

Joint Submission to the Working Group on the Protection Process

Ombudsman for Children's Office and the Office of the Ombudsman

January 2015

1. The Ombudsman for Children's Office (OCO) and the Office of the Ombudsman (OO) welcome the opportunity to contribute to the deliberations of the Working Group on the Protection Process.
2. Both Offices have for many years called for their remit to encompass complaints from protection applicants, including those in the Direct Provision system. Neither the OO nor the OCO is seeking to have a role in adjudicating on decisions relating to the status of protection applicants. In the event of amending legislation being enacted which extended the scope of the current remit of the Offices, they would be empowered to examine only those complaints about actions relating to the new area of remit which occur on or after a date to be specified after the date of such enactment.
3. The following submission outlines the principal reasons underpinning this position and illustrates how the need to provide protection applicants with access to an independent complaints-handling mechanism would best be met by modifying the remit of the OCO and the OO.
4. In summary, conferring this jurisdiction unambiguously on the OCO and the OO would provide protection applicants with access to statutory complaints-handling mechanisms that:
 - are free, independent and impartial;
 - are experienced, pragmatic and proportionate;
 - can provide expert advice on internal complaints-handling to staff within the Direct Provision system;
 - can provide independent oversight and can assure all concerned that there will be an effective avenue of redress for grievances that may arise;
 - can ensure that processes and procedures leading up to decisions on immigration and asylum are fair, thorough and not contrary to fair and sound administration;
 - can drive improvements within the Direct Provision system;
 - are cost effective and have an established, credible record;
 - do not duplicate the work of other statutory bodies and would provide a coherent complaints-handling framework; and
 - are in keeping with international best practice and Ireland's international legal obligations.
5. The OCO and OO are obliged to report to the Houses of the Oireachtas annually on the performance of their functions. Special and other reports published by the OO are referred to the Committee on Public Service Oversight and Petitions for consideration

and debate whereas the OCO engages regularly with a number of Oireachtas Committees with mandates relevant to children.

Independent and impartial

6. The OCO and the OO are independent and impartial in the performance of their functions. In the context of investigating complaints, this means that the OCO and the OO are neither advocates for complainants nor adversaries to public bodies. The Offices discharge their functions independently of Government and of civil society organisations.
7. The granting of remit to the OCO and the OO in line with paragraph 2 above would fully address the deficiencies with the current complaints system highlighted by MacEochaidh J in the recent case of *C.A. and T.A v The Minister for Justice and Equality and others*.¹ In particular, it will provide for an independent complaints system with an assurance of fair procedures for all concerned and in line with practice in almost every other European State.

Experienced, respected, pragmatic and proportionate

8. The OCO and OO take a proportionate approach to the resolution of individual complaints. Straightforward complaints are dealt with promptly and informally with the cooperation of the public body where necessary. It is only in cases where evidence emerges of possible serious maladministration or systemic failure that the Ombudsmen may open a formal investigation which may lead to published findings and recommendations. This occurs in a very small minority of cases which come before the Ombudsmen. This is normal practice for Ombudsman Offices and accords with the experience of such institutions in other jurisdictions.
9. Where a complaint can be dealt with rapidly at a local level, the Offices support and mediate that process. Dealing with complaints swiftly in this way is in the interests of both complainants and public bodies. Both Offices are mindful of the fact that complainants and public bodies often have an ongoing relationship and that it is therefore important to avoid escalating complaints unnecessarily.
10. The OO and the OCO are proactive in their outreach work. This ensures that individuals or groups who may for whatever reason experience difficulty or reticence in accessing a complaints mechanism are facilitated to do so. Both Offices would bring this experience to bear in making their services as accessible as possible for protection applicants.
11. In addition, the OCO is mandated to seek the views of children and young people who make complaints directly to the Office or on behalf of whom a complaint is made. The OCO has consequently developed expertise in providing a child-friendly complaints-handling mechanism to those under the age of 18.

Expertise on internal complaints-handling mechanisms

12. The OCO and the OO have significant expertise in advising public bodies regarding the development, operation and evaluation of internal complaints-handling procedures. Indeed, working with public bodies to improve the manner in which they address grievances forms a core element of an Ombudsman's work. In the experience of the OCO and the OO, better internal complaints-handling leads to fewer complaints being

made about public bodies in the long run; this is advantageous for those in receipt of services from such public bodies, as well as for the public bodies themselves.

13. Both the OCO and the OO would be in a position to draw on this considerable experience in assisting RIA, where necessary, with enhancing the internal complaints-handling process in place for those residing in Direct Provision accommodation centres. The two Offices normally require complainants to exhaust local complaint procedures before coming to the Ombudsmen. However, if the OCO or OO have objective evidence to suggest that a particular local complaints system is operating in an ineffective or unfair manner the Ombudsmen may, as an exceptional matter, accept some complaints which have not gone through the local complaints system. However, in such cases the Ombudsmen would work with the public body to improve the local procedures.

Cost-effective

14. As the OO and the OCO are both well-established institutions, the only costs associated with an increase in the number of complaints from protection applicants would be marginal. Both institutions already have very experienced caseworkers and investigators, detailed procedures for processing complaints and the infrastructure required to support that process.
15. The OCO and the OO would require one additional Investigator post in each Office. These additional resources would be deployed to deal with the additional cases but also in outreach and process improvement work with the Direct Provision centres as it is evident that the current system does not command the confidence of residents. The Offices would propose to review the resource issue after 2 years with a subsequent reduction in our budgets via the Estimates process if the posts are no longer needed at that stage.

