Review of the Ombudsman for Children Act 2002

A report by RDJ commissioned by the Ombudsman for Children's Office

November 2022

ombudsman do leanaí for children

RDJ

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Foreword by the Ombudsman for Children, Dr Niall Muldoon

This report documents the findings and recommendations of an independent review of the Ombudsman for Children Act 2002 (2002 Act), as amended, which the Ombudsman for Children's Office (OCO) initiated pursuant to section 7(1)(h) of the 2002 Act and which we commissioned RDJ to undertake.

This is the second review of the 2002 Act. Having monitored the operation of the 2002 Act since the initial review was completed in 2012, and having regard to developments in the external environment affecting children since then, we decided that it would be timely and prudent to commission a follow-up review to establish what amendments might be needed or merited at this point. The overall aim of the review was to consolidate and improve the OCO's ability to fulfil our statutory mandate in the best interests of children.

The review focused on three areas, namely: the OCO's independence, the scope of the OCO's existing statutory functions and duties, and the OCO's capacity to discharge our functions effectively. In addition to reviewing recommendations made on foot of the first review of the 2002 Act which were still outstanding, this current review examined whether there might be additional gaps and shortfalls in the 2002 Act that need to be addressed.

I acknowledge that implementation of a number of the recommendations contained in this report, in particular those concerning the extension of the OCO's complaints and investigations remit, will lead to an increased workload for the OCO and, with that, the need for additional resources to be allocated to the OCO. However, given children's right to an effective remedy and the OCO's unique statutory role as an alternative redress mechanism, I do not expect the resource implications of extending the OCO's statutory complaints function to be the determining factor when deciding on whether or not to implement these recommendations.

I wish to thank RDJ for the professionalism and rigour that they brought to their work on this review. I am also grateful to the external stakeholders and international experts, as well as members of the OCO team who shared their respective experiences and insights with RDJ as part of the review process.

I am pleased to submit this report to the Oireachtas pursuant to section 13(7) of the 2002 Act. I look forward to engaging with the Department of Children, Equality, Disability, Integration and Youth to pursue implementation of recommendations set out in this report.

Glossary

1980 Act	Ombudsman Act 1980
1998 Act	Education Act 1998
2002 Act	Ombudsman for Children Act 2002
2019 Bill	Education (Student and Parent Charter) Bill 2019
CRIA	Children's Rights Impact Assessment
DCEDIY	Department of Children, Equality, Disability, Integration and Youth
DPER	Department of Public Expenditure and Reform
ECCE	Early Childhood Care and Education Programme
ECHR	European Convention on Human Rights
HSE	Health Service Executive
IHREC	Irish Human Rights and Equality Commission
IPAT	International Protection Appeals Tribunal
IPO	International Protection Office
LPP	Legal Professional Privilege
OCO	Ombudsman for Children's Office
NHRI	National Human Rights Institution
PRCA Act	Protection of Persons Reporting Child Abuse Act 1998
RDJ	RDJ LLP
UN Paris Principles	Principles relating to the Status of National Institutions (1993)
Review Team	Team of lawyers at RDJ responsible for the conduct of this Review
UN Committee	United Nations Committee on the Rights of the Child
UN Convention	United Nations Convention on the Rights of the Child
Venice Principles	Principles on the Protection and Promotion of the Ombudsman Institution

Terms of Reference

The Ombudsman for Children's Office ("OCO") has commissioned RDJ ("RDJ LLP") to conduct a review of the Ombudsman for Children Act 2002 ("the 2002 Act"), as amended.

Objectives

The main objectives of the review are to identify amendments that could be made or should be made to the 2002 Act in order to strengthen:

- the independence of the OCO,
- the OCO's statutory functions under the Act, and
- the OCO's capacity to discharge its functions effectively in the best interests of children.

Output

RDJ will provide a report which seeks to address the issues listed above. The report will provide recommendations on a series of policy and legislative changes that are consistent with the objectives of the review. Any recommendations will be evidence-based and proportionate, with consideration given to their implementation.

Methodology

The review is to consist of three strands, as follows:

Strand 1 - Desk-based review

A desk-based review and analysis of the following key documents:

- the 2002 Act and issues highlighted by the OCO regarding the operation of the Act,
- the OCO's 2012 review of the 2002 Act and associated documents,
- the Ombudsman Act 1980 and the Ombudsman (Amendment) Act 2012,
- Ombudsperson for Children legislation in other jurisdictions (as necessary and highlighted by the OCO),
- Ireland's international children's and human rights obligations, including the UN Paris Principles, the Committee on the Rights of the Child's General Comment Number 2, and the Council of Europe's Venice Principles.

Strand 2 - Engagement with OCO staff

Engagement with OCO staff members will be necessary to gather information and viewpoints and to clarify issues relevant to the review. Instances of formal engagements are referenced in Appendix 1. However, additional ad-hoc engagements also took place more frequently.

Strand 3 - Engagement with external stakeholders

Bilateral meetings with the following external stakeholders:

- Department of Children, Equality, Disability, Integration and Youth and Office of the Ombudsman.

- Member organisations of the European Network of Ombudspersons for Children (ENOC), specifically Scotland, Poland and Jersey.

1. Introduction

1.1 Context for this Review

About the Ombudsman for Children's Office

The Ombudsman for Children's Office ("OCO") is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 ("2002 Act"). Under the 2002 Act, the OCO has two statutory functions:

- to promote the rights and welfare of children up to the age of 18 years, and
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and hospitals that have or may have adversely affected a child.

The 2002 Act has been amended on a number of occasions. The OCO is independent[1] of Government and civil society actors and the Ombudsman for Children is accountable to the Houses of the Oireachtas in relation to the exercise by the OCO of its statutory functions. The OCO is also subject to oversight by the Minister for Children, Equality, Disability, Integration and Youth.

Ombudsman for Children Act 2002

The primary purpose of the 2002 Act is to establish the Office of the Ombudsman for Children. Under the 2002 Act, a "child" means a person under 18 years of age.

The 2002 Act provides for the appointment of the Ombudsman for Children by the President. The 2002 Act also makes clear that the Ombudsman for Children is independent in performing the functions assigned to him or her under the 2002 Act.

One of the Ombudsman for Children's principal statutory functions, which is provided for under section 7 of the 2002 Act, is to promote children's rights and welfare. This statutory function comprises a range of positive duties, including advising the Government on any matter relating to children's rights and welfare, encouraging the development of policies, practices and procedures that promote children's rights and welfare, highlighting issues that are of concern to children, and monitoring and reviewing the operation of legislation insofar as it affects children.

In performing the Ombudsman for Children's statutory complaints function, the OCO is required to have regard to the best interests of the child and, in so far as practicable, to give due consideration to child's wishes, taking into account the age and understanding of the child. The complaints remit of the Ombudsman for Children extends to public bodies, schools and voluntary hospitals. Complaints can be made by a child, a parent of the child or a person who has either a personal or professional relationship to the child concerned and is considered a suitable person by the Ombudsman for Children.

1 Section 6 of the 2002 Act.

Previous Review

Under section 7(1)(h) of the 2002 Act, the Ombudsman for Children is obliged to "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)[2] or both for amending this Act."

Such a review was carried out and reported upon in 2012 – *A Report by the Ombudsman for Children on the Operation of the Ombudsman for Children Act 2002*[3] ("the 2012 Report"), and it was preceded by a legal review of the 2002 Act. A number of recommendations advanced in the 2012 Report have since been implemented.

Current Review

In the time that has passed since the initial review there have been very many legislative and policy developments that impact on children and children's rights. While a look-back to the work done and advances made since 2012 indicates that progress has been made, much work remains to be done to deliver on the State's obligations to children under the UN Convention on the Rights of the Child ("UN Convention"). As previously stated by the Ombudsman for Children, while Ireland's system of government and public administration is organised along sectoral lines, matters concerning the rights and welfare of children do not fit neatly into sectoral silos. Misalignment over a period of time can have a damaging impact on the lives of children.[4]

Owing to the length of time that has passed since the previous review in 2012 and the requirement to make further advances in the interests of the rights and welfare of children, the Ombudsman for Children commissioned a further review of the 2002 Act. That such a review would take place is als in-keeping with Action 4.2[5] of Objective 4 of the OCO's Strategic Plan 2019-2021.[6]

Methodology and Focus of this Report

As set out in the Terms of Reference governing this review, the main objectives of the review are to identify amendments that could be made or should be made to the 2002 Act in order to strengthen:

- the independence of the OCO,
- the OCO's statutory functions under the Act, and
- the OCO's capacity to discharge its functions effectively in the best interests of children.

2 Section 13(7) of the 2002 Act provides: "The Ombudsman for Children shall cause a report on the performance of his or her 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 to those functions as he or she thinks fit. The terms of a request under section 11(4) and of the statement in writing of the reasons for the request attached to the request shall be included in a report under this section."

3 https://www.oco.ie/app/uploads/2012/03/ReportonOCOActWEB.pdf

4 Opening Statement by the Ombudsman for Children to the Joint Committee on Children and Youth Affairs, 20 November 2019. Available at https://www.oco.ie/app/uploads/2019/11/Ombudsman-forChildren_OpeningStatement_20Nov2019.pdf

5 Action 4.2 pledged: "We will continue to develop, implement and review our legislation, organisational policies and procedures."

6 https://www.oco.ie/app/uploads/2019/05/Strategic-Plan-2019-2021-UPDATED.pdf

This Report:

- focuses on a number of areas and proposes a series of measures that could be adopted for the purpose of further strengthening the independence of the Ombudsman for Children;

- considers a number of measures that could be implemented for the purpose of strengtheningg and diversifying the OCO's statutory function to promote children's rights and welfare;

- advances several proposals which seek to enhance the statutory complaints remit of the Ombudsman for Children; and

- considers a number of measures which, if implemented, would assist the OCO with regard to the provision of access to information and reporting.

