institutions are an important mechanism to promote and ensure the implementation of the Convention, the establishment of such bodies falls within the commitment made by States parties upon ratification⁵. Where such bodies have already been established, the Committee has further called upon States parties to review their status and effectiveness in promoting and protecting children's rights⁶.
- 2.5 The general comment emphasises that national human rights institutions should be established in compliance with the UN Principles relating to the status of national institutions for the promotion and protection of human rights (the "Paris Principles"), adopted by the General Assembly of the United Nations in 1993⁷. These minimum standards provide guidance for the establishment, competence, responsibilities, composition, independence and powers of such organisations. The Ombudsman for Children Act, 2002 substantially satisfies these standards; there are, however, a number of areas set out below in which the Act could be strengthened further in light of the Paris Principles.
- 2.6 As the UN Committee has noted, adults and children alike need independent NHRIs to protect their human rights. However, additional justifications exist for ensuring that children's human rights 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

⁵ Ibid., para. 1

⁶ Ibid., para. 2

⁷ Ibid., para. 4. The Principles were endorsed by the UN General Assembly in resolution 48/134 of 20 December 1993.

significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children's access to organisations that may protect their rights is generally limited⁸.

2.7 The general comment of the UN Committee also noted that Ombudspersons for Children were being established in an increasing number of States parties⁹. Indeed, one of the statutory functions of the Ombudsman for Children's Office is to exchange information and cooperate with equivalent organisations in other jurisdictions¹⁰. As an active member of both the European Network of Ombudspersons for Children (ENOC) and the British and Irish Network of Ombudsman and Commissioners for Children (BINOCC)¹¹, this Office has had occasion to consider and discuss with other members of those networks how their organisations and statutory functions operate in practice. Although the context differs in each jurisdiction, this exchange has been beneficial in considering what amendments to the Ombudsman for Children Act, 2002 would be desirable in light of international practice.

⁸ Ibid., para. 5

⁹ Ibid., para. 6

¹⁰ S. 7(1)(f) of the 2002 Act

¹¹ See Ombudsman for Children's Office, *Report to the Joint Oireachtas Committee on Foreign Affairs* (OCO: 2008).

3 Investigation of complaints: jurisdiction

3.1 Sections 8 and 9 of the Ombudsman for Children Act 2002 provide that the Ombudsman for Children may investigate any action taken in the performance of administrative functions by or on behalf of a public body, school or voluntary hospital where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman for Children that:

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

3.2 Any decision, failure to act or omission defined as an “action” taken by or on behalf of a public body, school or voluntary hospital may be examined and investigated under Sections 8 and 9 of the 2002 Act provided:

- the public body is one of those set out in Schedule 1 Part 1, (1) or (2) of the 2002 Act;
- the school is a recognised school within the meaning of the Education Act, 1998 and the procedure prescribed in section 28 of the Education Act, 1998 has been resorted to and exhausted;
- the voluntary hospital is one of those set out in Schedule 2 of the Act.

- 3.3 The Ombudsman for Children has consistently drawn attention to problematic gaps in its investigatory mandate. They arise primarily from section 11 of the 2002 Act and have been the subject of criticism by a range of international human rights monitoring mechanisms such as the UN Committee on the Rights of the Child¹², the UN Committee Against Torture¹³, the UN Human Rights Council¹⁴ and the Council of Europe Commissioner for Human Rights¹⁵.
- 3.4 The UN Committee on the Rights of the Child has made it clear that Ombudsmen for Children should be accessible to all children. In the spirit of article 2 of the UN Convention on the Rights of the Child, the UN Committee recommends that Ombudsmen should proactively reach out to all groups of children, in particular the most vulnerable and disadvantaged, such as (but not limited to) children in care or detention, children from minority and indigenous groups, children with disabilities, children living in poverty, refugee and migrant children, street children and children with special needs in areas such as culture, language, health and education¹⁶.
- 3.5 With respect to Ireland, the UN Committee specifically recommended that the Government, together with the Ombudsman for Children, review and propose amendments to the specific provisions which limit the scope of the Ombudsman's Office investigative powers with a view to eliminating possible gaps which may result in a violation of children's rights¹⁷. This Office understands that the Government will be submitting its next report under the UNCRC for consideration by the UN Committee in the coming months. Against this background, it would be timely for the

¹² UN Committee on the Rights of the Child, *Concluding observations on the second report of Ireland*, CRC/C/IRL/CO/2 (2006), para. 14

¹³ UN Committee Against Torture, *Concluding observations on the initial report of Ireland*, CAT/C/IRL/CO/1 (2011), para. 23

¹⁴ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland*, A/HRC/19/9 (2011), para. 107.11

¹⁵ Council of Europe Commissioner for Human Rights, *Report by the Commissioner for Human Rights on his visit to Ireland*, CommDH(2008)9 (2008), para. 22

¹⁶ UN Committee on the Rights of the Child, General Comment No. 2, para. 15

¹⁷ UN Committee on the Rights of the Child, *Concluding observations on the second report of Ireland*, para.14

Government to give effect to the UN Committee's recommendation in relation to the Ombudsman for Children's remit.

- 3.6 There are a number of categories of young person whose access to this Office's complaints mechanism is limited or uncertain. In light of the UN Committee's recommendation to review this situation, and the general obligation of the State under article 2 of the UNCRC, a number of recommendations are set out below to address these deficiencies in the 2002 Act¹⁸.

Children in detention

- 3.7 Any child detained in one of the children detention schools may make a complaint to the Ombudsman for Children in accordance with the 2002 Act. 16 and 17 year old boys detained in St. Patrick's Institution, however, cannot make a complaint regarding the Institution to the Ombudsman for Children¹⁹. This anomaly arises due to the physical location of these young people: if they were detained in a detention school, they would immediately fall within the investigatory remit of the Office.
- 3.8 Although the detention of young people under the age of 18 in St. Patrick's Institution represents, in itself, a violation of Ireland's international human rights obligations²⁰, this is compounded by the fact that the young people in question cannot access the independent complaints-handling mechanism provided by the Ombudsman for Children's Office.

¹⁸ The first annual report of the Ombudsman for Children included references to exclusions relating to An Garda Síochána and the Defence Forces in its discussion of possible amendments to the 2002 Act. In light of the existence of independent statutory complaints-handling bodies in these areas, and the good working relationship between those organisations and the Ombudsman for Children's Office, this Office considers that there is no need to pursue the possibility of expanding its investigatory remit in these areas.

¹⁹ S. 11(1)(e)(iii)

²⁰ This has been the conclusion of many international monitoring mechanisms, including the UN Committee on the Rights of the Child. See, for example, UN Committee on the Rights of the Child, *Concluding observations on the second report of Ireland*

3.9 It should be recalled that the express intention of the Oireachtas was for this exclusion to be temporary²¹. In response to calls for the removal of the exclusion, section 11(2)(a) was inserted into the Ombudsman for Children Bill; this provides that the relevant section of the Act shall cease to have effect on and after such date as may be specified in an order made by the Minister for Children and Youth Affairs with the consent of the Minister for Justice and Equality. This would ensure that all children in detention would be able to make a complaint to the Ombudsman for Children's Office.