Non-duplication and coherence of complaints-handling framework

16. It should be noted that if a new entity were established to handle complaints from protection applicants in Direct Provision, it would not be able to deal with complaints regarding public bodies already under the remit of the OO and the OCO without unnecessary duplication. A protection applicant could therefore face the possibility of having to engage with multiple complaints bodies in more complex cases involving the Reception and Integration Agency (RIA) and other public bodies; this militates against efficiency and accessibility. In addition, any other entity established to review complaints from protection applicants would automatically be subject to investigation by both the OO and the OCO, unless explicitly excluded by Order of the Minister for Public Expenditure and Reform. A new entity would require sufficient authority, the necessary resources and a substantial period of time in order to be credible and effective. This would require new legislation, the establishment of a new office, appropriate accommodation, recruitment, appointment and training of new staff, provision of support services such as IT, HR, etc. The OO and OCO would be able to accept complaints within a short time frame of any agreement being reached.
17. Clarifying the remit of the OO and the OCO with respect to protection applicants would not duplicate the work of any other existing statutory body and would provide coherence to the complaints-handling framework for protection applicants.

18. The OCO and the OO have a long standing Memorandum of Understanding (MoU) in operation. This ensures that the two Offices do not duplicate or overlap in conducting the examination of complaints. The MoU has established mechanisms for the rapid transfer of cases received by one Office which is more appropriate for the other Office. The two Offices regularly confer and exchange information, where appropriate, in order to support each other in the oversight and improvement of public administration.
19. The OCO and the OO have qualifications to their investigatory remit in quite a number of other areas; these do not create jurisdictional problems when the parameters of the qualification are set out with precision in the relevant statutory provision. For example, the OO and OCO have jurisdiction over certain administrative functions of the Courts Service but cannot examine matters relating to judicial decisions. This does not preclude both Offices from investigating other aspects of the interaction between complainants and public bodies in these cases successfully.
20. Similarly, the OO and the OCO believe that it is possible to reframe the exclusion to their investigatory remit regarding protection applicants so that the actions of the relevant public bodies are clearly reviewable, with the exception of decisions on status. This would require amending Schedules 1 and 2 to the Ombudsman Act 1980 (as amended), which can be achieved by Ministerial Order in accordance with Section 4.10(a)(III) of the 1980 Act as inserted by Section 6 of the Ombudsman (Amendment) Act 2012, and amending section 11 of the Ombudsman for Children Act 2002, which requires primary legislation.
21. The OO and the OCO can already investigate cases brought by protection applicants against public bodies such as the Health Service Executive (HSE) and the Child and Family Agency (Tusla). In more complex cases, complaints will often relate to more than one public body and as a result, the OCO and the OO will frequently be called upon to engage with multiple public bodies in order to **examine** or investigate a complaint thoroughly. The OO and the OCO have received complaints regarding coordination between RIA and these other public bodies in relation to health and child protection services, for example; whilst both the OO and the OCO can currently examine the actions of the HSE and Tusla, RIA does not accept that it is subject to investigation by the OO and the OCO in the same way. The capacity of the OCO and the OO to investigate such cases fully is therefore impeded.
22. It should be noted that notwithstanding the fact that the OO or the OCO may be examining a complaint about a particular action this does not prevent the public body, in exercising any power or duty it may have, from taking further action with respect to the matter under examination by the Ombudsmen.
23. If a complainant initiates legal action in relation to an action complained about the Ombudsmen will not normally accept the complaint or continue with an examination already initiated.

Bringing Ireland in line with international best practice and legal obligations

24. From an international perspective, it is anomalous to prevent Ombudsmen Offices from **examining and investigating complaints from individuals seeking asylum or subsidiary** protection. The OO and the OCO's counterparts in almost every other European State

are empowered to investigate complaints in this domain. Ireland is out of step with international best practice.

25. In addition, Ireland is out of step with its international legal obligations. The absence of clear and unambiguous access for protection applicants to Ombudsmen Offices in Ireland has been the subject of criticism from both the United Nations and the Council of Europe."

ⁱ *C.A. and T.A v The Minister for Justice and Equality and others* [2014] IEHC 532, at para. 8.15-8.16:

"Complaints Handling Procedures

8.15. The applicants allege that the complaints procedure for matters connected with the accommodation centres lacks independence. (The complaint is not based on a breach of human rights but it is appropriate to address the matters here as it arises under the RIA Rules.)

8.16. RIA have contractual relations with the owners of the accommodation centres and acts as the final arbiter of disputes between residents and the centres. RIA is also the author of the House Rules. It is understandable that residents sense a lack of independence in complaints handling where the final arbiter is in a commercial relationship with the body about which complaint is made. RIA is the author of the House Rules, breach of which may give rise to the complaint and it is not appropriate that RIA having written the rules and appointed persons as operators of the centres should then ultimately decide on disputes between operators and residents about the rules. This seems to me to be a breach of the concept of *nemo iudex in causa sua*. In my view, there is no compelling reason why RIA must be the final complaints handling body for residents. I reject the respondents' contention that this is a theoretical issue as Ms. A has never appealed a decision on a matter to RIA. Ms. A is entitled to an independent complaints handling procedure and this is not dependent on whether she has ever invoked the current deficient system."

ⁱⁱ See, for example, United Nations Committee on the Rights of the Child, *Summary Record of the 1182nd Meeting*, (UN Doc. CRC/C/SR.1182), para. 13 and Council of Europe Commissioner for Human Rights, *Report by the Commissioner for Human Rights on his Visit to Ireland* CommDH(2008)9, paras. 16-17.