2. Strengthening the Independence of the Ombudsman for Children

2.1 Introduction

Independence and the Paris Principles

Independence is the bedrock of a credible, trusted and effective Ombuds-institution. The importance of independence has been emphasised in the Principles Relating to the Status of National Institutions[7] ("UN Paris Principles") and in international declarations and principles that have been pronounced since the establishment of the OCO in Ireland. The Paris Principles state that a national institution "shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text" specifying its composition and its sphere of competence.[8] The text of the UN Paris Principles is set out in Appendix 2.

Ensuring the strength of the independence of an Ombuds-institution goes far beyond the requirement to have a fair and open appointment process, security of tenure, and a statutory remit. Independence is also safeguarded through the governance, reporting and oversight arrangements that are put in place. Also of particular importance is the need for an Ombuds-institution to have an independent funding stream, the ability to select and appoint its own staff, the ability to function without the risk of political or other interference, and allocation of adequate resources to discharge its functions.

The issue of funding of national human rights institutions is expressly addressed as follows:

> "The national institution should have infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not to be subject to financial control which may affect its independence."

Independence and UN Declaration

The importance of the independence of Ombuds-institutions was re-affirmed by the UN Declaration on The Role of Ombudsman and Mediator Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law, which was adopted by the UN General Assembly on 16 December 2020. Among other things, the Declaration underlines "the importance of autonomy and independence from the executive or judicial branches of Government, its agencies or political parties, of Ombudsman and mediator institutions, where they exist, in order to enable them to consider all issues related to their fields of competence, without real or perceived threat to their procedural ability or efficiency".

7 Adopted by the General Assembly on 20 December 1993

8 Principle 2 of the Paris Principles.

Independence and the Venice Principles

The Principles for the Protection and Promotion of the Institution of the Ombudsman ("VenicePrinciples") published by the European Commission for Democracy through Law ("Venice Commission") in 2019 represent an international reference text listing 25 legal principles essential to the establishment and functioning of Ombuds-institutions in a democratic society. In many respects, the principles articulate the characteristics of an Ombuds-institution that are not only essential, but are also demonstrative of independence. The text of the Venice Principles is set out in Appendix 3.

According to the Venice Principles, an Ombuds-institution should be based on "a firm legal foundation, preferably at constitutional level".[9] The Principles are quite prescriptive on the approach required in relation to the funding of Ombuds-institutions and require as follows:

> "Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year."[10]

The Venice Principles also provide that an Ombuds-institution "shall have sufficient staff and appropriate structural flexibility" and go on to explicitly state that "[t]he Ombudsman shall be able to recruit his/her own staff."[11]

Independence and UN Resolution

In a Resolution adopted by the UN General Assembly on 19 December 2017,[12] Member States were encouraged to consider strengthening independent and autonomous Ombudsman and other national human rights institutions at the national level, and to provide them with an adequate constitutional and legislative framework, as well as financial and all other appropriate means, in order to ensure the efficient and independent exercise of their mandate and to strengthen the legitimacy and credibility of their actions.[13]

2.2 Current Funding, Recruitment and Governance Procedures in the OCO

Finance

The OCO currently receives its funding from the Central Fund via the Vote that relates to the Department of Children, Equality, Disability, Integration and Youth ("DCEDIY"). The OCO is required to keep accounts in such form as may be approved by the Minister for Children, Equality, Disability, Integration and Youth, with the consent of the Minister for Finance.[14]

9 Principle 2 of the Venice Principles.
10 Principle 21 of the Venice Principles.
11 Principle 22 of the Venice Principles.
12 A/RES/72/186. Accessible at: A/RES/72/186 - E - A/RES/72/186 -Desktop (undocs.org)
13 A/RES/72/186. Accessible at: A/RES/72/186 - E - A/RES/72/186 -Desktop (undocs.org)
14 Section 17(1) of the 2002 Act.

There is a requirement that the accounts kept in pursuance of this section shall be submitted to the Comptroller and Auditor General for audit.[15] The Ombudsman for Children is obliged to attend before the Dáil's Committee on Public Accounts.[16] The Ombudsman for Children can also be required to attend before a Committee of the Houses of the Oireachtas to account for the general administration of the office.[17]

Recruitment

The OCO holds a recruitment licence and avails of external assistance to assist in the recruitment process. However, before recruiting a new member of staff or filling a pre-existing vacancy, sanction must be sought from the Minister for Children, Equality, Disability, Integration and Youth, who must in turn seek and obtain the consent of the Minister for Public Expenditure and Reform. Under section 21(1) of the 2002 Act, the Minister for Children, Equality, Disability, Integration and Youth may, with the consent of the Minister for Public Expenditure and Reform, appoint such and so many persons to be members of the staff of the Ombudsman for Children as the Minister for Children, Equality, Disability, Integration and Youth may determine.

Internal Governance Arrangements

The Ombudsman for Children is appointed by the President under section 4(2) of the 2002 Act, following a public recruitment process and the passing of a resolution by the Dáil and Seanad. The stewardship structure of the OCO is not uncommon for an Ombuds-institution. In place of a Board structure, the Ombudsman for Children undertakes the collective role of a Board and that of an accounting officer. Therefore, in addition to performing his/her duties as a "Board", the Ombudsman for Children also performs executive functions. In discharging his/her functions, the Ombudsman for Children is supported by a management team whose members are responsible for key aspects of the work of the OCO covering areas such as Complaints and Investigations, Policy, Participation and Rights Education and Corporate Services. Corporate Services is responsible for assisting the Ombudsman for Children with regard to support services (HR, finance, ICT), risk, compliance, governance, internal and external audit.

The OCO also has an Audit and Risk Committee which comprises three independent members. The role of the Audit and Risk Committee is to support the Ombudsman for Children in relation to his/her responsibilities for issues of risk, internal controls, governance and associated assurance. The Audit and Risk Committee is independent from the financial management of the OCO. In particular, this Committee ensures that the internal control systems, including audit activities, are monitored actively and independently.

The OCO complies with the requirements of the Code of Practice for the Governance of State Bodies with the exception of the provisions in relation to role of the Board, the role of the Chairperson and the role of Board members. The OCO ensures that these requirements are met by the Ombudsman for Children, the OCO's Management Team and/or the Audit and Risk Committee, as appropriate.

15 Section 17(2) of the 2002 Act.
16 Section 18(1) of the 2002 Act.
17 Section 19(1) of the 2002 Act

External Governance Oversight of OCO

Externally, governance oversight of the OCO is principally provided by the DCEDIY and, to a lesser extent, by the Department of Public Expenditure and Reform ("DEPR"). The remuneration of the Ombudsman for Children is determined by the Minister for Children, Equality, Disability, Integration and Youth with the consent of the Minister for Public Expenditure and Reform.[18]

2.3 Issues with Current OCO Governance, Funding and Recruitment Procedures

Overlap between External Oversight and Discharge of OCO Functions

Certain governance arrangements, controls on funding and controls on recruitment can be used as levers which could be utilised in theory to exercise a degree of influence over the effectiveness of any organisation. One of the reasons why a different approach is warranted is the fact that an Ombuds-institution serves as an investigative body and therefore should be afforded the greatest degree of independence and autonomy so that it can discharge its statutory functions without fear or favour.

The OCO may investigate complaints made in respect of public bodies where the administrative action has or may have adversely affected a child, and that action was taken, for example, without proper authority or on irrelevant grounds.[19] Entities falling within the meaning of the term "public bodies" include all Departments of State. The OCO may also engage with these Departments through its function to promote the rights and welfare of children.[20]

Therefore, it is important to note that the DCEDIY and the DPER are in a position to exercise significant powers as regards the governance, financing and staffing of the OCO.

Funding

The approach to funding of the OCO is important both in respect of the actual and perceived independence of the OCO. In order for any Ombuds-institution to be assured of its independence, it should be confident that the discharge of its functions will not pose any risk to its funding, staffing or its very existence.

The need for the OCO to be funded in a manner which is independent of any Department of State has been previously raised by the OCO.[21]

The approach to the funding of the OCO is a matter that has been of concern to UN Committee and which they have raised with Ireland on a number of occasions. In its 2006 *Concluding Observations*[22] and its 2016 *Concluding Observations* on Ireland,[23] the

18 Section 5(1) of the 2002 Act.

19 Section 8 of the 2002 Act.

20 Section 7 of the 2002 Act.

21 For example, see "Submission for the 25th Session of the Working Group on Universal Periodic Review September 2015". Available at: https://www.oco.ie/app/uploads/2017/09/OCO-Submission-UPR-2016.pdf

22 CRC/C/IRL/CO/2. Published on 29 September 2006. Accessible at: https://www.oco.ie/app/uploads/2017/09/OCO-Submission-UPR-2016.pdf

23 CRC/C/IRL/CO/3-4. Published on 1 March 2016. Accessible at: https://www.oco.ie/app/uploads/2017/09/OCO-Submission-UPR-2016.pdf

UN Committee expressed concerns in relation to the independence of OCO, particularly in view of the means by which the OCO receives its funding. Evidencing its continued concern regarding the absence of an approach to funding which safeguards and reaffirms the independence of the OCO, the UN Committee again raised the issue in its 2021 *List of Issues Prior to Submission of the Combined Fifth and Sixth Reports of Ireland*,[24] where it requested that Ireland describe the measures that have been taken to "[e]nsure the independence of the Office of the Ombudsman for Children in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), including by ensuring that financial resources are directly allocated to the Office".[25]

While the Review Team notes that the OCO's relationship with the DCEDIY is positive and no issues have been experienced with regard to the flow of funding, it is important for the independence of the OCO that its funding stream should not be dependent upon an allocation that is provided by a Department of State which itself is within the scope of the OCO's core statutory functions.