3.10 Commenting on this provision during the Committee Stage debates on the Bill in Dáil Éireann, the then Minister of State at the Department of Health and Children, Minister Mary Hanafin TD, 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 [section 11(2)(a)]. 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 so immediately and I want to set up the office without any delay”²².

3.11 The Minister for Children and Youth Affairs has recently indicated that she is favourably disposed to making an order as provided for in section 11(2)(a) of the Ombudsman for Children Act²³, and this is a welcome development. Although ultimately the practice of detaining children in St. Patrick's Institution must cease – and the Government has committed to bringing this about – extending the remit of this Office will provide an additional protection for young people detained there in the interim.

²¹ See the debate on section 11 during Committee Stage of the Ombudsman for Children Bill's passage through Dáil Éireann. Dáil Éireann - Volume 552 - 24 April, 2002 - Ombudsman for Children Bill, 2002 Committee and Remaining Stages

²² Ibid.

²³ See , for example, the Minister for Children and Youth Affairs's reply to Parliamentary Question 7312/12 of 9 February 2012

Recommendation

An order under section 11(2) of the 2002 Act should be made allowing the Ombudsman for Children to consider complaints from young people detained in St. Patrick's Institution.

Asylum and immigration

3.12 Section 11(1)(e)(i) of the 2002 Act precludes the Ombudsman for Children from investigating an action “taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship”. The stated purpose of this exclusion was to avoid the duplication of statutory determination or appeals processes in this area²⁴.

3.13 This exclusion was also the subject of significant debate during the passage of the Ombudsman for Children Bill through the Houses of the Oireachtas. In particular, concerns were raised that this would leave an especially vulnerable group of children and young people outside the scope of the Ombudsman for Children's investigatory remit. In response, Minister Hanafin stated that:

“[T]he children of asylum seekers and refugees will have access to the Ombudsman for Children in the same way as every other child in Ireland. The only thing that is excluded is the administration of the law, in other words, the procedures for defining and determining whether a person is entitled to a particular status. The administration of the service is a different thing²⁵.”

3.14 The Minister also explained that:

“If, however, there are problems in relation to delays, the provision of accommodation, nutrition, housing etc., those issues are covered. This

²⁴ Dáil Éireann - Volume 552 - 24 April, 2002 - Ombudsman for Children Bill, 2002 Committee and Remaining Stages.

²⁵ Ibid.

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 country²⁶”.

3.15 The Ombudsman for Children raised concerns in her first annual report that this view may not ultimately be shared by the Department of Justice and Equality, notwithstanding the comments made by the Minister of State. In this Office’s subsequent engagement with the Department, it has become clear that we do not hold a shared understanding of the scope of the exclusion contained in section 11(1)(e)(i) of the 2002 Act.

3.16 As noted above, all children should have access to the Ombudsman for Children’s Office regardless of their citizenship, immigration or protection status. To that end, section 11(1)(e)(i) should be amended to clarify that it relates only to decisions regarding status, as outlined by the Minister of State at the time of the Ombudsman for Children Bill’s passage through the Oireachtas.

Recommendation

For the avoidance of doubt, section 11(e)(i) should be amended to clarify that the exclusion regarding the administration of the law in the area of asylum, immigration, naturalisation or citizenship relates solely to decisions taken by the relevant authorities in accordance with statutory procedures for determining whether a person is entitled to a particular status.

²⁶ Seanad Éireann - Volume 169 - 27 February, 2002 - Ombudsman for Children Bill, 2002: Committee Stage.

General review of public bodies subject to investigation by the Ombudsman for Children

3.17 The jurisdictional remit provided in Schedule 1 Part 1 and 2 of the 2002 Act is not organic and does not expand automatically with changes to public bodies which are given a separate statutory existence or functions. Accordingly, administrative actions hitherto within the remit of the Ombudsman for Children may be removed from her remit by the creation or reconstitution of a new public body. Public accountability can thereby be diminished and children are deprived of a mechanism for securing remedies for justified complaints.

3.18 The list of public bodies that are subject to investigation by the Ombudsman for Children can, however, be amended by making an order under section 10(7)(a)(i) of the 2002 Act. This provides that the Government may, after consultation with the Ombudsman for Children, by order amend Schedule 1 of the Act. When an order is proposed to be made in under that section, the Act requires that a draft thereof be laid before each House of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each House²⁷.

3.19 An example of a public body that has not been included within the scope of the Ombudsman for Children's investigatory remit is the National Council for Special Education (NCSE). The Council was originally established in 2003 by an order made by the Minister for Education and Science under the Education Act 1998. The Council as established by that order was formally dissolved in 2005 and re-established under the Education for Persons with Special Educational Needs Act 2004 (EPSEN Act 2004)²⁸. As an independent statutory body, the Council would have to be explicitly included in Schedule 1 of the Ombudsman for Children Act in order to come within the Office's investigatory remit; no such order has been made.

²⁷ S. 10(7)(a)(ii)

²⁸ National Council for Special Education, *Annual Report 2005*, p. 3

3.20 Notwithstanding this fact, the Ombudsman for Children's Office and the National Council for Special Education have engaged constructively on the issue and it is the understanding of this Office that the NCSE has no objection to an extension of this Office's investigatory remit in this area. In light of the importance of the administrative actions of the NCSE relating to education services for children with special educational needs, the Ombudsman for Children's Office considers that the Council should be brought within the ambit of the Schedule 1 of the 2002 Act.

3.21 More generally, Schedule 1 of the 2002 Act should be reviewed in order to ensure that public bodies established since the enactment of the 2002 Act with mandates and functions relevant to children and young people are included. In addition, any such public body established in future should also be included within this Office's investigatory remit.

Recommendations

Schedule 1 of the Ombudsman for Children Act, 2002 should be reviewed generally to ensure that public bodies established after the enactment of the 2002 Act with mandates and functions relevant to children and young people are included within the Schedule.

In particular, an order under section 10(7) of the 2002 Act should be made allowing the Ombudsman for Children to consider complaints regarding the National Council for Special Education (NCSE).

Young people over the age of 18

3.22 Section 2 of the 2002 Act defines "child" as a person under the age of 18 years. This is consistent with other areas of Irish law and the UN Convention on the Rights of the Child.

3.23 However, in other jurisdictions the Ombudsman for Children also has a mandate to examine complaints relating to certain categories of young person over the age of 18 (e.g. those who have been in care). An example of this is the Northern Ireland Commissioner for Children and Young People. The legislation establishing that Office defines a child or young person as a person under the age of 18 or a person aged 18 or over in receipt of certain aftercare services, or a person under the age of 21 with a disability within the meaning of the Disability Discrimination Act 1995²⁹.