Recruitment

As already mentioned, before recruiting a new member of staff or filling a pre-existing vacancy, the OCO must seek sanction from the Minister for Children, Equality, Disability, Integration and Youth, who must in-turn seek and obtain the consent of the Minister for Public Expenditure and Reform.

While the interaction between the OCO and the DCEDIY is collaborative and positive, it seems somewhat anomalous that two Departments of State (namely the DCEDIY and the DPER) that fall within the scope of the OCO's remit are Departments that occupy a position of power and influence over an area which seems key to the functioning and effectiveness of the OCO.

2.4 Funding, Recruitment and Governance Procedures in Similar Organisations

While the Office of the Ombudsman is under the aegis of the DPER and the Irish Human Rights and Equality Commission ("IHREC") is under the aegis of the DECDIY, the resourcing and staffing of these organisations are approached with a greater level of independence than is the case for the OCO.

There are several hundred public bodies in existence in Ireland,[26] most of which are funded via their respective Department of State. According to the Revised Estimates for 2022,[27] Voted expenditure was allocated under 47 headings (in other words, funding was allocated to 47 Departments of State, public bodies and funds). The Office of the Ombudsman has its own Vote (Vote 19), which is independent of the DPER (Vote 11). Other entities with their own Vote include the Data Protection Commission (Vote 44), and the IHREC (Vote 25).

24 CRC/C/IRL/QPR/5-6. Published on 18 November 2020. Accessible at: https://tbinternet.ohchr.org/_layouts/15/treaty bodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fQPR%2f5-6&Lang=en

25 Ibid., at paragraph 8(a).

26 296 public bodies identified in the context of the registration of lobbying regime.

27 https://assets.gov.ie/207416/1ebb916d-9839-458f-a4daf-9fa77be9b7de.pdf

In order to enhance the independence of OCO, consideration should be given to changing the funding model that is currently being applied to the OCO so that the OCO instead receives its funding pursuant to its own Vote. As previously noted, the Office of the Ombudsman and the IHREC receive their funding by having their own Votes. This means that these organisations deal directly with DPER in relation to funding and are not dependent upon any intermediary Government Department for their funding or longer-term sustainability. These examples represent a strong precedent for such an approach being adopted in respect of the OCO.

The Review Team has also noted that in jurisdictions such as Poland, Scotland and Wales the Ombuds-institution which is equivalent to the OCO is funded by parliament in a direct way.

While implementing such a change to the means by which the OCO receives its funding would not require legislative change to the 2002 Act, it would require the agreement of the DPER and the DCEDIY. There would also be resource implications for the OCO associated with managing its own Vote.

Recruitment

The Office of the Ombudsman has the authority to appoint its own staff without the need to seek sanction for the filling of roles, and that authority is only limited by reference to the number of persons who may be appointed – that being a matter which is determined by the Minister for Public Expenditure and Reform.[28]

IHREC has the authority to appoint its own staff, subject to the requirement that the number of staff, as well as their grades, be approved by the Minister for Children, Equality, Disability, Integration and Youth with the consent of the Minister for Public Expenditure and Reform.[29]

Similarly, the Financial Services and Pensions Ombudsman may appoint its own staff, subject to the requirement that the number of staff be approved by the Minister for Finance with the consent of the Minister for Public Expenditure and Reform.[30] Many other public bodies enjoy the authority to appoint their own staff subject to this approval and consent type mechanism.[31]

In contrast before recruiting any new member of staff or filling any pre-existing vacancy, the OCO must seek sanction from the Minister for Children, Equality, Disability, Integration and Youth, who must in-turn seek and obtain the consent of the Minister for Public Expenditure and Reform.[32] Even then, the appointment of staff to the OCO is made by the Minister Children, Equality, Disability, Integration and Youth, not by the Ombudsman for Children.

28 Section 10(1) of Ombudsman Act 1980 as substituted by section 20 of Civil Service Regulation (Amendment) Act 2005.

29 Section 24(1) of Irish Human Rights and Equality Commission Act 2014.

30 Section 15(1) & (4) of the Financial Services and Pensions Ombudsman Act 2017.

31 For example – the Garda Síochána Ombudsman Commission under section 71(1) of the Garda Síochána Act 2005; the Data Protection Commissioner under section 24(1) of Civil Service Regulation (Amendment) Act 2005.

32 Section 10(1) of Ombudsman Act 1980 as substituted by section 20 of Civil Service Regulation (Amendment) Act 2005.

2.5 Moving Forward

Affording the Ombudsman for Children constitutional status would be a clear demonstration of the standing of the office. It would also guarantee the independence of the Ombudsman for Children. However, in light of the requirement for the OCO to be wholly independent, there is also a need to alter the current governance and oversight arrangements so as to ensure that, in discharging his/her functions, the Ombudsman for Children's independence is not curtailed by having a dependency upon a particular Department of State. The independence of the OCO could be considerably enhanced through the implementation of the following recommendations.

Recommendation 1

With a view to further strengthening the OCO's independence, it is recommended that the following three changes are made:

- Funding – In view of the need to safeguard the actual and perceived independence of the OCO, and in view of the strength of the concerns raised by the UN Committee on repeated occasions, the Department of Public Expenditure and Reform in conjunction with the Department of Children, Equality, Disability, Integration and Youth resolve to amend the mechanism which is used to fund the OCO so that it is assigned its own Vote under the Revised Estimates;

- Recruitment – As the inability of the OCO to appoint its own staff limits the independence and autonomy of the OCO, and is at variance with the terms of the UN Paris Principles, section 21 of the 2002 Act should be amended so as to allow the OCO to appoint its own staff subject to requirement that the number of persons who may be appointed and their grades would be determined by the Minister for Public Expenditure and Reform;

- Governance – In view of the requirement for the OCO to be fully independent (both in actuality and in perception), and in order for the OCO to have the freedom to freely discharge its statutory functions in respect of all public bodies within its remit, it is recommended that the external oversight of the OCO should be provided by the Minister for Public Expenditure and Reform.

2.6 Ministerial Veto

Section 11(4) of the 2002 Act provides as follows:

> "(4) Where a Minister of the Government so requests in writing (and attaches to the request a statement in writing setting out in full the reasons for the request), the Ombudsman for Children shall not investigate, or shall cease to investigate, an action specified in the request, being an action of—
>
> **a)** a Department of State whose functions are assigned to that Minister of the Government, or
>
> **b)** a public body (other than a Department of State) whose business and functions are comprised in such a Department of State or in relation to which functions are performed by such a Department of State,
>
> (whether or not all or any of the functions of that Minister of the Government stand delegated to a Minister of State at that Department of State)."

This provision closely resembles section 5(3) of the Ombudsman Act 1980.

Actual interference or the prospect of Ministerial interference in the discharge by the OCO of its statutory complaints handling and investigative functions is wholly at variance with section 6(1) of the 2002 Act which states that the "Ombudsman for Children shall be independent in the performance of his or her functions under the Act". It does not appear possible to read section 11(4) of the 2002 Act in a manner which renders it compatible with the strong statement concerning the independence of the OCO as asserted by the legislature in section 6(1).

In embarking upon an investigation and adjudicating upon any complaint within its remit, the OCO must be free to consider only the actual circumstances and facts. The ability of the Ombudsman for Children to discharge his/her functions should not be subject to Ministerial veto as is provided for in section 11(4).

The UN Committee has emphasised on a number of occasions the need for Ireland to ensure the independence of the OCO. The independence of an Ombuds-institution constitutes a key aspect of the UN Paris Principles. The very existence of a statutorily based power of veto also seems to be contrary to the Venice Principles, which require that "the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence"[33]. This is emphasised further in Principle 14 which provides: "The Ombudsman shall not be given nor follow any instruction from any authorities." A similar message regarding potential interference with the work of Ombuds-institutions is delivered again, through principle 24 of the Venice Principles:

> "States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats."

33 Principle 1 of the Venice Principles. For the full text of the Venice Principles, see Appendix 3.

The problems presented by section 11(4) of the 2002 Act[34] were raised during the Second Stage debate on the Ombudsman for Children Bill 2002 in the Seanad. Senator Mary Jackman had anticipated some of the problems that a provision of this nature would present:

> "Section 11 also states that, although the ombudsman is to be independent of the Government and report directly to the Oireachtas, it provides Ministers with an effective veto over investigations and actions taken by public bodies. I read through it again last night and there is definitely a problem with regard to ministerial veto. If a Minister sends a written request to the ombudsman concerning actions taken by a Department, or a public body under the authority of the Minister, the Ombudsman for Children shall not investigate, or shall cease to investigate, an action specified in the request. The only conditions attached are that the request must be in writing and be accompanied by a written explanation setting out in full the reasons for the request. Why does the Minister have such sweeping authority to stop an investigation and why deny the ombudsman the right to exercise his or her judgment on the request? That will not promote the best interests of children."[35]

Dissatisfaction with this provision was also expressed by Senator Mary Henry, who remarked at Second Stage:

> "It is very unfortunate that section 11(3) provides that a Minister can request that the Ombudsman for Children shall not investigate or shall cease to investigate an action against a Department or public body. I cannot understand why that is included because it stymies the effect of the Bill. A Minister can easily make representations about these matters. It seems that the issue does not even have to go before both Houses of the Oireachtas for consideration to see if the Minister has a reasonable point. I ask that that section of the legislation be removed."[36]

Minister of State Hanafin, who shepherded the Bill through the Houses, attempted to respond to these concerns, in the following brief passage:

> "The power to restrain the investigation of the Minister is a provision which also applies in the Ombudsman Act, 1980, and is made to exclude points of judgment for which a Minister is answerable to the Dáil, but it has never been used. It ensures that a Minister remains answerable to the Dáil."[37]

Concerns regarding the ministerial veto were again raised during the course of the Second Stage debate in the Dáil, when Deputy Frances Fitzgerald emphatically stated:

> "Section 11(3) gives unlimited authority to the Minister to stop investigations. In many respects this is the most worrying element of the Bill as it appears that the Minister will have a veto over investigations into actions which could

34 It then featured as section 11(3) of the Bill as initiated.

35 Seanad Debates, 21 February 2002. Accessible at: https://www.oireachtas.ie/en/debates/debate/seanad/2002-02-21/6/

36 Ibid.,

37 Ibid.,

> be taken by public bodies, schools and voluntary hospitals. Will the Minister of State reconsider this provision? If the Minister has unlimited authority to stop or veto investigations, surely the independence of the office of ombudsman is compromised. One of the key issues for the ombudsman will be the degree of independence which the office and the holder will have. This matter needs to be unambiguous. Surely the principle of independence and the work of the ombudsman will be undermined if a Minister can stop or veto an investigation. The ombudsman should be given the right to investigate, or to continue to investigate, an action in the best interest of a child. Such a provision could be inserted in the Bill to strengthen the independence of the office."[38]

By way of response, Minister of State Hanafin sought to insist that the Ministerial veto is necessary, stating:

> "Deputy Fitzgerald asked a question in regard to what she perceived to be a ministerial veto but in fact is not such. It applies only to actions by Ministers in regard to the functions assigned to them and relates only to Government bodies. We investigated this provision, which arises from a strong recommendation by an all-party committee on administrative justice in the late 1970s and was included in the 1980 Act, very carefully. Bearing in mind that the 1980 Act is now 22 years old, we went back to the Office of the Ombudsman and asked if it was really necessary to keep this provision. It was seen as a very strong and important protection for that office's independence and its retention was strongly recommended, despite the fact that it has never been used."[39]

The rationale, as expounded by Minister of State Hanafin, for the inclusion of this provision in the Bill in the first place seems somewhat contrived and archaic.

While during the course of the review the Review Team was able to confirm that no Minister has sought to exercise his or her right of veto under section 11(4) of the 2002 Act, the very presence of this power is unseemly, out of place and diminishes considerably the independence and standing of the Office.

It can be noted that no such provision features in the Irish Human Rights and Equality Commission Act 2014. In fact, it has not been possible for the Review Team to identify the existence of a similar ministerial veto in any other comparable jurisdiction.

The retention of such a provision in the 2002 Act can in no way be justified on the basis that its terms have never been invoked. The independence of the OCO should not be dependent upon sheer good fortune in that regard. It is entirely possible to envisage circumstances where such a power might be used by a Minister at some future point and it is this consideration, as well as the overarching principle of complete independence of the OCO, which renders it a provision which requires to be repealed.

38 Dáil Debates. 23 April 2002. Accessible at: https://www.oireachtas.ie/en/debates/debate/dail/2002-04-23/16/
39 Ibid.,

While there may well have been a credible basis for advancing such a provision in 1979 (when the Ombudsman (No.2) Bill was first presented to the Houses), section 11(4) of the 2002 Act is a provision whose effect has no place in legislation governing an institution such as the Ombudsman for Children in twenty-first century Ireland.

Recommendation 2

Owing to the importance of the principle that the Office of the Ombudsman for Children be independent and that his or her ability to discharge powers of investigation is not subject to interference (actual or potential), it is recommended that section 11(4) of the 2002 Act be repealed.

3. Enhancing the Ombudsman for Children's Remit to Promote Childrens' Rights and Welfare

3.1 Amicus Curiae

The UN Committee has devoted one of their General Comments[40] to the role of independent national human rights institutions ("NHRI") in the promotion and protection of the rights of the child and what States parties' obligations are with respect to such institutions.

The General Comment emphasises that NHRI's should be established in compliance with the UN Paris Principles. As noted in section 2.1 of this Report, these minimum standards provide guidance for the establishment, competence, responsibilities, composition, independence and powers of such organisations.

Section 7 of the 2002 Act sets out the policy, research and legislative review functions of the OCO. 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.

The broad powers conferred on the Ombudsman for Children under section 7 extend the mandate of the OCO beyond that of a traditional ombudsman. In doing so, section 7 incorporates many of the elements of an independent NHRI identified by the UN Committee in its General Comment.

As noted in the 2012 review of the OCO's governing legislation, one area referenced in the General Comment that has not been included in the 2002 Act are powers to become involved in court cases concerning children's issues. Paragraph 14 of the General Comment notes that national human rights institutions should have the power to support children taking cases to court, including the power (a) to take cases concerning children's issues in the name of the national human rights institution and (b) to intervene in court cases to inform the court about human rights issues involved in the case.

40 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).

It is acknowledged that in most jurisdictions, children's ombud-institutions do not act as legal counsel to a child. However, a notable exception is that of Northern Ireland's Commissioner for Children and Young People. Section 14 of the Commissioner for Children and Young People (Northern Ireland) Order 2003 provides the following:

> "**14.—(1)** Subject to the following provisions of this Article, the Commissioner may in any court or tribunal—
>
> **a)** bring proceedings (other than criminal proceedings) involving law or practice concerning the rights or welfare of children or young persons;
>
> **b)** intervene in any proceedings involving law or practice concerning the rights or welfare of children or young persons;
>
> **c)** act as amicus curiae in any such proceedings;
>
> **(2)** An intervention under paragraph (1)(b) shall not be made except;
>
> **a)** with the leave of the court or tribunal; and
>
> **b)** in accordance with any such provision as may be made by the rules regulating the practice and procedure of the court or tribunal.
>
> **(3)** The Commissioner shall not bring or apply to intervene in proceedings unless he is satisfied that—
>
> **a)** the case raises a question of principle; or
>
> **b)** there are other special circumstances which make it appropriate for the Commissioner to do so".

Therefore, not only can the Children's Commissioner in Northern Ireland bring civil law proceedings, he or she can act as an intervener with leave of the court and also as amicus curiae (friend of the court).

The Irish Human Rights and Equality Commission is Ireland's NHRI. Its powers include the power to apply to the High Court, Court of Appeal or the Supreme Court for liberty to appear before the courts as amicus curiae in proceedings that involve or are concerned with human rights or equality.[41] Such a power is provided for in section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014, which states that the IHREC may " apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as amicus curiae in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an amicus curiae on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)".

41 https://www.ihrec.ie/our-work/legal-activity/amicus-curiae-power/

The function of applying for liberty to appear as amicus curiae, and of appearing as amicus curiae where liberty is granted, is to be exercised in furtherance of the functions provided for at s.10(1) of the 2014 Act, which said functions are to –

a) protect and promote human rights and equality,

b) encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State,

c) promote understanding and awareness of the importance of human rights and equality in the State,

d) encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, and

e) work towards the elimination of human rights abuses, discrimination and prohibited conduct.[42]

As noted previously, the broad powers conferred on the Ombudsman for Children under section 7 of the 2002 Act extend the mandate of the OCO beyond that of a traditional ombudsman and incorporates many of the elements of an independent national human rights institution identified by the UN Committee in its General Comment. However, of particular note in this regard is the omission from the 2002 Act of measures to address the UN Committee's recommendations that NHRIs for the promotion and protection of children's rights should have functions such as providing expertise in children's rights to the courts, in suitable cases as amicus curiae or intervener. Bearing this in mind, section 7 of the 2002 Act should be amended to include a specific statutory function to act as amicus curiae where requested or permitted by a court to do so.

It is acknowledged that IHREC can and does act as amicus curiae in cases involving children's rights. However, through the exercise of its function under section 7, the OCO has considerable expertise of children's rights. It is not proposed that extending powers to the OCO to act as amicus curiae would in any way impact on or dilute the work of IHREC in this area. Rather, extending these powers to the OCO would enhance the availability of this service to children who need this assistance. However we recognise the need to avoid a situation where a complainant, whether concurrently or consecutively, requests the OCO and IHREC to provide assistance in this way.

Recommendation 3

It is recommended that section 7 of the 2002 Act be amended so as to include a specific statutory duty which would enable the Ombudsman for Children to act as amicus curiae where requested or where permitted by a court to do so.

42 http://www.ihrc.ie/download/pdf/amicus_curiae_guidelines.pdf, p.1-2

3.2 Promotional, Educational and Outreach Activities

Utilising soft powers is an important aspect of the work of the OCO. The OCO should be empowered to engage in promotional activities in furtherance of its function to promote children's rights and welfare under section 7 of the 2002 Act.

The OCO has occasion to consider what types of support it is expressly or implicitly permitted to provide to other organisations and groups of people who are seeking to promote and advance children's rights in different ways.

The OCO has previously supported projects such as the Baboró children's festival, A Playful City, the Dublin Fringe Festival and others. The projects and activities supported by the OCO were developed specifically to promote children's rights.

It is envisioned that if the 2002 Act were to be amended to more explicitly enable the OCO to commission or sponsor activities, projects or events that promote the rights and welfare of children, the OCO's involvement in such activities could be developed further. The inclusion of this function in the 2002 Act would also allow the OCO to engage with smaller grassroots organisations and to enable them to run projects directly relating to children's rights. It would also empower the OCO to connect with national programmes, such as Crinniú na nÓg, raising awareness of the work of the OCO and its work to promote the rights and welfare of children in Ireland.

Consideration should be given to amending section 7 of the 2002 Act so as to more explicitly enable the OCO to commission or sponsor programmes of activities, projects or events that are specifically directed at promoting the rights and welfare of children. The approach which features in section 10(2)(j) and (l) of the Irish Human Rights and Equality Commission Act 2014 serves as a relevant precedent for the OCO to engage in such activities.

Recommendation 4

It is recommended that section 7 of the 2002 Act be amended so as to enable the Ombudsman for Children to undertake, sponsor, commission, or provide financial or other assistance for programmes of activities and projects for the promotion the rights and welfare of children.