3.24 The rationale for extending the remit of an Ombudsman for Children to include young people in this age cohort is that there can be significant continuity between the services received by certain young people under the age of 18 and in the early years of adulthood. In addition, offices such as an Ombudsman for Children often develop expertise in dealing with the complexity of these cases, the relevant public bodies and services providers, as well as with the young people in question and their families. As a result, there is a benefit to including such cases within the same investigatory mandate.

3.25 The Ombudsman for Children's Office considers that a remit similar to that of the Northern Ireland Commissioner for Children and Young People with respect to young people over the age of 18 would be appropriate in the context of the 2002 Act³⁰. This would also advance the principle of parity in the protection of human rights between the two jurisdictions on the island.

Recommendation

The definition of “child” in section 2 of the 2002 Act should be amended to include young people under the age of 21 who have a

²⁹ The Commissioner for Children and Young People (Northern Ireland) Order 2003, 2003 No. 439 (N.I. 11), Article 3

³⁰ Were such an amendment to the 2002 Act to be accepted, this would require the name of the Ombudsman for Children's Office to be changed to the Office of the Ombudsman for Children and Young People

disability within the meaning of section 2 of the Equal Status Act 2002 and young people who have left the care of the Health Service Executive.

Exclusion due to child's right to appeal, reference or review

3.26 Section 11(1)(a)(iii) provides that the Ombudsman for Children shall not investigate any action if the action is one in relation to which the child affected by it has a right of appeal, reference or review to or before a person other than the public body or, if appropriate, the school or voluntary hospital concerned.

3.27 The Ombudsman for Children's Office considers that this exclusion should be narrower and only apply in situations where the right of appeal, reference or review is to or before a person who is independent in the performance of his or her functions in relation to the appeal, reference or review.

Recommendation

Section 11(1)(a)(iii) should be amended to make the exclusion narrower and contingent on the appeal, reference or review being undertaken by a person who is independent in the performance of his or her functions in relation to the appeal, reference or review.

4 Investigation of complaints: procedure and access to information

Legal Professional Privilege

- 4.1 Section 14 of the 2002 Act gives the Ombudsman for Children all the powers of the Ombudsman under Section 7 of the Ombudsman Act 1980 in respect of preliminary examinations and investigations, including the power to call witnesses and request information or documentation necessary for the investigation of the complaint.
- 4.2 An issue that has arisen in this context is access to documents in respect of which public bodies claim legal professional privilege. It is not uncommon for this Office to have difficulty obtaining documents germane to an investigation due to a claim of such privilege. This can give rise to serious concerns if, as has been the experience of Ombuds in other jurisdictions, such an approach is adopted primarily to frustrate an investigation³¹.
- 4.3 This is not to call into question the importance of legal professional privilege as such. It is to advocate for its proper use. Understanding decision-making by public bodies is the core of the Ombudsman for Children's investigation and there are instances in which much may turn on the legal advice received by a public body. The purpose of obtaining and considering such documentation is to see what light it can cast on the administrative actions of the public body. It should be emphasised that this relates to legal advice received by an organisation under investigation and not any given individual.
- 4.4 There are precedents for adopting such an approach. The Australian Federal Ombudsman, for example, is empowered by section 9 of the

³¹ See, for example, New South Wales Ombudsman, *Removing Nine Words: Legal Professional Privilege and the NSW Ombudsman – A Special Report to Parliament under Section 31 of the Ombudsman Act 1974* (2010)

Ombudsman Act 1976 to obtain such information. This section provides that:

“Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:

....

(ab) would disclose one of the following:

(i) a legal advice given to a Minister, a Department or a prescribed authority;

(ii) a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege.

4.5 New South Wales also enacted the Ombudsman Amendment (Removal of Legal Professional Privilege) Act 2010 to prevent a public authority from claiming legal professional privilege in the context of an Ombuds investigation.

Recommendation

The power of the Ombudsman for Children to obtain information from a public body, school or voluntary hospital in the context of an investigation notwithstanding legal professional privilege should be made explicit.

The *in camera* rule

4.6 Given the nature of the investigations undertaken by the Ombudsman for Children, *in camera* information can often be directly relevant to an

understanding of the administrative actions of the public body in question, most often the Health Service Executive.

- 4.7 The Ombudsman for Children has previously called for a thorough review of the *in camera* rule – in all the relevant contexts - as well as a clarification of the law on sharing of information in the best interests of a child³². In particular, the Ombudsman for Children’s Office drew attention to the lack of clarity regarding the jurisdiction of the courts to lift the *in camera* rule in different areas of the law.
- 4.8 It is the understanding of the Ombudsman for Children’s Office that by virtue of section 40 of the Civil Liability and Courts Act, 2004, it can already obtain access to *in camera* information. However, this Office considers that an amendment to the Civil Liability and Courts Act, 2004 would be appropriate to put beyond doubt that there is a power available to the Ombudsman for Children to access such information, including that relating to childcare proceedings.

Recommendation

For the avoidance of doubt, the Civil Liability and Courts Act, 2004 should be amended to clarify that the Ombudsman for Children can access *in camera* information in accordance with that Act, including information arising from childcare proceedings.

Ministerial Veto

- 4.9 Section 11(4) of the 2002 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 that request. Section 13(7) of the Act further provides that the terms of such

³² Ombudsman for Children, *Advice on the Health (Amendment) Bill 2010* (OCO: 2010)

a request and of the statement in writing made by the Minister shall be included in a report by the Ombudsman for Children to the Oireachtas.

4.10 The Ombudsman for Children's Office considers that this provision fundamentally contradicts section 6(1) of the 2002 Act, which provides that the Ombudsman for Children shall be independent in the performance of his or her functions under the Act. In addition, it is clearly at odds with the guidance of the UN Committee on the Rights of the Child on the establishment of independent human rights institutions for the promotion and protection of children's rights³³.

4.11 The rationale for including such a provision advanced by the Minister of State for Children during the Oireachtas debates on the Ombudsman for Children Bill was that it would protect the Minister of the Government and the Ombudsman for Children by safeguarding their individual areas of competence. It mirrors a similar provision in the Ombudsman Act 1980, which has never been used.

4.12 Notwithstanding the fact that such a veto has never been used either under the Ombudsman Act, 1980 or the Ombudsman for Children Act, 2002, this provision has the potential to have an adverse impact on the way in which the independence of the Office is perceived. In light of this, and international guidance on best practice on the establishment of national human rights institutions, section 11(4) should be deleted.

Recommendation

Section 11(4) should be deleted to avoid the perception of Ministerial interference with the Ombudsman for Children's independence.

³³ UN Committee on the Rights of the Child, General comment no. 2, para. 4

Obligation to notify parents

4.13 Section 10(1)(c) requires the Ombudsman for Children to inform a parent of a child if a complaint is made by that child or on behalf of the child by a person other than a parent³⁴.