Effect could be given to this recommendation by inserting the following new paragraph into section 7(1) of the 2002 Act:

"(dd) at his or her sole discretion, sponsor, commission or provide financial or other assistance for projects or programmes of activities for the promotion of the rights and welfare of children;"

4. Enhancing the Complaints Remit of the Ombudsman for Children

4.1 Extension of Complaints Remit to Young People Over 18 in Limited Circumstances

It is well understood that there are strong policy considerations for confining the remit of the OCO to matters relating to persons aged under 18. However, without wishing to detract from the validity and strength of those policy considerations, the application of such a hard and fast rule does give rise to some situations of injustice. The setting of a specific age of a person as being the sole determinant as to whether or not he or she falls within the remit of OCO can seem harsh and arbitrary in a limited number of circumstances. While it is recognised that in those circumstances there may be other fora and State agencies which may have jurisdiction, there is an element of artifice where a person who would have been within the jurisdiction of the OCO on the day before their 18th birthday then suddenly finds, upon turning 18, that they are no longer within scope.

During the course of this review, three particular circumstances were identified, in which it was felt that fairness and justice would be better served if the OCO's jurisdiction were to not expire upon a child reaching their 18th birthday. The first such circumstance relates to young people in detention in Oberstown, the second concerns young people in aftercare, and the third scenario relates to students who are studying in secondary school.

4.2 Extension of Complaints Remit to Young People Detained at Oberstown Children Detention Campus

Oberstown Children Detention Campus ("Oberstown") is a national service that provides a safe and secure environment for young people remanded in custody or sentenced by the Courts for a period of detention.

Oberstown accommodates young people up to the age of 18 on detention or remand orders, providing them with care and education in a safe and secure environment, while helping them to address offending behaviour and preparing them to return successfully to their families and communities. Oberstown is authorised to accommodate 48 boys and six girls at any single point in time.[43] In 2020, the average daily occupancy was 36 young people and over the course of 2020, there were 122 young people detained on the Campus.[44]

The remit of the OCO is limited to children and young people up to 18 years old. While the OCO can deal with complaints made by or on behalf of children, including those in Oberstown, under section 8 of the 2002 Act, the OCO has no jurisdiction in respect of a complaint made about an action in respect of a young person who has reached age 18 and whose detention in Oberstown has continued (unless that action pre-dates that young person reaching age 18). The OCO has maintained a strong connection with Oberstown and has a regular presence at the facility.

43 Oberstown, About us. Accessible at: https://www.oberstown.com/about-us-2/

44 Oberstown Annual Report 2020 at p.4. Accessible at: https://www.oberstown.com/wp-content/uploads/_pda/2021/09/Oberstown-Annual-Report-2020_F.pdf?t=614b1d54278e7

Oberstown is principally used as a place of detention for children. However, on occasion where a child is in detention at Oberstown upon reaching age 18, their stay at Oberstown may continue for a limited period of up to six months, even though such persons are no longer considered as being children under the law. That this practice should occur is positive and is in accordance with the UN Committee's General Comment No. 24 (2019) on Children's Rights in the Child Justice System,[45] which states:

> "Child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process."[46]

In this vein, the UN Committee went on to recommend:

> "... that children who turn 18 before completing a diversion programme or non-custodial or custodial measure be permitted to complete the programme, measure or sentence, and not be sent to centres for adults."[47]

Of significant concern to the OCO is the fact that the OCO has no jurisdiction in respect of complaints made by persons who have reached age 18 but remain in detention at Oberstown.

It is fundamental to a system of accountability, oversight and protection of children and young persons that they have recourse to an Ombuds- institution that can investigate complaints made by them or on their behalf.

To fully realise protection of all young persons in detention at Oberstown, and to give full effect to the principles enunciated by the UN Committee in these matters, the 2002 Act should be amended to expressly permit the OCO to have its mandate extended to ensure that all young persons detained in Oberstown, and not just those under age 18, may have recourse to the services and assistance of the OCO's complaints service.

It is proposed that this anomalous situation could be remedied by way of an amendment to section 8 of the 2002 Act so that the OCO would be permitted to have jurisdiction in respect of a small cohort of young people who remain in Oberstown beyond their 18th birthday.

45 CRC/C/GC/24. Published on 18 September 2019. Accessible at: docstore.ohchr.org/SelfServices/FilesHandler

46 Ibid., at para.31.

47 Ibid., at para.35.

Recommendation 5

It is recommended that section 8 of the 2002 Act be amended so as to permit the OCO to investigate a complaint that concerns a person who has reached 18 years of age who is detained in Oberstown.

In order to give effect to this recommendation, it is proposed that the following text be inserted as a new subsection in section 8:

"(2) Nothing in this Act shall preclude the Ombudsman for Children from investigating a matter referred to in subsection (1) by reason only of the fact that the action relates to or concerns a person who –

(i) was not a child at the time of the action, and

(ii) is or was detained in Oberstown Children Detention Campus for a period of time after which he or she had attained full age, or ..."

4.3 Extension of Complaints Remit to Young People in Aftercare

Section 45 of the Child Care Act 1991 places a duty on Tusla (the Child and Family Agency) to decide whether each person leaving care has a need for assistance and, if so, to provide services in accordance with the legislation and subject to resources. Young people who have had a care history with Tusla are entitled to an aftercare service based on their assessed needs. As it currently stands, the core eligible age range for aftercare is from 18 to 21 years. This can be extended until the completion of a course of education in which a young person is engaged, up to the age of 23.[48] The Child Care (Amendment) Act 2015 strengthens the legislative provisions regarding aftercare, imposing a statutory duty on Tusla to prepare an aftercare plan for an eligible child or eligible young person.

Under the Child Care Amendment Act 2015 Act, the planning of aftercare for a child commences when they are 16 years of age. Any failure to fulfil aftercare commitments is likely to happen once a young person leaves full-time care. Therefore, while important administrative actions relating to decisions on the aftercare requirements of a child may be made at a time when the child is under 18, any failure to implement the required actions will occur at a time when the person is 18 or over.

This reality of the time-lapse between the devising of plans and the implementation of plans means that the remit of the OCO should be extended so as to ensure that there is continuity of jurisdiction as regards young people in aftercare. Doing so would ensure that the remit of the OCO is reflective of the remit of Tusla, which in certain circumstances extends to age 23.

Extending the remit of the OCO in this way would also assist the OCO with looking at transitional arrangements for children in care with disabilities who are moving into adult services.

48 Pursuant to section 45(4) of the Child Care Act 1991.

We note that some young adults in aftercare may also prefer to be dealt with by Office of the Ombudsman rather than by an Ombudsman for Children. Nothing in this amendment should remove the option for those young adults. However, the legislation would need to make it clear that a complainant cannot, as a means of seeking redress, avail of both the OCO and the Ombudsman either concurrently or consecutively.

Recommendation 6

It is recommended that the remit of the Ombudsman of Children be extended to those beyond age 18 in respect of young persons who are receiving aftercare pursuant to the Child Care (Amendment) Act 2015.

In order to give effect to this recommendation it is proposed that the following text be inserted as a new subsection in section 8 of the 2002 Act:

> "(3) Nothing in this Act shall preclude the Ombudsman for Children from investigating a matter referred to in subsection (1) by reason only of the fact that the action relates to or concerns a person who is or was in receipt of aftercare services and that person is over age 18."

4.4 Young People in Secondary School or Special School

Many students in Ireland do not complete their journey through secondary school until shortly after their 18th birthday. For young people who remain in secondary school or a special school beyond their 18th birthday and who wish to invoke the jurisdiction of the OCO, they find that the OCO is unable to provide assistance as the remit of the OCO is confined, under the 2002 Act, to children under the age of 18 years. They can make a complaint to the Office of the Ombudsman.

The remit of the OCO is such that it covers most children right through their schooling years. However, a cohort of young people who are at the latter end of their time in school find that they can no longer rely on the OCO for assistance. This is in spite of the fact that the OCO has a deep understanding of the education system and is very familiar with the issues and challenges that can arise in the context of sensitive matters, including examinations.

The assistance that the OCO can provide to students who are coming to the end of their time in secondary education or a special school is particularly significant as actions affecting them have the potential to have a lasting effect on their learning, academic achievements and options for further education. It is proposed that the remit of the OCO ought to be amended so as to permit the OCO to have jurisdiction under section 9 of the 2002 Act in respect of matters that are the subject of a complaint and require investigation when such matters relate to a young person whose 18th birthday has been reached and who is still in post-primary education. This proposal essentially provides for continuity of jurisdiction and could be facilitated by way of an amendment to section 9 of the 2002 Act.

We note that some young adults completing their secondary education may also prefer to be dealt with by Office of the Ombudsman rather than by an Ombudsman for Children. Nothing in this proposed amendment should have the effect of removing that option for those young adults. However, as stated above, the legislation would need to make it clear that a complainant cannot, as a means of seeking redress, avail of both the OCO and the Ombudsman either concurrently or consecutively.

Recommendation 7

It is recommended that section 9 of the 2002 Act be amended by inserting a new subsection so as to permit the OCO to investigate a complaint that concerns a person who has reached 18 years of age who remains in secondary education.

In order to give effect to this recommendation, it is proposed that the following text be inserted as a new subsection in section 9:

> "(4) Nothing in this Act shall preclude the Ombudsman for Children from investigating a matter referred to in subsection (1) by reason only of the fact that the action relates to a person who is or was attending a school for post-primary education as a child and while so attending he or she had attained the age of 18 years.":

4.5 Jurisdiction in Respect of Results of an Examination

Section 11(1)(f) of the 2002 Act expressly precludes the OCO from investigating any matter that relates to the results of an examination. The effect of this is that the OCO has no jurisdiction to consider or examine a complaint made by a child or a person acting on their behalf in respect of exam results.

In contrast, no such exclusion exists in respect of the Office of the Ombudsman. Therefore, the Ombudsman's Office can examine complaints made by persons aged 18 or over about the administration of education services including Leaving Certificate examinations and admissions to third-level education.