4.14 This provision has rarely been problematic in the 7 years since the Office's establishment. Indeed, parents are the principal advocates for their children and they make up the largest category of complainants to the Ombudsman for Children's Office. However, there have been unusual situations in which this Office's obligation to inform a parent has led to the complainant withdrawing a complaint. One involved a young person who contacted the Ombudsman for Children's Office to make a complaint regarding the actions of the HSE in dealing with allegations that she was being mistreated by her father and brother. This Office was not able to proceed with the complaint regarding the HSE as the young person chose not to pursue the matter when she was informed that this Office would have to inform a parent regarding the complaint. Another incident related to an uncle who contacted the Ombudsman for Children's Office to complain about the manner in which the HSE was dealing with concerns raised about his nephew's parents. This complaint was also withdrawn when the requirements of section 10(1)(c) were made clear to the complainant.

4.15 Clearly, this difficulty only arises in exceptional circumstances. In the overwhelming majority of cases, it is in the interests of children that a parent be informed before the Ombudsman for Children's Office investigates a complaint. However, it would be advantageous if the 2002 Act were amended to provide that the Ombudsman for Children could, in exceptional circumstances, dispense with the obligation to inform a parent if there were strong reasons to believe that it would not be in the best interests of the child in question for that parent to be informed.³⁵

³⁴ The term parent is broadly defined for the purposes of this subsection. See section 10(1)(d)

³⁵ Such an amendment would of course have to be framed in light of the judgment of the Supreme Court in *MK – v- Information Commissioner* [2006] IESC 2

Recommendation

Section 10(1)(c) should be amended to make the requirement to inform a parent of a complaint made by a child or by a person other than a parent on behalf of the child subject to such a notification being in the best interests of the child.

Response to recommendations

4.16 Section 13 of the 2002 Act provides for the preparation and circulation by the Ombudsman for Children of investigation statements and reports relating to the Office's investigatory function.

4.17 Whenever possible, the Ombudsman for Children's Office highlights systemic difficulties that become apparent in the course of an investigation; these difficulties can often be relevant to organisations other than those what may be under investigation.

4.18 It would be advantageous for the 2002 Act to include a specific provision allowing the Ombudsman for Children to address recommendations made to a particular organisation in general terms to such other agencies, schools and voluntary hospital as she considers appropriate.

Recommendation

Section 13 should be amended to provide that the Ombudsman for Children may make general recommendations arising from an investigation and address them to agencies, schools or voluntary hospitals that were not initially party to the investigation.

Protection from defamation

4.19 Section 13(8) of the 2002 Act provides that certain publications by the Ombudsman for Children shall be absolutely privileged for the purposes

of the law of defamation. These include reports made to the Houses of the Oireachtas in accordance with the Act, statements outlining a decision not to investigate a complaint, statements issued at the conclusion of an investigation and recommendations made to public bodies on foot of an investigation.

4.20 Section 13(8) does not provide for such protection with respect to draft statements issued under section 13(6) of the Act, which affords the opportunity to a person in respect of whom adverse findings have been made to make representations to the Ombudsman for Children in relation to those findings. This should be addressed in an amendment to the relevant section.

4.21 In addition, for the avoidance of doubt, section 13(8) should also clarify that the protection from defamation also applies in situations where a criticism is given to a third party, in addition to the person about whom the criticism is made. This arises naturally given the number of parties to an investigation and to whom statements relating to the investigation are given.

Recommendation

Section 13(8) of the 2002 Act should be amended to extend the privilege for the purposes of the law of defamation to include draft investigation statements issued under section 13(6) of the Act.

Reference of questions of law to the High Court

4.22 It would be beneficial if the Ombudsman for Children were able to refer points of law arising from an investigation under the 2002 Act to the High Court for determination. This would provide the opportunity to settle issues relating to jurisdiction and the conduct of investigations that may from time to time arise during the course of the Office's investigatory work.

Recommendation

The 2002 Act should be amended to enable the Ombudsman for Children at her absolute discretion to refer any question of law arising from an investigation under the Act to the High Court for determination.

Powers in respect of preliminary examinations and investigations

4.23 Section 14 of the 2002 Act provides that the Ombudsman for Children shall have all the powers of the Ombudsman under section 7 of the Ombudsman Act, 1980 with respect to preliminary examinations and investigations. This includes the power to 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, to attend before the Ombudsman for that purpose.

4.24 This provision further states that a person shall not by act or omission obstruct or hinder the Ombudsman in the performance of her 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.

4.25 However, the 2002 Act does not currently have an enforcement mechanism to address situations in which individuals or public bodies refuse to comply with the requirements of section 14. That section should therefore be amended to allow the Ombudsman for Children to apply to the Circuit Court for an order compelling the person concerned to comply with the relevant requirement under section 14.

Recommendation

Section 14 of the 2002 Act should be amended to allow the Ombudsman for Children to apply to the Circuit Court for an order compelling an individual to comply with the requirements of that section where it appears that the person in question has failed to do so.

5 Advisory functions

5.1 Section 7 of the 2002 Act sets out the policy, research and legislative review functions of the Ombudsman for Children's Office. In particular, it provides that the Ombudsman for Children shall:

- advise Ministers on the development and co-ordination of policy relating to children;
- encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights and welfare of children;
- advise Ministers on any matter relating to the rights and welfare of children, including the probable effect on children of proposals for legislation; and
- undertake, promote and publish research into any matter relating to the rights and welfare of children.

5.2 As noted above, this is also the provision of the Act that obliges the Ombudsman for Children to review the operation of the Act itself.

5.3 The broad powers conferred on the Ombudsman for Children under section 7 extend the mandate of the Office beyond that of a traditional ombudsman. In doing so, it incorporates many of the elements of an independent national human rights institution identified by the UN Committee on the Rights of the Child in its general comment, as discussed above.

5.4 In carrying out these functions the Ombudsman for Children is guided by the UN Convention on the Rights of the Child – which the Office is statutorily mandated to promote - and the other international human rights instruments to which the State is party. Although the current advisory powers of the Ombudsman for Children provide ample scope for adopting this rights-focused approach to its work under section 7 of the 2002 Act, the Act could be further enhanced by making this

orientation more explicit in light of the UN Committee's guidance. Of particular note in this regard are the UN Committee's recommendations that national human rights institutions for the promotion and protection of children's should have functions such as:

- Promote harmonisation of national legislation, regulations and practices with the Convention on the Rights of the Child, its Optional Protocols and other international human rights instruments relevant to children's rights and promote their effective implementation, including through the provision of advice to public and private bodies in construing and applying the Convention;
- sensitise the Government, public agencies and the general public to the provisions of the Convention and monitor ways in which the State is meeting its obligations in this regard; and
- provide expertise in children's rights to the courts, in suitable cases as *amicus curiae* or *intervener*³⁶.

5.5 Bearing these elements in mind, section 7 of the 2002 Act should be amended to mandate the Ombudsman for Children to have regard to Ireland's international as well as domestic human rights obligations when carrying out its advisory functions and to raise awareness among public bodies as well as members of the public regarding children's rights. The Ombudsman for Children should also be given a specific statutory function to act as *amicus curiae* where requested or permitted by a court to do so.