In the absence of compelling reasons otherwise, and as a matter of principle, persons aged under 18 ought to have the same avenues of redress open to them as persons aged over 18.

This is an anomalous situation whereby persons aged over 18 years of age who have sat their Leaving Certificate exam can make a complaint to the Ombudsman, whereas his or her classmates who have not yet reached 18 have no such avenue of recourse. This constitutes invidious discrimination, and it seems impossible to point to any policy arguments which could justify this anomaly being permitted to continue any longer.

Recommendation 8

It is recommended that the Ombudsman for Children be empowered to receive and investigate complaints made by children regarding the administration of education services, including Leaving Certificate examinations.

In order to give effect to this recommendation, it is proposed that section 11(1)(f) of the 2002 Act be repealed.

4.6 Complaints Relating to Early Childhood Education and Care and School-Age Childcare settings

In Ireland, the majority of early childhood education and care and school age-childcare settings are provided by private operators that receive a substantial level of State funding.

A study commissioned by Early Childhood Ireland in 2018 revealed that there were over 186,000 children in early childhood or school aged care, 73% of which were in a privately owned setting.[49] In 2019 that figure rose to over 200,000.[50]

Government spending in this area is channelled through the Early Childhood Care and Education Programme ("ECCE") and the National Childcare Scheme. The 2022 Budget allocation for the sector was €716 million – representing a very substantial increase of the €250m allocated six years ago. There are approximately 4,500 childcare providers in the State who provide care and education for children, and they employ in the region of 27,000 childcare workers.

The increasing popularity of pre-school attendance can be attributed in part to the ECCE programme which is a universal two-year pre-school programme available to all children within the eligible age range. It provides children with their first formal experience of early learning prior to commencing primary school. The programme is provided for three hours per day, five days per week over 38 weeks per year and the programme year runs from September to June each year.

Despite the rapid expansion of the sector, there appear to be few avenues available to parents who experience unresolved complaints with early years providers.

Tusla is the State agency with responsibility for the supervision of the operation of early years' services in the State. Under Part 12 of the Child and Family Agency Act 2013, all early years' services are required to be registered with Tusla. Tusla operates an Early Years Inspectorate which is responsible for conducting inspections of services under Part 7 of the Child Care Act 1991 and the Child Care Act 1991 (Early Years Services) Regulations 2016. Those Regulations set out the level of service which must be provided within any registered early years' service which is registered with the Child and Family Agency.

49 https://www.earlychildhoodireland.ie/work/advocacy/summing-eci-stats-series/

50 https://www.pobal.ie/app/uploads/2019/12/Annual-Early-Years-Sector-Profile-Report-AEYSPR-2018-19.pdf

The Inspectorate investigates concerns raised regarding the operation of a service and/or the welfare and safety of children who attend, within the remit of the Early Years Services Regulations (2016). According to its website, Tusla is "working closely with the DCEDIY, Barnardos and other organisations to support relevant early years' services in the development and implementation of suitable complaint management policies and practices so that parents, guardians and others can raise a concern and be assured that it will be robustly addressed. In addition to these new regulatory requirements the Early Years Inspectorate has commenced a new process for the management of all unsolicited information received."[51]

It is recognised that the vast majority of childcare settings are well run and are conducted with the best interests of the child as the primary focus. However, as past controversies have shown, certain childcare facilities have fallen below the standard of care that is expected of them.

Under current legislation, the mandate of the OCO means that it may only accept complaints concerning children in respect of public bodies, schools and voluntary hospitals. As a result, privately owned childcare facilities may be out of scope and consequently, the OCO finds that it has to turn away a significant number of complaints received from parents and guardians that relate to this sector. From 2015 to the end of 2021, complaints relating to early childhood education and care settings constituted approximately 2% of all complaints received by the OCO.[52] In the same period, only 6 of the 188 complaints made on this issue could proceed to preliminary examination stage. When the OCO receives a complaint relating to an early childhood education and care setting, the current practice of the OCO is to refer the complainant to County Childcare Committees, Tusla's Early Years Inspectorate or Pobal. It appears that none of these organisations have an express mandate to receive and adjudicate upon the types of complaints received by the OCO.

While the development of a dedicated State Agency for Early Learning and Care and School-Age Childcare was recently recommended,[53] the current absence of a suitable forum through which complaints relating to childcare services may be examined and investigated is of concern, particularly in view of the growth of the sector in recent years and the level of State expenditure associated with the provision of these services. It is in the interests of children, their parents, childcare service-providers and their staff that an independent complaints mechanism is put in place. The Review Team notes that the OCO is strongly in favour of this gap being addressed in a timely way. The extension of the Ombudsman's remit in 2015 in respect of privately-run nursing homes represents a strong precedent for ensuring that the administrative actions of privately run childcare facilities can be the subject of investigation.[54]

In view of the fact that the number of children attending childcare settings is high, it is foreseeable that the volume of complaints that will be received is likely to be high.

51 https://www.tusla.ie/services/preschool-services/where-to-get-advice-if-i-have-a-difficulty-or-a-complaint-about-a-service/

52 Information provided by the OCO's Complaints and Investigations Team.

53 https://www.gov.ie/en/press-release/c38c6-minister-ogorman-launches-findings-from-review-that-recommends-dedicated-state-agency-for-early-learning-and-care-and-school-age-childcare/

54 Principle 13 of the Venice Principles provide: "The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities."

Therefore, irrespective of where responsibility for the handling of complaints is placed, the establishment and maintenance of an effective independent system for dealing with complaints will require substantial additional resources.

Recommendation 9

It is recommended that the complaints remit of the Ombudsman for Children is extended to include settings which provide early childhood education and care and, school-age childcare services.

4.7 Administration of the International Protection Process

The Minister for Justice has responsibility for adjudicating upon applications for international protection made in respect of children (and adults). While the OCO does not wish to interfere in any way with the decision-making process relating to those applications, there is a need to limit the effect of a somewhat contentious provision of the 2002 Act.

Section 11(1)(e) of the 2002 Act precludes the OCO from investigating an action which was "taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship". As a consequence of this provision, the OCO has no jurisdiction in respect of complaints that a child, or a person acting on his/her behalf, may wish to make in respect of the administrative aspect of the decision-making process concerning applications for international protection. Delays in processing applications as well as procedural defects within the international protection process are examples of administrative matters in respect of which a child might justifiably wish to file a complaint.

Under the terms of section 11(1)(e) as matters currently stand, applicants for international protection who are children appear to be precluded from availing of any avenue of complaint concerning the administration of their applications.

Arising from a recommendation in the Working Group Report (McMahon Report) of 2015 to the effect that the Office of the Ombudsman should have the remit to examine complaints about the experience of residents of Direct Provision centres, the Department agreed that the Office of the Ombudsman would be permitted to receive such complaints from April 2017[55] While the OCO welcomed clarification of its complaints remit in respect of Direct Provision and Emergency Reception and Orientation Centres, the OCO is concerned that the wording of section 11(1)(e) of the 2002 Act remains on the statute book.

There does not appear to be any clear rationale for having in place a statutory provision which precludes the OCO from investigating complaints relating to the administrative process leading up to the making of decisions concerning international protection.

55 https://www.ombudsman.ie/publications/reports/the-ombudsman-and-direct/Direct-Provision-Commentary.pdf

It is noted that during the Dáil Committee Stage debate on the Ombudsman for Children Bill 2002, concerns were expressed about the exclusionary effect of section 11(1)(e). Such was the level of concern that one Deputy sought to have paragraph (e) deleted from the Bill. In response, Minister of State Hanafin assured the House in the following terms:

> "the 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 thing. My understanding is that all the children referred to here will be entitled to access to the ombudsman. A particular case is made for unaccompanied minors. They come into the care of the health board when they arrive but they are also automatically covered. It is almost misleading to list that group under 'exclusions'– the children themselves are included but the exclusion refers to the administration of the law."[56]

However, experience has shown that in spite of the assurance of the Minister of State, the exclusion that is provided for in section 11(1)(e) of the 2002 Act has been applied in a broader way, exactly as envisaged by Deputies who had expressed concern during Committee Stage in the Dáil.

In 2019, the Joint Committee on Justice and Equality advocated that:

> "the remit of the Ombudsman should be extended to include handling individual complaints in relation to the administrative process through which asylum applications are assessed."[57]

Echoing the views of the Joint Committee, a 2020 Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process recommended that:

> "The remit of the Ombudsman should be expanded to enable him to investigate complaints about the process leading up to decisions on applications for international protection and related administrative matters, excluding the decisions on protection status taken by the IPO [International Protection Office] and the IPAT [International Protection Appeals Tribunal] where other avenues of appeal already exist."[58]

The Report went on to recommend that: "The remit of the Ombudsman should be extended to enable him/her to investigate complaints about the process leading up to decisions on applications for international protection and related administrative matters."[59]

56 Dáil Debates (24 April 2002). Available at: https://www.oireachtas.ie/en/debates/debate/dail/2002-04-24/4/

57 Houses of the Oireachtas Joint Committee on Justice and Equality, Report on Direct Provision and the International Protection Application Process (Dec 2019) at p.54.

58 Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process (Sept 2020) at p.14.

59 Ibid., at p.99.

The OCO is on record as having proposed that the discriminating effects of section 11(1)(e) be removed.[60] The matter was also addressed in the OCO submission to the Oireachtas Committee on Justice and Equality regarding an examination of Direct Provision and the International Protection Application Process in May 2019.[61]

The Review Team notes the progressive nature of the proposals contained in the DCEDIY's report entitled A White Paper to End Direct Provision and to Establish a New International Protection Support Service.[62] However, in the shorter term, steps ought to be taken to remove the section 11(1)(e) prohibition from the statute book or, at a minimum, to clarify its scope.