Recommendation

Section 7 of the 2002 Act should be amended to make the Ombudsman for Children's advisory and promotional roles more explicitly tied to Ireland's human rights obligations, particularly those under the UN Convention on the Rights of the Child.

³⁶ UN Committee on the Rights of the Child, General Comment No. 2, para. 19

Section 7 should also provide for a statutory function to act as amicus curiae.

6 Additional Amendments

Child protection referrals

- 6.1 Section 16 of the 2002 Act applies Section 9 of the Ombudsman Act 1980 and provides that any information, document or thing obtained by the Ombudsman in the course of an examination is to be treated confidentially and cannot be disclosed except for the purposes of a statement, report or notification under the Act or for the purpose of proceedings for an offence under the Official Secrets Act.
- 6.2 However, information of a child protection nature can come to the attention of the Ombudsman for Children's Office during the course of its investigatory work. When such a situation arises, this Office forwards that information to the Health Service Executive in accordance with *Children First: National Guidance for the Protection and Welfare of Children*, even though section 16 of the 2002 Act would otherwise prohibit the sharing of such information.
- 6.3 Given the general function of the Ombudsman for Children to promote the rights and welfare of children, and the specific obligation to have regard to the best interests of children in carrying out its investigatory work, this Office is satisfied that the current practice of passing all child protection concerns to the HSE poses no legal difficulty.
- 6.4 However, it would be preferable to put the matter beyond doubt and amend section 16 of the Act to explicitly provide for an exception to the general secrecy obligations placed on the Ombudsman for Children in order to share information of a child protection nature with the relevant statutory authorities.
- 6.5 A related issue is the application of the Protection for Persons Reporting Child Abuse Act, 1998. Section 3 of the 1998 Act provides protection

from civil liability to individuals who report child abuse in good faith to designated officers within the HSE or members of An Garda Síochána.

6.6 The Ombudsman for Children's Office has no statutory responsibility in the area of child protection and, in addition to referring concerns in accordance with *Children First*, always directs those raising child protection concerns to the appropriate authorities. However, complainants and others contacting the Office may mistakenly believe the Ombudsman for Children's Office to have a statutory child protection function and disclose information regarding an allegation of child abuse. Moreover, the Ombudsman for Children's Office may be examining or investigating a complaint regarding the acts or omissions of the HSE in the area of child protection; during the course of such examinations or investigations, it is not uncommon for details regarding alleged abuse to be shared with this Office. In these situations, the Ombudsman for Children's Office must satisfy itself that the HSE is fully aware of all the child protection concerns.

6.7 Officers of the Ombudsman for Children's Office that pass such concerns on to the HSE are protected by the 1998 Act; those who relay concerns to the Ombudsman for Children's Office in the first place are not. In view of the practical reality that concerns of a child protection nature will continue to be brought to this Office, consideration should be given to amending the 1998 Act in order to protect from civil liability persons who report child abuse in good faith to officers of the Ombudsman for Children's Office.

Recommendations

Section 16 of the 2002 Act should be amended to put beyond doubt the power of the Ombudsman for Children's Office to share information of a child protection nature with the relevant statutory authorities.

The Protection of Persons Reporting Abuse Act 1998 should be amended to protect persons who report child abuse in good faith to officers of the Ombudsman for Children’s Office from civil liability.

Duty to provide information to children and those acting on their behalf

6.8 In the experience of this Office, the extent to which bodies subject to investigation provide assistance and guidance to children or others acting on their behalf – including information on rights of appeal or review – can vary enormously.

6.9 In order to address this inconsistency and encourage a stronger culture of sound public administration, the Ombudsman for Children’s Office considers that the 2002 Act should include a statutory duty on organisations subject to investigation under the Act to provide information and reasonable assistance to children or those acting on their behalf in any dealings with the organisation. It should further require that they be dealt with properly, fairly and in a timely manner.

Recommendation

The 2002 Act should be amended to include a duty on bodies subject to investigation under the Act to provide information and assistance to children or those acting on their behalf.

Definitions

6.10 Section 2 of the 2002 Act defines “Minister” as the Minister for Health and Children. Although the Office of the Minister for Children and Youth Affairs (Transfer of Departmental Administration and Ministerial Functions) Order 2011 (SI 218/2011) has already transferred the functions of the Minister for Health and Children under the 2002 Act to the Minister for Children and Youth Affairs, it would be desirable to amend the legislation explicitly.

6.11 The Ombudsman (Amendment) Bill 2008 proposed to amend the Ombudsman Act 1980 and, among other things, include new terminology relating to the bodies that are subject to investigation by the Ombudsman. Given the relationship between the Ombudsman Act, 1980 and the Ombudsman for Children act, 2002 with respect to the examination and investigation of complaints, it would be appropriate to emulate those particular changes in any amendment to the Ombudsman for Children Act 2002.

6.12 Other minor amendments contained in the Ombudsman (Amendment) Bill 2008 contained in the draft Bill below should also be include in any future amendment to the Ombudsman for Children Act 2002.

Recommendations

The definition of “Minister” in section 2 of the Act should now be clarified to mean the Minister for Children and Youth Affairs.

Certain provisions of the Ombudsman (Amendment) Bill 2008 relating to the terminology employed to describe organisations subject to investigation should be emulated in the Ombudsman for Children Act, 2002.

APPENDIX 1

OMBUDSMAN FOR CHILDREN (AMENDMENT) BILL 2012

BILL

entitled

AN ACT TO AMEND THE OMBUDSMAN FOR CHILDREN ACT 2002, TO PROVIDE FOR THE CONSEQUENTIAL AMENDMENT OF CERTAIN OTHER ACTS, TO MAKE PROVISION IN RELATION TO PUBLICATION OF REPORTS AND PRODUCTION OF DOCUMENTS PREPARED FOR THE PURPOSES OF PROCEEDINGS TO BE HEARD OTHERWISE THAN IN PUBLIC, TO STRENGTHEN PROCEDURES FOR REPORTING CHIDL PROTECTION CONCERNS AND TO PROVIDE FOR CONNECTED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

OMBUDSMAN FOR CHILDREN AND YOUNG PEOPLE

Short title and commencement.

- 1.-(1) This Act may be cited as the Ombudsman for Children (Amendment) Act 2012.
- (2) The Ombudsman for Children Act 2002 and this Act may be cited together as the Ombudsman for Children Acts 2002-2012.
- (3) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or different provisions.

Definition.

2.-In this Act “Principal Act” means the Ombudsman for Children Act 2002.

Alteration of name.

3.-(1) The name of the office, the present name of which is the office of the Ombudsman for Children, is altered to that of the office of Ombudsman for Children and Young People.

(2) The title of the holder of the office, whose present title is the Ombudsman for Children, is altered to that of the Ombudsman for Children and Young People.

(3) In an enactment or instrument made under an enactment-

(a) references to the office of Ombudsman for Children shall be construed as references to the office of Ombudsman for Children and Young People.

(b) references to the Ombudsman for Children shall be construed as references to the Ombudsman for Children and Young People.

Amendment of section 2 (interpretation) of Principal Act.