Recommendation 10

While International Protection applicants may have recourse to the OCO to pursue an issue of concern about their experiences in the system, it is recommended that section 11(1)(e) of the 2002 Act be amended so as to confirm that matters relating to the administration of services to persons involved in the : asylum, immigration, naturalisation and citizenship processes are within the scope of the OCO's complaints remit.

The required clarity could be effected by inserting the following new subsection in section 11:

> "(5) In subsection (1)(e)(i), 'administration of the law' means the making of decisions concerning the status or rights of the individual as provided for under the enactments governing asylum, immigration, naturalisation or citizenship, and does not include decisions relating to the administration of services that are provided to persons seeking asylum, immigration, naturalisation or citizenship."

60 See sections 3.12 – 3.16 of https://www.oco.ie/app/uploads/2012/03/ReportonOCOActWEB.pdf

61 https://www.oco.ie/app/uploads/2019/06/Ombudsman-for-Children-submission-on-Direct-Provision.pdf

62 Published February 2021. Accessible at: https://assets.gov.ie/124757/ef0c3059-b117-4bfa-a2df-8213bb6a63db.pdf

4.8 Actions of the Defence Forces Affecting Children

In its 2016 *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland, the UN Committee on the Rights of the Child,*[63] the UN Committee recommended that the State should:

> "Consider amending section 11(1)(b) of the Ombudsman for Children Act, 2002 and/or establishing other appropriate oversight mechanisms, in order to ensure that actions taken by the Defence Forces vis-à-vis children under the age of 18 are subject to adequate accountability".[64]

In its 2020 *List of Issues Prior to Submission of the Combined Fifth and Sixth Reports of Ireland,*[65] the UN Committee requested that Ireland provide information, in its State report to the Committee, about measures taken to implement its 2016 recommendation regarding the need for adequate accountability in respect of actions taken by the Defence Forces affecting children.

As the 2002 Act does not have extra-territorial effect, the OCO's remit relates only to children that are living in the State.

In so far as Departments of State are concerned, the complaints remit of the OCO includes public bodies that are specified in the First Schedule to the Ombudsman Act 1980[66] ("1980 Act"). That Schedule confirms that the remit includes Departments of State (which therefore includes the Department of Defence). However, the Second Schedule of the 1980 Act[67] expressly excludes the Defence Forces.

The effect of this is that the OCO has no authority to investigate complaints or to initiate an investigation in respect of actions taken by the Defence Forces concerning children. It does not appear that the Ombudsman has jurisdiction in such matters[68] and, similarly, it does not appear that the Ombudsman for the Defence Forces has jurisdiction in such matters.[69]

Disciplinary matters involving serving members of the Defence Forces, depending on the circumstances, are managed through the military discipline provisions of the Defence Act and the Defence Forces Regulatory Framework. The Military Police may be tasked with the investigation of a matter and it may subsequently proceed to court martial.[70]

63 CRC/C/IRL/CO/3-4. Published 1 March 2016. Accessible at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsvOufvUWRUJlLHiLHKqpXZxUGOtzQF0l%

64 At p.18.

65 CRC/C/IRL/QPR/5-6. Published 18 November 2020. Accessible at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fQPR%2f5-6&Lang=en

66 As substituted by Ombudsman (Amendment) Act 2012 s.16, Schedule.

67 As substituted by Ombudsman (Amendment) Act 2012 s.16, Schedule.

68 As with the OCO, the Defence Forces exclusion also applies in respect of the Ombudsman.

69 The Ombudsman for the Defence Force's jurisdiction is in respect of complaints made by serving members of the De fence Forces as well as former members of the Defence Forces.

70 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%-2fIRL%2f5-6&Lang=en

At present, complaints concerning the Defence Forces may only be made by current and former members of the Defence Forces, and such complaints may only be presented to the Ombudsman for the Defence Forces. Consequently, outside the Defence Forces itself and the justice system, it has not been possible for us to identify any forum where actions taken by the Defence Forces concerning children can be adjudicated upon.

Bringing the actions of the Defence Forces within the scope of complaints originating from members of the public that may be considered by the OCO would constitute a significant departure from principles that have been enshrined in Irish law since the establishment of the Ombudsman's Office in 1980.

It does not appear that any concerns have come to the attention of the OCO with regard to any administrative actions of the Defence Forces adversely affecting a child or children in Ireland. While the Review Team acknowledges that there is a forum gap, it has not been possible to pinpoint any specific matters of concern relating to children under 18 in Ireland that arise as a result of the express exclusion of the Defence Forces from the OCO's complaints remit. Therefore, the Review Team does not advance any recommendations for proposed policy or legislative changes in this regard.

4.9 Impediment to the Exercise of Existing Statutory Function Relating to Schools

Section 9 of the 2002 Act relates to the power of the OCO to examine and investigate complaints against schools and voluntary hospitals. Section 9(1) provides that the OCO may investigate any action taken by or on behalf of a school in connection with the performance of its functions, or a voluntary hospital in connection with the provision by it of health and personal social services, where having carried out a preliminary examination of the matter, certain conditions are satisfied.

The power set out in section 9(1) is conditional upon the matters provided for in section 9(2). Section 9(2) provides that the OCO may investigate an action involving a school only where the procedures prescribed under section 28 of the Education Act 1998 ("1998 Act") have been resorted to and exhausted in relation to the action.

Section 28 of the 1998 Act empowers the Minister for Education to prescribe, by regulation, procedures under which complaints of parents or students relating to a school may be addressed. To-date, no such regulations as envisaged by section 28 of the 1998 Act have ever been introduced.

As the OCO's power under section 9(1) of the 2002 Act is dependent upon procedures having been introduced under the 1998 Act, the very absence of such procedures has the effect of rendering 9(1) of the 2002 Act meaningless.

Section 28 of the 1998 Act came into operation in 1999.[71] While the power to be exercised under section 28 of the 1998 Act can properly described as being discretionary on the part of the Minister for Education, the fact that no such regulations have ever been introduced would appear to be at variance with the intent of the legislature in at least two respects, namely - when it was framing section 28 of the 1998 Act, and also when it was framing section 9 of the 2002 Act.

The Review Team notes that section 9(2) of the 2002 Act has been a matter of longstanding concern for the OCO and has been raised with the Minister for Education and the Minister for Children, Equality, Disability, Integration and Youth and their predecessors, as well as their respective officials on a number of occasions. Since 2016, the OCO has been calling for the removal of the statutory constraint in section 9(2) on the exercise of its powers under section 9(1).

Provision has been made in section 10 of Education (Student and Parent Charter) Bill 2019 ("2019 Bill") to effect an amendment to section 9 of the 2002 Act so as to remove the requirement for procedures to be prescribed. However, even if section 9 of the 2002 Act is amended by the 2019 Bill, the OCO will not be empowered to exercise its powers under section 9(1) until the procedures for dealing with grievances have been fully exhausted. This in effect reinforces the limitation that already exists on the OCO's exercise of its power under section 9(1) of the 2002 Act.

Based on its many years of experience of examining and investigating complaints, the OCO is firmly of the view that the preservation of section 9(2) and even its amendment as proposed by the 2019 Bill, will have the effect of creating serious difficulties for children and families seeking to bring complaints to the OCO in certain circumstances. This may render the OCO unable to intervene in a timely manner in serious cases, including cases concerning children's safety and welfare.

It is notable that in the 2002 Act, no other investigative power of the OCO is dependent, for its validity, on the exhaustion of any other complaints process or grievance procedure. The effect of section 9(2) of the 2002 Act is to tie the hands of the OCO. This has the effect of treating complaints concerning schools very differently from complaints concerning other bodies, which is surprising when considered in light of the fact that there are approximately 940,000 school-going children in Ireland today.[72]

The rationale for section 9(2) of the 2002 Act was not addressed during the course of any Dáil or Seanad contributions during the passage of the Ombudsman for Children Bill, and nor is it addressed in the Explanatory Memorandum that accompanied the 2002 Bill. As a consequence, the justification for imposing and reinforcing (in the 2019 Bill) this constraint on the exercise by the OCO of its power under section 9(1) has never been expanded upon.

It is noted that the General Scheme of the Education (Parent and Student Charter) Bill 2016 included a proposal to delete section 9(2) of the 2002 Act. However, that proposal was not reflected in the subsequent Bill upon its initiation in 2019.

71 23 December 1999 per Education Act 1998 (Commencement) (No. 2) Order 1999 (SI No 470 of 1999).

72 https://www.education.ie/en/Publications/Statistics/Key-Statistics/education-indicators-for-ireland-2020.pdf

Having examined the legal and practical position that prevails in other jurisdictions, it has not been possible to identify an instance where a direct comparator of the OCO faces an absolute legislative bar or obstacle to the conduct of an examination or investigation into matters relating to schools.

Children and persons acting on their behalf ought to have the ability to raise matters of concern with the OCO without being obliged to exhaust any other complaints process.

It is tenable to suggest that the retention of section 9(2) of the 2002 in any form, serves to fetter the independence of the Ombudsman for Children, and denies children, their parents and those acting on a child's behalf the right of access to the OCO as a forum where complaints relating to schools can be examined and investigated.

It is recommended that section 9(2) of the 2002 Act be repealed as a matter of priority so as to retain the ability of the Ombudsman for Children to investigate complaints and concerns that relate to schools without school's grievance procedures always having to be exhausted in all cases.

Recommendation 11

It is recommended that section 9(2) of the 2022 Act should be repealed. It is further recommended that section 10 of the Education (Student and Charter) Bill 2019 should be amended to provide for such repeal.

4.10 Legal Professional Privilege as an Obstacle to Effective Investigations

Legal professional privilege ("LPP") confers a privilege of exemption from disclosure of communications that may otherwise be required to be revealed. The party asserting the existence of LPP bears the onus of justifying the claim.