4.-Section 2 of the Principal Act is amended -

(a) in subsection (1) –

(i) by substituting the following definition for the definition of “child”:

““child” means -

(a) a person under the age of 18 years,

(b) a person under the age of 21 years and who has a disability within the meaning of s.2 of the Equal Status Act 2000,

(c) a person who has left the care of the Health Service Executive under the Child Care Act 1991 and -

(i) who has not attained the age of 21 years, or

(ii) who, upon attaining the age of 21 years was engaged in a course of education or instruction at any university, college, school or other educational establishment and who remains so engaged.”,

(ii) by inserting the following definitions after the definition of “civil servant”:

“entity” means a person, body of persons, organisation or group (other than a school or voluntary hospital), including, in particular, an organ of government, or an element of an organ of government, at national or local level;”,

“exempt agency” means—

(a) an entity specified in Schedule 2,

(b) an entity (being an element of an entity specified in Schedule 1 that is expressed by that Schedule to be excluded), and

(c) an entity (being an element of an entity declared by an order under section 2A to be a reviewable agency) that is expressed by that order to be excluded;”,

(iii) by substituting the following definitions for the definitions of “the Minister” and “public body”

“the Minister” means the Minister for Children and Youth Affairs”

“reviewable agency” means—

(a) an entity specified in Schedule 1, except to the extent that any element of that entity is expressed by that Schedule to be excluded, and

(b) an entity declared by an order under section 2A to be a reviewable agency, except to the extent that any element of that entity is expressed by that order to be excluded.”,

(b) in subsection (3)-

(i) by substituting “an entity (other than a Department of State) that is a reviewable agency or an exempt agency” for “a public body (other than a Department of State)”, and

(ii) by substituting “the entity” for “the public body” in each place where it occurs,

and

(c) by deleting subsection (6).

Reviewable agency.

5.- The Principal Act is amended by inserting the following section after section 2:

“2A.—(1) Subject to subsections (2) and (3), the Government may, after consultation with the Ombudsman for Children, by order declare to be a reviewable agency—

(a) an entity established by or under any enactment (other than the Companies Acts) or any scheme administered by a Minister of the Government,

(b) an entity, being—

(i) a company established under the Companies Acts in pursuance of powers conferred by or under another enactment, or

(ii) any other entity, that is financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government,

(c) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government,

(d) any other entity established or appointed by the Government or a Minister of the Government,

(e) any other entity on which functions in relation to the general public or a class of the general public stand conferred by any enactment (but only in respect of those functions),

(f) a subsidiary (within the meaning of the Companies Acts) of a company to which paragraph (b)(i) or (c) relates, or

(g) an entity (other than a subsidiary to which paragraph (f) relates) that is directly or indirectly controlled by an entity to which paragraph (a), (b)(ii), (c), (d) or (e) relates.

(2) The specification of an entity in an order under subsection (1) may be expressed to be subject to the exclusion of elements of that entity.

(3) Where an order is proposed to be made under subsection (1), a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each such House.”.

Amendment of section 7 (rights and welfare of children) of the Principal Act.

6.-Section 7 of the Principal Act is amended –

(a) in subsection (1)-

(i) by substituting the following paragraph for paragraph (b):

“(b) encourage entities to develop policies, practices and procedures designed to promote the rights of children,”,

(ii) by substituting the following paragraph for paragraph (d):

“(d) promote awareness among entities and members of the public (including children of such age or ages as he or she considers appropriate) of matters (including the principles and provisions of the Convention) relating to the rights and welfare of children and how those rights can be enforced,”,

(iii) by substituting the following paragraphs for paragraphs (g) and (h):

“(g) monitor and review generally the operation of legislation concerning matters that relate to the rights and welfare of children,

(h) 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, and

(i) act as *amicus curiae* where requested or permitted by a Court to do so.”,

(b) by substituting the following subsections for subsection (6):

“(6) In promoting the rights of children, the Ombudsman for Children shall have regard to:

(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and

(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.

(7) In this section “the Convention” means the United Nations Convention on the Rights of the Child done at New York on 20 November 1989, as amended by any protocol thereto to which the State is a party.”

Amendment of section 8 (function to examine and investigate complaints against public bodies) of the Principal Act.

7.-Section 8 of the Principal Act is amended by substituting the following section for section 8—

“(1) Subject to this Act, the Ombudsman for Children may investigate any action taken by or on behalf of a reviewable agency in the performance of administrative functions where, having carried out a preliminary examination of the matter, it appears to the Ombudsman for Children that—

(a) the action has or may have adversely affected a child, and

(b) the action was or may have been—

(i) taken without proper authority,

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) based on an undesirable administrative practice,

(vii) a failure to comply with section 9A, or

(viii) otherwise contrary to fair or sound administration.

(2) The Ombudsman for Children shall not investigate an action taken by or on behalf of an exempt agency.”

Amendment of section 9 (function to examine and investigate complaints against schools and voluntary hospitals) of the Principal Act

8.-Section 9 of the Principal Act is amended in subsection (1) by substituting the following paragraphs for paragraphs (1)(ii)(VI) and (1)(ii)(VII):

“(VI) based on an undesirable administrative practice,

(VII) a failure to comply with section 9A, or

(VIII) otherwise contrary to fair or sound administration.”

Duty on reviewable agencies, schools and voluntary hospitals to give assistance and guidance, etc.

9.-The Principal Act is amended by inserting the following section after section 9:

“9A.—(1) This section applies when an action taken by or on behalf of a reviewable agency (‘the agency’), school or voluntary hospital in the performance of administrative functions affects—

(a) a right, privilege or benefit to which a child is or may be entitled, or

(b) an obligation, liability, penalty or other detriment to which a child is or may be subject.

(2) The agency, school or voluntary hospital shall, consistent with the resources available to it—

(a) give reasonable assistance and guidance to the child or a person acting on his or her behalf in any dealings with the agency, school or voluntary hospital in relation to the action taken by it, having particular regard to -

(i) the age and understanding of the child, and

(ii) the needs of the child or any person acting on his or her behalf as a result of any disability,

(b) ensure that the business of the child or any person acting on his or her behalf with the agency, school or voluntary hospital in relation to that action is dealt with properly, fairly, impartially and in a timely manner, and

(c) provide information to the child or any person acting on his or her behalf on any rights of appeal or review in respect of that action and on the procedures for, and any time limits applying to, the exercise of those rights.”.

Amendment of section 10 (preliminary examination and investigation of complaints) of Principal Act.

10.-Section 10 of the Principal Act is amended-

(a) in subsection (1) by substituting the following for paragraph (c):

- “(c) If a complaint is made to the Ombudsman for Children by a child or on behalf of a child by a person other than a parent of the child, the Ombudsman for Children shall, before investigating the complaint, inform a parent of the child of the complaint unless it would not be in the child’s best interests to do so.”,
- (b) in subsection (2) by deleting “or” at the end of paragraph (iii) and substituting the following paragraphs for paragraph (iv):
 - “(iv) the lapse of time since the occurrence of the matter complained of makes effective redress impossible or impracticable, or
 - (v) satisfactory measures to remedy, mitigate or alter the adverse effect of the action on the child have been, or are proposed to be, taken by the reviewable agency, school or voluntary hospital concerned.”, and
- (c) by deleting subsection (7).

Amendment of section 11(exclusions) of Principal Act.

11.-The Principal Act is amended by substituting the following section for section 11:

“**11.-**(1) Subject to subsection (2), the Ombudsman for Children shall not investigate any action taken by or on behalf of a reviewable agency, school or voluntary hospital —

(a) if the action is one in relation to which—

- (i) civil legal proceedings in any court have been initiated on behalf of the child affected by the action and the proceedings have not been dismissed for failure to disclose a cause of action or a complaint justiciable by that court whether the proceedings have been otherwise concluded or have not been concluded,
- (ii) the child affected by the action has a right, conferred by or under an enactment, of appeal, reference or review to or before a court in the State (not being an appeal, reference or review in relation to a decision of a court), or
- (iii) the child affected by the action has a right of appeal, reference or review to or before a person, other than a reviewable agency or, if appropriate, the school or voluntary hospital concerned, who is independent in the performance of his or her functions in relation to the appeal, reference or review,

(b) if the action relates to or affects national security or military activity or (in the opinion of the Ombudsman for Children) arrangements regarding participation in organisations of states or governments,

(c) subject to subsection (2A), if the action relates to or affects—

- (i) recruitment or appointment to any office or employment, or
- (ii) the terms and conditions (including the terms and conditions upon and subject to which pensions, gratuities or other superannuation benefits are payable), being—

- (I) the terms and conditions upon and subject to which a person holds any office or is employed in any capacity, or
- (II) the terms and conditions of a contract for services,

(d) if the action is one -

- (i) granting, refusing or revoking a certificate of naturalisation;
- (ii) affirming or waiving any condition for the grant of a certificate of naturalisation;
- (iii) determining whether the entry or presence of a person in the State is lawful;
- (iv) granting or refusing an application for an Irish visa (including a transit visa);
- (v) granting or refusing an application for refugee status or subsidiary protection;
- (vi) making a deportation order, an exclusion order or a determination that it is conducive that a person remain outside the State;
- (vii) involving the exercise of the right or power referred to in Article 13.6 of the Constitution or the remission of any forfeiture or disqualification imposed by a court exercising criminal jurisdiction,

(e) if the action relates to the results of an examination (within the meaning of section 49 of the Act of 1998),

(f) in -

(i) a case where a complaint is made to the Ombudsman for Children in relation to the action, the complaint is not made before the expiration of two years from the time of the action or the time when the person making the complaint became aware of the action, whichever is the later,

(ii) any other case, a period of two years has elapsed since the time of the action, or

(g) if the action-

- (i) is taken before the commencement of this Act, and
- (ii) is not one that may be the subject of a complaint to the Ombudsman under the Act of 1980.

(2) Notwithstanding subsection (1), the Ombudsman for Children—

(a) may investigate insurability and entitlement to benefit under the Social Welfare Consolidation Act 2005, and

(b) if it appears to the Ombudsman for Children that special circumstances make it proper to do so, may investigate an action to which paragraph (a) or (f) of that subsection applies.

(2A) Subsection (1)(c) does not affect the power of the Ombudsman for Children to investigate an action, taken within a reviewable agency, school or voluntary hospital having responsibility for the administration of laws relating to employment, that relates to a complaint made under such a law.”

Amendment of section 12 (amendment of section 5 of Act of 1980) of Principal Act.

12.-Section 12 of the Principal Act is amended by deleting subsection (2).

Amendment of section 13 (reports, etc.) of Principal Act.

13.-Section 13 of the Principal Act is amended-

(a) by substituting the following subsections for subsections (1), (2), (3) and (4):

“(1) In any case where a complaint is made to the Ombudsman for Children in relation to an action and he or she decides not to carry out an investigation under this Act into the action or to discontinue such an investigation, he or she shall send to the child who made the complaint, or to the person who made the complaint on behalf of the child a statement in writing of his or her reasons for the decision and he or she shall send to such other (if any) person as he or she considers appropriate such statement in writing in relation to the matter as he or she considers appropriate.

(2) In any case where the Ombudsman for Children conducts an investigation under this Act, the Ombudsman for Children shall send a statement in writing of the results of the investigation —

(a) to the reviewable agency, school or voluntary hospital concerned,

(b) (i) to the Department of State in which are comprised the business and functions of, or which performs functions in relation to, a reviewable agency (other than a Department of State) to whom a statement is sent under paragraph (a),

- (ii) where the investigation relates to an action taken by or on behalf of a school, to the Department of Education and Skills, or
 - (iii) where the investigation relates to an action taken by or on behalf of a voluntary hospital, to the Health Service Executive,
- (c) to any other person who has or, in a case where a complaint in relation to the action the subject of the investigation has been made to the Ombudsman for Children, is alleged in the complaint to have taken or authorised the action, and
- (d) any other person to whom the Ombudsman for Children considers it appropriate to send the statement.

(3) Where, following an investigation under this Act into an action, it appears to the Ombudsman for Children that the action adversely affected a child and fell within paragraph (b) of section 8 or paragraph (ii) of section 9(1), he or she —

- (a) may recommend to the reviewable agency, school or voluntary hospital concerned—
 - (i) that the matter in relation to which the action was taken be further considered,
 - (ii) that measures or specified measures be taken to remedy, mitigate or alter the adverse effect of the action, or
 - (iii) that the reasons for taking the action be given to the Ombudsman for Children,
 and
- (b) may also request that reviewable agency, school or voluntary hospital to notify him or her within a specified time of its response to the recommendation.

(3A) Where the Ombudsman for Children makes a recommendation to a reviewable agency, school or voluntary hospital under subsection (3)(a)(ii) in relation to an action of a particular kind, the Ombudsman for Children —

- (a) may make a recommendation in general terms to such reviewable agencies, schools or voluntary hospitals as he or she considers appropriate with regard to remedying, mitigating or altering the adverse effect on children of actions of that kind by any such reviewable agency, school or voluntary hospital, and

(b) may also request any such reviewable agency, school or voluntary hospital to notify him or her within a specified time of its response to the recommendation.

(4) Where the Ombudsman for Children carries out an investigation under this Act into an action the subject of a complaint to him or her, he or she shall notify the child who made the complaint, or the person who made the complaint on behalf of the child, of—

(a) the result of the investigation,

(b) the recommendation (if any) made under subsection (3)(a) in relation to the matter, and

(c) the response (if any) made to that recommendation by the reviewable agency, school or voluntary hospital concerned.”

(b) by substituting the following for subsection (7) -

“(7) The Ombudsman for Children shall cause a report on the performance of his or her new functions under this Act to be laid before each House of the Oireachtas annually and may from time to time cause to be laid before each such House such other reports with respect those functions as he or she thinks fit.”