LLP exists under common law and under statute, in addition to enjoying constitutional protection under Article 34 of the Constitution, as part of the protection of the administration of justice. It is also recognised as a fundamental right in the jurisprudence of the European Convention on Human Rights as part of Articles 6 and 8.

LPP exists in two forms: Legal Advice Privilege and Litigation Privilege. Of particular relevance in the context of the OCO and this current review is Legal Advice Privilege. In order for a document to be classed as attracting legal advice privilege, it must fulfil the following four criteria:[73]

73 Abrahamson, W., FitzPatrick, & A., Dwyer, J., Discovery and Disclosure (2nd ed., 2013) at para. 39-13.

1. the material must constitute or refer to a communication between lawyer and client;

2. that communication must arise in the course of the professional lawyer-client relationship;

3. the communication must be confidential in nature; and

4. the communication must be for the purpose of giving or receiving legal advice.

Under section 7(1) of the 1980 Act, the OCO may for the purposes of a preliminary examination, or an investigation, require any person to furnish information or documentation of relevance to his/her investigation.[74]

During the course of this review, it has become apparent that the reliance by public bodies on LPP as a justification for the non-release of information relating to matters that are the subject of an OCO investigation is a cause of frustration for the OCO. There have also been instances where the existence of documentation that attracts LPP has given rise to the non-cooperation by public bodies with an investigation that is being conducted by OCO.[75]

The failure to disclose documentation on the grounds that it attracts LPP has also presented as a problem for the Office of the Ombudsman. For example, when the Ombudsman appeared before the Oireachtas Committee in 2015, he stated:

> "The issue of legal privilege vexes my office in the same way it does the Ombudsman for Children. It is very frustrating when a Department says, "I have legal advice that says that you are wrong but you can't [see] it". That seems an entirely inappropriate way to deal with matters. The committee will be aware that the legislation in respect of the Northern Ireland public services ombudsperson, NIPSO, is currently working its way through. That explicitly says that the ombudsperson is entitled to access to documents, even those protected by privilege."[76]

The 2002 Act is silent on what the options of the OCO are when a person or entity claims LPP in respect of documents that are required by the OCO in the context of an investigation. However, the issue of privilege is addressed in the 1980 Act, where section 7(4) provides:

> " (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)

74 Section 7 of the 1980 Act applies to the OCO by virtue of section 14 of the 2002 Act.

75 For example, concern was expressed by the OCO in her Annual Report 2003 at pp.36 – 37. Accessible at: https://www.ombudsman.ie/publications/annual-reports/Ombudsman_AR_2003.pdf
See also "Ombudsman halts abuse audit", Irish Times, 6 May 2009, accessible at: https://www.irishtimes.com/news/ombudsman-halts-abuse-audit-1.840115 See also, "Row erupts over abuse inquiry", Irish Independent, 7 May 2009. Accessible at: https://www.independent.ie/lifestyle/health/row-erupts-over-abuse-inquiry-26534145.html

76 Joint Committee on Public Service Oversight and Petitions debate (30 Sep 2015). Accessible at: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_public_service_oversight_and_petitions/2015-09-30/2/

> 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."[77]

The experience of the OCO suggests that LPP is being raised by public bodies as an irrefutable shield which cannot be questioned or challenged, the effect of which is to prevent the OCO from gaining access to documentation that it believes will be of assistance to its investigation.

The Venice Principles are very clear-cut in relation to such matters. Principle 16 provides:

> "The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential."

It is noted that the OCO's equivalent in other jurisdictions has the power to secure unfettered access to information that might otherwise be subject to LPP.

While seeking to preserve the integrity of the doctrine of LPP, the OCO is anxious to remove the ability of persons to withhold, from its investigations, information on the grounds that it attracts legal professional privilege.

Given that the OCO has highlighted the tendency of public bodies to place reliance upon the shield of LPP, this makes the implementation of a proportionate solution all the more necessary.

Recommendation 12

In respect of legal professional privilege, it is recommended that the Ombudsman for Children should have the power to secure access to information that might otherwise be regarded as attracting legal professional privilege.

77 A similar but yet clear provision applies in Northern Ireland. Section 32(2) of the Public Services Ombudsman Act (Northern Ireland) 2016 provides: "A listed authority is not entitled in relation to any 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. Reinforcing Child Protection Measures

5.1 Protection of Persons Reporting Abuse

The Protection of Persons Reporting Child Abuse Act 1998 ("PRCA Act") affords protection from civil liability to persons who report child abuse in certain circumstances. The protection available under section 3 of the Act applies where the report of child abuse is made to an "appropriate person" – meaning a member of the Gardaí, an officer of the HSE, or Tusla.

Due to its statutory functions, it is not uncommon for child protection concerns to be brought to the attention of the OCO.

The difficulty is that the OCO has no statutory role in respect of child protection. In addition to referring concerns in accordance with Children First, the OCO always directs those raising child protection concerns to the appropriate authorities. However, complainants and others contacting the OCO may mistakenly believe the OCO to have a statutory child protection function and disclose information regarding an allegation of child abuse.

In addition to that, the OCO may examine or investigate a complaint regarding the acts or omissions of Tusla in the area of child protection. In that context it is not uncommon for details regarding alleged abuse to be shared with the OCO.

While staff of the OCO that pass such concerns on to Tusla are protected by the PRCA Act, those who relay concerns to the OCO in the first place are not. The practical reality is that concerns of a child protection nature will continue to be brought to the OCO.

Therefore, it would be prudent for the protections from civil liability that are afforded to individuals reporting child abuse under section 3 of the PRCA Act to also be available to persons who report an alleged instance of child abuse to the OCO. This proposal was initially put forward in the 2012 review of the OCO's governing legislation, and the case for implementing this proposal remains.

Recommendation 13

It is recommended that the definition of "appropriate person" as contained in section 1 of the Protection of Persons Reporting Child Abuse Act 1998 be amended so as to include the Ombudsman for Children.

6. Minor Amendments

While the OCO is appreciative of the availability of a Revised version of the 2002 Act that has been prepared by the Law Reform Commission, for good order, the Review Team noted a small number of aspects of the 2002 Act which are in need of revision or updating.

Section 12 – Transitional Matter

Section 12(1) of the 2002 Act effected a number of textual amendments to the Ombudsman Act 1980. As the amendments have already been effected, this subsection is now redundant. On the basis that section 12 of the 2002 no longer serves any purpose, it is proposed that section 12 of the 2002 be repealed. This matter could be attended to when other amendments are being made to the 2002 Act.

Definition of Minister

It is noted that the definition of "Minister" in section 2 of the 2002 Act does not reflect the fact that Ministerial responsibility for children rests with a Department of State which is focused on children. While recognising that such a change is not essential, it is proposed that the definition of "Minister" in section 2 be amended to reflect the current title of the portfolio, that being the Minister for Children, Equality, Disability, Integration and Youth.

Appendices

Appendix 1 - Schedule of Engagements by Review Team

During the course of this review, the Review Team had multiple, informal engagements with members of staff of the Ombudsman for Children. In addition to those engagements, the Review Team held formal meetings/engagements as detailed in the Table below:

Date	Names	Organisation
27 January 2021	Ombudsman for Children Members of senior management	Ombudsman for Children's Office
3 February 2021	Ombudsman for Children Members of senior management	Ombudsman for Children's Office
7 April 2021	Denis O'Sullivan, Principal Officer Olive McGovern, Principal Officer Michael Keenan, Assistant Principal	Department of Children, Equality, Disability, Integration and Youth
7 April 2021	Bruce Adamson, Children and Young People's Commissioner Nick Hobbs, Head of Advice and Investigations	Children and Young People's Commissioner (Scotland)
9 April 2021	Agata Jasztal, Head of International Affairs and Constitutional Department	Ombudsman for Children (Poland)
15 April 2021	Peter Tyndall, Ombudsman and Information Commissioner	Ombudsman (Ireland)
19 April 2021	Deborah McMillan, Children and Young People's Commissioner	Children and Young People's Commissioner (Jersey)
9 November 2021	Ombudsman for Children Members of senior management	Ombudsman for Children's Office

Appendix 2 – UN Paris Principles

Principles relating to the Status of National Institutions (The UN Paris Principles)
Adopted by General Assembly resolution 48/134 of 20 December 1993
Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

   a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

      i. Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

      ii. Any situation of violation of human rights which it decides to take up;

      iii. The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

      iv. Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

   b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

e) To cooperate with the United Nations and any other orgnization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;

f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

   a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

   b) Trends in philosophical or religious thought;

   c) Universities and qualified experts;

   d) Parliament;

   e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence. 3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,

b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;

e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);

g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Appendix 3 – Venice Principles

PRINCIPLES ON THE PROTECTION AND PROMOTION OF THE OMBUDSMAN INSTITUTION

1. Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model across Council of Europe Member States, the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.

2. The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.

3. The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation.

4. The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences.

5. States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country.

6. The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.

7. The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law.

8. The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.

9. The Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The Ombudsman and his or her staff shall be bound by self-regulatory codes of ethics.

10. The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.

11. The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.

12. The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.

13. The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system.

14. The Ombudsman shall not be given nor follow any instruction from any authorities.

15. Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint.

16. The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector.

17. The Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution. The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman.

18. In the framework of the monitoring of the implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonization of national legislation with these instruments, the Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation.

19. Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts. The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts. The official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law.

20. The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities. This applies also to reports to be given by the Ombudsman appointed by the Executive.

21. Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.

22. The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.

23. The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.

24. States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats.

25. These principles shall be read, interpreted and used in order to consolidate and strengthen the Institution of the Ombudsman. Taking into consideration the various types, systems and legal status of Ombudsman Institutions and their staff members, states are encouraged to undertake all necessary actions including constitutional and legislative adjustments so as to provide proper conditions that strengthen and develop the Ombudsman Institutions and their capacity, independence and impartiality in the spirit and in line with the Venice Principles and thus ensure their proper, timely and effective implementation.

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