(c) by substituting the following for subsection (8)(b)(iv) -

“(iv) to a person mentioned in subsection (4) of a notification given to such person pursuant to that subsection,

(v) to a person mentioned in subsection (6) of a finding or criticism given to such person in pursuance of that subsection

and in each case publication to such other persons as the Ombudsman deems necessary for the discharge of her functions under the said subsections.”

Powers in respect of preliminary examinations and investigations.

14.—The following is substituted for section 14 of the Principal Act:

“**14.**-(1) (a) The Ombudsman for Children may, for the purposes of a preliminary examination, or an investigation, by him or her under this Act, require any person who, in his or her opinion, is in possession of information,

or has a document or thing in his or her power or control, that is relevant to the examination or investigation to furnish that information, document or thing to the Ombudsman for Children and, where appropriate, may require the person to attend before him or her for that purpose and the person shall comply with the requirements.

- (b) A requirement under paragraph (a) shall be made by notice in writing given to the person to whom it is directed and shall specify the period within which and the place at which any information, document or thing is to be furnished to the Ombudsman for Children or the place at which a person is to attend before him or her.
 - (c) 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.
 - (d) If it appears to the Ombudsman for Children that a person has failed to comply with a requirement under paragraph (a), the Ombudsman for Children may apply to the Circuit Court for an order under paragraph (e).
 - (e) If, on an application under paragraph (d), the Circuit Court is satisfied as to the failure of the person concerned to comply with the requirement concerned, the Court may, subject to subsection (2), make an order directing that person to comply with the requirement.
 - (g) An application under paragraph (d) shall be made to the judge of the Circuit Court for the Dublin Circuit.”
- (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 or she were a witness before the High Court.
 - (3) A person shall not by act or omission obstruct or hinder the Ombudsman for Children in the performance of his or her functions or do any other thing which would, if the Ombudsman for Children were a court having power to commit for contempt of court, be contempt of such court.
 - (4) (a) 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 for Children under this Act.

- (b) Subject to section 16(2) of this Act, the State shall not be entitled in relation to any such examination or investigation to any such privilege (including legal professional privilege) in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

(5) The Ombudsman for Children may, if he or she thinks fit, pay to the person affected by an action in respect of which an investigation is held by the Ombudsman for Children 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.

(6) A statement or admission made by a person in a preliminary examination, or investigation, under this Act by the Ombudsman for Children 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 10 (4) of this Act.

Conduct of investigations.

15.-The following is substituted for section 15 of the Principal Act:

“**15.—**(1) An investigation by the Ombudsman for Children under this Act shall be conducted otherwise than in public.

(2) Where the Ombudsman for Children proposes to carry out an investigation under this Act into an action he or she shall afford—

- (a) any reviewable agency 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 for Children, 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 for Children, 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 for Children considers appropriate in all the circumstances of the case.

(4) The Ombudsman for Children may determine whether any person may be represented, by counsel, solicitor or otherwise, in an investigation by him under this Act.”

Reference of questions of law to the High Court

16.—The Principal Act is amended by inserting the following section after section 15:

“15A.—(1) The Ombudsman for Children may at his or her absolute discretion refer any question of law arising in an investigation under this Act to the High Court for determination.

(2) A determination of the High Court under subsection (1) is final and conclusive.”.

Secrecy of Information

17.—The following is substituted for section 16 of the Principal Act:

“**16.**—(1) Information or a document or thing obtained by the Ombudsman for Children or his or her 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,
- (b) any proceedings under or as a consequence of section 14(1)(e),
- (c) any reference to the High Court on a question of law under section 15A or any proceedings as a consequence of same,
- (d) a communication falling within section 3 of the Protection for Persons reporting Child Abuse Act 1998 or any equivalent communication in respect of an adult,
- (e) without prejudice to section 14(6), an investigation into a criminal offence,
- (f) 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 for Children or any of his or her officers by virtue of this Act,

and the Ombudsman for Children or his or her 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 for Children, with respect to any exempt record specified in the notice, or any class of exempt record so specified, that, in the opinion of the Minister of the Government, the disclosure (other than to the Ombudsman for Children or his or her officers) of that exempt record or of exempt records 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 exempt record in their power or control specified in the notice, or any class of such exempt record so specified, that in the opinion of the Revenue Commissioners the disclosure (other than to the Ombudsman for Children or his or her officers) of that exempt record or of exempt records 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 for Children or any of his or her officers to communicate to any person or for any purpose any exempt record specified in the notice or any exempt record of a class so specified.
- (d) In this subsection, ‘exempt record’ has the meaning given by section 2 of the Freedom of Information Act 1997.”

18.—The Principal Act is amended by substituting, respectively, for the First and Second Schedules the Schedules set out in *Part 1* and *Part 2* of the *Schedule* to this Act.

PART 2

IN CAMERA RESTRICTIONS AND INVESTIGATORY BODIES

Amendment of s.40 of Civil Liability and Courts Act 2004.

19.- Section 40 of the Civil Liability and Courts Act 2004 is amended by inserting after subsection (11):

“(12) For the avoidance of doubt it is hereby declared that -

- (a) the enactments to which subsections (6) and (7) relate are not limited to relevant enactments within the meaning of subsection (2); and
- (b) nothing contained in section 40(9) removes the discretion of a court which is hearing, has heard or will be hearing proceedings otherwise than in public under any enactment from authorising -

- (i) a hearing, inquiry or investigation referred to in subsection (6) or (7) insofar as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7) from being conducted publicly to such extent and subject to such conditions as it may determine;
 - (ii) a hearing, inquiry or investigation referred to in subsection (6) or (7) insofar as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7) from being published to such extent and subject to such conditions as it may determine.
- (13) This section applies to documents prepared and information or evidence given by a person appointed under sections 26 or 27 of the Child Care Act 1991 or section 47 of the Act of 1995 in the performance of his or her functions under those sections.”

PART 3

PROTECTION OF PERSONS REPORTING CHILD ABUSE

Amendment of s.1 of The Protection of Persons Reporting Abuse Act 1998.

20.- The Protection of Persons Reporting Abuse Act 1998 is amended by the substitution for the definition of appropriate person in s.1(1) of the following:

““*appropriate person*” means a designated officer, a member of the Garda Síochána or an officer of the Ombudsman for Children”

SCHEDULE

PART 1

SCHEDULE REPLACING FIRST SCHEDULE TO PRINCIPAL ACT

“SCHEDULE 1

REVIEWABLE AGENCIES

[The Schedule should be reviewed generally to ensure that all relevant agencies established after the enactment of the Ombudsman for Children Act 2002 are included. This should include, for example, the National Council for Special Education and State Examinations Commission.]

PART 2

SCHEDULE REPLACING SECOND SCHEDULE TO PRINCIPAL ACT

“SCHEDULE 2

EXEMPT AGENCIES

The Schedule should be reviewed generally to ensure this list of agencies is appropriately updated to take account of the creation or abolition of bodies after the enactment of the Ombudsman for Children Act 2002.]